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THE NATIONAL POLICY FRAMEWORK AND STRATEGY ON PALLIATIVE CARE 2017–2022: WHAT'S IN IT FOR TERMINALLY ILL INMATES IN SOUTH AFRICA?

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SUMMARY

In South Africa many people suffer from serious, incurable health conditions that may render them incapacitated and/or terminally ill. Such persons may inevitably require holistic care such as palliative care. The adoption in 2017 of the National Policy Framework and Strategy on Palliative Care 2017–2022 (NPFSPC) in line with the Health Assembly Resolution 67.19 "Strengthening of Palliative Care as a Component of Comprehensive Care Throughout the Life Course" thus marked a significant milestone for advocates of palliative care, as well as for persons affected by terminal illness. Despite this positive step towards the fulfilment of the right to access healthcare, terminally ill persons who are inmates in South African correctional centres are not sufficiently protected by the NPFSPC. While the policy may be lauded for its detailed provisions aimed at affording appropriate care to free persons, it makes but a few fleeting references to inmates who are terminally ill – a very vulnerable group, given the often appalling conditions in correctional centres, the limited resources generally available to inmates and the stigma attached to them. It is therefore submitted that palliative care should be available to all inmates diagnosed with a terminal illness from the moment they are diagnosed. This article also analyses the stated purpose of the NPFSPC in relation to correctional settings, as well as the impact of disease on correctional centres, and the importance of fostering partnerships.

1 INTRODUCTION

During the Department of Health Budget Vote Speech 2017, the Deputy Minister of Health, Dr Phaahla, announced that South Africa had adopted the National Policy Framework and Strategy on Palliative Care 2017–2022 (NPFSPC).[1] The announcement was encouraging; South Africa had become

[1] Deputy Minister of Health "Budget Vote Speech" (2017) 2.

one of only a few countries in the world with a policy on palliative care[2] based on World Health Assembly Resolution 67.19.[3] A preliminary reading of the NPFSPC, however, unfortunately appears to raise questions as to the State's recognition of its duty to fulfil the right to palliative care of terminally ill inmates.[4] Consequently, this article highlights the extent to which the NPFSPC deals with palliative care in correctional centres. Furthermore, it analyses the stated purpose of the NPFSPC in relation to correctional settings as well as the impact of disease on correctional centres, and the importance of fostering partnerships.

To contextualise the abovementioned analysis, however, it is necessary first to describe the concept of "palliative care" and to justify briefly why terminally ill inmates are particularly in need of such care. The article then also provides a brief background to the World Health Assembly Resolution 67.19, "Strengthening of Palliative Care as a Component of Comprehensive Care Throughout the Life Course".

2 PALLIATIVE CARE

2 1 A description

To some extent, a description of palliative care assists in illuminating the basis for claiming an entitlement to such care. Palliative care includes total care – physical, psychosocial, and spiritual.[5] "[T]he essence of palliative care is the relief of suffering."[6] The World Health Organization (WHO) indicates that palliative care aims to: (a) recognise the importance of life, but regards dying as a normal process; (b) provide relief from pain and other distressing symptoms; (c) integrate the psychological and spiritual aspects of patient care; (d) help patients live as actively as possible until death; (e) assist the family to cope during the patient's illness and their subsequent bereavement when the patient dies;[7] (f) neither hasten nor postpone death; and (g) use a team approach to address the needs of patients and their families.[8] The

[2] The concept of "palliative care" is described in greater detail later in this article.

[3] World Health Assembly "Strengthening of Palliative Care as a Component of Comprehensive Care Throughout the Life Course" (24 May 2014) WHA67.19.

[4] According to McQuoid-Mason and Dada *A–Z of Medical Law* (2011) 414, "terminal illness" as applied to inmates means that the inmate was diagnosed with an illness or condition that will inevitably result in his death. At least two medical practitioners must agree that the inmate is terminally ill. The illness must be incurable. Such a disease or condition must also cause severe physical pain, discomfort and suffering and/or negate a person's prospects of leading a meaningful life. Some patients may be imminently and irreversibly terminally ill. This means that they will die within a relatively brief period of time. Others are regarded as distantly terminally ill because they may have been faced with imminent death at an earlier period but were medically rescued, and are medically sustained for an indefinite period of time. See Fleck "Just Caring: Health Care Rationing, Terminal Illness, and the Medically Least Well Off" 2011 39 *Journal of Law, Medicine and Ethics* 156 171.

[5] Gwyther and Cohen "Legal Aspects of Palliative Care" (2009) http://www.osf.org.za/ Publications/ default.asp?PubCatID=34 (accessed 2016-09-08) 2.

[6] Gwyther and Cohen http://www.osf.org.za/Publications/default.asp?PubCatID=34 2.

[7] McQuoid-Mason and Dada *Medical Law* 312.

[8] WHO "Non-Communicable Diseases and Their Risks" https://www.who.int/ncds/ management/palliative-care/introduction/en/ (accessed 2016-08-08) 1.

WHO adds that palliative care is applicable early in the course of the illness, "in conjunction with other therapies that are intended to prolong life, such as chemotherapy or radiotherapy, and includes those investigations needed to better understand and manage distressing clinical complications".[9] This form of care takes cognisance of the fact that "dying is more than a set of medical problems to be solved. Dying is personal; it is experiential. Caring for people who are dying involves helping them to say and do the things that matter most *to them*".[10]

The NPFSPC assumes all the main elements of the above description and defines "palliative care" as the "holistic multi-disciplinary care of a patient and family affected by a life limiting or life threatening illness and is applicable from the time of diagnosis for all adults and children across the life span and includes bereavement care for the family".[11] The provision of such care should thus start from the time of diagnosis and should last until the death of a patient.[12] Though this is the ideal, the application of this principle may prove challenging in the correctional environment where the basic required health assessments upon admission to a correctional centre are sometimes not complied with.

2 2 The rationale for palliative care

Palliative care, as may be gleaned from the above description, is a humane response to persons who may be facing final traumas, heightened grief, and even misgivings about their own existence. In a constitutional democracy like South Africa, palliative care should naturally have been embraced as crucial to upholding the rights to life, dignity and health of the terminally ill. In the absence of such a logical acceptance of palliative care, it becomes necessary to sketch, briefly, the rationale for the claim.

The claim for palliative care cannot be completely detached from the historical attitudes that have inhibited such care as a stage in the right to healthcare. Put plainly, these (often unspoken) attitudes regarding care for the terminally ill have over the years contributed to palliative care being on an unequal footing with the rights to curative and preventative healthcare. This imbalance between the different layers of healthcare may be inferred from the fact that an estimated 50 per cent of all people who die in South Africa "could have benefitted from palliative care".[13] By referring to some of these attitudinal barriers, the rationale for granting inmates access to palliative care may become less opaque.

Palliative care is not only about dying, but also about living a quality life (as may be evident from the definition provided above). Despite this understanding of palliative care, it cannot easily be gainsaid that most people choose not to think or talk about such care. The issues that affect

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9 *Ibid*.

10 Byock "Dying Well in Corrections: Why Should We Care" 2002 9 *Journal of Correctional Health* 110.

11 NPFSPC 2017–2022 9.

12 NPFSPC 2017–2022 10.

13 *Ibid*.

human beings during the period of life called dying – possibly the most vulnerable time in human existence – have thus always been almost unmentionable socially and side-lined in legal discourse. The limited discussions on end-of-life issues arguably exacerbate the vulnerability of those who are affected by terminal illnesses. This is unfortunate and particularly of concern in the South African context where indications are that thousands of people are not enjoying good health and are in fact facing life-threatening or potentially life-threatening medical diagnosis. At this juncture, it may also be added that health problems are exacerbated in correctional settings.[14]

The lack of, or inadequate engagement with, end-of-life issues may be morally comprehensible as death and the issues related to it are not pleasant or popular subjects of discussion for many individuals. However, cognisance must be taken of the implications of not broaching and dealing with some of these issues. The rights of terminally ill persons and of those affected by their illness are at risk of violation. Such risk may be prevented or mitigated through palliative care approaches.

2 3 Why terminally ill inmates?

When an inmate is diagnosed with a terminal disease while serving time in a South African correctional centre, the issue of release on medical parole is often one of the main considerations. While this is an important consideration, the question of appropriate healthcare should still be prioritised. The following remarks by former inmates may be regarded as an indication that appropriate care is often not afforded to terminally or seriously ill inmates.

> "While they waited for the [medical parole] application to be processed they had no access to medication and so they died within the prison premises."[15]

> "The one thing I want, my sister, is at least if one says that they are sick and they really look like they are sick then they must be released. I say this because others they are battling until death. Truthfully I have seen very sick people who had not been released. They had diseases that other people don't have and they end up dying right before us."[16]

These poignant words of former inmates are perhaps indicative of the maladies affecting inmates. Moreover, they allude to the need for palliative care to be provided to inmates. It should be recognised that access to effective palliative care should be afforded from the moment that a prisoner is diagnosed as terminally ill; whether the inmate is eligible for release should not affect the provision of palliative care. There are thus at least two categories of terminally ill inmate who require care. The first includes those

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14 Motala and McQuoid-Mason *Medical Law* (2013) 1.

15 Albertus *The Meaning of the Right to Healthcare of Terminally Ill Inmates in South Africa* (Unpublished LLD 2018) Comment of a former inmate interviewed in the Eastern Cape in October 2016.

16 Albertus *The Meaning of the Right to Healthcare of Terminally Ill Inmates in South Africa* Verbatim response of interviewee November 2016, Durban.

who are not eligible for medical parole, as they do not meet all the requirements of the medical parole provisions. The second category consists of those who have no support outside of the correctional environment and for whom the Department of Correctional Services (DCS) cannot find alternative care in hospice institutions, for example.

A further consideration as to why inmates' right to palliative care requires specific protection is that they do not have the same level of support from others as free persons do. Though state-funded palliative treatment is at present not readily available to everyone who needs it, terminally ill persons who are not imprisoned may, with assistance from their family and support networks, gain access to *some* state services. They may also depend on their support networks where state assistance is lacking. The plight of inmates is worse. They cannot freely access services available to the public owing to security measures in correctional centres, as well as a lack of transport and staff capacity, and the absence of family or other support networks. Thus, in the absence of state assistance, they are a marginalised group. A policy like the NPFSPC could therefore be crucial to the fulfilment of inmates' right to palliative care, provided that it takes into account the challenges in the provision of healthcare in correctional centres, and offers strategies to address and overcome such roadblocks (discussed in greater detail later). First, however, one of the main motivations for the drafting of the NPFSPC is briefly discussed.

3 WHA RESOLUTION 67.19: "STRENGTHENING OF PALLIATIVE CARE AS A COMPONENT OF COMPREHENSIVE CARE THROUGHOUT THE LIFE COURSE"

Though the right to palliative care had not been formally articulated in the early binding international law instruments, the World Health Assembly adopted Resolution 67.19 in 2014. The Resolution is a major milestone as it was the first time that member states had discussed palliative care.[17] Significantly, South Africa was one of the co-sponsors of the resolution that was adopted by all 194 member states.[18] Despite unanimous support for the Resolution, the World Health Assembly indicated on 1 August 2017 that globally less than 14 per cent of people who require palliative care receive such care.[19] Notwithstanding the seemingly stagnant attitude to implementing the Resolution, it is still worth considering how it may assist the plight of terminally ill persons – particularly those who also happen to be inmates.

The Resolution has nine action points that it urges member states to implement. These are as follows:

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17 NPFSPC 2017–2022 28.

18 *Ibid*.

19 World Health Organization Factsheet: Palliative Care 5 August 2020 httpa://www.who.int/news-room/fact-sheets/detail/palliative-care (accessed 2020-12-09).

> "1) [T]o develop and implement palliative care policies; 2) to ensure adequate domestic funding and allocation of human resources for palliative care initiatives; 3) to provide basic support to families, community volunteers and other individuals acting as caregivers, under the supervision of trained professionals; 4) to aim to include palliative care as an integral component of the ongoing education and training offered to care providers, in accordance with their roles and responsibilities; 5) to assess domestic palliative care needs, including pain management medication requirements, to ensure adequate supply of essential medicines in palliative care; 6) to review and revise national and local legislation and policies for controlled medicines; 7) to update, as appropriate, national essential medicines lists; 8) to foster partnerships between governments and civil society, including patients' organisations, to support the provision of services for patients requiring palliative care; and 9) to implement and monitor palliative care actions included in WHO's global action plan for the prevention and control of non-communicable diseases 2013–2020."[20]

The steps envisaged by the Resolution appear to be broad, yet appropriate, allowing member states to form approaches that may accommodate their unique situations domestically. The fact that the Resolution itself does not offer detailed guidance on how to extend palliative care to vulnerable groups, such as inmates, is therefore not a cause for serious criticism. The need to accommodate vulnerable groups ought to be self-evident to states aiming to comply with point 5 above, which calls on member states to assess domestic palliative care needs. It appears, however, that insofar as South Africa is concerned, the particular needs of inmates in correctional centres were not adequately considered. Except for a few fleeting references to inmates and correctional centres, the NPFSPC does not offer any detail on the challenges and possible strategies to address them. Furthermore, it is submitted that South Africa (as discussed later) has also not dealt satisfactorily with point 8, which calls for the fostering of partnerships.

Point 5 is also an issue of concern in South Africa. The NPFSPC notes that doctors are in relatively short supply in the country (0.77 per 1 000 population) and that this makes it necessary to shift certain tasks in the provision of palliative care to nurses.[21] One such shift ought to be that nurses be allowed to prescribe opioids, which are important for pain and symptom management. The NPFSPC acknowledges that the new policy allows nurses to prescribe medication from the Primary HealthCare Standard Treatment Guidelines and Essential Medicines List, but the NPFSPC itself notes that it is unclear if they may also prescribe opioids. Although these are serious concerns, they would be more intense in a prison context where there are additional factors such as drug addiction, security concerns and staffing limitations that may affect the administration of even basic medications. However, these considerations are not mentioned in the NPFSPC.

The adoption of the Resolution and the later introduction of the NPFSPC denote that the State recognises the need for palliative care, and that it has a duty to fulfil this need. While these are positive steps, it must be noted that it took South Africa three years to introduce the NPFSPC after the adoption

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20 NPFSPC 2017–2022 28.

21 NPFSPC 2017–2022 25.

of the Resolution;[22] and in its current form, the policy does not sufficiently protect terminally ill inmates' right to palliative care; nor does it introduce reasonable and workable plans to improve their access to such care – as may become clearer below.

4 THE IMPACT OF DISEASE IN CORRECTIONAL SETTINGS

It is positive that the NPFSPC acknowledges at the outset that it has become crucial for palliative care to be integrated into healthcare service delivery, given the already heavy burden of disease.[23] Though it is well known that in correctional settings this burden is even more pronounced than in many other communities, a statement to this effect is absent from the NPFSPC. Due consideration of the full extent of disease and its impact in correctional centres does not emerge from this policy framework. This is further demonstrated by the fact that in expressing the need to expand access to palliative care to all, the NPFSPC provides that "[w]e can only achieve this access if we focus on strengthening services at a primary health care level which includes our clinics as well as care within our communities and in the homes of patients".[24] The impact of disease on free communities is thus recognised, but no mention is made of its effects in the correctional system. Admittedly, it may be difficult to anticipate how the Department of Health may expand access to palliative care to inmates, but such difficulty does not justify an avoidance of the issue, especially in a national policy framework. If creating equitable access to palliative care for all, including vulnerable inmates, is to be achieved, the extent to which the inmate population is affected by disease should at least have been presented and acknowledged in the NPFSPC, so as to put the issue on the State's agenda.

5 THE STATED PURPOSE OF THE NPFSPC

A less obvious, yet serious, concern is that the most significant purpose of the NPFSPC, as stated in the policy framework itself, is to change how palliative care is viewed.[25] The policy seeks to instil the view that "palliative care includes but does not equate to end of life care".[26] Changing perceptions on palliative care is not objectionable; it is in fact necessary in the South African context. However, public acknowledgement of the need for palliative care, and education about what such care entails, is not tantamount (nor sufficient) to recognising the fundamental right to such care, and does not automatically indicate the State's duty to provide such care.

The most significant purpose of the policy framework should therefore have been to engender an understanding that the State has a legal duty to

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22 The Resolution was adopted in 2014 and South Africa introduced the NPFSPC in 2017 (NPFSPC 2017–2022 2).

23 NPFSPC 2017–2022 2.

24 *Ibid*.

25 NPFSPC 2017–2022 4.

26 *Ibid*.

fulfil towards all bearers of this right. Changing the perception of palliative care as envisaged in the NPFSPC may improve the plight of some terminally ill persons in that a more charitable view may be adopted to creating access to such care for them. However, a more direct and forceful expression is needed to recognise palliative care as the right of all terminally ill persons, as well as the State's duty to fulfil the right. Education and awareness strategies to change perceptions should then be aligned to such expressed right so as to avoid misconceptions about palliative care provision as a state obligation.

6 FOSTERING PARTNERSHIPS

It is positive that the NPFSPC affirms that palliative care is currently mainly offered by the non-governmental sector; but the NPFSPC also aims to facilitate the State's responsibility to strengthen health systems in order to extend integrated care, including palliative care for life-threatening or life-limiting illnesses.[27] Thus, a reasonably concrete plan for (introducing and) aligning standards of palliative care within correctional centres with those offered in the public domain is a basic expectation. This expectation is further cemented by the NPFSPC's description of various models of palliative care that allow for the provision of palliative care in different settings and according to the needs of a specific community.[28] Additionally, the NPFSPC provides assessment tools to measure patients' need for palliative care, which would arguably ensure that resources are used appropriately.[29]

Furthermore, the NPFSPC indicates that it aims to make palliative care accessible to everyone, including those who are vulnerable. Terminally ill inmates are included as a vulnerable group. The NPFSPC refers to certain barriers to palliative care in correctional centres. It indicates that palliative care in prisons is challenging because of a "hostile" environment in which access to family is limited and there are not enough carers for terminally ill inmates.[30] In most correctional centres, nurses are only available during the day, thus making opioid administration impossible at night. The policy also mentions a need for the development of a strategy to establish a multi-disciplinary team specialising in palliative care to be consulted on issues regarding medical parole and comprehensive care.[31]

The NPFSPC may be commended, as it offers various models for palliative care in different settings, provides assessment tools to determine patients' need for such care, and identifies some of the problems that impede access to palliative care in correctional centres. Unfortunately, it fails to lay the foundation for partnership with the DCS, although this may be implied in the NPFSPC's mention of some of the challenges to palliative care in correctional centres. However, the policy does not grapple with these

27 *Ibid*.
28 NPFSPC 2017–2022 13.
29 NPFSPC 2017–2022 13–15.
30 NPFSPC 2017–2022 18.
31 NPFSPC 2017–2022 18–19.

challenges and nor does it provide broad guidelines for addressing such issues.

At best, the NPFSPC sets the following goals:

1. strengthen palliative care services across all levels of the health system, from the tertiary hospital to the patient at home, to provide integrated and equitable care;
2. ensure an adequate number of appropriately qualified healthcare providers to deliver palliative care at all levels of the health service;
3. establish and maintain systems for the monitoring and evaluation of South Africa's palliative care programme;
4. ensure appropriate allocation of financial resources to strengthen and sustain South Africa's palliative care programme; and
5. strengthen governance and leadership to support implementation of the policy.[32]

It is only with regard to goal 5 that the NPFSPC appears to take cognisance of the need to engage the DCS. In pursuit of this goal, an inter-governmental forum will be established to strengthen delivery of palliative care by other sectors, including correctional services. The goal's ultimate target is for all social cluster policies to be supportive of palliative care service delivery by 2022.[33]

The achievement of the goals of the NPFSPC may greatly assist in finessing, and perhaps even entrenching, the State's duty to provide palliative care to terminally ill persons in the long-term. However, there may be major discrepancies between standards of palliative care in free communities and correctional centres respectively; different policies will have been developed by the different departments with the continuing aim to align such policies, but without any guarantee of achieving it. Although the State generally has a duty to provide palliative care to all terminally ill persons, inmates and free persons may not have access to the same treatment as a result of the parallel creation of separate policies. Resources would therefore have to be spent on aligning policies, as opposed to effectively implementing policies conceived and framed with an ethos of upholding equality between inmates and free persons.

In summary, the NPFSPC is undeniably a positive step towards acknowledging and fulfilling the right to palliative care of all free persons. However, it may widen the gap between inmates and free persons in terms of the State's duty to provide palliative care to both sets of persons. In view of terminally ill inmates' profound vulnerability, the State's duty to fulfil their right to palliative care ought not to be dealt with as a secondary matter that may be deferred. A more prudent approach in drafting the NPFSPC would have been to consider the Guidelines for Palliative Care in Correctional Settings (Guidelines).[34] The Department of Correctional Services drafted the

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[32] NPFSPC 2017–2022 56.

[33] NPFSPC 2017–2022 65.

[34] Hospice and Palliative Care Association of South Africa (HPCA) "Guidelines for Palliative

Guidelines with the assistance of the Hospice Palliative Care Association in 2013. Although there is no evidence that the Guidelines have been implemented nationally, their quality provides some indication of the benefit of fostering partnerships. Consequently, some of the guidelines are briefly discussed next.

The unique nature of the correctional environment requires special consideration in the formulation of guidelines. Although conditions may vary in correctional centres, the Guidelines are arguably more enforceable than guidelines drafted for palliative care in the home environment. As there is no specific law or set of regulations on palliative care in correctional centres, the Guidelines provide a list of legislation and policies (22 items in total) that should be complied with in the provision of palliative care.[35] While it is helpful for correctional authorities to be aware of the laws and policies that they should uphold, they also require explanations as to the exact relevance of these laws and how compliance may be ensured. Despite these considerations, the Guidelines ought to be introduced in correctional settings, as they would caution staff and inmates that the law requires palliative care to be provided and that specific standards must be followed. In the long-term, however, efforts ought to be made to consolidate laws specifically relevant to palliative care in correctional centres, as this may result in greater awareness of the law and perhaps make compliance with such law easier.

The Guidelines provide that an inmate has the right to be involved in any decision relevant to his or her care, treatment and service.[36] Although this is legally correct and applies to everyone, it is all the more important for it to be emphasised in respect of inmates. They should also be afforded professional support to assist them in making decisions, and be permitted to confer with their next-of-kin if they wish to do so. It is unfortunate that the Guidelines do not say this expressly, and yet this does not render them ineffective, as long as there is a basic understanding that inmates should have a say in how they are cared for.

The Guidelines provide that plans for palliative care ought to be based on a needs assessment of the inmate population, characteristics of the physical institution, medical-care capabilities, and other resources.[37] These are realistic considerations. If the Guidelines are followed, correctional authorities will have to address the question of how high-quality palliative care may be provided in an oppressive, overcrowded environment, where there is also a lack of reasonable medical resources, as these factors do exist in many prisons. Admittedly, it may be very difficult to address the issues mentioned here, but these are the exact impediments to palliative care that ought to be addressed by the State.

The Guidelines affirm that inmates may have no familial support owing to

Care in Correctional Settings" https://www.hpca.co.za/category/resources.html (accessed 2017-09-20) 1.

35 HPCA https://www.hpca.co.za/category/resources.html 3.

36 HPCA https://www.hpca.co.za/category/resources.html 4.

37 *Ibid*.

their incarceration and consequent separation from their biological family. The Guidelines therefore introduce the concept of a "family of choice", which is defined as "biological family members, significant others from the community and/ or inmates or individuals named as family by the inmate patient".[38] The family of choice is, as would be the case in a community setting, the focus of care and support. This is excellent as some inmates serve long sentences and do form emotional bonds with their peers. If not for this guideline, the importance of affording support to the family of choice may probably not occur to all correctional health staff.

The Guidelines also include further steps that should be undertaken in providing services: staff and management should be sensitive to the culturally and spiritually diverse needs of the correctional community it serves; palliative care should be offered as part of comprehensive care according to the need of each inmate; care must be fully coordinated to ensure continuity from admission to release/parole of the inmate patient and for the family; and a written care plan must be developed for each inmate patient. Such plan must take into account the special needs of the family and the services provided to the family, at the inmate patient's discretion. An interdisciplinary team must identify and incorporate specialised professionals, and must meet the specific needs of inmate patients and their families as identified in the plan of care. They should provide quality, coordinated care as defined by current professional guidelines that relate to the team member's practice specialties and to the principles of interdisciplinary team practice.[39]

The Guidelines, if properly implemented, would ensure that the individual needs of each inmate diagnosed with a terminal disease would be identified and documented. The interdisciplinary team would furthermore ensure that holistic care is provided to the inmate and that the needs of his family of choice are also attended to.

The Guidelines also provide for spiritual care services.[40] Such services should be based on an initial and ongoing documented assessment of the spiritual needs of the inmate patient and of his or her family by a chaplain or spiritual worker, using required resources as needed. The provision of these services may be of paramount importance to inmates who may be in extreme physical and emotional pain. This is also true for those who may be facing death in the near future. Spiritual guidance may provide them with comfort.

The Guidelines provide that the caregiver services in a correctional centre may include volunteer inmate caregivers, specially trained in the care of inmate patients who are terminally ill.[41] This guideline may be beneficial to both terminally ill inmates and the volunteer inmates. The former may be comforted by the fact that someone familiar with their struggles and experiences is caring for them, while the latter may acquire new skills that

38 *Ibid*.
39 HPCA https://www.hpca.co.za/category/resources.html 10.
40 HPCA https://www.hpca.co.za/category/resources.html 6.
41 HPCA https://www.hpca.co.za/category/resources.html 8.

may assist them in finding employment once released.

Further guidelines include: throughout all phases of care, patient needs must be matched with appropriate resources within (and, when necessary, outside) the correctional centre; all patients cared for by the correctional centre should have their holistic needs identified through an established assessment process; and when an opportunity to improve or to correct a problem in the quality of care or services is identified, action must be taken to improve the care or to correct the problem.[42]

The abovementioned guidelines are important. If implemented, they will ensure that the correctional authorities are always aware of the actual needs of terminally ill inmates, as well as the problems they experience. The Guidelines also indicate that the State should make resources available to ensure the care of terminally ill inmates, and where their needs cannot be met within the correctional setting, services that are available to the public must be accessed.

Importantly, the Guidelines suggest that patient accommodation should be adequate to allow for the safety, privacy and comfort of patients.[43] Furthermore, patient and family educational needs must be assessed and recorded. The correctional centre must design and carry out processes to provide continuity of patient care when a patient is transferred to another organisation; all terminally ill inmates referred for medical placement should have access to the services and support of a palliative care interdisciplinary team.

The Guidelines indicate that terminally ill inmates should not be accommodated in overcrowded cells where they have no privacy, where safety is compromised, and their symptoms may be exacerbated. Creating a comfortable environment conducive to the needs of the terminally ill inmate appears to be vital to ensuring proper care for them. Apparently, an understanding of the needs of the inmate and what palliative care involves is important; hence the educational needs of the family must be assessed and recorded.

Unsurprisingly, the Guidelines provide that the pharmaceutical needs of inmate patients should be met, consistent with all applicable regulations and acceptable standards of practice. Inmate patients should receive coordinated and accurate communication, information, instruction and education about their medication, medication profile and results of medication monitoring. The correctional centre should decide which medicines and pharmaceutical supplies will be made available for prescribing and ordering. This decision is based on patient needs and the types of services provided.[44]

If all the guidelines discussed above were to be followed in all correctional centres, it may lay the foundations for a human-rights-orientated approach to palliative care. A lesson to be learnt from the existence of the Guidelines,

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42 HPCA https://www.hpca.co.za/category/resources.html 9.

43 *Ibid*.

44 HPCA https://www.hpca.co.za/category/resources.html 13.

which were drafted almost six years ago, is that, though the content is appropriate for correctional centres, a firm undertaking from DCS is needed for actual implementation. There can be little doubt that the Guidelines are not followed in all correctional centres. This may be attributed to conditions in correctional centres, but it cannot be gainsaid that the non-binding nature of this instrument also contributes to the failure to observe it. Arguably, the position of terminally ill inmates would have been bolstered had the Guidelines been given due consideration in the drafting of the NPFSPC. Their claim for palliative care would have been bolstered to some extent.

7 CONCLUSION

The time is ripe to recognise that not all terminally ill inmates are released from correctional centres. In the past, some inmates were denied release on medical parole, even in instances where they had been diagnosed with a terminal illness. The problem of terminally ill inmates who require palliative care thus establishes an urgent need for state action. Moreover the State must recognise that it has a legal obligation to provide terminally ill inmates with palliative care. Furthermore, it must be realised that "[i]nitiatives to improve the health of a country's citizens are ineffective if they do not reach those in greatest need".[45]

Though great strides have been made in South Africa to give effect to health needs that can be addressed through curative and preventative measures, a substantial number of citizens require palliative care. Policy-makers and legislators must, however, also address barriers to access to the health system as increased expenditure by itself does not necessarily enhance access.[46] It ought also to be remembered that "[a]t the end of life, we are far more alike than different from one another [and] that [h]ow we care for others may well determine how we are cared for ourselves".[47] Though infirmity and death are some of the least popular subjects of conversation, it is ever the reality for thousands of people.

The NPFSPC affirmations concerning palliative care as a basic human right do not suffice in engraining such a right in the South African legal system. Admittedly, the NPFSPC is a commendable achievement for advocates of palliative care. As a policy document with a finite duration, it may be the impetus for service delivery until the year 2022. The laudable commitment of the steering committee may make this reasonably achievable. After the five-year period, the steering committee may dissolve, and the officials and focus of the Ministry of Health may also change. The current momentum for creating equitable access to palliative care may consequently decline and support for the right to palliative care, although buttressed by other laws, may have to be summoned and recalled afresh. This may be especially true for terminally ill inmates for whom the right to healthcare (even though constitutionally guaranteed) is often a point of

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45 Butler and Plaks "Access to Public Healthcare in South Africa" 2012 *South African Actuarial Journal* 130.

46 *Ibid.*

47 Byock 2002 9 *Journal of Correctional Health* 110.

contention. An explicit conferral of a right to palliative care within the framework of an Act of Parliament would guarantee the permanence and further development of palliative care in South Africa. It is therefore asserted in this article that the right of terminally ill inmates to palliative care should be made explicit in national legislation to ensure its permanency, expansion and development beyond the NPFSPC. The introduction of the NPFSPC is a major step towards the formal legal recognition of palliative care as a right for terminally ill persons. Whether or not such recognition will materialise and put palliative care on an equal footing with curative and preventative care for terminally ill free persons will become clearer over time. Currently, however, the NPFSPC signifies that the State accepts that, for a five-year period (the duration of the policy framework), it has a duty to introduce palliative care as appropriate care for terminally ill persons.

In short, overall, great effort and resources have been invested to implement and expand palliative care to public hospitals, local clinics and the homes of terminally ill persons. Although the NPFSPC states a number of times that all terminally ill persons, including inmates, have a right to palliative care, it is unclear how the State will fulfil its duty to them. It also appears that the Department of Health does not envisage a direct role for itself in making palliative care accessible to inmates.

AN OVERVIEW OF STATUTES RELATING TO CIVIL PROCEDURE IN SOUTH AFRICA IN LIGHT OF THE CHANGES IN TECHNOLOGY[1]

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SUMMARY

E-technology has fast become an acceptable and convenient method of communication and a prerequisite of business transactions globally. South Africa is no exception to the trend. While technological progress has facilitated rapid change in the way humans communicate and transact, South African law has not kept abreast of the swift transformation and growth in this sector. This lacuna is especially evident in the South African law of civil procedure, which regulates the civil process in South African courts. Although subject to regular amendment, it appears *prima facie* not to embrace advances in e-technology and their effect – or potential effect – on the legal process.

Moreover, the existing corpus of legislation governing civil process appears to have disregarded the provisions of the Electronic Communications and Transactions Act (ECTA) to the extent that it already provides mechanisms for the use of e-technology. In South Africa, the law of civil procedure is regulated by statutes such as the Rules Board for Courts of Law Act, the Superior Courts Act, the Magistrates' Courts Act, the Sheriffs Act, the National Credit Act, the Small Claims Court Act, and the Divorce Act, which *inter alia* regulate court process and ensure the fair administration of justice. The submission made here explores this indicated gap within selected legislation pertinent to civil procedure and postulates the effect of e-technology in the context of the abovementioned legislation.

As an example, section 35 of the Superior Courts Act indicates that parties and witnesses must make a physical appearance in the court of issue. This provision, however, does not expressly allow for the use of video conferencing, which would enable witnesses to give evidence via e-technology, and thus allow parties to investigate and re-examine witnesses situated in any geographical location outside of

[1] This article is part of an LLD thesis by NQ Mabeka, supervised by R Songca and V Basdeo on *The Impact of E-Technology on the Law of Civil Procedure* (Doctoral thesis, University of South Africa) 2018 hereinafter referred to as Mabeka *Impact of E-Technology*).

court. Further, section 74Q of the Magistrates' Courts Act makes it mandatory for garnishee orders to be served personally or by registered mail. This provision is not in line with developments in e-technology. Email, Facebook, or other digital means of service could facilitate the service of garnishee orders issued by magistrates' courts more effectively and remove delays posed by slow postal delivery, and also inhibit the prohibitive cost of personal service. With this contribution, select statutory provisions are compared to ECTA provisions and specific e-technology laws so as to determine the extent of the gap in the implementation of e-technology within the sphere of civil process. The authors then provide insights into how the current civil law statutes could be amended in line with selected e-technology legislation discussed here.

1 INTRODUCTION

E-technology is fast becoming a regular mode of communication, and its effective use in business globally cannot be denied. South African statutes that regulate the law of civil procedure (to wit, the Superior Courts Act[2] (SC Act), the Magistrates' Courts Act[3] (MCA), the Small Claims Court Act[4] (SCC Act), and the National Credit Act[5] (NCA)) are regularly amended; yet the amendments do not appear to embrace e-technology fully in civil proceedings in line with the rapid expansion and pervasive impact of e-technology. For example, the MCA still requires that service be effected via sheriff,[6] which includes processes relating to the issuing of automatic rent interdicts[7] and hypothecs. In these instances, if the sheriff does not submit a certificate of service, he/she may be subjected to disciplinary proceedings in terms of the Sheriffs Act (SA)[8] even though sheriffs and legal representatives can invoke electronic means of service if the legislation is amended to this effect. By way of further example, the NCA[9] requires parties first to issue a notice to a defaulting party at the last known address before the institution of court processes.[10] The authors argue that this mode of service is outdated and could be more effectively arranged via Facebook,

2 10 of 2013.

3 32 of 1944.

4 61 of 1984.

5 34 of 2005.

6 Anthony and Berryman *Magistrates' Court Guide* (2019) 1145–1183; Magistrates' Court Act 32 of 1944; Broodryk *Eckard's Principles of Civil Procedure in the Magistrates' Courts* 6ed (2019) 1–438; Cilliers, Loots and Nel *Herbstein and Van Winsen: The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* (2009) 1–2000; Erasmus and Van Loggerenberg *Jones and Buckle: The Civil Practice of the Magistrates' Court in South Africa* 10ed (2017) 21–80; Kelbrick and Cassim *Civil Procedure in South Africa* (2018) 1–146; Faris and Hurter *The Student Handbook for Civil Procedure* 7ed (2015) 344–345; Peté, Du Plessis and Sibanda *Civil Procedure: A Practical Guide – Procedural Law* 3ed (2017) 52–268.

7 S 31 of the MCA.

8 90 of 1986, s 3; see the Uniform Rules of Court 2009; Rules Regulating the Conduct of the proceedings of the Magistrate's Court of South Africa No.R740 (23 August 2010) (herein after referred to as the Magistrate's Court Rules).

9 S 29.

10 S 129–130; see also Mabeka *Impact of E-Technology* 66–69.

Instagram, email and other digital e-technology devices.[11] South African courts recognise the use of e-technology and allow for parties to serve by way of Facebook,[12] but it appears that the legislation is unclear in this regard.

In light of the above summary anecdotal examples, this contribution examines selected civil process legislation and makes recommendations for their potential development and eventual amendment so as to align them with developments in e-technology and the expanding branch of e-technology law. The authors begin by discussing the Constitution Seventeenth Amendment Act of 2012 (CSA), the Rules Board for Courts of Law Act[13] (RBCL Act) and the SC Act. In addition, the contribution analyses the MCA, the NCA, the SCC Act, the SA, the Consumer Protection Act[14] (CPA), the Divorce Act[15] and the Electronic Communications and Transactions Act[16] (ECTA), as they relate to the overall hypothesis of the submission.

2 THE CONSTITUTION SEVENTEENTH AMENDMENT ACT OF 2012 (CSA)

The unamended section 167 of the CSA entrenched the Constitutional Court structure and expanded on the duties of its staff. It stated that the Constitutional Court is the highest court that may decide on constitutional matters.[17] The use of the word "may" in this section, however, denoted that this provision was not mandatory, and hence, there was a need to amend it to enforce the supremacy of the Constitution.[18] Section 167 was thus amended in 2012 to solidify the hierarchy of the South African court structure.[19] This amendment emanated from a need to ensure that there is one court of final instance where all constitutional matters are finalised[20] and thus ensure finality, which is one of the basic principles of procedural law.

In terms of the CSA, parliament amended the Constitution to illustrate that the Constitutional Court is now the apex court,[21] meaning that it is the

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11 Papadopoulos and Snail *Cyberlaw@SA111: The Law of the Internet in South Africa* (2012) 1–3320.

12 *CMC Woodworking Machinery v Odendaal Kitchens* 2012 (5) SA 604 (KZD).

13 107 of 1985.

14 66 of 2008.

15 70 of 1979.

16 25 of 2002.

17 The Constitution Seventeenth Amendment Act of 2012 (CSA); Kleyn and Viljoen *Beginner's Guide for Law Students* 5ed (2018) 85; Peté *et al Civil Procedure: A Practical Guide – Procedural Law* 351.

18 Cockram *Interpretation of Statutes* 3ed (1987) 1–22; De Ville *Constitutional and Statutory Interpretation* 1ed (2000) 1–283; Mabeka *Impact of E-Technology* 52.

19 Cockram *Interpretation of Statutes* 1–22; De Ville *Constitutional and Statutory Interpretation* 1–283; Mabeka *Impact of E-Technology* 52; SCA The preamble.

20 Cockram *Interpretation of Statutes* 1–22; De Ville *Constitutional and Statutory Interpretation* 1–283; Mabeka *Impact of E-Technology* 52, s 3 of the CSA.

21 Kleyn and Viljoen *Beginner's Guide for Law Students* 85; Mabeka *Impact of E-Technology* 52; Peté *et al Civil Procedure: A Practical Guide – Procedural Law* 351.

highest court in all matters. This puts the decisions of the Constitutional Court above all other decisions, in any matter granted leave to appeal to the Constitutional Court, and affirms the supremacy of the Constitution[22] as intended by the drafters.

To expand on the authors' submissions regarding the impact of e-technology and related laws, the Constitutional Court will, as the apex court, set the pace for other courts to employ technology in its daily operations.

This amendment is important because proceedings in the Constitutional Court are recorded and court documents are still, to a certain extent, managed manually. Notwithstanding the current lack of full implementation of e-technology for court process, the authors submit that the amendment that brought about the apex jurisdiction will lead to proper implementation of e-technology legislation, particularly the ECTA, which enables courts to conduct processes using electronic or digital means.[23]

3 RULES BOARD FOR COURTS OF LAW ACT 107 OF 1985 (RBCL ACT)

The RBCL Act is significant because it establishes the Board and grants it extensive powers to draft and amend rules as it deems necessary.[24] The RBCL Act provides for rules that facilitate the functioning of the various courts – namely, the superior and lower courts. It further regulates the way in which courts conduct their proceedings – for example, the execution of writs, and other court processes.[25] The Board was created in terms of the Act, which reviews all the rules of the respective courts relating to practice and procedure, including the service of court documents.[26] The Board thus has a fundamental role to play in accepting and expanding the use of e-technology in the court process in future.

4 SUPERIOR COURTS ACT 10 OF 2013 (SC Act)

The SC Act repealed the Supreme Court Act 59 of 1959. The thrust of the new legislation was to create one legislative instrument to regulate proceedings in the superior courts.[27] The SC Act regulates different processes and proceedings in the Supreme Court of Appeal and the High Court.[28] It further provides for the appointment of court administrators such

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22 *Ibid*.

23 CSA; Kleyn and Viljoen *Beginner's Guide for Law Students* 85; Mabeka *Impact of E-Technology* 53; Peté *et al Civil Procedure: A Practical Guide – Procedural Law* 351.

24 S 2 of the RBCL Act; Faris and Hurter *The Student Handbook for Civil Procedure* 31; Mabeka *Impact of E-Technology* 53; Peté *et al Civil Procedure: A Practical Guide – Procedural Law* 12.

25 S 6 of the RBCL Act; Faris and Hurter *The Student Handbook for Civil Procedure* 31; Peté *et al Civil Procedure: A Practical Guide – Procedural Law* 12.

26 *Ibid*.

27 Faris and Hurter *The Student Handbook for Civil Procedure* 13–63; Peté *et al Civil Procedure: A Practical Guide – Procedural Law* 8–480; Van Blerk *Preparation for Civil Trials* 1ed (2019) 9.10–20.14.

28 *Ibid*.

as judges and other officers responsible for the daily operation of the court.[29]

It further regulates how judges should deliver judgments and determines the quorum of the Supreme Court of Appeal and the High Court.[30]

The SC Act further sets out processes that must be followed before court documents are served and filed. In addition, when there is a need to call upon witnesses who will not testify in person, the Act allows parties to subpoena witnesses. Section 34 provides that court documents must be certified for them to be admissible as evidence before the court.[31] A narrow interpretation of this provision points to an exclusion of the use of e-technology devices when witnesses must appear in person.[32] In *K v Transnet Ltd,*[33] however, the court attempted to look past this narrow interpretation and allowed a witness to testify using video conferencing, thus expanding the methods by which a court hears evidence. Whitear-Nel supported this decision.[34] Van Blerk posits that courts are indeed starting to follow a flexible approach when there is a need to use video-link to hear a witness who is otherwise unable to give evidence in person in court physically.[35]

The proffered narrow interpretation also applies to the subpoena *duces tecum* provided for by section 35 of the SC Act. There is no provision for the use of e-technology in the application of the subpoena *duces tecum* principle; a witness is subpoenaed only to produce the evidence required.[36] However, if amended in line with ECTA, in future, the courts will not necessarily require witnesses to make a physical appearance to produce documents or evidence.[37] This implies that sections 34 and 35 should be amended to support an electronic means of submission of evidence without a physical presence at court.

This amendment could also affect section 36, which requires subpoenaed witnesses to give oral evidence and to answer questions posed, and which criminalises a refusal to comply with the subpoena *duces tecum.*[38] Currently, a defaulter may be imprisoned if he or she refuses to comply with section 36 subpoena requirements. If amended, however, a refusal based on logistical and geographical reasons may be overcome in the absence of other

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29 S 11 of the SC Act; Faris and Hurter *The Student Handbook for Civil Procedure* 13; Peté *et al Civil Procedure: A Practical Guide – Procedural Law* 8–480; Mabeka *Impact of E-Technology* 53.

30 *Ibid.*

31 S 34 of the SC Act; Faris and Hurter *The Student Handbook for Civil Procedure* 24; Peté *et al Civil Procedure: A Practical Guide – Procedural Law* 8–480; Mabeka *Impact of E-Technology* 53.

32 Ss 54–55 of the SC Act; see also Mabeka *Impact of E-Technology* 53.

33 (2018) 4 All SA 251 (KZD).

34 Whitear-Nel "Video-Link Testimony in Civil Courts in South Africa: *K v Transnet Ltd T/A Portnet* (KZD)" 2019 *SALJ* 136 245–260.

35 Van Blerk *Preparation for Civil Trials* 169.

36 Faris and Hurter *The Student Handbook for Civil Procedure* 24; Peté *et al Civil Procedure: A Practical Guide – Procedural Law* 281; Van Blerk *Preparation for Civil Trials* 18.10.

37 *Ibid*.

38 S 36 of the SC Act; Faris and Hurter *The Student Handbook for Civil Procedure* 25; Peté *et al Civil Procedure: A Practical Guide – Procedural Law* 280, 281 and 299.

reasons for refusal.

Section 36, however, evinces a gap concerning the acceptance of digital or video-clips of oral evidence required when a person is subpoenaed in terms of the Act. A provision is thus required to accommodate digital or video-clips, Skype or any other means of communication using e-technology, whereby a witness may give oral evidence live in court proceedings without being physically present.

Section 39 deals with an examination by interrogatories.[39] An examination by interrogatories is one of the ways in which evidence may be brought before a court in civil procedure.[40] In practice, it means that a commissioner is given questions that the parties wish to put to the witness,[41] and this ordinarily occurs where a witness is unable to appear physically in court because he or she resides outside the jurisdiction of the court hearing the matter.[42]

There are electronic means of communication such as Skype, CCTV or video conference that can be used to facilitate the use of interrogatories in court proceedings. For example, a commissioner could allow a witness to give evidence directly through an electronic means of communication, and by way of technology, the witness's answers would be recorded onto a device or disk, and such media would then be produced in court. The memory stick or CD should be presented to the Registrar and should be stored for the record of the court. Moreover, the use of technology devices or instruments in the trial would circumvent the need for interrogatories. Thus, interrogatories would effectively become obsolete because witnesses would testify directly or via online communication. This would ultimately also serve as a cost-saving exercise for the Department of Justice and Constitutional Development.

Faris and Hurter affirm that the duties of sheriffs entail the execution of court processes as provided for in section 43 of the Act.[43] This provision may require amendment in future where action and summons proceedings are commenced and effected via ECTA preferably, as opposed to service by the sheriff as is currently required.

There may not be a need to use the services of sheriffs in future if the rules are amended to incorporate electronic service and return; much like the position of interrogatories, this would reduce the fiscal demand on the Department of Justice and Constitutional Development (not to mention the ease of service that would be facilitated by such an amendment).

Furthermore, the impact of e-technology in the future will not only affect

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39 Mabeka *Impact of E-Technology* 55, s 39 of the SC Act.

40 S 39 of the SC Act; Faris and Hurter *The Student Handbook for Civil Procedure* 25; Van Blerk *Preparation for Civil Trials* 20.1 and 20.14; Mabeka *Impact of E-Technology* 55.

41 Broodryk *Eckard's Principles of Civil Procedure in the Magistrates' Court* 210; s 52 of the MCA.

42 Whitear-Nel 2019 *SALJ* 245–260; *K v Transnet Ltd supra*; Mabeka *Impact of E-Technology* 55; Peté *et al Civil Procedure: A Practical Guide – Procedural Law* 697.

43 Faris and Hurter *The Student Handbook for Civil Procedure* 27; see also Mabeka *Impact of E-Technology* 55.

the position of sheriffs but also other processes conducted by officials of the court – for example, the taxation of party-and-party costs by the Registrar. The future use of e-technology implies that taxation could be conducted electronically, which means that the parties and the Registrar would use teleconference or video-link to conduct the taxation process instead of needing the physical appearance of the parties. In addition, the parties would submit taxation documents via email so that both the Registrar and the other party or parties are able to peruse the documents during the process. Naturally, this requires an amendment of the current rule(s) regarding taxation and verification of the services provided to the legal practitioner's client in practice up until the civil trial ends.

5 MAGISTRATES' COURTS ACT 32 OF 1944 (MCA)

According to the MCA, magistrates' courts are creatures of statute and thus jurisdiction is determined by the enabling statute. There are various provisions of the Act that would be affected by the use of e-technology. The point of departure here is section 14, which provides for the appointment of sheriffs of the court.[44]

Prior to legislative amendment, messengers of the court served and executed court documents but these officials are now referred to as sheriffs of the court.[45] The position of messengers of the court changed when the Sheriffs Act[46] was passed.[47] The future existence of sheriffs may be affected by the implementation of ECTA, particularly insofar as the service of court processes using electronic means or e-technology as discussed above is concerned.

If such amendment brings about the repeal of the office of the sheriff, it is submitted that sheriffs should be absorbed into any new system promoting the use of digital devices.[48] While traditional sheriffs will no longer be necessary if court documents can be served, filed and executed via electronic means,[49] the authors submit that use of a similar office should be accommodated to serve those who do not have access to e-technology,

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44 S 14 of the MCA; Broodryk *Eckard's Principles of Civil Procedure in the Magistrates' Courts* 8–10; Faris and Hurter *The Student Handbook for Civil Procedure* 139; see also Mabeka *Impact of E-Technology* 56.

45 *Ibid*.

46 90 of 1986.

47 S 64(2)(*a*)–(*b*) of the SA; Broodryk *Eckard's Principles of Civil Procedure in the Magistrates' Courts* 8–10; Mabeka *Impact of E-Technology* 57; Peté *et al Civil Procedure: A Practical Guide – Procedural Law* 133–134.

48 Ramotsho "Gauteng High Courts on a Journey to Go Paperless" (21 October 2019) http://www.derebus.org.za/gauteng-high-courts-on-a-journey-to-go-paperless/ (accessed 2019-11-14); Mabeka *Impact of E-Technology* 57; Swales "An Analysis of the Regulatory Environment Governing Hearsay Electronic Evidence in South Africa: Suggestions for Reform – Part One" 2018 21 *PER* 1–30; *K v Transnet Ltd supra*.

49 According to Ramotsho, there is a Caseline system that Judge President Mlambo has been preaching about, and which the Gauteng High Courts are gearing towards in the future, that will result in courts doing away with paperwork; Ramotsho http://www.derebus.org.za/gauteng-high-courts-on-a-journey-to-go-paperless/; Mabeka *Impact of E-Technology* 57.

particularly in the rural areas.[50] Sheriffs have extensive experience and phasing out their services will in the future have dire consequences on individual sheriffs, their families whom they financially support will be adversely affected if they are phased out. A proposed centralised system for electronic service and return, in compliance with ECTA, could incorporate sheriffs trained in new ways of serving process. It is prudent to note that the existence of the sheriffs should be preserved to assist in the use of digital or e-technology to effect court processes in future.

The same position expressed with regard to sheriffs applies to section 17 of the MCA,[51] which refers to evidence to prove service. In future, perhaps an electronic system could be used to draft returns of service for distribution electronically instead of having to submit original copies of the certificate of service as proof that service was effected. Naturally, any such change would require that authenticity be proved but these concerns are not relevant to the argument here and are aspects that could be addressed after implementing an amendment to incorporate such provisions as suggested by the authors.

Section 31 and 32 of the MCA provide for an automatic rent interdict and attachment of property to effect the hypothec.[52] Currently, the sheriffs of the court conduct the process of issuing summons for automatic rent interdict manually. Following the same arguments proffered above, these provisions could be amended to include electronic methods of issuing summons, which may be served and filed using e-technology.[53]

Moreover, sections 51, 52, 53 and 54 of the MCA[54] deserve further scrutiny because they speak to the manner in which evidence is secured in court proceedings. These sections deal with different methods of ensuring that witnesses testify in court where and when necessary, as is the case in

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[50] National Center for State Courts "Rural Courts Resource" (10 June 2017) http://www.ncsc.org/Topics/Special-Jurisdiction/Rural-Courts/Resource-Guide.aspx (accessed 2017-11-12).

[51] See Anthony and Berryman *Magistrates' Court Guide* 1145–1183; Broodryk *Eckard's Principles of Civil Procedure in the Magistrates' Courts* 1–438; Cilliers *et al Herbstein and Van Winsen: The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 1–2000; Erasmus and Van Loggerenberg *Jones and Buckle: The Civil Practice of the Magistrates' Court in South Africa* 21–80; Kelbrick and Cassim *Civil Procedure in South Africa* 1–146; Faris and Hurter *The Student Handbook for Civil Procedure* 344–345; Peté *et al Civil Procedure: A Practical Guide – Procedural Law* 52–268; Mabeka *Impact of E-Technology* 57.

[52] Ss 30–33 of the MCA; Anthony and Berryman *Magistrates' Court Guide* 1145–1183; Erasmus and Van Loggerenberg *Jones and Buckle: The Civil Practice of the Magistrates' Court in South Africa* 21–80; Kelbrick and Cassim *Civil Procedure in South Africa* 1–146; Mabeka *Impact of E-Technology* 57.

[53] Erasmus and Van Loggerenberg *Jones and Buckle: The Civil Practice of the Magistrates' Court in South Africa* 21–80; Kelbrick and Cassim *Civil Procedure in South Africa* 1–146; Faris and Hurter *The Student Handbook for Civil Procedure* 135–159; Peté *et al Civil Procedure: A Practical Guide – Procedural Law* 52–268; Mabeka *Impact of E-Technology* 57.

[54] See Erasmus and Van Loggerenberg *Jones and Buckle: The Civil Practice of the Magistrates' Court in South Africa* 21–80; Faris and Hurter *The Student Handbook for Civil Procedure* 135–159; Peté *et al Civil Procedure: A Practical Guide – Procedural Law* 52–268; Mabeka *Impact of E-Technology* 58.

section 43 of the SC Act.[55] Section 51 of the MCA provides for the issue of a subpoena and subpoena *duces tecum* when necessary, and requires witnesses to give evidence or to bring evidence before court using interrogatories, as is the case in the SC Act. Section 53 of the MCA facilitates other means of effecting evidence in court through commissions *de bene esse*, which are similar to interrogatories.[56]

Section 54 of the MCA provides that the court may call upon parties to conduct pre-trial proceedings when the court is of the view that it is necessary to do so,[57] or when there is a written request for such. The civil proceeding process involves narrowing down issues and deciding on relevant evidence to be presented during proceedings.[58] It eliminates irrelevant issues and expedites court proceedings.[59]

In practice, this process is conducted in the form of a meeting in a venue decided upon by the parties; often, the "[c]onference takes place in the chambers of the most senior advocate involved in a matter".[60] These provisions will, in future, be affected because, for example, there will be no need for the parties to meet to conduct a pre-trial conference physically. The same applies to interrogatories; if there is digital evidence, there is no need to use commissioners to ask witnesses questions to gather evidence.[61] Skype and live digital CCTV can be used during court proceedings to examine and cross-examine witnesses and their evidence. E-technology can be used before, during and after a civil trial.[62] The authors argue that the Department of Justice and Constitutional Development is responsible for providing and maintaining such facilities in the pursuit of justice.

Another significant provision of the MCA relates to the admission of liability, which enables a debtor to pay a debt in instalments through a

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55 Harms Civil Procedures in Magistrates' Court Part C (2016) C–10; Mabeka *Impact of E-Technology* 58.

56 Erasmus and Van Loggerenberg *Jones and Buckle: The Civil Practice of the Magistrates' Court in South Africa* 21–80; Peté *et al Civil Procedure: A Practical Guide – Procedural Law* 292–697; Mabeka *Impact of E-Technology* 59.

57 Anthony and Berryman *Magistrates' Court Guide* 1145–1183; Broodryk *Eckard's Principles of Civil Procedure in the Magistrates' Courts* 1–438; Cilliers *et al Herbstein and Van Winsen: The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 1–2000; Erasmus and Van Loggerenberg *Jones and Buckle: The Civil Practice of the Magistrates' Court in South Africa* 21–80; Kelbrick and Cassim *Civil Procedure in South Africa* 1–146; Faris and Hurter *The Student Handbook for Civil Procedure* 135–159; Peté *et al Civil Procedure: A Practical Guide – Procedural Law* 52–268; Mabeka *Impact of E-Technology* 59.

58 Erasmus and Van Loggerenberg *Jones and Buckle: The Civil Practice of the Magistrates' Court in South Africa* 21–80; Faris and Hurter *The Student Handbook for Civil Procedure* 135–159; Mabeka *Impact of E-Technology* 63.

59 S 54(1)(*a*) of the MCA; Mabeka *Impact of E-Technology* 59–63.

60 Harms Civil Procedures in Magistrates' Court (2016) C–10; Mabeka *Impact of E-Technology* 59; Peté *et al Civil Procedure: A Practical Guide – Procedural Law* 292.

61 Harms Civil Procedures in Magistrates' Court (2016) C–10; Mabeka *Impact of E-Technology 60*; Peté *et al Civil Procedure: A Practical Guide – Procedural Law* 292.

62 Erasmus and Van Loggerenberg *Jones and Buckle: The Civil Practice of the Magistrates' Court in South Africa* 21–80; Kelbrick and Cassim *Civil Procedure in South Africa* 1–146; Faris and Hurter *The Student Handbook for Civil Procedure* 135–159; Mabeka *Impact of E-Technology* 58.

written undertaking. The request for such undertaking, according to section 57, must be sent to the debtor by registered mail.[63] Without exploring the peculiarities of the South African postal service, it is perhaps trite to state that the postal service has become defunct by virtue of inefficiency. In contemporary society, most business communication occurs via email. Registered mail has fallen into disuse and has thus become obsolete, and even when used is ineffective. The provisions of section 57 must, therefore, be amended to accommodate the use of electronic communication such as email, as opposed to registered mail, in pursuance of section 57 process. While it is borne in mind that some parties prefer to send documents by registered mail, it appears that there is a need to replace registered mail with suitable electronic forms of delivery.

The authors' view is supported by the recent introduction of the digital Caselines by the High Court in the Gauteng Province.[64] Justice, in this instance, is enhancing the efficiency and certainty over outmoded rules for delivery. While those who prefer registered mail (perhaps for example in rural areas) must be accommodated, the rules of court should be progressive enough to embrace e-technology as a viable parallel to effect service. Other provisions of the MCA relating to the use of registered mail must likewise be amended in accordance with ECTA.[65]

A narrow interpretation of section 74(4) of the MCA demonstrates a need to amend the manner of effecting service of court documents in line with ECTA. Section 74(Q)(4)[66] may also require amendment as it currently requires personal service of rescission of judgment. These provisions ought to incorporate electronic means of service and delivery of court documents.

The overall implication of the above arguments for civil procedure is that summons, pleadings, affidavits, notices and all related court documents should, in future, be sent electronically as opposed to requiring physical delivery to the parties' physical addresses – with allowance being made for exceptional circumstances where e-technology is not available in a particular area or case. The authors reiterate that electronic and physical service can run as parallel options to effect service so as not to exclude those who do not have access to digital means of communication.

6 THE SHERIFFS ACT 90 OF 1986 (SA)

The main purpose of the SA is the creation of a process to employ sheriffs and to enforce their duties and responsibilities, which include effective

63 *Ibid*.

64 Ramotsho http://www.derebus.org.za/gauteng-high-courts-on-a-journey-to-go-paperless/.

65 Ss 74(1)(4)(Q) of the MCA; Broodryk *Eckard's Principles of Civil Procedure in the Magistrates' Courts* 350–351.

66 Broodryk *Eckard's Principles of Civil Procedure in the Magistrates' Courts* 350–351; Faris and Hurter *The Student Handbook for Civil Procedure* 135–159; MCA; Mabeka *Impact of E-Technology* 63.

service of court documents.[67] There is no doubt that sheriffs of the court play a significant role in ensuring that court processes and proceedings run smoothly. However, there are implications to the enhancement and enforcement of e-technology legislation that will affect the future role played by sheriffs in the South African court system.[68] It is therefore important to consider the relevant provisions of the SA. The authors' point of departure is section 2 of the Act.

Section 2 provides for processes followed in appointing sheriffs.[69] The Minister appoints deputy sheriffs in consultation with the Board for Sheriffs in the superior and lower courts.[70] Appointment of ordinary sheriffs does not require consultation with the Board. Consultation is required for senior positions, such as in the case of the appointment of deputy sheriffs.[71]

The continued existence of the Board for Sheriffs will be challenged by advancing technology, which in future will affect the manner in which sheriffs execute their duties. Essentially, the role of sheriffs may in future fall under the management of the Registrar of the courts (especially if the Caselines system, as mentioned earlier, is deemed appropriate and effective).[72] The composition of the Board in future may call for the inclusion of experts in information communication and technology as part of the decision-making process to ensure proficiency in running any electronic system created to serve court process.

If, for example, service is effected via electronic means, sheriffs cannot be held accountable for system problems or hardware failure. It would be unfair to hold sheriffs responsible for system glitches where there is evidence from one of the parties to the civil proceedings that confirms that service or attachment of property was effected electronically. In essence, sections 43 to 52 of the SA should be amended to incorporate service via e-technology.[73] These provisions will result in changes in how the return of service is effected, and to all other duties that sheriffs are required to

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67 The Preamble of the SA; Broodryk *Eckard's Principles of Civil Procedure in the Magistrates' Courts* 8–10; see Mabeka *Impact of E-Technology* 61–65; Peté *et al Civil Procedure: A Practical Guide – Procedural Law* 133–134.

68 Ss 2–15 of the SA; Broodryk *Eckard's Principles of Civil Procedure in the Magistrates' Courts* 8–10; see Mabeka *Impact of E-Technology* 61.

69 Ss 2–6 of the SA; Broodryk *Eckard's Principles of Civil Procedure in the Magistrates' Courts* 8–10; Peté *et al Civil Procedure: A Practical Guide – Procedural Law* 133–134; Mabeka *Impact of E-Technology* 61.

70 S 6 of the SA; Broodryk *Eckard's Principles of Civil Procedure in the Magistrates' Courts* 8–10; Peté *et al Civil Procedure: A Practical Guide – Procedural Law* 133–134.

71 See ss 2–6 of the SA; Broodryk *Eckard's Principles of Civil Procedure in the Magistrates' Courts* 8–10; Peté *et al Civil Procedure: A Practical Guide – Procedural Law* 133–134; Mabeka *Impact of E-Technology* 62.

72 *Ibid*.

72 Ramotsho http://www.derebus.org.za/gauteng-high-courts-on-a-journey-to-go-paperless/.

73 Ss 43 and 52 of the SA; Broodryk *Eckard's Principles of Civil Procedure in the Magistrates' Courts* 8–10; Peté *et al Civil Procedure: A Practical Guide – Procedural Law* 133–134; Mabeka *Impact of E-Technology* 62.

execute in civil proceedings.[74]

7 CONSUMER PROTECTION ACT 66 OF 2008 (CPA)

The CPA enables parties to address and deal with their differences before embarking on formal processes in consumer disputes. It forces parties to use alternative dispute resolution before approaching a court to intervene. There is a body that was created in terms of section 26 of the NCA, to resolve disputes relating to credit, consumer, and market agreements.[75]

The primary purpose of drafting and passing the CPA was to protect the integrity of business and consumers by ensuring processes to resolve disputes arising from commercial agreements.[76] The Act enforces international standards that protect consumer rights in international commercial agreements.[77] The Act was intended to protect the rights of historically vulnerable consumers and provide for efficient remedies.[78] The Act provides that when parties do not come to an agreement via alternative dispute resolution, they may commence formal court proceedings by issuing summons.[79]

Section 106(1) of the CPA enables the party that is required to submit information to the Tribunal or Commission to assert that the information is confidential. In terms of section 106(2), such a claim must be supported by a written statement explaining why such information is confidential. A narrow and contextual interpretation, however, demonstrates a breach in the implementation of sections 50[80] and 51[81] of ECTA. Both these sections promote the protection of personal information by setting out the manner in which the latter may be disclosed.[82] For example, personal information may be disclosed if consent is given for such disclosure.[83] In addition, personal information may be collected when the person whose information is affected provides articulated authority.[84] The same applies to processing the information – there must be consent.[85] Section 106 of the CPA may be

74 S 43 of the SA; Broodryk *Eckard's Principles of Civil Procedure in the Magistrates' Courts* 8–10; Peté *et al Civil Procedure: A Practical Guide – Procedural Law* 133–134; Mabeka *Impact of E-Technology* 62.

75 Mabeka *Impact of E-Technology* 63.

76 See Preamble of the CPA.

77 Broodryk *Eckard's Principles of Civil Procedure in the Magistrates' Courts* 18; Mabeka *Impact of E-Technology* 81.

78 The Preamble (a)–(b) of the CPA; Broodryk *Eckard's Principles of Civil Procedure in the Magistrates' Courts* 18; see also Mabeka *Impact of E-Technology* 63.

79 S 102 of the CPA; Broodryk *Eckard's Principles of Civil Procedure in the Magistrates' Courts* 18.

80 S 50 of ECTA deals with the scope of protection of personal information.

81 S 51 of ECTA provides for the manner in which personal information that is electronically collected may be dealt with in terms of ECTA.

82 S 50 and 51 of ECTA.

83 S 51 of ECTA.

84 S 51(1) of ECTA.

85 S 51(1) of ECTA.

construed as hindering the discovery process available to parties in civil proceedings because, when the information is officially declared confidential in terms of this section, such information may not be used in the trial proceedings.

This may disadvantage the party declaring the information in future civil proceedings. The court may, in terms of the rules, force the party who has already declared the information confidential in the Tribunal, to disclose such information. In the alternative, the court can dismiss the claim in civil proceedings.[86]

There is a need therefore to incorporate provisions in ECTA that will dissuade parties from discovering information in future civil proceedings, especially in situations where information was declared confidential in Tribunal proceedings.

Section 102 of the CPA enables the Commissioner to issue summons to a person who may be able to provide evidence during the investigation process.[87] The manner of service is effected in the same manner as other court documents; the sheriff of the respective court serves the summons.[88] This section further requires that a party in possession of documents necessary for the investigation, before and during the Tribunal, must present such documents to the Commission. The required manner of delivery of documents is not articulated by section 102(1) of the CPA.[89] In addition, there is no accommodation for presenting such documents or books using e-technology or electronic communication.[90] It is observed that there is a need to review section 102 in order to incorporate e-technology and an electronic means of effecting civil process. The Act should allow delivery by way of email, for example.

Section 115 provides for processes followed during civil proceedings and determination of jurisdiction.[91] It requires parties to file a notice commencing proceedings with the clerk of the court.[92] The manner of filing such notice, however, is not provided for in this provision, and there is no indication that filing can be conducted by electronic means of communication or e-technology. The authors, therefore, opine that there is a need to amend the provision to incorporate e-technology or electronic means of filing with the clerk of the court. The same applies to section 118, which deals with the manner of serving documents. In terms of this section, proper service occurs when the document is delivered to the relevant party, or is sent by registered mail to the person's last known address. This is significant not only for

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86 See Rule 37 of the Uniform Rules of Court, Mabeka *Impact of E-Technology* 64.

87 S 102 of the CPA; Peté *et al Civil Procedure: A Practical Guide – Procedural Law* 524–528; Mabeka *Impact of E-Technology* 64.

88 S 102 (2) of the CPA.

89 S 102(1) of the CPA.

90 S 102 of the CPA; Peté *et al Civil Procedure: A Practical Guide – Procedural Law* 524–528; Mabeka *Impact of E-Technology* 64.

91 Broodryk *Eckard's Principles of Civil Procedure in the Magistrates' Courts* 18; Peté *et al Civil Procedure: A Practical Guide – Procedural Law* 524–528; see Mabeka *Impact of E-Technology* 65.

92 S 106 of the CPA.

arguments evinced earlier as to efficiency but also because logistically people move abode from time to time[93] and the last known address that the creditor is required to use may be an address that the debtor no longer uses.[94]

Further to the above, the word "must", as used in the provisions of sections 115 and 118 of the CPA, is important from the perspective of the interpretation of statutes.[95] This provision requires scrutiny in that it does not make provision for service using e-technology, as provided for by ECTA, and thus limits service to in-person service or registered mail,[96] both of which, as discussed earlier, present challenges to efficiency and logistics.

"Must" indicates that this provision is mandatory. Therefore, there is no flexibility regarding its application and enforcement.[97] There is, therefore, a clear need to amend this provision and incorporate the relevant provisions of ECTA, as well as the guideline drafted by the Law Society of South Africa concerning the use of e-technology, in the court process. An interpretation of this provision that considers the intention of the legislature confirms the gap as identified in the enforcement of ECTA as far as civil proceedings and processes are concerned.[98]

8 NATIONAL CREDIT ACT 34 OF 2005 (NCA)

The NCA came into effect on 1 June 2007. The use or misuse of credit affects many South Africans because the consumer industry is vast and convoluted in its regulations. Before the ushering in of a democratic government in 1994, it was difficult for people who came from disadvantaged backgrounds to access credit; and a lack of information on the responsible use of credit has had a drastic impact on many consumers in the post-apartheid era. The Act was promulgated to educate consumers on how to use and manage credit responsibly.

The significant provisions of the Act, as they relate to the implementation of ECTA, are sections 129, 130, 162, 164, and 168.[99]

Section 129(1)(*a*) requires a lender who has not received payment to issue a notice to the consumer before instituting civil proceedings.[100] A

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93 Unpacktblog "Top 12 Reasons Why People Move to a New Home" http://www.blog.unpakt.com (accessed 2019-11-14).

94 *Ibid*.

95 Peté *et al Civil Procedure: A Practical Guide – Procedural Law* 510–528; Mabeka *Impact of E-Technology* 91.

96 Peté *et al Civil Procedure: A Practical Guide – Procedural Law* 510–528; Mabeka *Impact of E-Technology* 65; see also s 118 of the CPA.

97 S 115 of the CPA; Broodryk *Eckard's Principles of Civil Procedure in the Magistrates' Courts* 18; Peté *et al Civil Procedure: A Practical Guide – Procedural Law* 524–528.

98 S 118 of the CPA.

99 Broodryk *Eckard's Principles of Civil Procedure in the Magistrates' Courts* 18; Peté *et al Civil Procedure: A Practical Guide – Procedural Law* 524–528; Mabeka *Impact of E-Technology* 66.

100 See ss 129–169 of the NCA; Mohale "Protection Offered by s129 of the National Credit Act" 2016 *De Rebus* 23; Peté *et al Civil Procedure: A Practical Guide – Procedural Law* 510–521; Mabeka *Impact of E-Technology* 66.

narrow and grammatical interpretation of the use of the word "may" indicates that this is not mandatory.

A contextual interpretation, however, illustrates that section 129(1)(*b*) makes the process of issuing notice compulsory because it provides that parties may not institute legal proceedings without first issuing a notice. This provision, however, does not determine the manner of service on the defaulting debtor, which is problematic.[101] In *Kubyana v Standard Bank of South Africa Ltd,*[102] the notice was sent by registered mail to the address indicated in the credit agreement, but was returned, which slowed the process; it also goes to evince the inefficiency of registered mail as a manner of service. The Constitutional Court considered the importance of issuing a notice in terms of section 129 of the NCA and confirmed that notice must be delivered to the last known address.[103]

The above case demonstrates the potential use of electronic means of service and delivery and further points to the efficiency of such mechanisms, which would ensure delivery regardless of a defaulting debtor's geographic location.[104] In the absence of an amendment, the creditor would have difficulty proving that it has taken all the necessary steps to ensure effective delivery of the notice if the provision itself does not provide for other means to effect same. The latter is evinced bearing in mind that some do not have means to use electronic means or technology, particularly in the rural areas; and the authors proffer the same solutions to this challenge as discussed earlier.

It is argued that when interpreting section 129(1) of the NCA, it must be read with section 168 to reach a conclusion.[105] Mohale, on the other hand, emphasises the need to protect consumers by arguing for compliance with section 129 of the NCA.[106] Thus, currently, the law compels parties to issue a notice before civil proceedings are instituted. There is, therefore, a need to amend section 129 to ensure that *the notice* (authors' emphasis) should be issued electronically or by email or by other technological means, in case the debtor has moved and changed addresses without notifying the creditor.

Section 168 of the NCA states:

> "Unless otherwise provided in this Act, a notice, order or other document that, in terms of this Act, must be served on a person will have been properly served when it has been either–
> (a) delivered to that person; or

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101 S 129 of the NCA; Broodryk *Eckard's Principles of Civil Procedure in the Magistrates' Courts* 18; Peté *et al Civil Procedure: A Practical Guide – Procedural Law* 524–528; Mabeka *Impact of E-Technology* 67.

102 (2014) 4 BCLR 400 (CC).

103 Broodryk *Eckard's Principles of Civil Procedure in the Magistrates' Courts* 18; Peté *et al Civil Procedure: A Practical Guide – Procedural Law* 524–528; Mabeka *Impact of E-Technology* 101.

104 Broodryk *Eckard's Principles of Civil Procedure in the Magistrates' Courts* 18; Peté *et al Civil Procedure: A Practical Guide – Procedural Law* 524–528; Mabeka *Impact of E-Technology* 67.

105 *Ibid*.

106 Mohale 2016 *De Rebus* 23; see also Mabeka *Impact of E-Technology* 67.

(b) sent by registered mail to that person's last known address."

The general principles of interpretation show that the use of electronic service was not contemplated in the above section. Put differently, the meaning demonstrates that the legislature did not intend to consider electronic service of notice at the time of drafting the statute.[107] The provisions themselves are challenging because people may move from one country to another.[108] It is argued that if people are not aware of a notice issued in this regard, and if a default judgment is subsequently granted against them, they will be prejudiced.

The Constitutional Court confirmed the significance of following section 129 in *Baliso v Firstrand Bank Limited t/a Wesbank*.[109] In this case, the notice required in terms of section 129 of the NCA was sent by ordinary mail. The Constitutional Court considered both sections 129 and 130 and held that non-compliance with section 129 was not acceptable and that parties, therefore, could not go ahead with civil litigation unless they followed these provisions. The authors, however, argue that it is insufficient to effect service of notice merely by personal service or registered mail, especially in a world where mobility is enhanced and people move location frequently, often without notice to creditors. The situation would be better solved through the use of already existing e-technology laws to prevent prejudice. Certain provisions of ECTA, for example, would, if properly implemented, ensure effective delivery and service.

Section 130 of the Act is equally important. It provides that a creditor can only institute legal proceedings when there is a default for payment after 20 working days, and only if 10 working days have elapsed since a notice was delivered.[110] This is once again a challenge because the manner of delivery of the notice in question is not provided for, and it is evident that the legislature did not have ECTA in mind when drafting these provisions.

If the legislature had these provisions in mind, it would have permitted and enabled electronic means and other e-technology facilities for delivery of notices. As a result, there are now more default judgments taken against debtors that are unknown to them (this is also the case where the debtor did not cause the default in the first instance), which demonstrates the potential prejudice to both debtors and creditors. It is evident that these provisions must be amended to incorporate e-technology or electronic means for delivery of a notice to ensure fairness in civil proceedings.

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[107] S 168 of the NCA; De Ville *Constitutional and Statutory Interpretation* 1–94; Singh and Bhero "Judicial Law-Making: Unlocking the Creative Powers of Judges in Terms of Section 39(2) of the Constitution" 2016 *PER* 1727–3781; Mabeka *Impact of E-Technology* 68.

[108] Unpacktblog http://www.blog.unpakt.com; Mabeka *Impact of E-Technology* 68; see also The South African "South Africans Move to Australia" (2014) http://www.thesouthafrican.com/South-Africans-moving-toAustralia (accessed 2019-03-27).

[109] (2017) 1 SA 292 (CC).

[110] S 130 of the NCA; Broodryk *Eckard's Principles of Civil Procedure in the Magistrates' Courts* 18; Faris and Hurter *The Student Handbook for Civil Procedure* 343–346; Peté *et al Civil Procedure: A Practical Guide – Procedural Law* 524–528; Mabeka *Impact of E-Technology* 68.

9 SMALL CLAIMS COURT ACT 61 OF 1984 (SCC Act)

The SCC Act was introduced to enable parties with less substantial claims sounding in money to access the civil process more affordably. The Act was passed to enable parties who cannot afford legal fees access to legal recourse when they have disputes that can be handled by the small claims courts.[111] The small claims courts have limited jurisdiction; the Minister, from time to time, determines the amount in terms of the Act.[112] The amount currently is R 20 000. These courts cannot decide claims that exceed their jurisdiction in terms of this determination.[113]

Proceedings are presided over by a commissioner, and the parties represent themselves.[114] It appears that these courts expedite civil litigation and therefore save time and costs for all parties to a matter. As in the magistrates' courts, the small claims courts use the services of messengers and other officers to serve documents necessary for the proceedings.[115] Section 3 of the SCC Act, however, recognises the use of e-technology devices in that it enables the use of a recording of the proceedings.[116]

Another pertinent provision is section 11 of the SCC Act, which requires the sheriffs of the magistrates' courts to perform the same duties in the small claims courts.[117] The process provided for in the MCA for service of a summons and court documents is similar in the small claims court.[118]

Section 11 obliges the service of the summons to be effected personally.[119]

A narrow and contextual interpretation of section 29 of the SCC Act intimates that the use of the word "shall" denotes mandatory personal service. Section 29 further provides for personal service or service via registered mail, both of which garner the same criticism as provided for earlier in this submission. The authors maintain that registered mail should only be used in exceptional circumstances where parties can show that they have no means of using technology, for reasons beyond their control.[120]

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111 S 7(1) and (2) of the SCC Act; see also Mabeka *Impact of E-Technology* 70.

112 See ss 15 and 16 of the SCC Act.

113 Department of Justice "Determination of Amount for Purposes of Sections 15 and 16 of the Small Claims Court Act, 1984" http://www.justice.gov.za (accessed 2019-11-14); Sabinet "Monetary Jurisdiction of Small Claims Courts Set to Increase" (27 February 2019) http://www.golegal.co.za (accessed 2019-11-14); Mabeka *Impact of E-Technology* 70; Peté *et al Civil Procedure: A Practical Guide – Procedural Law* 484.

114 S 8 of the SCC Act.

115 Rule 8 and 9 of the Magistrates' Courts Rules; and the Small Claims Courts Rules.

116 S 3 of the SCC Act.

117 S 11 of the SCC Act; Magistrates' Courts Rules.

118 See Rule 4 and 13 of the Rules Regulating Matters in Respect of Small Claims Court of April 1991.

119 See Mabeka *Impact of E-Technology* 130.

120 *CMC Woodworking Machinery v Odendaal Kitchens supra* par 1; Mabeka *Impact of E-Technology* 72.

10 DIVORCE ACT 70 OF 1979

The Divorce Act was passed to amend the laws that regulate divorce proceedings[121] and to expedite processes incidental thereto. The Act sets out grounds for jurisdiction[122] and the grounds that assist the court to decide on a divorce matter brought before it.[123] It further highlights the process followed when assets are divided.[124] The relevant provision relating to the implementation of e-technology law is section 11. Section 11 states that the divorce procedure applicable shall be prescribed, from time to time, by the rules of court.[125] A contextual interpretation of this provision is problematic because it does not necessarily recognise procedures regulated by other statutes such as ECTA. However, the courts follow a flexible approach as demonstrated in *CMC Woodworking Machinery v Odendaal Kitchens*,[126] where the court allowed service of process via Facebook. While such flexibility is encouraged and welcomed, the authors argue that the procedure for electronic service and the rule regulating it should be prescribed by the Act, read together with the relevant provisions of ECTA in order to ensure formality of procedure.

11 RECOMMENDATIONS AND CONCLUSION

It is observed that, soon, most (if not all) court processes will be conducted by electronic communication, including the filing of court documents. This will necessitate the installation of satellite dishes by government departments in both rural and urban areas, particularly in courts where the proposed digital centralised department will operate. This will efficiently facilitate the processes of the law of civil procedure and will ensure compliance with ECTA and other e-technology laws.

It is further proposed that e-technology should be designed in a manner that enables any party to access information relating to civil proceedings and to track progress made in individual cases. The system should incorporate pop-up messages to indicate due dates for different court processes. For example, after a plaintiff files a notice of motion, the defendant has ten days to file a notice to defend the matter. It would be advantageous to have pop-up messages as a reminder of subsequent processes in terms of the rules. The South African judiciary and legislature must ensure that there is adequate budget available to implement e-technology law successfully. This would be boosted by having professional and accredited service providers and data controllers to deal with court files, avoid breaches of confidentiality, and facilitate efficient and effective court proceedings.

In conclusion and given the discussion in this article, the authors express

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121 Preamble of the Act.

122 S 2 of the Divorce Act.

123 Ss 3–4 of the Divorce Act.

124 S 7 of the Divorce Act.

125 S 11 of the Divorce Act; Uniform Rules of Court; see also Mabeka *Impact of E-Technology* 72.

126 *CMC Woodworking Machinery v Odendaal Kitchens supra*.

the view that there is a need to amend the current laws of civil procedure to ensure their alignment with e-technology laws and ECTA. It is submitted that Parliament should consider drafting the amendments for the provisions identified herein. In addition, the authors assert that the time has come to develop the law of civil procedure in line with e-technology and digital devices to save both the courts and the parties time and thus facilitate a speedy resolution of proceedings.

A COMPARATIVE EXPOSITION OF THE LAW OF HUSBAND AND WIFE IN TERMS OF ISLAMIC LAW, SOUTH AFRICAN LAW AND THE LAW OF ENGLAND AND WALES – PART ONE

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SUMMARY

The primary concern of this article is a comparative analysis of marriage law in three legal systems – namely, Islamic law, South African law and English law. The similarities and differences between these legal systems are highlighted. The comparative analysis demonstrates that although there are similarities in the three legal systems, the differences outweigh the similarities. This begs the question whether Islamic law (Muslim personal law in general and family law in particular) can be recognised and accommodated and implemented in the South African and English legal systems (both constitutional democracies) without compromising the principles of Islamic law, while at the same time upholding the rights contained in the Bill of Rights. To this end, a comparative analysis is undertaken of the law of marriage that entails a discussion, *inter alia*, of betrothal (engagement), the legal requirements for a marriage, as well as the personal and proprietary consequences of a marriage as applicable in Islamic law, South African law and English law.

1 INTRODUCTION

Islamic law, South African law and English law view the institution of marriage as a social institution of vital importance and one which is entitled to legal protection. In terms of the Islamic religion, the only intimate relationship allowed between a man and a woman is the marriage relationship.[1] Islam regards marriage not only as the lawful means for sexual enjoyment, but also as being essential for the establishment of the family, which is regarded as the first unit of society.[2] The institution of marriage is

[1] Alkhuli *The Light of Islam* (1981) 65.
[2] *Ibid*.

the only lawful Islamic means by which a family comes into existence and is, therefore, strongly encouraged.[3]

Historically, the position in South Africa was that the traditional Roman-Dutch common-law marriage was regarded as being superior to other kinds of marriage existing in South Africa.[4] After the enactment of the Constitution of the Republic of South Africa, 1996 (the Constitution), attempts were made to give legal support and protection to other forms of relationship that did not fall squarely into the common-law definition of marriage.[5] As a result, the Constitution, and the Constitutional Court in particular, requires South African family law to accommodate and protect diversity; the Constitution affirms the right to be different, and also celebrates the diversity of South African society.[6] In the present-day constitutional era, South African family law thus embodies a far wider range of family form, and the definition of a family now includes single-parent,[7] extended,[8] polygynous, unmarried and same-sex families.

In a similar vein, English law also attaches much importance to the institution of marriage as the State has always endorsed the institution of marriage by encouraging parties to enter into marriage. Unlike Islamic law, both English law and South African law recognise family units other than the traditional family. To this extent, as far as same-sex couples are concerned, English law has accommodated these diverse family forms with the enactment of legislation in the form of the Civil Partnership Act 2004 and the Marriages (Same Sex Couples) Act 2013.

The institution of marriage and the concept of family is of vital importance and worthy of protection in terms of Islamic,[9] South African[10] and English law.[11] Islamic, South African and English law, furthermore, regard marriage as the institution that provides marriage partners with companionship, love, conjugal rights, comfort and loyalty to each other. In essence, when two parties enter into a marriage it is regarded as the uniting of two souls physically, mentally and emotionally. However, the main difference between these three legal systems is that South African and English family law has extended the definition of family to include diverse family forms and has

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3 Siddiqi *The Family Laws of Islam* (1984) 28.

4 *Seedat's Executors v The Master* 1917 AD 302.

5 Ss 10, 15 and 28(1) of the Constitution provide constitutional protection for the family.

6 *Minister of Home Affairs v Fourie (Doctors for Life International, Amici Curiae; Lesbian & Gay Equality Project v Minister of Home Affairs)* 2006 (1) SA 524 (CC) par 60. See also the Recognition of Customary Marriages Act 120 of 1998 and the Civil Union Act 17 of 2006.

7 Hall and Wright *In Brief: A Profile of Children Living in South African Using the National Income Dynamics Study* (2011) 2.

8 *Ibid.*

9 *Quran* ch 7, verse 89; *Quran* ch 4v verse 34; Doi *Shari'ah The Islamic Law* (1984) 114.

10 South African Law Reform Commission Discussion Paper 104 Project 118 *Domestic Partnerships* (August 2003) 160; Lind "Sexual Orientation and the Transitional Constitution" 1995 *SALJ* 482; Mosikatsana "The Definitional Exclusion of Gays and Lesbians from Family Status" 1996 *SALJ* 557; *Satchwell v President of the Republic of South Africa* 2002 (9) BCLR 986 (CC).

11 *Huang v Secretary of State for the Home Department* [2007] UKH L 11; [2007] 2 AC 167; Reece *Divorcing Responsibility* (2003) 106; Berger and Keller "Marriage and the Construction of Reality" 1999 46 *Diogenes* 1; Burton *Family Law* (2003) 13; Herring *Family Law* (2011) 39.

granted legal protection to alternate family forms. This is not the position in Islamic law, which adopts a narrower approach to what constitutes the family. The differences between the three legal systems serve to highlight the different ideological principles on which Islamic law is premised in comparison to South African and English law. The comprehensive set of rules and principles developed by the three legal systems to regulate the institution of marriage, as well as betrothal or engagement, is now discussed.

2 THE BETROTHAL OR ENGAGEMENT

2 1 Islamic law

A betrothal (*khitba*), which precedes a marriage contract, is essentially composed of approaches made by the man (or his family) to the woman (or her family) asking for her hand in marriage, provided the proposed union is legally possible.[12] However, nothing precludes a woman from making a proposal to a man.[13] Terms and conditions are negotiated at this stage, and may end in mutual promises of marriage.[14] Although highly recommended, the *khitba* is not a prerequisite for the conclusion of a valid marriage. The word "betrothal" is used, rather than "engagement", as it denotes a more conventional arrangement; unlike the latter, it does not *per se* entail a claim for damages in the event of a breach, as a betrothal is not regarded as a binding contract.[15] The termination of an engagement without *Shari'ah*-approved justification is considered as breaking a promise, but Islamic law does not make provision for a claim for damages. The Permanent Committee for Islamic Rulings and Verdicts[16] has stated that a betrothal between a man and a woman is not equivalent to a contract, and that either party may terminate the betrothal if they wish to do so, whether or not the other party agrees to termination of the betrothal.[17]

Both parties should be made aware of the circumstances of the other and should know the other's character and behaviour in order for betrothal to be valid.[18] A betrothal is not permissible where there exists an impediment that prohibits a marriage from being concluded immediately.[19] Furthermore, an engagement between a woman and a third party is not permitted where the woman is already engaged to someone else.[20] However, if the proposal has

12 Bainham *The International Survey of Family Law* (1994) 3. In terms of *Shari'ah,* the parties do not have to be a specific age to enter into an engagement.

13 Nasseef *Muhammad: Encyclopaedia of Seerah* vol 2 (1982) 25. The Prophet Muhammad's (PBUH) first wife, Khadija, proposed to him. She was 40 years old at the time while the Prophet Muhammad (PBUH) was 25 years old.

14 Siddiqi *The Family Laws of Islam* 67.

15 Jamal *The Status of Women Under Islamic Law and Modern Islamic Legislation* (2009) 54.

16 This committee was established by royal decree on 29 August 1971 by King Faisal ibn Abd al-Aziz of Saudi Arabia.

17 Daweesh *Fataawa al-Lajnah al-Daa'imah* vol 18 (2003) 69.

18 Nasir *The Status of Women Under Islamic Law and Modern Islamic Legislation* (2009) 53.

19 Ba'-kathah *Tuh-fatul Ikhwaan* (1987) 143.

20 Alkhuli *The Light of Islam* 70.

not yet been accepted or rejected, a third party can propose to the same person.[21]

In the selection of a marriage partner, a man or woman is allowed to select their marriage partner upon meeting and viewing the person.[22] The parties are allowed to meet in the presence of a chaperone for a short period of time to become acquainted with each other's character, opinions and mannerisms.[23] No courtship is allowed.[24]

According to the traditions of the Prophet Muhammad (PBUH), the man was encouraged to view the face and hands of a prospective bride before making a proposal of marriage.[25] This is in conformity with the Islamic view that marriage is a contract and that the contracting parties must first view the subject matter of the contract.[26] A woman is also not precluded from viewing a prospective husband.[27] After the parties are satisfied with their selection of a marriage partner, a proposal of marriage is made.[28] If the woman (or those representing her) accepts the man's offer of marriage, a betrothal takes place and it constitutes a reciprocated promise by the two parties to marry at some time in the future.[29] After the conclusion of the betrothal, and once it becomes known that a woman is already betrothed, other men are precluded from proposing to the woman.[30]

It is customary for the prospective bride and bridegroom to exchange gifts and donations once the betrothal is formalised so as to strengthen the new relationship.[31] The general rule with regard to the exchange of gifts is that it is *haraam* (unlawful) to demand the return of gifts and presents.[32] The exception to the general rule arises where gifts are exchanged with a view to marriage.[33] Where the marriage is not concluded, the gifts exchanged between the prospective groom and bridegroom must be returned if one of the parties requests the return of the gifts exchanged.[34] The rationale for the exception is that the gifts were exchanged between the parties with a view to a marriage being concluded and were therefore not made gratuitously.[35] Therefore, where a marriage is not concluded, *Shari'ah* makes it permissible

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21 Nawawi *Minhaj et Talibin: A Manual of Muhammadan Law* (2000) 282; Ba'-kathah *Tuh-fatul Ikhwaan* 143.

22 Ayoub *Fiqh of Muslim Family* (no date of publication) 10.

23 Doi *Shari'ah The Islamic Law* 122.

24 *Ibid*.

25 Al-Misri and Keller *Reliance of a Traveller: A Classic Manual of Islamic Sacred Law* (2008) 511.

26 Siddiqi *The Family Laws of Islam* 67.

27 Sabiq *Fiqh Us-Sunnah* (1989) 386.

28 *Ibid*.

29 Nawawi *Minhaj et Talibin* 283.

30 Al-Misri and Keller *Reliance of a Traveller* 516.

31 Sabiq *Fiqh Us-Sunnah* 388.

32 *Ibid*.

33 Al-Mardaawi *Al-Insaaf* vol 8 (1998) 296.

34 *Ibid*.

35 Al-Zarkashi *Al-Manthoor fil-Qawaa'id al-Fiqhiyyah* vol 3 (1985) 269.

for the donor to demand the return of the gifts.[36] Furthermore, where the gift has been damaged or where it has been depleted, it must be replaced.[37]

To summarise, the betrothal merely constitutes a mutual promise of marriage between the parties and does not constitute a marriage contract. Both parties are at liberty to withdraw from the betrothal at any stage before the conclusion of the marriage.[38] The betrothal is also not legally binding between the parties in that it does not give rise to an action for breach of promise to marry.[39] Insofar as the return of engagement gifts is concerned, a donor can claim the return of all gifts where a marriage is subsequently not concluded and this ruling applies irrespective of whether the gifts have been consumed or depleted.

2 2 South African law

According to common law, an engagement is defined as "a legally binding agreement, in the nature of a reciprocal promise or contract between a man and a woman (who are competent to marry) to marry each other on a specific date, or on some undetermined future date, but within a reasonable period".[40] Since the enactment of the Civil Union Act,[41] same-sex partners are also allowed to enter into an engagement. An engagement has, therefore, in modern South African law, assumed the characteristic of being gender neutral.

An engagement, like any other contract, is concluded by means of offer and acceptance between the two parties concerned.[42] Although an engagement precedes a marriage, it is not a prerequisite for the parties to enter into a valid civil marriage.[43] As there are no special formalities required for the conclusion of an engagement, the engagement can be concluded orally, in writing or by mail or even tacitly.[44] Because an engagement is regarded as a contract, in order to be regarded as legally binding, it must comply with four validity requirements laid down for valid contracts – namely, consensus,[45] capacity to act,[46] lawfulness[47] and possibility of performance.[48]

The primary purpose of an engagement is for the parties to establish whether they are compatible and to foster a happy and successful marriage under the official protection of the law and within a socially acceptable

36 Ibn Taymiyah *Al-Fataawa al-Kubra* vol 5 (2010) 472.
37 Al-Jamal *Sharh Manhaj al-Tullaab* vol 4 (1938) 129.
38 Sabiq *Fiqh Us-Sunnah* 388.
39 Rautenbach and Bekker *Introduction to Legal Pluralism* 4ed (2014) 365.
40 Barratt, Domingo, Amien, Denson, Mahler-Coetzee, Olivier, Osman, Schoeman and Singh *Law of Persons and the Family* (2017) 227; Heaton and Kruger *South African Family Law* (1999) 5.
41 17 of 2006.
42 Heaton and Kruger *South African Family Law* 5.
43 *Ibid*.
44 Human, Robinson and Smith in Skelton and Carnelley (eds) *Family Law in South Africa* (2010) 20.
45 See *Schnaar v Jansen* 1924 NPD 218; *Thelemann v Von Geyso* 1957 (3) SA 39 (W).
46 S 26(1) of the Marriage Act 25 of 1961.
47 See *Friedman v Harris* 1928 CPD 43; *Pietzsch v Thompson* 1972 (4) SA 122 (R).
48 S 26(1) of 25 of 1961; s 18(3)(*c*)(i) read with ss 19 and 20 of the Children's Act 38 of 2005.

environment.[49] To this end, engaged parties enter into a courtship that will culminate in a marriage, provided they find that they are suited to each other. Where they are not compatible, the engagement will be terminated.

The fact that an engagement is a mutual undertaking by the two parties, to marry each other at a specific or determinable date, creates a reciprocal duty to marry on that date or on a date to be determined in the future.[50] Should one of the parties to the engagement renege on the promise to marry, the party will be in breach of the contract of engagement.[51] Withdrawal from the contract of engagement without potentially becoming liable for damages is only allowed if a *iusta causa* exists.[52] In the absence of a *iusta causa*, the innocent party can sue the offending party for contractual as well as delictual damages arising out of the breach of promise to marry.[53] With regard to the claim for contractual damages, only proved damages – namely, patrimonial loss – can be claimed.[54] Previously, patrimonial loss as well as proved prospective loss of the pecuniary benefits of the marriage could be claimed.[55]

In addition to contractual damages, the innocent party can also bring a claim for damages for non-patrimonial loss under the *actio iniuriarum* for the infringement of personality rights.[56] In order to succeed under the *actio iniuriarium*, the plaintiff is required to prove that his personal rights have been infringed and that the infringement was committed intentionally.[57]

During the course of the engagement, it is customary for the engaged parties to exchange various types of gift. Engagement gifts are classified into three categories – namely, s*ponsolatia largitas*, which consist of gifts made with a view to the marriage;[58] *arrhae sponsolatiae,* which is a gift given to show the seriousness of the promise;[59] and lastly, other inconsequential gifts or tokens of affection.[60] Where the engaged parties mutually decide to terminate the engagement, the *sponsolatia largitas* and the *arrhae sponsolitiae* must be returned.[61] Where breach of promise has occurred, the innocent party is entitled to the *arrhae sponsolatiae* and *sponsolatia largitas* that he or she received or, alternatively, may recover these gifts if given to the guilty party.[62] In the event of the innocent party instituting a claim for damages, the value of the gifts retained by the innocent party must be set off

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49 *Van Jaarsveld v Bridges* 2010 (4) SA 558 (SCA) par 8.

50 Barratt *et al Law of Persons and the Family* 228; Sinclair *The Law of Marriage* (1996) 316.

51 Barratt *et al Law of Persons and the Family* 229.

52 See *Van Jaarsveld v Bridges supra* par 3.

53 Barratt *et al Law of Persons and the Family* 229.

54 *Van Jaarsveld v Bridges supra* par 2–7.

55 *Guggenheim v Rosenbaum* 1961 (4) SA 21. See *Van Jaarsveld v Bridges supra* and *Cloete v Maritz* 2013 (5) SA 448 (WCC). It is submitted that the persuasiveness of the *obiter dictum* from the *Van Jaarsveld* case and the decision in *Cloete* will result in a denial of a claim for prospective loss.

56 *Guggenheim v Rosenbaum supra* 41; *Van Jaarsveld v Bridges supra* par 19.

57 Barratt *et al Law of Persons and the Family* 233.

58 For eg., appliances and furniture purchased for use in the future home.

59 The engagement ring is an example of *arrhae sponsilitiae*.

60 Flowers, chocolates and books are regarded as inconsequential gifts.

61 Voet 23.1.19; Barratt *et al Law of Persons and the Family* 234.

62 Heaton and Kruger *South African Family Law* 10.

against the value of the damages claimed.[63] Inconsequential gifts and tokens of affection need not be returned, irrespective of whether the engagement is terminated by mutual consent or whether breach of promise to marry occurs.[64]

2 3 The law of England and Wales

Before the conclusion of a marriage, it is common for couples to enter into an engagement in terms of which the parties agree to marry each other, either on a specified date or on some undetermined future date.[65] In order for a valid engagement to be concluded, both parties must consent to the engagement,[66] they must have legal capacity,[67] the engagement must be lawful,[68] and the parties must be in a position to conclude a valid marriage with each other.[69]

The purpose of the engagement is to establish whether they are compatible to enter into a marriage that will be a lasting and happy one.

Common law regarded the engagement as an enforceable contract. If one of the parties terminated the engagement without *iusta causa*, the other party could institute an action for damages for breach of promise to marry.[70] This position prevailed until 1970, when the action for breach of promise was abolished by section 1 of the Law Reform (Miscellaneous Matters) Act 1970, which states that no agreement to marry is enforceable as a contract.[71] An ex-fiancé(e) does, however, have an action to recover any gift that was made on the express or implied condition that it would be returned should the marriage not occur.[72] Furthermore, the presumption that the gift of the engagement ring is absolute can be rebutted by the giver producing evidence that it was in fact conditional.[73]

2 4 Comparison

From the discussion above it is clear that, while similarities exist between the Islamic law on betrothal and the South African law and English law on engagement, there are many distinct differences, especially in respect of the requirements necessary for a valid betrothal or engagement. This is problematic for South African and English Muslim women as they are confronted with two marriage systems that are at odds with one another – namely, a religious and a secular legal system.

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63 *Ibid*.

64 Barratt *et al Law of Persons and the Family* 234.

65 Herring *Family Law* 89.

66 See s 12(*c*) of the Matrimonial Causes Act 1973.

67 See s 1(1) of the Family Law Reform Act 1969, s 2 of the Marriage Act 1949 and s 11(*a*)(ii) of the Matrimonial Causes Act 1973.

68 S 11(*b*) of the Matrimonial Causes Act 1973.

69 See s 6(2) of the Marriage (Prohibited Degrees of Relationship) Act 1986.

70 Herring *Family Law* 89.

71 *Ibid*.

72 S 3(1) of the Law Reform (Miscellaneous Matters) Act 1970.

73 S 3(2) of the Law Reform (Miscellaneous Matters) Act 1970.

The similarities between a betrothal and an engagement relate to lawfulness, consent and capacity to act. In the laws of Islam, South Africa and England and Wales, an engagement is concluded by an offer (proposal) to marry and acceptance of the offer to marry. Secondly, the conclusion of a betrothal or an engagement is not a prerequisite for the conclusion of a valid marriage in any of the three legal systems under discussion. Thirdly, the parties cannot enter into a betrothal or engagement if they are related within the prohibited degrees of relationship. Fourthly, the consent of the prospective spouses is required in all three legal systems for a valid betrothal or engagement. Fifthly, both parties are also required to possess capacity to conclude a valid betrothal or engagement as the parties cannot enter into an engagement if one or both of them are under the age of puberty and both the prospective spouses must be immediately eligible to enter into a marriage. Lastly, as soon as the betrothal or engagement is concluded, the parties are expected to remain faithful to each other and not become intimately involved with third parties. In other words, both parties are expected to conduct themselves in a manner that will enhance and ensure a happy future marriage.

The notable differences between the legal systems are, first, the fact that an engagement in terms of both South African law and English law is very much a matter of individual concern, taking place between the prospective spouses, rather than being a family affair. Traditionally a man approaches the prospective bride's father or guardian for her hand in marriage, but he is under no legal obligation to do so. In contrast, an Islamic betrothal involves the families of the prospective bride and groom, with the groom's family approaching the prospective bride and her family with the proposal.

Secondly, notwithstanding that in all three legal systems both prospective spouses are required to consent to an engagement, Islamic law dictates that in addition, the consent of the prospective bride's guardian is required. This position prevails irrespective of whether or not the prospective bride is a major. In contrast, in both South African and English law, unless the prospective bride or groom is a minor, no parental or guardian consent is required for the conclusion of an engagement.

The third difference relates to the fact that, as Islam allows polygamy, a married man is allowed to propose marriage to a single woman. In South African and English law, both parties must be unmarried for an engagement to be valid.

The fourth difference pertains to the fact that in both South African and English law, the law relating to engagements is gender neutral, as the definition of an engagement can be extended to include an engagement concluded between same-sex couples. Islamic law only recognises betrothal between a man and a woman. Islamic law also differentiates between a man and woman in respect of the guardian's consent as the latter's consent is only required in respect of a male where the male is a minor. As stated above, the guardian's consent is required for a woman irrespective of whether she is a minor or major.

Fifthly, Islamic law prohibits a betrothal with a woman who is in a period of *iddah*[74]. In terms of South African and English law, a married spouse can enter into an engagement with a third person as soon as the marriage is dissolved by death or divorce. There are no legal impediments to a party proposing marriage to a third party once his or her marriage has been terminated.

The sixth difference between the three legal systems is that, in both South African and English law, the purpose of the engagement is to enable the couple to determine whether or not they are suited or compatible with each other with a view to creating a happy and successful marriage. In terms of Islamic law, the parties are allowed to meet and view each other at the time the proposal is made, but no courtship is allowed between the parties.

The seventh difference relates to the fact that, unlike the betrothal in terms of Islamic law, which is not regarded as a legally binding agreement and consequently does not give rise to an action for breach of promise to marry, an engagement in terms of South African law is a legally binding contract with legal consequences when breach of promise occurs. In terms of South African law, a breach of promise to marry gives rise to both a delictual and a contractual claim. Despite being regarded as a contract in terms of English law, an engagement nevertheless does not give rise to an action for damages if the engagement is terminated without *iusta causa*.

Lastly, in respect of gifts exchanged at the conclusion and during the subsistence of the betrothal and engagement, both Islamic law and South African law make provision for the return of such gifts where the betrothal or engagement is terminated. However, Islamic law differs in allowing for the return of gifts made with a view to the marriage, irrespective of which party is responsible for the non-conclusion of the marriage. Furthermore, Islamic law allows the parties to claim the return of gifts or the value thereof where the gifts have been depleted or consumed. In terms of South African law, the fate of the engagement gifts is determined by whether the engagement was terminated by mutual consent or whether breach of promise to marry occurred. South African law does not require parties to return gifts or the value that has already been consumed. In respect of English law, a gift can only be recovered if it was given on the express or implied condition that it would be returned should the engagement be terminated.

3 DEFINITION OF MARRIAGE

In this section, the definition of "marriage" in the three jurisdictions is compared in relation to potential spouses, impact of adultery and same-sex partners.

3 1 Islamic law

According to Ba'-kathah, marriage is defined as "a contract between two partners of the opposite sex, bringing about certain rights and

[74] *Iddah* is the period of waiting or mourning which a widow or divorcee observes after the termination of the marriage either by death or divorce.

responsibilities, whereby among other things, sexual relations is made permissible".[75]

The institution of marriage therefore has a three-fold function: first, the regulation of relations between a man and a woman; secondly, the regulation of relations between a child, his parents and the community; and lastly, it legalises sexual relations between a man and woman.[76] It can be deduced from the definition that Islam regards fornication (*zina*) and same-sex marriages as unlawful.[77] Homosexuality and sexual relationships between same-sex parties are regarded as serious sins and contrary to Islamic principles and teachings.[78] Islamic law, therefore, does not make any allowances for a marriage between same-sex partners.

3 2 South African law

Hahlo[79] and Sinclair[80] define marriage as "[t]he legally recognized voluntary union for life in common of one man and one woman, to the exclusion of all others while it lasts".

This definition of marriage as adopted by legal academics and the judiciary[81] no longer holds true for modern South African society. This is evident from the high divorce rate, the tolerance of adultery,[82] the fact that the Civil Union Act has granted legal recognition to marriages concluded by parties of the same sex,[83] and the enactment of the Recognition of Customary Marriages Act, which legalises and recognises polygamous marriages.[84] A more acceptable definition of a civil marriage in modern South African society would therefore be "the legally recognized voluntary union of two people to the exclusion of others while it lasts".[85]

The decision in *RH v DE*[86] is testament to an increased tolerance of adultery as a result of changes in the *mores* of society. The decision in *RH v DE* changed the law relating to delictual action against a third party who commits adultery with one of the spouses in a marriage. Prior to the decision in *RH v DE*, the common law allowed both husbands and wives to institute a delictual claim against a third party who commits adultery with their spouses.[87] The court held that in light of the changed *mores* of South African

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75 Ba'-kathah *Tuh-fatul Ikhwaan* 142. See also Siddiqi *The Family Laws of Islam* 1.

76 *Ibid*.

77 Siddiqi *The Family Laws of Islam* 30.

78 Doi *Shari'ah The Islamic Law* 241.

79 Hahlo *The South African Law of Husband and Wife* (1985) 21.

80 Sinclair *The Law of Marriage* 305.

81 *Nalana v R* 1907 TS 40; *R v Mboko* 1910 TPD 445; *R v Fatima* 1912 TPD 59.

82 Heaton and Kruger *South African Law of Marriage* 13. See also *RH v DE* 2014 (6) SA 436 (SCA).

83 S 1 of the Civil Union Act 17 of 2006.

84 S 2 of the Recognition of Customary Marriages Act 120 of 1998; Clark and Goldblatt *Gender and Family Law* (2007) 197 in Bonthuys and Albertyn (eds) *Gender, Law and Justice*.

85 Heaton and Kruger *South African Law of Marriage* 13.

86 *Supra*.

87 See *Viviers v Kilian* 1927 AD 449; *Foulds v Smith* 1950 (1) SA 1 (A); *Bruwer v Joubert* 1966 (3) SA 334 (A) 337.

society, the delictual claim for adultery has become outdated, and that the time has come for the action to be abolished.[88] It was held that the action derived from the *actio iniuriarum* based on adultery against third parties no longer forms part of South African law.

As stated above, the enactment of the Civil Union Act[89] legalises civil unions between same-sex couples.[90] A more acceptable definition of a civil marriage in modern South African society would therefore be "the legally recognized voluntary union of two people to the exclusion of others while it lasts".[91] Mention must be made of the fact that the Civil Union Act extends to both heterosexual and same-sex couples.

Furthermore, the Recognition of Customary Marriages Act[92] gives full recognition to all existing and future customary polygynous marriages, and allows a man to enter into multiple customary marriages provided he meets all the requirements set out in section 3(1) and section 7(6) of the Act.

3 3 The law of England and Wales

In *Hyde v Hyde and Woodmansee*,[93] the concept of marriage was defined as "the legally recognized voluntary union of a man and a woman for life to the exclusions of all others".

Although the definition of marriage, expounded by Lord Penzance in *Hyde v Hyde and Woodmansee,* continues to be used by modern judges, it does not provide any criteria for distinguishing the institution of marriage from cohabitation. It is submitted that marriage should be defined as "a contract for which the parties elect but which is regulated by the State, both in its formation and in its termination by divorce, because it affects status upon which depend a variety entitlements, benefits and obligations".[94] The definition distinguishes marriage from cohabitation as, unlike the latter, the law regulates a marriage from its inception until its termination. In addition, it creates a legal relationship with mutual rights and responsibilities.[95]

At present, the law of England and Wales legally recognises marriage in the forms of both civil and religious unions and marriages concluded in terms of the Marriages (Same Sex Couples) Act 2013.[96] The definition of the term "marriage" in English law excludes polygamous marriages; a polygamous marriage between partners where one or both of them are domiciled in England and Wales is invalid.

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88 *RH v DE supra* par 41.
89 17 of 2006.
90 S 1 of 17 of 2006.
91 Heaton and Kruger *South African Law of Marriage* 13.
92 120 of 1998.
93 1866 LR 1 P & D 130.
94 *Bellinger v Bellinger* [2001] 2 F.L.R.1048 par 128.
95 Burton *Family Law* 14.
96 Same-sex couples cannot, however, marry in the Church of England or the Church of Wales, as they do not recognise same-sex marriages.

Adultery, alongside unreasonable behaviour, is one of the most widely used reasons for divorce in England and Wales.[97]

3 4 Comparison

All three legal systems view marriage as a contract that regulates the relationship between husband and wife, their children and society at large. South African and English law also regulates the relationship between married spouses and the State as a valid civil marriage or customary union can only take place with state endorsement and approval. This is not the position in terms of Islamic law. The *Ulama* (theologians), while professing to have moral authority over the Muslim community, can merely draw on the moral conscience of Muslim spouses to adhere to *Shari'ah,* but cannot compel compliance as their orders lack the force of law. The non-recognition and lack of regulation of Muslim marriages impacts severely on the parties to these marriages, particularly on women and children who, as vulnerable groups, are currently disadvantaged both on a social and economic level. The need for the enactment of legislation granting legal recognition to Muslim marriages is crucial. Having stated this, it is also imperative that any legislation enacted to recognise and regulate Muslim marriages be *Shari'ah* compliant.

Another significant difference between the three legal systems relates to one of the purposes or aims of a marriage concluded in terms of Islamic rites – namely, the legitimisation of sexual relations between the spouses. As mentioned previously, Islam prohibits any courtship or sexual relations before marriage. The institution of marriage is the only recognised institution in Islam that legitimises sexual relations between a man and a woman. Adultery is strictly prohibited and Islam has adopted a zero-tolerance policy in that respect. Besides regarding adultery as sinful, Islamic law has also criminalised it. In contrast, South African law has, as a result of the changing *mores* of society, become more tolerant of adultery. To this extent, adultery has been abolished as one of the grounds for divorce and, furthermore, as a result of changing societal attitudes in respect of adultery, a spouse can no longer bring a delictual claim against a third party who commits adultery with one of the spouses in a marriage. Adultery is still relevant as a factor in determining spousal maintenance and the division of matrimonial property – particularly, in respect of forfeiture and redistribution orders. Insofar as English law is concerned, the presence of adultery is one of the facts that can be proved to establish that a marriage has indeed broken down.

Same-sex marriages are not recognised in Islam. Islam only grants recognition to a marriage between a man and a woman, as homosexuality[98] is totally prohibited in terms of the *Quran*.[99] In both South African and English legal systems, same-sex marriages have been legalised. If

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97 In 1969, the Divorce Reform Act 1969 provided that irretrievable breakdown of the marriage was the sole ground for divorce. The laws regulating divorce have been consolidated in the Matrimonial Causes Act 1973.

98 Homosexuality includes gays, lesbianism, bisexuality and transgendered persons.

99 Al-Misri and Keller *Reliance of a Traveller* 664–665; Doi *Shari'ah The Islamic Law* 242–243.

legislation is enacted to recognise Muslim marriages, that legislation would not allow same-sex marriages.

Unlike South African law[100] and English law, Islam caters for polygamy, as provision is made for a man to have up to four wives at any given time. Legislation enacted to recognise Muslim marriages should include a provision regulating polygynous marriages. Although a man who wishes to enter into a polygynous marriage is not required to seek the consent of his wife (or anyone for that matter) in terms of Islamic law, the aspect of polygynous unions must be regulated to ensure fairness between all the wives and to ensure that the man is in a financial position to provide maintenance for all his wives as he bears the sole responsibility of maintenance during the subsistence of the marriage.

Notwithstanding these differences, all three legal systems view marriage, when it is regarded as lawful, as an institution that is of vital importance, and therefore affords greater legal protection and respect to marriage than it does to other informal intimate domestic relationships.

4 THE LEGAL REQUIREMENTS FOR A VALID MARRIAGE

This section will consider the legal requirements of a marriage in all three jurisdictions with specific reference to capacity, consent, lawfulness and formalities.

4 1 Islamic law

The *Shafi'i* school of jurisprudence prescribes the following requirements for the solemnisation of a marriage according to Muslim rites: the parties must possess capacity to marry each other; there must be consensus between the parties, and the guardian of the prospective bride must consent to the marriage; the marriage must be lawful; and lastly, the marriage must conform to certain formalities prescribed in terms of *Shari'ah*.[101]

4 1 1 Legal Capacity

In order for a valid marriage to be concluded, each of the parties must possess legal capacity. The marriage will be deemed void in the absence of legal capacity. Factors such as age and mental capacity affect the legal capacity of a person.[102]

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[100] The exception to this being the Recognition of Customary Marriages Act 120 of 1998, which allows the man to practise polygyny.

[101] Doi *Women in Shari'ah* (1989) 48.

[102] Rautenbach and Bekker *Introduction to Legal Pluralism* 366.

(i) Age

In terms of Islamic law, no particular age has been stipulated for marriage.[103] *Shari'ah* allows for the conclusion of a marriage when the age of puberty (*mukallaf* or *bulugh*) is reached.[104] Puberty is determined by signs of physical maturation or, where there is no declaration of puberty, there is a presumption that puberty has been reached, in the case of a girl, when she has reached the age of nine years and, in the case of a boy, when he has reached the age of twelve years.[105] It is submitted that differing climatic, hereditary, physical and social conditions in different countries affect the age at which a person is deemed to be marriageable. As a result, no particular age is stipulated, as there would be a difference as to the marriageable age in different countries.[106]

In the event of a minor concluding a marriage, the consent of the minor (as well as the guardian of the minor) must be obtained.[107] A minor who is given in marriage by his or her guardian without the minor's consent has the option of repudiating the marriage when reaching the age of majority.[108] In contrast, the marriage of a minor without consent of the guardian is rendered voidable, and the validity of the marriage depends on whether the guardian will ratify the marriage.[109]

(ii) Mental capacity

The general rule in respect of a person who suffers from mental illness is that the person is allowed to conclude a marriage, subject to the condition that he or she informs the person he or she wishes to marry about the mental condition.[110] Where a party accepts or indicates acceptance of the fact that his or her future spouse suffers from mental illness, the party loses the right to have the marriage annulled.[111]

According to the majority of Islamic jurists, mental illness renders a marriage null and void and the innocent spouse can have the marriage annulled if he or she had been unaware that the other party suffered from mental illness at the time that the marriage was concluded.[112]

Provision is also made for the guardian of a woman, or an Islamic judge, to grant consent on behalf of a mentally ill woman to enter into a marriage so as to protect her from having illicit sexual relations, provided a physician

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103 Siddiqi *The Family Laws of Islam* 68.

104 Ibn Rushd *The Distinguished Jurist's Primer: A Translation of Bidayat Al-Mujtahid* (1996) 4.

105 In Sudan, the marriageable age for a girl is deemed to be 16 years, and in Tunisia, it is 22 years.

106 Siddiqi *The Family Laws of Islam* 68.

107 Siddiqi *The Family Laws of Islam* 70; Ayoub *Fiqh of Muslim Family* 22.

108 *Ibid*.

109 Siddiqi *The Family Laws of Islam* 71.

110 Al-Qayyim *Zaad Al-Ma'aad* vol 5 (1998) 166.

111 *Ibid*.

112 Ibn Qudaamah *Al-Mughni* vol 7 (2013) 140; *Al-Mawsu'ah al-Fiqhiyyah (The Fiqh Encyclopaedia)* vol 16 (1983) 108.

gives evidence that the marriage can cure the woman of her mental illness.[113]

4 1 2 Consent

(i) The consent of the prospective groom and bride

Both parties to the proposed marriage must have the intention to enter into a marriage with each other.[114] Consent on the part of both parties constitutes an essential requirement for a valid marriage.[115] Both the man and the woman have the freedom to choose their marriage partners.[116] The parents or guardian of the parties cannot force them to enter into a marriage with a person whom they do not wish to marry.[117] The parents or guardian can advise the parties contemplating marriage with regard to their choice of a marriage partner, but there is no justification for forced marriages in Islam.[118] Where the parents or guardian effect a marriage of a woman to someone without obtaining her consent, the marriage is null and void.[119]

Where a woman is divorced or widowed, her consent must be obtained before a further marriage can be concluded. Whether or not a woman has been previously married, her consent has to be obtained in order for a valid marriage to be contracted.

(ii) The consent of the guardian of the prospective bride

A marriage contracted without the consent of the woman's guardian is invalid.[120] Where a woman enters into married life without the permission of her guardian, the marriage is null and void.[121] This is the view held by the majority of the schools of jurisprudence, except the *Hanafi* school of jurisprudence.[122]

In order for the guardian's consent to be valid, the guardian must be male, legally responsible, a Muslim of good moral character and of sound judgement.[123] All the schools of jurisprudence, except the *Hanafi* school, are in agreement that the woman's guardian must be appointed from her paternal male family.[124] The order of preference for the appointment of a

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113 Ayoub *Fiqh of Muslim Family* 36.
114 Doi *Shari'ah The Islamic Law* 123.
115 Alkhuli *The Light of Islam* 70.
116 Doi *Shari'ah The Islamic Law* 123.
117 Siddiqi *The Family Laws of Islam* 69.
118 Alkhuli *The Light of Islam* 72. A marriage entered into under duress is null and void.
119 Ayoub *Fiqh of Muslim Family* 22.
120 Ayoub *Fiqh of Muslim Family* 26; Doi *Shari'ah The Islamic Law* 140.
121 Doi *Shari'ah The Islamic Law* 141.
122 Doi *Shari'ah The Islamic Law* 140. There are four schools of jurisprudence in Islam: *Shafi'i*, *Hanafi*, *Maliki* and *Hanbali*. The *Hanafi* school is of the opinion that it is permissible for a woman to enter into a marriage without the consent of her guardian.
123 Al-Misri and Keller *Reliance of a Traveller* 518.
124 Ayoup *Fiqh of Muslim Family* 29.

guardian is as follows: first, her father, and then her grandfather or great-grandfather if her father is deceased, and thereafter her brothers, brothers' sons or sisters' sons or father's brothers, and so on.[125] The consent of the guardian is also required where a minor male wishes to enter into a marriage.[126] According to the *Shafi'i* school of jurisprudence, only the father or grandfather of a minor will suffice as guardian to consent to the marriage of the minor.[127]

4 1 3 Lawfulness

Even if both parties to a prospective marriage possess the necessary capacity to act and do consent to the marriage, the marriage can be rendered void on the ground of unlawfulness,[128] as, in terms of Islamic law, there must be no impediments to the marriage taking place. In this regard, the impediments[129] prohibiting marriage may be divided into either permanent[130] or temporary impediments.[131]

4 1 4 Formalities

(i) Witnesses to the marriage

For a marriage to be validly concluded, the presence of at least four people is required – namely, the guardian of the bride, the bridegroom or his representative and two witnesses.[132] The witnesses are required to be just, free persons over the age of puberty who are not blind, deaf, mute or mentally ill.[133] The presence of witnesses at the marriage ceremony is essential to ensure compliance with the publicity requirement.[134] The presence of two males or one male and two female witnesses is required at the wedding ceremony. If both parties to the marriage are Muslim, then it is required for the witnesses to be Muslim as well.

(ii) Offer (*Ijab*) and acceptance (*qabul*) of the marriage proposal

From a legal perspective, as in any other contract, a marriage contract (*aqd-un-nikah*) can be concluded only through the pillars (*arkan*) of offer and

125 Siddiqi *The Family Laws of Islam* 71.
126 Siddiqi *The Family Laws of Islam* 73.
127 Doi *Shari'ah The Islamic Law* 142.
128 Doi *Shari'ah The Islamic Law* 124.
129 Rautenbach and Bekker *Introduction to Legal Pluralism* 366–367; Doi *Women in Shari'ah* 36.
130 For eg., a permanent impediment exists if parties are related within the prohibited degrees of relationship either by consanguinity, affinity or fosterage. Adoption is prohibited in terms of Islamic law.
131 For eg., a temporary impediment may exist in the face of a previous valid marriage, irrevocable divorce or where the parties follow different religions.
132 Ba'-kathah *Tuh-fatul Ikhwaan* 143.
133 *Ibid*.
134 Rautenbach and Bekker *Introduction to Legal Pluralism* 366.

acceptance by the two principals or their proxies.[135] There must be a meeting of minds by means of offer and acceptance. The proposal for marriage and acceptance thereof must be clearly conveyed, and there must be no room for ambiguity.[136]

(iii) The parties must agree on the dowry

Although all the major schools of jurisprudence are of the view that there must be agreement in respect of the dowry, an absence of agreement does not affect the validity of the marriage.[137]

(iv) Publicity of the marriage

The marriage must be publicised.[138] The publicity requirement serves to differentiate the institution of marriage from mere fornication.[139] The public announcement also serves to warn others not to interfere with the conjugal relations of the married couple.[140] If no public announcement is made, or there are no witnesses present, the union between the parties merely amounts to fornication and not a marriage.[141] This is the position even if both parties have consented to the marriage, as the factor that distinguishes a marriage from a clandestine relationship is its publicity.[142]

(v) Place of marriage

It is not a prerequisite for the validity of a marriage, nor is it *sunnah,*[143] for the marriage to be concluded in a mosque.[144] It is, however, *mustahab* or desirable that the marriage be concluded in a mosque for the sake of the *barakah* (blessing) and also so that the marriage be made public.[145]

4 1 5 Mustahab (Commendable) Acts

In addition to the legal requirements that must be met for the marriage to be valid and enforceable, Islamic law also regards certain acts (discussed below), which are performed at the time that the marriage is concluded, to be *mustahab* or commendable acts.[146]

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135 Ba'-kathah *Tuh-fatul Ikhwaan* 143. In terms of Islamic law, marriage by proxy is permissible whereby the woman delegates the conclusion of her marriage to her guardian.

136 *Ibid*.

137 Doi *Women in Shari'ah* 48.

138 Ayoub *Fiqh of Muslim Family* 53.

139 Alkhuli *The Light of Islam* 71.

140 *Ibid*.

141 Alkhuli *The Light of Islam* 71.

142 Alkhuli *The Light of Islam* 71. The publicity requirement can be met either by the presence of two witnesses or by the *Imam* delivering a special sermon at the wedding ceremony.

143 *Sunnah* refers to all traditions and practices of the Prophet (PBUH).

144 Al-Mawsu'ah Al-Fiqhiyyah *The Fiqh Encyclopaedia* vol 37 (1983) 214.

145 Buhuti *Kashshaaf Al-Qinaa* vol 2 (2009) 368; Zadeh *Majma Al-Anhar* vol 1(1901) 317.

146 Ayoub *Fiqh of Muslim Family* 51.

(i) *Khutbah* (sermon)

Before the marriage is announced, the *Imam* delivers a wedding sermon, whereby he advises both the prospective husband and wife on how they should conduct themselves as a married couple.[147] Both parties are, furthermore, reminded of the rights and responsibilities they will have towards each other once they enter into a marriage.[148] At the conclusion of the marriage sermon, an announcement is made that the parties have accepted each other as husband and wife.[149] The *Imam* also announces the dower at the same time that the marriage is concluded.[150]

(ii) The marriage feast (*walima*)

The giving of a *walima* is a confirmed *sunnah* in Islam.[151] After the marriage ceremony has been concluded, the bride is taken to her husband's home where the bridegroom hosts the *walima*.[152] The wedding feast is celebrated in accordance with the traditions of the Prophet Muhammad (PBUH).[153] The *walima* also serves as a means to fulfil the requirement that the marriage be made public.[154]

(iii) Announcing the marriage by beating the tambourine or drums (*duffs*)

In order for the marriage to be announced publicly, it is permissible to play the tambourine or beat the duffs.[155]

4 2 South African law

For the purposes of a comparative analysis, the legal requirements for a valid civil marriage in terms of South African law are discussed first, and thereafter the requirements of a marriage concluded in terms of English law are set out. In order for parties to enter into a valid civil marriage in terms of South African law,[156] the following essential requirements must be met: the parties must have capacity to marry each other; there must be consensus between the parties; the marriage must be lawful; and lastly, the wedding ceremony must conform to the prescribed formalities as stipulated in the Marriage Act.[157]

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147 Siddiqi *The Family Laws of Islam* 88.
148 Doi *Women in Shari'ah* 48.
149 Siddiqi *The Family Laws of Islam* 88.
150 *Ibid.*
151 Al-Bukhaari *Sahih Muslim: The Book of Marriage Hadeeth No 1427* (1998).
152 Siddiqi *The Family Laws of Islam* 91.
153 Nawawi *Minhaj et Talibin* 314.
154 *Ibid*.
155 Ayoub *Fiqh of Muslim Family* 53.
156 Marriage Act 25 of 1961; Civil Union Act 17 of 2006.
157 Barratt *et al Law of Persons and the Family* 237.

4 2 1 Capacity to marry

Owing to the fact that marriage is such an important juristic act, persons who are mentally ill and minors under the age of puberty are precluded from entering into a marriage as they have no capacity to marry.[158]

(i) Age

In terms of South African law, the age of puberty for girls and boys is set at 12 and 14 respectively.[159] A child under the age of puberty has no capacity to enter into a marriage.[160] A marriage concluded by a child below the age of puberty is void *ab initio* and has no legal effect. Children over the age of puberty have capacity to enter into a civil marriage in terms of the Marriage Act,[161] or a customary marriage in terms of the Recognition of Customary Marriages Act,[162] provided the required legal consent has been obtained.[163]

Section 26(1) of the Marriage Act provides that, in addition to parental consent,[164] the written consent of the Minister of Home Affairs is required where a girl between the ages of 12 and 15 and a boy between the ages of 14 and 18 wish to enter into a civil marriage. All minors below the age of 18 years, but over the age of puberty, require the written consent of the Minister of Home Affairs if they wish to enter into a customary marriage.[165]

The conclusion of a marriage terminates minority, and a minor who has been married before requires no consent to remarry.[166]

(ii) Persons who are mentally ill

The marriage of a person who is *de facto* mentally ill is void and of no legal effect.[167] Owing to the highly personal nature of a marriage, a curator cannot consent to a marriage on behalf of a person who is mentally ill.[168] This position prevails not only when the person is not able to understand the legal nature and consequences of the juristic act, but also when the person is influenced by hallucinations caused by mental illness.[169] Certification that a person is mentally ill, and the appointment of a curator for the person, do not

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158 Heaton and Kruger *South African Family Law* 14.

159 Nicholas *An Introduction to Roman Law* (2008) 91.

160 Sinclair *The Law of Marriage* 367.

161 25 of 1961.

162 120 of 1998.

163 S 24(1) of 25 of 1961; s 3(3) of 120 of 1998; s 1 of the Civil Union Act 17 of 2006. See s 18(3)(*c*)(i), read with s 18(5) of the Children's Act 38 of 2005; s 3(3)(*a*) of 120 of 1998, which regulates the consent by the guardian of the minor. See s 25(1) and (4) of 25 of 1961 and s 3(3)(*b*), which regulates the circumstances where the guardian of the minor cannot consent to the marriage.

164 The consent of the Minister of Home Affairs is additional and cannot therefore replace the consent of the parents, guardians, commissioner or that of the High Court.

165 S 3(1)(*a*)(i) read with s 3(4)(*a*) of 120 of 1998.

166 S 24(2) of 25 of 1961.

167 Barratt *et al Law of Persons and the Family* 238.

168 *Lange v Lange* 1945 AD 332.

169 *Ibid*.

per se affect the person's capacity to act.[170] Whether or not a person is mentally ill is a question of fact. A marriage concluded when a mentally ill person experiences a *lucidum intervallum* – that is, a temporary period of sanity – is valid and enforceable.[171] Certification is important as far as the onus of proof is concerned. Where a person has been declared mentally ill, the burden of proof is on that person to prove that he or she is not mentally ill.[172] In contrast, in the absence of any certification, it is the person who alleges mental illness who bears the onus of proving the mental illness.[173]

4 2 2 Consensus

A valid marriage can only come into existence if both parties give voluntary informed consent to the marriage.[174] During the marriage ceremony, the marriage officer must expressly ask both parties whether they accept each other as husband and wife.[175] The parties are then required to answer in the affirmative if they wish to get married.[176] The marriage officer is not allowed to solemnise the marriage if one of the parties is absent or replies in the negative.[177] There are certain factors that negate consensus – namely, material mistake,[178] misrepresentation[179] and duress.[180]

4 2 3 Lawfulness

(i) Prohibited degrees of relationship

Persons who are too closely related, whether by consanguinity,[181] affinity[182] or adoption,[183] may not marry each other.[184]

(ii) An existing civil or customary marriage or civil union

In terms of the Marriage Act[185] and Civil Union Act,[186] parties are prohibited from marrying each other where one or both of them are already married to

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170 Barratt *et al Law of Persons and the Family* 96; Heaton and Kruger *South African Family Law* 15.
171 *Prinsloo's Curators Bonis v Crafford and Prinsloo* 1905 TS 669.
172 *Ibid*.
173 *Ibid*.
174 Barratt *et al Law of Persons and the Family* 242.
175 S 30 of 25 of 1961; s 11 of 17 of 2006.
176 Heaton and Kruger *South African Family Law* 34.
177 *Ibid*.
178 *Benjamin v Salkander* (1908) 25 SC 512; *Kanatopsky v Kanatopsky* 1935 EDL 308.
179 See *Venter v Venter* 1949 (4) SA 123 (W); *Van Niekerk v Van Niekerk* 1959 (4) SA 658 (GW).
180 See *Smith v Smith* 1948 (4) SA 61 (N).
181 Heaton and Kruger *South African Family Law* 26–28.
182 Barratt *et al Law of Persons and the Family* 241.
183 Barratt *et al Law of Persons and the Family* 242.
184 Heaton and Kruger *South African Family Law* 26.
185 Marriage Act 25 of 1961.

someone else or have entered into a civil union,[187] or are married to someone else in terms of customary law.[188] In other words, polygynous marriages are not allowed when parties enter into a civil marriage or union.[189]

Where a married person purports to enter into another civil marriage, the second marriage will be unlawful and void and therefore have no legal effect.[190] In this instance, the person will have committed the crime of bigamy.[191] However, where a married spouse believed in good faith that he or she was divorced while this was not the case, or where the unmarried spouse was oblivious of the other spouse's existing civil marriage, the marriage will be putative[192] and as a result will be void.[193]

(iii) Persons of the same sex

The Civil Union Act[194] permits same-sex partners as well as partners of the opposite sex to enter into a civil union. Civil marriages in terms of the Marriage Act,[195] however, are reserved for heterosexual couples.[196] In terms of customary law, parties of the same sex cannot enter into a customary marriage.

4 2 4 Prescribed formalities

The Marriage Act and the Civil Union Act set out almost identical formalities for the ceremony that must be met for the marriage to be valid. Non-compliance with these requirements will result in the marriage being rendered void.[197]

(i) Witnesses

Owing to the requirement that a marriage "be undertaken in a public and formal way",[198] section 29(2) of the Marriage Act and section 10(2) of the Civil Union Act require the presence of the prospective spouses and two

186 S 8(2) of the Civil Union Act 17 of 2006.

187 This is a common rule set out by Grotius 1.5.2; Voet 23.2.1 and other Roman-Dutch writers.

188 Ss 3(2) and 10(4) of 120 of 1998.

189 The Recognition of Customary Marriages Act does make provision for polygynous marriages.

190 Grotius 2.5.2.

191 Barratt *et al Law of Persons and the Family* 239; Heaton and Kruger *South African Family Law* 26.

192 See *Prinsloo v Prinsloo* 1958 (3) SA 759 (T); *Moola v Aulsebrook No* 1983 (1) SA 687 (N).

193 Barratt *et al Law of Persons and the Family* 255; Heaton and Kruger *South African Family Law* 26. See *Ngubane v Ngubane* 1983 (2) SA 770 (T) and *Solomons v Abrams* 1991 (4) SA 437 (W).

194 17 of 2006.

195 25 of 1961.

196 *W v W* 1976 (2) SA 308 (W); *Simms v Simms* 1981 (4) SA 186 (D).

197 *Minister of Home Affairs v Fourie (Doctors for Life International, Amici Curiae; Lesbian & Gay Equality Project v Minister of Home Affairs) supra*.

198 *Minister of Home Affairs v Fourie (Doctors for Life International, Amici Curiae; Lesbian & Gay Equality Project v Minister of Home Affairs) supra* par 64.

competent witnesses at the time that the marriage is solemnised. Marriage by proxy is no longer permitted and the parties must be personally present at the solemnisation of their marriage.[199]

(ii) Place and time of the wedding

In terms of section 29(2) of the Marriage Act and section 10(2) of the Civil Union Act, a marriage can be solemnised in a public office or private dwelling-house; or a church or other building used for religious service. These sections, however, do not prohibit a marriage officer from solemnising a marriage in another place provided there are valid reasons for solemnisation occurring in that place.[200] A marriage may be solemnised on any day of the week between the hours of eight in the morning and four in the afternoon.[201]

(iii) Marriage officers

In terms of section 11(2) of the Marriage Act and section 4 of the Civil Union Act, only a duly appointed marriage officer may solemnise a marriage. The marriage will be deemed to be void if this requirement is not met.[202]

(iv) Objections

In terms of section 23 of the Marriage Act and section 9 of the Civil Union Act, any objections to the proposed marriage must be lodged with the marriage officer who will solemnise the marriage. The marriage officer is under an obligation to investigate the basis of the objection, and can solemnise the marriage only once it is established that there is no lawful impediment to the proposed marriage.[203]

(v) Proof of age and identity

Before a marriage officer can solemnise the marriage, both parties to the proposed marriage must produce their identity document and the prescribed affidavit.[204]

(vi) The marriage formula

In order for a marriage to be solemnised, it is essential that the marriage officer ask each of the parties whether there is any legal impediment preventing them from entering into the marriage, and whether he or she is prepared to accept the other as his or her lawfully wedded wife or husband

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199 S 20(2) of 25 of 1961; s 10(2) of 17 of 2006.
200 See *Ex parte Dow* 1987 (3) SA 829 (D).
201 S 29(1) of 25 of 1961; s 10(1) of 17 of 2006.
202 *Ex parte L (also known as A)* 1947 (3) SA 50 (C).
203 S 23 of 25 of 1961; s 9 of 17 of 2006.
204 S 12 of 25 of 1961; s 7 of 17 of 2006.

respectively.[205] The parties must reply in the affirmative in order for the wedding to proceed.[206] After replying in the affirmative, the marriage officer will request that the parties give each other the right hand, whereupon the marriage officer will declare them husband and wife.[207] It is at this moment that the marriage comes into existence.[208]

(vii) Registration of the marriage

Section 29A of the Marriage Act, section 12 of the Civil Union Act and section 4(3)(*b*) of the Recognition of Customary Marriages Act describe the essential elements of the registration of a marriage as being: first, the signing of the marriage register or other prescribed documents by the marriage officer, the parties to the marriage and the two competent witnesses; and secondly, the marriage register or other prescribed documents must be forwarded to a regional or district representative of the Department of Home Affairs. Non-registration of the marriage does not affect the validity of the marriage.[209]

4 3 The law of England and Wales

The legal requirements for a marriage to be valid in terms of English law are discussed next.

4 3 1 Capacity

Capacity to marry can affect the individual[210] as well as the couple.[211] Where the parties conclude a marriage without possessing the necessary capacity, the marriage will be deemed to be void.

(i) Age

Section 1(1) of the Family Law Reform Act 1969, section 2 of the Marriage Act 1949 and section 11(*a*)(ii) of the Matrimonial Causes Act 1973 provide that both parties must be 16 years or older to conclude a valid marriage. This is an absolute restriction, and a marriage involving a party younger than 16 years old will therefore be deemed to be void, even where a person believed in good faith that he or she had attained the required age. In terms of section 3 of the Marriage Act 1949, the consent of the parent or guardian in whom parental rights and responsibilities are vested is required in the event of the marriage of a 16 or 17-year-old minor.[212] Where a parent or

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205 Hutchison, Van Heerden, Visser and Van der Merwe *Willie's Principles of South African Law* (1991) 107.

206 S 30(1) of 25 of 1961; s 11(2) of 17 of 2006.

207 *Ibid*.

208 Heaton and Kruger *South African Family Law* 32.

209 *Ibid*.

210 See Probert *Family and Succession Law in England and Wales* (2013) 72.

211 *Ibid*.

212 The Family Reform Act 1969 changed the age of majority from 21 to 18 years.

guardian refuses to consent to an impending marriage, or is unable to give the consent by reason of absence, inaccessibility or disability, the consent of the court may replace the consent of the parent or guardian.[213]

(ii) Mental capacity

The Mental Capacity Act 2005 provides the statutory framework for persons who lack capacity to make decisions for themselves as a result of mental illness. The issue of incapacity owing to mental illness is specific both to the particular decision and to the time at which the decision is taken. A mentally ill person lacks capacity to enter into a legally binding marriage.[214] Therefore, a marriage concluded by a person who is suffering from a mental disorder[215] at the time the marriage is concluded is rendered voidable.[216] In contrast, a marriage entered into by a mentally ill person during a *lucidum intervallum* is valid. In terms of section 27(1) of the Mental Capacity Act 2005, the court and/or any individual (including a parent) cannot in any circumstances give consent to marriage on behalf of an adult who lacks the capacity to give his/her own consent.

4 3 2 Consent

The enactment of the Nullity of Marriage Act 1971 provides that a marriage concluded after 31 July 1971 would be voidable in the absence of true consent.[217] The Matrimonial Causes Act 1973 recognises duress, mistake, unsoundness of mind and certain others[218] as the circumstances that vitiate consent and therefore render the marriage voidable.

4 3 3 Lawfulness

(i) Prohibited degrees of relationship

Section 6(2) of the Marriage (Prohibited Degrees of Relationship) Act 1986 regulates the prohibited degrees of relationship by consanguinity, affinity[219] and adoption;[220] marriages entered into within the prohibited degrees of relationship are deemed to be void.[221]

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213 S 3 of the Marriage Act 1949. See Cretney, Mason and Bailey-Harris *Principles of Family Law* (2003) 12.

214 *Re Beaney* [1978] 1 W.L.R. 770.

215 As defined by the Mental Health Act 1983.

216 *Bennett v Bennett* [1969] 1 All ER 539; S 12(*c*) Part II Ch 1 par 199 of the Matrimonial Causes Act 1973; s 50(1)(*a*) Part II Ch 2 par 234 of the Civil Partnership Act 2004.

217 S 12(*c*) of the Matrimonial Causes Act 1973.

218 The Matrimonial Causes Act refers to factors other than duress and mistake – for example, drunkenness, fraud and misrepresentation.

219 Marriage Act 1949, Sch.1 Pt II; Probert *Family and Succession Law in England and Wales* 73.

220 Marriage Acts 1949–986, Sched. 1, Pt 1; S 47(1) of the Adoption Act 1976.

221 S 11(*a*)(i) of the Matrimonial Causes Act 1973; s 1 of the Marriage Act 1949.

(ii) Existence of a valid marriage

Section 11(*b*) of the Matrimonial Causes Act 1973 prohibits a person from entering into a marriage with a third party where he or she is already married or is in a civil partnership with someone else. This prohibition is absolute. Where parties enter into a marriage in contravention of this absolute prohibition, they will be guilty of the crime of bigamy. A prior marriage or civil partnership always renders a later marriage void.[222]

(iii) Persons who are of the same sex

As indicated previously, the enactment of the Marriage (Same-Sex Couples) Act 2013 legalised same-sex marriages in England and Wales.

4 3 4 Formalities of marriage

The three key stages to the solemnisation of a marriage insofar as the formalities are concerned are preliminaries, celebration and registration.[223] A failure to observe the required formalities can, but does not necessarily, render the marriage void.[224] If the parties knowingly and wilfully choose not to comply with the formalities as set out in the Marriage Act 1949, the marriage is deemed to be void.

(i) Preliminaries

(*1*) *Parental consent*

The issue of parental consent for the marriage of minors has already been mentioned under 4 3 1 (i) of this article.

(*2*) *Publicising the intention to marry*

The parties to an impending marriage are required by law to publicise the intended marriage so that any legal obstacles may present themselves before the marriage is solemnised.[225] Parties who elect to marry according to the rites of the Church of England are given a choice as to which of the preliminaries they wish to observe, the most popular one being the posting of banns in the parishes where they reside.[226] Where the couples wish to avoid this publicity, they are allowed marry by licence, which requires them to declare their freedom to conclude the marriage to the relevant church authorities.[227] In addition to the two options mentioned above, parties can also marry by special licence, which is obtained from the Archbishop of

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222 *Padolecchia v Padolecchia* [1967] 3 All ER 863; *Maples v Maples* [1987] 3 All ER 188.
223 Probert *Family and Succession Law in England and Wales* 76.
224 Burton *Family Law* 13.
225 Probert *Family and Succession Law in England and Wales* 76.
226 S 5 of the Marriage Act 1949.
227 Probert *Family and Succession Law in England and Wales* 77.

Canterbury and which allows the parties to be married at any time or place.[228]

In addition to the above preliminaries, a marriage in the Church of England may also be preceded by civil preliminaries.[229] The same preliminaries apply to civil weddings and to marriages celebrated according to non-Anglican rites. In terms of the civil preliminaries, the parties are required to give notice of their intention to marry in person to their local superintendent registrar.[230] The details of the parties will be displayed at the superintendent's office for a period of 15 days and, provided no objections are lodged against the impending marriage, the superintendent will issue a certificate authorising the marriage to go ahead.[231]

(ii) Celebration

(*1*) *The place of celebration*

A marriage solemnised according to the rites of the Church of England must be conducted in the Anglican Church, unless the parties have opted to be married by special licence.[232] In order for members of other religious denominations to conclude a marriage according to the rites of their religion at their local place of worship, that place of worship must be registered and licensed for marriages, and the celebrant must be authorised to conduct marriage ceremonies.[233] Where the local place of worship does not comply with these requirements,[234] the parties will have to conclude a civil ceremony of marriage, either in addition to, or instead of the religious marriage, for their marriage to be legally recognised.[235]

A civil ceremony can be concluded at any place that has the approval of the local authority.[236] Persons who are terminally ill are allowed to conclude a marriage at their home or in a hospital, while those persons who are housebound, or who have been detained, may enter into a marriage at the place where they are confined.[237]

(2) *The celebrant (marriage officer)*

An Anglican marriage must be solemnised by a clergyman of the Church of England.[238] The marriage is deemed to be void if the parties knowingly and

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228 Cretney *et al Principles of Family Law* 21.

229 S 17 of the Marriage Act 1949.

230 S 27 of the Marriage Act 1949; Cretney *et al Principles of Family Law* 16.

231 S 27 of the Marriage Act 1949; Cretney *et al Principles of Family Law* 17.

232 Marriage Act 1949, s 12 (marriage with banns); s 15 (marriage by common licence); s 17 (marriage under superintendent registrar's certificate).

233 *Ibid*.

234 There are many mosques and temples that are not registered and licensed places of worship.

235 Probert *Family Law and Succession in England and Wales* 78.

236 Marriage Act 1994.

237 S 27 of the Marriage Act 1949 as amended by the Marriage Act 1983.

238 S 25 of the Marriage Act 1949.

wilfully consent to the solemnisation of their marriage by a person who is not under Holy orders.[239] Similarly, a civil marriage is void if the parties knowingly and wilfully consent to the solemnisation of their marriage by a person who is not a superintendent registrar.[240] In respect of other religious marriages celebrated in registered buildings, these must be solemnised by either an authorised person[241] or a superintendent registrar.[242]

(*3*) *The content of the ceremony*

Where the parties conclude their marriage according to the rites of the Church of England, the relevant religious authorities determine the content of the marriage ceremony.[243] In the case of civil marriages, the parties themselves determine the content of the ceremony.[244] Parties to civil marriages and religious marriages celebrated in registered buildings must make a declaration that they are free to marry each other and that they take one another as husband and wife.[245]

(iii) Registration of marriages and civil partnerships

All marriages and civil partnerships that are solemnised in England and Wales must be registered.[246] Non-registration of the marriage does not affect the validity of the marriage.[247] The responsibility for the registration of the marriage is borne by the person conducting the marriage ceremony,[248] or the person who is appointed for the purpose of registering the marriage.[249]

4 4 Comparison

A notable similarity in Islamic, South African and English law is that a marriage is concluded by an offer and an acceptance of the offer of marriage. As far as the requirements for a valid marriage are concerned, while all three legal systems share common requirements, there are marked differences as to what these requirements entail. These differences are discussed with reference to the requirements for a valid marriage – namely, legal capacity, consensus, lawfulness and formalities.

Although all three legal systems require that the prospective bride and groom possess the necessary capacity to enter into a marriage, the difference in respect of this requirement lies in the fact that, while South

239 *Ibid*.
240 S 49(*g*) of the Marriage Act 1949.
241 S 43 of the Marriage Act 1949.
242 S 49(*f*) of the Marriage Act 1949.
243 Probert *Family Law and Succession in England and Wales* 79.
244 *Ibid*.
245 S 44(3) of the Marriage Act 1949; see Cretney *et al Principles of Family Law* 27.
246 S 65 of the Marriage Act.
247 Probert *Family and Succession Law in England and Wales* 80.
248 S 47 of the Marriage Act 1949.
249 The secretary of the synagogue will register the marriage where a marriage according to the Jewish faith is concluded, and the registering officer of the Society of Friends will register the marriage in the case of Quakers.

African and English legal systems prescribe specific categories of ages for marriage, Islamic law requires the parties to reach the age of puberty, without stipulating a specific age.

Similarly, all three legal systems require the parties to the marriage to be of sound mind when entering into the marriage. Islamic law makes provision for a person with mental illness to conclude a marriage, provided that the mental illness is disclosed to the other party and also makes provision for a woman with mental illness to conclude a valid marriage where a physician leads evidence that the marriage would be a cure for the mental illness. In contrast, both South African and English law regard the marriage of a person with mental illness as valid only if the person experiences a *lucidum intervallum* at the time the marriage is concluded. Bar this exception, the marriage of a person suffering from mental illness is void. Therefore, if a person is unable to consent to his or her marriage as a result of mental illness, the parent or guardian is also prohibited from granting consent to the marriage.

While consent is a common requirement in all three legal systems, Islamic law requires that, in addition to the consent of the prospective bride, her guardian also has to give his consent in order for the marriage to be valid. This is the position irrespective of the age of the woman entering into the marriage. It is only where the prospective groom is a minor that the consent of his guardian is required. This is in stark contrast to South African and English law where only the consent of each party is required, unless the party is a minor. Cognisance must, however, be taken of the fact that the age of minority differs in the South African and English legal systems.

Another significant difference between Islamic law and South African and English law is that, in the latter two legal systems, both prospective spouses must expressly consent to the impending marriage while Islamic law makes provision for tacit consent.

Insofar as the requirement of lawfulness is concerned, the prohibitions with regard to consanguinity and affinity are very similar in all three legal systems. Although the institution of adoption is not recognised in Islamic law, a prohibited degree of relationship is created where fosterage has occurred.

A profound difference between Islamic law on the one hand, and South African and English law on the other, relates to the choice of a marriage partner. Islamic law strictly prohibits the marriage between a Muslim woman and a non-Muslim man. In contrast, South African and English family law places no legal prohibition in respect of a marriage between parties who have different religious beliefs.

Islamic law makes provision for polygynous marriages, as it allows the man to have a maximum of four wives at a time. A man who already has four wives, is prohibited from entering into a marriage with a fifth wife, unless he divorces one of his other wives. A married Muslim woman is, however, prohibited from entering into another marriage without the previous marriage being terminated either by death or divorce. In addition to this, the woman has to observe the compulsory waiting period before she can enter into a valid marriage. These prohibitions do not exist in South African or English law. Civil marriages and unions concluded in terms of South African or

English law are strictly monogamous, and a person who concludes a civil marriage or union with more than one spouse is guilty of bigamy.

Islamic law, unlike South African and English law, does not make provision for same-sex marriages or unions.

In respect of the witnesses, Islam draws a distinction between circumstances where the witnesses are male or female. If there are two males present to witness the conclusion of the marriage, this will suffice. The presence of one male witness must be accompanied by two female witnesses for the marriage to be valid. South African and English law draws no such distinction.

Although the payment of dowry to the prospective bride is not an essential requirement for the validity of the marriage, it is still regarded as indispensable to a marriage concluded in terms of Muslim rites. In South African and English law, where a civil marriage is concluded, there is no payment of dowry to the prospective bride.

Both Islamic law and English law require the observance of formalities in respect of the publication of the marriage. English law, however, requires the publication of the intended marriage and further draws a distinction between a marriage concluded in terms of the rites of the Church of England and one concluded by special licence; the former requires publication, while the latter does not. Islamic law requires publication of the marriage only after it has been concluded so as to differentiate the marriage from mere fornication. South African law contains no requirements in respect of the publication of a marriage, either before or after the marriage is concluded – except that the marriage must be solemnised in a church or other building used for religious service, public office or private dwelling with open doors so as to avoid clandestine marriages.[250]

As far as the place for the conclusion of the marriage is concerned, Islamic law is not prescriptive in this regard and a marriage can be solemnised at any place, although it is preferable that it be concluded in a mosque. In terms of South African law, the Marriage Act provides that a marriage can be solemnised at any public or private dwelling. English law requires a marriage to be solemnised in the Anglican Church where the marriage is concluded according to the rites of the English Church unless the parties have elected to be married by special licence. If the parties wish to conclude a civil marriage, the place where the marriage is solemnised must have the approval of the local authority.

A marriage in terms of Islamic rites can be concluded by a learned religious scholar, or the father of the bride can elect to conclude the marriage. In contrast, both South African law and English law require that a designated marriage officer solemnise the marriage.

Both South African and English law require the marriage to be registered. However, non-registration of the marriage with the local authorities does not affect the validity of the marriage. A marriage in terms of Islamic rites is not registered. The person performing the marriage will issue the parties with a

[250] S 29(2) of the Marriage Act 25 of 1961.

marriage certificate but no relevant official authority exists for the registration of the marriage.

5 MARITAL RIGHTS AND DUTIES

The legal consequences of a marriage are far reaching for the spouses in respect of their person and their property. As far as the legal consequences of marriage are concerned, a distinction can be drawn between the personal and proprietary consequences of a marriage.

5 1 Personal consequences

5 1 1 Islamic law

5 1 1 1 The duties of the husband

The duties of the husband include the payment of dower, maintenance, the provision of suitable accommodation, treating the wife with kindness and displaying equality where he has entered into a polygamous marriage.

(i) Dower

The first and foremost duty of the husband is the payment of dower to the wife.[251] The payment of a dower (*mahr*) is an indispensable component of an Islamic marriage contract.[252] *Mahr* is anything of value and it incorporates either a sum of money or property that becomes payable by the husband to the wife after the prospective spouses have agreed to conclude the marriage.[253] The payment of dower at the conclusion of the marriage is obligatory by the husband.[254]

The validity of the marriage will not be affected if the amount of dower has not been specified or paid at the time of marriage.[255] The husband, however, is not discharged from his duty to make payment of the dower and he is obligated to make payment of the dower at the time that the marriage is consummated or any time thereafter.[256] The dower becomes the sole property of the bride.[257] The dower remains the property of the wife, even where the marriage is dissolved through divorce.[258] The wife becomes the owner of the dower as soon as the marriage is solemnised.[259]

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[251] Siddiqi *The Family Laws of Islam* 106.
[252] Siddiqi *The Family Laws of Islam* 107.
[253] Nasir *The Status of Women Under Islamic Law* 87; Doi *Shari'ah The Islamic Law* 158–166.
[254] Siddiqi *The Family Laws of Islam* 79; *Quran* ch 4, verse 4 and 24.
[255] Siddiqi *The Family Laws of Islam* 80.
[256] *Ibid.*
[257] Doi *Shari'ah The Islamic Law* 158; *The Holy Quran* ch 4, verse 4.
[258] Doi *Shari'ah The Islamic Law* 158. The only exception to this principle is when the marriage is dissolved by means of a *khula* – that is, where the marriage is dissolved at the request of the wife in consideration of the return of all or a portion of the dower paid to her.
[259] Doi *Shari'ah The Islamic Law* 159.

The sum or value of the dower is not prescribed by law – rather it may be decided by the parties, or it may be determined *via* the operation of Islamic law, with due regard to the social status of the parties.[260] However, the dower must be something of value, even if it is worth a small amount.[261]

The dower does not constitute a bride price with which the husband purchases the wife upon the payment of dower.[262] The purpose thereof is to emphasise the prestige and importance of the contract of marriage.[263] Furthermore, the dower is regarded as a token of the husband's love and affection that he offers to the wife when they enter into the contract of marriage.[264]

The payment of the dower can be effected in one of three ways: the transfer of the dower to the wife may be made immediately upon the conclusion of the marriage; the payment of the dower may be deferred to a later date; or the payment of a portion of the dower may be made at the conclusion of the marriage, the balance to be paid if and when the marriage is dissolved by divorce or death of the husband.[265] The manner in which payment of the dower is effected depends on the terms of the marriage contract between husband and wife; in the absence of a marriage contract, it would depend on the custom of the country in which they are living.[266]

(ii) Maintenance (*Nafaqah*)

The second duty of the husband is to provide maintenance to his wife as the wife has the right to be provided with food, clothing and housing at the expense of the husband, on a scale suitable to his means.[267] With regard to the amount of maintenance, the position and social status of both spouses must be taken into account.[268] Where both spouses are wealthy, the maintenance provided to the wife should be of that standard.[269] The same applies where both spouses are not financially well off.[270] If a wife is wealthy and the husband is not, the wife in this instance would be entitled to reasonable maintenance.[271]

Maintenance (*nafaqah*) is primarily the husband's duty, regardless of the private means of the wife.[272] The wife is under no obligation to contribute financially towards the running of the household, and where she does, she may claim such amounts from her husband.[273] Furthermore, if the wife

[260] Siddiqi *The Family Laws of Islam* 81.
[261] Doi *Shari'ah The Islamic Law* 164.
[262] Siddiqi *The Family Laws of Islam* 81.
[263] Siddiqi *The Family Laws of Islam* 81; Doi *Women in Shari'ah* 154.
[264] *Ibid*.
[265] *Ibid*.
[266] Siddiqi *The Family Laws of Islam* 84.
[267] Siddiqi *The Family Laws of Islam* 107.
[268] Siddiqi *The Family Laws of Islam* 108.
[269] *Ibid*.
[270] *Ibid*.
[271] *Ibid.*
[272] Siddiqi *The Family Laws of Islam* 107.
[273] Siddiqi *The Family Laws of Islam* 108.

cannot perform her household duties due to illness, or where the wife is wealthy and she refuses to do any domestic work as she considers it to be beneath her dignity, it is the duty of the husband to provide her with cooked food, for example.[274]

Where the marriage is dissolved, the husband is under an obligation to provide accommodation and maintain the wife during the three-month waiting period (*iddah*).[275] Once the three-month waiting period has elapsed, the husband is not obliged to pay maintenance to his former wife.[276] According to the *Shafi'i madhhab*, where the husband fails to provide *nafaqah* to his wife, this constitutes a debt that the husband is obliged to pay to the wife.[277] In other words, the wife is entitled to claim for arrear *nafaqah* during and after the termination of the marriage.[278]

(iii) Residence

The general rule is that the husband is under an obligation to provide his wife with suitable accommodation or housing according to his means as long as the marriage subsists.[279] This is also the position where the marriage is terminated by divorce, as the divorced wife is entitled to remain in the marital home during her period of *iddah*.[280] For as long as the marriage subsists, the husband bears the sole responsibility of providing accommodation and maintenance for his wife.[281] Where the husband has leased property to provide accommodation for his wife, he bears the sole responsibility to pay the rental of the property.[282]

(iv) Treatment of wives

The Prophet Muhammad (PBUH) in his last sermon repeatedly admonished men to treat their wives with kindness and respect, and in fact laid great emphasis upon kind and good treatment towards the wife.[283] The husband is, therefore, obliged to treat his wife with kindness, love and respect in order for peace and happiness to prevail within the marital home.

(v) Equality between wives

Where a husband is practising polygyny, it is incumbent upon him to treat all his wives equally, as all wives are deemed to be equal in status and should enjoy equal rights.[284] The husband is therefore required to treat all his wives

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274 Siddiqi *The Family Laws of Islam* 108–109.

275 Ayoub *Fiqh of Muslim Family* 347.

276 The rule applies unless the wife is pregnant or is breastfeeding, in which case the husband is obliged to maintain the wife until the birth of the child or the completion of breastfeeding.

277 Esposito and DeLong-Bas *Women in Muslim Family Law* (2001) 115.

278 *Ibid*.

279 Siddiqi *The Family Laws of Islam* 109.

280 Siddiqi *The Family Laws of Islam* 109.

281 *Ibid*.

282 Ba'-kathah *Tuh-fatul Ikhwaan* 157.

283 Siddiqi *The Family Laws of Islam* 109.

284 Siddiqi *The Family Laws of Islam* 115.

equally with regard to the provision of maintenance as well as the time spent with each wife.[285]

5 1 1 2 The duties of the wife

Islam allows a wife certain rights that place duties upon her husband, but similarly the wife owes certain duties towards her husband.

(i) Guarding the husband's rights

Faithfulness and chastity are regarded as the first duties of the wife.[286] In the husband's absence, it is the duty of the wife to guard his possessions, which include his offspring, property and honour.[287]

(ii) Management of household affairs

The second duty of the wife includes the supervision of the family home, as well as the improvement and protection of family relationships.[288] The primary duties of the wife can therefore be listed as the management of the household and the rearing of the children.[289] These duties do not detract from the fact that a woman, more specifically a wife, has the right to engage in employment, to seek education and even to defend her country in the same manner as a man, if she is required to do so.[290]

The wife is under no obligation to provide personal services, such as cooking meals and cleaning the marital home.[291] Where she does undertake these duties, it is regarded as a favour that she does for her husband. According to the *sunnah* practices of the Prophet Muhammad (PBUH), both husband and wife should assist each other with regard to duties in the marital home.[292]

(iii) Headship of the family

Although Islam advocates the idea that the marital home is viewed as a kingdom ruled by both husband and wife, Islam is patriarchal in nature and the husband is regarded as the head of the family, having the decisive say in all matters.[293] The wife is, therefore, required to obey her husband in matters relating to the well-being and happiness of the family unit, as well as in matters relating to the upbringing of their children.[294] A wife may, however, refuse to obey her husband if he requires her to do that which is contrary to

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285 *Ibid.*
286 Siddiqi *The Family Laws of Islam* 118.
287 *Ibid*.
288 Nasir *The Status of Women Under Islamic Law* 81.
289 Alkhuli *The Light of Islam* 78.
290 *Ibid*.
291 Siddiqi *The Family Laws of Islam* 119.
292 Siddiqi *The Family Laws of Islam* 119.
293 Alkhuli *The Light of Islam* 77.
294 Siddiqi *The Family Laws of Islam* 120.

the teachings and rulings of Islam.[295] If the husband, for example, forbids the wife to do the compulsory fasting during the month of *Ramadan,* the wife is not required to obey him.[296]

(iv) Family name

Upon the solemnisation of a marriage, a Muslim woman does not lose any of the rights she had prior to the marriage; as a married woman, she retains her individuality and her name.[297] Although in practice, most women accept their husbands' surnames, Islam permits women to retain their maiden surnames.[298] In fact, the opinion among the majority of Islamic jurists is that the woman is required by Islamic law to retain her surname and not adopt that of her husband.[299]

5 1 2 South African law

5 1 2 1 Maintenance

One of the invariable consequences of a civil marriage is the reciprocal duty of support that arises between spouses as soon as the marriage is solemnised.[300] The reciprocal duty of support between spouses applies to all marriages concluded in terms of civil law,[301] regardless of which matrimonial property regime the parties have chosen to regulate their marriage.[302] Furthermore, the duty of support subsists throughout the marriage and can under certain circumstances be extended, even after the marriage has been terminated, either through divorce or by the death of one of the parties to the marriage.[303]

The reciprocal duty of support arises when the spouse who claims maintenance is in need of it, and the spouse from whom maintenance is claimed is in a financial position to provide the maintenance claimed.[304]

The reciprocal duty of support means that both husband and wife have a duty to support each other on a *pro rata* basis according to their respective means.[305] In terms of the common law, spouses can fulfil their duty of support in one of two ways – either by providing the necessary finances to purchase what the other requires, or alternatively by providing certain kinds of service, such as doing the housework in the marital home or looking after

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295 Siddiqi *The Family Laws of Islam* 122.
296 *Ibid*.
297 Alkhuli *The Light of Islam* 76.
298 *Ibid*.
299 Al-Bukhaari *Sahih Muslim: The Book of Marriage Hadeeth No 6391* (1998).
300 *Oberholzer v Oberholzer* 1947 (3) SA 294 (O); *Reyneke v Reyneke* 1990 (3) SA 927 (E).
301 This includes marriages entered into in terms of the Civil Union Act 17 of 2006 and the Recognition of Customary Marriages Act 120 of 1998.
302 Barratt *et al Law of Persons and the Family* 264.
303 Divorce Act 70 of 1979; Maintenance of Surviving Spouses Act 27 of 1990.
304 Voet 25.3; Heaton and Kruger *South African Family Law* 44.
305 Barratt *et al Law of Persons and the Family* 265.

the children born of the marriage.[306] The provision of accommodation, food, clothing, medical expenses and litigation costs are examples of items that typically fall within the duty of support. The duty of support is not limited to the bare necessities of life, but is rather determined by the spouses' standard of living, their financial means or income and the cost of living.[307] Therefore, overseas holidays, weekly visits to the hairdresser and expensive cars, for example, are items that may well fall within the duty of support if the person from whom support is being claimed is a wealthy person.[308]

Where the duty of support is not being fulfilled, the spouse claiming maintenance can enforce the duty of support by instituting a maintenance claim in either the High Court or a maintenance court.[309] In terms of section 3 of the Maintenance Act,[310] maintenance courts are empowered to grant both maintenance orders and civil and criminal sanctions where a party fails to comply with the maintenance order.

Both spouses in a civil marriage have the power to bind each other in contract for the things and services that are necessary for the running of the joint household, irrespective of the matrimonial property system regulating the marriage, and irrespective of which spouse buys the household necessaries.[311] The capacity to conclude binding contracts for the purchase of household necessities is an automatic consequence of marriage that cannot be excluded by an antenuptial contract.[312] In modern times, spouses share the duty to purchase and pay for household necessities on a *pro rata* basis according to their means.[313] The spouses will only have the power to bind each other contractually for the purchase of household necessities if: they have entered into a valid civil marriage; a joint household exists at the time the purchase is made;[314] and the item purchased must be a household necessity.[315]

5 1 2 2 Residence

One of the most important invariable consequences of a civil marriage is the creation of the *consortium omnis vitae*[316] that includes the duty and the right to live together in their marital home.[317] The general rule is that neither spouse can evict the other from the marital home, irrespective of the matrimonial property regime, and irrespective of which one owns the marital home.[318] The right to live in the marital home includes the right to possession

306 *Ibid*.
307 *Young v Coleman* 1956 (4) SA 213 (N) 218.
308 *Gammon v McClure* 1925 CPD 137.
309 Barratt *et al Law of Persons and the Family* 266.
310 99 of 1998.
311 Ss 17(5) and 23 of the Matrimonial Property Act 88 of 1984.
312 Voet 23.2.46; see also *Reloomel v Ramsay* 1920 TPD 371; *Excell v Douglas* 1924 CPD 472.
313 Barratt *et al Law of Persons and the Family* 273.
314 *Reloomel v Ramsay supra* 376; *Excell v Douglas supra* 484.
315 *Voortrekkerwinkels (Ko-operatief) Bpk v Pretorius* 1951 (1) SA 730 (T).
316 *Peter v Minister of Law and Order* 1990 (4) SA 6 (E).
317 *Badenhorst v Badenhorst* 1964 (2) SA 676 (T).
318 *Owen v Owen* 1968 (1) SA 480 (E); *Whittingham v Whittingham* 1974 (2) SA 636 (R).

and use of the household furniture and other effects, regardless of which one of the spouses owns the items.[319] In the event that one of the spouses threatens the other spouse in respect of the use and enjoyment of the marital home or the household effects, the threatened spouse can apply for an interdict to prevent this.[320] Where one spouse has already been evicted from the marital home, or has been dispossessed of household goods, the aggrieved spouse can apply, by means of the *mandament van spolie,* to regain possession of the marital home or the household effects.[321] The *mandament van spolie* can also be used to regain possession of household effects, as the one spouse cannot dispose of the household furnishings and effects and leave the other spouse with only the "empty shell of the matrimonial home".[322] The exception to the general rule that a spouse cannot be evicted from the marital home arises in domestic violence matters where a spouse applies for a protection order in terms of the Domestic Violence Act.[323] If a protection order is granted, the guilty spouse may be prevented from entering the marital home or living in it.

5 1 2 3 Treatment of spouses

Closely related to the creation and protection of the *consortium omnis vitae* that arises automatically when a civil marriage is concluded is the treatment of spouses. Although the term *consortium omnis vitae* does not lend itself to precise legal definition, it includes both intangibles (such as love, loyalty and care) and the more material needs of life (for example, physical care and financial support).[324] However, although spouses have *consortium* duties towards each other, these duties cannot be enforced in a court of law.[325] Where one or both spouses fail in performing the interpersonal aspects of the *consortium*, the aggrieved spouse can institute an action for divorce on the basis that the marriage has broken down irretrievably.

5 1 2 4 Family name

In modern South African society, most married women still assume their husband's surname although it is not necessary for them to do so.[326] In terms of section 26(1) of the Births and Deaths Registration Act,[327] a person is not allowed to change his or her surname unless the required authorisation has been obtained from the Director-General of Home Affairs. However, section 26(1) does not apply to women who marry or who have been married because a wife does not need official permission to assume her husband's surname after the solemnisation of her marriage,[328] or after

319 *Whittingham v Whittingham supra*; *Buck v Buck* 1974 (1) SA 609 (R).
320 *Buck v Buck supra*; *Du Plessis v Du Plessis* 1976 (1) SA 284 (W).
321 *Manga v Manga* 1992 (4) SA 502 (ZSC); *Du Randt v Du Randt* 1995 (1) SA 401 (O).
322 *Whittingham v Whittingham supra*.
323 116 of 1998.
324 *Peter v Minister of Law and Order supra* 9.
325 *Boon v Boon* (1898) 8 CTR 397.
326 Heaton and Kruger *South African Family Law* 59.
327 51 of 1992.
328 S 26(1)(*a*) of 51 of 1992.

having assumed his surname, to resume a surname she bore at any prior time,[329] or to add her married surname to any surname she bore at any prior time.[330] A divorced or widowed woman may assume a surname she bore at any previous time.[331] Where a man wishes to assume his wife's surname, or add it to his own surname, he is required to apply to the Director-General of Home Affairs for permission.[332] In addition to the differential treatment of men and women as cited above, there is also differential treatment between men married in terms of the Marriage Act and partners in a civil union, as section 26(1) of the Births and Deaths Registration Act allows spouses to a civil union to change their surnames without obtaining official consent from the Director-General of Home Affairs to do so. It is submitted that there is no constitutionally acceptable justification for the differentiation.

5 1 2 5 Headship of the family

In terms of the common law, the husband was head of the family and had the decisive say in all matters concerning the common life of the spouses – for example, where and in what style they live.[333] The husband's common-law status as head of the family was expressly incorporated into section 13 of the Matrimonial Property Act,[334] providing that, although the husband's marital power over the wife has been abolished, this would not affect the husband's position as the head of the family. The legislature attempted to remove the husband's headship with the enactment of section 30 of the General Law Fourth Amendment Act,[335] which repealed section 13 of the Matrimonial Property Act. Sinclair submits that, although section 13 was repealed, the common-law rule that recognises the husband as the head of the family remains unchanged.[336] However, in modern South African society, the husband's common-law headship of the family has very little practical significance and no longer has any substantial content, as the major practical aspects of the husband's headship have been abolished through the enactment of several other statutes.[337] The continued existence of the common-law rule in respect of the husband's headship is unconstitutional as it is discriminatory on the ground of gender, which is a violation of sections 9 and 10 of the Constitution.[338]

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329 S 26(1)(*a*) and (*b*) of 51 of 1992.

330 S 26(1)(*c*) of 51 of 1992. In other words, the wife can create a double-barrelled surname.

331 Labuschagne and Bakker "Naamsvoering en die Behoefte aan 'n Socio-juridiese Identiteit: 'n Regsantropologiese en Menseregtelike Perspektief" 1999 62 *THRHR* 176 185–189.

332 S 26(1) of 51 of 1992.

333 Heaton and Kruger *South African Family Law* 60.

334 88 of 1984.

335 132 of 1993.

336 Sinclair *The Law of Marriage* 439.

337 S 1(1) of the Domicile Act 3 of 1992; see Heaton and Kruger *South African Family Law* 60.

338 Heaton and Kruger *South African Family Law* 60.

5 1 3 The law of England and Wales

5 1 3 1 Maintenance

In terms of the common law, the husband had a duty to support his wife according to his means.[339] The Equality Act 2010 has abolished the sex-specific rule. At present, the duty of support is regulated by statute,[340] which provides that a reciprocal duty of support exists between the spouses at the conclusion of the marriage. Where one spouse fails to discharge the duty of support, the aggrieved spouse can lodge an application to court for an order for financial provision.[341] The Domestic Proceedings and Magistrates' Court Act 1978 authorises a magistrates' court to grant periodical or lump-sum financial orders where one spouse has failed to provide reasonable maintenance for the other spouse.[342] Where one spouse has not discharged his or her duty to provide reasonable maintenance to the other spouse, an application for maintenance can also be lodged in the county court or the High Court.[343]

Furthermore, there is no legislation regulating the specific obligations of the spouses during the subsistence of the marriage.[344] There is no requirement that the spouses share the expenses of the household equally, or even that each spouse is required to make a fair contribution to the expenses of the household.[345] The only specific provision relating to the expenses of the household is in respect of the ownership of any surplus saved from a housekeeping allowance.[346] In terms of the common-law rules, ownership of the surplus belonged to the spouse who provided the allowance.[347] The common-law rule was amended by the Married Women's Property Act 1964, which provided that a wife is entitled to half of any savings she made out of a housekeeping allowance. The Equality Act 2010 subsequently changed this by providing that any surplus savings are to be shared between the spouses irrespective of who provided the housekeeping allowance.[348]

5 1 3 2 Residence

There is no statutory code or provision regulating the ownership or disposition of the matrimonial home.[349] While each spouse acquires the right to occupy the matrimonial home, the ownership thereof is governed, largely

339 Probert *Family and Succession Law in England and Wales* 85.
340 Domestic Proceedings and Magistrates' Courts Act 1978; Matrimonial Causes Act 1973.
341 S 27 of the Matrimonial Causes Act 1973.
342 S 1 of the Domestic Proceedings and Magistrates' Courts Act 1978.
343 S 27 of the Matrimonial Causes Act 1973.
344 *Ibid*.
345 *Ibid*.
346 *Ibid*.
347 *Ibid*.
348 S 200 of the Equality Act 2010.
349 Probert *Family and Succession Law in England and Wales* 177.

by the law of trusts.[350] A spouse who has sole legal and beneficial ownership of the matrimonial home is at liberty to dispose of the matrimonial home as he or she deems fit, without consulting the other spouse.[351] There are certain steps that an aggrieved spouse can take to prevent the other spouse from disposing of the marital home without obtaining consent, but the protection afforded in this instance is not automatic and simply serves to delay the sale of the matrimonial home.[352]

Where the parties are joint beneficial owners of the matrimonial home, each spouse has the right of occupation.[353] Where one spouse is the sole legal owner, but the other spouse has a beneficial interest in the matrimonial home, the former spouse is obligated to consult the latter in respect of any dealings with the matrimonial home.[354] Where the spouse who is the sole legal owner sells the property, the proceeds thereof are divided according to the spouses' respective beneficial interests.[355]

The right to occupy the marital home as a consequence of statutory "home rights" means that the exclusion of one spouse from the marital home by the other spouse can take place only where this is court-sanctioned.[356] Section 33(3) of the Family Law Act 1996 also authorises a court to make an order granting a spouse who is not currently occupying the marital home, the right of entry and occupation even where the other spouse is opposed to it. The general rule in respect of the termination of home rights is that they are terminated only at the dissolution of the marriage, whether by death, divorce or annulment.

5 1 3 3 Treatment of spouses

Traditionally, upon the conclusion of a marriage, a consortium is created between the spouses that includes, among others, the practical aspects of living together in marriage, the right to sexual intercourse, the right to occupy the matrimonial home and respect for marital confidences.[357] Therefore, once a marriage is concluded, the spouses are required to live together as husband and wife as this forms part of the legal concept of consortium.[358] The importance of the spouses living together can be inferred from the fact that a spouse may apply for a divorce on the ground of desertion if the other spouse refuses to live with him or her.[359] Despite the spouses having the right to consortium, it is not a right that the law allows the individual to enforce, either through self-help[360] or an order of the court.[361]

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350 *Ibid*.
351 Probert *Family and Succession Law in England and Wales* 177.
352 Probert *Family and Succession Law in England and Wales* 178.
353 Probert *Family and Succession Law in England and Wales* 181.
354 S 11 of the Trusts of Land and Appointment of Trustees Act 1996.
355 Probert *Family and Succession Law in England and Wales* 182.
356 S 30 of the Family Law Act 1996.
357 Burton *Family Law* 36.
358 Probert *Family and Succession Law in England and Wales* 85.
359 *Ibid*.
360 *R v Jackson* [1981] 1 Q.B. 671.
361 *Best v Samuel Fox & Co Ltd* [195] A.C. 716 731.

5 1 3 4 Family name

Although there is no legal obligation for a woman to change her name, and while either spouse can adopt the other's surname on the conclusion of a marriage, it is generally the wife who adopts the surname of her husband.[362] It has, however, become increasingly common for spouses to retain their own surname or to combine their surnames.[363] Where a marriage is terminated either by death or divorce, a woman is under no obligation to resume her maiden name where she had adopted the surname of her husband.[364] An adult, male or female, is allowed in terms of the law to adopt whatever surname or forename he or she chooses, as long as there is no intent to deceive.[365] Despite no formal procedure required to effect a name change, state officials will require documentary proof before effecting a name change.[366]

5 1 4 Comparison

As far as similarities between the three legal systems are concerned, marriage in Islamic, South African and English law creates a *consortium omnis vitae* between the spouses that requires husband and wife to remain faithful to each other and to treat each other with kindness, to live together and to support each other.

The differences between the three legal systems relate to the payment of dowry, maintenance, residence, headship of the husband and family name.

South African law and English law do not require a woman to assume the surname of her husband when concluding a marriage.

Although it is not a legal requirement and does not affect the validity of the marriage, Islamic law places an obligation upon the husband to pay a dowry to his wife. There exists no such obligation when the parties enter into a marriage in terms of South African or English law.

Unlike the position in Islamic law, where the husband bears the sole duty of support, the position in South African and English law as far as spousal maintenance is concerned, is that there is a reciprocal duty of support between spouses. Furthermore, in terms of South African and English law, this reciprocal duty of support exists throughout the marriage, and can even be extended in certain circumstances upon dissolution of the marriage. The prevailing position in Islamic law is that the husband bears the sole responsibility for support during the subsistence of the marriage, and where the marriage is dissolved through divorce, the husband is only obligated to maintain the woman for a period of three months after the divorce has taken place.

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362 Probert *Family and Succession Law in England and Wales* 55.
363 Probert *Family and Succession Law in England and Wales* 89.
364 Probert *Family and Succession Law in England and Wales* 55.
365 *Ibid*.
366 *Ibid.*

Islamic law delegates the management of the household, and the purchases relating to the household, to the wife. The husband is, however, required to provide the financial means to his wife in order for her to fulfil this duty. South African law grants both spouses the authority to bind each other for the purchase of household necessities and where the parties are married in community of property, section 15 of the Matrimonial Property Act[367] grants both spouses equal powers of administration in respect of the joint estate. In terms of English law, there is no requirement that the spouses share the expenses of the household equally, or even that each spouse is required to make a fair contribution to the expenses of the household. This position differs markedly from the position in both Islamic law as well as South African law.

As far as the marital home is concerned, in Islamic law, it is the sole duty of the husband to provide the wife with suitable accommodation according to his means. The wife is entitled to remain in the marital home during the subsistence of the marriage as well as during her *iddah* period if the marriage is dissolved by divorce. Once the *iddah* period expires, the husband is allowed to evict the wife from the marital home. In terms of South African and English law, both parties have the right to occupy the marital home during the subsistence of the marriage and neither spouse can evict the other from the marital home.

Islamic law requires the wife to obey the husband in respect of all matters unless it is contrary to the principles of Islam. In terms of South African law, there is no similar duty upon the wife where the parties are civilly married in terms of the Marriage Act or Civil Union Act. However, Islamic law and South African common law are to a certain extent patriarchal in nature as the husband is regarded as the head of the family, having the decisive say in matters relating to the family. The common-law rule, however, is subject to constitutional scrutiny as it discriminates on the basis of sex or gender in terms of section 9 and 10 of the Constitution.[368]

5 2 Property rights

5 2 1 Islamic law

5 2 1 1 Property rights

Community of property is not recognised under Islamic law. Spouses to an Islamic marriage maintain separate estates and each spouse retains sole ownership and control of his or her property, whether movable or immovable, and whether acquired before or after the marriage.[369] According to authentic narrations from Islamic jurists,[370] a person is only allowed to receive benefits and wealth that is earned through lawful means; thus if the parties were married in terms of a shared matrimonial property system, for

[367] 88 of 1984.
[368] Heaton and Kruger *South African Family Law* 62.
[369] Rautenbach and Bekker *Introduction to Legal Pluralism* 368.
[370] Ibn Katheer *Tafseer al-Quran al-Adheem* (2003) Vol 1 93.

example, one spouse would become entitled to receive benefits to which he or she was not Islamically entitled.

The complete separation of assets is often very prejudicial to a spouse who is not the primary breadwinner, as a spouse who has very little income or no income at all is unable to amass his or her own estate. If an asset is registered only in the husband's name, for example, the wife has no legal claim to the asset. This could prove very disadvantageous to her if the marriage is dissolved by divorce and she has no assets to her name.

Under Islamic law, the woman enjoys an absolute right to earn, acquire and inherit property.[371] She also possesses the right of ownership over her goods and wealth independent of any male.[372] She is entitled to instruct any person of her choice to deal with her property without consulting her husband, and she has the right to dispose of her assets as she sees fit.[373] Muslim jurists are unanimous[374] that, where the wife is of sound mind, the husband does not have the right to object to the manner in which his wife manages her wealth, and the husband does not have the right to dispose of the wealth of his wife, except with her consent.[375] It is clear, therefore, that a woman does not forego any of her property rights by reason of marriage.[376]

5 2 1 2 The marriage contract

Besides the duties that flow automatically when parties enter into a marriage, the parties can also regulate their marriage by means of a marriage contract. Before parties conclude a marriage, they may enter into a prenuptial agreement, or *taqliq,* in terms of which they can agree upon any legal condition or conditions.[377] The prenuptial agreement may include a condition, for example, that the woman shall retain the right to dissolve the marriage, or that the husband may not marry a second wife during the subsistence of the first marriage,[378] or that upon marriage they will live in a certain city or country.[379] In essence, the parties can also enter into a marriage contract to regulate their marital assets.

While the marriage contract is usually concluded before solemnisation of the marriage, nothing prohibits spouses from adding new provisions to the marriage contract, provided this is done in writing and attested to by two competent witnesses.[380] The conclusion of a marriage contract is indicative of the nature of marriage as a contract whereby each spouse has the right to set certain conditions in respect of the marriage, and it also demonstrates the manner in which Islam protects the rights and welfare of the prospective

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371 Doi *Women in Shari'ah* 147, 162.

372 Bulbulia "Women's Rights and Marital Status: Are We Moving Closer to Islamic Law?" 1983 *De Rebus* 431.

373 Al-Jibreen *Fataawa al-Mar'ah al-Muslimah* vol 2 (1996) 674.

374 Ibn Qudaamah *Al-Mughni* 513.

375 Sa'ad *Mawsoo'at Al-Ijmaa Fi'l-Fiqh Al-Islami* vol 2 (1985) 566.

376 Al-Tahaawi *Sharh al-Ma'aani al-Athaar* vol 4 (1994) 352.

377 Alkhuli *The Light of Islam* 72.

378 Alkhuli *The Light of Islam* 73.

379 Alkhuli *The Light of Islam* 72.

380 The *Quran* ch 5, verse 1.

wife, by allowing her the right to lay down certain conditions before she signs the marriage certificate.[381]

However, cognisance must be taken of the fact that conclusion of the marriage contract essentially depends on consensus between the parties. Owing to the unequal distribution of power between men and women, the latter may lack the negotiating power, first, to insist that a marriage contract be concluded, and secondly, to insist that certain provisions be included in the marriage contract that will offer them protection during the subsistence of the marriage. In addition to the above limitations in respect of the marriage, where one of the spouses is in breach of the marriage contract, the aggrieved spouse may be reluctant to institute action in a secular court of law to enforce his or her rights.

5 2 2 South African law

At present, there are three matrimonial property systems that regulate the patrimonial consequences upon conclusion, as well as dissolution, of a civil marriage: in community of property; out of community of property excluding accrual sharing; and lastly, out of community of property including accrual.

5 2 2 1 Marriage in community of property

Marriage in community of property is regarded as the default matrimonial property system in South Africa. In other words, couples are deemed to be married in community of property when they enter into a civil marriage, if they have not concluded an antenuptial contract.[382] Where spouses are married in community of property, they are automatically joint co-owners of an indivisible half-share of all assets and liabilities, irrespective of whether these assets or liabilities had been acquired before the marriage was concluded or during the subsistence of the marriage.[383] Upon marriage, the spouses' separate estates merge to form a joint estate.[384] This takes place *via* operation of law the moment the parties enter into a marriage, and therefore no transfer of movable property, registration of immovable property or cession of rights from one spouse to the other is required.[385] There are, however, certain assets that are excluded from the joint estate – for example, assets excluded by means of a will.[386]

Administration of the joint estate for spouses married in community of property is regulated by section 15 of the Matrimonial Property Act.[387] Section 15(1) allows spouses to act independently of each other in respect of the joint estate, except for those transactions specifically excluded by the Act. Section 15(2) and (3) and section 17(1) of the Matrimonial Property Act

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381 Alkhuli *The Light of Islam* 73.

382 S 86 of the Deeds Registries Act 47 of 1937.

383 *De Wet v Jurgens* 1970(3) SA 38 (A); *Mazibuko v National Director of Public Prosecutions* 2009 (6) SA 479 (SCA).

384 *Ibid*.

385 *Corporate Liquidators (Pty) Ltd v Wiggill* 2007 (2) SA 520 (T).

386 Barratt *et al Law of Persons and the Family* 287–288.

387 88 of 1984.

regulate the position where the consent of both spouses is required. Different kinds of consent are required depending on the nature of the juristic act that the spouses wish to conclude. Other than the juristic acts mentioned in section 15(2) and (3) and section 17, no consent is required for juristic acts not specifically referred to in the Matrimonial Property Act. In terms of section 15(6), spousal consent is also not required for juristic acts concluded by a spouse in the course of his or her trade, profession or business.[388]

The community of property matrimonial property system has far-reaching consequences for parties owing to the fact that as soon as a marriage is solemnised, the principle of joint liability arises, resulting in neither spouse being protected against the other's creditors.[389] A liquidity problem can also arise at the death of one of the spouses as the executor is both entitled and obliged to liquidate some, or even all, of the assets of the joint estate to meet the claims of creditors.[390] Furthermore, even where the spouses do not have creditors, the surviving spouse may still experience liquidity problems when the heirs' inheritances become due as the executor is authorised to liquidate part, or even the entire joint estate, to meet the claims of the heirs.[391]

5 2 2 2 Marriage out of community of property and community of profit and loss without the accrual

The fundamental rule in respect of the matrimonial property system "out of community of property, and community of profit and loss without the accrual" is that there is no merging of estates and liabilities of the spouses as each spouse retains their separate estate.[392] All assets acquired and liabilities incurred before the marriage was concluded, and everything earned or acquired during the course of the marriage, falls into the separate estate of each spouse.[393] It is as if the spouses were legal strangers to each other. There is no joint administration of assets, and neither do the spouses require each other's consent when entering into transactions or incurring debts.[394] However, spouses married out of community of property share mutual duties of spousal support, as well as responsibilities for the expenses of the joint household.[395] Spouses married out of community of property, however, can become joint owners of property and even joint holders of a bank account.[396] In contrast to the position of spouses married in community of property, spouses married out of community of property are merely ordinary co-owners as their shares in the joint property are divisible and can be sold to third parties.[397]

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388 *Distillers Corporation v Modise* 2001 (4) SA 1071 (O).
389 S 17(5) of 88 of 1984.
390 *Williams v Williams* (1896)13 SC 200.
391 Heaton and Kruger *South African Family Law* 116.
392 Barratt *et al Law of Persons and the Family* 310–311.
393 *Ibid*.
394 *Rohloff v Ocean Accident & Guarantee Corp Ltd* 1960 (2) SA 291 (A).
395 *Ibid*.
396 Mostert and Pope *The Principles of the Law of Property* (2010) 96–100.
397 *Ibid*.

If spouses wish to be married out of community of property, they have to conclude an antenuptial contract before they enter into a marriage. Where the intention of the parties is to keep their estates completely separate, the antenuptial contract must exclude both the community-of-property system, and the accrual system.[398] In order for an antenuptial contract to be valid against third parties, it must be registered in terms of section 87 of the Deeds Registries Act.[399]

The spouses can include any provision in their antenuptial contract, provided the provision is not impossible, illegal, contrary to public policy or contrary to the nature of marriage.[400] However, the main objective of an antenuptial clause is the regulation of the spouses' matrimonial property system.[401]

5 2 2 3 Marriage out of community of property including the accrual

Section 2 of the Matrimonial Property Act[402] provides that the accrual applies to all marriages entered out of community of property from 1 November 1984, unless the parties specifically elected to exclude the accrual system.

The accrual system is referred to as a type of deferred community-of-property system as it allows the spouses to retain separate estates during the subsistence of the marriage, but at the dissolution of the marriage, the spouses share in the financial growth that their respective estates have accrued during the course of the marriage.[403] In terms of section 3(2) of the Matrimonial Property Act, the accrual system allows the spouse whose estate shows no accrual or a smaller accrual than the estate of the other spouse, a share in the estate of the spouse who has a greater accrual, for an amount equal to half of the difference between the accrual of the respective estates of the spouses.

Generally, the accrual claim only arises at the dissolution of the marriage, but section 8 of the Matrimonial Property Act makes provision for immediate division if the conduct of one spouse seriously prejudices, or will seriously prejudice, the other spouse's right to share in the accrual at the dissolution of the marriage. Insofar as the calculation of the accrual is concerned, the accrual or growth of the estate is the amount by which the net value of the estate at dissolution exceeds the net value of the estate at commencement of the marriage.[404]

Despite the fact that the spouses retain separate estates during subsistence of the marriage, spouses married in terms of the accrual system must provide for household necessaries *pro rata* according to their financial

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398 Barratt *et al Law of Persons and the Family* 311–312.

399 47 of 1937.

400 *Ex parte Wismer* 1950 (2) SA 195 (C); Hahlo *The South African Law of Husband and Wife* 259.

401 Heaton and Kruger *South African Family Law* 83.

402 88 of 1984.

403 S 3(1) of 88 of 1984.

404 S 4(1)(*a*) of 88 of 1984.

means, and are jointly and severally liable to third parties who supply the household with necessaries. A reciprocal duty of support arises where the parties are married out of community of property, subject to the accrual system.[405]

5 2 3 The law of England and Wales

Despite the fact that there is no statutory code regulating matrimonial property regimes in England and Wales, the default matrimonial property system is out of community of property in terms of which each spouse retains ownership and control over all his or her own property, whether or not the property is acquired before or during the subsistence of the marriage.[406] Although the default matrimonial property regime is out of community of property, at divorce, little regard is paid to strict ownership rights when deciding how property should be allocated on the basis of need. Ownership of assets, especially those assets that were acquired before the conclusion of the marriage, may be taken into consideration when deciding how the surplus should be divided.[407]

5 2 4 Comparison

As mentioned previously, in Islamic law, the general rule as far as matrimonial property regimes are concerned, is that marriage is out of community of property with no sharing of assets or liabilities. During the subsistence of the marriage, the spouses are deemed to be legal strangers to each other, and therefore do not require consent from each other to enter into contracts or when incurring debts. In Islamic law, there is also no joint administration of assets acquired by the spouses during the subsistence of the marriage. Similarly, a marriage out of community of property with the accrual is also foreign to Islamic law. The parties can elect to enter into a marriage contract to regulate their marital property in a manner that best suits them. In contrast to the position described above, there are currently three matrimonial property regimes in operation in South Africa, each with its own advantages and disadvantages. In English law, while the default matrimonial property regime is marriage out of community of property, where the marriage is dissolved by divorce, little regard is paid to strict ownership rights.

6 CONCLUSION

From the discussion above, it is evident that, while Islamic, South African and English law all attach great importance and significance to the family and to the institution of marriage, these legal systems differ in respect of the legal protection afforded to the family. Islamic law only recognises the family unit that exists within the confines of a marriage. South African and English family law acknowledge that the family unit is much more complex than one

405 *Ibid*.
406 *Charman v Charman* [2007] EWCA Civ 503 par 124.
407 *Ibid*.

consisting merely of husband, wife and their children, but is inclusive also of other relationships. As a result, the ambit and scope of protection offered by the South African and English legal systems in respect of the family is extensive as it seeks to accommodate alternative family relationships. A case in point is the legalisation of same-sex marriages.

Furthermore, the adoption of certain international human rights legislation and the enactment of the Constitution dictated that South African family law undergo considerable changes so as to bring the law into conformity with international law, the Bill of Rights and the intrinsic values contained in the Constitution. While the importance of the Constitution as the supreme law of the land cannot be undermined, cognisance must be taken of the fact that the Constitution (and the Bill of Rights in particular) is centred on the individual and based on Western values and philosophies, which are fundamentally different to the principles of Islamic law. The question that needs to be addressed is, therefore, whether Western ideologies should in this day and age be used as the yardstick for marriages concluded in terms of Islamic law.

The fundamental difference between Islamic law on the one hand, and South African and English legal systems on the other, indicates that Islamic law will never completely comply with international equality rights or with the South African Constitution. The conflict between the right to equality, especially insofar as women's right to equality is concerned, and the right to religious freedom will always exist in respect of Islamic law. The fact that Islamic law is fundamentally different to both South African and English law does not make it wrong – merely different. It is therefore imperative that, if South African society is to overcome past discrimination and achieve the vision of equality that is fundamental to a constitutional democracy, the courts, as well as the State, must recognise and promote the full range of diversity that is prevalent in South Africa. This inevitably includes the recognition of Muslim marriages in South Africa.

MOTIVATING LARGE GROUPS OF LAW STUDENTS TO THINK CRITICALLY AND WRITE LIKE LAWYERS: PART 1

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SUMMARY

This two-part article explores two central themes – student motivation and critical thinking – as they relate to teaching law students how to write like lawyers. The article examines these two themes through the lens of a case study on a legal writing programme, the "Write it Like a Lawyer" [WiLL] programme implemented at the University of KwaZulu-Natal, Durban, in 2019. The design of the programme draws upon three distinct teaching principles – constructive alignment, learner participation and conversations in feedback. This article argues that by applying these principles when teaching legal writing, law students are motivated to engage critically with legal materials, thereby enabling them to produce persuasive, logical, coherent legal writing, containing well-substantiated arguments.

The article is in two parts.

Part 1 begins by focusing on the theoretical underpinnings of the main themes of the article as well as the teaching principles applied in the WiLL programme. It then goes on to describe the significance of the central themes to a legal writing programme such as WiLL.

Part 2 of this article moves on to a discussion of the three teaching principles – constructive alignment, learner participation (including blended-learning techniques) and conversations in feedback – and the manner in which these principles were used to achieve the desired outcomes in the WiLL programme. Finally, the second part of the article evaluates the relative success of employing the three principles in order to further student motivation and critical thinking in the programme. The article concludes with recommendations for improvements that could be implemented in future such programmes.

1 INTRODUCTION

> "Behind the scenes of a finished product is a messy process of exploratory writing, conversation, discarded drafts, midnight agony."[1]

[1] Bean *Engaging Ideas: The Professor's Guide to Integrating Writing, Critical Thinking, and Active Learning in the Classroom* (1996) 4.

Bean's statement highlights how difficult it is to produce a high-quality, persuasive piece of writing, which is exactly what hundreds of law students are required to attempt every year at the School of Law at the University of KwaZulu-Natal. Over the years, the concept of legal writing, and how to teach this important skill, have been debated by numerous academic writers.[2] Bridge notes that these writers are not always in agreement on how to approach this concept:

> "The existence of 'legal' writing is challenged; its major divisions are disputed; the possibility of teaching it is doubted. Agreement comes only at the point of bemoaning its low level".[3]

It stands to reason that teaching law students how to improve their basic legal writing skills in order to produce high-quality writing is difficult, and this task is not made any easier by the hours of tedious practice and countless drafts required to hone these skills. However, the task is not impossible and with a little imagination, it can be achieved. The key is student motivation. If law students' innate curiosity is piqued and they are motivated to engage on a sufficiently deep level with the learning process, their critical thinking skills can improve, which in turn can open the door to improving their ability to write like lawyers.

The aim of this two-part article is to explore two central themes – student motivation and critical thinking – as they relate to teaching law students how to write like lawyers. The two parts examine these two themes through the lens of a case study of a legal writing programme, the "Write it Like a Lawyer" [WiLL] programme implemented at the University of KwaZulu-Natal, Durban, in 2019. The programme's design draws on three distinct teaching principles – constructive alignment, learner[4] participation and conversations in feedback. This two-part article argues that by applying these principles when teaching legal writing, law students are motivated to engage critically with legal materials, thereby enabling them to produce persuasive, logical, coherent legal writing[5] containing well-substantiated arguments. All of these

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2 Various models of teaching legal writing exist: Boughey advocates for discipline-specific academic literacies (Boughey "Department-Specific Writing Centres Linked to Tutorial Programmes: The Quest for Quality" 2012 26(1) *SAJHE* 51–65); Broodryk talks of the benefits of writing-intensive courses across the law curriculum (Broodryk "Writing-Intensive Courses Across the Law Curriculum: Developing Law Students' Critical Thinking and Writing Skills" 2014 35(3) *Obiter* 453–456); Quinot writes of transformative legal education (Quinot "Transformative Legal Education" 2012 129 *South African Law Journal* 411); and Bean supports the concept of integrating writing, critical thinking and active learning (Bean *Engaging Ideas*). Greenbaum also summarises several authors' descriptions of the term "legal writing" (Greenbaum "Teaching Legal Writing at South African Law Faculties: A Review of the Current Position and Suggestions for the Incorporation of a Model Based on New Theoretical Perspectives" 2004 *Stellenbosch Law Review* 6).

3 Bridge "Legal Writing After the First Year of Law School" 1978 5(2) *Ohio Northern University Law Review* 411.

4 Note that the terms "learner" and "student" are used interchangeably throughout this article.

5 See Crocker "Facing the Challenge of Improving the Legal Writing Skills of Educationally Disadvantaged Law Students in a South African Law School" 2018 21 *PER/PELJ* DOI http://dx.do i.org/10.17159/1727-3781/2018/v21i0a1368, fn 13, which points out that Greenbaum summarises a number of authors' descriptions of the term "legal writing", all of which emphasise that the legal writer, in addition to displaying competent grammatical

principles embrace constructivist, learner-centred, blended-learning teaching methodologies and all are intricately linked by a scaffolded teaching-and-learning experience.[6]

As stated above, this article is split into two parts. Part 1 begins by focusing on the theoretical underpinnings of the main themes of the article as well as the teaching principles applied in the WiLL programme. It then goes on to describe a five-week legal writing intervention [WiLL] implemented at the School of Law, University of KwaZulu-Natal (UKZN), Howard College Campus, and the significance of the central themes to a legal writing programme such as WiLL.[7]

Part 2 of this article moves on to a discussion of the three teaching principles – constructive alignment, learner participation (including blended-learning techniques) and conversations in feedback – and how these principles were used to achieve the desired outcomes in the WiLL programme. Finally, part 2 evaluates the relative success of employing the three principles in order to further student motivation and critical thinking in the programme. The article concludes with recommendations for improvements that could be implemented in future such programmes.

2 THEORETICAL UNDERPINNINGS: INTRINSIC MOTIVATION IN TEACHING CRITICAL LEGAL WRITING

Learning how to write persuasively in legal discourse is challenging for the majority of law students at UKZN, not just because of the prevalence of second-language speakers in the student body,[8] but since it requires more than just writing clearly in order to communicate. Bean contends:

> "[W]riting instruction goes sour whenever writing is conceived primarily as a 'communication skill' rather than as a process and product of critical thought. If writing is merely a communication skill, then we primarily ask of it, 'Is the writing clear?' But if writing is critical thinking, we ask, 'Is the writing interesting? Does it show a mind actively engaged with a problem? Does it bring something new to readers? Does it make an argument?"[9]

skills, should also demonstrate an awareness of legal discourse and how to communicate within this community (Greenbaum 2004 *Stellenbosch Law Review* 6).

6 Quinot states that there is a need for "a fundamental shift from formalistic legal reasoning to substantive reasoning under a transformative constitution, for a shift towards a constructivist student-centred teaching model and for the recognition of a paradigm shift in knowledge from linear to non-linear, relational or complex." (see Quinot 2012 *SALJ* 412).

7 The programme formed part of the 2019 Legal Research, Writing and Reasoning 2nd-year LLB module (LRWR). Details of the LRWR module will be elaborated on below. However, the focus of this article is on the 5-week legal writing intervention that formed part of the LRWR module.

8 Note that it is not only the second-language students who struggle to assimilate legal writing skills. Most new law students are participating in legal discourse for the first time and, as such, are novice legal writers and will need to learn to apply the particular conventions attached to writing in this foreign discourse. See Crocker 2018 *PER/PELJ* 3. See also Rideout and Ramsfield "Legal Writing: A Revised View" 1994 *Wash L Rev* 60, speaking of the unwritten rules of legal discourse.

9 Bean *Engaging Ideas* 3–4.

Persuasive legal writing requires learners to think critically – like lawyers do – by considering numerous elements before beginning the drafting process. These include: identifying an argument and then articulating cogent assertions to justify that argument; considering the target audience; maintaining a logical flow throughout the piece; and, challenging the *status quo* and finding alternatives that can be justified by evidence. Therefore, the ability to think critically is inextricably entwined with the concept of writing like a lawyer and it is imperative that legal educators focus on honing the critical thinking skills of their students.[10] Bean maintains, "writing is both a process of doing critical thinking and a product communicating the results of critical thinking". [11] This seems to imply that good-quality legal writing requires the critical, creative use of relevant sources to develop and communicate a logical, persuasive argument. For example, an important aspect of thinking critically is to be able to use authority, not as an end in itself, but as a justification for a particular position. This focus on justification rather than authority helps develop learners' ability to think creatively in any given situation – a particularly important skill in the legal profession.[12] Quinot develops this idea of justification further by suggesting that in the context of a transformative constitutional democracy in which learners are being trained to practise, they must be encouraged to reflect critically on the underlying normative considerations behind legal authority when justifying any particular argument. This represents:

> "a shift from a 'culture of authority' to a 'culture of justification' – that is, an understanding of the validity of a legal position not because of the force behind it (e.g., as contained in a statute or court judgment) but because of the sound normative considerations upon which it is explicitly based – our pedagogy needs to reflect justification and not authority".[13]

The achievement of the twin goals of thinking critically and the effective communication of the results of that critical thinking is based on a number of building blocks. First, students must have an in-depth understanding of the legal materials, since they will otherwise find it difficult to engage with complex legal concepts at a sufficiently critical level. The inability to comprehend and engage at a critical level will inevitably lead to reduced student motivation, rendering many learners incapable of producing legal writing of the required standard.[14] Secondly, students must be motivated. It

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10 It is interesting to note that the specific outcomes attached to the first exit level outcome of the Bachelor of Laws degree required by the South African Qualifications Authority (SAQA) focus strongly on critical thinking attributes, including requirements that: "The learner has acquired the ability to analyse and comment upon the law critically. The learner has acquired knowledge and understanding of, and ability to critically analyse and comment upon current and controversial legal issues ...The learner has developed the ability to explain, critically analyse and comment upon the relationship between law and society." http://regqs.saqa.org.za/viewQualification.php?id= 22993.

11 Bean *Engaging Ideas* 3.

12 Quinot 2012 *SALJ* 417.

13 *Ibid*.

14 This necessity for law students to engage in the learning process at a deep level is reiterated in the SAQA standards for the Bachelor of Laws degree, which recommends that learning and assessment be integrated and that assessments be designed to achieve, *inter alia*: "An integration of the achievement of exit-level outcomes in a way which demonstrates

is argued that focusing on improving learner comprehension not only motivates students to engage at a deep level with the information, but also gives them the intellectual space to flex their critical thinking muscles in order to justify their arguments effectively.[15]

The key, therefore, to teaching critical thinking and writing skills lies in student motivation.[16] Academic engagement, however, implies more than simply being motivated to work hard, listen to instructions or respond effectively to questions posed during class. Newmann, Wehlage and Lamborn explain:

> "Engagement involves psychological investment in learning, comprehending, or mastering knowledge, skills, and crafts, not simply a commitment to complete assigned tasks or to acquire symbols of high performance such as grades or social approval. Students may complete academic work and perform well without being engaged in the mastery of a topic, skill, or craft. In fact, a significant body of research indicates that students invest much of their energy in performing rituals, procedures, and routines without developing substantive understanding."[17]

Inspiring a large, diverse group of students to engage with the difficult, tedious, creative process of legal writing on a deep psychological level can only be achieved if learners are intrinsically motivated to learn. Learners who are intrinsically motivated to learn are driven to participate in the process, not only because they may want to attain a good mark for the module or to impress the lecturer, but simply because they love learning or because they want to understand.[18] The advantages of intrinsic motivation are well documented and include increasing learners' ability to comprehend more complex materials, enhancing creativity and promoting long-term memory.[19]

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a 'deep' approach to learning and shows that the purpose of the qualification as a whole has been achieved." http://regqs.saqa.org.za/viewQualification.php?id=22993.

15 Curtis and Karp make an interesting point that critical reading and critical thinking are inextricably linked: "Critical reading absolutely encompasses the concept of 'critical thinking'. These two skills marry the finding of meaning with the evaluating of meaning, and indivisibly work together. Overall, critical skills should not be treated as something to be isolated – such as with specific courses or texts – but rather should be treated as a part of the atmosphere of every classroom by every teacher." (Curtis and Karp "'In a Case, in a Book, They Will Not Take a Second Look!' Critical Reading in the Legal Writing Classroom" 2005 41 *Williamette Law Review* 293 295, making reference to Carr "How Can We Teach Critical Thinking?" www.risd.k12.nm.us/instruction/criticalthinking.htm.

16 The idea of student motivation is specifically mentioned in the University of KwaZulu-Natal Policy on Assessment, in relation to providing feedback to students, in which it is stipulated that feedback should be "formulated in such a way that the student(s) can see how to improve their learning and are motivated to do so". CO/01/0312/2012 last updated 3/9/2018. https://soe.ukzn.ac.za/mdocs-posts/policy-on-assessment.

17 Newmann, Wehlage and Lamborn *The Significance and Sources of Student Engagement in Student Engagement and Achievement in American Secondary Schools* (1992) 12.

18 Voke "Motivating Students to Learn" 2002 28 *Student Engagement* http://www.ascd.org/publications/newsletters/policypriorities/feb02/num28/Motivating-Students-to-Learn.aspx. See also Crocker 2018 *PER/PELJ* 11–12.

19 Voke http://www.ascd.org/publications/newsletters/policypriorities/feb02/num28/Motivating-Students-to-Learn.aspx.

So how do we inculcate such intrinsic motivation in our students? Part of the process is for educators to inspire their learners to excellence.[20] One way of providing this inspiration is to convince learners that lawyerly writing need not be a boring, lifeless exercise. Bridge makes the point that "writing is peculiarly personal; style can be more identifiable than handwriting".[21] But what about *legal* writing? Is it possible that writing like a lawyer need not be dull and tedious, but that legal writing can have some soul? This article argues that it is a misconception that legal writing is a one-size-fits-all deal and that individual writing styles must be forsaken in order to produce a clear, concise piece of written work.[22] In fact, Bridge writes, "If a separate art of legal writing exists, it does not escape the influence of the writer. To the extent any writing becomes disembodied prose, it is unsuccessful communication between the writer and the reader."[23] In other words, effective legal writing can indeed have a soul. It is up to legal educators to convince their students that there is an art to producing an elegantly drafted, truly persuasive piece of legal writing – one that is clear, concise and unambiguous, without being dry and dull.[24] Calleros adds to this, stating that infusing a piece of legal writing with an individual writing style can actually enhance the persuasiveness of the piece:

> "Clear, concrete, concise legal writing can and should be active, vivid, and engaging. Indeed, you can enhance the persuasive effect of your writing with a telling metaphor, a dramatic phrase, or an engaging description of events that tells a client's story accurately but in a compelling fashion. In short, 'law does have a poetic dimension', and the narrative techniques employed in a novel can play a role in legal advocacy. If you can grab and hold the reader's rapt attention with clear, concise, engaging writing, your memorandum or brief will drive your points home like a home run with the bases loaded."[25]

However, motivating learners to put the time and effort into their writing that is required to elevate basic writing skills to a level of excellence requires a more creative approach to teaching than merely allowing some leeway in personal legal writing styles. Learners need to care about their subject

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20 In this respect, Bridge comments: "To attain minimal vocational proficiency is too narrow a goal, if it be a goal at all. If the law remains, or retains pretension of being 'one of the principal' literary professions, then lawyers, law students, and law teachers must acquire and nurture the desire for excellence." (Bridge 1978 *Ohio Northern University Law Review* 431.)

21 Bridge 1978 *Ohio Northern University Law Review* 411.

22 Allowing students to reflect their individual writing styles in their legal writing will, of course, raise further questions. Should learners earn marks for creativity or reflecting their individual writing styles? What proportion of the assessment mark should be allocated to this outcome? What are the minimum legal conventions that must still be met?

23 Bridge 1978 *Ohio Northern University Law Review* 411.

24 In keeping with the idea that excellent legal writing will be infused with soul, Quinot posits that legal educators must take an entirely different approach to legal teaching and must consider that we are teaching within a transformative constitutional democracy. This means that legal writing, in addition to being concise and unambiguous, must embody the social context within which it operates. Quinot states that "matters of morality and policy, even politics, can no longer be excluded from legal analysis. This means that such matters should also enter the law lecture hall … The door of the law lecture hall can no longer be shut to what is going on outside it." (Quinot 2012 *SALJ* 415.)

25 Calleros *Legal Method and Writing* (2014) 5.

matter and need to have a sense that learning to communicate effectively in writing could make a difference in a real, practical way. A way to stimulate student motivation and to develop in our learners a will to think critically – to breathe some life into the concept of legal writing – is to pique their natural curiosity by offering them interesting, relevant, contextual problems to solve. Bean believes in "the natural, healthy, and motivating pleasure of problems – and in the power of well-designed problems to awaken and stimulate the passive and unmotivated student."[26]

Thus, it is argued that inspiring students to excellence in legal writing is a two-step process. The first is to motivate learners intrinsically by showing them that legal writing can have soul – that a creative, personal style can enhance persuasiveness, and be used to solve interesting, complex, relevant real-world problems. The second step is to encourage learners to engage at a sufficiently deep level to allow them to think and write critically. It is submitted that ensuring that these curious, enquiring minds remain motivated and critically engaged requires the implementation of three teaching principles: constructive alignment (offering learners module materials that are constructively aligned and contextually relevant); learner participation (using teaching techniques that encourage class participation); and conversations in feedback (individualising the educator-learner contact).

The theoretical underpinning of these three teaching principles is discussed below with the practical application of the principles in the WiLL programme being discussed in detail in part 2 of this article.

3 THEORETICAL UNDERPINNING OF THREE NECESSARY TEACHING PRINCIPLES

3 1 Constructive alignment

The first key teaching principle to be considered when designing an effective legal writing programme is constructive alignment. If a module is constructively aligned it will enhance learner comprehension by ensuring that the programme materials, teaching techniques and assessments are all logically linked and presented in order to achieve the module's intended learning outcomes (ILOs). A focus on learner comprehension stimulates intrinsic motivation by giving learners intellectual space to engage deeply and critically with the module materials. Biggs succinctly explains the process of implementing constructive alignment in a module:

> "In setting up an aligned system, we specify the desired outcomes of our teaching in terms not only of topic content, but in the *level of understanding* we want students to achieve. We then set up an environment that maximises the likelihood that students will engage in the activities designed to achieve the intended outcomes. Finally, we choose assessment tasks that will tell us

[26] Bean *Engaging Ideas* 2–3.

> how well individual students have attained these outcomes, in terms of graded levels of acceptability. These levels are the grades we award."[27]

When deciding on ILOs for a module it is important to bear in mind that learners must acquire two different kinds of knowledge – both declarative and functioning knowledge. Thus, in addition to knowledge that learners are able to declare or reproduce, whether orally or in writing, they must also acquire knowledge that serves a function. With regard to legal writing, law students must acquire knowledge that will enable them to think and write like lawyers in a transformative South African context or, as Biggs points out:

> "Understanding makes you see the world differently, and behave differently towards that part of the world. We want lawyers to make good legal decisions, doctors to make accurate diagnoses, physicists to think and behave like physicists."[28]

Once the ILOs of a module have been defined, relevant teaching activities for the module must be determined and appropriate assessments must be designed, so as to allow learners to assimilate both declarative and functioning knowledge. Biggs emphasises the need for assessment tasks to mirror ILOs and that these must "refer to sought-for *qualities of performance*, and it is these that need to be stated clearly, so that the students' actual learning outcomes can be judged against those qualities."[29]

Lastly, educators should not only include constructive alignment in the design of any legal writing programme, but they should also take the time to explain to learners participating in the programme how and why it has been designed in this way. This should happen in the introductory lecture as it will awaken learners to the persuasive benefits of logical linkages – whether these links be in a programme or in a written work. Modelling logical linkages in this manner facilitates the development and understanding of how mindful alignment and analysis work together to deepen comprehension, enhance critical thinking, and inspire intrinsic motivation.

Effective constructive alignment of a legal writing programme enhances student comprehension of the materials associated with the legal writing activities presented in the programme, leading to much-needed intrinsic motivation for learners. Such an approach also ensures that all programme materials and activities (chosen for their contextual relevance) support critical thinking ILOs, which are essential to thinking like a lawyer; such skills are then rendered a focus of the programme rather than an unintended benefit.

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[27] Biggs "Aligning Teaching for Constructing Learning" The Higher Education Academy https://www.researchgate.net/profile/John_Biggs3/publication/255583992_Aligning_Teaching_for_Constructing_Learning/links/5406ffe70cf2bba34c1e8153.pdf (accessed 2019-07-29).

[28] *Ibid*.

[29] *Ibid.*

3 2 Learner participation

The second key teaching principle to be considered when designing an effective legal writing programme is learner participation. This principle is best implemented by employing a constructivist teaching framework. Quinot agrees, maintaining that:

> "learning can only occur through construction of knowledge, teaching must involve learners as active participants. The role of the teacher thus changes from that of the sole and authoritative holder of knowledge that must be imprinted on the blank slates of her students to a role of facilitator that must guide students' own efforts at construction".[30]

In addition to using constructivist teaching techniques, the design of class activities should embrace a scaffolded learning experience, which has been described as a "process that enables a child or a novice to solve a problem, carry out a task or achieve a goal which would be beyond his unassisted efforts". [31] In this respect, Vygotsky's theory of the zone of proximal development, which incorporates the idea of a relative expert in the field giving guided instruction to learners, is central. This theory is defined as:

> "the distance between the actual developmental level as determined by independent problem solving and the level of potential development as determined through problem solving under adult guidance or in collaboration with more capable peers".[32]

By actively participating in discussions on the materials in order to contextualise the information, learners are able to construct their own knowledge as well as play an active role in the knowledge acquisition of their peers. In this way, they are able to enhance their own understanding while simultaneously motivating one another to produce high-quality, persuasive pieces of writing, rather than simply writing to complete an assigned task as quickly as possible. Hedegaard links Vygotsky's theory of the zone of proximal development to the idea of contextualising learning, saying that, "(t)he underlying assumption behind the [Vygotsky] concept is that psychological development and instruction are socially embedded; to understand them one must analyse the surrounding society and its social relations".[33] Thus, it is essential that active, scaffolded learning opportunities be embedded in any legal writing programme.

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30 Quinot 2012 *SALJ* 420.

31 See discussion on the concept of scaffolded teaching in Crocker 2018 *PER/PELJ* 5, quoting Cheyne and Tarulli "Dialogue, Difference and Voice in the Zone of Proximal Development" in Daniels *An Introduction to Vygotsky* (2005) 135, quoting Wood, Bruner and Ross "The Role of Tutoring in Problem Solving" 1976 17 *Journal of Child Psychology and Psychiatry* 89–100.

32 Vygotsky *Mind in Society: The Development of Higher Psychological Processes* (1978). See discussion on Vygotsky's definition of the zone of proximal development in Crocker 2018 *PER/PELJ* 5.

33 See Crocker 2018 *PER/PELJ* 11 quoting Hedegaard "The Zone of Proximal Development as Basis for Instruction" 227 in Daniels *An Introduction to Vygotsky* 227.

In the constructivist teaching environment, however, the teaching and learning process is more complex than the simple transmission of information from educator to learner. Quinot and Greenbaum comment:

> "The teaching-learning process is non-linear, that is knowledge does not flow from the teacher to the student in one direction. There is a complex interaction between what the teacher brings to and does in class and what the student brings to and does in class that defines learning."[34]

Thus, scaffolded learning requires not only vertical learning between instructor and learner, but also horizontal peer learning between learners themselves. In this respect, Quinot comments:

> "[Constructivism] implies that the richness of the knowledge community becomes a key consideration in effective teaching. Since students learn by engaging, not just on a vertical level with the teacher but also critically on a horizontal level with peers, diversity in the learning community becomes a strength, even a prerequisite. As students actively engage with a greater variety of background experiences (that is, with others that bring very different existing knowledge bases to the knowledge community) their own existing knowledge bases are increasingly challenged."[35]

It is at this point of constructivist module design that challenges such as a lack of resources that may be present at the institution become apparent.[36] However, Biggs has a refreshingly positive take on these challenges, saying that these very problems might, in fact, force educators to include inherently constructivist learning activities that encourage deep learning and the acquisition of functioning knowledge. He states:

> "In fact, problems of resourcing conventional on-campus teaching, and the changing nature of HE, are coming to be blessings in disguise, forcing learning to take place outside the class, with interactive group work, peer teaching, independent learning and work-based learning, all of which are a rich source of relevant learning activities."[37]

In addition to providing intrinsic motivation to engage deeply with learning materials, active class participation creates opportunities for learners to think critically. Referencing Kurfiss,[38] Bean posits that when planning a module with a focus on critical thinking, learners should be presented with "'problems, questions, and issues' that make a course 'assignment centred, rather than text or lecture centered' and holds students responsible for 'formulating and justifying' their sources orally or in writing". He also emphasises the importance of writing assignments "because they are perhaps the most flexible and most intensive way to integrate critical thinking

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34 Quinot and Greenbaum "The Contours of a Pedagogy of Law in South Africa" 2015 *Stell LR* 1 36.

35 Quinot 2012 *The South African Law Journal* 421.

36 It is an unfortunate reality that these kinds of challenges have been ongoing at the UKZN School of Law. For a discussion on the challenges encountered as far back as 2009 when implementing the first legal writing programme at UKZN, see Crocker 2018 *PER/PELJ* 21–23.

37 Biggs https://www.researchgate.net/profile/John_Biggs3/publication/255583992_Aligning_Teaching_for_Constructing_Learning/links/5406ffe70cf2bba34c1e8153.pdf.

38 Kurfiss *Critical Thinking: Theory, Research, Practice, and Possibilities* (1988).

tasks into a course and because the writing process itself entails complex critical thinking", in addition to "class discussions, small group activities, and other teaching strategies that encourage students to work collaboratively to expand, develop, and deepen their thinking".[39]

At this point, it must be noted that class participation can be enhanced by using a blend of constructivist teaching techniques and e-learning opportunities. It is imperative to consider participation in the wider blended-learning community and the impact that e-learning and digital information transmission has on teaching and learning. The Internet has revolutionised the way in which information can be accessed and manipulated, changing the very nature of teaching and learning. With more and more learners having access to digital information, be it on computer or smartphone, research and information gathering has become infinitely more dynamic and educators need to swim with these digital tides of change.

Quinot and Greenbaum maintain that the change in the way information is accessed, manipulated and assimilated via digital formats requires educators to incorporate blended-learning methodologies into their teaching repertoire so as to remain current with changing technology:

> "It seems evident that different (or at least varied) skills are required to navigate this new knowledge world. Given the mode and ease of access to information, there is arguably less need for memorising large portions of detailed information and more need for skills in finding and filtering information. The more fluid nature of the knowledge paradigm calls for a move away from a linear step-by-step approach to learning, to a more relational or networked approach."[40]

In addition to this, multimedia tools can significantly enhance the motivational aspect of contextualising the subject matter – for example, by showing *inter alia* video clips of roleplays, news reports, and debates to illustrate real-world challenges. Quinot and Greenbaum advocate:

> "[Information and communications technology (ICT)] thus makes it possible for law teachers to incorporate carefully designed real-world contexts into the learning process in a manner which is very difficult (if not impossible) to achieve in any other way. ICT can thus help the law teacher to bring the real-world context to the class without the logistical challenges of taking the class to the real-world context."[41]

Thus, boosting learner participation by using scaffolded learning techniques that take advantage of horizontal as well as vertical learning opportunities in a blended-learning environment, will increase learners' intrinsic motivation as well as improve their critical thinking skills. This has a direct impact on the achievability of the ILOs on critical thinking skills, as learners are motivated to grapple with critical thinking, which is inherent to thinking like a lawyer.

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39 Bean *Engaging Ideas* 5.

40 Quinot and Greenbaum 2015 *Stell LR* 37.

41 Quinot and Greenbaum 2015 *Stell LR* 54.

3 3 Conversations in feedback

The third and final key teaching principle to be considered when designing an effective legal writing programme is that of having conversations in feedback. Learners need to be guided through the process of how to write critically like lawyers through a series of conversations held with an expert in the field. Laurillard posits that, in order for effective teaching and learning to take place, it should occur within a "conversational framework" – that is, "a dialogue must take place somewhere, even if it is only in the learner's mind".[42] This idea is taken further by Flower who recommends implementing a "framework for enquiry" when engaging in the learning process. This system of enquiry, she maintains, should go further than a simple dialogue and should take the more complex form of a negotiation as well as encourage interpretation of the knowledge being acquired.[43]

Gamoran and Nystrand link this idea of holding a conversation in learning to increased student engagement:

> "When students' ideas are taken seriously, this tells the students that they are important members of a learning community, and the work of responding to teachers' questions is more authentic because the students can actually influence the course of the conversation. In this sense, questions that take students seriously promote engagement."[44]

These conversations in feedback are a key element to improving student motivation and critical thinking. It is argued that actively engaging learners in conversations in formative feedback during the assessment process and requiring them to justify the critical thinking behind their arguments helps

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[42] Laurillard *Rethinking University Teaching: A Framework for the Effective Use of Educational Technology* (1993) 105. See general discussion on Laurillard's "conversational framework" in Crocker *The Practical Considerations of Implementing Online Learning Technology at the Howard College School of Law, University of Natal, Durban, Using the Legal Method Module [DLA2LGM] as a Case Study, in Order to Develop an Appropriate Strategy for Its Implementation* (master's thesis, University of Natal, Durban) 2003 29–30.

[43] See general discussion on Flower's "framework for enquiry" in Crocker *The Practical Considerations of Implementing Online Learning Technology* 30–31; Maharg and Paliwala "Negotiating the Learning Process With Electronic Resources" in Burridge, Hinett, Paliwala and Varnava (eds) *Effective Learning and Teaching in Law* (2002) 90.

[44] Gamoran and Nystrand *Taking Students Seriously in Student Engagement and Achievement in American Secondary Schools* (1992) 40–41. Kearney and Beazley support this point by referring to Socratic teaching techniques, which they describe: "In the traditional law classroom, teachers who use Socratic method ask questions designed to challenge their students' assertions and assumptions about cases, laws, and principles. In figuring out the answers to these questions, the students achieve a better understanding of both the legal issues being discussed and the process of legal analysis." Just as Socratic methods are used to get students thinking critically like lawyers, Kearney and Beazley maintain that these techniques should also be used to get students writing critically like lawyers. They posit, "Good writing results from good thinking. It makes sense, then, that tools used to teach good thinking should be combined with tools used to teach good writing when law students are learning how to conduct written legal analysis." (Kearney and Beazley "Teaching Students How to 'Think Like Lawyers': Integrating Socratic Method With the Writing Process" 1991 64 *Temple Law Review* 885–887.)

them become invested in their writing.[45] This further stimulates intrinsic motivation to elevate their standard of writing and to think more critically about what they want to say. It also serves the important purpose of ensuring that learners get exposure to what feedback means and how it can be used.

It is also important that these feedback conversations form part of a process. Writing in any form, but particularly legal writing, can be an intensely personal and sometimes overwhelming process; it is often slow and frustrating in the refinement stages – exacerbated by the amount of time and effort that needs to be invested into each persuasive word. Thus, Bean maintains that the progression of legal writing from first draft to final draft is a process that students should be forced to follow. In this way, learners are discouraged from neglecting to revise a first draft, and then attempting to submit an unrevised version as a final draft.[46] Greenbaum also promotes the value of this process in writing and suggests using repetition in feedback throughout each stage of the process in order to motivate learners:

> "Students should receive feedback on their writing during the various stages in the composing process, and revising takes on a new significance as students develop their own valid professional and personal voices."[47]

Novice writers therefore need to be guided carefully through the writing process by a series of conversations with a relative expert in the field providing feedback on each of their attempts. Bridge makes the point that this guidance or supervision is an essential element in the writing experience:

> "In legal drafting, in seminars, in law review work, or in moot court work, a key element is supervision. Students must have expert support accessible to them. Readers who will review a written product, criticize its organization, content, and underlying assumptions, and suggest improvements are crucial to the benefit derivable from the experience."[48]

These conversations in feedback can be provided in a number of different settings, each time adding to the process valuable intrinsic motivation and the opportunity to think critically. Examples include: delayed feedback given orally by a module lecturer in a large group setting some days after evaluating class work; instantaneous feedback given orally by a module lecturer in more intimate, small-group settings as learners work on a task; peer feedback given orally in small-group settings; delayed, written feedback given by a module lecturer on formal module assessments; instantaneous

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45 Specific mention is made of the importance of providing ongoing formative feedback to students in the SAQA standards for the Bachelor of Laws degree wherein it is stated: "Learning and assessment should be integrated. Ongoing formative assessment is required so that learners are given feedback on their progress in the achievement of specific learning outcomes." http://regqs.saqa.org.za/viewQualification.php?id=22993.

46 Bean *Engaging Ideas* 8.

47 Greenbaum 2004 *Stellenbosch Law Review* 14.

48 Bridge 1978 *Ohio Northern University Law Review* 424.

oral feedback given in one-on-one consultations with a module lecturer; and feedback given by peers.[49]

The two central themes of student intrinsic motivation and critical thinking, as well as the three key teaching principles discussed above, were applied when designing the WiLL programme. The practical application of the teaching principles that were used to encourage student motivation, leading to a deep, critical engagement with the programme content, are discussed in the second part of this article. Below are details of the structure of the WiLL programme.

4 THE 2019 LEGAL RESEARCH WRITING AND REASONING MODULE AND THE WiLL PROGRAMME

The LRWR module is an 8-credit, semesterised, second-year LLB module with an enrolment of over 300 learners per semester. Learners must each attend one double-period contact session per week. Over the past few years, in order to reduce the class size to approximately 150 learners per contact session, the class was split in half and the lecture was repeated to each group every week. The module content covered theory and practical exercises in critical thinking and legal writing skills, with some practical application. In 2019, however, the LRWR module was reimagined using a transformative, constructivist teaching pedagogical framework. The first part of the module kept a similar structure, with the class being split in two and lectures repeated once each week. These large-group lectures covered content on the theory of critical thinking and formed an essential part of the module, providing a theoretical underpinning for the materials and activities that were to follow. The latter part of the module introduced the WiLL programme, which took on a small-group, participatory, skills-based lecture format. This programme was designed, implemented and administered by a School of Law lecturer in consultation with an applied linguist working in the School of Law; it introduced an active learning ethos so as to encourage the students to put in the practical, hard work that such a module requires.[50]

The structure of WiLL introduced a further reduction in class sizes with the class being split into six groups of 50 students each. Learners were required to attend one weekly double-period contact session. Every week, learners had to complete lecture preparation tasks to enable them to participate in group-work activities during lectures. Assessment of the WiLL programme (comprising two written assignments worth 20 per cent each) formed 40 per cent of the assessment for the entire LRWR module. The first assignment

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[49] Bridge notes that student-controlled feedback can be just as helpful as that given by faculty: "The law review experience demonstrates that supervision need not be faculty supervision, as long as the critical reading is intelligent, careful and demanding." (Bridge 1978 *Ohio Northern University Law Review* 424.)

[50] Note that some of the positive features of previous writing interventions implemented at the UKZN Law School were incorporated into the programme. See Crocker 2018 *PER/PELJ* 19–20.

required learners to draft a case summary and the second assignment required them to compose an article for a legal newspaper column.

The materials, formal lecture preparation, lecture tasks and assessments were all carefully chosen and constructively aligned so as to be congruent with a constructivist teaching paradigm and blended-learning practices.

5 CONCLUSION

This article as a whole identifies two themes that are central to the teaching of legal writing to law students: student motivation and critical thinking. An examination of these themes through the lens of the legal writing programme case study, WiLL, reveals three teaching principles that were applied when developing the programme and that are closely linked to the central themes. These principles are constructive alignment, participation and conversations in feedback. All three principles, in addition to being closely linked to the themes of the programme are intricately intertwined, both with respect to their links within educational theory and in their practical application; thus, all must receive equal attention within the programme. This requires a commitment to student-centred, critical teaching using constructivist teaching methods.

Part 1 of this article began by giving an overview of the theoretical underpinnings of the two central themes, discussing, in particular, the way in which they relate to teaching law students how to write like lawyers. Here the importance of intrinsically motivating learners to engage deeply with the concept of critical legal writing – as well as with the programme materials used to facilitate the acquisition of this skill – was considered. It is argued that educators running an effective legal writing programme must encourage learners to want to learn and to want to be excellent at legal writing. In other words, learners must be intrinsically motivated to learn how to write like lawyers. This is not an easy task, but intrinsic motivation can be inspired in various ways, such as by revealing that legal writing can have soul – the idea that legal writing need not be dull but instead can have a personal style that assists in enhancing its persuasiveness. Learners can also be enticed into engaging more deeply with the writing that they embark upon by having their interest piqued with contextualised, relevant, interesting problems that they can solve in order to make a difference. An important part of this process is to ensure that learners comprehend the materials at a deep, critical level. This allows them the space to engage and think deeply about how to solve the problems with which they are presented using their legal writing skills. In other words, learners must be given every opportunity to excel.

The focus in part 1 of this article then shifted to a discussion of the theoretical underpinning of the three key teaching principles that were employed when designing the WiLL programme. It was shown that each of these principles furthers student intrinsic motivation and maximises the opportunities for learners to engage in critical thought and critical legal writing.

Finally, part 1 of this article gave a detailed description of the ethos and background leading to the development of the WiLL programme, which was

designed with the three key teaching principles in mind, in the context of the central themes and learning how to write like a lawyer.

Part 2 of this article explores the practical application of the four teaching principles identified as essential when implementing the WiLL programme. It scrutinises the importance of the constructive alignment of the module and the careful selection of module materials and classroom activities within a constructivist, learning environment focusing on participation and conversations in feedback. Thereafter, part 2 identifies challenges experienced and suggests recommendations for improvement. Final conclusions are then drawn in an attempt to plan a way forward within the context of a contemporary South Africa, balancing the needs of a diverse student body and the necessity to motivate law students to apply critical thinking techniques.

6 ACKNOWLEDGEMENT

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THE VAT TREATMENT OF CRYPTOCURRENCIES IN SOUTH AFRICA: LESSONS FROM AUSTRALIA*

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SUMMARY

Cryptocurrencies are revolutionary digital currencies used by people on a peer to peer network. Cryptocurrencies are predominantly used as a payment method in business transactions. However, challenges arise with cryptocurrency borne transactions due to the lack of universal accepted classification of cryptocurrencies, the result of which leads to unintended tax consequences for cryptocurrency users. This article examines the recent amendment to the Value-Added Tax (VAT) 89 of 1991 pertaining specifically to the VAT treatment of cryptocurrencies in South Africa. Currently, transactions in cryptocurrencies are deemed to be financial services in South Africa. This means that a supply of any cryptocurrency in South Africa is exempt from VAT. This article makes a comparison with the Australian legislative framework to determine how cryptocurrencies are treated for VAT/GST purposes in that country. Although the move to regulate cryptocurrencies is welcomed, this article argues that cryptocurrency activities are incorrectly legislated as financial services in the VAT Act.

1 INTRODUCTION

Since its inception in 2009, cryptocurrencies have revolutionised money markets, the financial sector and electronic commerce transactions while potentially creating new business models in the process. The idea of using a perceived digital decentralised currency as a payment method in exchange for goods and services has proven to be indispensable for individuals and businesses. However, part of the challenge with cryptocurrency-borne transactions is the seemingly lack of an appropriate uniform legislative framework addressing the risks and tax implications thereof. This is compounded by a lack of universal classification of cryptocurrencies, leading to unintended tax consequences for cryptocurrency users and merchants.

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For any government to do its core functions efficiently, it requires revenue. The revenue collected is generated from taxes with the aim of addressing core functions such as financing public expenditure and promoting socio-economic growth.[1] It is trite that states need additional streams of revenue and improved revenue systems.[2] The reality is that imposing taxes on economic activity is one of the most efficient ways for governments to raise revenue. It stands to reason that tax authorities should endeavour to broaden the tax base in order to increase the revenue pool.[3]

The advent of the Taxation Laws Amendment Act 23 of 2018 introduced changes to the Value-Added Tax 89 of 1991 (the VAT Act) in so far as cryptocurrencies are concerned. In terms of the VAT Act, cryptocurrencies are deemed to be financial services and therefore exempt from VAT.[4]

The purpose of this article is to argue for the treatment of cryptocurrencies as taxable supplies for VAT purposes. To support this argument, the article explores the Australian legislative framework that specifically deals with the VAT/Goods and Services Tax (GST)[5] treatment of cryptocurrencies. The way Australia treats cryptocurrencies can be used as a model for the VAT treatment of cryptocurrencies in South Africa. Australia is selected as a comparative country as it currently has the most comprehensive guidelines and legislation pertaining to the VAT/GST treatment of cryptocurrencies.

This article concludes by making recommendations for the treatment of cryptocurrencies as a taxable supply for VAT purposes.

In this article "cryptocurrencies" and "Bitcoin" are used interchangeably.

2 THE CHARACTERISTICS OF CRYPTOCURRENCIES

The success and popularity of cryptocurrencies has largely been attributed to two important aspects. Firstly, cryptocurrency transactions are anonymous in nature. Users buy, sell and exchange cryptocurrencies with other users without revealing one's identity. Secondly, transactions involving cryptocurrencies do not incur any fees.[6] The lack of fees translates into significantly lower transaction costs because users transact with each other without the aid of an intermediary.[7]

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1 Croome, Oguttu, Muller, Legwaila, Williams, Kolitz and Louw *Tax Law An Introduction* (2013) 8.

2 Bird and Gendron *The VAT in Developing and Transitional Countries* (2007) 8.

3 There is a caveat to this, however. When considering an expansion of the tax base, it is important to consider the principles of taxation like certainty, convenience, equity, cost effectiveness and efficiency.

4 S 2 of the VAT Act.

5 GST and VAT are used interchangeably throughout this article.

6 Bal "Taxing Virtual Currency: Challenges and Solutions" 2015 43(5) *Intertax* 381. See also Van Alstyne "Why Bitcoin has Value: Evaluating the Evolving Controversial Digital Currency" 2014 57(5) *Communications of the ACM Journal* 30 30.

7 Brito, Anning, Friedman, Taylor, Strauss, Brazell, Von Unruh, Brailsford, Cleary and Hoegner *The Law of Bitcoin* (2015) 7.

The growth of cryptocurrencies has been precipitated by what is known as the network effect.[8] What this means in simple terms, is that the more people use and exchange cryptocurrencies (such as bitcoins) in the digital currency sytem,[9] the more valuable the cryptocurrency (Bitcoin) becomes.[10] The reason cryptocurrencies have value is because people receive and use it as a form of money.[11] However, cryptocurrencies have a tendency to fluctuate due to uncertainty regarding its value and the attempts by jurisdictions to regulate it.[12] According to Blundell-Wignall, the reason for bitcoins' volatility is that:

> "There is no clear intrinsic value or agreed valuation method, and certainly no Bitcoin central bank prepared to intervene to make the price more stable, which would violate the fixed supply element."[13]

The volatility component creates uncertainty for potential users, investors, businesses, governments and tax authorities. Due to its volatility, Nabilou argues that the use of cryptocurrencies as a unit of account will be difficult.[14] For this reason, Nabilou also argues that it is preferable for individuals to use cryptocurrencies as a store of value (an asset) as opposed to a unit of account.[15]

Regulation of cryptocurrencies remains one of the most difficult challenges for governments and tax authorities. This is because transactions involving cryptocurrencies do not require the intervention or facilitation of third parties. Instead, cryptocurrencies are created and exchanged through a decentralised global network.[16] The decentralised global network is not controlled by any government or state.

3 UNDERSTANDING THE NATURE OF CRYPTOCURRENCIES

From the outset, it is important to understand and define cryptocurrencies. In as much as governments and tax authorities seek to regulate cryptocurrencies, comprehensive regulation cannot properly take place if the

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8 Bashir *Mastering Blockchain: Distributed Ledgers, Decentralization and Smart Contracts Explained* (2017) 115.

9 It should be noted that "Bitcoin" with a capital "B" refers to the cryptocurrency as a brand of digital currency as opposed to other cryptocurrency brands such as Litecoin, Ethereum and Tether whereas "bitcoin" with a lower case "b" refers to the denomination of the Bitcoin cryptocurrency in use.

10 Bashir *Mastering Blockchain: Distributed Ledgers, Decentralization and Smart Contracts Explained* 115.

11 Van Alstyne 2014 *Communications of the ACM Journal* 30.

12 Callahan "The Bitcoin Price is Fluctuating: What Are the Reasons?" (6 June 2018) https://www.coinspeaker.com/bitcoin-price-fluctuating-reasons/ (accessed 2019-06-03).

13 Blundell-Wignall "The Bitcoin Question: Currency Versus Trust-Less Transfer Technology" 2014 37 *OECD Working Papers on Finance, Insurance and Private Pensions* 8.

14 Nabilou and Prum "Ignorance, Debt and Cryptocurrencies: The Old and the New in the Law and Economics of Concurrent Currencies" (2018) *Journal of Financial Regulation* http://orbilu.uni.lu/bitstream/10993/38830/1/SSRN-id3121918.pdf (accessed 2019-07-22) 7.

15 *Ibid*.

16 The original decentralised global network is known as "Bitcoin" with a capital "B".

same governments and tax authorities do not adequately understand the nature and activities relating to cryptocurrencies.[17] It is quite likely that jurisdictions interpret the meaning of cryptocurrencies differently and the result is a lack of uniformity on the VAT treatment for cryptocurrencies.

The term cryptocurrency is often used to denote "virtual currency". A cryptocurrency is a maths-based decentralised convertible virtual currency that is protected by cryptography.[18] From this definition, it can be said that a cryptocurrency is a subdivision of a virtual currency.[19] The Financial Action Task Force (FATF)[20] defines a virtual currency as a digital representation of value that is traded digitally and has one or more of the following characteristics: a medium of exchange, a unit of account and a store of value.[21] In other words, the existence of virtual currency is largely dependent on the Internet because virtual currencies are digital in nature. Although virtual currencies may be used as a medium of exchange and they appear to have all the characteristics of money,[22] it does not necessarily follow that virtual currency is legal tender[23] unless it is duly issued and authorised by a state's central bank. Virtual currencies on the other hand, are issued by individuals on a peer-to-peer network. In South Africa, legal tender is only issued by the South African Reserve Bank (SARB).[24] Although the term "legal tender" is not specifically defined in the South African Reserve Bank Act 90 of 1989, it is generally accepted to mean coins, bank notes and gold coins.[25]

A distinction must be drawn between virtual currency and fiat money. Fiat money includes bank notes, coins and any legal tender issued by a jurisdiction. Fiat money, however, is often also colloquially referred to as "electronic money" or "e-money" because it is capable of being represented

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17 Bal "Developing a Regulatory Framework for the Taxation of Virtual Currencies" 2019 47(2) *Intertax* 224.

18 Financial Action Task Force (FATF) "FATF Report Virtual Currencies Key Definitions and Potential AML/CFT Risks" (2014) https://www.fatf-gafi.org/media/fatf/documents/reports/Virtual-currency-key-definitions-and-potential-aml-cft-risks.pdf (accessed 2019-05-28) 5; see also Bal 2019 *Intertax* 219 at fn 2.

19 Bal 2019 *Intertax* 219 at fn 2.

20 The Financial Action Task Force (FATF) is an inter-governmental body established in 1989 by the Ministers of its Member jurisdictions. The objectives of the FATF are to set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system. The FATF is therefore a "policy-making body" which works to generate the necessary political will to bring about national legislative and regulatory reforms in these areas, https://www.fatf-gafi.org/about/ (accessed 2019-07-15).

21 FATF https://www.fatf-gafi.org/media/fatf/documents/reports/Virtual-currency-key-definitions-and-potential-aml-cft-risks.pdf; see also Brito *et al The Law of Bitcoin* 2–3; Lyndell *Virtual Currencies: Regulatory and Tax Compliance Issues* (2014) 7.

22 Characteristics of money include: (1) medium of exchange (2) store of value (3) unit of account (4) legal tender (5) standard of deferred payment (6) liquidity (7) stability of value (8) interchangeable (9) portability and (10) confidence, https://simplicable.com/new/money (accessed 2019-07-15).

23 FATF https://www.fatf-gafi.org/media/fatf/documents/reports/Virtual-currency-key-definitions-and-potential-aml-cft-risks.pdf 4; see also Brito *et al The Law of Bitcoin* 3.

24 S 10(1)(iii) of the South African Reserve Bank Act 90 of 1989.

25 S 17 of the South African Reserve Bank Act 90 of 1989.

digitally.[26] Because of this digital representation, virtual currency and fiat money are often referred to as "digital currencies". By definition, a digital currency is a digital representation of virtual and fiat currencies.[27] A virtual currency can further be subdivided into convertible and non-convertible virtual currencies. For instance, bitcoins can have a value in South African Rand (the Rand) and it can be exchanged for the Rand at any given time. For this reason, bitcoins is an example of a convertible virtual currency. On the other hand, a non-convertible currency "is intended to be specific to a particular virtual domain or world".[28] Typical examples of non-convertible currencies include World of Warcraft Gold and Q Coins.[29]

Furthermore, convertible virtual currencies can be divided into centralised and decentralised virtual currencies. A virtual currency is centralised if it has a central administrator that is responsible for issuing the currency; the administrator establishes the rules of the currencies' use and the administrator maintains a payment ledger.[30] A decentralised currency, as the name suggests, has no central authority and no central monitoring oversight.[31] The most well-known decentralised currency is bitcoin.

4 WHAT IS BITCOIN?

Introduced in 2009 by a programmer using the pseudonym *Satashi Nakamoto*, bitcoin is an international, decentralised, convertible, virtual currency.[32] Bitcoins consist of units of account comprised of numbers and letters that constitute units of the currency.[33] Bitcoins, as a form of cryptocurrency, is traded digitally between users and they can also be exchanged into fiat currency (real money); bitcoins can be exchanged for other virtual currency; and bitcoins can be exchanged for goods and services.[34] Brito *et al* summarise the characteristics of Bitcoin as a system that is peer to peer and computationally impractical to reverse; cryptographically secure and uses proof of work.[35]

Anyone can create bitcoins through a process called "mining". The mining of bitcoins involves creating new bitcoins by using computational power in

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26 FATF https://www.fatf-gafi.org/media/fatf/documents/reports/Virtual-currency-key-definitions-and-potential-aml-cft-risks.pdf 4; see also Brito *et al The Law of Bitcoin* 3. Fiat money can also be represented digitally. For example, money can be transferred electronically by means of an electronic funds transfer (EFT).

27 *Ibid*.

28 *Ibid*.

29 *Ibid*.

30 FATF https://www.fatf-gafi.org/media/fatf/documents/reports/Virtual-currency-key-definitions-and-potential-aml-cft-risks.pdf 5.

31 *Ibid*.

32 Brito *et al The Law of Bitcoin* 7.

33 FATF https://www.fatf-gafi.org/media/fatf/documents/reports/Virtual-currency-key-definitions-and-potential-aml-cft-risks.pdf 3–6.

34 FATF https://www.fatf-gafi.org/media/fatf/documents/reports/Virtual-currency-key-definitions-and-potential-aml-cft-risks.pdf 6.

35 Brito *et al The Law of Bitcoin* 5.

order to solve complex algorithms or puzzles.[36] Once a miner[37] has created new bitcoins, that miner is rewarded with what is known as "block reward" and transaction fees. The block reward consists of a specific number of bitcoins.[38]

One of the interesting aspects of utilising the Bitcoin system is that one does not need to register or provide their identity in order to conduct a transaction. All Bitcoin transactions are stored in the Bitcoin blockchain stored in a free and open-source software that is often known as the Bitcoin protocol.[39] One merely accesses the Internet on a compatible device, downloads the free software and then stores, sends, receives and monitors Bitcoin transactions.[40]

Currently, the Organisation for Economic Cooperation and Development (OECD) has not prescribed any universal regulations or guidelines on the classification and VAT treatment of cryptocurrencies. However, the OECD,[41] in its 2018 *Report to G20 Finance Ministers and Central Bank Governors*, stated:

> "Given the availability of big data, international co-operation among tax authorities should be enhanced, in particular, as regards the information on the users of online platforms as part of the gig and sharing economies, to ensure taxes are paid when they are due. The forum on tax administration, working with the inclusive framework, will develop practical tools and cooperation in the area of tax administration and will also examine the tax consequences of new technologies like cryptocurrencies and blockchain."[42]

This implies that the OECD is of the view that transactions involving cryptocurrencies should be subject to tax. However, the report does not specifically state how such transactions should be taxed. Nor does it give a pro forma legal framework for the taxation and VAT treatment of cryptocurrencies. The "how" is left to individual states to consider and establish appropriate regulatory framework for the tax consequences of cryptocurrencies.

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36 FATF https://www.fatf-gafi.org/media/fatf/documents/reports/Virtual-currency-key-definitions-and-potential-aml-cft-risks.pdf 7; Bal 2015 *Intertax* 381.

37 An individual or entity that has special computer software that enables them to "create" new bitcoins.

38 De Filippi and Wright *Blockchain and the Law: The Rule Code* (2018) 25.

39 De Filippi and Wright *Blockchain and the Law: The Rule Code* 21.

40 FATF https://www.fatf-gafi.org/media/fatf/documents/reports/Virtual-currency-key-definitions-and-potential-aml-cft-risks.pdf 6.

41 South Africa is currently not a member of the OECD but interacts with subsidiaries of the organisation; see http://www.dirco.gov.za/foreign/Multilateral/inter/oecd.htm (accessed 2019-11-30).

42 OECD "OECD Secretary-General Report to G20 Finance Ministers and Central Bank Governors" (March 2018) http://www.oecd.org/ctp/OECD-Secretary-General-tax-report-G20-Finance-Ministers-Argentina-March-2018.pdf (accessed 2019-12-02) 9.

5 THE VAT TREATMENT OF CRYPTOCURRENCIES IN SOUTH AFRICA

5 1 A modern VAT system

Before discussing the VAT treatment of cryptocurrencies in South Africa, it is important to understand how VAT works. VAT is a form of consumption tax. Although VAT is collected at each stage of production, the consumer is ultimately responsible for paying VAT. While the VAT liability is on the consumer, VAT is charged at each stage of production and distribution making it possible for businesses in the chain to deduct the VAT paid.[43] The VAT deducted is also known as input tax. VAT is due when a consumer "pays" for the goods or services that they have acquired for personal use.[44] Usually, a consumer receives an invoice with the purchase price that is inclusive of VAT. The VAT displayed on the invoice affords businesses the opportunity to recover VAT on their own purchases.[45] This is known as the invoice method of accounting for VAT.

The conventional approach is for a seller to charge VAT on his or her taxable supplies (output tax) and then subsequently claim a credit for the purchase of the goods or services (input tax). The difference between the output tax and input is the VAT payable. If the input tax exceeds the output tax, then a refund can be claimed. The collection of VAT during the various stages of production indicates that VAT is a form of tax introduced with the objective of raising revenue.[46]

In South Africa, VAT is levied on the importation of goods; on the supply of imported services and on the supply of goods and services by a vendor in the furtherance of his or her enterprise.[47] Although not explicitly stated in the VAT Act, South Africa adopts the destination principle as opposed to the origin principle[48] as means to tax consumption. In terms of the destination principle, the taxation of goods and services takes place in the country where these goods are services are "used". In other words, all exports are free from VAT while imports are subject to VAT.

The destination principle is particularly important where services (electronic services) are purchased and thereafter supplied from traders that

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43 Silver and Beneke *Deloitte VAT Handbook* 10ed (2015) 3.

44 *Ibid*.

45 Kerrigan "The Elusiveness of Neutrality – Why is it so Difficult to Apply VAT to Financial Services?" 2010 *Munich Personal Research Papers in Economics Archive* https://mpra.ub.uni-muenchen.de/22748/1/MPRA_paper_22748.pdf (accessed 2019-12-01) 4.

46 Bal *Taxation of Virtual Currency* (PhD thesis, University of Leiden) 2014 202.

47 S 7(1)(*a*) to (*c*) of the VAT Act. An "enterprise" is defined as "any enterprise or activity which is carried on continuously or regularly by any person in the Republic or partly in the Republic and in the course or furtherance of which goods or services are supplied to any other person for a consideration, whether or not for profit, including any enterprise or activity carried on in the form of a commercial, financial, industrial, mining, farming, fishing, municipal or professional concern or any other concern of a continuing nature or in the form of an association or club."

48 In terms of this principle, taxation of goods and services takes place in the country where they are produced.

are located outside the borders of South Africa (cross-border electronic commerce transactions). Sometimes, it is impossible to establish the location or the area where the services[49] are consumed.[50] This is due to various reasons, but the most crucial aspect is the inability to identify the consumer. As a result of this, tax authorities insert proxies in legislation as aids to determine the location of the consumer.[51]

5 2 Cryptocurrencies and the VAT Act

Currently, the VAT Act does not define cryptocurrencies. It appears that the relevant policy makers did not consider the importance of including a legal definition of cryptocurrencies in the VAT Act. A lack of a definition in the VAT Act creates uncertainty for taxpayers and the general public because compliance with any tax legislation is dependent on the understanding of the relevant legal provision in any tax legislation. By the same token, if a taxpayer does not understand the meaning of the terms in a tax legislation or if the term is vague; it is difficult for a taxpayer to comply with the necessary legislation. This challenge is compounded by the fact that there is a plethora of information about cryptocurrencies on the Internet. Accessing different websites may result in a taxpayer formulating his or her own opinion about what constitutes cryptocurrencies; in the absence of any legislated definition of the said term in the VAT Act. For example, the word "cryptocurrency" can often be used interchangeably to denote "bitcoin", "currency", "money" and even "tokens".[52] All these terms have different connotations which may or may not necessarily be attributed to a legal definition of cryptocurrencies. Furthermore, Bitcoin is not the only form of a decentralised cryptocurrency.[53] To avoid uncertainty, a definition of cryptocurrency must be adopted in the VAT Act.

5 3 Financial services and cryptocurrencies

Section 2 of the VAT Act defines the term "financial services" as:

> "(1) For the purposes of this Act, the following activities shall be deemed to be financial services:
>
> (a) The exchange of currency (whether effected by the exchange of bank notes or coin, by crediting or debiting accounts, or otherwise);
>
> (b) the issue, payment, collection or transfer of ownership of a cheque or letter of credit;
>
> (c) the issue, allotment, drawing, acceptance, endorsement or transfer of ownership of a debt security;

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49 This is because services are intangible in nature making the traceability thereof impractical.

50 Kabwe *Consumption Tax Collection Models in Online Trade in Digital Goods* (unpublished LLM mini-dissertation, UNISA) 2017 27; Bal *Taxation of Virtual Currency* 204.

51 See s 1 part (vi)(aa) to (cc) of the definition of "enterprise" in the VAT Act. Currently, South Africa uses the bank details, address and residency status of the consumer as proxies for the supply of electronic services.

52 Bal 2019 *Intertax* 225.

53 Others include Litecoin, Ethereum, Dash and Monero.

(d) the issue, allotment or transfer of ownership of an equity security or a participatory security;
(e) …..
(f) the provision by any person of credit under an agreement by which money or money's worth is provided by that person to another person who agrees to pay in the future a sum or sums exceeding in the aggregate the amount of such money or money's worth;
(g) …..
(h) …..
(i) the provision, or transfer of ownership, of a long-term insurance policy or the provision of reinsurance in respect of any such policy: Provided that such an activity shall not be deemed to be a financial service to the extent that it includes the management of a superannuation scheme;
(j) the provision, or transfer of ownership, of an interest in a superannuation scheme;
(k) the buying or selling of any derivative or the granting of an option:
Provided that where a supply of the underlying goods or services takes place, that supply shall be deemed to be a separate supply of goods or services at the open market value thereof:
Provided further that the open market value of those goods or services shall not be deemed to be consideration for a financial service as contemplated in this paragraph;
(l) ….
(m) ….
(n) …..
(o) *the issue, acquisition, collection, buying or selling or transfer of ownership of any cryptocurrency*."[54]

The implication of this provision has the effect of rendering supplies of cryptocurrencies as VAT exempt in South Africa.[55] A resident who supplies or sells any cryptocurrency may not charge any output VAT on that transaction. Similarly, a vendor[56] cannot claim an input tax deduction on any subsequent purchase of the cryptocurrency. Although it is not explicitly stated in the VAT Act, it is submitted that this provision also applies to business to business transactions. A business that transfers cryptocurrencies to another business will not be required to account for VAT on that transaction. While the cross-border trade of cryptocurrencies is also currently not addressed in the VAT Act, it is submitted that these transactions are likewise exempt from VAT.

5 3 1 An analysis of the classification of cryptocurrency activities as financial services

Currently, there is no universal accepted definition of financial services for VAT purposes. As a result, states and tax authorities use their discretion in

54 Emphasis added.
55 S 12(*a*) of the VAT Act.
56 A vendor is a person that is required to be registered in terms of the VAT Act. A person is obligated to register as a vendor at the end of a month where the total value of the taxable supplies exceeds R1 million in the preceding 12 months. See s 1 of the definition of "vendor" read with s 23(1)(*a*) of the VAT Act.

their respective legislative framework in order to establish activities that constitute financial services. The conventional approach is to define financial services by giving examples of the activities that comprise financial services in a form of a list. For instance, the VAT Act does not explicitly define "financial services" but itemises services, such as the exchange of money or the issue of a debt security instrument, in the definition of financial services.[57] In Australia, a similar approach is followed where financial supplies (financial services) are not specifically defined in the legislative framework.[58] Instead, financial supplies are itemised in the Regulations to the GST Act (the Regulations).[59] Interestingly, the Regulations specifically list items that constitute financial supplies and items that do not constitute financial supplies.[60] This is in contrast to the VAT Act which merely lists services that constitute financial services for VAT purposes. It is submitted that the rationale for inserting provisions in the regulations of an enabling Act as opposed to a specific legislation is to enable legislators to easily effect the necessary changes without going through the perceived tedious process of amending the relevant legislation.

It is unclear why there is a lack of consensus on the definition of financial services. As the term suggests, financial services are services that relate to the financial sector. Services in the financial sector include banking, insurance, investments and the financial market. In its simplest from, financial services are transactions that involve the exchange of money against money.[61] At the core of these transactions is the role that a bank plays as an intermediary. Banks play a crucial role when, for instance, an investor deposits funds which are then required by a borrower.[62] If one considers that financial services use intermediaries and in most cases banks, it becomes apparent that there is no nexus between cryptocurrencies and its classification as a financial service in the VAT Act. The lack of a nexus renders the current framing of cryptocurrency activities in the VAT Act devoid of any existential meaning because cryptographic transactions do not make use of banks as intermediaries. Furthermore, it is accepted that cryptocurrencies do not comply with the definition of "money" for VAT purposes. Currently, banks do not lend cryptocurrencies as "money" to borrowers.[63] This then raises an important question as to why tax authorities in South Africa elected to classify an activity involving cryptocurrencies as a financial service.

To the author's knowledge, no written reasons were submitted by National Treasury or SARS pertaining to the VAT treatment of cryptocurrency

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57 S 2 of the VAT Act.

58 See the definition of "financial supply" in s 40–5 of the GST (*A New Tax System*) Act regulations 1999 compilation 38.

59 S 40–5.09 of the GST (*A New Tax System*) Act regulations 1999 compilation 38.

60 S 40–5.10 read with s 40–5.11 and Schedule 2 of the GST (*A New Tax System*) Act regulations 1999 compilation 38.

61 Kerrigan https://mpra.ub.uni-muenchen.de/22748/1/MPRA_paper_22748.pdf 1.

62 James *The Rise of the Value-Added Tax* (2015) 62.

63 Even if banks do lend cryptocurrencies as "money", the cryptocurrencies will not be considered as legal tender unless it is specifically recognized as such by a state's central bank.

dealings as a "financial service" for VAT purposes. The only previous known communiqué to the author was an official statement released on 6 April 2018 by SARS on its website.[64] The statement, while it attempted to guide taxpayers on the income tax treatment of cryptocurrencies, read as follows in relation to VAT and cryptocurrencies:

> "The 2018 annual budget review indicates that the VAT treatment of cryptocurrencies will be reviewed. Pending policy clarity in this regard, SARS will not require VAT registration as a vendor for purposes of the supply of cryptocurrencies."

Subsequent to this statement, no further official announcements pertaining to the VAT treatment of cryptocurrencies were communicated to the general public. Similarly, the relevant tax authorities did not provide any reasons for rendering the supply of cryptocurrencies as VAT exempt.[65] It is generally accepted that supplies of financial services are exempt from VAT. However, there is a view that financial services should be subject to VAT.[66] The argument for subjecting financial services to VAT emanates from a need to broaden the tax base. Another reason that supports the view that financial services should be subject to VAT is that not subjecting financial services to VAT compromises the neutrality of tax leading to market distortions.[67] The arguments supporting the exemption of financial services becomes apparent when it becomes difficult to ascertain the value of the services on a transactional basis[68] and the administrative complexities involved in identifying the actual value of the service element that is part of a margin.[69]

While it is conceded that a possible rationale for rendering supplies of cryptocurrencies as VAT exempt is because there is no actual "value added",[70] it does not necessarily follow that cryptocurrency activities are financial services. It is submitted that the tax authorities' classification of cryptocurrencies as a financial service has more to do with the perceived nature of cryptocurrencies as opposed to its potential use as a source of revenue.

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64 SARS "SARS's Stance on the Tax Treatment of Cryptocurrencies" (6 April 2018) https://www.sars.gov.za/Media/MediaReleases/Pages/6-April-2018---SARS-stance-on-the-tax-treatment-of-cryptocurrencies-.aspx (accessed 2019-07-16).

65 See the Explanatory Memorandum on the Taxation Laws Amendment Bill, Act 23 of 2018.

66 See Tait *Value Added Tax: International Practice and Problems* (1998) 93; Prebble and Van Schalkwyk "VAT and Financial Services" 2013 29 *Victoria University of Wellington Legal Research Papers* 363 365; Kerrigan https://mpra.ub.uni-muenchen.de/22748/1/MPRA_paper_22748.pdf 1.

67 Kerrigan https://mpra.ub.uni-muenchen.de/22748/1/MPRA_paper_22748.pdf 1.

68 James *The Rise of the Value-Added Tax* 61.

69 Bird and Gendron *The VAT in Developing and Transitional Countries* 98; James *The Rise of the Value-Added Tax* 61–62; Ebrill, Keen, Bodin and Summers *The Modern VAT* (2001) 94–95; Prebble and Van Schalkwyk 2013 *Victoria University of Wellington Legal Research Papers* 365.

70 When a person mines, issues, sells, buys or even exchanges cryptocurrencies. Simply put, at no stage during the 'production' of cryptocurrencies does the creator add value to the same cryptocurrency before selling it to potential buyers.

5 4 Mining cryptocurrencies and VAT

5 4 1 Is it a service?

An important aspect that needs exploration is whether the process of creating cryptocurrencies, that is bitcoin mining, qualifies as a service for VAT purposes. Bitcoin mining is not specifically addressed in the VAT Act. If one considers that a person creates new bitcoins during the mining process, then that person is rendering a service for VAT purposes. It is submitted that the definition of services in the Act is sufficiently broad to include bitcoin mining. This viewpoint is supported by Bal.[71]

5 4 2 Is it a taxable supply?

Having established the classification of bitcoin mining as a service for VAT purposes, it must be established whether the supply of bitcoin mining is a taxable supply. Generally, a supply is taxable if VAT is charged at a rate of fifteen per cent on that transaction.[72] Since the supply of cryptocurrencies is VAT exempt, then it follows that bitcoin mining is not a taxable supply. Bal correctly points out that the liability for VAT is contingent on the establishment of a reciprocal legal relationship between the provider of the services and the recipient of those services.[73] In the context of bitcoin mining, no person "consumes" the proceeds thereof. If there is indeed a consumer, identifying that consumer would be unrealistic. For this reason, bitcoin mining does not incur any VAT liability.

5 5 Cryptocurrencies as a payment method

Bitcoin was originally designed as an alternative payment method to traditional payment methods.[74] Bitcoin's popularity led to increase usage by merchants and other businesses. Low transaction costs, instantaneous payments and unlimited territorial application are some of the reasons for bitcoin's success.[75] It is possible that Bitcoin will be accepted as a valid payment system if merchants continue to accept it as form of payment for goods and services.[76] For this reason, it can be argued that whenever local merchants and vendors receive bitcoins as a form of payment for goods and services then that transaction should be treated as a taxable supply. For example:

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71 Bal 2015 *Intertax* 386.

72 S 1 of the definition of "taxable supply" in the VAT Act.

73 Bal 2019 *Intertax* 222–223.

74 Shcherbak "How Should Bitcoin be Regulated?" 2014 *European Journal of Legal Studies* 7 46.

75 *Ibid*.

76 Alcorn, Eagle and Sherbondy "Legitimizing Bitcoin: Policy Recommendations" 2013 http://groups.csail.mit.edu/mac/classes/6.805/student-papers/fall13-papers/bitcoin.pdf (accessed 2018-07-27) 6.

> XYZ is a resident e-commerce company selling goods and services on the Internet. XYZ regularly receives and accepts bitcoin payment from consumers in exchange of goods and services. XYZ converts the bitcoins into Rands. YYZ is a registered VAT vendor.

The implication of this transaction is that the VAT vendor in the above scenario must account for fifteen per cent VAT on transactions where bitcoins are accepted as a form of payment for goods and services. The onus rests on the vendor to collect and remit VAT on those transactions to SARS.[77] The acceptance and subsequent conversion of bitcoins into the Rand equivalent effectively renders the transaction into a taxable supply. When issuing a tax invoice, a merchant or vendor must display the Rand value of the cryptocurrencies at the time the invoice is issued or at the time the vendor receives payment in cryptocurrencies.[78] This implies that the merchant or vendor must establish the relevant exchange rate to convert the cryptocurrencies to Rand at the time the cryptocurrencies are received as payment or at the time the tax invoice is issued whichever time comes first.[79]

The effect of transactions akin to these effectively treats bitcoin payments as a consideration in money for VAT purposes.[80] The definition of "money" specifically excludes any cryptocurrencies. The primary reason for this is that, despite having all the features of money, cryptocurrencies are not issued by the South African Reserve Bank.[81]

It is submitted that the treatment of cryptocurrencies as a taxable supply in the vendor's hands is important for three reasons. Firstly, it implies that a non-registered person accepting cryptocurrencies as a payment method and carrying on an enterprise becomes liable to register at the end of the month when the taxable supplies exceed R1 million in a 12-month period. The registration requirement applies to taxable supplies consisting of goods and services where cryptocurrencies are accepted as a payment method.[82] Secondly, it becomes easier for the relevant tax authorities to audit VAT vendors as opposed to private individuals. The audit function works as an incentive for businesses and vendors to comply with VAT laws in order to

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77 S 14(1)(*a*) and (*b*) of the VAT Act.

78 S 20(4) read with s 9(1) of the VAT Act.

79 See s 9(1) of the VAT Act. This also highlights bitcoin's volatility since its value is determined by supply and demand.

80 The definition of "consideration" is quite broad. It denotes "in relation to the supply of goods or services to any person, includes any payment made or to be made (including any deposit on any returnable container and tax), whether in money or otherwise, or any act or forbearance, whether or not voluntary, in respect of, in response to, or for the inducement of, the supply of any goods or services, whether by that person or by any other person, but does not include any payment made by any person as a donation to any association not for gain: Provided that a deposit (other than a deposit on a returnable container), whether refundable or not, given in respect of a supply of goods or services shall not be considered as payment made for the supply unless and until the supplier applies the deposit as consideration for the supply or such deposit is forfeited." In addition, a consideration in money means a consideration expressed as money. See s 1 of the definition of "consideration" and "consideration in money" in the VAT Act.

81 See s 1 of the definition of "money" in the VAT Act.

82 See the definition of "supply", "enterprise" read with s 23(1) of the VAT Act.

avoid fines and penalties. Thirdly, additional revenue is collected by vendors broadening the tax base in the process.

5 6 Sale and trade of bitcoins

It is important to consider if the sale and trade in bitcoins incurs any VAT liability for VAT vendors. Generally, a vendor incurs VAT liability when they supply goods and services in the furtherance of his or her enterprise.[83] A vendor selling bitcoins in the furtherance of his or her enterprise will not incur any VAT liability for those transactions. Similarly, the buyer of those cryptocurrencies incurs no VAT liability.[84] Often, these buyers purchase cryptocurrencies as a form of investment or for trading purposes. Bitcoins can be acquired on various platforms including from peers on the Bitcoin protocol, cryptocurrency trading platforms and cryptocurrency vending machines.[85]

6 VAT/GST TREATMENT OF CRYPTOCURRENCIES IN AUSTRALIA

6 1 Background

In 2014, the Australian Tax Office (ATO) released a Goods and Services Tax General Ruling (GSTR) pertaining to transactions involving bitcoins.[86] Public Rulings are ATO's interpretation of the law. If a person or business makes use of a Ruling, ATO applies the law as expressed in the Ruling and binds both ATO and the taxpayer. A taxpayer does not incur any tax penalties for applying the provisions in the Ruling.[87]

According to the Ruling,[88] the supply of bitcoins was not a financial supply for GST purposes; although a supply of bitcoins gave rise to GST liability.[89] However, concerns relating to double taxation arose due to ATO's GST treatment of bitcoins. For example, the acquisition of bitcoins with Australian dollars (a supply of bitcoins in exchange for money) by an Australian resident was subject to GST. If a resident proceeds to purchase goods and services with those bitcoins, that transaction was likewise susceptible to GST.[90] This was because ATO treated bitcoins as intangible property. The result was that taxpayers were liable for GST twice.[91]

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83 S 7(1)(*a*) of the VAT Act.

84 S 2(1)(*o*) of the definition of "financial services" in the VAT Act.

85 IFWG Crypto Assets Regulatory Working Group (2019) *Consultation Paper on Policy Proposals for Crypto Assets* 9–10.

86 ATO GSTR 2014/3 https://www.ato.gov.au/law/view/document?docid=GST/GSTR20143/NAT/ATO/00001&PiT=20150121000001#P34 (accessed 2019-11-13).

87 For e.g., see ATO GSTR 2014/3.

88 The GST Ruling is equivalent to the SARS General Binding Ruling.

89 ATO GSTR 2014/3 read with s 9–5 of the GST Act.

90 Australian Government "GST Treatment of Virtual Currency" (2016) https://treasury.gov.au/sites/default/files/2019-03/C2016-019_GST_treatment_of_digital_currency.pdf. (accessed 2019-07-23) 6.

91 *Ibid*.

6 2 A new position

As a result of the implications of the double taxation, the ATO and the Australian government made changes to the GST treatment of cryptocurrencies. GSTR 2014/3 was subsequently withdrawn in December 2017.

Legislative changes in the form of the Treasury Laws Amendment Act (Measures No. 6) Act of 2017, assented to in October 2017, was promulgated. Although the Amendment Act was assented to in October 2017, ATO began treating transactions involving digital currencies as "money" effective 1 July 2017.[92] The Amendment Act introduced a legal definition for digital currency[93] in *A New Tax System* (Goods and Services Tax) Act (the GST Act) 1999.

6 3 What is digital currency?

According to the Treasury of the Australian government, the insertion of a legal definition for digital currency allows for a "precise set of criteria that avoids unintended outcomes."[94] Providing a legal definition also enables the Australian tax authorities to cover GST treatment of digital currencies comprehensively, thus creating legal certainty in the process.

"Digital currency" is defined as:

> Digital units of value that:
> (a) are designed to be fungible; and
> (b) can be provided as consideration for a supply; and
> (c) are generally available to members of the public without any substantial restrictions on their use as consideration; and
> (d) are not denominated in any country's currency; and
> (e) do not have a value that depends on, or is derived from, the value of anything else; and
> (f) do not give an entitlement to receive, or to direct the supply of, a particular thing or things, unless the entitlement is incidental to:
> (i) holding the digital units of value; or
> (ii) using the digital units of value as consideration;
> but does not include:
> (g) money; or
> (h) a thing that, if supplied, would be a financial supply for a reason other than being a supply of one or more digital units of value to which paragraphs (a) to (f) apply.[95]

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92 See https://ministers.treasury.gov.au/ministers/scott-morrison-2015/media-releases/removing-double-taxation-digital-currency (accessed 2020-10-23).

93 It must be noted that the GST Act uses the term "digital currency" as opposed to "cryptocurrency".

94 Australian Government https://treasury.gov.au/sites/default/files/2019-03/C2016-019_GST_treatment_of_digital_currency.pdf (accessed 2019-07-23) 6.

95 S 195–1 of *A New Tax System* (Goods and Services Tax).

The definition of digital currency in the Australian GST Act is quite broad and succinctly encapsulates the characteristics of a cryptocurrency. For example, the definition makes it clear that a digital currency can be used as a consideration for a supply.[96] A consideration is any payment in connection with a supply.[97] Interestingly, the definition of digital currency means that a supply of digital currency is not a financial supply for GST purposes.[98] If one considers the meaning of digital currency and the meaning of consideration in the GST Act, it is clear that digital currency is treated as "money" for GST purposes. From a GST perspective, "money" includes Australian currency or currency of any other country.[99]

6 4 A supply of digital currency

The term "supply" has a broad definition in terms of the GST Act and includes, *inter alia*, any form of supply whatsoever including a supply of goods and services.[100] However, a supply does not include a supply of digital currency unless digital currency is used as consideration for a supply of money or digital currency.[101] The effect of this provision is that a supply, in relation to digital currency, occurs when digital currency is used as a means of payment for a supply of money and other digital currencies. Thus, there is no GST liability if an Australian resident conducts a sale or purchase of digital currencies. It is important to determine the extent to which an Australian resident will incur GST on the supply of digital currency.

For a transaction to incur GST, that transaction must be a taxable supply for GST purposes. A taxable supply occurs when:

(a) you make the supply for consideration; and
(b) the supply is made in the course or furtherance of an enterprise that you carry on; and
(c) the supply is connected with the indirect tax zone; and
(d) you are registered or required to be registered.

However, the supply is not a taxable supply to the extent that it is GST-free or input taxed.[102]

The effect of this provision is that an Australian resident that carries on an enterprise[103] in the Indirect Tax Zone[104] (ITZ) will be rendering a taxable supply if that resident supplies goods and services to another resident. If payment is effected in digital currency, then that transaction will attract GST liability and the Australian enterprise will be required to account for and remit

96 S 195–1(*b*) of the GST Act.
97 S 9–15 of the GST Act.
98 Part (h) of the definition.
99 S 195–1 of the GST Act.
100 S 9–10 of the GST Act.
101 S 9–10(4) of the GST Act.
102 S 9–5 of the GST Act.
103 S 9–20(1)(*a*) of the GST Act defines an "enterprise" as an activity or a series of activities in a form of a business.
104 S 195–1 defines the "ITZ" as Australia excluding other external territories.

GST to ATO. The amount of GST remitted is the amount of money in Australian dollars.[105] In the United Kingdom (UK), a similar approach is followed where VAT is due and payable by a person or entity supplying goods and services in exchange for cryptocurrencies.[106] Similarly, the UK treats cryptocurrency as money for VAT purposes when used as payment for goods and services. The value of the supply of the goods or services is the equivalent of British Pound (BP) value of the cryptocurrency at the time the transaction took place.[107]

In Australia, an Australian business is not liable for GST when using digital currency to pay for goods or services simply because using digital currency as payment has the same effect as using money for payment.[108] Any supply of digital currency made by an Australian resident to a non-resident will be GST free.[109] It is unclear from the literal wording of the GST Act if GST liability accrues where a non-resident supplies goods and services to Australian residents in exchange of payment effected in digital currency. It is submitted that under these circumstances, normal GST rules apply. However, due to the complexities surrounding the cross-border supply of cryptocurrencies, any compliance measures expected from a non-resident would be impractical.

6 5 The registration requirement

In Australia, businesses incur GST liability and are required to register by the GST Act if they carry on an "enterprise" in the Indirect Tax Zone (ITZ)[110] and the businesses' taxable supplies exceeds an annual threshold of $75 000.[111] A business is deemed to be carrying on an enterprise if the activity that is been carried is done in a form of business or trade.[112] It should be noted that section 25-1 of the GST Act uses the word 'must' suggesting that it is a peremptory provision and thus a business does not have discretion in determining when to register for GST purposes.

For example:

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105 See ATO "GST and Digital Currency" https://www.ato.gov.au/Business/GST/In-detail/Your-industry/Financial-services-and-insurance/GST-and-digital-currency/ (accessed 2019-10-06).

106 HR Revenue & Customs "Brief 9: Bitcoin and cryptocurrencies" (2014) https://www.gov.uk/government/publications/revenue-and-customs-brief-9-2014-bitcoin-and-other-cryptocurrencies/revenue-and-customs-brief-9-2014-bitcoin-and-other-cryptocurrencies#future-implications (accessed 2019-11-15).

107 *Ibid*.

108 See ATO https://www.ato.gov.au/Business/GST/In-detail/Your-industry/Financial-services-and-insurance/GST-and-digital-currency/. (accessed 2019-10-06). It must be noted that an Australian business will be liable for GST if they make a taxable supply and receive digital currency as form of payment.

109 *Ibid*.

110 The Indirect Tax Zone refers to Australia excluding other territories that fall outside the ambit of the GST.

111 S 23–5 read with s 23-15 of the GST Act.

112 S 9–20 of the GST Act.

> Business XYZ is an Australian business that trades in fashion clothing and digital currency. Business XYZ's taxable supplies amounts to $75 000. Of those supplies, $15 000 consists of digital currency supplies.

In the above example, although the supplies of Business XYZ exceed the registration threshold, Business XYZ is not compelled to register for GST purposes because a portion of those supplies emanates from the supply of digital currencies. Similarly, if Business XYZ made sales solely from the supply of digital currency, no GST registration obligation will ensue. Generally, supplies of digital currencies do not attract any GST (input taxed).[113]

6 6 Tax invoices

When submitting a tax invoice to ATO, an Australian business receiving digital currency as payment for a taxable supply must include the GST payable in Australian dollars together with sufficient information that will indicate the price or value of the digital currency.[114] The tax invoice should also include the conversion rate that the business used in order to work out the GST payable on the specific supply in Australian dollars.[115]

7 LESSONS DRAWN FROM AUSTRALIA: POSSIBLE SOLUTIONS FOR SOUTH AFRICA

For South Africa to replicate the Australian GST treatment of digital currency in respect of its VAT treatment of cryptocurrency, the following steps are indicated:

1. A legal definition of cryptocurrencies must be inserted in the VAT Act. This definition should include what does not constitute cryptocurrencies for VAT purposes. The following definition can be used as an example for VAT purposes:

   > "A cryptocurrency is a digital representation of value used as a consideration for a supply but excludes money."

2. The reference to cryptocurrencies under "financial services" must be removed from section 2 of the VAT Act. For VAT purposes, a sale and purchase of cryptocurrencies should be VAT exempt. If a vendor accepts cryptocurrencies as payment for goods and services, then that transaction should be deemed to be a taxable supply and therefore incurring VAT liability. The vendor or merchant must account for and remit VAT to SARS on that transaction. The use of cryptocurrencies in those circumstances must be treated as a payment for taxable supply insofar as the vendor accepts cryptocurrencies as payment (consideration in money) for goods or services in South Africa. The

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113 ATO "Input-Taxed Sales" https://www.ato.gov.au/Business/GST/When-to-charge-GST-(and-when-not-to)/Input-taxed-sales/ (accessed 2019-07-23).

114 See ATO https://www.ato.gov.au/Business/GST/In-detail/Your-industry/Financial-services-and-insurance/GST-and-digital-currency/ (accessed 2019-10-06).

115 *Ibid*.

merchant or vendor must convert the cryptocurrency equivalent into South African Rand. In South Africa, certain e-commerce businesses like Takealot.com accept bitcoins as a means of payment for goods and services.[116] The initiative must be supported and driven forward by SARS and National Treasury.

3. The cross-border supply of cryptocurrencies to residents must be VAT exempt. If a resident uses cryptocurrencies as a payment method for goods or services from a non-resident, then that transaction should be VAT exempt. This must be clearly stated for purposes of legal certainty.
4. SARS must publish administrative guidelines that clearly state and describe the VAT treatment of cryptocurrencies for taxpayers. The guidelines should include the relevant information that must be displayed on a tax invoice by merchants and vendors.

8 CONCLUSION

A juxtaposition of the South African legal framework and the Australian legal framework pertaining to the VAT/GST treatment of cryptocurrencies reveals that the South African legal system has deficiencies when it comes to the VAT treatment of cryptocurrencies. While it is true that there is currently no universal consensus on the classification and definition of cryptocurrencies, this should not deter South African tax authorities and policymakers from inserting a legal definition of cryptocurrencies in the VAT Act. Tax authorities should take cognisance of the fact that technology continuously evolves and having a clear definition of cryptocurrencies has the propensity to encourage compliance amongst taxpayers. The implementation of a flexible legislative framework allows for necessary changes to be made by policymakers when the need arises.[117] For these reasons, it is suitable to insert a legal definition in published Regulations to the VAT Act.

This article has shown that transactions involving cryptocurrencies can be treated as a taxable supply. If one considers that VAT is the most important and reliable source of revenue for states,[118] the VAT system should consistently be used as an avenue to generate revenue. Tax authorities must publish guidelines in instances where cryptocurrencies will be treated as a taxable supply. One of the most fundamental aspects of any VAT system is its administration.[119] If the administrative guidelines pertaining to the VAT treatment of cryptocurrencies is lacking, a taxpayer's tax obligation may be non-existent. Tax authorities should aim to provide as much information as possible to taxpayers to enable the latter to meet their tax obligations.[120] Bal correctly points out that any information provided to taxpayers should be easily accessible and formulated in a language that a

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116 See www.iol.co.za/business-report/watch-what-can-you-buy-with-bitcoin-in-south-africa-12208261 (accessed 2019-10-09).

117 Bal 2019 *Intertax* 226.

118 Gendron "Real VATs vs the Good VAT: Reflections From a Decade of Technical Assistance" 2017 32(2) *Australian Tax Forum* 259 259.

119 Ebrill *et al The Modern VAT* 141.

120 *Ibid*.

reasonable taxpayer can understand.[121] The guidelines must clearly explain, by means of practical applicable examples, the nature and extent to which taxpayers will incur VAT liability when dealing with cryptocurrencies.

In conclusion, this article has identified an area for the fiscus to broaden the tax base. Considering that SARS recently recorded a revenue shortfall,[122] it is submitted that treating cryptocurrencies transactions as a taxable supply is one way of addressing revenue shortfall.

[121] Bal 2019 *Intertax* 228.

[122] See Mail & Guardian "Tax Revenues Record Shock Decline" https://mg.co.za/article/2019 04-01-tax-revenues-record-shock-decline (accessed 2019-10-07).

LESSONS ON PARENTAL LEAVE: A COMPARATIVE ANALYSIS OF PARENTAL LEAVE IN SOUTH AFRICA AND THE UNITED KINGDOM

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SUMMARY

Recent amendments to the Basic Conditions of Employment Act 75 of 1997 have resulted in the introduction of parental leave. This provides employees with 10 consecutive days of time off from work to care for their newborn babies and may commence from the day of the birth. The right to parental leave has the additional benefit of impacting gendered social assumptions that place women in the primary role of caregiver and a secondary role as worker. With the rise in the labour participation of women, there has been an increase in the need for the involvement of men in the caregiving and upbringing of children in the home. Although parental leave applies to men and women, it has been enacted with the objective of encouraging working fathers to participate as caregivers and to share in the burden of care placed on new mothers to care for themselves and their newborn babies during maternity leave. This article considers the effects of parental leave as a recent addition to South African law by conducting a comparative analysis with the long-established parental leave models of the United Kingdom. These include the right to parental leave that is applicable to a parent who has parental responsibility for a child, and a right to shared parental leave, which allows the mother of the child to share her maternity leave with the other parent of the child. The parental leave rights of the United Kingdom have been developed to provide employees with choice and flexibility to accommodate their caregiving responsibilities, and may indicate a trajectory for the progression of the newly enacted right to parental leave in South Africa.

1 INTRODUCTION

The Labour Laws Amendment Act (LLAA)[1] introduces the rights to parental leave, adoption leave and commissioning parental leave to the Basic Conditions of Employment Act (BCEA).[2] The amendments follow criticisms that have trended in academic literature and elsewhere and which recommend the introduction of leave entitlements inclusive of fathers in

[1] 10 of 2018.
[2] 75 of 1997.

South African labour legislation.[3] In response, the amendments were proposed with the primary objective of recognising the role of fathers in the upbringing of their children, and of encouraging the bond between fathers and their children.[4] Comparative research has indicated that several countries have amended their labour legislation to provide for parental leave on the basis that leave that is inclusive of fathers is recognised as the first step towards the reconciliation of work and caregiving.[5] Different countries have adopted different models of parental leave that vary as to eligibility requirements, duration of leave, the attachment of a minimum age for the child to be cared for, cash benefits, and the flexibility and transferability of the leave between parents.[6]

However, the primary purpose of parental leave that is offered to both mothers and fathers is to allow both parents time off from work to care for their child – from the stages of infancy to young childhood.[7] While the right to parental leave is couched in gender-neutral terms, it may nevertheless fail effectively to support both working mothers and fathers with their care responsibilities.

This article considers the provision for parental leave in the model accepted into the BCEA. The parental leave laws of the United Kingdom (UK) have been selected for comparative analysis as the UK model has evolved through family-friendly reforms initiated by the UK government since 1997.[8] The UK provisions of various leave options and a widened scope of entitlements to time off from work for the purposes of caregiving gives employees the flexibility and choice to cater to their care-giving responsibilities. The comparative analysis in this article is aimed at examining the existing parental leave model of the UK so as to identify areas for development in the newly enacted South African parental leave model.

2 THE RELATIONSHIP BETWEEN MATERNITY LEAVE AND PARENTAL LEAVE

Social values place greater emphasis on the paid work of employees than on the unpaid work of family carers.[9] This affects women who attempt to

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3 Dancaster "State Measures Towards Work-Care Integration in South Africa" in Mokomane *Work-Family Interface in Sub-Saharan Africa: Challenges and Responses* (2014) 186.

4 GN 1174 in *GG* 39445 of 2015-11-25, Memorandum on the Objective of the Labour Laws Amendment Bill, 2017, clause 1.1.

5 Dancaster and Baird "Workers With Care Responsibilities: Is Work-Family Integration Adequately Addressed in South African Labour Law?" 2008 29 *ILJ* 22 35; Field, Bagraim and Rycroft "Parental Leave Rights: Have Fathers Been Forgotten and Does It Matter?" 2012 36(2) *SALR* 30.

6 ILO "Maternity and Paternity at Work: Law and Practice Across the World" http://www.ilo.org/maternityprotection (accessed 2020-01-07) 61.

7 ILO http://www.ilo.org/maternityprotection 60.

8 Conaghan "Work, Family and the Discipline of Labour Law" in Conaghan and Rittich (eds) *Labour Law, Work and Family* (2007) 19 27; James *The Legal Regulation of Pregnancy and Parenting in the Labour Market* (2009) 39.

9 Dancaster and Cohen "Family Responsibility Discrimination Litigation: A Non-Starter?" 2009 2 *Stell LR* 221 228; Cohen "The Efficacy of International Standards in Countering Gender Inequalities in the Workplace" 2012 33 *ILJ* 19 24.

balance their responsibilities as paid employees with those as unpaid caregivers and homemakers.[10] Gendered assumptions have led to "systemic barriers" that have carried through to the workplace. Such barriers obstruct the rights of women to attain full-time employment by placing the care-giving role of women in opposition to the role of the "ideal worker".[11] The ideal worker is perceived as a person who functions in the primary role of full-time employee and who has little or no role as a family carer for the purposes of childbearing or childrearing. The ideal worker is assumed to be male (a gendered assumption) and workers with care-giving responsibilities are excluded from performing as ideal workers.[12] Social ideals reflect further that an employer is more likely to consider a man, rather than a woman, to be the type of employee who can work long hours without interruption.[13] Thus, most women are in reality excluded from fulfilling the role of the ideal worker.[14]

Although women are not considered as "ideal workers", the labour participation of women has been increasing steadily over several years.[15] For instance, the labour force participation of women has increased from 38 per cent in 1995 to 53,3 per cent in 2018.[16] The increased labour participation of women has added to the conflict between work and care in South Africa.[17] South Africa has a large percentage of households headed by women. This is particularly true in rural areas, where women live apart from their husbands and care for the children.[18] These households are often vulnerable and lack financial resources. This means that more women from rural homes must seek income-producing employment.[19] Therefore, women often fulfil dual roles as both worker and carer.

However, owing to their care-giving responsibilities, women are more likely to be found in atypical employment that allows them to work on a part-time basis. Part-time employment provides an employee who has care-

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10 Cohen 2012 *ILJ* 30.

11 Cohen 2012 *ILJ* 30; and Clarke and Goldblatt "Gender and Family Law" in Bonthuys and Albertyn (eds) *Gender, Law and Justice* (2007) 195 203.

12 Cohen 2012 *ILJ* 30.

13 *Ibid*.

14 Adams "The *Family Responsibilities Convention* Reconsidered: The Work-Family Intersection in International Law Thirty Years On" 2013–2014 22 *Cardozo J, Int'l and Comp L* 201 211; Bonthuys "Gender and Work" in Bonthuys and Albertyn (eds) *Gender, Law and Justice* (2007) 245 249 250; Dupper "Maternity Protection in South Africa: An International and Comparative Analysis (Part One)" 2001 3 *Stell LR* 421.

15 Adams 2013–2014 *Cardozo J, Int'l and Comp L* 208*;* Huysamen "Women and Maternity: Is There Truly Equality in the Workplace Between Men and Women, and Between Women Themselves?" in Malherbe and Sloth-Nielsen (eds) *Labour Law Into the Future: Essays in Honour of D'Arcy du Toit* (2012) 46; Smit "The Changing Role of the Husband/Father in the Dual-Earner Family in South Africa" 2002 33(3) *Journal of Comparative Family Studies* 401 402.

16 *Quarterly Labour Force Survey – P0211: 4th Quarter 2018* Appendix 1, Table 2 (Quarterly Labour Force Survey 2018) (2 February 2019) http://www.statssa.gov.za (accessed 2020-01-05).

17 Cohen and Gosai "Making a Case for Work-Life Balance for the South African Employee" 2016 37 *ILJ* 2237.

18 Clarke and Goldblatt in Bonthuys and Albertyn *Gender, Law and Justice* 198; Bonthuys in Bonthuys and Albertyn *Gender, Law and Justice* 247.

19 Clarke and Goldblatt in Bonthuys and Albertyn *Gender, Law and Justice* 197 198.

giving responsibilities with the dual benefits of income and flexibility.[20] When women cannot reconcile their work and care-giving responsibilities, they tend to resort to voluntary withdrawal from employment by resigning for the purpose of attending to their care-giving responsibilities.[21] To address these issues and in the interest of affording equal opportunities to men and women in the workplace, maternity leave was first legislated in South Africa via provisions in the now-repealed Basic Conditions of Employment Act 3 of 1983.[22] The objectives of providing for maternity leave are the protection of the health of the woman and child after birth and the provision of a necessary bonding period between mother and child.[23]

Section 25 of the current BCEA provides that a pregnant employee is entitled to four consecutive months' unpaid maternity leave. The leave can commence at any time from four weeks before the expected date of delivery or from a date certified by a medical practitioner or midwife.[24] The employee is prohibited from working for six weeks after the birth of the child unless a medical practitioner or midwife certifies that it is safe for her to do so.[25] This provision applies irrespective of whether or not the child is born alive.[26] Thus, the BCEA sets out a compulsory leave period of six weeks. Maternity benefits are available through the Unemployment Insurance Act (UIA), to contributing employees, for a maximum period of 17.32 weeks of the maternity leave period.[27]

However, providing maternity leave without a corresponding period of paternity leave or parental leave creates an imbalance in family dynamics, as well as in the workplace.[28] According to the International Labour Organisation's *Resolution on Gender Equality at the Heart of Decent Work*, there is an increase in women's labour force participation where legislative measures or policies offer parental leave.[29] A legislative leave package that includes parental leave has been found to encourage shared parental

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20 *Ibid*.

21 Dupper, Olivier and Govindjee "Extending Coverage of the Unemployment Insurance-System in South Africa" 2010 21 *Stell LR* 438 447; Huysamen in Malherbe and Sloth-Nielsen *Labour Law Into the Future: Essays in Honour of D'Arcy du Toit* 65; *Masondo v Crossway* (1998) 19 *ILJ* 180 (LC) 181C.

22 S 17(*b*) of the Basic Conditions of Employment Act 3 of 1983 prohibited employees from working one month before and two months after confinement. Grogan *Workplace Law* (2014) 65; Kagnas and Murray "Law and Women's Rights in South Africa: An Overview" 1994 *Acta Juridica* 1 29.

23 Haas "Parental Leave and Gender Equality: Lessons from the European Union" 2003 20(1) *Review of Policy Research* 91.

24 S 25(2)(*a*) and (*b*) of the BCEA.

25 S 25(3) of 75 of 1995.

26 S 25(4) of 75 of 1995 provides: "An employee who has a miscarriage during the third trimester of pregnancy or bears a stillborn child is entitled to maternity leave for six weeks after the miscarriage or stillbirth, whether or not the employee had commenced maternity leave at the time of the miscarriage or stillbirth."

27 S 24 of 63 of 2001.

28 Dancaster and Baird 2008 *ILJ* 22, 35; Behari "Daddy's Home: The Promotion of Paternity Leave and Family Responsibilities in the South African Workplace" 2016 37(2) *Obiter* 346 360.

29 International Labour Conference (98th Session) Resolution concerning gender equality at the heart of decent work (Geneva, 19 June 2009) (Resolution on Gender Equality at the Heart of Decent Work) 6.

responsibilities between parents, promote gender equality in the workplace and give recognition to the role of men in family participation.[30] It provides these benefits by encouraging fathers to take time off work to care for their children, and thus to share with women in the burden of care while both the father's and mother's access to employment is maintained.[31]

In order to deliver these benefits effectively, fathers must be encouraged to take parental leave.[32] Parental leave cannot change gender dynamics in the workplace and in households if only women employees are enjoying it. The use of parental leave by men may also prevent women from being pressured into resigning or from temporarily leaving employment for the sole purpose of taking care of young children.[33] Take-up rates of parental leave by fathers are higher where it is offered as a non-transferrable, individual leave entitlement available to both fathers and mothers rather than as a single entitlement of parental leave that may be taken by either the mother or the father of the family.[34] This encourages men to take the leave that is due to them by virtue of their roles as fathers. Fathers are also more likely to take parental leave if the leave is supplemented with income replacement and if they are provided with employment protection such as prohibitions against dismissal and discrimination on the basis of taking parental leave.[35] Thus, in order to give effect to parental leave in a gender-neutral way, it must not only provide women with additional time to care for their babies after their maternity leave ends, but it must also provide supportive incentives for men to rely on parental leave.

3 SOUTH AFRICA'S PARENTAL LEAVE MODEL

With the introduction of parental leave, adoption leave and commissioning parental leave, the LLAA retains the right to maternity leave and deletes the entitlement to family responsibility leave for the birth of a child. The addition of parental leave is regarded as essential considering the inadequacy of the three days of family responsibility leave previously provided for in the BCEA, which was the only leave entitlement upon which fathers could previously rely in relation to the birth of a newborn baby.[36]

Accordingly, section 25A of the BCEA, as amended, provides that the parent of a child is entitled to at least 10 consecutive days of parental leave. There are no eligibility requirements for the entitlement to parental leave apart from that the employee should be the "parent" of the child. An employee may commence parental leave on the day that the child is born or

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30 Behari 2016 *Obiter* 348; Smit "Family-Related Policies in Southern African Countries: Are Working Parents Reaping Any Benefits?" 2011 42(1) *Journal of Comparative Family Studies* 18.

31 ILO http://www.ilo.org/maternityprotection 61.

32 *Ibid*.

33 ILO http://www.ilo.org/maternityprotection 62; Dancaster in Mokomane *Work-Family Interface in Sub-Saharan Africa: Challenges and Responses* 188.

34 ILO http://www.ilo.org/maternityprotection 62.

35 Rycroft and Duffy "Parental Rights: Progress But Some Puzzles" 2019 40 *ILJ* 12 25.

36 Behari "The Effect of the Labour Laws Amendment Bill 2017 on Shared Parental Responsibilities" 2018 39 *ILJ* 2148.

on the day that the adoption order is granted.[37] The employee must give the employer written notice of the intention to take parental leave at least one month before the date of the birth of the child, or of the day the adoption order is granted.[38] The notice must be given in writing and must set out the date that the leave will commence and the date that the employee will return to work after the leave period.[39]

As with the right to maternity leave, the right to parental leave in the BCEA is unpaid and the employee has to rely on the Unemployment Insurance Act (UIA)[40] to claim parental leave benefits.[41] Parental benefits are set out as an added amendment in section 26A of the UIA. This section states that the parental benefits are available to a contributing employee who: is either registered as the father of the child in terms of the Births and Deaths Registration Act;[42] is the prospective adoptive parent of a child below the age of two; or is the parent of a child who has been born as a result of a surrogate motherhood agreement referred to in the Children's Act.[43]

Parental benefits may only be claimed if the employee meets the qualifying period attached to the entitlement. Section 26A(5) of the UIA, as amended, states that the employee must have been in employment for at least 13 weeks before the date of the application for parental benefits. This is the same minimum period of employment that is applicable for the claim of maternity benefits.[44] Furthermore, the right to parental benefits is only available to an employee who has not claimed adoption benefits or commissioning parental benefits.[45] The parental benefit is paid at a maximum rate of 66 per cent of the earnings of the employee at the date of application.[46] The benefits may not exceed the remuneration that the employee would have received if the employee had not been on parental leave.[47]

4 PARENTAL-LEAVE MODELS IN THE UNITED KINGDOM

The regulation of work and care within labour law in the UK has largely been driven by political agendas.[48] Introduced by the British New Labour

37 S 25A(2) of the BCEA.
38 S 25A(3) and (4) of the BCEA.
39 S 25A(3) of the BCEA.
40 63 of 2001.
41 S 12 of the UIA.
42 51 of 1992.
43 38 of 2005; S 26A(1)(*a*)–(*c*) of the BCEA.
44 S 9 of the UIA.
45 S26A(1) of the BCEA.
46 S 12 of the UIA.
47 S26A(4) of the BCEA.
48 Adams "A Right to Request Flexible Working: What Can the UK Teach Us?" 2014 1 *Feminism and Legal Theory Project @ 30, Workshop on Labor and Employment* 1 8; Wheatley "Employee Satisfaction and Use of Flexible Working Arrangements" 2016 *Work, Employment and Society* 1; Golynker "Family-Friendly Reform of Employment Law in the UK: An Overstretched Flexibility" 2015 37(3) *Journal of Social Welfare and Family Law* 378 382.

Government in 1997, family-friendly strategies have resulted in numerous policy initiatives and legal reforms aimed at the reconciliation of work and family responsibilities.[49] Many of the initiatives overlap with those identified in South Africa. For instance, as in South Africa, there has been a steady increase in the labour participation of women in the UK since the 1950s.[50] Women now represent 46 per cent of the total labour force in the UK.[51] Diverse family models are also prevalent in the UK, with an increase in the number of single-parent households, as well as cohabitations and heterosexual partnerships.[52] The occurrence of such modern family models is also increasing in South Africa.[53] Other identifiable factors that are common to both jurisdictions are the predisposition of women to be found in part-time or atypical employment;[54] the need to encourage active participation in caregiving by fathers;[55] and the need to address gender inequalities in the workplace arising from the gendered division of work and care.[56]

This has resulted in the adoption of a statutory maternity leave period of 52 weeks in the UK.[57] Statutory maternity leave in the UK is made up of "compulsory maternity leave" (the first two weeks following the birth of the child), "ordinary maternity leave" (the first 26 weeks), and "additional maternity leave" (the last 26 weeks).[58] An employer may not permit an employee to work in the two weeks after childbirth, making up the compulsory maternity leave period.[59] Employees who have taken maternity leave are entitled to maternity pay in the form of a maternity allowance or statutory maternity pay, provided they meet the applicable eligibility

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49 Golynker 2015 *Journal of Social Welfare and Family Law* 378; Conaghan in Conaghan and Rittich *Labour Law, Work and Family* 27; Caracciolo di Torella "New Labour, New Dads: The Impact of Family Friendly Legislation on Fathers" 2007 36 *Industrial Law Journal* 318; Lewis, Knijn, Martin and Ostner "Patterns of Development in Work/Family Reconciliation Policies for Parents in France, Germany, the Netherlands, and the UK in the 2000s" 2008 15(3) *Social Politics: International Studies in Gender, State and Society* 261 270; Mitchell "Encouraging Fathers to Care: The Children and Families Act 2014 and Shared Parental Leave" 2015 44(1) *Industrial Law Journal* 123; James *The Legal Regulation of Pregnancy and Parenting in the Labour Market* 39.

50 Busby and James *Families, Care-Giving and Paid Work: Challenging Labour Law in the 21st Century* (2011) 15.

51 The World Bank "Labor Force, Female (% of Total Labor Force)" *The World Bank Databank* (2019) http://data.worldbank.org/indicator/SL.TLF.TOTL.FE.ZS (accessed 2019-11-13).

52 James *The Legal Regulation of Pregnancy and Parenting in the Labour Market* 4; Lewis "Employment and Care: The Policy Problem, Gender Equality and the Issue of Choice" 2006 8(2) *Journal of Comparative Policy Analysis* 103 105.

53 Behari 2018 *ILJ* 2150.

54 Lewis and Campbell "UK Work/Family Balance Policies and Gender Equality 1997–2005" 2007 14(1) *Social Politics: International Studies in Gender, State and Society* 4 9.

55 Caracciolo di Torella 2007 *Industrial Law Journal* 319.

56 Lewis and Campbell 2007 *Social Politics: International Studies in Gender, State and Society* 10.

57 S 71(3) of the Employment Rights Act 1996 c. 18 (U.K.) (Employment Rights Act).

58 Emir *Selwyn's Law of Employment* (2016) 189; James *The Legal Regulation of Pregnancy and Parenting in the Labour Market* 41.

59 Rickard "Getting Off the Mommy Track: An International Model Law Solution to the Global Maternity Discrimination Crisis" 2014 47 *Vanderbilt Journal of Transitional Law* 1465 1490.

requirements.[60] As of 1 April 2007, an employee who has given birth is entitled to 39 weeks (or nine months) of statutory maternity pay.[61] If an employee does not qualify for statutory maternity pay, then she may qualify for 39 weeks of maternity allowance.[62]

Employed fathers, who are responsible for the care of a child, are entitled to one or two consecutive weeks of paternity leave.[63] The leave may be taken for the purpose of caring for a child or supporting the mother of the child.[64] The leave may be taken within 56 days after the birth of a child or the placement of an adopted child.[65] Statutory paternity pay is payable for two weeks at a fixed rate.[66]

In addition to maternity leave and paternity leave, parental leave, or shared parental leave is available to employed mothers or fathers, provided they meet the qualifying requirements attached to the entitlement.[67] These leave entitlements also extend to partners of the mother of the child, and adoptive parents.[68]

4 1 Parental leave

Parental leave in the UK is regulated by the Maternity and Parental Leave etc. (Terms and Conditions of Employment) Regulations, 1999, which provide that employees are entitled to 18 weeks of parental leave.[69] Parental leave may be claimed for the purpose of caring for a child.[70] In order to be eligible for parental leave, the employee must have been continuously employed for a period of one year, and must be responsible for the care of the child.[71] An employee is responsible for the care of a child if he or she has "parental responsibility" over the child as set out in section 3 of the Children Act, 1989.[72]

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60 Social Security Contributions and Benefits Act 1992 c. 4 (U.K.) (Social Security Contributions and Benefits Act); Statutory Maternity Pay (General) Regulations 1986 (U.K.) SI 1986/1960 (Statutory Maternity Pay Regulations).

61 S 165 of the Social Security Contributions and Benefits Act; reg 2 of the Statutory Maternity Pay Regulations; the Statutory Maternity Pay, Social Security (Maternity Allowance) and Social Security (Overlapping Benefits) (Amendment) Regulations 2006 (UK) SI 2009/2379.

62 S 35(2) of the Social Security Contributions and Benefits Act states that a maternity allowance shall be payable for the period which, if she were entitled to statutory maternity pay, would be the maternity pay period.

63 S 80 of the Employment Rights Act; reg 5(1) of the Paternity and Adoption Leave Regulations.

64 Reg 4(1) of the Paternity and Adoption Leave Regulations.

65 Reg 5(2) of the Paternity and Adoption Leave Regulations.

66 S 171ZE of the Social Security Contributions and Benefits Act; Emir *Selwyn's Law of Employment* 202.

67 Employment Rights Act.

68 *Ibid*.

69 The Maternity and Parental Leave etc. (Terms and Conditions of Employment) Regulations 1999 (UK), SI 1999/3312 (Maternity and Parental Leave Regulations).

70 Reg 13 of the Maternity and Parental Leave Regulations.

71 Emir *Selwyn's Law of Employment* 192.

72 Reg 2 and 13 of the Maternity and Parental Leave Regulations; s 3 of the Children Act 1989 c. 41 (U.K.)

In terms of this provision, the parent must have all the rights, duties, powers, responsibilities and authority that by law a parent of a child has in relation to the child and his property.[73] The mother of the child is automatically considered to have parental responsibility for the child. The father will acquire parental responsibility only if he is married to the child's mother; or, if he is unmarried, he will acquire parental responsibility as the child's father upon the registration of the birth, or by the conclusion of a parental responsibility agreement, or by a court order.[74] Furthermore, guardians and adoptive parents of the child may also qualify for parental leave.[75]

The right to take parental leave is non-transferrable between parents and endures from the time the child is born until the child reaches the age of 18 years.[76] The qualifying employee may take up to four weeks of leave in one year.[77] The leave must be taken in complete blocks. This means that if the employee takes only a few days of the week as parental leave, it will still count as a week of parental leave.[78] The employee must give at least 21 days' notice of the dates when the leave will be taken.[79] The regulations make provision for the postponement of leave by the employer where the employer considers that the operation of the business would be unduly disrupted if the employee took leave during the period identified in his notice. However, the leave cannot be postponed for longer than six months.[80]

Parental leave is unpaid.[81] It is for this reason that parental leave is not often used by employees.[82] Most employees cannot afford to take unpaid absences from work.[83] This is particularly the case for fathers, who are often the primary financial income providers of the family.[84] Nevertheless, employed fathers are entitled to paid paternity leave.

4 2 Shared parental leave

Shared parental leave and pay was introduced by the Children and Families Act, 2014[85] with the intention of encouraging shared parental care-giving responsibilities and providing flexibility for the involvement of fathers in family care.[86] Shared parental leave allows the employee on maternity leave to convert part of her maternity leave to shared parental leave, which may be

73 S 3 of the Children Act 1989, c. 41 (UK).
74 S 4 of the Children Act 1989, c. 41 (UK).
75 Emir *Selwyn's Law of Employment* 192.
76 Reg 15 of the Maternity and Parental Leave Regulations.
77 Sch 2 par 8 of the Maternity and Parental Leave Regulations; James *The Legal Regulation of Pregnancy and Parenting in the Labour Market* 45.
78 Emir *Selwyn's Law of Employment* 192.
79 Sch 2 par 3 of the Maternity and Parental Leave Regulations.
80 Sch 2 par 6 of the Maternity and Parental Leave Regulations.
81 James *The Legal Regulation of Pregnancy and Parenting in the Labour Market* 45.
82 James *The Legal Regulation of Pregnancy and Parenting in the Labour Market* 46.
83 Caracciolo di Torella 2007 *Industrial Law Journal* 318 326.
84 *Ibid*.
85 S 117(1) of the Children and Families Act 2014 c. 6 (UK) (Children and Families Act).
86 Golynker 2015 *Journal of Social Welfare and Family Law* 384.

shared with her spouse or partner.[87] The leave entitlement is applicable to eligible parents of children born on or after 5 April 2015.[88] Shared parental leave and pay applies to the eligible mother/adopter of a child, and the child's father/adoptive parent, or the mother's/adopter's partner.[89] It is described as a "new statutory right" for employees with a partner who is working, or who has recently been working, as an employed earner or as self-employed.[90] The new statutory right allows eligible employees to share up to 50 weeks of shared parental leave and up to 37 weeks of statutory shared parental pay with the co-parent.[91]

4 2 1 The application of shared parental leave

Shared parental leave operates by enabling the eligible employee to reduce her maternity leave or adoption leave upon reaching the end of the compulsory leave period. This is known as "the entitlement to curtail statutory rights to leave".[92] The remainder of the untaken maternity or adoption leave may be taken as shared parental leave.

The leave may be curtailed upon notice to curtail maternity or adoption leave at a specified future date, or by simply returning to work.[93] The remaining maternity leave or adoption leave is then transferred to the co-parent.[94] Essentially, shared parental leave may encompass a period of 50 weeks, made up of 52 weeks of maternity leave, minus two weeks of compulsory maternity leave.[95] As such, it works alongside traditional maternity leave to provide working parents with more flexibility and choice when reconciling employment and family demands.[96]

4 2 2 Shared parental leave period claims

Shared parental leave may be claimed any time between the birth of a child, or the placement of a child for adoption or placement with prospective adopters, and the child's first birthday or the first anniversary of the

87 Children and Families Act; Golynker 2015 *Journal of Social Welfare and Family Law* 383.

88 S 75E of the Employment Rights Act; reg 2(1) of the Shared Parental Leave (Terms and Conditions of Employment) Regulations 2014 (UK) SI 2014/3050 (the Shared Parental Leave Regulations); reg 3 of the Statutory Shared Parental Pay (General) Regulations 2014 (UK) SI 2014/3051 (Statutory Shared Parental Pay Regulations).

89 Explanatory Memorandum to the Shared Parental Leave Regulations; Statutory Shared Parental Pay Regulations; Maternity and Adoption Leave (Curtailment of Statutory Rights of Leave) Regulations 2014 (UK) SI 2014/3052 (Maternity and Adoption Leave (Curtailment) Regulations).

90 Explanatory Memorandum to the Shared Parental Leave Regulations; Statutory Shared Parental Pay Regulations; Maternity and Adoption Leave (Curtailment) Regulations.

91 Shared Parental Leave Regulations; Statutory Shared Parental Pay Regulations.

92 Maternity and Adoption Leave (Curtailment) Regulations.

93 Maternity and Adoption Leave (Curtailment) Regulations; Explanatory Memorandum to the Shared Parental Leave Regulations; Statutory Shared Parental Pay Regulations.

94 Emir *Selwyn's Law of Employment* 202.

95 Reg 6 of the Shared Parental Leave Regulations.

96 Golynker 2015 *Journal of Social Welfare and Family Law* 384; Emir *Selwyn's Law of Employment* 202.

placement.[97] The leave must be taken in complete blocks, although the blocks of leave may be continuous or discontinuous.[98] Each parent is entitled to three continuous blocks of leave. The leave of each parent may be taken at the same time or separately.[99]

Therefore, employees can take leave in a continuous block or they can return to work intermittently between their periods of leave.[100] The minimum period of shared parental leave that may be taken is one week.[101] The structure of a 50-week leave entitlement available to both parents of a child is supportive of shared parental care.[102] By providing parents with the choice of accessing their leave continuously or in discontinuous blocks, together with the provision that the leave may be taken by the parents at the same time or separately, means that the law does not intend to prescribe care-giving roles to the parents.[103] The parents are allowed to structure the leave according to their family needs.[104]

4 2 3 Statutory shared parental pay

Shared parental pay arises from the transfer of untaken statutory maternity pay.[105] Statutory maternity pay due to a mother may be transferred as statutory shared parental pay.[106] A mother/adopter and a co-parent to whom the shared parental leave is transferred is entitled to statutory shared parental pay for a total of 39 weeks, less the number of weeks that statutory maternity pay is paid to the mother.[107] Shared parental leave is paid at a weekly rate of £138.18 a week, or 90 per cent of the normal weekly earnings of the individual claiming statutory shared parental pay, whichever amount is less.[108] The final 13 weeks of statutory shared parental leave is unpaid.[109] Statutory shared parental pay is not payable after the child's first birthday or the first anniversary of the placement for adoption.[110]

97 Reg 7(1) of the Shared Parental Leave Regulations.

98 Reg 7(2) and (3) of the Shared Parental Leave Regulations.

99 Reg 16(1) of the Shared Parental Leave Regulations; Mitchell 2015 *Industrial Law Journal* 127 128.

100 Mitchell 2015 *Industrial Law Journal* 127.

101 Reg 7(4) of the Shared Parental Leave Regulations.

102 Mitchell 2015 *Industrial Law Journal* 128.

103 Mitchell 2015 *Industrial Law Journal* 128.

104 *Ibid*.

105 S 165(3A) of the Social Security Contributions and Benefits Act, as amended by s 120(4) of the Children and Families Act, provides that the duration of the maternity pay period may be reduced in accordance with terms and conditions set out in regulations.

106 Part 12ZC of the Social Security Contributions and Benefits Act; s 119 of the Children and Families Act.

107 Reg 10 of the Statutory Shared Parental Pay Regulations.

108 Reg 40 of the Statutory Shared Parental Pay Regulations.

109 Rickard 2014 *Vanderbilt Journal of Transitional Law* 1494.

110 Reg 11 of the Shared Parental Leave Regulations; Statutory Shared Parental Pay Regulations.

4 2 4 Eligibility

In order to claim shared parental leave and statutory shared parental pay, the mother/adopter must first trigger the leave entitlement by curtailing the statutory maternity leave to which she is entitled; or where she has not curtailed her leave in that way, the mother/adopter has to return to work before the end of her statutory maternity leave.[111] The mother/adopter and the co-parent must then meet the following requirements to be eligible for shared parental leave and statutory shared parental pay. Both mother/adopter and co-parent must:

- satisfy the continuity-of-employment test, which requires the employee to have been continuously self-employed or employed with an employer for a period of not less than 26 weeks ending with the 15th week before the expected week of birth, or the week in which the adoptive parent has been notified of having been matched for adoption with the child; and to have remained in continuous employment until the week before any period of shared parental leave taken by the employee;[112]
- satisfy the employment-and-earnings test, which requires the employee or self-employed earner to have worked for at least 26 weeks in the 66 weeks leading up to the expected week of childbirth, or the week in which the adoptive parent has been notified of having been matched for adoption with the child; and the employee must have earned an average of at least £30 a week in any 13 weeks;[113]
- at the date of the child's birth, carry out the main responsibility for the care of the child;
- have complied with the condition that notice and evidence of the leave entitlement must be given to their employers; and
- have complied with the condition that a period of leave notice be given to the employer.[114]

Each entitlement to shared parental leave and pay is not affected by the number of children born or expected as a result of the same pregnancy.[115]

Both the mother/adopter and the co-parent must give the employer notice of the entitlement and the intention to take shared parental leave.[116] Written notice must be given to the employer at least eight weeks before the start of the first period of shared parental leave, and must indicate specified information as set out in the regulations.[117] The notice must be accompanied by a declaration indicating compliance with the conditions of entitlement for shared parental leave, and consenting to the amount of leave that each

111 Reg 4(2)(*d*) of the Shared Parental Leave Regulations.

112 Reg 35 of the Shared Parental Leave Regulations.

113 Reg 36 of the Shared Parental Leave Regulations.

114 Shared Parental Leave Regulations; Statutory Shared Parental Pay Regulations.

115 Reg 4(4) and 5(4) of the Shared Parental Leave Regulations; reg 11 of the Statutory Shared Parental Pay Regulations.

116 Reg 8 and 9 of the Shared Parental Leave Regulations; reg 6 and 7 of the Statutory Shared Parental Pay Regulations.

117 Reg 8(1) and 9(1) of the Shared Parental Leave Regulations; reg 6(1) and 7(1) of the Statutory Shared Parental Pay Regulations.

parent intends to take.[118] The regulations make provision for the parents to provide further written notice to their employers varying the periods of shared parental leave each parent intends to take.[119]

4 3 Employment protection

The Employment Rights Act,[120] together with the regulations, provides employment protection to the employee who takes or seeks to take paternity leave, parental leave or shared parental leave.[121] The Act states that an employee who is absent from work because of parental and shared parental leave is entitled to the benefits, and is bound by the terms and conditions of employment that would have applied had the employee not been absent.[122] If the employee takes parental or shared parental leave as a period following additional maternity leave or additional adoption leave, she is entitled to return from leave to the job in which she was employed before her absence unless it is not reasonably practicable for her to return to that job. In such an instance, the employer must offer the employee a job that is suitable and appropriate for her to do in the circumstances.[123] The employee is entitled to terms and conditions of employment that are no less favourable than those that would have applied had she not been absent.[124] Furthermore, the employee is protected against any detrimental treatment by the employer for the reason that he or she took or sought to take parental or shared parental leave.[125] The employee is also protected against unfair dismissal on the basis that he or she took or sought to take parental or shared parental leave.[126]

4 4 Take-up rates in the UK

The Fourth Work-Life Balance Employee Survey, 2012 was conducted in 2011 and is the most recent survey reflecting take-up rates of parental leave. According to the survey, 11 per cent of parents with children under the age of six had taken parental leave.[127] Reports also find a slow take-up rate attached to shared parental leave.[128] In April 2016, the My Family Care and

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118 Reg 8(3) and 9(3) of the Shared Parental Leave Regulations; reg 6(3) and 7(3) of the Statutory Shared Parental Pay Regulations.

119 Reg 11(1) of the Shared Parental Leave Regulations.

120 Employment Rights Act 1996 c. 18 (UK).

121 Reg 18(1) of the Employment Rights Act; Maternity and Parental Leave Regulations; reg 18(1) of the Shared Parental Leave Regulations.

122 Ss 75I and 77 of the Employment Rights Act.

123 Reg 18(3) of the Maternity and Parental Leave Regulations; reg 18(2) of the Shared Parental Leave Regulations.

124 Reg 18(5) of the Maternity and Parental Leave Regulations; reg 41(3) of the Shared Parental Leave Regulations.

125 Reg 20 of the Maternity and Parental Leave Regulations; reg 42 of the Shared Parental Leave Regulations.

126 S 99 of the Employment Rights Act; reg 20 of the Maternity and Parental Leave Regulations; reg 43 of the Shared Parental Leave Regulations.

127 *Ibid*.

128 My Family Care and Women's Business Council *Shared Parental Leave: Where Are We Now?* (2016) https://www.myfamilycare.co.uk/news/blog/shared-parental-leave-our-findings.html (accessed on 2019-12-16).

Women's Business Council surveyed 200 employers and 1 000 employees to determine take-up rates of shared parental leave.[129] According to the results, only 1 per cent of men have used shared parental leave, while 55 per cent of women stated that they would not want to share their maternity leave.[130] The main reasons that men had not taken shared parental leave were: financial affordability of the leave, lack of awareness of the right to shared parental leave, and unwillingness of women to share their maternity leave.[131] However, research indicates that the take-up rates are set to rise, as 63 per cent of male employees with young children indicated they would consider taking up shared parental leave.[132] The Maternity and Paternity Rights and Women Returners Survey 2009/10 indicated that 49 per cent of fathers had taken statutory paternity leave.[133] The majority of employees who had taken statutory paternity leave used the full two-week duration of statutory paternity leave.

5 COMPARATIVE ANALYSIS

The UK has two models of parental leave, both of which are highly regulated by legislative eligibility requirements but which nevertheless provide more flexibility and support to parents with caregiving responsibilities than the parental leave model of South Africa.

The duration of parental leave in South Africa is *at least* 10 consecutive days.[134] By contrast, the UK offers an eligible employee 18 weeks of parental leave, albeit unpaid, with a maximum of 4 weeks per year. Shared parental leave allows the parents to share the applicable maternity leave period between themselves. Thus, the UK offers longer periods of parental leave than South Africa does.

It is assumed that the words "at least" in section 25A(1) of the BCEA, as amended, were made to correspond with the wording of the right to maternity leave in section 25 of the BCEA. Section 25 states: "An employee is entitled to at least four months' consecutive maternity leave." In this provision, the words "at least" accounts for instances where the duration of maternity leave is extended by collective agreements or by agreements between the employer and the employee.[135] Similar conditions would apply

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129 *Ibid*.

130 *Ibid*.

131 *Ibid*.

132 *Ibid*.

133 O'Brien and Koslowski "United Kingdom Country Note" in Koslowski, Blum and Moss (eds) *International Network of Leave Policies and Research 2016: 12th International Review of Leave Policies and Related Research* (2016) 359 http://www.leavenetwork.org/lp_and_r_reports/ (accessed on 2016-12-20); Chanfreau, Gowland, Lancaster, Poole, Tipping and Toomse *Maternity and Paternity Rights and Women Returners Survey* 2009/2010 (2011) Department of Work and Pensions; Department of Business Innovation and Skill Research Report No 777 https://www.gov.uk/government/publications/maternity-and-paternity-rights-and-women-returners-survey-200910-rr777 (accessed on 2016-12-20).

134 S 25A(1) of the BCEA.

135 Dupper, Malherbe, Shipman and Bolani "The Case for Increased Reform in South African Family and Maternity Benefits" 2001 4 *Journal of Law, Democracy and Development* 27 33; Matthais "Achieving Effective Maternity Rights in a Post-Apartheid South Africa: Is the

to parental leave. Nevertheless, section 26A(4) of the UIA, as amended, states that the *maximum* period for which parental leave benefits may be claimed is 10 consecutive days.

The provision in South Africa for a shorter duration of parental leave (10 days) seems unlikely to interrupt the business of the employer. This is unlike parental leave in the UK, which provides for 18 weeks of parental leave, therefore requiring the further provision that allows the employer to postpone the leave for a period of six months so that it does not disrupt business operations.[136] Ten days of leave is less likely to impact the employer through the interruption of commercial activities.

The leave in the South African model can only be used upon the birth of a child.[137] It fails to provide continued caregiving support to parents with young children. By contrast, parental leave in the UK is applicable to parents of children under the age of 18.[138] Thus, the South African model of parental leave fails to account for the ongoing caregiving responsibilities of working parents with young children. However, the amendments retain the right to family responsibility leave for the purpose of taking care of a sick child.[139] In terms of this right, a parent with a young child who falls ill is entitled to three days of family responsibility leave per annual leave cycle.[140] If the parent has used up his or her family responsibility leave, he or she will have to rely on annual leave to take time off from work to attend to the child. In this respect, the parental leave model of South Africa fails to provide long-term support to working parents with young children.

Both parental leave and shared parental leave in the UK have strict eligibility requirements that must be met before the employee can rely on either of the leave entitlements. The South African right to parental leave does not set out detailed eligibility requirements. The failure to define the term "parent" in section 25A(1) of the BCEA, as amended, leads to a lack of clarity as to the applicability of parental leave. The provision operates on the interpretation that the "parent" of the child is referring to either a mother or the father.[141] It may also lead to the adoption of a broad understanding of "father," which is consistent with African culture, where the role of father can be ascribed to an uncle, stepfather or grandfather.[142]

Parental leave in the UK is applicable to an employee who has parental responsibility for the child in terms of the UK Children's Act, 1989.[143] Thus, the UK legislation clearly indicates in which instances a mother and a father will qualify for parental leave. Similarly, the right to shared parental leave indicates explicitly the persons eligible for the leave within the legislative

Constitution Adequate?" 1995 28(2) *The Comparative and International Journal of Southern Africa* 251 252.

136 Maternity and Parental Leave Regulations.

137 S 25A(1) of the BCEA.

138 Reg 15 of the Maternity and Parental Leave Regulations.

139 S 27(2)(*b*) of the BCEA.

140 *Ibid*.

141 Behari 2018 *ILJ* 2152; Rycroft and Duffy 2019 *ILJ* 22.

142 Rycroft and Duffy 2019 *ILJ* 22.

143 Reg 2 and 13 of the Maternity and Parental Leave Regulations; s 3 of the Children Act 1989, c. 41 (UK).

provision of the right.[144] It is submitted that the South African right to parental leave would have benefited from a reliance on the definition of "parent" in the Children's Act 38 of 2005. In such an instance, the BCEA would state that the employee would be considered as a "parent" of the child if he or she has "parental rights and responsibilities" over the child as set out in the Children's Act 38 of 2005. This would provide clear parameters to the application of parental leave.

As in the UK parental leave models, the South African right to parental leave is also available to adoptive parents.[145] However, its application to mothers remains uncertain for a number of reasons. First, section 25A(2)(*a*) of the LLAA states that an employee may commence parental leave on the day that the child is born or when the adoption order is granted. This suggests that parental leave may only be taken immediately after the birth of the child. If this is the case, then it would exclude the application of parental leave to all biological mothers, as mothers would be on compulsory maternity leave for two weeks after giving birth. This would indicate that the mother who has taken maternity leave will not be entitled to apply for parental leave once her maternity leave period ends.

Secondly, there is little clarity on whether the mother who has taken maternity leave will be entitled to apply for parental leave once her maternity leave period ends.[146] Rycroft and Duffy argue that parental leave is intended for the parent who is not the primary nurturer of the child.[147] This argument rests on the assumption that the primary nurturer of the child will be entitled to either maternity leave, adoption leave or commissioning parental leave under the BCEA, and that parental leave is to be taken by the secondary nurturer.[148] Nevertheless, where the employee is the mother of the child, she will not be able to claim parental benefits in terms of the UIA, as she will not be able to meet the qualifying requirement that the employee be the registered father of the child.[149]

A further shortcoming of the right to parental benefits in South Africa is that a female partner in a same-sex relationship will not be able to rely on parental benefits where her partner is the biological mother of the child and is entitled to maternity leave and benefits, while she, as the other parent, takes parental leave. Here too, the employee will be excluded from parental benefits as she will not be able to meet the qualifying requirement that the employee be registered as the father of the child.[150] The requirement that the employee must be the registered father of the child thus narrows the scope of parental leave and inevitably excludes categories of women despite its gender-neutral appearance.

Parental leave in the UK has an unbiased structure in that it allows either the mother or the father, or both partners in a same-sex partnership

144 Explanatory Memorandum to the Shared Parental Leave Regulations; the Statutory Shared Parental Pay Regulations; Maternity and Adoption Leave (Curtailment) Regulations.

145 S 25A(2)(*b*) of the BCEA.

146 Behari 2018 *ILJ* 2153; Rycroft and Duffy 2019 *ILJ* 19.

147 Rycroft and Duffy 2019 *ILJ* 17.

148 Behari 2018 *ILJ* 2153; Rycroft and Duffy 2019 *ILJ* 20.

149 S 26A(1) of the BCEA.

150 Behari 2018 *ILJ* 2158.

(whether male or female), to apply for a non-transferable entitlement of leave. Each parent is entitled to their own individual right to parental leave, which encourages each parent to use the right, irrespective of whether they are the mother or the father. Non-transferable parental leave allows both the mother and the father of the child to exercise a separate and individual entitlement to parental leave.[151] This encourages fathers to take parental leave and assists in the sharing of parental responsibilities between parents. The extension of the leave provision as an individual entitlement to fathers also assists in the promotion of an expanded caregiving role for fathers.[152] Shared parental leave in the UK appears to be aimed at assisting the mother with postnatal caregiving during her maternity period. It operates on the basis that the mother is offered a long maternity leave period, during which time she may want to return to work, in which case she can rely on the father/partner to take time off to assist with the care of the baby.[153] Both parents have the opportunity to care for the newborn or newly adopted baby.

In this respect, the South African model of parental leave fails to provide support for working mothers who have caregiving responsibilities for a newborn baby after the maternity leave period, as the mother cannot take parental leave once she exhausts her maternity leave. Owing to the limited applicability of parental leave to females, it appears that the right was better suited to be structured as a form of paternity leave rather than a gender-neutral parental leave entitlement. The true purpose of the South African model of parental leave is to offer fathers time off from work to care for a newborn baby, and to share in the caregiving with the mother who is on maternity leave. However, it must be noted that reliance on the UIA to provide parental leave benefits may affect the take-up rates of parental leave by fathers.

Family responsibility leave was previously paid by the employer at the full rate of the employee's remuneration.[154] By contrast, parental benefits are paid at a maximum rate of 66 per cent of the employee's remuneration. Thus, the employee who takes parental leave and relies on parental benefits will not be receiving full remuneration over the parental leave period. Parental leave in the UK is unpaid. Thus, while it is commendable that there are benefits attached to parental leave in South Africa, the discouraging level of benefits provides little incentive for fathers to take parental leave and may altogether deter a father who is the primary income provider of a household from taking parental leave.[155]

Furthermore, a significant exclusion from the introduction to parental leave is the provision of employment protection under the Labour Relations Act (LRA)[156] and the Employment Equity Act (EEA).[157] Currently, the LRA

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151 Huysamen in Malherbe and Sloth-Nielsen *Labour Law into the Future: Essays in Honour of D'Arcy du Toit* 73.

152 Morrell and Richter "Introduction" in Richter and Morrell (eds) *Baba: Men and Fatherhood in South Africa* (2006) 3.

153 Golynker 2015 *Journal of Social Welfare and Family Law* 378 383.

154 S 27(3)(*a*) and (*b*) of the BCEA.

155 Behari 2018 *ILJ* 2160.

156 66 of 1995.

157 55 of 1998.

provides protection against the dismissal of pregnant employees and employees with family responsibilities.[158] The EEA also provides protection from discrimination for pregnant employees and employees with family responsibilities.[159] As set out above, UK legislation provides employment protection to employees who take parental leave and shared parental leave. It is submitted that the LRA and EEA should be amended in like vein to ensure that an employee who has taken parental leave be entitled to return to the job in which he or she was employed. The employee must also be protected against unfair dismissal and unfair discrimination on the basis that he or she took or sought to take parental leave.

This article recommends that section 187(1)*(c)* of the LRA should be amended to ensure that the refusal to allow an employee to resume work after he has taken parental leave amounts to a dismissal. Section 187(1)*(f)* of the LRA should be amended to state that a dismissal is automatically unfair if an employer unfairly discriminates against an employee on grounds that include that the employee took or sought to take parental leave.[160] Furthermore, section 6(1) of the EEA should be amended to provide that no person may unfairly discriminate, directly or indirectly, against any employee in any employment policy or practice, on grounds that include that the employee took or sought to take parental leave.

In initiating these developments, South Africa may follow the lead of the UK in committing itself to the adoption of legislated family-friendly entitlements that will provide employees with the employment protection needed to support their caregiving responsibilities.[161] Against the background of a different socio-economic and political context, South Africa cannot be expected to have taken strides as progressive within the area of work-care reconciliation as those taken by the UK.[162] However, there is a need for South African labour law to commit itself to the further development of leave entitlements that will provide employees with more effective rights and protection to take time off from work to attend to their caregiving responsibilities.

6 CONCLUSION

The comparative analysis of the South African model of parental leave against parental leave entitlements in the UK has indicated that the legislative framework of South African parental leave offers limited rights and

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158 S 186(1)(*c*) and s 187(1)(*e*) of the LRA.

159 S 6 of the EEA.

160 S 187 provides: "(1) A *dismissal* is automatically unfair if the employer, in dismissing the *employee*, acts contrary to s 5 or, if the reason for the *dismissal* is– …
(f) that the employer unfairly discriminated against an *employee*, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility."

161 Field *et al* 2012 *SALR* 39; Lewis and Campbell 2007 *Social Politics: International Studies in Gender, State and Society* 21; Dancaster and Baird 2008 *ILJ* 41.

162 Bonthuys in Bonthuys and Albertyn *Gender, Law and Justice* 251; Dancaster and Baird 2008 *ILJ* 23; Smit 2011 *Journal of Comparative Family Studies* 20; Albertyn "Substantive Equality and Transformation in South Africa" 2007 23 *SAJHR* 253 255 261.

protections to employees with care responsibilities. Parental leave implies that the leave is applicable to both mothers and fathers. However, the South African model of parental leave is one-sided as it applies more directly to fathers than to both parents equally. This leaves one to question why it was modelled as parental leave at all, rather than as a right to paternity leave. It is also crucial that further legislative amendments are made to provide employment protection and non-discrimination measures to employees who rely on parental leave in South Africa. The commitment of the South African government is needed to develop the current model of parental leave into a legal mechanism that can support both parents and achieve gender equality in the workplace and the home.

COGNITIVE BIAS AFFECTING DECISION-MAKING IN THE LEGAL PROCESS

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> *The big problem, as it is everywhere, is with unconscious bias. I dare say that we all suffer from a degree of unconscious bias, and it can occur in all sorts of manifestations. It is almost by definition an unknown unknown, and therefore extraordinarily difficult to get rid of, or even to allow for.* (Lord Neuberger, President of the Supreme Court of the United Kingdom, "Fairness in the Courts: The Best We Can Do", Address to the Criminal Justice Alliance 10th April 2015).

SUMMARY

Several empirical research studies have shown that cognitive bias can unconsciously distort inferences and interpretations made by judges either at the hearing, ruling or sentencing stage of a court trial and this may result in miscarriages of justice. This article examines how cognitive heuristics affects judicial decision-making with seven common manifestations of heuristics such as availability heuristics, confirmation bias, egocentric bias, anchoring, hindsight bias, framing and representativeness. This article contends that the different manifestations of heuristics pose a potentially serious risk to the quality and objectivity of any criminal case, despite the professional legal training and experience of judges and magistrates. Therefore, suggestions on how best to avoid and minimise the effects of cognitive heuristics, especially within South African courts are proffered. These include creating awareness raising, cross-examination and replacement.

1 INTRODUCTION

The growing research on, and the scrutiny of, bias within the criminal justice system has shown that judicial decision-makers such as magistrates, judges and fact finders such as the jury[1] can be susceptible to cognitive bias despite their acquired legal knowledge, training and experience.[2] Cognitive bias is well-established in psychology and has been described as predispositions and preferences that affect human reasoning, perceptions and judgements.[3] Cognitive bias involves unconscious or unintentional influences on legal decisions.[4] This differs from the common-law understanding of bias which involves conscious influences affecting judges or magistrates who have an interest in a case.[5] This conception of judicial bias, especially in the context of actual bias and apprehension of bias[6] and how judges' perspectives on factors, such as politics, race, gender, religion and ethnicity etc can influence

1 A jury refers to a group of people chosen from the public to participate in the judicial decision-making process in countries like United States, England and Wales, Canada and Australia etc. This contrasts with the system in South Africa where judges and magistrates (not jury) are used. They are professionally trained for the position and are responsible for the administration of justice in South African courts. See Hornby *Oxford Advanced Learner's Dictionary* 9ed (2015) 825; Beecher-Monas "Heuristics, Biases, and the Importance of Gatekeeping" 2003 4 *Law Review of Michigan State University Detroit College of Law (L Rev MSU-DCL)* 987 988.

2 Edmond and Martire "Just Cognition: Scientific Research on Bias and Some Implications for Legal Procedure and Decision-Making" 2019 82 *Modern Law Review (MLR)* 633 and Guthrie, Rachlinski and Wistrich "Inside the Judicial Mind" 2001 *Cornell Law Faculty Publications Paper* 777–830. (The authors argue that the general assumption or expectation that judges can avoid error(s) in judgment is unrealistic due to the problem of cognitive bias or illusions). See also Peer and Gamliel "Heuristics and Biases in Judicial Decisions" 2013 49 *Court Review* 114; Gravett "The Myth of Rationality: Cognitive Biases and Heuristics in Judicial Decision-Making" 2017 134 *The South African Law Journal* 53 54; Sharp "Cognitive Heuristics and Law – An Interdisciplinary Approach to Better Judicial Decision Making" 1995 20 *Bulletin of the Australian Society of Legal Philosophy* 75 and Beecher-Monas 2003 *L Rev MSU-DCL* 987–1022.

3 Edmond and Martire 2019 *MLR* 646; The President's Council of Advisors on Science and Technology (PCAST) "Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods" https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf (accessed 2018-11-02) (PCAST 2016 Report) 31 and Stafford, Holroyd and Scaife "Confronting Bias in Judging: A Framework of Addressing Psychological Biases in Decision Making" (June 2018) https://pdfs.semanticscholar.org/168e/e8355eced41066c11a195092992da37c0176.pdf?_ga=2.120098568.1063625548.1576768096-245500049.1568038155 (accessed 2019-12-19) 1–20.

4 Irwin and Real "Unconscious Influences on Judicial Decision-Making: The Illusion of Objectivity" 2016 42 *McGeorge L Rev* 2 and Edmond and Martire 2019 *MLR* 634.

5 Edmond and Martire 2019 *MLR* 633; Irwin and Real 2016 *McGeorge L Rev* 2 and Nwauche "A Return to the Manifest Justice Principle: A Critical Examination of 'Reasonable Suspicion/Apprehension of Bias' and 'Real Possibility of Bias' Tests for Judicial Bias in South Africa and England" 2004 7 *PER/PELJ* 4.

6 Actual bias is when there is the real likelihood that a judge has an interest in the outcome of a case. Apprehension (or appearance) of bias occurs when parties to a dispute or the public entertain a reasonable suspicion of the likelihood that the judge might be partial and prejudiced in the resolution of a case. In *Ebner v Official Trustee in Bankruptcy* (2000) HCA 63 par 23. The court notes that: "Bias, whether actual or apprehended connotes the absence of impartiality." See also Nwauche 2004 *PER/PELJ* 4–7; Malan "Reassessing Judicial Independence and Impartiality Against the Backdrop of Judicial Appointments in South Africa" 2014 17 *PER/PELJ* 1965 1998–1999 and Edmond and Martire 2019 *MLR* 641.

their decisions, has been dealt with by the courts.[7] In particular, the South Africa courts have reiterated that the "notion of impartiality"[8] is fundamental to the objectivity and legitimacy of any legal proceedings and judgment.[9] Impartiality is a standard of conduct which judges or magistrates must adhere to when adjudicating on the facts of a case, contradictory evidence and the relevant principles of law.[10] The judge or magistrate must make fair and ethical decisions without the influence of biases and prejudices.[11] Nonetheless, it should be noted that this form of judicial bias is beyond the scope of this article.

The purpose of this article is to examine cognitive bias affecting judicial decision-making. Cognitive bias involves many processes but this article does not attempt to discuss all the processes. Rather, it focuses on the cognitive bias that is produced as a result of heuristics; a strategy or mental shortcuts that people rely on to make complex decisions or judgments simpler.[12] This is when decisions are made under different situations that

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7 Guthrie *et al* 2001 *Cornell Law Faculty Publications Paper* 782 and Harris and Sen "Bias and Judging" (2018) https://scholar.harvard.edu/files/msen/files/bias-judging-arps.pdf (accessed 2019-11-03) 1–35.

8 The notion of impartiality resonates with the Latin maxim*: Nemo judex in sua causa* meaning "no one is a judge in his (or her) own cause" and the right to fair hearing under the general principles of natural justice. Edmond and Martire 2019 *MLR* 633; Malan 2014 *PER/PELJ* 1998 and Nwauche 2004 *PER/PELJ* 1–4.

9 In *S v Le Grange* (040/2008) [2008] ZASCA 102 par 14, the court states that:

A cornerstone of our legal system is the impartial adjudication of disputes which come before the courts and tribunals. What the law requires is not only that a judicial officer must conduct the trial open-mindedly, impartially and fairly, but that such conduct must be 'manifest to all those who are concerned in the trial and its outcome, especially the accused' … As far as criminal trials are concerned, the requirement of impartiality is closely linked to the right of an accused person to a fair trial which is guaranteed by S 35(3) of our Constitution.

See also *President of Republic of South Africa v South African Rugby Football Union* (1999) (4) SA 147 (CC) 177 par 48. The court notes that "[i]t must never be forgotten than an impartial judge is a fundamental prerequisite for a fair trial …"; *S v Basson* 2007 (1) SACR 566 (CC) par 26; *Livesey v New South Wales Bar Association* (1983) 151 CLR 288, 293–294 and *Republican Party of Minnesota v White* 536 US 765 (2002).

10 See, for eg., article 4 of the Code of Judicial Conduct (adopted in terms of s 12 of the Judicial Service Commission Act No. 9 of 1994) for South African judges which states that: "A judge must (a) uphold the independence and integrity of the judiciary and the authority of the courts; (b) maintain an independence of mind in the performance of judicial duties …" Also, article 14(4)(e) of the South African Judicial Service Commission Amendment Act 20 of 2008 identifies the lack of impartiality as a condition for laying a complaint against a judge and s 165(2) of the South African Constitution Act 108 of 1996 which states that "The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice." See also Irwin and Real 2016 *McGeorge L Rev* 1.

11 In *Flaherty v National Greyhound Racing Club Ltd* [2005] EWCA Civ 1117 par 28 Lord Justice Scott Baker defined bias as "a predisposition or prejudice against one party's case or evidence on an issue for reasons unconnected with the merits of the issue". See also Irwin and Real 2016 *McGeorge L Rev* 1.

12 Psychologists Amos Tversky and Daniel Kahneman were the first to introduce heuristics and cognitive bias in their study on human judgment and choice. See Tversky and Kahneman "Judgment Under Uncertainty: Heuristics and Biases" 1974 185 *Science* 1124; Peer and Gamliel 2013 *Court Review* 114; Beecher-Monas 2003 *L Rev MSU-DCL* 994–995; Gravett 2017 *The South African Law Journal* 54; Guthrie *et al* 2001 *Cornell Law Faculty Publications Paper* 780–783; Edmond and Martire 2019 *MLR* 634; Greene and Ellis

encourage reliance on limited information instead of on all the relevant information that can be used in decision-making.[13] Though reliance on heuristics can produce good decisions, it can also result in systematic errors or inaccurate inferences due to the limited information relied upon.[14]

To further the understanding of heuristics and cognitive bias, this article examines seven common manifestations of heuristics that can result in cognitive bias and affect decision-making. These include availability heuristics,[15] confirmation bias,[16] egocentric bias,[17] anchoring,[18] hindsight bias,[19] framing[20] and representativeness.[21] Several empirical research studies have demonstrated how these cognitive heuristics affect judges either at the hearing, ruling or sentencing stage of a court trial.[22] Most of the empirical studies and court cases used to illustrate the effect of heuristics and cognitive bias in judicial decision-making, emanate from the United States of America and Europe.[23] It seems that there is no empirical evidence to show the influence and extent of the effect of heuristics and cognitive bias on judges in South Africa.[24] However, the studies conducted (some of which are discussed below) reveal the profound effect of heuristics on judicial decision-making which may result in miscarriages of justice. This article

"Decision Making, in Criminal Justice" (May 2008) https://www.researchgate.net/publication/229737159_Decision_Making_in_Criminal_Justice (accessed 2019-10-27) 3.

13 Gravett 2017 *The South African Law Journal* 53–54 and Peer and Gamliel 2013 *Court Review* 114.

14 Gravett 2017 *The South African Law Journal 55 and* Guthrie, Rachlinski and Wistrich "Judging by Heuristic-Cognitive Illusions in Judicial Decision Making" 2002 86 *Judicature* 44.

15 This can occur when a person assesses the probability of an event by the occurrences of its instances recalled. See Tversky and Kahneman 1974 *Science* 1127.

16 This is when a person seeking to test a hypothesis, beliefs or expectations looks for instances that confirm rather than falsifying instances. See Reese "Techniques for Mitigating Cognitive Biases in Fingerprint Identification" 2012 59 *UCLA Law Review* 1252 1260 and Rassin, Eerland and Kuijpers "Let's Find the Evidence: An Analogue Study of Confirmation Bias in Criminal Investigations" 2010 *Journal of Investigative Psychology and Offender Profiling* (*J. Investig. Psych. Offender Profil*) 231.

17 This form of heuristics can occur when a judge overestimates his/her abilities. See Guthrie *et al* 2001 *Cornell Law Faculty Publications Paper* 780–784.

18 This refers to when a person makes estimates based on an initial reference value. See Guthrie *et al* 2001 *Cornell Law Faculty Publications Paper* 784; Hollier "Anchoring Bias in the Courtroom" *The Law Project* (May 2017) https://www.thelawproject.com.au/insights/anchoring-bias-in-the-courtroom (accessed 2019-10-21) and Rachlinski, Wistrich and Guthrie "Can Judges Make Reliable Numeric Judgements? Distorted Damages and Skewed Sentences" 2015 90 *Indiana Law Journal* 695–739.

19 This can occur when a person overestimates the predictability of past events. Rachlinski "Heuristics and Biases in the Courts: Ignorance or Adaptation" 2000 79 *Oregon Law Review* 61.

20 This can occur when a person makes uncertain decisions on whether to settle a case or to proceed to trial. Guthrie *et al* 2002 Judicature 46.

21 This can occur when a person assesses the probability of certain events and makes categorical judgments. See Guthrie *et al* 2001 *Cornell Law Faculty Publications Paper* 805–806.

22 See, for eg., Guthrie *et al* 2001 *Cornell Law Faculty Publications Paper* 780; Edmond and Martire 2019 *MLR* 633, Peer and Gamliel 2013 *Court Review* 114–118; Gravett 2017 *The South African Law Journal* 53; Sharp 1995 *Bulletin of the Australian Society of Legal Philosophy* 74–75; Beecher-Monas 2003 *L Rev MSU-DCL* 995–997.

23 Gravett 2017 *The South African Law Journal* 53 and 60.

24 Gravett 2017 *The South African Law Journal* 53.

reviews the problem of heuristics in judicial decision-making and proffers possible strategies to minimise any negative effects, especially within South African courts.

This article proceeds in four parts. Following the introduction, Part II discusses the role of judges in court proceedings. Part III examines the nature and extent of the influence of cognitive bias and heuristics in judicial decision-making. Part IV provides possible solutions to mitigate the effect of cognitive bias in judicial decision-making.

2 THE ROLE OF JUDGES

Judges (and magistrates) are persons appointed to preside over court proceedings. Their appointments are subject to specified minimum criteria.[25] For instance, judicial appointments in South Africa are subject to the criteria set out in the Constitution[26] and the supplementary criteria provided by the Judicial Service Commission (JSC).[27] The criteria are as follows:[28]

In the Constitution:

1 Is the particular applicant an appropriately qualified person?
2 Is he or she a fit and proper person, and
3 Would his or her appointment help to reflect the racial and gender composition of South Africa?

The supplementary criteria include:

1 Is the proposed appointee a person of integrity?
2 Is the proposed appointee a person with the necessary energy and motivation?
3 Is the proposed appointee a competent person?
   a) Technically Competent
   b) Capacity to give expression to the values of the constitution
4 Is the proposed appointee an experienced person?
   a) Technically experienced
   b) Experienced in regard to the values and needs of the community
5 Does the proposed appointee possess appropriate potential?
6 Symbolism. What message is given to the community at large by a particular appointment?

[25] Malan 2014 *PER/PELJ* 1972–1973.

[26] See s 174 and 175 of the South African Constitution.

[27] The Judicial Service Commission is an independent body established by virtue of s 178 of the South African Constitution and the Judicial Service Act 9 of 1994 to facilitate judicial appointments. Also, the appointment of magistrates is prescribed by Regulations 3(1) of the Magistrate Act No 90 of 1993.

[28] Mokgoro "Judicial Appointments" (December 2010) https://www.sabar.co.za/law-journals/2010/december/2010-december-vol023-no3-pp43-48.pdf (accessed 2019-12-22) 43 and Malan 2014 *PER/PELJ* 1972–1973.

Through the above criteria, judges are selected and appointed with the professional responsibility of maintaining the judicial standard of impartiality when presiding over a case.[29] In *S v Le Grange* the court confirms:

> "It must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial. The integrity of the justice system is anchored in the impartiality of the judiciary. As a matter of policy, it is important that the public should have confidence in the courts. Upon this social order and security depend. Fairness and impartiality must be both subjectively present and objectively demonstrated to the informed and reasonable observer.[30]

This means that the interest of judges and magistrates should not be focused on a particular outcome or judgment but rather on the interpretation of the law and careful deliberation on the facts, evidence and arguments presented by the prosecution and the defence.[31] In other words, the expectation is that judges would not develop "a condition or state of mind which sways judgement and renders a judicial officer unable to exercise his or her functions impartially in a particular case".[32] Also, judges must act as gatekeepers, screening relevant information to ensure that the evidence adduced by the prosecution and the defence are well-founded.[33]

Despite the critical role of judges as impartial arbiters, the findings of recent research studies on cognitive psychology, reveal the problem of unconscious influences on human thought processes, which could undermine fair reasoning.[34] The next section of this article discusses some manifestations of heuristics and their influence on judicial decision-makers.

3 HEURISTICS AND COGNITIVE BIAS IN JUDICIAL DECISION-MAKING

Ideally, the judicial decision-making process would involve a careful weighing-up of all relevant information and evidence. But with the limitation of human cognitive capacity in dealing with vast amounts of information (some of which are ambiguous), there can be situations of unconscious

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29 Irwin and Real 2016 *McGeorge L Rev 10;* Gravett 2017 *The South African Law Journal* 59 *and S v Le Grange supra* par 14. Beecher-Monas 2003 *L Rev MSU-DCL* 989–991.

30 *S v Le Grange supra* par 21. See also *Bernert v Absa Bank Ltd* 2011 (3) SA 92 (CC) par 31; *Dube v The State* (523/07) [2009] ZASCA 28; 2009 (2) SACR 99 (SCA); *Sepheka v Du Point Pioneer* (J267/18) [2018] ZALCJHB 336; (2019) 40 ILJ 613 (LC) (9 October 2018); *S v Roberts* 1999 (2) SACR 243 (SCA) par 26.

31 *S v Le Grange supra* par 21. See also *Bernert v Absa Bank Ltd supra* par 31; *Dube v The State supra* 28; *Sepheka v Du Point Pioneer supra* 336; *S v Roberts supra* par 26. See also Gravett 2017 *The South African Law Journal 75;* Irwin and Real 2016 *McGeorge L Rev* 10 *and* Beecher-Monas 2003 *L Rev MSU-DCL* 989–991.

32 *S v Le Grange supra* par 21. See also *Bernert v Absa Bank Ltd supra* par 31; *Dube v The State supra* 28; *Sepheka v Du Point Pioneer supra* 336; *S v Roberts supra* par 26.

33 Beecher-Monas 2003 *L Rev MSU-DCL* 989–991; *Daubert v Merrell Dow Pharmaceuticals, Inc* 509 U.S. 579 (1993) and *Kumho Tire Co. v. Carmichael* 526, U.S. 137 (1999).

34 Stafford *et al* https://pdfs.semanticscholar.org/168e/e8355eced41066c11a195092992da37c0176.pdf?_ga=2.120098568.1063625548.1576768096-245500049.1568038155 1–3.

reliance on heuristics.[35] Heuristics is often in the form of a feeling or impression to ease the burden or complexity of daily decision-making.[36]

As stated in the introduction, reliance on heuristics can speed up a decision-making process and help produce good judgements or create a solution(s) to problems.[37] But in situations involving judgemental uncertainty, heuristics can produce systematic errors in judgment.[38] In the words of Reese, "the misapplication of heuristics leads to cognitive biases that prevent people from making the most rational decisions."[39] Below seven different manifestations of heuristics[40] are briefly discussed:

- Availability heuristic also referred to as judgmental heuristic, occurs when people estimate the frequency or the probability of the occurrence of an event when making a decision.[41] This estimation is based on how easy it is to recall from memory instances of an event.[42] If people can recall many instances or examples of an event then there is a possibility of a regular occurrence of the event.[43] Tversky and Kahneman illustrated the occurrence of availability heuristics through the random sampling of a word of three letters or more from an English text.[44] The sampling sought to establish whether it is "more likely that the word starts with r or that r is the third letter?"[45] The participants recalled words that begin with r (road) and have r in third position (car) and assessed the frequency of the letter by the ease with which the words come to mind.[46]

Research studies have shown how availability heuristics can influence a judge's cognitive reasoning in court proceedings.[47] Saks and Kidd explain:

> "The availability heuristic raises important concerns for the presentation of certain kinds of evidence to a fact finder. The subjective estimates of the likelihood that a particular event did occur or that particular consequences

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35 Gravett 2017 *The South African Law Journal* 54; Peer and Gamliel 2013 *Court Review* 114 and Greene and Ellis https://www.researchgate.net/publication/229737159_Decision_Making_in_Criminal_Justice 1–2.

36 Gravett 2017 *The South African Law Journal* 54–55 and Peer and Gamliel 2013 *Court Review* 114.

37 *Ibid*.

38 Gravett 2017 *The South African Law Journal* 55; Reese 2012 *UCLA L. REV.* 1260 and Sharp 1995 *Bulletin of the Australian Society of Legal Philosophy* 86.

39 Reese 2012 *UCLA L. REV.* 1260.

40 See Tversky and Kahneman 1974 *Science* 1124–185. Reese 2012 *UCLA L. REV.* 1260 (the author notes that "Cognitive bias comes in many forms, and their classifications are not mutually exclusive."); Guthrie *et al* 2001 *Cornell Law Faculty Publications Paper* 780 and Peer and Gamliel 2013 *Court Review* 114.

41 Tversky and Kahneman 1974 *Science* 1127 and Greene and Ellis https://www.researchgate.net/publication/229737159_Decision_Making_in_Criminal_Justice 7–10.

42 Peer and Gamliel 2013 *Court Review* 114; Tversky and Kahneman 1974 *Science* 1127.

43 Greene and Ellis https://www.researchgate.net/publication/229737159_Decision_Making_in_Criminal_Justice 8.

44 Tversky and Kahneman 1974 *Science* 1127.

45 *Ibid*.

46 *Ibid*.

47 Saks and Kidd "Human Information Processing and Adjudication: Trial by Heuristics" 1980–1981 *Law and Society Review* 123 137.

> would follow from certain actions will be influenced not only by the actual frequencies of those events but by their availability in memory. Expert witnesses reporting scientific and/or statistical data are likely to have less impact on a fact-finder than does a person who reports a case study, relates a compelling personal experience or offers anecdotal evidence."[48]

This means that evidence that is based on subjective interpretation rather than on objective, scientific or statistical data, may seem more probable to the fact-finder.[49] Also, when evidence is "more concrete, vivid, emotion-rousing and otherwise more salient [it] will be more accessible when a fact-finder ponders the decision to be made".[50] For instance, the manner in which a lawyer presents his or her arguments or an expert witness's anecdotal evidence may affect the way judges think during the decision making process.[51]

In *Mashpee Wampanoag Indians v Assessors,* the court deliberated on whether or not the plaintiffs who are native Americans, indeed constituted a tribe.[52] The plaintiff's expert witness, an anthropologist, had anecdotal observational evidence while the defence's expert witness, a sociologist had computer-analysed survey data.[53] The plaintiff brought a motion to the judge to exclude the sociologist's quantitative evidence because it is "flawed by methodological and analytic errors …"[54] The motion was brought to court probably because of fear that the quantitative evidence may have an overpowering effect.[55] Saks and Kidd believe the motion was a mistake.[56] They note:

> "First, based on what we know about the availability heuristic, we would predict that the quantitative data of the sociologist would have been less persuasive than the anthropologist's anecdotal report, because the latter would generally be more concrete and salient, and therefore more accessible. Second, and somewhat beside the present point, if the data were flawed, then exposing it to adversary cross-examination would lead the jurors to give it even less weight than their own cognitive processing would normally have given it.[57]

Though the plaintiff won the motion to exclude the sociologist's data, the defence won the case with limited evidence (anecdotal personal observations) presented to the court.[58]

From the case above, the exclusion of the quantitative evidence triggered reliance on limited information which might have affected the judge's intuitive probability estimates.[59] Also, cross-examination is an important strategy

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48 *Ibid*.
49 Saks and Kidd 1980–1981 *Law and Society Review* 137–139.
50 Saks and Kidd 1980–1981 *Law and Society Review* 137.
51 *Ibid*.
52 *Mashpee Wampanoag Indians v Assessors, 1980 Mass., 398 N.E. 2d 724* cited in Saks and Kidd 1980–1981 *Law and Society Review* 138 and 160.
53 Saks and Kidd 1980–1981 *Law and Society Review* 138–139.
54 *Ibid*.
55 *Ibid*.
56 *Ibid*.
57 *Ibid*.
58 Saks and Kidd 1980–1981 *Law and Society Review* 137.
59 *Ibid*.

which could have been used to challenge the disputed evidence and discover the truth in the case.[60] Therefore, cross-examination as a possible strategy to reduce the influence of heuristics in judicial decision-making is considered in Part IV of this article.

- Confirmation bias is the tendency to test a pre-existing belief, expectation or hypothesis by looking for information or evidence that confirms it rather than to consider contrary information or interpretation.[61] This form of bias "results from a heuristic-based expectation – the natural tendency of human beings to see what they expect to see".[62] In other words, once there is a hypothesis, a decision-maker develops a (1) biased search for evidence to confirm it or (2) provides a biased interpretation of information[63] because he or she is convinced about the truth of the hypothesis and would not consider alternative information that proves otherwise.[64]

Several research studies have shown the influence of confirmation bias in criminal proceedings, especially with regard to how it affects judges at the hearing process.[65] Judges hear and evaluate the evidence presented before the court by forensic experts, police officers/investigators and lawyers etc[66] but they can be biased and selectively confirm their pre-existing beliefs on the guilt of the accused without considering contrary evidence that may challenge their findings and seek to exonerate the accused.[67] Also, pretrial detention hearing (or bail hearing) in criminal trials has been identified as possible triggers of confirmation bias in judges.[68] A judge may be influenced

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60 Saks and Kidd 1980–1981 *Law and Society Review* 137. See also Thompson and Scurich "How Cross-Examination on Subjectivity and Bias Affects Jurors' Evaluations of Forensic Science Evidence" 2019 *Journal of Forensic Science* 1 and Schwikkard and Van der Merwe *Principles of Evidence* 4ed (2016) 12.

61 PCAST 2016 report 31; see also Rassin *et al* 2010 *J. Investig. Psych. Offender Profil* 231–232 and Reese 2012 *UCLA L. REV*. 1260.

62 Reese 2012 *UCLA L. REV.* 1260.

63 Shiyuan "Cognitive Biases that Lead to Wrongful Convictions: Illustrated by Twenty-Three Erroneous Chinese Cases" 2018 4 *California Western Law Review* 4–5; Gravett 2017 *The South African Law Journal* 69–70 and Ask and Granhag "Motivational Sources of Confirmation Bias in Criminal Investigations: The Need for Cognitive Closure" 2005 *Journal of Investigative Psychology and Offender Profiling* 43 45. The authors note "The confirmation bias can thus be said to operate by means of two mechanisms – selective information search and biased interpretation of available information." See also Findley and Scott "The Multiple Dimensions of Tunnel Vision in Criminal Cases" 2006 *Wisconsin Law Review* 292–293.

64 Gravett 2017 *The South African Law Journal* 69–70.

65 See, for eg., Rassin *et al* 2010 *J. Investig. Psych. Offender Profil* 231–232; Reese 2012 *UCLA L. REV.* 1260; Peer and Gamliel 2013 *Court Review* 114 and Findley and Scott 2006 Wisconsin Law Review 291–397.

66 See, for eg., Rassin *et al* 2010 *J. Investig. Psych. Offender Profil* 232–238; Lidén, Grans and Juslin "'Guilty, No Doubt': Detention Provoking Confirmation Bias in Judges' Guilt Assessments and Debiasing Techniques" 2018 *Psychology, Crime and Law* 1, 2.

67 Gravett 2017 *The South African Law Journal* 69–70; Lidén *et al* 2018 *Psychology, Crime and Law 2;* Ask and Granhag 2005 *Journal of Investigative Psychology and Offender Profiling* 45 *and* Shiyuan 2018 *California Western Law Review* 4–5.

68 Lidén *et al* 2018 *Psychology, Crime and Law* 2 and 19–20. The findings of the studies conducted by the authors showed that judges' detention of suspects can trigger a confirmation bias and significantly increase the probability of the suspect's guilt and a conviction. Also, the authors note that "the results illustrate an interaction between the detention decision and the decision-maker, meaning that participants made more guilt

by the information on a case or about a suspect and hypothesise or conclude on the probability of the guilt of an accused person.[69]

The influence of confirmation bias is recognised as a contributing factor to the wrongful conviction in the Schiedam Park murder case, in the Netherlands, where a ten-year-old girl was murdered and her friend assaulted.[70] The latter survived the attack. Kees Borsboom was identified as a witness in the murder case after the surviving child met him cycling in the park and asked him to call the police.[71] However, Borsboom became a prime suspect in the same murder case when it was found by the police that he had solicited sexual acts from a minor (a boy) at the same park weeks before the murder of the girl.[72] Borsboom initially confessed to the murder but later argued that it was made under duress. In fact, the surviving child's description of the perpetrator of the crime did not fit Borsboom's appearance, neither did the description of events leading to the murder match details provided in Borsboom's confession.[73] Also, the DNA evidence obtained from the crime scene was not a match with Borsboom.[74] He was convicted and sentenced to prison but released four years later following the confession by the real perpetrator of the crime and a positive DNA match.[75] An investigation into this case revealed that tunnel vision, also referred to as confirmation bias, influenced the judgment and the miscarriage of justice.[76] It seems that the police, public prosecution and the judge were convinced by the incriminating evidence which pointed to the guilt of Borsboom and overlooked the exonerating evidence that he was not guilty.[77]

- Egocentric bias occurs when people make judgements about themselves and their abilities in an egocentric or self-serving way.[78] People are influenced by different self-serving factors that define how they make their decisions about themselves in terms of whether they

presumptive ratings of the suspect's trustworthiness, the guilt consistent evidence as well as the total evidence and were also more likely to convict if they themselves had previously detained the suspect."

69 Lidén *et al* 2018 *Psychology, Crime and Law* 2 and 19–20.

70 Van Koppen "Blundering Justice: The Schiedam Park Murder" in Kocsis (ed) *Serial Murder and the Psychology of Violent Crimes* (2008) 207–216 and Rassin *et al* 2010 *J. Investig. Psych. Offender Profil* 233 and Van Koppen "Finding False Confessions" in Bull, Valentine and Williamson (eds) *Handbook of Psychology of Investigative Interviewing: Current Developments and Future Directions* (2009) 62–64.

71 Van Koppen in Kocsis *Serial Murder and the Psychology of Violent Crimes* 207–216.

72 Van Koppen in Kocsis *Serial Murder and the Psychology of Violent Crimes* 208.

73 Van Koppen in Bull *et al Handbook of Psychology of Investigative Interviewing: Current Developments and Future Directions* 62–64.

74 According to Van Koppen, the DNA was found under the nails and on the rubber boot of the girl and the surviving child belonged to someone other than the children, an unknown male person. See Van Koppen in Kocsis *Serial Murder and the Psychology of Violent Crimes* 213.

75 Rassin *et al* 2010 *J. Investig. Psych. Offender Profil* 233 and Van Koppen in Kocsis *Serial Murder and the Psychology of Violent Crimes* 210–213.

76 Rassin *et al* 2010 *J. Investig. Psych. Offender Profil* 232–233.

77 Van Koppen in Kocsis *Serial Murder and the Psychology of Violent Crimes* 207–216.

78 Guthrie *et al* 2001 *Cornell Law Faculty Publications Paper* 811–812 and Beecher-Monas 2003 *L Rev MSU-DCL* 1006–1008.

are better than average or when to overestimate their abilities.[79] Research studies have revealed the likelihood of judges being susceptible to egocentric biases which make them believe they are better decision-makers.[80] For example, the study by Guthrie, Rachlinski and Wistrich demonstrated the influence of egocentric bias in judges.[81] About 155 judges who participated in the study were asked anonymously to estimate the reversal rate of their decisions on appeal.[82] Also, the judges were asked, "to place themselves into the quartile corresponding to their respective reversal rates: highest (i.e., >75%), second-highest (>50%), third-highest (>25%), or lowest (<25%)".[83] The result showed that 56.1% of the judges placed themselves in the lowest quartile; 31.6% were in the second-lowest quartile; 7.7% in the second-highest quartile, and 4.5% in the highest quartile.[84] In other words, about 87.7% of the judges believed their colleagues have a higher reversal rate on appeal when compared to them.[85] This study reveals the strong influence of egocentric bias in the judges which prevented them from placing themselves in the high reversal rate on appeal.[86] The judges believed that they made better decisions.[87] This implies that when judges rely on the self-serving or egocentric bias, they become overconfident which precludes them from acknowledging any mistakes or limitations relating to their decisions.[88]

- Anchoring occurs when people make estimates or decisions based on a standard of reference (also referred to as initial value, starting point or a numeric reference point) or what is called an anchor.[89] The anchor influences what decision-makers will consider as the final value or numeric estimates/judgments based on adjustments made from or towards the anchor.[90] The anchor induces decision-makers "to consider

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79 Guthrie *et al* 2001 *Cornell Law Faculty Publications Paper* 811–812 and Babcock and Loewenstein "Explaining Bargaining Impasse: The Role of Self-Serving Biases" 1997 11 *Journal of Economic Perspectives* 109–126 and Greene and Ellis https://www.researchgate.net/publication/229737159_Decision_Making_in_Criminal_Justice 21.

80 See, for eg., Guthrie *et al* 2001 *Cornell Law Faculty Publications Paper* 811–812 and Greene and Ellis https://www.researchgate.net/publication/229737159_Decision_Making_in_Criminal_ Justice 21.

81 Guthrie *et al* 2001 *Cornell Law Faculty Publications Paper* 813–814.

82 *Ibid*.

83 *Ibid*.

84 *Ibid*.

85 Guthrie *et al* 2001 *Cornell Law Faculty Publications Paper* 813–814; see also Greene and Ellis https://www.researchgate.net/publication/229737159_Decision_Making_in_Criminal_ Justice 22–23.

86 Greene and Ellis https://www.researchgate.net/publication/229737159_Decision_Making_ in_Criminal_Justice 22–2 and Guthrie *et al* 2001 *Cornell Law Faculty Publications Paper* 813–814.

87 Greene and Ellis https://www.researchgate.net/publication/229737159_Decision_Making_in_Criminal_Justice 22–23.

88 Guthrie *et al* 2001 *Cornell Law Faculty Publications Paper* 815.

89 Tversky and Kahneman 1974 *Science* 1128 and Guthrie *et al* 2001 *Cornell Law Faculty Publications Paper* 787–788; Rachlinski *et al* 2015 *Indiana Law Journal* 695 and Hollier https://www.thelawproject.com.au/insights/anchoring-bias-in-the-courtroom.

90 Tversky and Kahneman 1974 *Science* 1128–1129 and Guthrie *et al* 2001 *Cornell Law Faculty Publications Paper* 787–788.

seriously the possibility that the numeric estimates are similar to the anchor, thereby leading them to envision circumstances under which the anchor would be correct".[91] The reliance on an anchor may provide relevant information about the estimates[92] but, in some situations, the anchor may provide no relevant information and still influence the adjustments made to the numeric estimates[93] because it is often difficult to ignore a previously considered standard.[94]

Research studies have shown how anchors influence decision-makers in different situations.[95] Anchors often influence decisions made by judges, especially in civil compensatory damages awards[96] and criminal sentencing (i.e., prison sentence or fine).[97] Englich, Mussweiler and Strack noted that it seems highly unlikely that a judicial decision with far-ranging implications can be influenced by a standard of reference or an anchor.[98] This is because judges are well trained and have lots of professional experience to handle the different issues that arise in criminal cases.[99] Furthermore, judges are well-guided by relevant procedural rules of law and sentencing guidelines.[100]

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91 Guthrie *et al* 2001 *Cornell Law Faculty Publications Paper* 788.

92 *Ibid*.

93 *Ibid*.

94 Guthrie *et al* 2001 *Cornell Law Faculty Publications Paper* 788 and Englich and Mussweiler "Sentencing Under Uncertainty: Anchoring Effects in the Courtroom" 2001 31 *Journal of Applied Social Psychology* 1536.

95 See, for eg., Tversky and Kahneman's well-cited illustration of anchoring, where participants were asked to indicate whether the percentage number of African countries in the United States is higher or lower than a standard or anchor determined by the spinning of a wheel of fortune. The participants were grouped with one group arriving at 10% and the other group 65% after spinning. The determined anchors influenced the participants' estimates, with the first group with the low anchor arriving at 25% and the other group with high anchor arriving at 45%. Also, a study where students were to determine whether the average cost of a college textbook was higher or lower than $7128.53 (the anchor). The result showed that students thought the textbooks were higher than they believed it to be. Tversky and Kahneman 1974 *Science* 1128; Guthrie *et al* 2001 *Cornell Law Faculty Publications Paper* 788 and Rachlinski *et al* 2015 *Indiana Law Journal* 701–702.

96 See, for eg., Guthrie *et al* 2001 *Cornell Law Faculty Publications Paper* 790–791 and Rachlinski *et al* 2015 *Indiana Law Journal* 707. In the study conducted 106 federal magistrate judges were presented with a hypothetical personal injury lawsuit. The plaintiff in the case was seriously injured in an accident involving the defendant's truck. Police investigation revealed that the truck had faulty braking system and the truck was not properly maintained. The plaintiff requested for the court to award damages for lost wages (he was unable to walk and work), hospital bills and pain/suffering, but he did not specify an amount for the damages. The judges were grouped into two: Group one has no anchor condition and asked to specify an amount to award the plaintiff as compensatory damages. In group two the judges were asked to make similar award but provided with an anchor condition that "the defendant has moved for dismissal of the case, arguing that it does not meet the jurisdictional minimum for a diversity case of $75,000." The $75, 000 served as the anchor. The judges in group two were asked to make a ruling on the motion and specify an amount to award the plaintiff if the motion was denied. The result showed that the judges that did not receive the anchor awarded the plaintiff $1,249,000 while the judges with the anchor condition $75,000 awarded the plaintiff $882,000.

97 Rachlinski *et al* 2015 *Indiana Law Journal* 695 and 706 and Englich and Mussweiler 2001 *Journal of Applied Social Psychology* 1537.

98 Englich, Mussweiler and Strack "Playing Dice with Criminal Sentences: The Influence of Irrelevant Anchors on Exerts Judicial Decision Making" 2006 *Personality and Social Psychology Bulletin* 189.

99 *Ibid*.

100 *Ibid*.

However, research findings have revealed that judicial decisions can be influenced by anchors under certain conditions, irrespective of professional training and experience.[101]

For example, Englich and Mussweiler demonstrated in a hypothetical case of an alleged rape that "sentencing demands can serve as anchors to which a final sentence is assimilated" despite other potential influences like the severity of the crime or the accused's criminal record etc.[102] Nineteen German trial judges participated in the study and were handed all appropriate case materials.[103] About half of the participants were told the prosecutor demanded a sentence of 34 months for the accused person and the other half were informed that he demanded a sentence of 2 months.[104] The result showed that "the given sentences were higher for participants who evaluated the high sentencing demand (m=28.70, SD 6.53) than for participants who evaluated the low sentencing demand (m 18.78 months, SD=9.11)".[105]

One of the studies conducted by Englich, Mussweiler and Strack showed that irrelevant anchors can influence criminal sentencing.[106] They examined "whether a sentencing anchor that is suggested by the media may influence judges' sentencing decisions".[107] The experiment involved the participation of 43 experienced legal practitioners (23 judges and 19 prosecutors)[108] at educational conferences for judges and prosecutors. The judges/participants received materials with realistic relevant information on an alleged rape case and were asked to take on the role of the criminal judge in this case.[109] During the court recess, a media reporter called the judges and asked the question: "Do you think that the sentence for the defendant in this case will be higher or lower than 1 or 3 year(s)?"[110] About half of the judges thought the prison sentence for the defendant in this case will be high and the other half decided on the low prison sentence.[111] Media scrutiny which is irrelevant to a judicial decision, should normally not influence a court's sentencing, but the results of this experiment have shown that judges can be influenced by irrelevant sentencing anchors.[112]

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101 Englich *et al* 2006 *Personality and Social Psychology Bulletin* 189; see also Guthrie *et al* 2001 *Cornell Law Faculty Publications Paper* 788 and Rachlinski *et al* 2015 *Indiana Law Journal* 703.

102 Englich and Mussweiler 2001 *Journal of Applied Social Psychology* 1535–1538 and Rachlinski *et al* 2015 *Indiana Law Journal* 695 and 706.

103 Englich and Mussweiler 2001 *Journal of Applied Social Psychology* 1535–1538.

104 *Ibid*.

105 *Ibid*.

106 Englich *et al* 2006 *Personality and Social Psychology Bulletin* 190.

107 *Ibid*.

108 The legal education system in Germany allows judges and prosecutors to receive the same legal training as well as alternate between their positions in the first years of their professional training and practice. Englich *et al* 2006 *Personality and Social Psychology Bulletin* 190–191.

109 *Ibid*.

110 *Ibid*.

111 *Ibid*.

112 Englich *et al* 2006 *Personality and Social Psychology Bulletin* 192*;* Fitzmaurice and Pease *The Psychology of Judicial Sentencing* (1986).

- Hindsight bias: Generally, before events occur, they are less predictable.[113] But when they occur and are evaluated, there is the tendency for people exposed to the events to exhibit hindsight bias (also known as "we knew it all along" phenomenon).[114] This means people overestimate the predictability of past events or assign higher probabilities to the outcome of events that have occurred as though they knew it all along or could have foreseen it.[115] Harley, Carlsen and Loftus note that "Hindsight bias is thought to result from cognitive reconstruction processes that occur after outcome information is received."[116]

Several studies have shown that hindsight bias has affected court judgments, specifically, related to negligence, liability and medical practice.[117] For instance, many medical malpractice litigations in radiology involving diagnostic, perceptual, or decision-making errors have been linked with hindsight bias.[118] In court cases like this, "the task of the judge is to assess how foreseeable an outcome was and to evaluate whether the plaintiff's behaviour took this risk into consideration."[119] But the problem in these types of court cases is that judges evaluate outcomes after the fact and in hindsight, while the plaintiff only had the chance to provide foresight about it.[120]

Peer and Gamliel illustrated in their study the effect of hindsight bias in a malpractice claim case where the physician was accused of malpractice because of his failure to detect a tiny tumour in early chest radiography.[121] The tumour got bigger and the patient died. The court found the physician guilty after a second radiologist who saw the radiographs after the tumour was found, testified that the tumour could have been detected in the early chest radiography.[122] The second radiologist's evaluation in hindsight was an advantage the first physician did not have at the time.[123]

Similarly, in *Gehlen v Snohomish Public Hospital* (a medical malpractice case) the plaintiff's expert evaluated the radiograph and testified (in

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113 Peer and Gamliel 2013 *Court Review* 115.

114 Peer and Gamliel 2013 *Court Review* 115; see also Rachlinski 2000 *Oregon Law Review* 66–80 and Guthrie *et al* 2001 *Cornell Law Faculty Publications Paper* 799–701.

115 *Ibid*.

116 Harley, Carlsen and Loftus "The Saw It All Along Effect: Demonstrations of Visual Hindsight Bias" 2004 30 *Journal of Experimental Psychology: Learning, Memory and Cognition* 960.

117 See, for eg., Roese "I Knew it all Along … Didn't I? Understanding Hindsight Bias" (6 September 2012) *Psychological Science* https://www.psychologicalscience.org/news/releases/i-knew-it-all-along-didnt-i-understanding-hindsight-bias.html (accessed 2019-07-26); Peer and Gamliel 2013 *Court Review* 115 and 118; Rachlinski 2000 *Oregon Law Review* 69–70 and Guthrie *et al* 2001 *Cornell Law Faculty Publications Paper* 799–701.

118 Harley *et al* 2004 *Journal of Experimental Psychology: Learning, Memory and Cognition* 960.

119 Peer and Gamliel 2013 *Court Review* 115 and 118 and Rachlinski 2000 *Oregon Law Review* 69.

120 Peer and Gamliel 2013 *Court Review* 115.

121 *Ibid*.

122 *Ibid*.

123 *Ibid*.

hindsight) that the radiologist should have seen the small mass.[124] The court also deliberated on whether or not the radiologist's failure to see the small mass resulted from "negligence" or "perceptual error".[125] One of the experts called to testify on perceptual error notes that: "In his opinion, all radiologists make perceptual errors [that is looking at an object or features associated and not seeing it], and it would be impossible for a reasonably prudent radiologist to interpret x-rays on a daily basis without making perceptual errors."[126] The expert also noted that "80 per cent of cases in which a radiologist makes a significant diagnostic error, the reason for the diagnostic error is a perceptual error."[127] But after Gehlen's case, Harley, Carlsen and Loftus illustrated in their study how hindsight bias might apply to visual perception.[128] They used radiology data as an example to show that "82% of missed tumors were 'visual in hindsight' by radiologists with outcome knowledge."[129] This study confirms the susceptibility of radiologists who are expert witnesses to hindsight bias, the potential for error and its profound impact on the quality of decision-making.

- Framing can occur when a person is confronted with making "risky or uncertain decisions - such as deciding whether to settle a case or to proceed to trial – they tend to categorise their decision options as potential gains or losses from the status quo".[130] The categorisation, also referred to as "framing" of decision options, influences a person's evaluation and the extent to which he or she is willing to incur risk.[131] Guthrie, Rachlinski and Wistrich explain further on the concept of framing:

> "People tend to make risk-averse decisions when choosing between options that appear to represent gains and risk-seeking decisions when choosing between options that appear to represent losses. For example, most people prefer a certain $100 gain to a 50% chance of winning $200 but prefer a 50% chance of losing $200 to a certain $100 loss."

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124 See *Gehlen v Snohomish County Public Hospital District* No. 1, 2001 WL 815005 (Wash.App.Div. 1) (unpublished opinion) cited in Johns "What Was He Thinking? Beyond Bias – To Decision Making and Judging" (8 March 2007) https://gacc.nifc.gov/swcc/dispatch_logistics/overhead/imt/documents/what_was_he_thinking.pdf (accessed 2020-01-05) 8.

125 *Ibid*.

126 *Ibid*.

127 *Ibid*.

128 See Harley *et al* 2004 *Journal of Experimental Psychology: Learning, Memory and Cognition* 960–968.

129 The empirical data was taken from Muhm, Miller, Fontana, Sanderson and Uhlenhopp "Lung Cancer Detected During a Screening Program Using Four-Month Chest Radiographs" *Radiology* 609–615. The authors conducted a screening program at the Mayo Clinic for men at high risk of lung cancer. The study involved 4,618 members whose chest radiographs were obtained every 4 months, "and each radiograph was read by two to three radiologists or chest physicians". Over the course of the 6-year study, 92 tumors were detected in the study group. Of these, 75 (82%) were, as the authors termed it, "visible in retrospect". See Harley *et al* 2004 *Journal of Experimental Psychology: Learning, Memory and Cognition* 961 and Johns https://gacc.nifc.gov/swcc/dispatch_logistics/overhead/imt/documents/what_was_he_thinking.pdf 9.

130 Guthrie *et al* 2002 *Judicature* 46.

131 Guthrie *et al* 2002 *Judicature* 46; see also Guthrie *et al* 2001 *Cornell Law Faculty Publications Paper* 794.

Research studies have shown that framing can have profound effect on civil law cases.[132] In such cases, plaintiffs are confronted with decision options of "either to accept a certain settlement from the defendant or to gamble, hoping that further litigation will produce a larger gain".[133] For defendants, the decision options are "either to pay a certain settlement to the plaintiff or to gamble that further litigation will reduce the amount that they must pay."[134] Thus, from the plaintiffs' perspective the chosen option seems to represent gains ("settlement, the risk-averse option") while the defendants' options seem to represent losses ("trial, risk-seeking option").[135]

Judges play a critical role in settlement talks between plaintiffs and defendants, but framing can influence them when making decisions.[136] The study conducted by Guthrie, Rachlinski and Wistrich have revealed that "framing can detrimentally impact judicial management of law suits."[137] In this study, some judges were asked to preside over a case labelled "suit and settlement" in which a plaintiff sued the defendant for $200,000 in a copyright action.[138] The plaintiff and defendant are publishing companies. The dispute focused on "whether the defendant's actions infringed on the plaintiff's copyright."[139] It is also stated in the case study that the judges must believe that "the plaintiff has a 50% chance of recovering the full $200,000 and a 50% chance of recovering $0."[140] Also, the judges must note that "should the parties fail to settle each will spend approximately $50,000 at trial in litigation expenses. Assume that there is no chance that the losing party will have to compensate the winner for these expenses."[141]

Half of the judges view this case from the plaintiff's perspective in which the choice involved potential gains. The judges learnt that the defendant intends to offer $60,000 to the plaintiff to settle the case and were asked the question: "Do you believe that the plaintiff should be willing to accept $60,000 to settle the case?"[142] The judges response should be a "Yes or No" answer. In this instance, the plaintiff is confronted with "a choice between a certain $60,000 gain or an expected trial outcome of $50,000."[143]

The other half of the judges represent the defendant's perspective in which the choice involved potential losses.[144] The judges also learnt that the plaintiff's intended to accept $140,000 from the defendant to settle the case

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132 See Guthrie *et al* 2002 *Judicature* 46–47 and Guthrie *et al* 2001 *Cornell Law Faculty Publications Paper* 794–799.

133 Guthrie *et al* 2001 *Cornell Law Faculty Publications Paper* 795 *and* Guthrie *et al* 2002 *Judicature* 46.

134 *Ibid*.

135 Guthrie *et al* 2001 *Cornell Law Faculty Publications Paper* 798.

136 Guthrie *et al* 2002 *Judicature* 46 and Guthrie *et al* 2001 *Cornell Law Faculty Publications Paper* 798.

137 *Ibid*.

138 Guthrie *et al* 2001 *Cornell Law Faculty Publications Paper* 796.

139 *Ibid*.

140 *Ibid*.

141 *Ibid*.

142 Guthrie *et al* 2001 *Cornell Law Faculty Publications Paper* 796–797.

143 Guthrie *et al* 2001 *Cornell Law Faculty Publications Paper* 796–797; see Guthrie *et al* 2002 *Judicature* 46–47.

144 Guthrie *et al* 2001 *Cornell Law Faculty Publications Paper* 797.

and were asked "Do you believe that the defendant should be willing to pay $140,000 to settle the case?"[145] The judges response should also be a "Yes or No" answer. In this instance, the defendant is confronted with "a choice between a certain $140,000 loss or an expected trial outcome of $150,000".[146] The results revealed:

> "Among the judges evaluating the case from the plaintiff's perspective, 39.8% (thirty-three out of eighty-three) indicated that they thought the plaintiff should accept the $60,000 settlement offer, but only 25% (twenty out of eighty) of the judges evaluating the case from the defendant's perspective indicated that they thought the defendant should pay the $140,000 settlement payment proposed by plaintiff."[147]

Thus, the judges were more inclined towards the plaintiff accepting a settlement. The framing of decision problems seem to influence how judges perceive settlement decisions.[148]

- The representativeness heuristic can occur when people assess the probability of certain events (or behaviour) and rely on apparent similarities between the features of the events and the features of a particular category, in order to determine whether the events are representative of the category.[149] Guthrie, Rachlinski and Wistrich explain:

> "When people make categorical judgments (e.g., assessing the likelihood that a criminal defendant is guilty), they tend to base their judgments on the extent to which the evidence being analysed (e.g., the defendant's demeanour) is representative of the category. When the evidence appears representative of, or similar to, the category (e.g., the defendant is nervous and shifty), people judge the likelihood that the evidence is a product of that category as high (i.e., evidence of guilt). When the evidence being analysed does not resemble the category (e.g., the defendant appears at ease), people judge the likelihood that the evidence is a product of that category as low (i.e., evidence of innocence)."[150]

This is a case of reliance on similarity likelihood rather than on statistical likelihood.[151] The judge's ability to observe and draw inferences from the demeanour, that is the visible or audible expression,[152] of witnesses,

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145 Guthrie *et al* 2001 *Cornell Law Faculty Publications Paper* 797; see Guthrie *et al* 2002 *Judicature* 46–47.

146 *Ibid*.

147 *Ibid*.

148 *Ibid*.

149 Rachlinski 2000 *Oregon Law Review* 82; Guthrie *et al* 2001 *Cornell Law Faculty Publications Paper* 805–806 *and* Greene and Ellis https://www.researchgate.net/publication/229737159_Decision_Making_in_Criminal_Justice 11–12.

150 Guthrie *et al* 2001 *Cornell Law Faculty Publications Paper* 805.

151 Johns https://gacc.nifc.gov/swcc/dispatch_logistics/overhead/imt/documents/what_was_he_thinking.pdf 11.

152 These include "witnesses' manner of testifying, character, personality and the impression they create. Whether they are candid or evasive, ready or reluctant in giving their version, whether they hesitate unnecessarily, fidget nervously, twitch facially in response to straight forward questions, and 'a thousand other considerations' cumulatively contribute to shaping demeanour". See *S v Shaw* [2011] ZAKZPHC 32 AR342/10 78; Schwikkard and Van der Merwe *Principles of Evidence* 575 and Naude "Face-Coverings, Demeanour Evidence and the Right to a Fair Trial: Lessons From the USA and Canada" 2013 46 *The Comparative and International Journal of Southern Africa* 168.

contributes to confirming the probative value of the testimony presented in court.[153] Demeanour of witnesses is considered real evidence as the court is observing an evidentiary fact.[154] However, this evidence is controversial in nature, in the sense that, it is not enough to confirm the likelihood of the guilt of an accused based on expressions displayed in court or confirm the credibility of an expert's testimony by the manner he or she testifies.[155] Also, the court's observation of demeanour is subjective with the danger of human error.[156]

The problem with the value of demeanour evidence has been pointed out by the South African courts.[157] In *Medscheme Holdings (Pty) Ltd v Bhamjee*[158] the court stated:

> "An assessment of evidence on the basis of demeanour – the application of what has been referred to disparagingly as the 'Pinocchio theory' – without regard for the wider probabilities, constitutes a misdirection. Without a careful evaluation of the evidence that was given (as opposed to the manner in which it was delivered) against the underlying probabilities, which was absent in this case, little weight can be attached to the credibility findings of the court *a quo*."

Courts have reiterated the need for demeanour evidence to be applied wisely.[159] The following principles have been summed up for consideration when interpreting demeanour evidence. They include:

> "(a) Demeanour in itself is a fallible guide to credibility and should be considered with all other factors: it is in the overall scrutiny of evidence that demeanour should be considered and then only if there are sufficient indications thereof to be significant.[160]
> (b) The limited value of a finding on demeanour becomes even less where an interpreter is used.[161]
> (c) The Constitutional Court has pointed out the danger of assuming that: 'all triers of fact have the ability to interpret correctly the behaviour of a witness, notwithstanding that the witness may be of a different culture,

153 Naude 2013 *The Comparative and International Journal of Southern Africa* 166–167.

154 Naude 2013 *The Comparative and International Journal of Southern Africa* 166 and Schwikkard and Van der Merwe *Principles of Evidence* 575.

155 Naude 2013 *The Comparative and International Journal of Southern Africa 167* (the author notes that "it is possible that an honest witness may be shy or nervous by nature while a dishonest and crafty witness may simulate an honest demeanour" and "it would be wrong to assume that those who are lying display behavioural signs of lying, or that those who are telling the truth will not show signs that may create the appearance of lying"). See also *Mofutsana v S* (A287/2017) [2018] ZAFSHC 170 (1 November 2018) 18–19.

156 *Mofutsana v S supra* 20.

157 See, for eg., *Mofutsana v S supra* 20; *S v Shaw supra* 77–82 and *President of the Republic of South Africa v South African Rugby Football Union* [1999] ZACC 11; 2000 (1) SA 1 77–79.

158 2005 (5) SA 339 14; see also *Mofutsana v S supra 20*.

159 *Ibid*.

160 *S v Shaw supra* 78–80; *Mofutsana v S supra* 20; *Cloete v Birch* 1993 (2) PH F17 (E) and *S v Civa* 1974 (3) SA 844 (T). See also Schwikkard and Van der Merwe *Principles of Evidence* 575.

161 *Mofutsana v S supra* 20; *S v Malepane* 1979 (1) SA 1009 (w) 1016H–1017A; *Rex v Dhlumayo* 1948 (2) SA 677 (A) 697 and *Body Corporate of Dumbarton Oaks v Faiga* 1999 (1) SA 975 (SCA). See also Schwikkard and Van der Merwe *Principles of Evidence* 575.

class, race or gender and someone whose life experience differs fundamentally from that of the trier of fact.'[162]

(d) Demeanour can hardly ever be decisive in determining the outcome of a case. Demeanour is merely one factor to be taken into account: 'In addition to the demeanour of the witness', said Krause J in *R v Momekela & Commandant*[163] 'one should be guided by the probability of his story, the reasonableness of his conduct, the manner in which he emerges from the test of his memory, the consistency of his statements and the interest he may have in the matter under enquiry.'[164]

(e) A trial court is obviously in a better position than the court of appeal to make a finding on demeanour, and the court of appeal "must attach weight, but not excessive weight" to the trial court's finding. It is as a general rule important that a trial court should record its impression of the demeanour of a material witness."[165]

While the South African courts have emphasised caution when applying demeanour evidence, a clear link with representativeness heuristic, which is from the psychology discipline, has not been shown. Research studies on the representativeness heuristic have noted the problem of the misinterpretation of evidence when a judge relies too much on it.[166] For example, Greene and Ellis note that "child witness demeanour [i.e., crying] in the courtroom can affect perceptions of the child and of the defendant's guilt."[167]

Over-reliance on representativeness heuristics can lead judges to "downplay the importance of the probability of a random match" or "disregard other characteristics of the evidence that undermine its probative value, such as the probability of laboratory error or other mismanagement of the evidence".[168]

While representativeness heuristic may be useful in decision-making, it can lead decision-makers to discount relevant statistical evidence.[169] Judges might ignore or discount what is known as base-rate statistics that are considered highly relevant for decisions.[170] Base-rate statistics is the probability with which a crime or an event actually occurs.[171] In situations where base-rate statistics are ignored, it can induce a problem known as an

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162 *President of the Republic of South Africa v South African Rugby Football Union supra* 79; See also *Mofutsana v S supra* 20 and Schwikkard and Van der Merwe *Principles of Evidence* 575–576.

163 1936 OPD 24 and Schwikkard and Van der Merwe *Principles of Evidence* 576.

164 *Mofutsana v S supra* 20; *Cloete v Birch supra* and Schwikkard and Van der Merwe *Principles of Evidence* 576.

165 *Mofutsana v S supra* 20; *S v Mwanyekanga* 1993 (2) PH H54 (C); see *S v Jochems* 1991 (1) SACR 208 (A). See also Schwikkard and Van der Merwe *Principles of Evidence* 576.

166 See, for eg., Rachlinski 2000 *Oregon Law Review* 85–86.

167 Greene and Ellis https://www.researchgate.net/publication/229737159_Decision_Making_in_Criminal_Justice 12.

168 *Ibid*.

169 Johns https://gacc.nifc.gov/swcc/dispatch_logistics/overhead/imt/documents/what_was_he_thinking.pdf 9.

170 Johns https://gacc.nifc.gov/swcc/dispatch_logistics/overhead/imt/documents/what_was_he_thinking.pdf 9 and Guthrie *et al* 2001 *Cornell Law Faculty Publications Paper* 806.

171 Greene and Ellis https://www.researchgate.net/publication/229737159_Decision_Making_in_Criminal_Justice 12.

inverse fallacy.[172] Guthrie, Rachlinski and Wistrich describe inverse fallacy as;

> "The tendency to treat the probability of a hypothesis given the evidence (for example, the probability that a defendant was negligent given that a plaintiff was injured) as the same as, or close to, the probability of the evidence given the hypothesis (for example, the probability that the plaintiff would be injured if the defendant was negligent)".[173]

Guthrie, Rachlinski and Wistrich examined the possibility that judges would commit the inverse fallacy.[174] Using a *res ipsa loquitur*[175] a problem in a Torts case some judges were given a brief description of a case based on the classic English case *Byrne v Boadle*.[176] The plaintiff was struck by a barrel that was being hoisted into the warehouse while passing the defendant's warehouse.[177] An investigation was conducted by the Government safety inspectors and they determined that "a) when barrels are negligently secured, there is a 90% chance that they will break loose; (b) when barrels are safely secured, they break loose only 1% of the time and c) workers negligently secure barrels only 1 in 1,000 times".[178] Based on the facts provided, the judges were asked: "how likely is it that the barrel fell due to negligence of one of the workers".[179] The findings showed that the probability that the defendant was negligent is actually only 8.3%, although most people commit the inverse fallacy and assume the likelihood of negligence is as high as 90% "because they fail to attend to the base rate (that workers negligently secure barrels only 1 time in 1000 attempts)".[180] About 40% of judges selected a correct answer in the range 0–25% (probability of negligence).[181] The remaining 60% of judges who did not choose the correct answer, exhibited a tendency to select the highest range which suggested they committed an inverse fallacy.[182]

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172 Guthrie *et al* 2001 *Cornell Law Faculty Publications Paper* 807.

173 *Ibid*.

174 Guthrie *et al* 2001 *Cornell Law Faculty Publications Paper* 808.

175 *Res ipsa loquitur* is a legal doctrine used "to describe situations where notwithstanding the plaintiff's inability to establish the exact cause of the accident the fact of the accident by itself is sufficient to justify the conclusion that the defendant was probably negligent, and in the absence of an explanation by the defendant to the contrary that such negligence caused the injury to the plaintiff". See Van den Heever and Lawrenson "Inference of Negligence – Is it Time to Jettison the Maxim *Res Ipsa Loquitur*?" http://www.saflii.org/za/journals/DEREBUS/2015/15.html (accessed 2020-01-12).

176 159 Eng. Rep. 299 (Ex. Ch. 1863) cited Guthrie *et al* 2001 *Cornell Law Faculty Publications Paper* 808.

177 Guthrie *et al* 2001 *Cornell Law Faculty Publications Paper* 808–809 and Greene and Ellis https://www.researchgate.net/publication/229737159_Decision_Making_in_Criminal_Justice 15–16.

178 *Ibid.*

179 *Ibid*.

180 *Ibid*.

181 *Ibid*.

182 Guthrie *et al* 2001 *Cornell Law Faculty Publications Paper* 808–809.

3 1 Coherence-based reasoning

This article considers coherence-based reasoning because it is recognised as "a general model of judgment and decision-making in conditions of complexity".[183] Also, it differs from biases and heuristics which deal with more specific situations or evidence and narrowly defined tasks of judgement and choice.[184] Coherence-based reasoning involves the mental tasks of evaluating pieces of evidence in a legal case to establish the strength of all the evidence as either strong or weak in order to confirm the guilt of the accused.[185] It is also a theoretical framework for decision-making from a psychological perspective.[186] This framework "applies whenever people must derive a conclusion on the basis of the integration of numerous ambiguous, complex, and contradictory inferences".[187] Coherence-based reasoning involves "an unconscious transformation of the way decisions are mentally represented, ultimately leading to a seemingly straightforward choice between a compelling alternative and a weak one".[188]

Research studies have shown that coherence-based reasoning applies to the mental process involved in dealing with the complexities in legal cases.[189] Charman, Douglas and Mook note that the underlying idea behind this theoretical framework as it applies to legal decision-making is that:

> "[v]arious propositions (pieces of evidence, beliefs about the suspect, etc.) to be integrated into a final assessment (e.g., a guilty/not guilty verdict) can be represented as a network of nodes that are interconnected via a series of excitatory and inhibitory links that represent positive or negative relationships, respectively, between the nodes. When individuals are making a decision regarding that information (e.g., deciding on the guilt of a suspect), a parallel constraint satisfaction mechanism settles the entire network into a state that maximizes coherence among the elements".[190]

Charman, Douglas and Mook's illustration is based on a detective investigating a case and who has four pieces of evidence concerning an accused person.[191] The evidence includes: "cell phone records that place the suspect in the vicinity of the crime, an eyewitness identification of the suspect, the suspect's alibi, and a low level of similarity between the suspect and a facial composite of the perpetrator".[192] The phone records and the eyewitness identification are both incriminating evidence against the

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183 Simon "A Third View of the Black Box: Cognitive Coherence in Legal Decision Making" 2004 *The University Of Chicago Law Review 517 and* Charman, Douglas and Mook "Cognitive Bias in Legal Decision Making" 2019 *Psychological Science and the Law* 30–33.

184 Simon 2004 *The University Of Chicago Law Review 517.*

185 Charman, Douglas and Mook 2019 *Psychological Science and Law* 42–45.

186 Simon 2004 *The University Of Chicago Law Review* 512–513 *and* Charman, Douglas and Mook 2019 *Psychological Science and the Law* 30–32.

187 Charman, Douglas and Mook 2019 *Psychological Science and Law* 42.

188 Simon 2004 *The University Of Chicago Law Review* 513 and 518.

189 Simon 2004 *The University Of Chicago Law Review* 516 and Charman, Douglas and Mook 2019 *Psychological Science and the Law* 41–43.

190 Charman, Douglas and Mook 2019 *Psychological Science and the Law* 42.

191 Charman, Douglas and Mook 2019 *Psychological Science and the Law* 42; see also Simon 2004 *The University Of Chicago Law Review* 516–518.

192 Charman, Douglas and Mook 2019 *Psychological Science and the Law* 42.

accused, so they are connected via a positive link.[193] The alibi and low level of similarity between the accused and the facial composite are both exonerating evidence and are connected via a positive link.[194] The final step is for the incriminating evidence to be connected to the exonerating evidence via negative links.[195] Thus, the detective's increased belief in the validity of the phone record evidence increases the cognitive believability of the eyewitness identification evidence and decreases the believability of the suspect's alibi and the relevance of the low similarity to the facial composite.[196] Over time this becomes a coherent state as the mutually reinforcing or incriminating evidence becomes highly activated, thereby suppressing the contradictory or exonerating evidence.[197]

This implies that as a result of coherence-based reasoning, legal decision-making can be construed as a bidirectional process where the evaluation of pieces of evidence integrated together, can affect decision-makers' emerging beliefs concerning the guilt of the accused person and the emerging beliefs equally affect the pieces of evidence that are evaluated.[198]

4 DEBIASING COGNITIVE SHORTCUTS

4 1 Creating awareness through judicial education and training

Awareness has been suggested as a possible strategy to avoid or mitigate the effects of heuristics and cognitive bias in judicial decision-making.[199] Educating judges and magistrates on the causes and effects of the different manifestations of heuristics[200] could at least raise awareness of the influence of complex mental processes on legal decision-making. However, there are concerns about whether simply creating awareness in this regard is sufficient to avoid or minimise heuristics in judicial decision-making, because heuristics is an automatic or unintended process that occurs in human cognition.[201]

As stated in the introduction of this article, there is no empirical evidence to indicate the effect of heuristics and cognitive bias on judges in South Africa.[202] Education and awareness could, however, stimulate future

193 *Ibid*.

194 *Ibid*.

195 *Ibid*.

196 *Ibid*.

197 *Ibid*.

198 Johns https://gacc.nifc.gov/swcc/dispatch_logistics/overhead/imt/documents/what_was_he_thinking.pdf 26 and Charman, Douglas and Mook 2019 *Psychological Science and the Law* 42.

199 Irwin and Real 2016 *McGeorge L Rev 10;* Edmond and Martire 2019 *MLR* 657–658 and Greene and Ellis https://www.researchgate.net/publication/229737159_Decision_Making_in_Criminal_Justice 30.

200 Peer and Gamliel 2013 *Court Review* 118.

201 Greene and Ellis https://www.researchgate.net/publication/229737159_Decision_Making_in_Criminal_Justice 30; Peer and Gamliel 2013 *Court Review* 118.

202 Gravett 2017 *The South African Law Journal 53 and* Edmond and Martire 2019 *MLR* 657–661.

research to address this research gap. Section 180 of the South African constitution provides for the consideration of education and training for judicial officers to foster the administration of justice.[203] Perhaps, through the South African Judicial Education Institute (SAJEI)[204] education and training on cognitive psychology could be designed. The mandate of the institute includes the following:

> "(a) To establish, develop, maintain and provide judicial education and professional training for judicial officers;
> (b) To provide entry-level education and training for aspiring judicial officers to enhance their suitability for appointment to judicial office;
> (c) To conduct research into judicial education and professional training and to liaise with other judicial education and professional training institutions, persons and organisations in connection with the performance of its functions;
> (d) To promote, through education and training, the quality and efficiency of services provided in the administration of justice in the republic;
> (e) To promote the independence, impartiality, dignity, accessibility and effectiveness of the courts; and
> (f) To render such assistance to foreign judicial institutions and courts as may be agreed upon by the Council."[205]

The mandate implies that the education and training for judicial officers could include discussions on cognitive psychology. Currently, the institute organises programmes on judicial education and training for newly appointed and existing judicial officers with the aim of sharpening the competence and efficiency of the Bench.[206] For example, the institute organises the Aspirant Judges Training Course[207] and the Annual Training for District Court Magistrates.[208] In addition, the institute electronically publishes the Judicial Education Newsletter that is focused on judicial education and related matters.[209]

Thus, providing awareness of cognitive bias and heuristics through the institute's training programmes, workshops, seminars and/or newsletters, could help judges and other fact-finders to have a better understanding of human cognitive systems and the manifestations of heuristics. It will help judges to become familiar with the effects of heuristics on judicial decision-makers and it will help to show the inevitability of cognitive biases and the need for appropriate measures to reduce its effects.

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[203] Mokgoro https://www.sabar.co.za/law-journals/2010/december/2010-december-vol023-no3-pp43-48.pdf 46.

[204] The institute is established by the South African Judicial Education Institute Act (SAJEI) 14 of 2008.

[205] S 5 of the South African Judicial Education Institute Act 14 of 2008.

[206] Mokgoro https://www.sabar.co.za/law-journals/2010/december/2010-december-vol023-no3-pp43-48.pdf 46.

[207] See SAJEI Aspirant Judges Programme https://www.judiciary.org.za/index.php/sajei/aspirant-judges-programme (accessed 2019-12-23).

[208] See SAJEI 2019/2020 Annual Training Schedule for District Magistrate https://www.judiciary.org.za/index.php/sajei/annual-training-schedule-2018-19 (accessed 2019-12-23).

[209] SAJEI Judicial Education Newsletter https://www.judiciary.org.za/index.php/sajei/judicial-education-newsletters (accessed 2019-12-23).

In summary, "awareness is a sensible first step" amongst other strategies that can be used together to prevent or minimise the effects of heuristics and bias.[210]

4 2 Cross-examination

Heuristics and cognitive bias have the potential to affect not only judicial decision-makers but defence counsel, police officers/investigators and expert witnesses in the legal system.[211] For example, cognitive shortcuts**,** such as availability heuristics, confirmation bias and representative heuristic etc can affect the interpretation and evaluation of expert witness testimony and this could have profound effects on judicial decision-makers.[212] Thus, exposing bias or potential bias by cross-examination is critical. Cross-examination has two purposes "first, to elicit evidence which supports the cross–examiner's case; and secondly, to cast doubt on the evidence given for the opposing party".[213] In addition, cross-examination will test the credibility and veracity of the witness and/or evidence presented in court.[214]

In an adversarial system judges have the responsibility to be impartial and must not be seen to be too involved in the cross-examination of witnesses in order to prevent any allegations of unfairness.[215] They must focus on the interpretation of the law and carefully consider the facts, evidence and arguments presented by the prosecution and the defence.[216] However, judges can allow cross-examination questions used to interrogate expert witnesses, investigators and accused persons on the manifestations of cognitive bias where applicable.[217] Such questions relating to (1) whether the witness is familiar with what cognitive bias means in the context of their testimony; (2) whether the witness considered contradictory evidence (i.e., categorical judgements or statistical/scientific evidence, where relevant) refuting the guilty hypothesis;[218] (3) whether the witness is familiar with the effects of cognitive bias on judicial decision-makers.

The kind of cross-examination questions referred to above, could be powerful tools available to cross-examiners to expose manifestations of cognitive bias. Cross-examination questions such as these, could be of

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210 Edmond and Martire 2019 *MLR* 658.

211 Charman, Douglas and Mook 2019 *Psychological Science and the Law* 32 and 38.

212 Saks and Kidd 1980–1981 *Law and Society Review* 137–139; Rassin *et al* 2010 *J. Investig. Psych. Offender Profil* 231–232 and Rachlinski 2000 *Oregon Law Review* 85–86.

213 Zeffertt and Paizes *The South African Law of Evidence* 3ed (2017) 1030 and Vettori and De Beer "The Consequences of Pleading a Non-Admission" 2013 *De Jure* http://www.scielo.org.za/pdf/dejure/v46n2/15.pdf (accessed 2020-01-14) 617.

214 *Ibid*.

215 *S v Le Grange supra* par 21.

216 *S v Le Grange supra* par 21; see also *Bernert v Absa Bank Ltd supra* par 31; *Dube v The State supra* 28; *Sepheka v Du Point Pioneer supra* 336; *S v Roberts supra* par 26. See also Gravett 2017 *The South African Law Journal 75;* Irwin and Real 2016 *McGeorge L Rev 10* and Beecher-Monas 2003 *L Rev MSU-DCL* 989–991.

217 Charman, Douglas and Mook 2019 *Psychological Science and the Law* 36.

218 Rassin "Reducing Tunnel Vision With a Pen-and-Paper Tool For The Weighting of Criminal Evidence" 2018 *Journal of Investigative Psychology and Offender Profiling* 1 1–7.

significant assistance to the court in its attempts to curb the effects of cognitive bias on judicial decision-making.

4 3 Replacement

Replacement strategy has been suggested as effective in avoiding and mitigating bias.[219] This strategy involves replacing a judge who is likely to be biased when making decisions.[220] Pretrial detention hearings (or bail hearings) have been identified as possible triggers of confirmation bias. The appointment of a different judge for the main hearing, instead of the same judge involved in the pretrial hearing, could mitigate the effect of bias in judicial decisions.[221]

5 CONCLUSION

This article briefly examines how heuristics, which have an automatic or unconscious influence on human reasoning, can affect judicial decision-making. The discussion above briefly indicate how availability heuristics, confirmation bias, egocentric bias, anchoring, hindsight bias, framing and representativeness can distort inferences and interpretations that are made either at the pretrial, hearing, ruling or sentencing process of a criminal case. The article emphasises that the different manifestations of heuristics pose a potentially serious risk to the quality and objectivity of any criminal case, despite the professional legal training and experience of judges and magistrates. Therefore, suggestions on how best to avoid and minimise the effects of cognitive shortcuts are suggested. These include creating awareness raising, cross-examination and replacement.

The article recognises that heuristics affecting judicial decisions are not well known in South Africa, but the situations that have been illustrated in existing research shows a possibility of occurrence in any jurisdiction, including South Africa.

Lord Neuberger states that judges are human and therefore inevitably susceptible to cognitive bias.[222] One study summarises its conclusions as follows:

> "Judges, it seems, are human. They appear to fall prey to the same cognitive illusions that psychologists have identified among laypersons and other professionals … Even if judges are free from prejudice against either litigant, fully understand the relevant law, know all of the relevant facts, and can put their personal politics aside, they might still make systematically erroneous decisions because of the way they – like all humans – think".[223]

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219 Edmond and Martire 2019 *MLR* 658–659.

220 *Ibid*.

221 Lidén *et al* 2018 *Psychology, Crime and Law 22* and Edmond and Martire 2019 *MLR* 658–659.

222 Lord Neuberger "'Judge not, that ye be not judged': Judging Judicial Decision-Making" 2015 F A Mann Lecture https://www.supremecourt.uk/docs/speech-150129.pdf (accessed 2020-01-16).

223 Guthrie *et al* 2002 *Judicature* 1 44, 50, itself abstracting the authors' article "Inside the Judicial Mind" 2001 86 *Cornell L Rev* 777.

PREDATORY PRICING: SINGLE-FIRM DOMINANCE, EXCLUSIONARY ABUSE AND PREDATORY PRICES (PART 1)

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SUMMARY

Important pronouncements of legal principle were recently made by the Competition Appeal Court and Constitutional Court on the determination of predatory pricing under section 8 of the Competition Act 89 of 1998. These pronouncements must now be seen in the context of the subsequent commencement of certain provisions of the Competition Amendment Act 18 of 2018, which affect predatory pricing cases under section 8 of the Act. In light of these developments, the main aim of this series of three articles is to evaluate the law relating to the economic concept of predatory pricing under the Competition Act. In this context, the main constituent elements of a predatory pricing case – namely, dominance, identifying an exclusionary abuse and predatory prices – are discussed in three parts. Part One critically evaluates the law on the determination of single-firm dominance under section 7 of the Competition Act. Part Two starts to focus on abuse analysis and discusses the basic forms of abuse, the meaning of abuse, tests that have been developed to identify exclusionary abuse, criticism of the traditional theory of predatory pricing, the main strategic economic theories of predatory pricing and non-pricing theories of predation. Part Three then specifically deals with the law of predatory prices under section 8(*c*) and 8(*d*)(iv) of the Competition Act. Pursuant to section 1(3) of the Competition Act, appropriate foreign and international law may be considered when interpreting or applying the Competition Act. This is complementary to section 1(2)(*a*), which directs that the Competition Act must be interpreted in a manner that is consistent with the Constitution and that gives effect to the purposes set out in section 2. In light hereof,

where appropriate, the South African position is compared, mainly with the position in the European Union and the United States.

1 INTRODUCTION

Competition law aims to promote low prices and prevent high ones. Yet, a predatory pricing case is exactly based on a firm charging a price that is too low. This has been referred to as the paradox of predatory pricing.[1] Society considers predation socially harmful because short-term aggressive price-cutting drives out competitors and results in long-term higher prices. Against this background, important pronouncements of legal principle were recently made by the Competition Appeal Court[2] and the Constitutional Court[3] in the lengthy *Media24* case[4] on the determination of predatory pricing under section 8 of the Competition Act 89 of 1998 (the Act). These decisions must now be seen in the context of the subsequent commencement of certain provisions of the Competition Amendment Act 18 of 2018, which affect predatory pricing cases under section 8 of the Act.

In light of these developments, the main aim of this series of three articles is to evaluate the law relating to the economic concept of predatory pricing under the Act. While competition law is not concerned with low pricing by non-dominant firms, section 8 of the Act prohibits dominant firms from engaging in the exclusionary act of predatory pricing. In this context, the main elements of predatory pricing – namely, dominance, identifying an exclusionary abuse and predatory prices – are discussed in three parts. This first article critically evaluates the law on the determination of single-firm dominance under section 7 of the Act. Part Two starts to focus on the abuse analysis and discusses the basic forms of abuse under section 8, the meaning of abuse, tests that have been developed to identify exclusionary conduct, criticism of the traditional theory of predatory pricing, the main strategic economic theories of predatory pricing and non-pricing theories of predation. Part Three then specifically deals with the law of predatory prices under section 8(*c*) and 8(*d*)(iv) of the Act. The competition law systems of the European Union (EU) and the United States (US) are unquestionably the most developed and advanced systems of all competition-law jurisdictions. This means that the South African courts frequently look to their experience for guidance on how to fill the complexities of modern competition law in a unique South African context. Accordingly, throughout these articles and where appropriate, the South African position will be compared (mainly) with the position in these jurisdictions.

If a firm is not found to be dominant, the abuse-of-dominance provisions will not apply. The dominance analysis therefore plays a crucial role in any abuse-of-dominance case. However, while the abuse analysis leans towards economic effects, the dominance analysis adopts a formalistic approach. The main aim of this article is to evaluate critically the law on the

1 Crane "The Paradox of Predatory Pricing" 2005 91 *Cornell Law Review* 1 2–3.
2 *Media 24 Proprietary Limited v Competition Commission of South Africa* 146/CAC/Sep16.
3 *Competition Commission of South Africa v Media 24 (Pty) Limited* [2019] ZACC 26.
4 See also *Competition Commission v Media 24 (Pty) Ltd* [2016] ZACT 86.

determination of single-firm dominance under section 7 of the Act. Under heading 2, this article starts with a short discussion on the differences in approach to dominance under article 102 of the Treaty on the Functioning of the European Union (TFEU)[5] and section 2 of the United States Sherman Act 1890 (Sherman Act). This background context remains relevant for both Parts Two and Three of this series of articles. As the articles develop, further differences relevant to the elements being discussed in Parts Two and Three will be emphasised where appropriate. Under heading 3, this article then critically evaluates the South African approach to a dominance analysis under section 7 of the Act, and heading 4 provides a conclusion.

2 DIFFERENCES IN APPROACH IN THE US AND EU

2 1 General differences

At its core, section 2 of the Sherman Act was enacted in 1890 as part of criminal law, with monopolisation being classified as a felony. During the late nineteenth century, the economic environment of the US was characterised by a number of dominant cartels and conglomerates, or "trusts" as they were known, that had adverse effects for consumers. The main motivation behind US antitrust law was therefore the desire to undo these cartels and conglomerates. As Frank Easterbrook wrote:

> "Back in 1890 Senator Sherman and colleagues protested the Sugar Trust and other malefactors and told the judiciary to do something about it. They weren't sure just what. Their statute does not contain a program; it is instead a blank check."[6]

Article 102 TFEU, on the other hand, was inserted in the Treaty of Rome in 1957 (or the EC Treaty) not only to create legal rights and obligations, but also to create a "new legal order of international law".[7] The origins of European competition law were very different and reflected a desire to break down trade barriers and promote economic integration with the hope that this would lead to a period of stability and peace in the post-war European environment.[8] In the pursuit of establishing an internal market as set out by article 3(3) of the Treaty on European Union (TEU), article 102 TFEU is a legal instrument used by the EU specifically to address conduct by dominant undertakings in the market that impedes this goal; this also includes a system ensuring that competition law is not distorted.[9] As the European

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5 Consolidated version of the Treaty on the Functioning of the European Union [2012] *OJ* C326/01 (TFEU).

6 Easterbrook "Workable Antitrust Policy" 1986 84 *Mich L Rev* 1696 1702; see also Stigler "The Origin of the Sherman Act" 1985 14 *The Journal of Legal Studies* 1–12.

7 Case C-26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 95; see further O'Donoghue and Padilla *Law and Economics of Article 102 TFEU* 2ed (2013) 55, where the authors write about the various influences on Article 102 TFEU.

8 O'Donoghue *et al Law and Economics of Article 102 TFEU* 62.

9 Case C-52/09 P *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR I-00527 par 20–21.

Court of Justice in *Konkurrensverket v TeliaSonera Sverige AB* stated, "Article 102 TFEU is one of the competition rules referred to in Article 3(1)(b) TFEU which are necessary for the functioning of that internal market".[10]

As time passed, the development of case law strengthened Senator Sherman and his colleagues' interpretation of section 2 of the Sherman Act. Likewise, the practice of the European Commission and the case law of the European courts developed and strengthened the purpose and meaning of article 102 TFEU.[11]

Against this background, the US has adopted a less interventionist approach to enforcement under section 2 of the Sherman Act than has the EU under article 102 TFEU. The EU institutions appear to have greater confidence in their predictive assessments of the markets.[12] By contrast, the US institutions and courts appear to have less confidence in their predictive abilities, and believe that market forces are better overall at correcting inefficiencies than are government agencies or court interventions.[13] The quintessence of the US's circumspect approach against excessive intervention is motivated by a judicious assessment of what conduct is truly anti-competitive, with the aim of not chilling competition through mistaken condemnation of ambiguous conduct – that is, preventing false positives.[14] As US judge Learned Hand famously stated, "[t]he successful competitor, having been urged to compete, must not be turned upon when he wins."[15]

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10 *Ibid*.

11 See Mestmäcker "The development of German and European competition law with special reference to the EU Commission's Article 82 Guidance of 2008" in Pace *European Competition Law: The Impact of the Commission's Guidance on Article 102* (2011) 35.

12 O'Donoghue *et al Law and Economics of Article 102 TFEU* 62.

13 *Ibid*.

14 See, for example, in *Brooke Group Ltd v Brown & Williamson Tobacco Corp* (1993) 509 US 209, the US Supreme Court's reluctance to treat price cuts as predatory was based, among other factors, on the concern that the strict rule could chill legitimate price competition. The court stated that, as a general rule, "the exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable "risks of chilling legitimate price cutting"; see also *Verizon Communications Inc v Law Offices of Curtis V Trinko,* LLP (2004) 540 US 398 414, where it was held that "[u]nder the best of circumstances, applying the requirements of §2 'can be difficult' because 'the means of illicit exclusion, like the means of legitimate competition, are myriad.' […] Mistaken inferences and the resulting false condemnations 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'"; *Concord Boat Corp v Brunswick Corp* (8th Cir 2000) 207 F 3d 1061, which noted that "[b]ecause cutting prices in order to increase business often is the very essence of competition, which antitrust laws were designed to encourage, it 'is beyond the practical ability of a judicial tribunal to control [above cost discounting] without courting intolerable risks of chilling legitimate price cutting.'"; and *United States v AMR Corp* (10th Cir 2003) 335 F 3d 1114, which stated that "caution in predatory pricing cases is the watchword 'as the costs of an erroneous finding are high'".

15 *United States v Aluminum Co of America* (2d Cir 1945) 148 F 2d 416.

2 2 Substantive differences

Certain substantive differences relating to the conditions and circumstances under which liability can be found for predatory pricing under section 2 of the Sherman Act and article 102 TFEU are also apparent. Although the reasons and effect of the finer differences will be unpacked as the articles develop, it is important to bear in mind at the outset that US antitrust law follows different cost benchmarks and also requires proof of the dominant firm's ability to recoup losses.

According to established case law, article 102 TFEU does not prohibit the mere existence of a dominant position, only its abuse.[16] Moreover, when an undertaking holds a dominant position, its behaviour in the market may be scrutinised for compatibility with article 102 TFEU. EU competition law therefore aims to prevent powerful firms from using their power abusively. On the other hand, section 2 of the Sherman Act does not require a prior formal finding of a dominant position, but seeks to identify anti-competitive conduct that creates or threatens to create a monopoly.[17]

The emphasis of the European Commission's enforcement activity in relation to exclusionary conduct is on safeguarding the competitive process in the internal market and ensuring that undertakings that hold a dominant position do not exclude their competitors by means other than competing on the merits.[18] Article 102 TFEU is, therefore, not only concerned with practices that may cause damage to consumers directly[19] but, as the European Court of Justice has explained, this provision also includes practices that are detrimental to consumers through their impact on

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16 Case C-322/81 *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities* [1983] ECR 3461 ("*Michelin*") par 57 and Joined Cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge Transports* v *Commission of the European Communities* [2000] ECR I-1365 par 37.

17 See *US v Grinnell Corp* (1966) 384 US 563 570–571, where it can be seen that from the earliest cases construing the provision, the US courts have recognised that section 2 does not attempt to make the size of a firm, however large, or the existence of unexerted power on its part an offence when unaccompanied by unlawful conduct in the exercise of its power.

18 Guidance Communication on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] *OJ* C45/02 ("the Guidance Paper") par 6; see also Case C-8/08 *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529 par 38, noting that the Treaty's competition rules are designed to protect not only the immediate interests of individual competitors or consumers, but also to protect the structure of the market and thus competition as such. Dominant firms are therefore entitled to compete "on the merits" in relation to pricing, contractual conditions, output, quality, innovation, cost reduction and efficiency. See Bellamy and Child *European Union Law of Competition* 8ed (2018) 860. For a US perspective, see Hovenkamp "Exclusion and the Sherman Act" 2005 72 *U Chi L Rev* 149–150, which refers to the "Areeda-Turner laundry list" of competition on the merits, including "'non-exploitative pricing, higher output, improved quality, energetic market penetration, successful research and development, cost-reducing innovations, and the like'" but stating that such a standard "may do an adequate job of characterizing past decisions. But it is not always very helpful in evaluating novel practices".

19 Case C-6/72 *Europemballage Corporation and Continental Can Company Inc v Commission of the European Communities* [1973] ECR 215 par 26.

competition.[20] However, the Grand Chamber of the Court of Justice has held that competition on the merits may lead to competitors exiting the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other aspects, price, choice, quality or innovation.[21] Under article 102 TFEU, predatory pricing is a good example of this.[22] Below-cost pricing benefits consumers, at least in the short-term, unless and until the low prices are recouped in the following stage through higher prices. However, predatory pricing may be condemned under article 102 TFEU without proof of recoupment, because it can cause a competitor either to exit the market or be marginalised, which alters the structure of competition in a way that may harm consumers.[23]

Other distinctive features of article 102 TFEU include: the imposition of a special responsibility on the dominant firm not to allow their conduct to impair genuine undistorted competition on the internal market;[24] *per se* impermissible conduct; and, although not important for purposes of these articles, the possibility of bringing proceedings against dominant undertakings for exploitative abuses.

3 SINGLE-FIRM DOMINANCE

3 1 Constituent elements of section 8

Following the wording of Chapter 2 Part B of the Act, and assuming that the provisions relating to the territorial application of the Act are met,[25] four constituent elements must be satisfied for the abuse of dominance provisions to apply:

(i) a "firm";[26]

(ii) meeting the financial threshold provisions;[27] and

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[20] Case C-280/08 P *Deutsche Telekom AG v European Commission* [2010] ECR I-09555 par 176; see also *TeliaSonera Sverige AB supra* par 21–22, which notes that the function of the competition rules of the Treaty, including article 102 TFEU, is to "prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers, thereby ensuring the well-being of the European Union"; and see Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services Unlimited v Commission of the European Communities* [2009] ECR I-09291 par 63, where it was stated that "the Court has held that […] like other competition rules laid down in the Treaty […] [it] aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such".

[21] Case C-209/10 *Post Danmark A/S v Konkurrencerådet* EU:C:2012:172 par 22 ("*Post Danmark I*"); Case C-413/14 P *Intel Corp. v European Commission* EU:C:2017:632 par 134.

[22] O'Donoghue *et al Law and Economics of Article 102 TFEU* 6.

[23] Case COMP/38.233 *Wanadoo Interactive*, European Commission Decision of 16 July 2003; Case T-340/03 *France Télécom SA v Commission of the European Communities* [2007] ECR II-00107; Case C-202/07 *France Télécom SA v Commission of the European Communities* [2009] ECR I-02369.

[24] *Michelin supra* par 57. It is often the case that, owing to historical advantages benefitting network incumbents, a tougher standard of abuse is applied to dominant (incumbent) network operators in regulated network industries through an expansive view of the doctrine of "special responsibility". See *Post Danmark I supra* par 23.

[25] S 3 of 89 of 1998.

[26] S 1 of 89 of 1998.

(iii) holding a dominant position;

(iv) must engage in an exclusionary act prohibited by section 8.

The first and second elements focus on the jurisdictional application of the Act and are not the focus of these articles. The existence of a dominant position is considered before the question of any abuse. This requires defining the relevant market. Apart from market definition, these two elements are usually the main issues under section 8.

3 2 Importance of dominance under section 8

Establishing dominance is an essential prerequisite for section 8 to apply. Dominance is the core market power threshold under the Act. However, the Act does not direct that dominance itself is contrary to section 8. If dominance is not proven, the abuse provisions will not apply, regardless of the anti-competitive effects of the conduct in question.

This important point is shared with article 102 TFEU,[28] but not with the legal regime under the Sherman Act. In the latter case, a firm that is not yet dominant may commit a violation if its conduct would lead to monopolisation or, in the case of attempted monopolisation, if there were a dangerous probability that it would succeed in doing so. This means, at least in theory, that a firm with a small market share could violate section 2 of the Sherman Act if there were a dangerous probability that its attempt to monopolise would eventually succeed. In contrast, before conduct can fall into a prohibited category under section 8 of the Act (as under article 102 TFEU), it is essential to establish dominance at the time of the alleged abuse.

3 3 Definition of dominance

Section 7 defines the circumstances in which a firm may be found dominant as follows:

(a) a firm with a market share of at least 45 per cent in the relevant market is dominant (this is an irrebuttable presumption);[29]

(b) a firm with a market share of at least 35 per cent, but less than 45 per cent of the relevant market is presumed to be dominant unless the firm can prove that it does not have market power (this is a rebuttable presumption);[30] or

(c) if the firm's market share of the relevant market is below 35 per cent, the complainant has the burden of proving that it has market power.[31]

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27 S 6 of 89 of 1998.

28 See *Michelin supra* par 47 "[a] finding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market".

29 S 7(*a*) of 89 of 1998. *See Competition Commission v South African Airways (Pty) Ltd* 18/CR/Mar01 par 87.

30 S 7(*b*) of 89 of 1998.

31 S 7(*c*) of 89 of 1998.

This codification of dominance means that the dominance analysis entails an assessment of whether a firm falls under one of these three structurally defined circumstances. This codification also does little to provide any comfort to firms in terms of a "safe harbour" – that is, where a firm is so small in a correctly defined market that it is highly unlikely to have market power.

3 4 Analytical framework for assessing dominance

Based on the above definition, and taking the practice of the US and the EU into account,[32] a considered determination of whether a firm holds a dominant position should involve the following two steps:

1. Market definition: the relevant (product and geographic) market provides a frame of reference for analysing whether the firm concerned holds a dominant position and, therefore, whether its conduct may be abusive within the meaning of section 8. The main purpose of market definition is to identify in a systematic way the immediate competitive constraints faced by a firm. This step also involves the identification of the competitors in the market, which may include supply-side substitutes.
2. Market power analysis: assessing the degree of market power enjoyed by the firm on the relevant market. In relation to section 7(*a*), this step involves a consideration of the market share of the firm concerned. As regards section 7(*b*) and (*c*), the analysis relates to market share and market power. An analysis of market power may further involve some or all of the following considerations: the nature of the market and the competitive process, barriers to entry, exit and expansion and competitive constraints.

The use of market share as an indicator of dominance is common to all three circumstances of the dominance analysis under section 7, but the Act does not indicate how a firm's market share is to be calculated. This is with good reason,[33] especially in relation to section 7(*a*). If the assessment of market share is the sole or main basis for the finding of a dominant position, there can be no clearly correct, or even best, basis on which to assign[34] market share in all cases.[35] This requires that considerable care should be taken in such assignment.[36] Although market share is reflected in descriptive

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[32] See *Continental Can supra;* Case 85/76 *Hoffmann-La Roche & Co. AG v Commission of the European Communities* [1979] ECR 461 par 38–41 and 48; *US v Microsoft Corp* (DC Cir 2001) 253 F 3d 34; see also *United States v Grinnell Corp* (1966) 384 US 563.

[33] Werden "Assigning Market Shares" 2002 70 *Antitrust Law Journal* 67–104.

[34] Werden 2002 70 *Antitrust Law Journal* fn. 2 where the author explains that the use of term "assignment" reflects "the wide range of conscious choices to be made" and that "[t]his task goes well beyond 'calculation' and 'measurement' – two terms conventionally used to describe it".

[35] For a discussion and analysis on the calculation, measurement and assignment of market shares see Werden 2002 70 *Antitrust Law Journal* 67–104; O'Donoghue *et al Law and Economics of Article 102 TFEU* 144–145; Bellamy *et al European Union Law of Competition* 871–878; Bishop and Walker *The Economics of EC Competition Law: Concepts, Application and Measurement* 3ed (2010) 65; Niels, Jenkins & Kavanagh *Economics for Competition Lawyers* 2ed (2016) 100–103.

[36] Werden 2002 70 *Antitrust Law Journal* 104.

statistics for an industry, they are intended for the useful description of the comparative sizes of competitors in the relevant market. Therefore, market share should be the share of some real and measurable industry quantity that reasonably serves as a common denominator for the collection of products in the relevant market.

In difficult cases, the actual computations may be extremely complex, which in turn may limit their robustness in terms of the implications for a dominance analysis.[37] Under these circumstances, this will arguably put more pressure on an accurate market definition exercise, especially in relation to section 7(*a*), to safeguard the robustness of the dominance assessment.

3 5 Section 7(*a*)

3 5 1 Market share as the sole indicator of dominance

In *Competition Commission v South African Airways (Pty) Ltd*,[38] SAA was held to be presumptively dominant. As a result, the Competition Tribunal did not find it necessary to consider in great detail the evidence presented by SAA's expert witnesses to the effect that it does not, in fact, have market power. The Competition Tribunal regarded this evidence as irrelevant, because, on a simple reading of section 7(*a*), once a firm's market share exceeds the 45 per cent threshold, it is presumed to be dominant; the section states categorically that a firm is presumed dominant if it has 45 per cent of the market. This is to be contrasted with section 7(*b*) where the presumption of market power is rebuttable.

Market share plays an important role in the market power analysis and is traditionally used as a first indicator of market power.[39] However, assessing market share in isolation cannot be used as a guide to conclude effectively that a firm has market power.[40] The existence of a dominant position may derive from several additional factors which, taken separately, are not necessarily determinative.[41] However, in order to avoid a simplistic checklist approach, the determination of dominance requires a careful assessment of market conditions, in what must necessarily be a case-by-case analysis.[42]

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37 See Evans and Schmalensee "The Antitrust Analysis of Multi-Sided Platform Businesses" 2012 *Coase-Sandor Institute for Law & Economics Working Paper No. 623*; O'Donoghue *et al Law and Economics of Article 102 TFEU* 146.

38 18/CR/Mar01 par 87.

39 See for eg., Dansby and Willig "Industry Performance Gradient Indexes" 1979 64 *The American Economic Review* 249–260; Motta *Competition Policy: Theory and Practice* (2004) ch 3; United States Department of Justice and the Federal Trade Commission *Horizontal Merger Guidelines* (2010) ch 5; Rey "Towards a Theory of Competition Policy" (2014) IDEI University of Toulouse 32–34.

40 Bellamy *et al European Union Law of Competition* 871–872.

41 *Hoffmann-La Roche supra* par 39.

42 Geradin, Hofer, Louis, Petit and Walker "The Concept of Dominance in EC Competition Law" *Global Competition Law Centre Research Paper on the Modernization of Article 82 EC* (2005) College of Europe 10.

While market share remains a useful first indicator in this analysis, market share cannot by itself be decisive.[43]

Depending on the type of market and players in question, assessing market share alone may fail properly to address one or more of the following issues, which in turn can have consequences for the abuse analysis:[44]

- whether market power was attained as a result of superior skill, foresight, and industry;
- conditions of competition in innovative markets;
- accurately capturing market power in markets where products are differentiated from the viewpoint of consumers in terms of time, switching costs, consumer information, branding, product features, product quality, level of service or the location of the seller;
- the firm's profitability;
- the position of the firm's rivals;
- whether the market is growing or declining;
- properly considering that some bidding markets may be characterised by intense competition despite the presence of large market shares;
- whether the firm in question is in fact an unavoidable trading partner;
- taking account of potential competition and buyer power;
- capacity utilisation;
- recognising different levels of vertical integration;
- taking account of multi-sided platforms and network effects;
- the technical or financial resources of a firm;
- cost asymmetries;
- first-mover or incumbency advantages;
- the importance of economies of scale and scope; and
- whether market share ultimately shows a position of strength over a relatively long period of time (for instance, a period between three and five years, depending on the market in question) – that is, lasting market power, which involves a proper assessment of barriers to entry, exit and expansion.

Therefore, observing a firm's high market share on its own can be highly misleading and a poor indicator of market power if the relevant market conditions, market characteristics and competitive constraints faced by the firm are not also assessed in conjunction with the market share of the firm in question.[45] By only assessing market share, no emphasis is placed on the price-setting power of the firm, or its ability to exclude competition or to behave independently, but makes the finding of dominance a purely

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43 *Ibid*.

44 Geradin *et al Global Competition Law Centre Research Paper on the Modernization of Article 82 EC* 10–15; O'Donoghue *et al Law and Economics of Article 102 TFEU* ch 4; Bishop *et al The Economics of EC Competition Law* ch 3.

45 Posner and Landes "Market Power in Antitrust Cases" 1980 94 *Harvard Law Review* 937–996; Bishop *et al The Economics of EC Competition Law* ch 3; Motta *Competition Policy* ch 3.

mechanical analysis based on market share.[46] For all these reasons, while section 7(*a*) creates an irrebuttable presumption for the benefit of the competition authority, this approach to dominance is not consistent with an economic approach.

3 5 2 Threshold level for intervention

It is arguable that the threshold level for intervention set by the legislature is in fact too low. In this regard, the decisional practice and case law of article 102 TFEU differs materially from the treatment of monopolisation conduct under US antitrust law. Under article 102 TFEU, meeting a 50 per cent market share threshold, without more, immediately suggests dominance.[47] An analysis of cases in the US tends to show that monopolisation concerns arise in cases where the firm's market share exceeds 70 per cent.[48] Even under these circumstances, an analysis of other market conditions in conjunction with market share (the most important of which is the presence or lack of barriers to entry) is required.[49] In light hereof, US courts have held that a market share of 100 per cent does not necessarily establish monopoly power in the absence of a showing that the respective market is protected by entry barriers.[50] US antitrust law under section 2 of the Sherman Act therefore appears to be less restrictive than the standards to determine dominance under article 102 TFEU.[51] Accordingly, it has been argued that a significant problem with article 102 TFEU is that the threshold for intervention is too low.[52]

Bloch argues that this approach has significant ramifications from a policy standpoint in terms of discouraging efficiency-enhancing conduct that is not unlawful.[53] This means firms that are found to be "dominant" are prohibited from engaging in business conduct that non-dominant firms are permitted and encouraged to pursue. Thus, article 102 TFEU, when compared to section 2 of the Sherman Act, may impede firms with large market shares in

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46 Harbord and Hoehn "Barriers to Entry and Exit in European Competition Policy" 1994 14 *International Review of Law and Economics* 411–435; Kaplow and Shapiro "Antitrust" 2007 2 *Handbook of Law and Economics* ch 15.

47 For instance, under art 102 TFEU, the European Court of Justice held in *Hoffmann-La Roche supra* that generally a very large share, in the absence of exceptional circumstances, is sufficient evidence of the existence of a dominant position. On that basis, the European Court of Justice held, in Case C-62/86 *AKZO Chemie BV v Commission of the European Communities* [1991] ECR I-03359 par 59–60, that 50% is a large market share, and when accompanied by the fact that AKZO's market share remained stable over a period of three years, this was sufficient proof of a dominant position. A market share in excess of 50% therefore, in the absence of countervailing indications, creates a rebuttable presumption of dominance in the EU.

48 Bloch, Kamann, Brown and Schmidt "A Comparative Analysis of Article 82 and Section 2 of the Sherman Act" 2006 7 *Business Law International* 151.

49 *Ibid*.

50 Bloch *et al* 2006 *Business Law International* 152.

51 *Ibid*.

52 See Bellamy *et al European Union Law of Competition* 873–877 and O'Donoghue *et al Law and Economics of Article 102 TFEU* 147–150 for a full discussion of the general indicators relating to the level of market shares in the EU.

53 Bloch *et al* 2006 *Business Law International* 152.

an otherwise competitive market from engaging in pro-competitive conduct, which the law seeks to promote.[54] Although policy reasons probably justify the mechanical nature of a section 7(*a*) dominance analysis,[55] nevertheless, from an economic perspective, it is suggested that the same critique applies to section 7(*a*).

3 6 Section 7(*b*) and (*c*)

Both paragraphs (*b*) and (*c*) of section 7 refer to the term "market power", while section 7(*a*) does not, only referring to the firm in question as dominant once the 45 per cent threshold is crossed. Under section 7(*b*), the presumption of market power is rebuttable by the firm in question,[56] and under section 7(*c*), the complainant is required to prove that the respondent possesses market power.[57] For purposes of section 7(*b*) and (*c*), "market power" means that the firm has the power to control price, to exclude competition, or to behave to an appreciable extent independently of its competitors, customers or suppliers.[58]

Although market share still plays a key role in each of these circumstances in dominance analysis, the definition attempts to capture the main concepts of market power found in the US, EU and, to a certain extent, the United Kingdom (UK). In principle, the term "dominance" is a legal concept, but the assessment of dominance is ultimately influenced by economic considerations. As such, the definition of "market power" requires the identification of corresponding legal and economic concepts.

3 6 1 Basic legal concept of dominance

The latter part of the definition, "behave to an appreciable extent independently of its competitors, customers or suppliers", corresponds with the terminology used in the working definition of dominance established in EU case law under article 102 TFEU. The European Court of Justice in *United Brands* and *Hoffman-La Roche* captured this notion by referring to the ability to behave independently and to hinder or exclude competition:

> "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers."[59]

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54 *Ibid*.

55 As regards the possible policy reasons behind this approach, see Sutherland and Kemp *Competition Law of South Africa* (2017) Issue 21 Lexis Library s 7.7.6.5 and Mackenzie "Are South Africa's Predatory Pricing Rules Suitable?" (September 2014) available at http://www.compcom.co.za/wp-content/uploads/2014/09/Neil-Mackenzie-Predatory-Pricing-in-SA.pdf (accessed 2015-03-22) section 2.

56 *Competition Commission v South African Airways (Pty) Ltd supra* par 87.

57 Sutherland *et al* Competition Law of South Africa 7–26.

58 S 1 of 89 of 1998.

59 See Case 27/76 *United Brands Company and United Brands Continental BV v Commission of the European Communities* [1978] ECR 207 par 65; *Hoffmann-La Roche supra* par 38.

In the European Commission's discussion paper on the application of article 102 TFEU to exclusionary abuses, the European Commission treats this definition as consisting of three elements as follows: (a) there must be a position of economic strength in a market which (b) enables the undertaking(s) in question to prevent effective competition being maintained in that market by (c) affording it the power to behave independently to an appreciable extent.[60] The European Commission considers the latter two elements to be closely linked. However, Geradin, Hofer, Petit and Walker,[61] as well as Neven, Nutall and Seabright,[62] maintain that these elements are one and the same. This is to an extent confirmed by the EU courts, which have never drawn any distinction between these elements, and also appears to be the approach taken by the European Commission in its subsequent guidance paper relevant to its article 102 TFEU enforcement priorities.[63]

Although the first element does not appear in the South African definition of market power, the latter two elements concern the link between the position of economic strength held by the firm in question and the competitive process. Dominance is the ability to prevent effective competition being maintained in the market and to act to an appreciable extent independently of other competitors. The notion of independence, which is the special feature of dominance, is related to the level of competitive constraints faced by the firm in question. For dominance to exist, the firm concerned must, for a sustained period, not be subject to effective competitive constraints. This means that the firm must have substantial market power.

From an economic perspective, since every firm (even a monopolist) will be constrained by its respective demand curve, no firm can really behave – at least not on a sustainable basis – independently of its competitors, consumers or customers. First, the presence of competitors limits to some extent the commercial behaviour of all firms, since the presence of these competitors affects the firm's demand curve. This applies to firms in a competitive market as well as to a dominant firm. All firms will increase prices to the point at which further price increases would not be profitable. In this sense, competitors do constrain the behaviour of firms so that even a dominant firm does not act independently of its competitors. Secondly, an individual firm's demand curve is also affected by the behaviour and preferences of its customers. Firms invariably face downward-sloping demand curves, indicating that a higher price means that it will have fewer sales. It is not generally open to a firm to raise prices and sell the same quantity as before. Again, this applies to all firms, whether dominant or not.[64]

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60 DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses (2005) par 21.

61 Geradin *et al Global Competition Law Centre Research Paper on the Modernization of Article 82 EC* 3.

62 Neven, Nutall and Seabright "Merger in Daylight: The Economics and Politics of European Merger Control" 1993 *Center for Economic Policy Research* 18.

63 The Guidance Paper par 10.

64 For example, in wholesale markets when a firm's customers are not the end consumers, the firm will still not be able to behave independently of consumers. This is because demand for intermediate goods is a "derived" demand – that is, it is ultimately determined by end

Strictly speaking, only a true monopolist would be able to behave independently of its competitors, customers and consumers.

This means that the notion of independence, as a useful indicator of dominance, does not provide an adequate basis for differentiating between all firms in a market, whether dominant or not. However, reference to "an appreciable extent" perhaps recognises that most firms have market power and suggests that independence is not absolute, but a matter of degree. This latter part of the definition also recognises that both suppliers and buyers can have market power. Usually, for purposes of clarity, market power refers to a supplier's market power; and where a buyer's market power is at issue, the term "buyer power" is used.[65] Equally, and depending on the circumstances, when a firm's customers are not the end consumers (for example, in wholesale markets), the term "customers" is likely to refer to those customers.

3 6 2 Basic economic concept of dominance

Although the wording "exclude competition" is common to the US, UK and the EU, the wording "power to control prices" appears to resemble, at least, the first part of the US definition of monopoly power. The US Supreme Court has defined monopoly power specifically as the "power to control prices or exclude competition".[66] However, the US Supreme Court and lower courts have refined this definition further by incorporating more economic principles associated with the definition of market power, holding that market power is "the ability to raise prices above those that would be charged in a competitive market".[67]

In real-world industries, few firms are pure price takers facing perfectly elastic demand. For example, the unique location of a shop selling widgets may confer the shop with slight market power, because some customers are willing to pay a little more rather than walk an extra block or incur further search costs for the next-closest widgets shop. In economic terms, the widgets shop has some market power, even if only an insignificant degree. In nearly all industries, fixed costs exist and products are differentiated from one another, whether in terms of time, switching costs, consumer information, branding, product features, product quality, level of service or the geographical location of the seller. This means that most firms possess some degree of market power.[68] One firm may be able to increase price well above competitive levels on a sustainable basis while another may only be able to increase price slightly above the competitive norm for a short time.

consumers. See Geradin *et al Global Competition Law Centre Research Paper on the Modernization of Article 82 EC* fn. 5.

65 See s 8(4) of 89 of 1998.

66 *United States v. E. I. du Pont de Nemours & Co*. (1956) 351 U.S. 391.

67 *NCAA v. Board of Regents of the University of Oklahoma*. (1984) 468 U.S. 85, 109 n.38; see also, for instance, *United States v Microsoft Corp* (DC Cir 2001) 253 F 3d 51; *Eastman Kodak Co. v. Image Technical Servs. Inc*. (1992) 504 U.S. 451, 464; *Jefferson Parish Hosp. Dist. No. 2 v. Hyde* (1984) 466 U.S. 2, 27 n.46; and Carlton and Perloff *Modern Industrial Organization* 4ed (2005) 642; Posner and Landes 1980 94 *Harvard Law Review* 939.

68 Posner *Antitrust Law* 2ed (2001) 265; Motta *Competition Policy* 115–116.

But the type of power described is qualitatively identical in both cases. Motta acknowledges that firms would only have no market power in the theoretical models of perfect competition or in the Bertrand model with homogeneous goods and perfectly symmetric firms.[69] Thus, most firms with downward-sloping demand curves possess a small degree of market power, but this does not warrant intervention by the competition authorities.[70]

Under the Sherman Act, market power and monopoly power are related but not the same. Monopoly power under section 2 requires something greater than market power under section 1,[71] but Krattenmaker, Lande and Salop have argued that they believe market power and monopoly power to be qualitatively identical concepts since both terms refer to anti-competitive economic power that can ultimately compromise consumer welfare.[72] Their view is that courts should be less concerned with labelling the type of anti-competitive economic power exerted by a firm. Instead, they should focus on the methods by which this power is achieved. Precisely at what point market power becomes so great that the law deems it to be monopoly power is largely a matter of degree rather than one of kind. Clearly, however, monopoly power requires, at a minimum, a substantial degree of market power.[73]

In Europe, a firm enjoys a dominant position if it has substantial (or significant) market power, which means that it has the ability to raise prices profitably above competitive levels or restrict output significantly below competitive levels for a sustained period. This standard definition of market power is also used by a number of competition authorities in Europe. For instance, the European Commission considers that "[a]n undertaking that is capable of substantially increasing prices above the competitive level for a significant period of time holds substantial market power".[74] The UK Competition and Markets Authority refer to market power as "the ability to raise prices consistently and profitably above competitive levels".[75]

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69 Motta *Competition Policy* 115.

70 Carlton "Market Definition: Use and Abuse" Spring 2007 *Competition Policy International* 7.

71 *Eastman Kodak Co. supra* 481.

72 Krattenmaker, Lande and Salop "Monopoly Power and Market Power in Antitrust Law" 1987 76 *Georgetown Law Journal* 246–247.

73 See, for eg., *Bacchus Indus., Inc. v. Arvin Indus., Inc*. (10th Cir. 1991) 939 F.2d 887, 894, which defines monopoly power as "substantial" market power; *Deauville Corp. v. Federated Dep't Stores, Inc*. (5th Cir. 1985) 756 F.2d 1183, 1192 n.6, which defines monopoly power as an "extreme degree of market power"; Areeda and Hovenkamp *Fundamentals of Antitrust Law* 2ed (2002) 318, which states that "the Sherman Act § 2 notion of monopoly power is conventionally understood to mean 'substantial' market power"; Posner and Landes 1980 94 *Harvard Law Review* 937, which defines monopoly power as "a high degree of market power".

74 DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses (2005) par 24; see also The Guidance Paper par 11; Commission Working Document on the Proposed New Regulatory Framework for Electronic Communications Networks and Services: Draft Guidelines on market analysis and the calculation of significant market power COM (2001) 175 final par 65; Commission Notice Guidelines on Vertical Restraints (2000) *OJ* C291/01 par 119.

75 UK Office of Fair Trading Competition Law Guideline: Assessment of Market Power 2004 OFT 415 par 1.2 and 1.4.

Dominance should therefore only apply to those firms that possess substantial market power or a very high degree of market power.[76] But does the reference to the ability of a firm to behave to an "appreciable extent" already equate dominance with substantial (or significant) market power? In recent times, within the EU, the legal notion of independence described earlier has been tied to the economic notion of substantial market power. This reference to an "appreciable extent" suggests that the South African market power definition is not concerned with the trivial amount of market power that most firms enjoy. For example, in *Nationwide Poles v Sasol Oil (Pty) Ltd*,[77] although the Competition Tribunal concluded that by "dint" of a market share in excess of 45 per cent Sasol had market power, the Competition Tribunal went further and showed that Sasol evidenced its dominance by its exercise of market power, because it priced creosote at a liquid fuels equivalent price rather than with consideration of the wood preservative market for which creosote was used.[78] The Competition Tribunal held that this bolstered its finding of dominance.[79]

3 6 3 What counts as substantial market power?

Considering that the core (economic) concept underlying the notion of market power is a firm's ability to increase profits and to harm consumers by charging prices above competitive levels, the question then turns on what counts as substantial market power, as opposed to insubstantial or insignificant market power. A firm that is not constrained by competition from a sufficient number of equally efficient existing and potential competitors can profitably raise price or prevent price from falling in two ways.

First, the firm may raise or maintain price above the competitive level directly by restraining its own output.[80] The first part of the market power definition thus focuses on the power to control price profitably, directly by restraining one's own output. However, in terms of implementation, it is not clear by how much price must exceed the competitive level before there is (substantial) market power. According to Geradin *et al*, a one-way test can be inferred from the market definition SSNIP methodology.[81] At the same time, market power is also not simply a matter of higher prices. Market power may be exercised by increasing price, reducing quality, range, service and/or by slowing innovation. Thus, the definition should also include, for example, the ability to reduce quality or slow the pace of innovation. It is also well known that determining the competitive price level is a difficult, if not impossible, task. The same unsatisfactory result applies when the competitive level is taken to mean marginal cost. Therefore, while the exercise of substantial market power can be proved by way of direct

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76 The Guidance Paper par 10; Geradin *et al Global Competition Law Centre Research Paper on the Modernization of Article 82 EC* 4; Motta *Competition Policy* 35.

77 72/CR/Dec03.

78 *Nationwide Poles v Sasol Oil supra* par 70–71.

79 *Nationwide Poles v Sasol Oil supra* par 71.

80 See Stigler *The Organization of Industry* (1968) for an analysis of this type of market power.

81 Geradin *et al Global Competition Law Centre Research Paper on the Modernization of Article 82 EC* 5.

evidence[82] of actual exercise of control over prices, it is difficult to find such direct evidence. This means that market power is most likely to be inferred by way of indirect and or circumstantial evidence of the firm's ability to control prices, which can be gauged from an assessment of existing competition,[83] potential competition[84] and buyer power.[85]

A second form of market power is the "power to exclude". According to Krattenmaker, Lande and Salop, this form of market power can be found where:

> "[a] firm or group of firms may rise price above the competitive level or prevent it from falling to a lower competitive level by raising its rivals' costs and thereby causing them to restrict output […] Such allegations are at the bottom of most antitrust cases in which one firm or group of firms is claimed to have harmed competition by foreclosing or excluding its competitors. We denote this power as "exclusionary" [...] market power".[86]

Here the focus is on the dominant firm using its market power to create, maintain or strengthen its position further by engaging in anti-competitive conduct in order to foreclose, exclude or deter competitors from the market. This form of market power is already explicitly taken into account in the US, EU, UK and South Africa (as well as other jurisdictions). Examples of such exclusionary behaviour include predatory pricing, certain forms of price discrimination, refusal to supply and margin squeeze, which invariably leads to foreclosure of competitors or because it raises competitors' costs, limits their capacity to compete effectively or limits the ability of competitors to introduce new, innovative products. Again, the exercise of substantial market power can be proved by way of direct evidence of actual exclusion of competition from the relevant market, but it will also be difficult to find such direct evidence. Hence, substantial market power is usually inferred by way of an indirect assessment of the firm's ability to exclude competition, including existing competition, potential competition and countervailing buyer power. However, care should be taken by the competition authorities to ensure that the aim of the investigation is to protect competition and consumers, not competitors.

4 CONCLUSION

It can be seen that exclusionary conduct by a single firm is outside the scope of section 8 unless the firm is found to be a dominant firm within the meaning

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82 For instance, high profits, price-cost margins, demand elasticity and evidence of anti-competitive effects.

83 This means firms already in the market. The effectiveness of existing competition is gauged, among others, by market share over time and ease of expansion. The focus is thus on the competitive constraints imposed by the existing sellers and the position of actual competitors on the market, which looks at the market position of the dominant firm and its competitors.

84 This means future expansion by actual competitors and firms that may enter the market and prevent exercise of market power in the long run. The effectiveness of potential competition is gauged by barriers to entry (and expansion).

85 This means credible threats to switch to new suppliers or sponsor new entry and growth.

86 Krattenmaker *et al* 1987 *Georgetown Law Journal* 249.

of section 7. However, when the abuse analysis is leaning towards economic effects, as section 8 suggests, a prior dominance assessment is essential. While the abuse analysis is notoriously difficult and prone to error on any approach, the dominance assessment provides the advantage of efficiently screening out cases where it need not be undertaken.

As to the standard of proof of dominance, section 7 defines dominance mainly in a formalistic manner. In particular, section 7(*a*) relies only on market share while section 7(*b*) and (*c*) rely on market share and market power. In theory, the formalistic and strict nature of section 7(*a*) should mean that there is more efficient scope for enforcement and perhaps greater scope for private actions. While section 7(*b*) and (*c*) are less clear on when a firm is dominant, and probably apply to firms with a mild degree of market power, such firms will in any event be less likely to distort competition than the same conduct by a firm with great market power under section 7(*a*). So, on balance, the competition authorities can direct their resources better by examining the latter than the former. While the market-share level as indicator for section 7(*a*) dominance is arguably set quite low, the conditions provided under section 7(*b*) and (*c*) also hardly give any comfort.

It is widely understood that the market share of correctly defined markets should at most be used as a way to screen or filter out cases that deserve no further consideration. In the US, and to a certain extent the EU, high market share alone never implies dominance. Unless the market definition exercise has been incorrectly carried out, there can be no significant prospect of single-firm dominance without at least substantial market power. In the context of predatory pricing, consumers suffer only when prices go up relative to where they otherwise would have been – that is, once market power has been enhanced. This does not necessarily mean that demonstrating dominance means prices will inevitably rise if a competitor exits. This may be so if there is a near monopolist in the market and predation also occurs in that same market. But firms only marginally dominant may still face a similar amount of competition after marginalising a small competitor.

The wording of the South African "market power" definition appears to borrow primarily from the experiences in the US and EU and, to date, has not been given much consideration in the case law. The first element of the notion of dominance under the South African definition incorporates an economic concept, which is broadly associated with the concept of market power as understood in the economic literature and found in US antitrust case law. The latter two elements of the definition are broadly consistent with the legal concept of dominance in the US and EU. However, the incorporation of all three elements means that the South African concept of market power is *sui generis* to South African competition law. It does not correspond with the legal definition of dominance under section 7(*a*), and also does not fully correspond with the legal or economic concept of dominance under EU competition law. Likewise, the legal definition of dominance under EU competition law corresponds fully with neither the economic concept of dominance nor the US concept of dominance.

In cases that proceed to abuse analysis, the dominance assessment should ideally be integral to – not separate from – the analysis of harm to competition and consumers. Crucially, in this regard, dominance (a legal concept) should be seen as the possession of substantial market power (an economic concept). As a matter of policy, the competition authorities should be encouraged to clarify explicitly that dominance amounts to substantial market power, whether or not this applies to borderline cases.

THE COMPLIANCE OF THE SOUTH AFRICAN SOCIAL SECURITY SYSTEM WITH THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

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SUMMARY

The ratification of the International Covenant on Economic, Social and Cultural Rights by South Africa has resulted in the provisions thereof becoming binding on the South African legislature. The right to social security is entrenched in the ICESCR, which provides for the elements of a social security system that must be complied with by states. This article sets out what is required of states in terms of the right to social security in the ICESCR by way of crystallising the elements of a social security system. Thereafter, the South Africa social security system is compared to these elements to determine whether there is compliance with the right to social security in the ICESCR.

1 INTRODUCTION

The International Covenant on Economic, Social and Cultural Rights (ICESCR)[1] is one of the instruments that form the International Bill of Rights.[2] One of the stated purposes of the ICESCR is the promotion of the general welfare of persons in a democratic society.[3] The recognition that certain rights have an impact on the dignity of each person is an integral part of the ICESCR. To this end, the Preamble to the ICESCR provides that each person should be permitted to benefit from the exercise of his rights, which include economic, social, cultural, civil and political rights.[4] Accordingly, the ICESCR makes provision for the realisation of numerous rights of the

1 The International Covenant on Economic, Social and Cultural Rights adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966.

2 United Nations General Assembly Resolution 217 (1948) A/RES/217(III).

3 Art 4 of the ICESCR.

4 Preamble to the ICESCR.

aforementioned categories. The content of the ICESCR includes provisions relating to the right to work,[5] the right to social security[6] and the right to an adequate standard of living.[7]

Approximately 165 countries have signed and ratified the ICESCR, which means that these countries are compelled to implement its provisions into their domestic law.[8] However, a lack of ratification does not mean that countries that have only signed the ICESCR are unaffected by the provisions therein. Countries that have signed and not ratified the ICESCR are obliged to refrain from enacting laws which conflict with the provisions of the ICESCR.[9]

Until late 2014, South Africa was only a signatory to the ICESCR.[10] A concerted campaign by numerous stakeholders resulted in the ratification of the ICESCR by South Africa on 12 January 2015.[11] Upon ratification, South Africa became bound by the provisions in the ICESCR and has an obligation to domesticate the provisions therein.[12] The role of South Africa as a State Party has now shifted from a passive one, in terms of which they were merely prevented from enacting laws in conflict with the provisions of the ICESCR,[13] to an active one, in terms of which the provisions of the ICESCR

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5 For e.g., Art 6(1) provides that "[t]he States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right".

6 Art 9 of the ICESCR provides that "[t]he States Parties to the present Covenant recognize the right of everyone to social security, including social insurance".

7 Art 11 of the ICESCR provides that "[t]he States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent".

8 S 27(2) of the ICESCR provides that each state ratifying the ICESCR becomes bound by its provisions three months after such ratification. UN Committee on Economic, Social and Cultural Rights "Status of the International Covenant on Economic, Social and Cultural Rights" http://www.ohchr.org/Documents/Issues/HRIndicators/DataICESCR.xls (accessed 2014-05-14).

9 Art 18 of the Vienna Convention on the Law of Treaties, 1969. Puta-Chekwe and Flood "From Division to Integration: Economic, Social and Cultural Rights as Basic Human Rights" in Merali and Oosterveld *Giving Meaning to Economic, Social and Cultural Rights* (2001) 47. CESCR was first invited to prepare general comments in 1987 – Economic and Social Council Resolution 1987/5. See also Tomuschat *Human Rights: Between Idealism and Realism* (2008) 190.

10 South Africa signed the ICESCR on 3 October 1994. UN Treaty Body Database https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=162&Lang=EN (accessed 2020-02-04).

11 The stakeholders were, *inter alia*, Black Sash, the Community Law Centre at the University of the Western Cape and the Socio-economic Rights Institute of South Africa. See Dullah Omar Institute https://dullahomarinstitute.org.za/socio-economic-rights/international-covenant-on-economic-social-and-cultural-rights-icescr (accessed 2020-02-04).

12 Art 27(2) provides that the provisions of the ICESCR enter into force three months after the deposit of ratification documents by the state party.

13 S 39(2) of the Constitution of the Republic of South Africa, 1996 provides that international law must be taken into consideration when interpreting national legislation, irrespective of

must now be incorporated into South African legislation.[14] For purposes of this article, the provisions of the ICESCR relating to social security schemes is discussed.

1 1 The right of access to social security in South Africa

Section 27(1)(*c*) of the Constitution of the Republic of South Africa provides that "everyone has the right of access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance". This right is part of the collection of socio-economic rights found in the Bill of Rights. Section 7 of the Constitution emphasises this importance and further, provides important information on how the socio-economic rights in the Bill of Rights are to be handled by the state. Section 7(2) provides that "[t]he state must respect, protect, promote and fulfil the rights in the Bill of Rights".

According to Ngcobo CJ,

> "[t]his obligation goes beyond a mere negative obligation not to act in a manner that would infringe or restrict a right. Rather, it entails positive duties on the state to take deliberate, reasonable measures to give effect to all of the fundamental rights contained in the Bill of Rights".[15]

It was also found in *Glenister v President of the Republic of South Africa* that, in interpreting the content of the obligation created by section 7(2), it was not necessary to prescribe exactly which steps the state has to take to meet its obligation in terms of the section.[16] However, the chosen steps must be reasonable and effective, and must be steps that would be taken by a reasonable decision-maker in the circumstances.[17] This means that any steps taken in relation to the realisation of the right of access to social security must be done in a manner that respects, protects, promotes and fulfils the right, and these steps must be reasonable.

According to the South African Human Rights Commission (SAHRC), the obligation to respect a right means that the state must not hinder the exercising of that right.[18] This includes an obligation not to limit the enjoyment of a particular right already in existence.[19] The protection of a right entails the state preventing violations of that right by third parties (the violation of the right by the state is already prohibited through the obligation to respect the right).[20] The state must also promote rights in the Bill of Rights, which involves the provision of information about the right to persons

whether that international law has been ratified. This section does not place a positive obligation to incorporate unratified international law into national legislation.

14 Art 2 of the ICESCR.

15 *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) par 105.

16 *Glenister v President of the Republic of South Africa supra* par 191.

17 *Ibid*.

18 SAHRC 7th Report on Economic and Social Rights 2006–2009 (2009) vi.

19 *Ibid*.

20 SAHRC (2009) v.

entitled to it.[21] In other words, the state must educate persons about which rights they are entitled to and the scope and content of those rights. Finally, the obligation to fulfil rights obliges the state to take appropriate legislative and other measures which contribute to the full realisation of the rights in the Bill of Rights.[22] The obligation to fulfil rights is somewhat curtailed by the principle that such fulfilment must be progressively realised using the resources available to the state.[23]

1 2 Application of the right of access to social security

The right of access to social security is guaranteed for "everyone" in terms of section 27(1)(*c*) of the Constitution. In the case of *Khosa v Minister of Social Development*,[24] the Constitutional Court considered the meaning of the word "everyone" for purposes of the right of access to social security. Following the reasoning of the court in this case, it is implicit in the use of the word "everyone" that the right of access to social security is guaranteed to persons who are permanent residents or citizens of South Africa.[25]

According to section 27(2), "[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights".[26] The terms "reasonable measures", "available resources" and "progressive realisation" have specific meanings for the right of access to social security, which are discussed in the paragraphs hereafter.

Government of the Republic of South Africa v Grootboom[27] is the landmark case in relation to these terms. According to the Constitutional Court, in evaluating measures taken by the state to ensure access to social security the court is not concerned with the availability of "more desirable" measures, but rather with whether the measures taken were "reasonable".[28] The court recognises that many different measures may be considered reasonable in any set of circumstances and, as long as the particular measures chosen can be considered reasonable in the circumstances, the requirement of reasonable measures is met.[29]

It was previously said that the right of access to social security cannot be enforced (or realised) upon demand,[30] and this is echoed in the requirement

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21 *Ibid*.

22 *Glenister v President of the Republic of South Africa supra* par 107.

23 Wiid *The Right to Social Security of Persons with Disabilities in South Africa* (doctoral thesis, University of the Western Cape) 2015 87.

24 *Khosa v Minister of Social Development, Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC).

25 *Khosa v Minister of Social Development, Mahlaule and v Minister of Social Development supra* par 49.

26 S 27(2) of the Constitution of the Republic of South Africa, 1996.

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

28 *Government of the Republic of South Africa v Grootboom supra* par 41.

29 Wiid *The Right to Social Security of Persons with Disabilities in South Africa* 88.

30 *Minister of Health v Treatment Action Campaign (2)* 2002 (5) SA 721 (CC) par 39.

that the right be progressively realised. According to the Constitutional Court in the *Grootboom* case,

> "The goal of the Constitution is that the basic needs of all in our society be effectively met and the requirement of progressive realisation means that the state must take steps to achieve this goal. It means that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time."[31]

Progressive realisation of social security includes, but is not limited to, increasing the level of coverage and benefits.[32] This view is supported by the statement that achieving progressive realisation of socio-economic rights consists of more than increasing the finances allocated to the realisation of a particular right.[33] The focus should rather be on how many people have actually been awarded the benefit attached to a particular socio-economic right.

The question of available resources raises the ever-present issue of social spending. Essentially, the right of access to social security is limited by the stipulation that the state is only compelled to provide social security benefits where it has the resources to do so. If the state is able to prove that it does not have the resources to meet its social security obligations, the resultant (internal) limitation of social security rights is justifiable. This does not mean that the state can entirely avoid its social security obligations merely by asserting that it does not possess adequate resources.[34] In the *Khosa* case, the court stated that the limitation of the right of access to social security may be justifiable on the basis of a lack of resources, but the manner in which the existing resources are allocated must be consistent with the Bill of Rights in general.[35]

2 THE RIGHT TO SOCIAL SECURITY IN THE ICESCR

Article 9 of the ICESCR provides that "States Parties to the present Covenant recognize the right of everyone to social security, including social insurance." This article creates the right of individuals to social security, and a corresponding obligation on States Parties to provide such social security. However, Article 9 on its own does not provide much indication as to the scope and content of social security systems, beyond the allusion to social insurance.

In order to give content to the right to social security, the General Comments released by the Committee for Economic, Social and Cultural Rights (CESCR) need to be considered. The CESCR was established in

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

32 Wiid *The Right to Social Security of Persons with Disabilities in South Africa* 92.

33 *Ngxuza v The Permanent Secretary, Department of Welfare, Eastern Cape* 2001 (2) SA 609 (E).

34 Olivier, Smit, Kalula (ed) *Social Security: A Legal Analysis* (2003) 76.

35 *Khosa v Minister of Social Development, Mahlaule v Minister of Social Development supra* par 45.

1985 for the purpose of monitoring the implementation of the ICESCR by States Parties.[36] It is made up of 18 independent experts who are tasked with receiving state reports on the progress of implementation of the ICESCR and publishing their interpretation of the provisions of the ICESCR in the form of general comments.[37]

For purposes of social security, General Comment 19 provides information for States Parties to comply with Article 9 of the ICESCR.

2 1 General Comment 19

The right to social security is defined by the CESCR as the right to access and maintain benefits, whether in cash or in kind, without discrimination in order to ensure protection from a number of contingencies that result in a lack of work-related income, or unaffordable health care or insufficient family support.

According to General Comment 19, social security systems should be established in terms of the domestic law of each country and the administration thereof should be the responsibility of a public authority.[38] This means that it is up to each State Party to decide how to administer its own social security system, and that such administration must be transparent. The CESCR also confirms that there are a number of contingencies for which any social security system should provide coverage.[39] These contingencies are sickness, disability, maternity, employment injury, unemployment, old age or death of a family member.[40] However, the General Comment does not provide more specific examples of events leading to loss of income resulting from these contingencies, nor does it refer to any monetary amounts which may be provided to persons affected by such contingencies.[41]

In order to inform the approach of state parties in implementing the right to social security, the General Comment requires states parties to respect, protect and fulfil the right to social security.[42] This echoes the obligation to respect, protect, promote and fulfil the right of access to social security in the

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[36] The implementation of the provisions of the ICESCR by states that have ratified it is monitored by the Committee on Economic, Social and Cultural Rights (CESCR). This committee is also responsible for releasing general comments on the ICESCR in order to clarify the obligations created by its various provisions. The CESCR was established in 1985 in terms of the Economic and Social Council Resolution 1985/17.

[37] United Nations Human Rights Office of the High Commissioner "Committee on Economic, Social and Cultural Rights" https://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIntro.aspx (accessed 2020-02-21).

[38] General Comment 19 Part II.

[39] General Comment 19 Item 2.

[40] General Comment 19 Item 2.

[41] Scruggs and Zimmerman "Implementation of the Human Right to Social Security Around the World. A Preliminary Empirical Assessment of National Social Protections Laws" in Minkler (ed) *The State of Economic and Social Human Rights* (2013) 119.

[42] Vonk "The Fundamental Right of Social Assistance: a Global, a Regional (Europe and Africa) and a National Perspective (Germany, the Netherlands and South Africa)" 2019 21(3) *European Journal of Social Security* 219 228.

Constitution, although the explanations of each term are not identical. In respecting and protecting the right to social security, it has been suggested that the state must not only provide legislative protection to existing private and collective social security schemes but also that non-state social security schemes must be established.[43] The fulfilment of the right to social security is more straightforward, in that the state party is merely required to have a legislative framework in place for a social security system.[44]

General Comment 19 provides for basic principles which must be present in any social security system.[45] In the following paragraphs these basic principles as well as the obligations discussed above are explained and applied to the South African social security system in order to gauge whether South Africa's social security system complies with them.

3 INDICATORS FOR COMPLIANCE WITH THE ICESCR

From the discussion of General Comment 19, several indicators can be crystallised that can be used to determine whether a country's social security system meets the requirements established by the ICESCR. These indicators are:

- the existence of a social security system
- the administration of such social security system by a public authority
- the coverage of a minimum of nine named contingencies
- the level of coverage provided by the social security system
- the level and duration of benefits provided
- the use of benefits in the realisation of other rights in the ICESCR

The Office of the High Commissioner of the United Nations summarises the key elements of the right to social security as availability, adequacy, affordability and accessibility.[46] The implementation of the right to social security must therefore be informed by these three principles.[47] Each of these elements can be linked to one of the indicators named above.

3 1 The existence of a social security scheme

This indicator could also be called the availability of a social security system. This indicator is arguably the easiest one to satisfy, in that all that need be proved is that a social security system providing benefits is in place. This is also reminiscent of the requirement to fulfil the right to social security in

43 *Ibid*.

44 *Ibid*.

45 General Comment 19 Item 31.

46 Office of the High Commissioner "Toolkit on the Rights to Social Security" https://www.ohchr.org/EN/Issues/RightSocialSecurity/Pages/SocialSecurity.aspx (accessed 2020-02-21).

47 Stamm "The Human Right to Social Security and Its Impact on Socio-Political Action in Germany and Finland" 2017 2 *Journal of Human Rights and Social Work* 25 28.

General Comment 19, which also only requires that a legislative framework for social security be in place.[48] The system may consist of a single scheme or a variety of schemes;[49] the accessibility and adequacy of these schemes becomes relevant when applying the other indicators.

In terms of section 27 of the Constitution of the Republic of South Africa, everyone has a right of access to social security.[50] There is thus a constitutional basis for the social security system in South Africa, subject to certain limitations and qualifying criteria. In addition, numerous pieces of legislation give effect to this constitutional right. These include the Social Assistance Act,[51] Unemployment Insurance Fund Act,[52] Compensation for Occupational Injuries and Diseases Act and the Pension Funds Act.[53] The Social Assistance Act makes provision for social grants administered by the State, and the other legislation mentioned establishes and provides structure for various social insurance schemes. The social security system therefore exists and consists of multiple schemes as envisaged by the UN High Commissioner.

3 2 Administration by a public authority

The ICESCR requires that the social security system of a member state be administered by a public authority. Neither the ICESCR nor the General Comment relating to social security provides a definition of "public authority". However, a public authority is defined as any government or public institution at national, regional or local level. It is submitted that a government department or institution that performs a public function and is financially accountable to a national or regional institution would be appropriate for administration of social security in terms of the ICESCR.

This indicator ties in with the obligation to protect the existing social security system. Through requiring the administration of social security schemes to be transparent and publicly accountable, a number of harmful behaviours affecting the funding of social security may be prevented. Since State Parties must protect their social security systems and considering that these schemes are often funded by public monies, requiring that the administrating authorities subject themselves to public scrutiny is particularly appropriate.

48 Vonk 2019 *European Journal of Social Security* 219 228.

49 Office of the High Commissioner https://www.ohchr.org/EN/Issues/RightSocialSecurity/Pages/SocialSecurity.aspx (accessed 2020-02-21).

50 S 27(1)(*c*) of the Constitution of the Republic of South Africa, 1996.

51 13 of 2004.

52 63 of 2001.

53 24 of 1956.

3 2 1 Administration of social assistance

The administration of social assistance in South Africa is the responsibility of the Department of Social Development,[54] which is a state department under the leadership of the Minister of Social Development. In terms of national legislation, the Minister may delegate the administration of social assistance,[55] and has done so. The delegation of responsibility to the South African Social Security Agency (SASSA) was done in terms of the South African Social Security Agency Act in 2004.[56] The express purpose of SASSA is to act as the sole agency involved in the management, administration and payment of social assistance in South Africa.[57] Since SASSA is subject to the provisions of the Public Finance Management Act[58] which regulates the management of finances in national and provincial government and is a juristic person,[59] this satisfies the requirement relating to administration by a public authority.

3 2 2 Administration of social insurance

Social insurance in South Africa is somewhat fragmented, in that there are a number of available schemes and each of these is run by a different institution. The major social insurance schemes are the Unemployment Insurance Fund, the Compensation for Occupational Injuries and Diseases Fund and retirement schemes. One can therefore not say that social insurance is administered by a public authority in its entirety without looking at the management of each scheme in turn.

The Unemployment Insurance Fund (UIF) was established in terms of the Unemployment Insurance Act[60] in 2001. The UIF provides benefits for persons who were employed and making contributions to the UIF and who are no longer able to work as a result of contingencies such as pregnancy, illness and dismissal.[61] The entity responsible for the administration and management of the fund is the Department of Labour, which is a state department forming part of the South African government.[62] The UIF is also subject to the provisions of the Public Finance Management Act.[63] The UIF thus satisfies the requirement of administration by a public authority.

The Compensation for Occupational Injuries and Diseases Fund (COIDA Fund) was established in terms of the Compensation for Occupational

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54 National Government of South Africa "Department of Social Development" https://nationalgovernment.co.za/units/view/38/department-of-social-development-dsd (accessed 2020-02-21).

55 S 29 of Act 13 of 2004.

56 Act 9 of 2004.

57 S 3 of Act 9 of 2004.

58 Act 1 of 1999.

59 S 2(2) of Act 9 of 2004.

60 S 1 of Act 63 of 2001.

61 S 2 read with s 12 of Act 63 of 2001.

62 S 58 of Act 63 of 2001.

63 Act 1 of 1999.

Injuries and Diseases Act (COIDA) in 1993.[64] The purpose of the COIDA fund is to compensate workers who are injured or become ill in the course of their employment and are unable to work because of such injury or illness.[65] The COIDA Fund is also administered by the Director-General of the Department of Labour,[66] and as such is administered by a public authority.

Retirement schemes in South African are numerous and varied – there are over 5000 active retirement funds in South Africa.[67] Each of these funds has its own board of trustees and management. However, these funds are subject to the provisions of the Pension Funds Act,[68] which provides for the regulatory framework within which each of these funds must operate. In addition, retirement funds are subject to the rules of the Financial Services Conduct Authority,[69] which is empowered to investigate and regulate the conduct of financial service providers in South Africa, including retirement funds.[70] While there is no single administrator for retirement funds in South Africa, the regulatory framework established by the Pension Funds Act may be considered a public authority for purposes of this discussion.

Since each of the major social insurance schemes in South Africa is managed by a public agency, it is submitted that social insurance as a whole complies with the ICESCR requirement of management by a public authority and the obligation to protect social security schemes.

3 3 Coverage of contingencies

According to General Comment 19, the social security systems of States Parties should provide coverage for contingencies from the nine principal branches of social security.[71] These branches are health care, sickness, old age, unemployment, employment injury, family and child support, maternity, disability, and survivors and orphans.[72]

Social assistance in South Africa provides social grants for persons who are unable to provide for their own maintenance needs.[73] There are grants payable to persons who are unable to meet their own maintenance needs as a result of disability, old age and for families with children under 18 and families with disabled children who are unable to meet the financial needs of those children.[74] Social insurance provides financial assistance for persons who have become unemployed as a result of illness, maternity, dismissal, retrenchment, occupational injury, occupational diseases and for survivors in

64 S 15 of the Compensation for Occupational Injuries and Diseases Act 130 of 1993.
65 S 22 of Act 130 of 1993.
66 Ch 2 of Act 130 of 1993.
67 Financial Services Board Annual Report (2018) 42.
68 24 of 1956.
69 Financial Services Conduct Authority "Who We Are" https://www.fsca.co.za/Pages/Vision-and-Mission.aspx (accessed 2020-02-21).
70 Financial Sector Regulation Act 9 of 2017.
71 Item 2 of General Comment 19.
72 *Ibid*.
73 S 27(1)(*c*) of the Constitution of the Republic of South Africa, 1996.
74 Ch 2 of Act 13 of 2004.

the event of the death of the breadwinner. The UIF is the source of many of these benefits.[75] Benefits in the form of partial income replacement for persons who are injured or become ill in the course of their employment are payable from the COIDA Fund.[76]

Between the contingencies covered by social grants and social insurance schemes, all the contingencies specified by the CESCR are provided for in the South African social security landscape.

3 4 Level of coverage

This indicator refers to the reach of social security. Put in simpler terms, the number of people covered by social security needs to be assessed in order to establish whether such coverage is adequate or not. This component of the right to social security ties in with the element of accessibility as specified by the UN High Commissioner.

3 4 1 Coverage of social assistance

As per section 27(1)(*c*) of the Constitution, the right of access to social security includes social assistance for persons who are unable to provide for their own maintenance needs.[77] The right of access to social assistance is thus inclusive as indicated by the use of the word "everyone",[78] but qualified through providing that persons only gain access to social assistance if they are unable to provide for their own maintenance needs. This qualification takes the form of the use of a means test applied to persons applying for social assistance.[79] The purpose of the means test is to prevent persons receiving social grants when their financial needs are being met through their own endeavours.[80] It has been argued that the means test should be abolished and that social assistance should be awarded to any person applying for it.[81] It is submitted that this argument is flawed, since it would place an undue burden on an already financially strained state. As of February 2019, there were approximately 18 million social grant recipients in South Africa.[82] This number was higher than the number of persons

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75 The UIF pays benefits for maternity, adoption, illness, dismissal, retrenchment and the death of the breadwinner. See Parts B–F of Act 63 of 2001.

76 S 22 of Act 130 of 1993.

77 S 27(1)(*c*) of the Constitution of the Republic of South Africa, 1996.

78 The word "everyone" refers to South African citizens and permanent residents as decided by the Court in *Khosa v Minister of Social Development, Mahlaule v Minister of Social Development supra* par 49.

79 Ss 5(2)(*a*) and (*b*) of 13 of 2004.

80 Economic Policy Research Institute "Social Security Take-Up and the Means Test in South Africa" (2001) EPRI Research Paper #24 3.

81 Reports of the Taylor Committee into a Social Security System for South Africa (2002) 24; Nyenti and Mpedi "The Impact of SADC Social Protection Instruments on the Setting Up of a Minimum Social Protection Floor in South African Countries" 2012 15(1) *Potchefstroom Electronic Law Journal* 244 269.

82 Minister of Finance Budget Speech 2019/2020 https://www.sanews.gov.za/south-africa/increased-allocations-grants-education-and-health (accessed 2020-02-21).

employed in formal employment at that time[83] and comprised approximately 30 per cent of the total population.[84] It is submitted that social assistance coverage in South Africa is currently in compliance with Article 9 of the ICESCR in relation to the extent of coverage, since such a large number of persons are in receipt of a social grant.

It must be noted that this indicator is subject to the internal limitation in section 27 of the Constitution, which provides that the right of access to social security is subject to available resources.[85]

Since social assistance is funded through general revenue (which includes income tax),[86] the amount that is available for distribution through social assistance is limited. This limitation is as a result of the low levels of formal employment in the country,[87] which consequently results in a relatively low number of persons paying income tax. The less tax paid by those who are in formal employment, the less money there is available for social assistance grants. The state may thus claim that the current number of social assistance grant recipients and the concomitant social spending is the best that can be done within the currently available resources.

3 4 1 1 Impact of COVID 19 on social assistance

In April 2020, President Cyril Ramaphosa announced a range of measures that would benefit social grant recipients during the nationwide lockdown in response to the international outbreak of COVID-19.[88] These measures include the availability of a lesser used social grant, called social relief of distress[89] and the temporary increase in the amounts received by all existing social grant recipients. The source of funds for these increases was not the general revenue used for the standard social grants but was an amount that was re-directed from other parts of the budget allocated to other expenditure.[90] In addition, funds were made available from other state administered funds such as the UIF and sources from local and international sources.[91]

The rapid response of the state to the needs of social assistance recipients is indicative of the state's commitment to providing financial assistance to those in dire need and is to be commended. However, it is

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83 Quarterly Labour Force Survey Q2 2019 provides that there were 11 220 000 people in formal in employment from January to March 2019.

84 Statistics South African Mid-Year Population Estimates 2019 estimates that the mid-year population was 58,78 million.

85 S 27(2) of the Constitution.

86 Strydom (ed) *Essential Social Security* (2006) 7.

87 The Statistics SA Quarterly Labour Force survey (2019) estimates the number of people in formal, non-agricultural employment at 10 142 000.

88 Speech made by President Cyril Ramaphosa (21 April 2020) https://www.gov.za/speeches/president-cyril-ramaphosa-additional-coronavirus-covid-19-economic-and-social-relief (accessed 2020-05-23).

89 *LAWSA XIII Social Security: Core Elements* par 188.

90 Speech made by President Cyril Ramaphosa https://www.gov.za/speeches/president-cyril-ramaphosa-additional-coronavirus-covid-19-economic-and-social-relief.

91 *Ibid*.

submitted that the increased amounts made available temporarily do not mean that there is more money available to social grant recipients under normal circumstances. As indicated above, the funds used for the new and increased social grants are not sourced from general revenue, which is the dedicated source of funds for social grants. These funds were made available through emergency and temporary measures and cannot be used to make the argument that the state is not using its available resources to increase the amounts paid to social grant recipients in normal circumstances.

3 4 2 Coverage of social insurance

It is more complicated to determine the exact level of coverage of social insurance schemes in South Africa. Social insurance consists of a number of schemes that may have no relation to each other, save that they can only be accessed through employment.[92] The three primary social insurance schemes are the UIF, the COIDA Fund and retirement funds.

The pre-requisite of employment makes social insurance schemes exclusive in nature, since the unemployment rate in South Africa at the end of 2019 was 29.1%.[93] This means that a third of the working age population has no access to social insurance. Further, these schemes are only accessible to certain categories of employees and exclude workers in informal employment, casual workers and often government employees and members of the military also.[94] Considering that so many persons are excluded from social insurance, it is submitted that the level of coverage currently provided does not comply with Article 9 of the ICESCR.

3 5 Level and duration of benefits

The level and duration of benefits provided by a social security scheme must be adequate and must be provided as long as the individual is negatively affected by the particular contingency they are receiving benefits for. This means that the benefits provided must be enough to meet the recipients' basic needs and the benefits should not be ceased while the recipient needs them.

3 5 1 Level of benefits provided by social assistance

The level of benefits refers to the amount of money paid to recipients of such benefits. In order to satisfy this requirement, the amount paid must be

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92 Olivier and Mpedi "The Extension of Social Protection to Non-Formal Sector Workers – Experiences from SADC and the Caribbean" 2005 19 *Zeitschrift fur auslandisches und internationals Arbetis- und Sozialrecht* (*ZIAS*) 150 152.

93 Statistics South Africa Quarterly Labour Force Survey Q4 2019 http://www.statssa.gov.za/?p=12948 (accessed 2020-02-21).

94 For e.g., domestic workers and self-employed persons are excluded from the COIDA Fund in terms of s 1(xix) of 130 of 1993, and migrant and government workers are excluded from the UIF in terms of s 3(1) of 63 of 2001.

adequate. What is meant by adequate is not easy to establish, considering that there are many factors contributing towards the financial needs of persons negatively affected by the named contingencies. It is submitted that, in the South African context, this amount should allow a grant recipient to provide for their own maintenance needs, since this is the primary qualifier for social assistance in the Constitution. For purposes of this article, the amounts paid through social assistance are provided and then analysed to gauge whether these are "adequate".

3 5 1 1 Minimum wage as an indicator of adequacy

Social grants for older persons and persons with disabilities provide the same amount to recipients (this is not taking into consideration any supplementary grants such as the grant in aid). As of April 2020, this amount is R1860 per month per recipient[95] (excluding the additional temporary amount payable as a result of the COVID19 outbreak).[96] From this amount, a recipient is expected to provide for all their daily needs, such as food, rent and electricity.[97]

As of 1 January 2019, the National Minimum Wage in South Africa is R20 per hour.[98] This amount was increased to R20.76 for employees, effective 1 March 2020.[99] The primary aim of introducing a minimum wage is to address the extreme levels of income inequality in South Africa.[100] Based on a work week of 40 hours (excluding any overtime that may be required), this equates to approximately R43 000 per annum. A person earning a minimum wage therefore earns approximately R3600 per month. This means that a social grant recipient is expected to meet their own maintenance needs with slightly more than half the amount that is considered adequate as a minimum wage. It is submitted that this amount cannot be considered adequate for purposes of meeting the requirements of the ICESCR.

However, one must still consider the impact of the internal limitations on the right of access to social security found in section 27(2), which are that the right must be realised progressively and within the available resources. As discussed above, the resources available to the state are finite and do not leave much room for increasing social grant amounts. The issue of progressive realisation is addressed through the annual increase of the

95 Minister Tito Mboweni Budget Speech (2020) https://www.gov.za/BudgetSpeech2020 (accessed 2020-05-23).

96 South African Government "Social Grants – Coronavirus COVID19" https://www.gov.za/coronavirus/socialgrants (accessed 2020-05-23).

97 South Africa does have free basic healthcare, so this expense is not necessarily meant to be covered by the grant amount. However, it is widely known that the public healthcare system is rife with problems and may not be reliable. Unfortunately an in-depth discussion of public healthcare in South Africa is beyond the scope of this article, but the existence and availability of such a system must be noted for purposes of the amount payable in terms of social grants.

98 S 6(6) read with Schedule 1 of the National Minimum Wage Act 9 of 2018.

99 This increase was made in terms of s 6 of Act 9 of 2018, which requires an annual review of the minimum wage and allows for adjustments to the minimum wage amount.

100 Preamble to Act 9 of 2018.

amounts payable to social grant recipients.[101] Each year in the annual budget speech, social grant amounts are increased by a small amount, usually less than R100 per social grant recipient. Considering that the concept of progressive realisation only requires that the state take steps to increase the level of benefits payable, it can thus be said that the annual increase to social grants amounts to progressive realisation. The state is thus progressively realising the right of access to social assistance through this annual increase, albeit that such realisation is slow because of the small amount by which the grant is increased.

The question, then, is whether the current inadequate amount is justified by the clear progressive realisation and the limitation of available resources. It is submitted that the low amount payable is, in fact, justified through an examination of these limitations. As mentioned previously, state expenditure on social grants is already substantial and the growing number of social grant recipients makes increasing the amount payable infeasible. In addition, the state is meeting its obligation to progressively realise the right of access to social assistance through annual increases in social grant amounts.

Despite the initial finding that the social grants in South Africa are not compliant with the ICESCR, it is submitting that the amount paid is justifiable by the requirements of the Constitution, which take precedence over the provisions of international law.

3 5 2 Level of benefits provided by social insurance

The benefits payable through social insurance schemes are not only extremely varied, but also tailored to each individual recipient. In the case of UIF benefits, the amount payable depends on the amount the employee has contributed to the UIF and for how long they made contributions.[102] The actual individual benefit is paid on a sliding scale based on the recipients' salary.[103] This means that the more an employee earns, the smaller percentage of their salary will be paid in UIF benefits. COIDA Fund benefits are calculated on an individual basis and depend upon the nature and extent of the illness or injury experienced by the employee.[104] Retirement fund benefits depend on the amount and duration of contributions made by the recipient and, in some cases, tax must be paid on benefits received.[105] For these reasons, it is not possible to establish whether social insurance payments as a whole are adequate in South Africa. Such an in-depth analysis would have to take place on a case by case basis for each scheme and is therefore beyond the scope of this article.

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101 G*overnment of the Republic of South Africa v Grootboom supra* par 45.

102 S 12 of 63 of 2001.

103 S 13 of 63 of 2001.

104 Ch IV of the Compensation for Occupational Injuries and Diseases Act 130 of 1993.

105 Whether tax is payable depends on the amount received – see South African Revenue Service "Retirement Lump Sum Benefits" https://www.sars.gov.za/Tax-Rates/Income-Tax/Pages/Retirement-Lump-Sum-Benefits.aspx (accessed 2020-02-23).

3 5 3 Duration of social assistance benefits

In terms of social assistance, the social grant is payable for as long as the recipient is unable to meet their financial needs.[106] The right of access to social security is thus qualified, and the use of a means test has been implemented in order to determine the financial need of applicants for social assistance.[107] If an applicant for (or recipient of) a social grant earns money in excess of a specified amount, they become ineligible for the social grant and the grant will either not be awarded,[108] or, in the case of a person already receiving a grant, the payment of the grant will cease.[109] The threshold for income is currently R82 400 per annum for single persons and R164 880 for married persons.[110] An applicant or recipient is thus permitted to have an income, as long as the income does not exceed these amounts. Any income received will cause the amount received from the social grant to be adjusted pro rata.[111] The principle applicable here is that once income exceeds these amounts, a recipient is no longer unable to meet their own maintenance needs and the contingency has therefore effectively ended.[112]

In addition to the use of the means test, a social grant will also lapse if the contingency for which it is paid is no longer applicable. In particular, if a recipient of a disability grant is no longer considered disabled and declared medically fit to work, the grant will lapse.[113] Similarly, if a social grant is paid in respect of a child, the grant will lapse when the child reaches the age of majority.[114]

A further example of social assistance benefits only being paid while needed is the availability of the temporary social relief of distress grant made available to persons affected by the outbreak of COVID-19 who have consequently lost income.[115] As of May 2020, the social relief of distress grant will be payable to successful applicants for 6 months.[116] The increases in social grant amounts already being paid are also effective for 6 months.[117]

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106 Olivier *et al Social Security: A Legal Analysis* 327.

107 *Ibid*.

108 Economic Policy Research Institute "Social Security Take-Up and the Means Test in South Africa" EPRI Research Paper 24 3.

109 In terms of s 14(5) of Act 9 of 2004, a recipient of a social grant must inform SASSA of any material changes in their circumstances after applying for the grant. In terms of s 17(1), any person in receipt of amounts they are not entitled can be compelled to repay those amounts to SASSA. It is also an offence to withhold such information and an offence to receive a social grant while knowing that one is not entitled thereto in terms of s 21.

110 SASSA "You and Your Grant 2019/2020" (2019) https://www.sassa.gov.za/Pages/Grant-Booklets.aspx (accessed 2020-02-23) 7.

111 *Ibid*.

112 Wiid *The Right to Social Security of Persons with Disabilities in South Africa* 183.

113 SASSA "Disability Grant" https://www.sassa.gov.za/Documents/Grants-Documents/Disability-Grant.pdf (accessed 2020-02-23).

114 SASSA "Child Support Grant" https://www.sassa.gov.za/Documents/Grants-Documents/Child-Support-Grant.pdf (accessed 2020-02-23).

115 Minister Tito Mboweni Budget Speech https://www.gov.za/BudgetSpeech2020.

116 South African Government 'Social Grants – Coronavirus COVID19' https://www.gov.za/coronavirus/socialgrants (accessed on 23/05/2020).

117 South African Government https://www.gov.za/coronavirus/socialgrants.

The state is thus clearly cognisant of the need to provide social assistance when it is most needed by recipients.

It is thus submitted that social assistance (both in the form of temporary grants and permanent grants) therefore does provide benefits for the duration of the financial need of the recipient and meets the requirement of adequate duration of benefits.

3 5 4 Duration of social insurance benefits

The social insurance schemes in South Africa are not means tested. This means that there are no income thresholds attached to the receipt of social insurance benefits. However, certain social insurance benefits may cease before the contingency has ended. For example, UIF benefits paid to an unemployed person may be exhausted before the recipient has secured further employment.[118] This is also the case where UIF benefits are paid to and exhausted by a recipient who is no longer working as a result of illness or incapacity who has not yet been able to return to work. Since UIF benefits may not be payable for the entirety of the period that a person is unemployed, it may appear as though the duration of benefits is not adequate. However, it must be borne in mind that UIF benefits are funded through contributions by the employee and their employer and are capped at a certain amount.[119] The duration of UIF benefits is thus a legislative principle and is aimed at encouraging recipients to secure employment and providing benefits beyond this is not possible.

In the case of COIDA Fund benefits, the duration of benefits depends on the nature of the illness or injury experienced by the recipient of benefits. Employees with permanent disablements will receive benefits for life;[120] those with temporary disablements receive benefits for the duration of the illness or injury.[121] It is submitted that the duration of COIDA benefits is adequate.

Finally, retirement fund benefits are paid once a member of a retirement fund reaches retirement age. Retirement fund benefits can be paid as a pension or as a lump sum.[122] In the case of a pension, one third of retirement fund savings is paid out immediately at retirement and the balance of the amount is usually payable until the death of the recipient.[123] A provident fund pays out in one lump sum upon the retirement of the employee.[124] It is submitted that the provision of benefits until death is adequate. In the case of a lump sum, the recipient must manage their finances themselves in order to ensure that the amount will cover their

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118 Ss 15 and 16 of Act 63 of 2001.

119 S 13 of Act 63 of 2001 provides that a maximum of 238 days benefit is payable.

120 S 49 read with Schedule 2 of Act 130 of 1993.

121 *Ibid*.

122 The South African Labour Guide "Pension and Provident Funds" https://www.labourguide.co.za/general/499-pension-and-provident-funds (accessed 2020-02-24).

123 S 1 of Act 24 of 1956.

124 *Ibid*.

financial needs for the rest of their life. Since there is no oversight in this management of funds, the longevity of this lump sum is entirely individual and adequacy can therefore not be assessed.

3 6 Use of benefits to realise other rights

The United Nations recognises that all rights are interrelated,[125] and that the realisation of one of these rights could contribute towards the full realisation of other rights. The provision of financial assistance through social security schemes to persons with disabilities creates opportunities for social inclusion and better participation in society.[126] For example, the provision of adequate financial assistance may enable a person with a disability to make use of rehabilitation services or create the opportunity for further education. The provision of adequate social security benefits is thus vital for a number of related rights which are provided for in the ICESCR. In the case of the right to social security, the clearest link exists between it and the right to an adequate standard of living.[127]

3 6 1 Social assistance

The right to social security has been recognised as a chief contributor to achievement to the right of an adequate standard of living guaranteed in terms of international law.[128] However, an incomplete realisation of the right to social security would not result in as great a contribution towards the realisation of other rights.[129] Considering that that the benefits provided by social grants are not sufficient to meet the maintenance needs of social grant recipients,[130] it is submitted that social assistance is not sufficient to realise the right to an adequate standard of living as envisaged in international law, and may have a similar effect on the realisation of other rights related to the right to social security.

It must be noted that financial assistance does not comprise the entirety of a social security system. Goods and services such as free utilities, subsidised housing and free healthcare also form part of the broader concept of social protection.[131] In South Africa, many basic goods and services are either free or substantially subsidised, although the standard of

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125 Office of the High Commissioner "Your Human Rights" https://www.ohchr.org/EN/Issues /Pages/WhatareHumanRights.aspx (accessed 2020-02-24).

126 Item 59 of General Comment 19.

127 Item 28 of General Comment 19.

128 Wiid *The Right to Social Security of Persons with Disabilities in South Africa* 150.

129 Office of the High Commissioner https://www.ohchr.org/EN/Issues/Pages/ WhatareHumanRights.aspx.

130 The submission that the amount provided to social grant recipients is justified in terms of the Constitution in paragraph 3.5.1 above does not affect the reality that the amount provided does not facilitate the realisation of an adequate standard of living of these recipients.

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

these services is not necessarily adequate.[132] Unfortunately a full discussion of the adequacy of these measures is beyond the scope of this article. Nonetheless, it is submitted that the social assistance amount payable that is the subject of this discussion is not sufficient to realise an adequate standard of living either on its own, or in conjunction with sub-par additional goods and services.

3 6 2 Social insurance

An assessment of whether social insurance benefits are being used to realise an adequate standard of living for persons with disabilities is not as simple. This is because each recipient of COIDA Fund and UIF benefits receives a benefit that is based on their salary, which means benefits are highly individualised.[133] The level of social insurance benefits available may contribute greatly towards the realisation of an adequate standard of living for a person in receipt thereof. However, while social insurance schemes are inaccessible to large numbers of persons as a result of unemployment in South Africa,[134] the level of benefit is irrelevant. It is thus submitted that social insurance benefits are not currently contributing towards the achievement of an adequate standard of living since so many are excluded from social insurance schemes.

4 REPORTING AND ENFORCEMENT MECHANISMS

In terms of Article 16 of the ICESCR,

> "The States Parties to the present Covenant undertake to submit in conformity with this part of the Covenant reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized herein."

This means that States Parties are required to compile and submit reports on the status of the implementation of the provisions of the ICESCR periodically. South Africa submitted the initial report in 2017,[135] as required by Article 17 of the ICESCR. The section on the right to social security is woefully inadequate. The report includes only two pages of information related to social security in South Africa, and merely states selected statistics related to social assistance without attempting to show the adequacy of the benefits provided through social security.[136] Essentially, the

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132 See generally Statistics South Africa The State of South Africa: In-Depth Analysis of the Community Survey 2016 data (2016).

133 Wiid *The Right to Social Security of Persons with Disabilities in South Africa* 239.

134 See par 3.4.2 above for a discussion of the impact of unemployment on access to social insurance.

135 Initial Report of South Africa on the International Covenant on Economic, Social and Cultural Rights (2017) https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fZAF%2f1&Lang=en (accessed 2020-02-24).

136 Initial Report of South Africa on the International Covenant on Economic, Social and Cultural Rights https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fZAF%2f1&Lang=en 31.

report only confirms the existence of social assistance and the institutions involved in the administration thereof.

The report omits social insurance, save for one recommendation relating to the extension of coverage of the UIF.[137] While reporting on social insurance is problematic, the omission of one of the two main branches of social security is not acceptable for reporting purposes. It is clear upon reading the section on social security in the country report that much more information and analysis must be provided in order to establish whether the South African social security system meets the requirements of the ICESCR. A mere statement of information relating to social assistance is not enough.

The lack of information in the section on social security has been noted and addressed by the CESCR in its "Concluding Remarks" on the Country Report.[138] The CESCR has also made a number of recommendations relating to social assistance, including the increasing of the monthly amount paid and the abolition of the means test for certain applicants.[139] It is respectfully submitted that the Concluding Remarks do not provide enough information in order to rectify the current problems with social assistance, and that the recommendations relating to social assistance are too vague to be meaningful at this stage. If South Africa does not implement the Concluding Remarks, it is unclear what the sanctions would be. The current reporting and monitoring mechanisms appear to be somewhat toothless, in that the CESCR cannot compel a State Party to comply with its recommendations. Real change requires firmer and more harsh consequences for continued non-compliance with the ICESCR and the Concluding Remarks made by the CESCR.

5 CONCLUSION AND RECOMMENDATIONS

From the above discussion, the duty of South Africa to comply with the provisions of the ICESCR in relation to social security has been established.[140] These requirements are the existence of a social security system; the administration of such social security system by a public authority; the coverage of a minimum of nine named contingencies; the level of coverage provided by the social security system; the level and duration of benefits provided; the use of benefits in the realisation of other rights in the ICESCR.

5 1 Conclusion

Upon critical analysis of the elements of the right to social security in the ICESCR, it becomes apparent that South Africa's current social security

[137] CESCR "Concluding Remarks on the Initial Report of South Africa" (2018) https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fZAF%2fCO%2f1&Lang=en (accessed 2020-02-24) 9.

[138] CESCR https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fZAF%2fCO%2f1&Lang=en 9.

[139] *Ibid*.

[140] See par 3 above.

system falls short in a number of areas. In particular,[141] the extent of coverage by social insurance[142] and the use of social assistance benefits to realise other rights[143] fall short of what is required in terms of the ICESCR. Since there has been no appreciable improvement in these areas since the release of the Concluding Remarks by the CESCR, it is submitted that South Africa is currently non-compliant with the ICESCR and needs to take meaningful steps in order to address the areas of concern as discussed above.

5 2 Recommendations

The high unemployment rate in South Africa is the greatest contributor towards a lack of access to social insurance. The implementation of a national social security fund has been mooted for a number of years by the state but has not yet come to fruition. The introduction of such a fund, with universal coverage for retirement benefits would substantially increase the level of coverage of social insurance benefits. The mechanisms of such a fund have never been published in great detail; best practice in countries with such universal funds would have to be considered, along with the input of economic experts to implement such a fund successfully.

The question of the use of social assistance benefits to realise other rights is not an easy one to answer. As mentioned above, South Africa is currently progressively realising this right within the available resources. How, then, can social assistance be used to more effectively realise other rights, such as the standard of living? It is submitted that social assistance grants can contribute more towards the realisation of other rights if other aspects of social security are improved. For example, the introduction of a functioning basic universal healthcare system would alleviate the burden of paying medical costs from the meagre amount currently paid to social grant recipients.

141 See par 3.5.1 above.
142 See par 3.4.2 above.
143 See par 3.6 above.

DOES THE PREVENTION OF ILLEGAL EVICTION FROM AND UNLAWFUL OCCUPATION OF LAND ACT OF 1998 PROVIDE ADEQUATE FAMILY HOME PROTECTION TO INSOLVENT DEBTORS OR IS IT STILL PIE IN THE SKY? (PART 2)[1]

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SUMMARY

Although some legal systems provide some protection for a debtor's homestead or family home when his or her estate is insolvent, such direct protective measures are absent in South African insolvency law. Such protection during insolvency can be provided by means of some level of exemption for the insolvent's family home or homestead, as in the insolvency laws of the USA, or by providing protection of occupancy to the insolvents and his or her dependants, as is the case in England and Wales.

In view of developments concerning the protection of a debtor's primary residence in South African individual debt collecting and execution procedures (in light of the right to housing provided for in section 26 of the Constitution), the question was posed in Part 1 of this article whether a court hearing an application for compulsory sequestration should apply the same principles, especially if the debtor raises the point that the sequestration order may render him or her homeless. In this respect, no direct authority for this proposition could be found. (Commentators have argued for some time that the position of the homestead of the debtor in insolvency needs the legislature's attention as well, but there has not been real progress in this regard to date.)

However, there are a few judgments in which courts have considered the applicability of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998 (the PIE Act) after sequestration of the insolvent's estate. Part 2 of the article is therefore devoted to discussing developments in this regard and to considering what problems are encountered in applying the PIE Act during a debtor's insolvency. Part 2 also considers whether this Act provides sufficient protection to insolvent debtors to prevent them from being evicted from "their" homes when they cannot afford alternative accommodation.

Against this background, the two parts of the article deal with different aspects of the issue under discussion. Ultimately, the two parts aim to provide some answers to

[1] See Boraine "Does the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act of 1998 Provide Adequate Family Home Protection to Insolvent Debtors or Is It Still Pie in the Sky? (Part 1)" 2020 41 *Obiter* 199–225.

the pertinent question – that is, whether the PIE Act can provide effective interim and/or adequate protection to an insolvent debtor who may be evicted from his or her (former) homestead, in particular in the absence of direct measures in insolvency law to protect insolvents and their dependants under these circumstances. In raising this question, pertinent issues regarding the application of the PIE Act in insolvency are also considered.

6 THE ESSENTIALS OF THE PIE ACT

6 1 Overview

The Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998 (PIE Act) came into force on 5 June 1998.[2] It is clear the Act was inspired by section 26 of the Constitution of the Republic of South Africa, 1996 (Constitution) as in terms of its long title its aims are to provide for the prohibition of *unlawful* eviction and procedures for the eviction of *unlawful* occupiers.[3] Examples of unlawful occupiers include a person who trespassed on land and established a shelter there (a typical squatter scenario), a former tenant of a terminated or expired lease agreement, or a mortgagor holding over on a property sold or bound to be sold in execution.[4] Among other aims, and in terms of its Preamble, the PIE Act broadly intends to assist in ensuring that no person is deprived of *property* except in terms of a law of general application and to prevent arbitrary deprivation of *property* in terms of *any* law. In particular, it states that no one may be evicted from their home, or have their home demolished without an order of court made after considering *all the relevant circumstances*. To this end, the Act states that it is desirable that the law should regulate the eviction of *unlawful* occupiers *from land* in a fair manner, while recognising the right of landowners to apply to a court for an eviction order in appropriate circumstances. It is notable that section 4(1) makes it clear that this Act trumps the common law or any law relating to eviction.[5] Also, it is clear the Act may avail an insolvent debtor after sequestration of his or her estate if all

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2 The PIE Act assists in giving effect to socio-economic rights relating to the right to housing and has its roots, *inter alia*, in s 26(3) of the Bill of Rights, which provides that "no one may be evicted from their home without an order of court made after consideration of all the relevant circumstances" (*Cape Killarney Property Investment (Pty) Ltd v Mahamba* 2001 (4) SA 1222 (SCA) 1229E). The PIE Act invests in the courts the right and duty to make the order that, in the circumstances of the case, would be just and equitable, and it prescribes some circumstances that have to be taken into account in determining the terms of the eviction.

3 See Smith *Eviction and Rental Claims: A Practical Guide* (2013) ch 3; Pienaar *Land Reform* (2014) ch 10; and Muller, Brits, Pienaar and Boggenpoel *Silberberg: The Law of Property* 6ed (2019) 751 for comprehensive discussions of the PIE Act. This article however focuses on those sections of the Act that are relevant to the application of the PIE Act in insolvency.

4 *Ndlovu v Ngcobo* 2003 (1) SA 113 (SCA); see Pienaar *Land Reform* 703 ff, where she refers to earlier proposed amendments to exclude the PIE Act's application to the latter two categories.

5 The wording of the section states: "[n]otwithstanding anything to the contrary contained in any law or the common law, the provisions of this section apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier."

the requirements are met, although the PIE Act does not refer to sequestration as such.[6]

In an eviction application, the court considers the rights of the owner as well as the unlawful occupier. It is of major importance that special consideration be given to the rights of the elderly, children, disabled persons and particularly households headed by women, and it should be recognised that the needs of those groups should be considered in a case of eviction.[7]

The operation of the Act is not restricted as to its application to an insolvent's estate after sequestration since the Act prescribes no bar on its application in this respect.[8] When applied in a sequestration situation, pertinent questions arise relating to whether the trustee has *locus standi* to bring the application, and under what circumstances the insolvent will be deemed to occupy the property unlawfully.

For the purposes of this article, certain definitions in section 1 of the PIE Act are of importance.

First, the definition of "unlawful occupier" is key and refers to a person who occupies land without the explicit or tacit consent of the owner or person in charge or without any other right in law to occupy such land. This definition does not refer only to the owner of land but refers to any person who occupies land unlawfully, which may of course be the (registered) owner or any other occupant. Also, it is important to note that the definition refers to the explicit or tacit consent of the owner or the person in charge.[9]

After this Act came into operation, the courts grappled with the question (among others) whether the Act included only persons like squatters who occupied land unlawfully – without the consent of the owner – or whether it also referred to persons who at some stage occupied the property legally, such as the owner or a tenant of property, but whose occupation at a later stage became illegal. In *Ndlovu v Ngcobo*,[10] the majority judgment of the Supreme Court of Appeal ruled that the definition would include both categories of occupiers, but at the time of the application for eviction the occupation must have been unlawful. Within the insolvency context therefore, it is important for the applicant to first establish that occupation of the family home is unlawful at the time when he or she seeks eviction.

Read with the Preamble, which states that no one may be evicted from their home without an order of court made after considering all the relevant circumstances, the definition of "building or structure" is very important since it includes any hut, shack, tent or similar structure or any other form of

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6 The purpose of this article is not to provide a comprehensive discussion of the PIE Act but is to highlight those aspects pertinent to the eviction of an occupier of land for residential purposes – especially insofar as they relate or may relate to the insolvency of the home owner or occupant.

7 S 4(7) of the PIE Act.

8 See par 7 of this article for a discussion of cases where the Act featured in the post-sequestration phase of insolvency.

9 The facts of course determine if such consent was granted or not. See, in general, *Residents of Joe Slovo Community v Thubelisa Homes* 2010 (3) SA 454 (CC) for issues relating to consent in cases of state-owned land as discussed by Muller *et al Silberberg* 752.

10 *Supra*.

temporary or permanent dwelling or shelter. It is clear from this definition that an ordinary house or apartment of an insolvent debtor falls under the definition. But, this definition is broad enough to include other types of abode that he or she may use as a dwelling or shelter – such as a caravan, a shipping container or even a sheet of plastic or canvas. Cases may emerge where a person occupies bare land for residential purposes. In view of this possibility, the question may well be asked if the PIE Act also applies where the insolvent and his or her dependants occupy the insolvent's holiday apartment, caravan and/or camping tent as their home after they have vacated the primary residence. In terms of the definition, these "structures" seem to fall under the definition, but it must be noted that the Act refers to *unlawful occupancy of land* whereas the definition of eviction, as referred to below, refers to eviction from occupation of a building or structure *or* the land. It is submitted that it is important to read this definition in conjunction with the Preamble, which states that no one may be evicted from their *home* without a court order and after considering all the facts. However, it seems that courts may scrutinise the type of dwelling with a view to establishing whether it is the primary residence of the occupant or if the structure is intended for human dwelling or shelter; if not, the court may well come to the conclusion that the protective measures of the Act do not apply.[11]

Smith argues that the PIE Act concerns not only land on which buildings are erected but includes all land of a residential nature. In order to ascertain the property (home) to which the PIE Act applies,[12] he refers to the different terms used in the Act in this context; for instance, the Preamble refers to persons being "evicted" from their homes, whereas other parts of the Preamble refer to people being deprived of "property". The PIE Act also states that the law should "regulate the eviction of unlawful occupiers from land". He submits that "property" and "land" should not be interpreted restrictively and, for instance, a holiday home could, depending on the circumstances, be included. In support of a more flexible interpretation, he refers to section 25(4)(*b*) of the Constitution, where property is described as "not limited to land" and to the use of the words "temporary" and "form of dwelling" in the definition of "building or structure" in s 1 of the PIE Act. In the same vein, Muller *et al* concludes:

> "[w]hile the essential jurisdictional elements had been identified as the unlawful occupation of homes, dwellings and abodes, courts still struggle to ascertain the elements in practice. The result is that some courts continue to grant eviction orders outside the paradigm that was specifically developed to give effect to constitutional imperatives. This cannot continue. Once unlawful

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11 See *Barnett v Minister of Land Affairs* 2007(6) SA 328B–C, where the court ruled that the Act, for instance, will not cover holiday homes. In this regard, the court appreciated that a person may have more than one residence and it was mindful of the reference in the Preamble to "home" read with s 26(3) of the Constitution, but it found that the term "home" implied an element of regular occupation linked with some degree of permanence (see 327–328). See *Ndlovu v Ngcobo supra* 124H–125A and *Shoprite Checkers Ltd v Jardim* 2004 (1) SA 502 (O).

12 The purpose of this article, however, is not to provide a comprehensive discussion of the PIE Act but those aspects pertinent to the eviction of an occupier of land for residential purposes are discussed – especially insofar as they relate or may relate to insolvency of the home owner or occupant.

> occupation had been established, and it is clear that the relevant property embodies housing or shelter, the PIE Act has to be employed." [13]

It is submitted that the use of the structure is of paramount importance and if used for dwelling or shelter purposes as a home of the occupant – even when deemed to be movable – it should be subject to the eviction procedure of the PIE Act. This aspect must be read with the definition of "evict", which means to deprive a person of occupation of a building or structure, or the land on which such building or structure is erected, against his or her will – and "eviction" has a corresponding meaning. These aspects read together, it seems, mean that eviction may relate to the occupancy of land where the occupier *occupies* a structure permanently erected on such land, or where he or she merely occupies the land as such for purposes of dwelling or shelter, or it may relate to the mere occupancy of a movable structure stationed on land.[14] In this context, the broad interpretation advocated by Smith and Muller *et al* is fully endorsed.

In determining whether the occupation of the occupier is lawful, it must be noted that consent to occupy the premises (for temporary or permanent dwelling or shelter purposes) can be granted explicitly or tacitly, in writing or otherwise, *by the owner or person in charge of the land* in question. As indicated above, the position of the trustee of an insolvent estate differs from that of the sheriff, since the insolvent estate of the insolvent debtor ultimately vests in the trustee. Therefore, it is submitted that continued occupation by the insolvent after sequestration ultimately depends on the decision of the trustee. If an insolvent's occupation of a building or structure that forms part of the estate assets after sequestration is tolerated, it may be interpreted as tacit consent. From a practical point of view, it is submitted that the trustee should make clear whether or not he or she has consented to the insolvent's continued occupation – for instance, by giving notice to vacate to the insolvent or others, such as family members, occupying the residence in order for the property to be realised for the benefit of the creditors. Such a notice may assist in determining if the occupation is (or becomes) unlawful for the purposes of the Act from an evidentiary point of view. But if the trustee allows the insolvent to remain in the house until a later date – the sale date of the property, for instance – the occupation should be taken to be lawful. In practice, the trustee sometimes allows the insolvent to remain in occupation but then attempts to gain a "rental" income from the insolvent. The benefit of such an arrangement is that the property earns income to defray expenses in relation to it and the trustee may save the cost of placing a security guard on the premises to protect it, but (depending on the terms of the arrangement) it may complicate matters when ultimately trying to get the insolvent to vacate the premises.

Since only the owner or an organ of state, as defined in section 239 of the Constitution, has *locus standi* to evict an occupier of a building or structure, the definition of the term "owner" is important. The definition includes the registered owner of land and an organ of state. The "person in charge"

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13 Muller *et al Silberberg* 753.

14 To "evict" an occupier means to deprive a person of occupation of a building or structure, or the land on which such building or structure is erected, against his or her will, and "eviction" has a corresponding meaning.

means a person (not necessarily the owner) who has (or, at the relevant time, had) legal authority to give a person permission to enter or reside upon the land in question.[15] It is submitted that the trustee in an insolvent estate should be deemed to be the registered owner of immovable property in the insolvent's estate although the title deed of the immovable property will not be registered in his or her name. In this regard, section 20(1) of the Insolvency Act[16] (the section that vests the estate property in the trustee) must be read with the definition of "owner" in section 102 of the Deeds Registry Act,[17] where this definition includes the trustee.[18] Section 58 of the Deeds Registry Act requires the trustee to transfer immovable property back to the insolvent should it re-vest in the insolvent after rehabilitation and only the trustee is entitled to give transfer of such property after sequestration. In any event, should a court find that the trustee cannot be deemed to be the *registered* owner as defined, the trustee at least qualifies as the person in charge of the property as defined in section 1 of the PIE Act. So, the trustee clearly has *locus standi* to bring an application for eviction.

An insolvent individual may also have the use and occupation of a residence registered, for instance, in the name of a company, a close corporation or a trust under such insolvent's control. In *Van der Merwe NO v Moodliar NO*,[19] the residence occupied by the insolvent vested in a company under liquidation owing to its insolvency. The company used to be under the control of the insolvent before its liquidation. In this case, the liquidators of the company successfully applied for the eviction of the insolvent individual who continued to occupy the premises after liquidation of the company; the judge remarked that the liquidators applied for the eviction of the occupants in order to put them in a position, ultimately, to sell the property unoccupied.[20] Suffice it to say that, in the *Van der Merwe* case, the court clearly accepted that the liquidators had *locus standi* to bring the eviction application in terms of the PIE Act. It is submitted that although the property of a company in liquidation remains vested in the company, the liquidator will be deemed the person in charge of such property; unlike the trustee appointed in terms of the Insolvency Act, the liquidator (upon his or her appointment) merely acquires control of the property.[21]

Section 4(1) of the Act states that, notwithstanding anything to the contrary contained in any law or the common law, the provisions of the section apply to proceedings by an *owner* or *person in charge of land* for the eviction of an *unlawful* occupier. This means that the section must be

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15 See further Smith *Eviction and Rental Claims* par 3.4; Pienaar *Land Reform* 717 ff.

16 24 of 1936.

17 47 of 1937.

18 See the discussion in the previous paragraph regarding the notion of ownership of the insolvent estate property.

19 *Van der Merwe NO v Moodliar NO; Van der Merwe NO v Moodliar NO; Nkhoma NO v Moodliar NO* [2019] ZAWCHC 160; [2020] 1 All SA 558 (WCC).

20 An important observation at par 33 is the reference to Kuper J, in *SA Clay Industries v Katzenellenbogen NO* 1957 (1) SA 220 (W) 224, who said that "the whole machinery of the [Companies] Act is directed towards a speedy liquidation and distribution of the assets of an insolvent estate".

21 S 361 of the Companies Act 61 of 1973 provides that, in any winding-up by the court, all the property concerned shall be deemed to be in the custody and under the control of the Master until a provisional liquidator has been appointed and has assumed office.

complied with in the case of an eviction of an unlawful occupant. Whenever an insolvent's occupancy of the structure that he or she uses for dwelling or shelter purposes can be deemed unlawful, the applicant as defined may apply for his or her eviction. Clearly, in many such instances, spouses, children and or other family members occupy the premises as well. Although the structure used for residential purposes probably will be a house or apartment, and subject to a mortgage bond in the majority of insolvency matters, it must be noted that it may also be a property that does not serve as security or it may be a movable asset of the insolvent such as a caravan, tent or a shipping container as mentioned before.[22]

Section 4 then sets out the process to be followed by the owner or person in charge of the property, being the applicant with *locus standi*, and prescribes a 14-day notice of the proceedings to be given to the unlawful occupier and the local municipality. The notice, among other matters, states that the unlawful occupier is entitled to appear before the court and *defend* the case.

It is notable that the local municipality in whose area of jurisdiction the property is situated must be informed as well. The municipality of course is a body that may be able to provide alternative land or housing, but in practice this seems easier said than done owing to a lack of available land or housing. The municipality is also empowered in terms of section 7 of the Act to facilitate mediation between the interested parties to settle any dispute in terms of the Act. In practice, municipalities are not very active in these proceedings, especially when the applicant is a private individual.[23]

On a substantive basis, the court may grant an eviction order where an *unlawful* occupier has occupied the land in question for less than six months at the time that the proceedings are initiated if it is of the opinion that it is *just and equitable* to do so and after considering all *relevant circumstances*, including the *rights and needs of the elderly, children, disabled persons and households headed by women*.

The relevant circumstances to be considered by the court require a balance between the interests of the owner and the unlawful occupier(s) with a view to finding a "just and equitable" solution.[24] Relevant circumstances mentioned in section 4(7) are the rights and needs of the elderly, children, disabled persons and households headed by women. It was intended that a court should have broad discretion to look at various relevant factors that may affect the eviction.[25] Smith indicates that the rights in section 4(7) include the rights to human dignity, the right not to be treated in a cruel,

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22 S 1 of the PIE Act; see definition of "building or structure".

23 See in general Pienaar *Land Reform* 725; and *Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC), which notes that the courts don't treat the constitutional duty of municipalities to provide housing as an absolute right or duty.

24 Smith *Eviction and Rental Claims* 3–41, where the author discusses various aspects, such as emotional aspects owing to the trauma suffered when the home is lost, and the dignity of the occupants. See also *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) 233F; *Davids v Van Straaten* 2005 (4) SA 468 (CPD) 484B–D; *Arendse v Arendse* 2013 (3) SA 347 (WCC); *Machele v Mailula* 2010 (2) SA 267 (CC). See also Pienaar *Land Reform* 727 ff for a discussion of the so-called defences that may be raised.

25 See Smith *Eviction and Rental Claims* 3–41 with reference to *ABSA Bank Ltd v Murray* 2004 (2) SA 15 (CPD) 26G.

inhumane or degrading way, the constitutional rights of children and the availability of alternative accommodation in the context of the State's obligation to provide access to land. [26] Steyn submits that the developments and consideration laid down by the courts in the individual attachment and execution procedures may also be relevant in cases of eviction since there is a clear link between these situations.[27]

Where an *unlawful* occupier has occupied the land in question for more than six months at the time the proceedings are initiated, a court may grant an order for eviction under similar circumstances to the previous case, (except where the land is sold in a sale of execution pursuant to a mortgage), *whether land has been made available or can reasonably be made available* by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier and including the rights and needs of the elderly, children, disabled persons and households headed by women.[28] It is submitted that, for the sake of clarity, the exception could have been drafted more elegantly. In *Ndlovu v Ncgobo*, this exception regarding a house sold in execution was termed an anomaly and it may well be asked whether the exception in itself does not militate against section 26 of the Constitution.[29] It is to be noted that the exception refers only to judicial execution following the individual attachment and execution process as described above, since a sale emanating from an insolvent estate is not termed an execution sale in the Insolvency Act.[30] It seems the thinking was that a person who could afford a mortgage bond should be able to find alternative accommodation, which may of course not always be the case. Pienaar mentions that the notion of alternative accommodation is very important where the occupation of premises has been for longer than six months.[31] But the courts seem to draw a distinction between privately owned land and public land. In the first-mentioned instance, the availability of alternative accommodation may be more relevant to the date of the eviction order.

Where the court is satisfied that all the requirements of this section have been complied with, and that *no valid defence* has been raised by the unlawful occupier, it must grant an order for the eviction of the unlawful occupier, and determine:

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[26] Smith *Eviction and Rental Claims* 3–42.

[27] See Steyn *Statutory Regulation of Forced Sale of the Home in South Africa* (doctoral thesis, University of Pretoria) 2012 63, where she points out, with reference to *Gundwana v Steko* 2011 (3) SA 608 (CC) par 23, 41, 44 and 46 and *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC); 2001 (1) SA 46 (CC) par 34 and subsequent cases, that connections have been made between the forced sale of a debtor's home (in individual attachment and execution) and the eviction of a person from his or her home.

[28] S 4(7) of the PIE Act.

[29] *Ndlovu v Ngcobo supra* par 10. It is clear the legislature considered the rights and interests of the mortgagee in this instance and decided that it should be of greater importance than the rights of the insolvent under these circumstances. See also *Brodie v Kgomasang* unreported case no 32683 of 2019 (GJ) par 28.

[30] 24 of 1936.

[31] See Pienaar *Land Reform* 724, where the author refers to *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA).

(a) a just and equitable date on which the unlawful occupier must vacate the land under the circumstances; and
(b) the date on which an eviction order may be carried out if the unlawful occupier has not vacated the land on the date contemplated in paragraph (a).[32]

Importantly for this discussion, section 4(9) of the PIE Act states that in determining a just and equitable date contemplated in subsection (8), the court must have regard to all relevant factors, including the period the unlawful occupier and his or her family have resided on the land in question. Even where the occupant must vacate the premises, the courts must still provide a just and equitable date for this – clearly with the interests of the occupant in finding alternative accommodation in mind.[33]

A court that orders the eviction of any person in terms of this section may make an order in terms of section 4(10) for the demolition and removal of the buildings or structures that were occupied by such a person on the land in question.

Any order for the eviction of an unlawful occupier or for the demolition or removal of buildings or structures in terms of this section is subject to the conditions deemed reasonable by the court; and on good cause shown, the court may vary any condition for an eviction order.[34]

The PIE Act also makes provision for an urgent application to evict in exceptional circumstances as stated in the section.[35]

6 2 Conclusion

It should be clear from these provisions that a number of matters should be considered when applying the PIE Act to an insolvent debtor and/or his or her dependants in bringing an application to evict them from a building or structure forming part of the insolvent estate. It should be clear that where the insolvent and/or his or her dependants still occupy property after sequestration, the trustee has *locus standi* (in view of the definition of "owner") to bring an application for eviction by following the PIE Act. It is submitted that this is the case since the Insolvency Act does not state that such occupation becomes unlawful by the mere issuing of a sequestration order. In fact, the continued basis of occupation will be determined by the trustee, probably acting on instructions of the creditors, since the trustee is deemed to be the "owner" in terms of section 20 of the Insolvency Act, but he or she is also the person legally in charge of the land.

From a practical point of view, and if the insolvent still occupies the land at the time that the estate property vests in the trustee, it is submitted that the

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32 S 4(8) of the PIE Act.

33 See *Brodie v Kgomasang supra* par 27, where it was made clear that the unlawful occupant is entitled to get notice, which must be a fair period: "It is clear that part of the fairness contemplated by PIE is that unlawful occupiers are given a period of time to vacate their homes that is just and equitable. Although it is not explicitly stated, this necessarily means that they must be given sufficient notice to do so."

34 S 4(12) of the PIE Act.

35 S 5 of the PIE Act.

trustee should provide a notice to the insolvent to vacate the premises as a result of the sequestration process in order to make it clear that he or she may no longer occupy the premises – except where the trustee in fact allows the insolvent to remain in occupation.[36] It is important, for purposes of an eviction application, to establish that the insolvent occupies *unlawfully* since this is a requirement for application of the PIE Act.

In general, where the insolvent remains in occupation of the family homestead, it is a building or structure (as included in the definition) that is occupied, but it must be noted that the insolvent may have vacated the house and moved into a caravan, perhaps parked on the land on which the house stands, or on another property of his or hers or the land of someone else.

The trustee in his or her official capacity as owner and as the person legally in charge of the estate property may bring an application to evict the insolvent if his or her occupancy is deemed to be unlawful. As far as the process is concerned, the trustee should follow the procedural imperatives of the PIE Act but in principle it must also be established that the occupancy by the insolvent is unlawful.

It is clear that, if the court finds the occupancy to be unlawful, the insolvent may ask the court not to grant the eviction order owing to circumstances that the court may consider as relevant considerations for the purposes of deciding on the order it should make. The court has broad powers in making a suitable order and, even where eviction is ordered, the court may determine the terms and conditions, for instance, of when the occupant must vacate the property. It must be noted that even in such an instance, where an eviction is ordered, the Act provides some temporary relief for the occupant. At least, this relief grants him or her time to find alternative accommodation.

Muller *et al*,[37] with reference to *Port Elizabeth Municipality v People's Dialogue on Land and Shelter*,[38] state that the PIE Act is welfare legislation and cannot be approached from a legalistic point of view since it relates to social and economic factors tied up with fairness, morality and social values, as well as humanity and dignity for all persons.[39] Clearly, in view of a more sympathetic approach detected among some judges, this scenario may lead to a more insolvency-specific approach in future. In this regard, it is submitted that the factors considered in *Jaftha v Schoeman; Van Rooyen v Stoltz*[40] and subsequent cases also may be relevant in order to guide the courts as to these considerations, although this line of cases dealt with *attachment* of the primary residence of the debtor.

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36 See for instance *Starbuck NO v Halim* (12535/ 2015) [2015] ZAGPPHC 839 par 2, where the trustees served the occupants with written demands to vacate the property.

37 Muller *et al Silberberg* 756.

38 2000 (2) SA 1074 (SE).

39 See judgment of the Constitutional Court in *Port Elizabeth Municipality v Various Occupiers supra*.

40 2005 (1) BCLR 78 (CC). Further see Steyn *Statutory Regulation of Forced Sale of the Home in South Africa* 63 ff at fn 27 above whose points raised are supported.

Should an insolvent succeed in maintaining his or her occupancy of the home, it may become relevant to ask how this will be resolved in the long run, since an extended stay may be to the prejudice of creditors relying on the proceeds of the sale of the property and runs contrary to the principle that an insolvent estate should be wound up within a relatively short time span. These questions are not answered by the PIE Act since the Act clearly was not written with an insolvency situation in mind.

Where occupancy is legal, *cadit questio*; if the insolvent is able lawfully to remain in occupancy, an essential element of the application will be absent.

It is also important to take note that the property of the insolvent may be sold in different ways following the sequestration of his or her estate. The trustee is tasked with taking care of the property of the insolvent and must ensure that it remains intact. On instruction of the creditors, the property may be sold out of hand or by tender, but usually it will be sold by way of a public auction.

It must also be noted that, compared to an attachment and judicial sale following an individual execution procedure, the position in insolvency may be different. There is clear authority that where the debtor's estate has not been sequestrated, then occupation of his or her own house as a rule only becomes unlawful when the property is sold and registered in the name of the purchaser.[41] The purchaser then in terms of the PIE Act is saddled with the process to evict the occupant. This is different from the case of sequestration where, as stated above, the property no longer vests in the insolvent from commencement of sequestration, but vests in the trustee. It is submitted that the trustee may need to take steps to give notice to the insolvent to vacate before occupation will be deemed unlawful. Put differently, the mere fact of sequestration may not make continued occupation by the insolvent unlawful. In some instances, the trustee will be faced with a situation that requires considering assisting the insolvent to rent other premises or allowing the insolvent to continue to stay on the property, sometimes in terms of a "rental" agreement. All these positions need careful consideration by the trustee and creditors since there are pros and cons attached to these options. From a practical point of view and to provide certainty, the trustee should inform the insolvent in writing if he or she must vacate the premises in order to prevent an evidential issue arising concerning the lawfulness or otherwise of the occupation. As indicated, an eviction application may be brought only against a person who occupies unlawfully.

It must be noted that an insolvent may vacate his or her house before or on sequestration and find him- or herself a place of dwelling in, for instance, a caravan or may rent some form of housing from a third party. It is submitted that the eviction of the insolvent under such circumstances and under circumstances where his or occupation has become unlawful may also trigger the application of the PIE Act. In such cases, basic principles should be adhered to and the owner or person in charge must still be identified to bring the eviction application.

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41 *Sediba v United Building Society* 1993 (3) SA 671 (T).

7 RELEVANT CASE LAW REGARDING THE APPLICATION OF THE PIE ACT IN INSOLVENCY

A number of insolvency cases have dealt with aspects of the PIE Act to date. In this section, the most relevant cases in this regard will be discussed. The section must be read against the backdrop of the discussion of the PIE Act under heading 6 of this article above.

7 1 *ABSA Bank v Murray*[42]

In this case, a mortgaged property – the family home of the insolvents (a husband and wife married in community of property) – was sold out of the joint insolvent estate by way of a public auction. ABSA Bank, the former mortgagee, purchased the property at the auction. The bank resold the property but since the insolvents still occupied the property by way of holding over the erstwhile mortgaged property, it instituted an application for the eviction of the insolvents in order to give vacant possession to the purchaser. At the time of the application, the insolvents had occupied the property for longer than six months. (In order to have had *locus standi* to have lodged the application, it is assumed that the bank was still the owner of the property at the time of its eviction application.)[43]

It seems the bank, as applicant, followed the PIE Act procedures and the respondents relied on the grounds of "just and equitable" as mentioned in the PIE Act since they had no common-law defence to raise against the eviction order.[44] The court accepted that the insolvent respondents had been in unlawful occupation for more than six months when proceedings were initiated and it deemed sections 4(7) and (8) to be central to the determination of the application.[45] In paragraph 15 of the judgment, the court noted that the occupation of the property by the insolvents initially was "lawful due to their previous ownership of the property but subsequently terminated by their sequestration and the consequent realisation of the property by the bank".[46] This remark may point to authority that sequestration *per se* may cause the occupation to become unlawful but the full sentence must be read – that is, the court refers to sequestration and consequent realisation of the property. Also, it can be accepted that the bank requested the insolvents to vacate, which it was entitled to do as owner of the property. As to whether there was permission to remain in occupation,

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42 2004 (2) SA 15 (CPD).

43 Par 1–2.

44 At par 17 read with 23, the court accepted that the common-law grounds for eviction were altered by the PIE Act and the effect of s 26(3) of the Constitution was twofold: first, it imposed a duty upon courts to investigate and address considerations of justice and equity in determining the application for eviction; and, secondly, it provided a broad discretionary power to the court to impinge on the common-law right to obtain possession by the owner to the extent that considerations of justness and equity demand.

45 Par 5.

46 The court at par 13 also applied the interpretation in *Ndlovu v Ngcobo supra* – namely, that the PIE Act will apply to a case of holding over where the occupation was legal initially but became illegal at a later stage.

the author maintains this to be a factual question; in a case such as this, where the insolvent remained in occupation of the property after commencement of sequestration, the question must be considered for the purposes of bringing the matter within the purview of the PIE Act. Some indirect support for this approach is to be found, in that the court mentions that the insolvents had been aware for over a year of the bank's intention to evict them.[47]

The point of departure for the court regarding the eviction application therefore was a duly-formed opinion that it would be just and equitable in all the relevant circumstances to grant an order for eviction;[48] in the words of the court, "[t]he 'validity' of the defence depends upon the determination of what would be just and equitable".[49] The court was mindful of the balance to be struck between the proprietary rights of the owner and the basic human rights of the occupier in making a determination.[50]

The respondents argued that it would not be just and equitable for the court to grant the eviction order and raised the following facts to convince the court not to grant the eviction order,[51] namely:

1. They and their family had lived in the house for almost 20 years.
2. They had not wilfully defaulted on the mortgage bond repayments. The reason for the default was first respondent's loss of employment by reason of a worker complement reduction retrenchment process instituted by first respondent's erstwhile employer. The first respondent had paid R36 000.00 of his retrenchment package in reduction of the mortgage debt, before being sequestrated.
3. The first respondent conducts a business from the garage on the property with the permission of the trustee of respondents' insolvent estate. The first respondent needed the space thus provided to earn a living.
4. The first respondent had offered to pay rent on the property.
5. The first respondent had asked the bank for time until the end of 2002 to raise the funds to repurchase the property. He explained that he intended to do this from the proceeds of an MVA award that his brother expected to receive.
6. The respondents' grandchild (just over 2 years of age) and an 11-year old girl placed in the respondents' care lived in the house together with the respondents.
7. The respondents and their family have no alternative place to stay.

The applicant, however, argued that these factors were legally irrelevant and afforded no basis to refuse the order.[52] After lengthy reasoning, the court

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47 Par 48. The court also mentioned that they had occupied without recompensing the owner.

48 Par 19.

49 *Ibid*.

50 Par 21, where the court states that "[i]t does not provide for the negation of either class or category of rights and leaves it to the courts to endeavour to address tension between them justly and equitably".

51 Par 4 and 6.

52 Par 9.

rejected this argument.[53] The exception to having to consider just and equitable considerations (where the property has been sold in execution as provided for in sections 4(6) and (7)) was deemed to be central to the matter and thus also considered, but the court held that the exception in section 4(7) would not apply since the house was sold in terms of section 83(8) of the Insolvency Act[54] and not by an execution sale as provided for in the section 4(7) exception.[55] Therefore, the facts raised by the insolvents should be considered by the court.

Although the court took a liberal view concerning the assistance to be provided by courts in view of section 26 of the Constitution,[56] as well as the provision of the PIE Act,[57] in the end it granted the eviction order since it concluded that the respondents did not qualify for any special consideration in justice and equity entitling them and their dependants to remain in occupation of the property against the owner's right to possession.[58] The following reasons were advanced by the court:[59]

> "The respondents' occupation of the property was a consequence of a mortgage loan contract with the applicant, which had afforded them the financial means to acquire possession of the property. Interference with the effectiveness of the bank's security in cases like this could have far reaching adverse consequences in the housing market inimical to the realisation of the object of the progressive provision of access to housing by the broader community.
>
> The first respondent is a relatively sophisticated and economically active member of the community who was able to provide independently for the needs of his family and dependants, within the limits of his income. He is a small-scale entrepreneur who has established a successful business. The first respondent had in fact offered to pay rent to the applicant. With adequate notice to make arrangements to move to alternative accommodation, there is no reason to believe he will not be able to continue to provide adequately for his and his dependants' basic needs.
>
> The respondents had been aware for over a year of the bank's intention to evict them and accordingly they had already had a considerable period, during which they have occupied the property without any recompense to the owner, to prepare to vacate the property. Accordingly, in terms of ss 4(8) and (9) of the Act, I considered that a period of approximately 6 weeks' notice to vacate the property before an eviction order could be executed was just and equitable in the circumstances."

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53 Par 10–18.

54 24 of 1936.

55 Par 27.

56 Par 17, where the court mentioned that the substantive reforming effect of s 26(3) of the Constitution was that: first, it unambiguously places a duty upon courts to investigate and address considerations of justice and equity in determining any application for the eviction of any person from his or her home; secondly, it clothes the court with a discretionary power to impinge on the common-law right of the owner to obtain possession of the property to the extent that consideration of justness and equity demand.

57 See for instance par 19, 23, 28 38 and 39.

58 Par 44.

59 Par 46 to 49.

The importance of this case lies first in that it accepted the applicability of the PIE Act after sequestration, and considered factors to be used to decide whether the insolvent occupant should be evicted following the provisions of the Act. The judgment made clear that the interests of both parties must be considered – especially since the applicant in the matter was the mortgagee.[60] It must be noted that the mortgagee was the applicant in the eviction application since it bought the property from the insolvent estate. Eviction was sought in order to give possession of the property to the person who purchased it from the mortgagee (the bank). The court clearly pointed out that it did not amount to an execution sale and that the exception provided for in section 4(7) therefore would not apply.[61]

In this case, with reference to the ambit of the Act, it was held that the PIE Act applies in cases where occupancy initially is legal but becomes unlawful at a later stage.[62] It is assumed that the occupation became unlawful when the bank (as the new owner) instructed the insolvent to vacate in view of the fact that it had purchased and resold the property and needed to give vacant possession to the new owner.[63]

Some of the court's remarks remain important – namely, that one of the requirements of section 4 of the PIE Act, to grant an order for eviction, is *a duly formed opinion* that the eviction would be *just and equitable in all the relevant circumstances*, also considering the rights and needs of the occupant.[64] The court made an important observation:

> "The enquiry, in at least insofar as it takes into consideration the effect of an eviction on the person sought to be evicted, will be influenced particularly by the consideration of the effect on that person's basic rights, including that person's constitutional socio economic rights."

The courts need to be sensitive to the social and economic repercussions of exercising the important responsibility granted them by the PIE Act to regulate property rights; this means contextualising the immediate circumstances of the case in terms of the national and social and economic microcosm.[65] It must be remembered, as pointed out by the court in paragraph 32, that the PIE Act does not provide a mechanism to divest an owner of property; it simply affords a basis upon which the judiciary *can and must* regulate the exercise of proprietary rights to possession against the unlawful occupier ("to whom the property has become home") in a way that, as far as is practically achievable, is consistent with the Bill of Rights and the founding principles of the Constitution. The court did not want the

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60 Par 21.

61 Par 26 and 27. In this regard, the court at par 25 referred to *Ndlovu v Ngcobo supra* par 10, where the court found s 4(7) and (8) to be anomalous with regard to the exception following an execution sale in that the rights of the elderly, children, disabled persons and households headed by woman would not have to be considered.

62 Par 13 and 15 with reference to the SCA judgment in *Ndlovu v Ngcobo supra.*

63 Par 2.

64 Par 22.

65 *Ibid*.

consideration of such circumstances tied down to a hard-and-fast burden of proof.[66]

The court discussed the reason that local municipalities are formally informed of eviction applications as provided for by the Act: it is to assist the courts in realising socio-economic constitutional rights pertaining to housing, water and related matters. In this regard, the local municipality should assist the court to make decisions that are truly just and equitable. The court mentioned that apparently it is the norm that municipalities do not report to the courts in practice.[67] However, it should be noted that there seems to be a greater reluctance by municipalities to get involved in matters where the land is private land. Ultimately at play here is the question whether the occupant will be able to find suitable alternative accommodation if he or she is evicted. Trustees who bring eviction applications may of course also assist the court by indicating whether it is possible for the insolvent to find alternative accommodation and may even make proposals in this regard.

The *ABSA v Murray* case offers a peculiar set of facts where the bank purchased the property from the insolvent estate of the insolvent occupier after sequestration of the estate and then applied for eviction but the same considerations will apply if the trustee applies for an eviction order.

7 2 *Mayekiso v Patel NO*[68]

This case concerns an appeal against an eviction order following an application in terms of the PIE Act by the trustees of an insolvent joint estate granted against Mr and Ms Mayekiso, the insolvents and the appellants in the current matter. The eviction order granted by the court *a quo* in 2016 related to their most luxurious house in which they resided for a number of years after sequestration and which was finally sold as part of the estate's assets.[69] The court *a quo* granted the eviction application on the ground that the appellants' continued occupation of the house after its sale in execution was unlawful. In an appeal to the full bench, the appellants, who conceded that their occupation was unlawful,[70] argued that the court *a quo* had failed properly to consider the effects of the eviction on the family, particularly the minor children.

The facts giving rise to the appeal include that the main asset in the estate is a luxury house purchased in 2007 for R19.95 million rand in cash.[71] The insolvents experienced financial difficulties after 2011 but thwarted an attempted sale in execution in 2014 by an urgent application for sequestration of the joint estate. Their joint estate was subsequently

66 Par 38: "I consider that it is inappropriate to fix an ultimate onus of proof on either side. The court's decision falls to be made on the basis of all the relevant facts and considerations available to it." It is to be noted that the SCA found it unnecessary to decide this point in that matter; see *Ndlovu v Ngcobo supra* par 19.

67 Par 40 and 41.

68 2019 (2) SA 522 (WCC).

69 Par 4–10.

70 Par 21.

71 Par 4.

sequestrated in 2014.[72] The house had a market value of R18m in 2015 and a so-called forced sale value of R13m. The insolvents and their two minor children nevertheless remained in occupation of the house after sequestration. The joint trustees of the estate were formally directed and authorised by written resolution of the creditors at the second meeting of creditors to dispose of any movable and immovable property of the estate.[73] On 1 December 2014, the trustees made an offer to the insolvents to accommodate their continued occupation of the house as tenants in terms of a formal lease agreement.[74] The fate of these negotiations is not absolutely clear but the insolvents were not interested in paying rental to the trustees in order to continue occupying the property.[75] The property was ultimately sold in 2017 for R13.2m. (It must be noted that a contract of lease entered into between a trustee and an insolvent may complicate the eviction process but it is understandable that the trustee will try to recuperate some expenses in relation to the property while the insolvent still occupies the premises. It could be asked what the object of such a rental agreement will be since, although the sequestration divests insolvents of their property, they retain a residual interest in it; it is submitted that it would be the right to occupy and to use it.)

The appellants, having earlier accepted during the appeal that the property had to be sold to satisfy creditors' claims,[76] nevertheless made an application (among others) to introduce new evidence on appeal – much of it hearsay – to show that one of the trustees was an impostor and not trustworthy[77] and they argued that this state of affairs rendered the eviction application fundamentally flawed.[78] This request was rejected by the majority judgment of the court of appeal.

Another point raised by the insolvents was that, since they were the registered owners of the property, they asserted a residual right therein and, based on this claim, they challenged the right of the trustee to deprive them of their occupancy of the property and, as mentioned before, they objected to the request to pay rent. In essence, they argued that their ownership entitled them to occupy the property without paying rental for their right of occupation.[79] The court, with reference to *Hendricks v Hendricks;*[80] remarked on this point that the ownership could not amount to the bare dominium in the property. This matter, as well as the objection to *locus standi* of the trustee was not persisted with in the appeal case.

Following the sequence of events, the trustees continued to offer the property for sale on a public auction.[81] The insolvents at one point brought an urgent application in an attempt to stop the sale of the property and the

72 Par 5–8.
73 Par 10.
74 Par 11.
75 Par 12.
76 Par 25.
77 *Ibid*.
78 Par 28.
79 Par 20.
80 2016 (1) SA 511 (SCA) 7.
81 *Mayekiso v Patel NO supra* par 12.

court was informed that this was an attempt to save the family home.[82] This application was rejected since the court hearing this earlier application found the applicants had no *locus standi* to intervene in the matter.[83] Hence, the trustees continued with the sale of the property as they had a statutory obligation to realise the assets of the insolvent joint estate. The trustees brought an eviction application in which they indicated that the matter had become urgent since the property was deteriorating on a daily basis, which of course was to the detriment of the creditors.[84]

In opposing the later application to evict them from the house in the court *a quo*, the insolvents raised a number of substantive as well as procedural defences. They claimed that, since they were still the registered owners, they retained a residual right to challenge the trustees to deprive them of occupation of the property.[85] They also argued that, as they were still registered owners, they could not be expected to pay rental.[86] The court *a quo* however did not accept the argument that their occupation was lawful and indeed concluded that it was unlawful;[87] this finding rendered the PIE Act applicable. Their argument that the trustees had no *locus standi* to bring the eviction application raised in the court of first instance was not again raised on appeal.[88]

In view of these concessions, the end result of the appeal was that the appellants relied on the defences provided for in the PIE Act by claiming that the effects of an eviction order in relation to their minor children and the Mayekiso family being left homeless were not properly considered by the court *a quo*.[89] On appeal, the insolvents ultimately accepted that the property would have to be sold in the end but argued that there would be no risk if they remained in the house and indicated that they would vacate once the property had been sold and registered in the name of a third party.[90] As indicated above, the property had in fact been sold on 18 September 2017 and the trustees mentioned that the appeal in fact became moot in view of the undertaking to vacate the premises.[91]

After the appellants (the insolvents) made certain concessions regarding technical points raised as part of the appeal, the court narrowed down the issues for the purposes of the appeal to the argument that the court *a quo* failed to have proper regard for the effect of an eviction order on the parties' minor children and further failed to consider the prospect that eviction would render the Mayekiso family homeless.[92]

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82 Par 14.
83 Par 16 and 17.
84 Par 19.
85 Par 20.
86 Par 21. This amounted to no more than bare dominium with reference to *Hendricks v Hendricks supra* par 7.
87 Par 21.
88 Par 22.
89 Par 23.
90 Par 25.
91 Par 20.
92 Par 23.

The respondents (the trustees) argued that the appeal had become moot since the appellants agreed they would vacate the premises once the property had been sold, and the fact that the property had been transferred to the purchaser.[93]

An important matter considered on appeal was whether the decision of the court *a quo* was just and equitable. The appellants relied heavily on the judgment in *Port Elizabeth Municipality v Various Occupiers*[94] and the *Berea* judgment[95] in their submissions that Dolamo J, the judge of first instance, had failed to discharge his constitutional duty in ordering the eviction. The court on appeal indicated that these were not the only authorities to be considered; and mentioned that the application of the PIE Act and the removal of unlawful occupiers of land had generated a considerable body of law in the last 15 years or so with leading appellate cases such as *Ndlovu,*[96] *Blue Moonlight*[97] and *Changing Tides*[98] featuring prominently in the debates before our courts.

In this regard, the argument was raised that the court *a quo* did not have sufficient evidence before it about the precarious position of the minor children should the eviction order be granted and about the hardship it would cause owing to the homelessness of the family and the displacement of family members.[99]

The court of appeal concluded that the application by the appellants to adduce further evidence was not *bona fide;* the appeal had to be decided on the record as it stood together with the relevant common-cause facts.[100]

In deciding the matter, the court indicated that the facts of each case of alleged illegal occupation are the point of departure[101] and in applying the established jurisprudence, when a court applies section 4(6) and (7) of the PIE Act, being the statutory instrument that underpins the section 26(3) basic right, the court needs to know, *inter alia*:

- whether the land in question is privately owned or whether it belongs to the State (or an arm of government);
- how long the land has been illegally occupied;
- how many people/families/households are likely to be affected by the proposed eviction;
- how many of those households are headed by women;
- how many children are likely to be affected, what their ages are, whether they attend school and if so where;

93 Par 26.
94 *Supra*.
95 *Occupiers, Berea v De Wet N.O.* 2017 (5) SA 346 (CC).
96 *Ndlovu v Ngcobo supra; Bekker v Jika* 2003 (1) SA 113 (SCA).
97 *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC).
98 *City of Johannesburg v Changing Tides 74 (Pty) Ltd supra*.
99 *Mayekiso v Patel NO supra* par 60.
100 Par 54–55 and 58–59.
101 Par 58.

- whether there are sick or disabled occupiers who might be dependent on public health care;
- whether homelessness is likely to ensue; and
- what alternative options, particularly in respect of emergency housing, can be made available by the local authority concerned.

As to the merit of the defence raised by the appellants, the court found that the presence of children on the property did not necessarily trump the right of the owner (the trustee) to seek the eviction of their parents.[102] Save for raising the possibility of homelessness, the appellants did not point out other factors relating to the children that the court *a quo* considered material, and the reason was clear, there were none.[103] The appeal bench accepted that the court *a quo* gave full consideration to the issue of homelessness and the effect it might have on the minor children, which was the only context in which the children's interests fell and needed to be considered.[104] But the appellants' continuing opulent lifestyle and their ability to conduct drawn-out and expensive litigation suggested unequivocally that homelessness was not a likely consequence of their eviction.[105] It was pointed out that this situation was confirmed by the first appellant, who promised under oath that the family would move out when the property was sold and transferred to its new owner.[106] Accordingly, it was for the court just and equitable in the circumstances to grant an order of eviction.[107] The court in the end did not accept that eviction would render the Mayekiso family homeless and also was not prepared to entertain further evidence on the matter on appeal.[108]

It is interesting to note that the court *a quo*, in granting an eviction order, granted the insolvents a 30-day time of grace to remain on the property with a view to entering into a deal with the trustees concerning a way to save the property that was their home. This grant was made subject to the condition that potential buyers would have reasonable access to the property and that the insolvents would pay the rates and taxes during the remainder of their stay on the premises.[109]

In confirming the ultimate eviction order granted by the court *a quo*, the court of appeal provided a reasonable time for the appellants to vacate the premises. In this way, the needs of the unlawful occupants were addressed to an extent since even where the circumstances do not warrant continued occupation, the court may rule under what conditions the occupant must

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102 Par 60.

103 Par 66.

104 Par 67.

105 Par 4 and 69–70. With regard to the dilatory tactics applied by the insolvents, the court accepted that the liabilities of the estate had to be settled with the house being sold in a speedy and efficient way; see par 52.

106 Par 71.

107 Par 74.

108 Par 70–72. Since it was not clear that the application to adduce further evidence was *bona fide*, the appeal had to be decided on the record as it stood together with the relevant common-cause facts; see par 54–55 and 58–59.

109 Par 38–39.

vacate the property. In this regard, factors such as the end of the school term are taken into consideration.[110]

In a minority judgment, the dissenting judge, Mantame J, came to a different conclusion and indicated that both the appellant and the respondents should be given the opportunity to adduce further evidence.[111] In essence, he accepted that the court *a quo* had to look more closely at the position of minor children and the matter of homelessness. The judge alluded to a more liberal approach followed by the courts. He concluded that the sophistication of the appellants' lifestyle was not a sufficient reason not to protect occupancy; he held that the court could not assume that, because the appellants occupied a R19.95 million house, they could not be rendered homeless by eviction.[112] The learned judge held the opinion that due process required that an inquiry be made[113] and concluded that the court *a quo* should have investigated the appellants' arrangements for alternative accommodation and enquired into the circumstances of the children.[114] Thus, a broader investigation into relevant circumstances as intended in section 4(7) of the PIE Act was supported in the minority judgment. The importance of the statutory obligations of municipalities as prescribed by the PIE Act were also highlighted in this minority judgment.[115]

7 3 Body Corporate of *Redberry Park v Sukude NO*[116]

This was an application for provisional sequestration order by means of compulsory sequestration against an insolvent deceased estate of the late Mr Sukude. The applicant-creditor was the Body Corporate of Redberry Park, established in terms of section 36 of the Sectional Titles Act;[117] the insolvent estate was indebted to the body corporate for payment of the statutory imposed levies.

Important to this discussion is that the founding affidavit of the applicant mentioned that *an order for sequestration would avoid any problems with possible defences under the PIE Act, which would lead to delays and further prejudice*. Although not specifically elaborated on in the judgment, it is assumed that family members of the deceased insolvent debtor occupied the sectional title unit. The applicant raised this matter apparently to convince the court that sequestration would be to the advantage of creditors since, it seems, the argument was that a sequestration order would prevent any unlawful occupant from raising the defences in the PIE Act that might prevent the "owner" from evicting occupants from the premises as it would

110 Par 76.
111 Par 45 of the minority judgment.
112 Par 35 of the minority judgment.
113 Par 28 ff of the minority judgment.
114 Par 41 of the minority judgment.
115 Par 32–33.
116 [2015] JOL 33408 (KZD).
117 95 of 1986.

obviate problems caused by the defences raised in terms of the PIE Act. During argument, the applicant abandoned this suggestion.[118]

The court held the opinion that the property should in fact be sold in execution and was not convinced that sequestration would be to the advantage of creditors or serve any other purpose. The court agreed that the point relating to the potential advantage of granting a sequestration order with reference to an avoidance of the effects of the PIE Act should be abandoned and mentioned that the court had no doubt that that was in the mind of the applicant when the papers were drawn.[119] The court also held the view that such reasons may not be legitimate when seeking to issue sequestration proceedings as opposed simply to following the normal execution process.[120] This argument did not convince the court that it should exercise its discretion in terms of section 10 of the Insolvency Act[121] to permit the sequestration of the deceased insolvent estate.

In refusing the application for sequestration for lack of proof of advantage to creditors, the court stated that it was not clear why it became necessary for the administrator to be granted an order for the sequestration of the insolvent estate of Sukude (the erstwhile sectional title holder) when there was no apparent reason that the property could not be sold in execution.

The court mentioned that although the applicant did not eschew any reliance on the avoidance of the consequences of the eviction of persons from the unit as a basis for justifying sequestration proceedings, *there is no doubt that that was in the mind of the administrator when the papers were drawn*. In addition, a main reason the administrator wished to proceed with a sequestration process was to secure an advantage over the mortgagee. The court concluded: "[i]n my view neither of those are legitimate reasons for seeking to issue sequestration proceedings as opposed to simply following the normal execution process against immovable property".

It must be stressed that this application dealt with a compulsory sequestration application. It seems the applicant initially attempted to convince the court that a sequestration order would be to the advantage of creditors since this is one of the key requirements to obtain such an order. In support of factors supporting the advantage of creditors, the applicant apparently tried to imply that the PIE Act would not be applicable after sequestration regarding the eviction of unlawful occupants and, hence, would benefit the body of creditors. Although this point was abandoned during the application, it must be noted that sequestration *per se* does not obviate the application of the PIE Act. The exception in section 4(7) of the PIE Act will also not avail the applicant in a subsequent eviction order since a sale following sequestration is not an execution sale as envisaged in the section.

Nevertheless, the application for sequestration was dismissed since no information was disclosed by the administrator as to the relative costs of recovering the debt via a sequestration process as opposed to levying

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[118] *Body Corporate of Redberry Park v Sukude NO supra* par 9.

[119] Par 11.

[120] *Ibid*.

[121] 24 of 1936.

execution against the sectional unit in the normal course. The application contained no further indication as to the costs of sequestration. Had these aspects been fully dealt with by the administrator, it would have been of some assistance in arriving at the proper exercise of the court's discretion.[122]

For the purposes of this article, it is important to note that the court, while considering the advantage-to-creditors requirement, merely accepted that a possible motive for bringing the application was that the applicant thought the sequestration order would obviate/override any defences that may be raised against an eviction claim based on the PIE Act. It seems that there was an issue regarding current occupants of the sectional title unit of the deceased – perhaps family members occupying the unit. On a proper reading of the judgment, the court apparently accepted that such an ulterior motive was in the mind of the applicant, and questioned its legality. The effect of the position taken on the matter is that the court did not want to upset occupants who are entitled to seek the protection offered by the PIE Act from using it when faced with an eviction order.

However, it is clear that granting a sequestration order would not *per se* prevent the occupants from relying on certain statutory defences provided by the PIE Act when faced with an eviction order.

7 4 *Botha NO v Kies*[123]

In this case, the joint trustees in the insolvent estate of the first respondent launched an eviction application on 12 July 2012 against the respondents, which was opposed. At the time of the application, the first and second respondents occupied a sectional title unit, number 2 in a sectional title scheme. The first respondent purchased the property on 28 September 2004 for the amount of R540 000.00 and it was registered in the first respondent's name on 17 March 2005. During 2005 and 2006, two sectional mortgage bonds were registered in favour of First National Bank (FNB), which provided security in the aggregated sum of R1 440 000.00.[124]

On 23 April 2012, and after their appointment, the applicants demanded that the first respondent vacate the property, which notice was served personally on the first respondent on 2 May 2012; he refused to comply with the demand.[125]

Against this eviction application, the first respondent, Mr Kies, raised the defence that a person cannot be a squatter in his own house[126] – an insolvent cannot occupy "his" or "her" property unlawfully, even after sequestration, according to the argument. The first respondent then alleged that the applicants had no *locus standi* and that the provisions of the PIE Act were not applicable.[127]

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122 Par 12.
123 (40111/2012) [2014] ZAGPPHC 809.
124 Par 1–4.
125 Par 4–5.
126 Par 6–7.
127 Par 7.

However, the court referred to the provisions of the Insolvency Act,[128] which state in section 20(1) that an insolvent is divested of his estate (the insolvent estate vests in the Master of the High Court, and upon the appointment of the trustees, it vests in them). The Insolvency Act provides that all the property, which according to the definition in the Act includes "movable or immovable property wherever situated within the Republic", so vests in the Master and then in the trustee upon his or her appointment.[129]

At the time of the application, the applicants, in their official capacities, were the owners of the property. The court found that, in view of section 2 read with section 4 of the PIE Act, they had the necessary *locus standi* to launch the present application.[130]

The insolvents occupied the property without any form of consent from the trustees and the court therefore found them to be the unlawful occupiers of the property.[131] In particular, the court stated: "[t]here is no doubt in my mind that the PIE Act applies."

The court quoted *Bekker v Jika*[132] at paragraph 11, where Harms JA stated:

> "Since the factors discussed are essentially neutral, one is left with the ordinary meaning of the definition which means that (textually) PIE *applies to all unlawful occupiers, irrespective of whether their possession was at an earlier stage lawful*."(court's emphasis)

At paragraph 19, Harms JA went on to state:

> "Unless the occupier opposes and discloses circumstances relevant to the eviction order, the owner, in principle, will be entitled to an order for eviction. Relevant circumstances are nearly *without fail facts within the exclusive knowledge of the occupier and it cannot be expected of an owner to negative in advance facts not known to him and not in issue between the parties*." (court's emphasis)

In its judgment, the court in *Botha NO v Kies* noted in paragraph 18 that it was patently clear that the first respondent was factually insolvent and that there was no equity in the estate.

Relevant to the reasoning of the court was the fact that the creditors at the second meeting of creditors authorised the trustee to sell the property as directed in one of the resolutions adopted at the meeting,[133] as follows:

> "That the trustee be, and is hereby authorized, to sell or in any other way dispose of any immovable or movable assets of the Insolvent Estate, whether as a going concerns, or otherwise, or whether separately or jointly, with any other person or corporate entity, and on such terms and conditions as the Trustee, in his sole discretion, may decide on and particularly, in his sole discretion, should they decide to sell or otherwise dispose of any such asset, jointly with any other person or corporate entity, on the method and quantum,

128 24 of 1936.
129 Par 8.
130 Par 9.
131 Par 12.
132 *Supra* (referred to as *Ndlovu v Ncgobo* in this article).
133 *Botha NO v Kies supra* par 19.

> of division, of the total consideration, by public auction, tender or private treaty, and on such terms and conditions as he, the Trustee, in his sole discretion may deem fit and any other costs thereof which he, in his sole discretion cannot pass over, to be costs of sequestration."

In paragraph 20, the court states that the applicants cannot sell the property while the respondents are occupying the property – hence the application for the eviction of the respondents. It is submitted that this statement by the court should be restated to say that it may impact negatively on the sale value of the property if the insolvent still occupies the premises when the trustee wants to sell it but that such occupation in itself did not prevent the trustee from selling it in accordance with the creditors' resolution. (Clearly it may have a negative effect on the interest in the property should the insolvent still be in occupation at this time.)

In preparation for judgment, the court remarked that "[i]t is clear that the first respondent [that is, the insolvent] cannot accept that he has reached the end of the road and that he has no defence whatsoever".[134]

In support of the application, the court considered the fact that the insolvents had been occupying the property unlawfully, free of charge and to the detriment of the insolvent estate. Furthermore, each day the value of the property was diminishing owing to the lack of maintenance. It could not be marketed and sold and the proceeds distributed to the first respondent's creditors. It had been two years and four months since notice to vacate had been given to the respondents but to no avail.[135] The court considered all the arguments by counsel for the applicants and the respondents and the provisions of the respective Acts. Important to the court was that the respondents, were not relying on the fact that they were "poor and vulnerable".[136] The court mentioned that Mr Kies (first respondent) described himself as a pensioner and legal advisor;[137] and therefore the only inference the court could draw was that he had an income. The court concluded that it would be just and equitable to grant the eviction orders as requested in these circumstances.[138]

It was determined that the continued occupation of the property was to the detriment of the *concursus creditorum* and could not be further tolerated;[139] hence, the court granted the eviction order.

7 5 *Starbuck NO v Halim*[140]

In this case, an eviction order was granted against an insolvent husband and wife whose joint estate had been sequestrated. Their mortgaged home vested in their insolvent estate but they continued to occupy the premises together with three other persons. The insolvents were first and second

134 Par 22.
135 Par 23.
136 Par 24.
137 *Ibid*.
138 Par 23 and 24.
139 Par 25.
140 (12535/ 2015) [2015] ZAGPPHC 839.

respondents in an eviction application brought by the trustees of their estate. After their sequestration, the insolvents apparently rented the house out without the approval of the trustees as required in terms of section 23(2) of the Insolvency Act.[141] (The lessee, who also occupied the house was the third respondent in the eviction application.) No defence based on the PIE Act was raised by the respondents, and although the third respondent opposed the application on other grounds, the eviction order was granted against all the respondents.[142] This case is not that significant except that it mentions that the trustees first sent eviction notices to the occupiers, including the insolvents, before bringing the eviction application.[143] As proposed earlier in this article under heading 6, such a pre-application process is commendable in such a case in order to establish the element of unlawful occupation by the occupiers.

8 CONCLUSION

As indicated in the introduction in Part 1[144] of this article, South African insolvency law does not provide direct protection for insolvents insofar as their family home after sequestration is concerned – for instance, by excluding it or some of its equity from the insolvent estate, or by providing for continued occupation after sequestration as is the case in some other legal systems.[145]

However, in view of section 26 of the Constitution, South African law has developed rules to protect the right to housing as guaranteed in the Bill of Rights.[146] This development was initiated by case law but the genesis remains the basic rights enshrined in the Bill of Rights. The cases dealing with this matter concern the socio-economic rights of persons – in particular, the right to housing of vulnerable and insolvent debtors whose estates have not been sequestrated. It should be clear that many in fact were not eligible for sequestration owing to the statutory requirements for this process. The judgments, including those of the Constitutional Court, caused rules of individual attachment and execution to be amended in order to provide for judicial oversight in cases of individual execution of the residence of the debtor.[147] This development by case law following the important *Jaftha* judgment resulted in legislative amendments to the High Court and magistrates' courts procedures dealing with these matters; due process was introduced in deciding whether execution of the primary residence of the debtor should proceed in particular circumstances. Factors to be considered by courts adjudicating such requests are referred to under heading 3 in Part 1 of this article.

As mentioned, these procedures currently are not applicable in a sequestration application and the question is whether these considerations

141 24 of 1936.
142 Par 12–16 and 19.
143 Par 2.
144 See heading 1 in Part 1 of this article.
145 See heading 2 in Part 1 of this article.
146 See heading 3 in Part 1 of this article.
147 *Ibid*.

spill over to sequestration applications and, more importantly for this article, whether there are any other measures that protect vulnerable insolvents faced with the prospect of being rendered homeless after the sequestration of their estates.[148] It remains a question whether a court hearing a sequestration application will consider similar factors to those argued in applications for attachment and execution. In a recent case, *Jordaan v Jordaan*[149] an application for voluntary surrender did open the door in an indirect way for such an investigation and approach in the future.[150] The granting of a sequestration order is governed by the Insolvency Act[151] but it is submitted that a case could be argued on the lines of *Jaftha* and subsequent cases should the facts regarding the personal circumstances of the insolvent be similar. With reference to the advantage-of-creditors principle, the respondent-debtor (owner) may argue a case that the sequestration in any event will not be to the advantage of creditors or may indicate alternative arrangements or procedures that could be used in place of a sequestration order. The facts will determine what is or is not possible in this regard.

It seems the protection relating to attachment and execution initially applied to indigent home owners but the courts also had to deal with more affluent property owners, such as those who could afford mortgage bonds over the residences.[152] In such instances, with the rights of secured creditors (the mortgagees) to consider, it seemed the courts were reluctant to provide similar protection. On the other hand, it must be conceded that a debtor who can afford a mortgage bond may well be in a better financial position than the atypical debtor in the *Jaftha* matter. After initial hesitation, later judgments did consider the plights of those with bonded property as well. It is submitted that the developments affecting a debtor's estate that is not sequestrated either protects his or her continued occupation of the primary residence and/or they afford the debtor an opportunity while still in occupation to enter into a debt rearrangement with the creditor with a view to a time when for instance the debtor's financial position has improved in order for him or her to be able to pay the debt. Nevertheless, the measures developed in this instance were designed to prevent the debtor being rendered homeless and courts hearing such cases should seek solutions that protect the debtor as well as the interests of the creditor.

Against the backdrop of Part 1 of this article, the applicability of and possible protection offered by the PIE Act to insolvents facing eviction from their homesteads following sequestration of their estates have been considered in Part 2. The PIE Act is of general application and to some extent it gives effect to the constitutional imperatives in section 26 of the Constitution by making it compulsory in the case of an eviction application for the applicant owner or person in charge of the occupied property to follow a prescribed process to make an application to court to apply for eviction.[153]

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148 See heading 4 in Part 1 of this article.
149 [2020] JOL 46613 (FS).
150 See heading 3 and 4 in Part 1 of this article.
151 24 of 1936.
152 See heading 3 in Part 1 of this article.
153 See heading 4 in Part 1 of this article.

This Act provides statutory defences that an unlawful occupant may raise in an attempt to remain in occupation of his or her house, the ultimate aim being to prevent the debtor from being rendered homeless. The South African legislature decided to apply the protective measures to the "primary residence" of the debtor; this resort is commendable since the notion of a family or matrimonial home may be too restrictive and perhaps militates against basic rights like gender equality.

In this article, the applicability of the PIE Act to protecting the occupancy of insolvents in certain circumstances was considered against the backdrop of pertinent aspects of insolvency law. It is clear that the PIE Act has application in relevant situations after sequestration as well; the insolvent who occupies his or her (former) house unlawfully may rely on the PIE Act with a view to not being evicted under certain conditions and depending on the facts of the case – these being mainly the personal circumstances of the insolvent and his or her dependants.[154] The insolvent's claims are nevertheless pitted against the body of creditors. At the time of opposing an eviction order, the court hearing the sequestration application must amongst other reasons consider if there is an advantage to creditors before granting the order. Insolvency law dictates that the estate property ultimately vests in the trustee; he or she has a statutory duty to realise such assets to the benefit of the creditors in a relatively short prescribed time period. In many instances of consumer insolvency, the primary residence is in fact the main asset in the estate to be used to satisfy the creditors.

A number of court cases have considered the application of the PIE Act in an insolvency context.[155] It is clear from these cases that the PIE Act applies in a sequestration context as well. The theme of the article was inspired by these judgments as referred to under heading 1 and further discussed under heading 4 in Part 1 of this article. In *Body Corporate of Redberry Park v Sukude NO*[156] (an application for compulsory sequestration), the court found, among other determinations, that the applicant had not established that there would be advantage to creditors when the debtor's property was sold in execution; it seemed to the court that the application for sequestration was motivated by the wish to circumvent the provisions of the PIE Act (with reference to the eviction of persons from the dwelling unit) and thereby to secure an advantage over the bond holder.

In another more pertinent judgment, *Botha NO v Kies,*[157] the court accepted that the protective measures of the PIE Act may be to the avail of an insolvent debtor faced with an eviction order by the trustee under applicable circumstances.

Lastly, there is the judgment in *Mayekiso v Patel NO*,[158] where the court considered various aspects of the PIE Act that may be relevant in a sequestration situation. In this case, among other defences, the insolvents

[154] See heading 4 and 5 in Part 1 of this article.
[155] See heading 5 in Part 1 of this article.
[156] *Supra.*
[157] *Supra*.
[158] *Supra*.

relied on those provided in the PIE Act in an attempt to extend their occupation of the family homestead.

It is clear that the PIE Act may provide some relief for an insolvent debtor regarding continued occupation of his or her former home but the question is whether the relief is adequate since the PIE Act was not designed in the first place with formal insolvency in mind. It is also telling that to date no insolvent who has used the PIE defences has succeeded, but the option remains available.[159]

In summary, the following aspects of the PIE Act must be considered when applying it in an insolvent situation – that is, when the estate of an insolvent has been sequestrated:

- The granting of a sequestration order that vests the insolvent estate assets or property (including the primary residence of the insolvent) in the trustee and divests the insolvent of his or her ownership is not currently subject to the same judicial oversight as is applicable in a case of a request to attach the primary residence and to declare it specially executable.[160]
- After sequestration and where the insolvent still occupies his or her house or land or another building or structure for dwelling or shelter purposes, the PIE Act is in principle applicable where the occupancy of the insolvent amounts to unlawful occupation of such a building or structure or land for residential purposes.[161]
- The trustee of the estate has the required *locus standi* to bring the application and will qualify as owner and/or as the person in charge of such property.[162]
- It is submitted that it is not clear on a reading of the Insolvency Act and the PIE Act whether or not sequestration *per se* causes the continued occupation of the insolvent after sequestration to be unlawful, but a case can be argued that the trustee, once appointed, could grant explicit or tacit permission to the insolvent to remain in occupation. From a practical point of view, and for the sake of certainty, it is submitted that the trustee has the authority to give notice to the insolvent to vacate the premises within a reasonable time.[163] If the insolvent fails to vacate, then the trustee can bring the eviction application in terms of the PIE Act. The purpose of the notice will be to ensure that the insolvent's occupancy is or has become unlawful in order to bring the matter under the jurisdiction of the PIE Act and to avoid evidentiary issues.
- In practice, the trustee sometimes specifically agrees that the insolvent may remain in the premises on condition that he or she pays a kind of rental for the continued use of the property to the estate. The benefit of such an arrangement may be that the property earns income during the phase after sequestration and before it has been sold as directed by the creditors, but it may create additional problems in getting the insolvent

159 See heading 6 of this article.
160 See heading 3 in Part 1 of this article.
161 See heading 6 and 7 of this article.
162 *Ibid*.
163 See heading 6 and 7 of this article and see *Starbuck NO v Halim supra*.

to vacate should it become necessary to so do. Once again, the trustee will have to ensure that the occupation is unlawful before attempting to bring an application for eviction.[164]

- It may seem odd that the insolvent who has been the registered owner of the property may rent the property from the trustee but it must be noted that the insolvent is divested of his or her property upon sequestration and that he or she in principle needs permission to occupy the property.
- Usually, the residence of the insolvent is thought to be the only property that is used as a dwelling or shelter for residential purposes but an insolvent may vacate the primary residence either before or after sequestration and move into another property – for instance, his flat or an apartment or even a movable structure such as a caravan, a boat or a shipping container. A movable structure used for such residential purposes could be located on land that forms part of the estate or on land belonging to someone else. It is submitted that the PIE Act will apply if all the requirements are met. It is clear that even such movables can be used for residential purposes as envisaged by the PIE Act.
- An interesting question may arise with regard to a movable asset, such as a caravan, that is used for residential purposes. In view of section 19 of the Insolvency Act, the sheriff has a duty to make an inventory of all movable estate property and to attach it and take possession of it.[165] It seems that, in such a case, section 19 may become subject to the PIE Act. It must be noted that if the insolvent uses his or her caravan as a residence owing to financial problems, the caravan may be parked on land that the insolvent owned (now vesting in the insolvent estate) or the insolvent for instance may rent a parking spot at a caravan park. In the last-mentioned instance, occupation of the land may be legal but after the caravan has been claimed from the insolvent, occupation of the caravan as such may be deemed illegal.
- Where the property used for residential purposes is sold in terms of the resolution of creditors and if the trustee has not evicted the insolvent, it becomes the burden of the new owner to do so. Hence, it is advantageous for the creditors to see to it that the property is sold without the insolvent and/or family members still occupying the premises.[166]
- When the court ultimately has to decide on the granting of an eviction order, it will have to consider the relevant factors that should be considered in terms of the PIE Act. In this regard, the approaches developed by the courts following the *Jaftha* judgment may be of use.[167]
- It must be noted that section 4(7) of the PIE Act mentions that the defences that may be raised by the unlawful occupant will not apply if the property is sold in execution on behest of a mortgagee. A sale following a sequestration order is not a sale in execution and the

[164] See heading 4 in Part 1 of this article and heading 6 and 7 above.
[165] See heading 4 in Part 1 of this article and heading 6 above.
[166] See *ABSA Bank v Murray supra* under heading 6.2 of this article.
[167] See heading 3 in Part 1 of this article.

exception in section 4(7) will thus not affect the application of section 4(7) in full.[168]

- Where a court decides not to evict an insolvent, due attention must be paid to the duration of the continued occupation since it remains important to wind up the insolvent estate within a reasonable time. The impact of the *concursus creditorum* therefore must be considered. Even so, the court must set a reasonable period for the insolvent to vacate the premises. This in itself may provide some relief for the insolvent since it provides time to find other accommodation.[169]
- As discussed above, there are a number of aspects that must be considered and interpreted when applying the PIE Act – especially in an insolvency matter. The PIE Act was clearly not written with the Insolvency Act and other legislation, such as the Deeds Registry Act, in mind, but it remains the task of the courts to give effect to it. It is a "strong-arm" Act in that it basically trumps other laws in relation to eviction; when applied in insolvency matters together with the aims of the PIE Act, it must be read in conjunction with its basic rights as genesis.
- It is clear that in the absence of a special insolvency dispensation to deal with the protection of the family home in South African insolvency law, the PIE Act at least offers an interim solution to vulnerable insolvents but it seems that the chances are not good for a successful attempt to remain in occupation. Since the PIE Act was not designed to cater for insolvents, its provisions need interpretation (sometimes liberal), to extend the relief to insolvents. It is submitted that an insolvency-specific model, taking all policy considerations into account, is the preferable option in the long run.
- It is clear that further consideration is required of the treatment of attachments of, and evictions from, a movable asset used for residential purposes under similar circumstances.
- In some instances, a person who is insolvent may occupy the premises of a company (or a trust) that may become insolvent. The insolvent may have the use of such property while exerting control over the company. If the company is liquidated, for instance, it seems clear that the liquidator of such company will have *locus standi* to apply for the eviction of an unlawful occupier. Sometimes such occupier may him- or herself be an insolvent whose personal estate has also been sequestrated, but he or she in fact uses the company or perhaps a trust as a vehicle to be vested with ownership of the house.[170]
- In a comparison, the protection offered by the PIE Act is more in line with the position in England than that in the USA.[171] Should this matter be addressed in future by the legislature, policy considerations should be considered in working out which approach to follow in local circumstances.

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168 See heading 4 in Part 1 of this article and heading 6 above.

169 See heading 6 of this article and *Brodie v Kgomasang supra*.

170 See heading 6.1 of this article and Van der *Merwe NO v Moodliar NO supra.*

171 See heading 2 in Part 1 of this article.

It is submitted that, in the absence of an insolvency-specific family home or primary residence dispensation, the PIE Act offers some protection to insolvent unlawful occupiers of their erstwhile family homes, but a number of vexing questions exist. Therefore it is submitted that such provisions should become part of insolvency law through legislative intervention with a view to establishing protective measures that address issues pertaining to insolvency and that provide certainty about adequate protection regarding the insolvent's right to housing.

COMMISSIONS OF INQUIRY AS A RESPONSE TO CRISIS: THE ROLE OF THE JALI COMMISSION IN CREATING PUBLIC AWARENESS OF CORRUPTION (PART 1)

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SUMMARY

When the government of a liberal constitutional democracy is confronted by some or other existential crisis that threatens a major institution of state or the very foundations of the democracy itself, it will often appoint a high-level judicial commission of inquiry as part of its response to the crisis. South Africa is no exception to this tendency, as is evidenced in recent years by the appointment of no fewer than four such commissions in response to a series of crises related to ongoing corruption within state institutions – commonly referred to by ordinary South Africans as "state capture". This has raised questions as to the alleged benefits of such commissions when viewed in relation to their considerable costs. This article seeks to contribute to this general debate by focusing on one of the purported benefits of such commissions that may be somewhat under-appreciated. This is the creation of public awareness, during the life of the commission itself, about the nature and extent of the particular grave threat that confronts the society in question. It is contended that, mediated by a free and vibrant press, the public narrative that emerges during the operation of a commission of inquiry may serve to make a liberal democratic society more resilient in the face of threats to that society's continued existence. This article seeks to support this contention by focusing on an important precursor to the more recent commissions of inquiry on corruption in South Africa – that is, the Jali Commission of Inquiry into corruption within the South African penal system, which sat in the early years of the new millennium. By analysing the many articles and reports that appeared in a range of South African newspapers during the initial hearings of the Jali Commission, this article documents the emergence of an important public narrative on corruption within South Africa's prisons, and reflects upon the ultimate significance of this narrative. This article is divided into two parts: the first part deals with the initial hearings of the Jali Commission in KwaZulu-Natal, and the second part with subsequent hearings in the Free State.

1 INTRODUCTION

At the time of writing this article – just over a quarter of a century since the collapse of the apartheid system – South Africa finds itself in a difficult position. With the economy of the country devastated by the effects of

rampant criminality within both the public and private sectors, South Africa appears to have run out of easy political and economic options.[1] There is open acknowledgement (even from powerful politicians within the ruling party) that "state capture" has played a major role in weakening the country.[2] Furthermore, the realisation that many years of rampant corruption have caused incalculable damage to South Africa's economy and polity extends to the South African public at large.[3] Without necessarily seeing eye to eye on all the details, South Africans as a whole seem to agree on both the general cause and extent of the problem. Clearly, acknowledgement of a problem is a necessary first step towards its eventual resolution.

The focus of this article is on a tool that various governments in South Africa, both pre- and post-apartheid, have adopted when confronted with public crises of significant magnitude – that is, the appointment of a high-level public commission of inquiry. The present series of crises faced by the country – all involving the general issue of corruption – have resulted in the appointment of a series of commissions of inquiry into various manifestations of the problem. Within nine months of replacing Jacob Zuma

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1 According to the journalist, author and anti-apartheid activist Jacques Pauw: "Our state institutions have been hijacked for the benefit of the elite few. The public protector's State of Capture report and the thousands of leaked Gupta e-mails have painted a sordid picture of the extent to which the state, the government, the ANC and the president have been infiltrated and turned into enablers of the violation of our sovereignty. This has impoverished the nation, crippled key state institutions and jeopardised our security." Pauw *The President's Keepers: Those Keeping Zuma in Power and Out of Prison* (Kindle ed.) (2017) ch 17 par 2.

2 On 25 January 2018, the then-Deputy President of South Africa, Cyril Ramaphosa, told Zeinab Badawi, who was interviewing him for the British Broadcasting Corporation's (BBC) *Hardtalk* programme: "Everyone agrees that our state was captured by corrupt elements, by people who purported to be close to the president, who have been doing really bad things getting into many state institutions" (BBC News (25 January 2018) http://www.bbc.com/news/av/world-africa-42821474/ramaphosa-south-africa-captured-by-corrupt-elements). Another example of open acknowledgement by a top politician of the reality of "state capture", together with the expression a considerable degree of angst, is to be found in the words of Ronnie Kasrils, a member of the National Executive Committee of the African National Congress from 1987 to 2007 and Minister for Intelligence Services in the South African government between 2004 and 2008: "Where and how did the rot all start? And who can we say was responsible? Do we blame individuals, the liberation movement, South African society, capitalism, the world we live in, human nature, an unfathomable enigma? Is there something innate about the human condition which makes people susceptible to greed, the lust for wealth and power? Can such flaws be overcome, can temptation be resisted or at least contained by mere appeals to conscience, by whistleblowing, by tough regulations and penalties?" Kasrils *A Simple Man: Kasrils and the Zuma Enigma* (Kindle ed.) (2017) ch 32 par 1.

3 The intense emotions that characterise public debates on the issue of corruption in South Africa is apparent in the following quotation from a recently published book on the topic of corruption at the highest levels of the South African state by journalists Adriaan Basson and Pieter du Toit: "Through his misrule, Zuma and his circle of rogue protectors broke not only the country's spirit and moral fibre, but also our hearts. By allowing his son and dodgy friends to run amok and operate what is effectively a parallel state, by appointing compromised individuals to protect him and his cronies from prosecution, by weakening the state's investigative capacities to the point of institutional collapse, and by allowing weak and incompetent sycophants to manage key service-delivery departments, Zuma broke his oath of office and became an enemy of the people he had promised to serve" (Basson and Du Toit *Enemy of the People: How Jacob Zuma Stole South Africa and How the People Fought Back* (2017) 107–112).

as president of South Africa in February 2018, Cyril Ramaphosa appointed no fewer than four commissions of inquiry: the Zondo Commission (also known as the State Capture Inquiry) into allegations of state capture; the Nugent Commission (also known as the SARS Commission) into tax administration and governance by the South African Revenue Service; the Mpati Commission (also known as the PIC Inquiry) into allegations of impropriety regarding the Public Investment Corporation; and the Mokgoro Enquiry (also known as the NPA Enquiry) into the fitness of the deputy national director of public prosecutions, Nomgcobo Jiba, and the special director of public prosecutions, Lawrence Mrwebi, to hold office.[4] With the appointment of so many commissions of inquiry within such a short period of time, questions have arisen as to whether such inquiries are worth the considerable costs involved in their operation.[5]

Following a brief overview of certain of the traditional arguments advanced both for and against the appointment of commissions of inquiry in times of public crisis, this article focuses on one particular objective that is said to form part of the aims of a commission of inquiry appointed in such circumstances – that is, the objective of educating the public on the nature and scope of the crisis in question, including the attribution of responsibility for what went wrong. This article does not focus on the educative and/or archival role of the final report produced by each such commission of inquiry, the production of which is clearly a formal objective of each such inquiry. Rather, this article seeks to shed light on the process that happens during the life of such commissions – at least within a constitutional democracy, with a vibrant free press, when the process works well.

This article contends that the true impact of a public commission of inquiry within a constitutional democracy such as South Africa is not restricted to the "official" impact of its final report on government functionaries. Much of the impact of such a commission of inquiry depends upon the narrative that is constructed in and mediated via the public media (in particular, the free press) during the life of a commission. So stated, this point may seem somewhat obvious. However, it is the contention of this article that the creation of public awareness over an extended period of time, about the nature and scope of a serious social problem (such as the existence of large-scale corruption within a range of important social institutions), is a significant but under-appreciated benefit of the appointment of a public

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4 What became known as the State Capture Inquiry (or Zondo Commission) was constituted on 8 February 2018, with Deputy Chief Justice Raymond Zondo as Commissioner; the SARS Commission (or Nugent Commission) was constituted on 24 May 2018 with retired Justice Robert Nugent as Commissioner; the PIC Inquiry (or Mpati Commission) was constituted on 17 October 2018, with former Supreme Court of Appeal President Justice Lex Mpati as Commissioner; the NPA Enquiry was constituted on 9 November 2018, with former Justice of the Constitutional Court Yvonne Mokgoro as Chairperson of a three-member Panel.

5 See, for e.g., Powell "South Africa's Commissions of Inquiry: What Good Can They Do?" The Conversation (8 November 2018) https://theconversation.com/south-africas-commissions-of-inquiry-what-good-can-they-do-106558 (accessed 2020-11-25); see also Mohale "Three Reasons Why SA Needed the Commissions of Inquiry" SABCNewsOnline (24 January 2019) https://www.sabcnews.com/sabcnews/three-reasons-why-sa-needed-the-commissions-of-inquiry/ (accessed 2020-11-25).

commission of inquiry in times of crisis.[6] Of course, a vibrant free press will report upon the existence of social ills and create public awareness, even in the absence of a commission of inquiry. This article argues, however, that the appointment of a public commission of inquiry provides an official "stamp of approval" to the often-difficult process of dragging a particularly intractable and serious social problem into the public spotlight. It is contended that, in the best cases, media reporting around the often long drawn-out proceedings of a public commission of inquiry serves to keep serious threats to constitutional democracy constantly in the public mind; it is an intangible but important bulwark against those forces that seek to undermine the principles of such a constitutional democracy.

This article seeks to illustrate the point by an in-depth analysis of the media reporting surrounding an important precursor to the various commissions of inquiry appointed in 2018 that are mentioned above. The commission in question is the Jali Commission of Inquiry into corruption within the South African penal system, which sat between 2001 and 2005. By examining a large number of reports that appeared in a range of national newspapers during the first months of operation of the Jali Commission, this article seeks to achieve two main objectives: first, to set out the narrative in all its urgency and immediacy, as it was actually conveyed to the South African public over many weeks, through factual reporting and editorial commentary; secondly, to comment on the possible significance of this narrative, and its implication for the wider question of whether such expensive public commissions of inquiry (including commissions that are at present ongoing) are ultimately justified in a country such as South Africa.

In setting out the narrative in accordance with the first objective, this article seeks to capture what may be referred to as a "living history" (the basic details of which were later confirmed in the official report of the Jali Commission (Jali Commission Report))[7] of the often banal manner in which corruption was able to take hold and thrive within an important part of the

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6 Public awareness, created by free and ready access to relevant information through the media, is clearly crucial to the continued health of a constitutional democracy. This point was made forcefully by South African Constitutional Court Justice Sandile Ngcobo in an address to the Constitutional Conference that took place in 2010 on the topic "Freedom of Information and Freedom of Expression: The Bedrock of Democracy". Justice Ngcobo's views on this important point were summed up as follows: "In the keynote address, Justice Ngcobo spoke about the constitutional rights to freedom of expression and access to justice, and the role of the media in a democratic society ... He said that access to information was the 'oxygen of democracy' and, together with an independent press, was the foundation of democracy ... Justice Ngcobo said that access to information led to transparency in government, which was essential for democracy, and could combat corruption – the biggest threat to democracy. He said that secrecy provided a 'fertile ground for corruption' and that, in terms of the Declaration of Principles on Freedom of Expression in Africa, disclosure of information should be the rule and non-disclosure the exception" (Manyathi "Access to Information is the Oxygen of Democracy: Justice Ngcobo" 2012 *De Rebus* 12).

7 Jali, Steyn, Sishi and Poswa-Lerotholi *Commission of Inquiry Into Alleged Incidents of Corruption, Maladministration, Violence or Intimidation Into the Department of Correctional Services Appointed by Order of the President of the Republic of South Africa in Terms of Proclamation No. 135 of 2001, as Amended: Final Report* (December 2005) https://www.gov.za/sites/default/files/gcis_document/201409/jalicommfull0.pdf.

South African state apparatus – namely, the Department of Correctional Services – during the post-liberation period. It also seeks to capture the immediate public reactions of South Africans to the "drama of corruption" that was being played out before them. In commenting on the narrative in accordance with the second objective, this article seeks to gauge the effects upon the South African public psyche – in particular, whether such effects may in some way have better prepared South Africans for present and future battles against the scourge of corruption.

It is clear that, in order to achieve its objectives, this article needs to cover much ground. The hearings of the Jali Commission took place over a number of years across the length and breadth of South Africa, with hundreds of newspaper articles being written about the hearings. It is thus impossible – in a relatively short article such as this – to cover in a nuanced way the public discourse surrounding all the hearings of the commission. Therefore, this article restricts itself to a close analysis of the debates surrounding the first two sets of hearings: those held in KwaZulu-Natal, and those in the Free State. In accordance with this focus, the article is divided into two parts: the first part deals with the initial hearings of the commission in KwaZulu-Natal; and the second part deals with the hearings in the Free State. Although not all hearings of the commission are dealt with, it is submitted that the picture of corruption that emerges within the public narratives surrounding this issue is sufficiently detailed and nuanced so as to allow valid conclusions to be drawn.

2 COMMISSIONS OF INQUIRY: ARGUMENTS FOR AND AGAINST

Scholars commenting on the value of judicial commissions of inquiry often mention that such commissions can be an important government instrument. Usually, of course, this instrument is reserved for dealing with matters of great public importance, such as a nationwide crisis of confidence. For example, commenting on the value of appointing commissions of inquiry in South Africa – albeit during the apartheid period – Professor AJ Middleton points out that the practice is "sometimes regarded with a certain degree of scepticism", but notes the value of such commissions as "an important tool of government". [8] Another example of this traditional argument that commissions of inquiry are an important part of the government's "toolbox" is advanced by Canadian Justice John H. Gomery, who states as follows:

[8] Middleton "Notes on the Nature and Conduct of Commissions of Inquiry: South Africa" 1986 XIX *Comparative International Law Journal of Southern Africa* (*CILSA*) 252 252 and 256. Professor Middleton cites an article in the New Zealand Law Journal listing the following benefits of a commission of inquiry: "(i) It is an important tool of government; (ii) it provides the means of arriving at a balance between public and private good; (iii) it assists the government to formulate policy; (iv) it enables an examination of conflicting expert opinion; (v) it tests the strength of opposition to a project; (vi) by giving more individuals and groups an opportunity to express their views, public inquiries provide public authorities with a more precise appreciation of the public's requirements and expectations; and (vii) from the citizen's point of view, commissions of inquiry provide an opportunity to participate in the process of decision-making which affects their lives" (Black "Commissions of Inquiry" 1980 19 *New Zealand Law Journal* (*NZLJ*) 427, quoted in Middleton 1986 XIX *CILSA* 256).

> "Public inquiries are a regular part of the political landscape in Canada. There have been over four hundred of them since Confederation in 1867, if you include provincial commissions of inquiry ... They constitute what has been described by the Supreme Court of Canada as 'a significant and useful part' of our democratic traditions, both in Canada and elsewhere."[9]

This generally positive view of commissions of inquiry as being useful "democratic tools" that may assist a government with its duties (such as adopting rational policies in response to problems) is not, however, adopted by all scholars in this field. Adam Ashforth, for example, argues that commissions of inquiry are a special kind of institution within the modern state, standing apart from the main institutions of political power and deploying "forensic procedures" in their investigations. As opposed to being simple "policy-making instruments", Ashforth regards their work as "reckoning schemes of legitimation" that "serve in constituting a realm of discourse through which collective action vis-à-vis Society by those who act in the name of the State becomes thinkable, and thereby organizable".[10] Ashforth's more critical stance on the role of commissions of inquiry within capitalist liberal democracies is well expressed in the following quotation:

> "[T]he hearing of oral evidence continues as a central time- and money-consuming pastime of public inquiries. The main reason for this lies in the veracity lent to inquiry by public hearings. Public 'sittings' by Commissions of Inquiry can be considered as a form of symbolic ritual, akin to the holding of Court but in a modern rationalized form, wherein the subjects of State power speak, and are heard. As such, they have rather less to do with the 'gathering of facts' than with expressing the truth of power. That 'truth' being that State power serves the interest of all citizens and is open to their views. On the symbolic level, then, by appointing a Commission of Inquiry a Government pays homage to this truth and serves notice of its desire to serve the common interest in the most rational way."[11]

Having noted the above critique (which operates at a somewhat abstract ideological level), it is useful to touch briefly on certain of the more prosaic arguments frequently raised in opposition to the use of commissions of inquiry in capitalist liberal democracies. One such argument is that commissions of inquiry may operate as a means for corrupt or incompetent politicians who are under immediate pressure from the public to account for a crisis caused by their misdeeds or incompetence to temporarily shift the focus away from themselves, in the hope that the delay caused by the investigative process will result in the public forgetting about whatever issue gave rise to the public anger in the first place. The regularity with which this argument is put forward is clearly expressed in the following quotation:

> "[I]f Commission reports appear to be frequently ignored by the governments which commission them, they are ignored in the vast majority of instances by the general public. Another well-known and cynical suggestion is that Commissions of Inquiry serve no other purpose than obfuscation and delay."[12]

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9 Gomery "The Pros and Cons of Commissions of Inquiry" 2006 51 *McGill Law Journal* 786–787.

10 Ashforth "Reckoning Schemes of Legitimation: On Commissions of Inquiry as Power/Knowledge Forms" 1990 3(1) *Journals of Historical Sociology* (*JHS*) 1.

11 Ashforth 1990 *JHS* 12.

12 Ashforth 1990 *JHS* 2.

Another frequent argument against the appointment of commissions of inquiry is that they may cost far more than they are worth. This common concern is clearly articulated in the following extract from an opinion piece on the cost of recent commissions into various forms of corruption in South Africa:

> "These commissions are not coming cheap at all. For example, the Inquiry into State Capture will cost no less than R230 million in the first six months and it is expected to run for two years or more ... From this, one can conclusively deduce that taxpayers will part with close to a billion rand to sustain these commissions. The irony of it all is that to uncover the truth is coming at a huge price. But that is also the sad truth about corruption: it is costly."[13]

Clearly, the various sceptical arguments mentioned above are valid to a certain degree. The purpose of this article, however, is to focus on one of the more beneficial aspects of public commissions of inquiry in a constitutional democracy such as South Africa. As pointed out in the introduction to this article, this involves the important role that such commissions play in informing and educating the public about particularly serious threats to constitutional democracy itself. This article contends that, having been in some sense "inoculated", an educated and informed public is better able to mount an effective defence against those who would subvert the basic rights and freedoms characteristic of liberal constitutional democracies. As was pointed out in the introduction to this article, however, not all aspects of the "educational function" of such commissions are examined here. In order to appreciate the particular point of focus of this article concerning the educative function of such commissions, it is useful to make reference to a set of distinctions made by Adam Ashforth in this regard. Ashforth maintains that the "discursive work" of commissions of inquiry takes place in three phases. The first phase is "investigative" and takes place "during the life of the particular Commission when the Commissioners, official representatives of the State chosen by the Government from the ranks of Civil Society, are engaged in discussion with representatives of social interests".[14] The second phase, which Ashforth calls the "persuasive phase", begins after the publication of the commission report, which Ashforth characterises as an "invitation to discussion", symbolising "a sort of dialogue between the State on the one hand and Society on the other".[15] The third phase is the "archival" phase, during which "reports enter a dialogue with history" and "become a

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13 Mohale https://www.sabcnews.com/sabcnews/three-reasons-why-sa-needed-the-commissions-ofinquiry/ (accessed 2020-11-25).

14 Ashforth 1990 *JHS* 6.

15 Ashforth 1990 *JHS* 6. The public dialogue referred to by Ashforth around the reports of commissions and committees of inquiry is nicely described in the following words of Gerald Rhodes: "The reports of committees are public documents. They often contain a wealth of information in addition to discussion and specific recommendations for action. They are commented on by newspapers, by professional and technical journals, sometimes by academic commentators. The question is, therefore, what the significance of such reports is, not simply in terms of the reactions of civil servants and ministers poring over them in their offices, but in this wider public context" (Rhodes *Committees of Inquiry* (1975) 149).

source of historical 'facts'".[16] The focus of this article is on the "discursive work" that takes place during the investigative phase referred to above – that is, during the life of the commission of inquiry.

As pointed out in the introduction, a central task of this article is to examine closely the many articles and reports that appeared in a range of South African newspapers during the first part of the life of the important Jali Commission of Inquiry into the South African penal system, just after the turn of the millennium.[17] It is contended that, coupled with a free and vibrant press, the evidence given before a public commission of inquiry can be a powerful instrument to protect a liberal constitutional democracy against the ravages of corruption and other forms of malfeasance perpetrated by the powerful. Of course, this applies not just to South Africa, but to constitutional democracies generally, as is illustrated in the following comment of Canadian Justice John H. Gomery:

> "[A]ll of these powerful people were obliged to answer questions about their actions and involvement in a controversial government program whether they wanted to or not. They were expected to explain their actions, and to account for the manner in which they had discharged their public responsibilities, to an independent body carrying out its investigation in public, in the full glare of television coverage."[18]

Returning to the specific application of this point in the South African context, it is submitted that (when confronting the worst abuses of power, such as occurred in South Africa during the apartheid period, or the systemic corruption that has undermined entire institutions of state during the post-apartheid period), the "public narrative" that accompanies a major public commission of inquiry is an essential part of what makes such commissions effective in defending democracy and the rule of law. It is not simply the narrative contained in the eventual report of a particular commission of inquiry that serves effectively to counter the corrosive effects of corruption and abuse of power, but also the public narrative that accompanies hearings of the commission and which is reflected in the public media. In commenting on the potential value of two prominent South African commissions of inquiry set up in recent years in the aftermath of the controversial Zuma presidency to investigate various forms of irregularity and corruption, Cathleen Powell makes this point cogently:

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16 Ashforth 1990 *JHS* 6.

17 At this point, it is worth noting the old adage: "News is a first rough-draft of history." This phrase first appeared in the 13 June 1948 edition of the *Washington Post* (Washington Post (13 June 1948) https://slate.com/news-and-politics/2010/08/on-the-trail-of-thequestion-who-first-said-or-wrote-that-journalism-is-the-first-rough-draft-of-history.html (accessed 2020-11-25).

18 Gomery 2006 *McGill LJ* 787. Gomery was commenting on the Canadian "Sponsorship Inquiry", which took place in 2006. Of course, not all aspects of the publicity resulting from public evidence given to a high-profile commission of inquiry is necessarily positive and supportive of justice in a liberal constitutional democracy. In counterpoint to his generally favourable opinion of the role of commissions of inquiry in Canada, Justice Gomery quotes Edward Greenspan QC, a Canadian defence lawyer: "Commissions of inquiry are bound by no rules of evidence. Anything goes. At public inquiries, witnesses are able to tarnish the reputation of others before a nationwide television audience. Trials, because of their solemnity, are not televised in Canada. And rightly so" (Gomery 2006 *McGill LJ* 788).

> "[C]ommissions of inquiry don't remove an issue from the public eye if they're run openly and transparently. Instead, they draw the public in to the issue, educating and inviting engagement. The most important work of the Zondo and Nugent Commissions might be done before their formal function – the submission of their reports – is completed."[19]

Powell points out that, in performing their educational function, commissions of inquiry may serve to ensure public "buy-in for important processes of change and renewal."[20] It is submitted that Powell's point is particularly crucial when taking into account the sheer scale and extent of the social, political and economic problems faced by South Africa as a result of decades of corruption. Calling on ordinary South Africans to make significant personal sacrifices – to put right the damage caused by the corrupt activities of others over many years – is clearly not possible without significant public "buy-in", as Powell terms it. It is argued in this article that a properly and expertly conducted commission of inquiry, working in tandem with a responsible free press, is able to operate as a powerful tool to achieve this crucial public "buy-in".

3 PUBLIC DISCOURSE SURROUNDING THE HEARINGS OF THE JALI COMMISSION IN KWAZULU-NATAL

The subheadings below trace the public narrative as reflected in the many newspaper articles and reports that emerged around the initial hearings of the Jali Commission of Inquiry, which were held in KwaZulu-Natal. The public shock and anger that greeted the revelations are apparent in the narrative that emerged.

3 1 The establishment of the Commission

The immediate event that gave rise to the establishment of the Jali Commission of Inquiry into alleged incidents of corruption, maladministration, violence and intimidation within the South African penal system was a brutal murder that took place on 26 June 2001. The victim was a certain Ms Thuthukile Bhengu, who had been in charge of Human Resource Management in the KwaZulu-Natal Provincial Office of the

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19 Powell https://theconversation.com/south-africas-commissions-of-inquiry-what-good-can-they-do-106558 (accessed 2020-11-25). Powell's rejection of the common misconception that the appointment of a commission of inquiry automatically leads to a reduction in public concern about the issue being investigated receives solid support from Raanan Sulitzeanu-Kenan. Sulitzeanu-Kenan refutes the "common claim" that "the appointment of an inquiry acts to reduce the level of public interest in the affair [which led to such appointment]", stating that "despite the prevalence of this claim, no empirical support was found for any mitigating effect of inquiry appointment on media salience in recent studies" (Sulitzeanu-Kenan "Reflection in the Shadow of Blame: When Do Politicians Appoint Commissions of Inquiry?" 2010 40(3) *British Journal of Political Science* (*BJPS*) 617).

20 Powell https://theconversation.com/south-africas-commissions-of-inquiry-what-good-can-they-do-106558 (accessed 2020-11-25).

Department of Correctional Services. She was gunned down in the study of her home near Pietermaritzburg's Napierville Prison.[21]

Although it was generally known that violence and intimidation existed within the Department of Correctional Services, the murder of Thuthukile Bhengu was particularly shocking to members of the Department, because, in the words of the final report of the Jali Commission of Inquiry published four and a half years later, "even though ... sinister forces operating in the Department had been violent towards male and female members previously, at no stage had a female member been murdered".[22] The Commission commented further that, "[i]n the eyes of the ordinary law abiding members" of the Department, the murder of Thuthukile Bhengu "gave the impression that the sinister forces within the Department were prepared to go to any extent to achieve their objectives".[23] The Commission noted that, during this period, intimidation and fear were prevalent within the Department, including its Head Office.[24]

Following Thuthukile Bhengu's murder, the Minister of Correctional Services, Ben Skhosana, decided to call for a national inquiry. In August 2001, Durban High Court Judge Thabani Jali was appointed to head a national commission of inquiry to investigate and report on incidents of corruption, maladministration, violence or intimidation within the Department of Correctional Services.[25]

On 1 February 2002, it was reported that eight prisons throughout the country were to be investigated by the Commission, with the Durban-Westville and Pietermaritzburg Prisons being at the centre of the inquiries.[26] On 4 February 2002, the Commission started hearings in the Durban magistrates' court that were due to last for five weeks.[27] Advocate Vas Soni, who was leading evidence for the Commission, stated that three prisons in KwaZulu-Natal were part of the initial enquiry. They were the Durban-Westville Prison, the Ncome Prison in northern KwaZulu-Natal, and the Pietermaritzburg Prison. It was at the Ncome Prison that senior correctional officer Sipho Khumalo had been shot dead by a colleague in 1999, and at the Pietermaritzburg Prison that Thuthukile Bhengu had been murdered in 2001. It was also reported that Bhengu's killers were expected to appear in court in June 2002.[28]

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21 Two senior correctional officers, Mr Mlungisi Dlamini and Mr Lucky Mpungose, were charged with her murder. They were found guilty in June 2002, and were sentenced to life imprisonment. The evidence before court was that Ms Bhengu had refused to consider a fraudulent job application from Mr Mpungose's fiancée (Jali Commission Report Vol 1 27 fn 43).

22 Jali Commission Report Vol 1 26.

23 *Ibid*.

24 *Ibid*.

25 (2001-08-24) *Natal Witness* 2. The Jali Commission of Inquiry was appointed in terms of Proclamation Number 135 of 2001, published in *GG* 22718 of 2001-09-27. See Jali Commission Report Vol 1 5.

26 (2002-02-01) *Pretoria News* 3.

27 (2002-02-01) *Daily News* 2.

28 (2002-02-05) *Star* 5.

3 2 Shocking allegations of rampant corruption in the prisons of KwaZulu-Natal

Press reports conveyed the seriousness of the situation confronting South Africa's penal system at this time. For example, in addressing Mr Justice Thabani Jali at the start of the Commission on 4 February 2002, Advocate Vasi Soni was reported to have stated that the prison system needed a complete overhaul – so that the climate of fear, which allowed lawless behaviour to prevail within the system, could be eradicated. Referring to prison officials who saw themselves as "untouchable and above the law", he stated that it was the task of the Commission "not only to touch (the untouchables) but also to bring them down", and added that the Commission was "the last chance saloon" for the Department of Correctional Services".[29] He referred to two specific instances of corruption. In one instance, an official allegedly extorted money from a former prisoner. The Department of Correctional Services was supplied with proof in the form of bank slips that payments had been made into the official's bank account, but the only action taken against him was that he was transferred. In another instance, it was alleged that five officials had submitted fraudulent qualifications. While the cases against three of the officials were still pending, the other two had simply received a written warning. According to Soni:

> "This is an invitation to other officials that they can do what they want without any action being taken."[30]

The KwaZulu-Natal Commissioner of Correctional Services, Mr Patrick Gillingham, was cross-examined by Advocate Soni. He asked a number of questions based on allegations of corruption within the Durban-Westville Prison and which had been published in the press. Among these questions were the following: how a convicted drug dealer had received parole without serving a day in prison; how a tycoon had served a two-year sentence while living in a palatial home and in various five-star hotels; why the prison employed people with criminal records; how a prisoner received a job as a warder at Westville Prison; and how the chairman of the parole board could say that child abuse was not a serious crime. Furthermore, with regard to a man who was referred to in the press as "Westville's Mr Untouchable", Soni asked the following:

> "Who is this man who is untouchable at Westville Prison who is so highly placed that nobody can do anything to him? What action has been taken against him for what can only be described as criminal acts? Has he been arrested? Is he suspended?"[31]

The Commissioner said that he would reply to these questions at a later stage.[32]

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29 (2002-02-05) *Cape Argus* 5.
30 (2002-02-05) *Cape Argus* 5.
31 (2002-02-05) *Daily News* 3.
32 *Ibid*.

On 5 February 2002, the manager of the elite Emergency Support Team (EST) at the Westville Prison, Hendrik van Heerden, gave evidence before the Jali Commission, which made for sensational reading in the press. He told the Commission he was certain that prisoners were being taken out of the prison in the boots of cars in order to commit crimes:

> "It's the perfect crime. The prisoner will never be convicted unless he is caught in the act because he is officially in prison when the crime takes place. They are usually back in time for the afternoon count. If you wanted a particular type of criminal for a particular crime, you could easily find that person in prison."[33]

Van Heerden also alleged that vehicles were admitted to the prison without searches; that guards sold and rented their departmental residences to persons not employed by the Department of Correctional Services; and that guards ran shebeens from their quarters. He claimed that a high level of fear and intimidation existed within the Department of Correctional Services, and he told the Commission that his office had been ransacked when it became known that he was due to testify at the Commission. He stated further:

> "I know guards who have information but are afraid for their lives. This commission will fail unless intimidation is addressed and people come forward. It is unfortunate that you can't protect everyone all the time and 'accidents' will happen."[34]

Van Heerden claimed that a particularly high level of intimidation and fear pervaded the Pietermaritzburg New Prison:

> "[People there] shoot first and ask questions later. There is a sense of people getting away with things in Pietermaritzburg. Intimidation is so high even the EST is scared of doing its job."[35]

Van Heerden also informed the Commission that he suspected corruption among investigating officers at the prison. He told the Commission of an incident in which the Emergency Security Team had confiscated a batch of mandrax tablets from prisoners, and had then marked them before handing them to a prison officer for investigation. The marked batch of tablets found its way back into the hands of prisoners, and was again confiscated by the EST during a subsequent raid. Van Heerden told the Commission that the main drug couriers in the prison appeared to be warders who were employed by drug syndicates that operated both inside and outside the prison. Several guards who had been caught with drugs had not been dismissed. The main route for smuggling drugs into the prison appeared to be through the kitchen.[36]

On the same day that Van Heerden gave his evidence, Michael Johannes Buitendag, a prison warder at Westville Prison, also appeared before the Commission. He stated that he had addressed 36 written complaints to the Department of Correctional Services to repair damaged scanners, X-ray

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33 (2002-02-06) *Natal Witness* 1.

34 (2002-02-06) *Natal Witness* 1.

35 *Ibid*.

36 *Ibid*.

machines and metal detectors, but without success. He stated that he had written the report so many times that he could "write it blind-folded".[37] The equipment was necessary to check prisoners for illicit drugs and weapons. He stated that most drugs entered the Westville Prison through the kitchen. Another witness, Bongani Shadrack Gumede, who was an investigator in the Youth Centre, told the Commission that drugs were a major problem in the prison and that he believed that about 90 members of the prison staff were involved.[38]

The following day, the commission heard evidence surrounding the remark by the head of the parole board at Westville Prison, Bongani Magubane, that child abuse was not a serious crime like murder or rape. The remark had been made in court in support of a convicted child-molester's parole application. The prosecutor who had opposed the parole application, Vanshree Moodley, told the commission that she had found Magubane's statement "incredible and disgusting". [39] The commission recommended that Magubane be relieved of his duties as chairman of the parole board.[40]

On 7 February 2002, the *Natal Witness* commented on the testimony given before the commission, *inter alia,* as follows:

> "Some alarming testimony is presently being given to the commission, and those who do so are also to be commended because of the risk they take of possible retribution … It seems that civilised prison norms have yet to be achieved in this country."[41]

The next day, the commission was in the news once again. It was reported that the provincial correctional officer for functional services, Innocent Zulu, told the commission that Pietermaritzburg's New Prison was the most problematic prison in KwaZulu-Natal. The high number of escapes from the prison indicated that there was "definitely something wrong", and that the prison appeared to have a unique culture of intimidation. During the hearing, reference was made to a senior departmental investigator from the Department of Correctional Services Anti-Corruption Unit who was forced to leave KwaZulu-Natal because his life was threatened. Zulu admitted that there were many people in the Department of Correctional Services with relatives also working in the department, but he denied that he was instrumental in securing a job for his wife in the department during 1998.[42]

A few days later, Police and Prison Civil Rights Union shop steward, Fanu Makhathini, told the commission that corruption, nepotism and favouritism were so rife at Westville Prison that warders were ashamed to wear their

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37 (2002-02-06) *Daily News* 3.
38 *Ibid*.
39 (2002-02-07) *Sowetan* 7.
40 (2002-02-07) *Daily News* 2.
41 (2002-02-07) *Natal Witness* 8.
42 (2002-02-09) *Natal Witness* 3.

uniforms in public. Warders in uniform were pestered by members of the public, who offered them bribes in return for jobs or tenders.[43]

On 11 February 2002, further dramatic details concerning evidence presented to the commission appeared in the press. It was reported that Claude King, a prisoner confined in Westville Prison, had asked the commission for police protection before testifying against corrupt warders. He told the commission that several threats had been made against him since it became known that he was cooperating with the commission. Prisoner Gregory Christensen told the commission that he had paid two warders to take him home on a number of occasions to visit his wife. One warder had charged him R500 per visit and the other had charged him R100 per visit. Once this became too expensive for Christensen, one of the guards offered him money in return for Christensen's assistance in selling drugs inside the prison. The guard supplied R500 worth of cannabis for Christensen to sell every week. Christensen later began dealing in mandrax on behalf of the guards. He bought mandrax tablets for R20 each from the guards and sold them to other drug dealers inside the prison for R25 each, and directly to drug users for R30 each. He sold up to 50 tablets per week. Eventually he acquired a cellphone that he would use to purchase drugs from dealers outside the prison. Guards would pick up the drugs and transport them to the prison in return for R500. Many guards were involved in the scheme. Christensen eventually reported his activities, and those of the corrupt guards, to a senior warder, but by the time he returned to his section, two of the corrupt guards already knew that he had discussed their illegal activities. He told the commission that he had no confidence in the system.[44] Advocate Vas Soni later commented on Christensen's attempt to extricate himself from the drug syndicate:

> "The whole prison system crumbled and crushed a vulnerable man who wanted to get out of a vicious circle of drug dealing."[45]

Press coverage of the dramatic evidence presented to the commission continued the next day when it was reported that Judge Jali had agreed to afford Claude King protection by having him removed from KwaZulu-Natal. King gave evidence in support of the evidence given by Gregory Christensen. He stated that he was present when a warder, Mr Karl Viljoen, gave Christensen mandrax tablets. He also told the commission that warders Devan Maharaj, Devan Brijlall and Leon Pakiri had given mandrax to Christensen. Christensen's wife Joanne also supported Christensen's testimony. She told the commission that guards had brought her husband home on about 20 separate occasions for illegal visits. She was able to describe the car driven by one of the guards and told the commission that her son was conceived during one of the illegal visits.[46]

On 13 February 2002, a prisoner sentenced to life for the murder of two young boys and confined in the Westville Prison, Kistensamy Govender, told

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43 (2002-02-11) *Sowetan* 4.

44 (2002-02-12) *Natal Witness* 1. See also (2002-02-12) *Sowetan* 4.

45 (2002-02-15) *Sowetan* 7.

46 (2002-02-13) *Natal Witness* 2. (2002-02-13) *Daily News* 1.

the commission that the kitchen area of the prison was the "nerve-centre for smuggling". Prisoners and warders came together in this area for food. Prisoners sent to wash the warders' cars retrieved drugs and alcohol, wrapped in black plastic bin bags, from the vehicles. These bags were then stored in the kitchen storeroom. Govender alleged that on one occasion he had opened a bucket of peanut butter in the kitchen storeroom and found that it was full of cannabis. He testified further that he had once seen a warder, Nhlanhla Radebe, giving a prisoner three plastic bags of cannabis, which were later found in that prisoner's cell. This incident was never investigated. Govender stated that he sold surplus bread to the prisoners, and that for every R100 he made, he gave R80 to Andre Ntombela who ran the kitchen.[47] X-rated movies, alcohol and drugs were readily available over the counter at the prison kitchen. A nip of spirits cost R20 and a full bottle cost R100. He told the Commission that he watched X-rated movies at least twice a week.[48] Govender was also reported to have told the Commission:

> "When I was transferred to Medium C, it was like walking into a casino. Warders and prisoners gambled together. Alcohol, drugs and sex were freely available. I became part of that."[49]

Advocate Vas Soni later praised the prisoners who had testified and called for President Thabo Mbeki to appoint a "crack task team" to investigate charges against the warders who had been implicated in drug dealing. He stated that it would be a complete waste of taxpayers' money to leave the criminal investigation to the Westville Prison prison authorities who had proved themselves to be hopelessly inefficient.[50] Advocate Soni also called for the dismissal or transfer of the deputy head of Westville Prison, Maduramuthoo Sigamoney – accusing him of ignoring the unlawful conduct of warders and inmates and turning a blind eye to the illegal activities within the prison.[51]

On 15 February 2002, the *Sowetan* commented *inter alia* in an editorial:

> "The shocking testimonies of prisoners, particularly about syndicates operating in cahoots with warders in the prison, are consistent with claims made by other inmates at other institutions in the past. Such evidence is not entirely unexpected but instead confirms long-standing suspicions that some of the country's prisons have become dens of corruption in the iron grip of a coterie of powerful warders. Many of the prisoners have been known to act as middlemen in the chain of corrupt activities to protect their principles, who invariably are warders. Essentially, as evidence before the commission has underlined, prisoners have become nothing more than a captive market for corrupt warders who peddle anything from drugs to blue movies with impunity."[52]

Extensive press coverage of the evidence presented to the commission continued in the days that followed. On 18 February 2002, Westville Prison

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47 (2002-02-14) *Sowetan* 6.
48 (2002-02-14) *Daily News* 3.
49 (2002-02-17) *Sunday Tribune* 1.
50 (2002-02-15) *Sowetan* 7.
51 (2002-02-17) *Sunday Tribune* 1.
52 (2002-02-15) *Sowetan* 12.

area manager Terence Moses Sibiya gave evidence. He stated that the prison had the highest number of staff assaults on prisoners in KwaZulu-Natal. He told the commission about one incident, which involved six warders who had assaulted a prisoner by the name of Elvis Ngcobo. The prisoner died and the warders were found guilty of "causing the death" at a disciplinary hearing. Aside from a verbal warning, no other action was taken against the warders. According to Sibiya:

> "The outcome was not a reasonable outcome but policy does not allow us to take the matter further."[53]

Judge Jali challenged Sibiya, and asked him whether he needed policy documents to tell him that a murder investigation should be opened in this case. He stated that the matter should have been raised with the provincial or national correctional services commissioner.[54]

Another incident involved a finding by an internal prison tribunal, to the effect that an official had allowed a certain prisoner to spend "more nights out of prison than inside". The prisoner concerned was a certain Chicago Mtshali, who, according to the *Sowetan*, had "made newspaper headlines recently for his escapades outside prison while still a prisoner".[55] The official concerned was let off with a mere warning, and although Sibiya was dissatisfied with this sentence, he did not intervene. It emerged during the hearing that warnings were the standard sentence for crimes committed by warders at Westville Prison – no matter how serious these crimes happened to be. Commenting on Sibiya's apparent inability to take positive action to prevent these abuses, Advocate Soni stated:

> "All these things pass before your eyes but like a spectator, you do nothing to stop them."[56]

On 21 February 2002, senior warder at the Westville Prison Rabson Hlabisa testified. He alleged that on one occasion during December 2001, the head of the Medium C section at Westville Prison, Bongani Ngcobo, was so drunk when reporting for duty that he could hardly stand. He told the commission that Ngcobo regularly came to work drunk and was frequently absent from work. Ngcobo denied the allegations.[57]

On 26 February 2002, Ntombodumo Delubom, who was employed in the Employee Assistance Programme at Westville Prison, testified. She complained that sexism was preventing promotions based on merit within the Correctional Services Department in KwaZulu-Natal. She told the commission that black men with no training were promoted to powerful positions, but that women were ignored. She pointed out that even the head of the female section at the Westville Prison was a male. Managers lacked both leadership and management skills, and were unable to inspire their

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53 (2002-02-19) *Cape Argus* 5.
54 *Ibid*.
55 (2002-02-20) *Sowetan* 4.
56 *Ibid*.
57 (2002-02-22) *Sowetan* 4.

subordinates. Supervisors were rigid and resistant to change. Supervisors were also guilty of favouritism, and there was a tendency for them to cover up disciplinary infractions by their family and friends. This favouritism went hand in hand with racism, with supervisors always favouring employees from their own racial or ethnic group.[58]

Further sensational reports appeared in the press on 28 February 2002. It was reported that the panel-beating workshop at the Westville Prison might have been used to "doctor" stolen vehicles. The chief investigator for the commission, Advocate Jerome Brauns SC, described the following startling allegation that had been made to the commission:

> "We've been told that prisoners have been given 'shopping lists' of desirable vehicles and then let out for the night by corrupt officials … They return with stolen cars, and the chassis and engine numbers are doctored in the prison workshop while the cars are given a respray prior to resale. These are just some of the allegations we've had, but hard evidence is difficult to come by. We've been given the names of some of some of those allegedly involved, but they, of course, deny all knowledge. Intimidation is very high in these circles and people will talk to us in confidence, but are afraid to speak on the record."[59]

On 5 March 2002, evidence was led before the commission in relation to the employment of Thembi Zulu, the wife of Innocent Zulu who was head of functional services of the Correctional Services Department in KwaZulu-Natal. It was alleged that Innocent Zulu had arranged for the transfer of his wife (who was also a member of the Correctional Services Department) from the Stanger Prison to the Westville Prison. It was irregular for a husband to sign the transfer form of his own wife. Furthermore, according to the evidence, Thembi Zulu was not on the shortlist of applicants for the Westville position, and there was doubt as to whether she was ever stationed at the Stanger Prison. The only time Thembi Zulu was seen at the Stanger Prison was on the day of her "transfer" to Westville Prison. On that day, she arrived at the Stanger Prison in a car driven by her husband, and her name appeared on the prison register for that day; her name did not, however, appear on the duty list for that day. On the following day, it was recorded that she was absent on sick leave, after which it was recorded that she had been transferred to Westville Prison.[60] It then emerged that Thembi Zulu had a previous criminal conviction for theft, and was ineligible to hold a post in any government department. However, the provincial head of human resources for the Department of Correctional Services in KwaZulu-Natal, Nhlanhla Ndumo, gave evidence that it was accepted policy to employ persons with minor criminal convictions. He stated that the policy did not exist in written form, but had been agreed upon by prison officials at a seminar.[61] Evidence was then put forward about a "letter of condonation" that had been written on behalf of Thembi Zulu, paving the way for her appointment. Innocent Zulu admitted that he had instructed a prison official,

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58 (2002-02-27) *Daily News* 2.

59 (2002-02-28) *Mail and Guardian* 33.

60 (2002-03-06) *Sowetan* 4.

61 (2002-03-08) *Daily News* 2.

Ronnie Erasmus, to write the letter of condonation, which was then signed by the provincial commissioner of Correctional Services, Thembi Kgosidinsi, who was working in the same office as Innocent Zulu.[62]

A few weeks later, yet more sensational details of evidence presented to the commission appeared in the press. On 26 March 2002, it was revealed that the head of security at the Westville Prison, Tyron Baker, was the official who had been nicknamed "Mr Untouchable" by the press. One of Baker's alleged victims, Mrs Ray Miller, gave evidence. She had spent 13 months in prison awaiting trial on charges of fraud, and alleged that she had paid R6 000 into Baker's bank account after he had threatened that he could make her life in prison "either comfortable or terrible".[63] She alleged further that Baker had asked her for R3 000, which she had paid, before he would allow her to be taken to hospital outside prison. Baker told the commission he had a problem testifying, since he was facing criminal charges and a departmental inquiry concerning the matter before the commission.[64]

On 4 April 2002, prison officer Winston Naidoo gave evidence. He alleged that he, together with a colleague by the name of Shabalala, had been bribed to ensure preferential treatment of a woman prisoner, Neethie Naidoo. Neethie Naidoo had been convicted of involvement in a cash-in-transit heist, and had been sentenced to three years correctional supervision. Winston Naidoo alleged that Neethie Naidoo's husband, Yegan Naidoo, was a friend of a certain "Vishnu", who allegedly supplied mandrax tablets to Innocent Zulu, the provincial correctional officer for functional services. Yegan Naidoo offered to pay a substantial bribe to ensure that his wife was given easy clerical work for her correctional supervision. Zulu allegedly urged Winston Naidoo to assist Yegan Naidoo. Winston Naidoo and his colleague Shabalala then arranged for Neethie Naidoo to be placed in an administrative capacity at the "Wings of Love" institution during her correctional supervision – for which they were paid R19 000 in bribes by Yegan Naidoo. Winston gave evidence that he had accepted a further bribe of R2 000 from Yegan Naidoo in order to arrange the transfer of Neethie Naidoo from Wings of Love to the Chatsworth Secondary School.[65]

3 3 Corruption with a nasty ideological twist: "Operation Quiet Storm"

As disturbing as the instances of alleged corruption referred to above might have been, the South African public was to be shocked to its core by explosive allegations of corruption with a particularly nasty ideological twist. On 20 February 2002, Philemon Ntuli, senior official and spokesman for the Department of Correctional Services in KwaZulu-Natal and a former leader of the Police and Prisons Civil Rights Union (POPCRU), gave evidence. He told the commission of a plan called "Operation Quiet Storm" that was

62 (2002-03-07) *Daily News* 3.
63 (2002-03-27) *Daily News* 3.
64 *Ibid*.
65 (2002-04-05) *Natal Witness* 2.

designed to place appointees of POPCRU in high managerial positions throughout the penal system in KwaZulu-Natal. The aim was to bring about transformation in the operation of the prisons in the province. The plan was originally formulated in 1997 at a meeting in Pietermaritzburg, when it was decided that conservative white officials and their black "lackeys" should be replaced with "progressive" black officials. It was decided that Khulekani Sithole should become the National Commissioner of Correctional Services, and that Maxwell Ntoni should become the KwaZulu-Natal Commissioner of Correctional Services. It was also decided that Nhlanhla Ngubo should become the head of the inspectorate, while Nhlanhla Ndumo should become the personnel officer. According to Ntuli, the implementation of the plan included engaging management in arduous meetings, frustrating management, making demands, taking officials hostage, preventing management from entering their offices, as well as engaging in protest action and go-slows. Ntuli told the commission that the plan had gone horribly wrong, resulting in murders and corruption within the prisons:

> "Those who benefited from the plan have betrayed it and entrenched their power, resulting in corruption, nepotism, favouritism, bribery and murders."[66]

According to Ntuli, ordinary officials were terrified of those in power:

> "People are too afraid and intimidated to challenge their actions, no matter how unlawful, irregular or improper. They rule with an iron fist."[67]

Immediately after testifying, Ntuli was put into a police protection programme.[68]

Just under two months later, on 15 April 2002, Ntuli gave further evidence before the commission. He alleged that managers in key positions in the prisons of the province, including himself, owed their promotions to Operation Quiet Storm. Ntuli alleged that Operation Quiet Storm was a reign of terror orchestrated by Nhlanhla Ndumo, Russel Ngubo and Thami Memela, who were all senior officials in the Department of Correctional Services. At the time of Ntuli's evidence, these officials were in custody facing charges of murder, arising from the death during 1998 of Ernest Nzimande, an Induna at Impendle, as well as charges of the attempted murder of three of Nzimande's companions. Ntuli told the commission:

> "I never knew that I was employed by a filthy department. I never knew that one was living at the mercy of certain people."[69]

Ntuli made further allegations of corruption against senior members of the Department of Correctional Services. He told the commission that Durban businessman Mari Mutho had been sentenced to three-and-a-half years' imprisonment but had never spent a day in prison, although he was given a prison number. The matter was investigated by an anti-corruption unit and

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66 (2002-02-21) *Daily News* 3.
67 *Ibid*.
68 (2002-02-27) *Daily News* 2.
69 (2002-04-16) *Natal Witness* 1.

referred to Raphepheng Mataka, who was head of human resources at the time, but no action was taken and the case was covered up. Ntuli also claimed that Mataka failed to act when anti-corruption members from Pretoria, after being visited in their hotel by persons wearing balaclavas, hurried back home without completing their work. Ntuli claimed that Mataka was not suitably qualified for the position of deputy commissioner (human resources). Ntuli stated that, according to records, Mataka had a legal qualification, but no relevant experience when he was appointed to this important human resources position. Ntuli told the commission that Mataka had been promoted twice a year, which was against departmental policy. Ntuli also made allegations of nepotism within the department. He claimed that the wife of the former national commissioner, Khulekani Sithole, was appointed by the Department of Home Affairs in exchange for the appointment of the wife of the former Home Affairs Director-General, Albert Mokoena, by Correctional Services. Ntuli claimed further that the head of the Pietermaritzburg female prison, Zodwa Dandile, was involved in the murder of Thuthu Bhengu, the director of provincial human resources – in that she (Dandile) lured Bhengu to the window of her residence by making a hoax phone call. Bhengu was then shot through the window and killed. Ntuli also alleged that Russel Ngubo and Nhlanhla Ndumo had been either directly or indirectly involved in the murder of Bhengu, as she had been investigating allegations of corruption within the Department. Ntuli alleged further that the former commissioner of correctional services in Mpumalanga province, Mr Zwi Mdletshe, had a falsified matriculation certificate, which he used to gain promotion to the department's head office. He alleged that Mdletshe was promoted to a position in head office although he was not in possession of a diploma or a degree, which was a requirement to occupy such a position. Ntuli alleged further that Lindi Mzimela, the daughter of the former minister of Correctional Services, Dr Sipho Mzimela, had been fraudulently appointed as a warder in the department at the time her father was still in office. He told the commission that Lindi Mzimela was employed as a warder without being in possession of a matriculation certificate when she was still 19 years old. According to Ntuli, it was a requirement that prospective warders be at least 21 years old and in possession of a valid matriculation certificate.[70] Mataka denied Ntuli's allegations, stating that Ntuli was bitter because he had failed to secure a position in the POPCRU national leadership and a departmental promotional post.[71]

The widespread publication in the nation's press of the shocking details summarised above must have been deeply worrying to the average South African. In an editorial dated 17 April 2002, the *Natal Witness* commented on the evidence given by Ntuli, *inter alia,* as follows:

> "This testimony indicates that individuals (and possibly party-political) groups have been manipulating the affairs of the prison system in this province for their own ends and calls into question the viability of the KwaZulu-Natal prison system … It reveals that Popcru had developed a long-term strategy of

[70] (2002-04-18) *Natal Witness* 1; (2002-04-18) *Daily News* 1; (2002-04-18) *Sowetan* 4; (2002-04-21) *Sunday Times* 5; (2002-04-21) *Sunday Tribune* 8.

[71] (2002-04-19) *Natal Witness* 3.

> circumventing the principle of accountability to the minister of correctional services and had thereby turned prisons into petty fiefdoms accountable to no one … The evidence for mismanagement and corruption and for violent criminal behaviour among senior management of the prison is growing, and, because the rot in such institutions starts at the top, it's impossible that this has not affected the running of the prison at every level."[72]

Approximately a month later, an editorial in the *Natal Witness* summed up the public mood regarding the shocking evidence presented to the Jali Commission, as follows:

> "The revelations of crime and corruption emerging from the Jali Commission investigations get worse and worse. Forging matric certificates is small beer compared to the use of prisoners to commit crimes. And some of those thefts and robberies (complete with 'in-jail-at-the-time' alibis) are in turn eclipsed by the use of prisoners to murder political opponents, or colleagues in the Prisons' Service who don't kowtow to the corrupt ruling clique … The more one learns about the goings-on, the more obvious it seems that there must be a ruthless clean-up. The buck must stop somewhere; someone must take final responsibility for the web of evil that has been spun in the Correctional Services in this province. Someone must see that the guilty are removed and punished, and that decent officials can begin to rebuild a service whose credibility and reputation have been destroyed from within."[73]

The sensational revelations in the press outlined above, which arose from dramatic evidence presented to the Jali Commission and which pointed to extensive corruption in the prisons of KwaZulu-Natal, must have left few South Africans in any doubt that the reputation of the post-apartheid penal system was in tatters. Unfortunately, more sensational revelations were to follow. The media frenzy that surrounded the evidence detailing massive corruption in the Durban-Westville Management Area was to be repeated in relation to evidence concerning the other eight management areas investigated by the commission. Since it is beyond the scope of this article to examine in detail all nine management areas, only one further management area is examined through the lens of the public media. The management area covered in Part 2 of this article is Bloemfontein – in particular, the widespread corruption that was revealed at the Grootvlei Prison.

4 CONCLUSION

Part 1 of this article has traced the public narrative around the hearings of the Jali Commission of Inquiry into corruption in the South African penal system, held in KwaZulu-Natal in the first half of 2002. Although only allegations at the time, the first shocking details that emerged in the press, of systematic and widespread corruption within the Department of Correctional Services, painted an extremely disturbing picture. It was a picture that was to become seared into the South African public imagination in the years that followed. It is submitted that, among the many elements that must have made this picture particularly worrying to South Africans at the time were the following: the extent of the corruption; its almost "commonplace" acceptance

[72] (2002-04-17) *Natal Witness* 8.
[73] (2002-05-11) *Natal Witness* 6.

by all involved; the fact that it appeared to have infected the Department of Correctional Services from the very top to the very bottom; the immense suffering clearly caused to powerless and vulnerable individuals; the apparent ease with which corrupt officials and prisoners were able to achieve their corrupt aims; the overall impunity with which corrupt activities were carried out; the twisted political ideology employed by certain corrupt officials to rationalise their activities; and the overall toxic nature of what was clearly a deeply ingrained culture of corruption in the context of a country recovering from decades of oppression while trying to build strong democratic institutions. It is submitted that the Jali Commission of Inquiry may be seen as a "canary in the coal mine"; it was able to detect the corrosive effects of widespread state corruption at a relatively early stage during the post-apartheid period. Part 1 of this article has shown that, from as early as 2002, the dangers of this type of corruption were there for all South Africans to see.

As to the wider implications of the above for more recent commissions of inquiry into the threats posed by corruption in South Africa (such as the ongoing Zondo Commission of Inquiry into State Capture), it is clear that the influence and relevance of such a high-profile public commission of inquiry extends far beyond any recommendations it may make in the legal report published after it has fulfilled its mandate. Such commissions are constituted and operate within a particular milieu, both influencing and influenced by the social, political and economic forces that surround them. This dialectical process is mediated through the public media, which often plays a major role before, during and after the operation of such a commission.[74] As Raanan Sulitzeanu-Kenan points out, such commissions "whether willingly or not, play a political role by often providing critical information about issues of governance and responsibility, either through the course of their investigation, or in those reports and parts thereof that get publicized".[75] The "critical information" provided to the South African public by the Jali Commission was not sufficient to completely "cure" the penal system or to prevent massive corruption from emerging within other institutions of state in the years which followed. It is submitted, however, that the public narrative that emerged from the hearings of the commission did indeed serve to stamp out much of the corruption within South African prisons, as well as, at the very least, to prepare the South African public for the long battle against corruption that was to follow and, as noted in the introduction to this article, which is reaching its peak at the time these words are being written.

As stated in the introduction, Part 2 of this article will analyse the public narrative surrounding the hearings of the Jali Commission of Inquiry held in the Free State in 2002. It will also advance further arguments as to why

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74 As to the role of the media before the appointment of a commission of inquiry, Sulitzeanu-Kenan notes that the extent to which the media puts pressure on politicians concerning a particular crisis (the "media salience") is central to whether a commission of inquiry will be appointed in the first place. He notes: "Contrary to what could be expected and prescribed, this research suggests that the inherent severity of an issue or event does not directly affect the decision to appoint an inquiry, but is mediated by media salience" (Sulitzeanu-Kenan 2010 *BJPS* 632).

75 Sulitzeanu-Kenan 2010 *BJPS* 614.

commissions of inquiry of this type are useful and important in defending liberal constitutional democracies against existential threats such as that posed by the scourge of corruption.

NOTES / AANTEKENINGE

THE LAW AND AN ANCESTRAL REQUEST FOR EXHUMATION

"No man can outwit the ancestors" ~ African Proverb

1 Introduction

Exhumation is the removal of the remains of a dead body from its initial resting place – in other words, when a corpse is removed from a coffin, either to be re-buried at another place, or to dispose of the remains in a different manner as in cremation. A corpse could be the remains of a deceased person or a stillborn child or a fetus. An exhumation may also be undertaken to ascertain the cause of death or to ascertain the identity of the deceased. A court or the immediate family of the deceased may request an exhumation for any of the mentioned reasons. If the family is asked by the ancestors to exhume a grave, certain legal questions may come to the fore. It is the purpose of this note to discuss the legal requirements for exhumations and briefly to address the traditional African cultural belief in which ancestors play a part in life on earth. It is not a complete analysis or an opinion on African culture or beliefs. Ancestral beliefs simply form the background to the real legal questions surrounding exhumations in South Africa.

These notes focus on a recent request put to a funeral undertaker. The immediate family of a deceased woman contacted the funeral undertaker with a request for the exhumation of the grave of their relative buried quite a few years ago. The basis of their request was that the ancestors had indicated to the mother of the deceased that the dead woman was not comfortable. The deceased had been pregnant when she died. She had been buried with the fetus still in her uterus. It had now been "communicated" that she would like the fetus to be removed and cremated. To fulfil the request, the grave of the deceased would need to be opened, the remains of the fetus removed and cremated, and the corpse re-buried. But is this legal?

The common-law crimes of violating a dead body and violating a grave are dealt with in some articles (see Christison and Hoctor "Criminalisation of the Violation of a Grave and the Violation of a Dead Body" 2007 28(1) *Obiter* 23–43; Snyman *Criminal Law* 6ed (2015) 435–436), but there seems to be no academic literature on legally permitted exhumations in South Africa. There are a few cases concerning exhumations, but nothing directly relevant to this discussion (see for example, *Rex v Lekota* 1947 (3) SA 713 (O*); R v*

Sephuma 1948 (3) SA 982 (T); *Gillespie v Toplis* 1951 (1) SA 290 (C); *Dibley v Furter* 1951 (4) SA 73 (C); *Mphiki v Mphiki* (54/2018) [2019] ZANCHC 43 (24 May 2019); *Bukula v Nkosi* (41333/11) [2014] ZAGPJHC (20 October 2014); see also Christison and Hoctor 2007 *Obiter* 23 for the long history of the crimes comprising violation of a grave and violation of a dead body).

2 Historical background concerning burials

According to Roman law, if a corpse was buried on the land of a person who gave permission for the burial, the grave became *res religiosa* or *locus religiosus* (Inst. 2.1.9; C. 3.44.2. and D. 11.7.2.5; C. 3.44.4.1). It was a crime known as *sepulchri violatio* to violate a *locus religiosus* (D. 47.12.11). The exhumation of corpses or the disturbance of the bones was also listed under this crime. A further requirement was that the act of exhumation or the disturbance of the bones should have been done *dolo malo* (with malicious intent) (D. 47.12.3.pr. and 1). It thus seems as if it was not *sepulchri violatio* to re-bury a corpse or exhume a body if there was a just cause (*iusta causa*) for the act (D. 47.12.3.4 and C. 3.44.1).

De Vos quotes some Roman-Dutch law writers who argued that graves were not holy and that they could be owned and sold (De Vos "Grafskending" 1952 69(3) *SALJ* 297; Van Leeuwen R.H.R., 2.1.9). He also refers to the case of *Cape Town and District Waterworks Co. Ltd. v Executors of Elders* ((1890) 8 S.C. 9), in which Lord de Villiers concluded that the term *res religiosa* was not part of Roman-Dutch law. Even though the grave is not holy anymore, violation of a grave and violation of a corpse have been accepted as crimes in Roman-Dutch law and are therefore part of the common law in South Africa (see De Vos 1952 *SALJ* 297–306; Christison and Hoctor 2007 *Obiter* 23–43). If a body is exhumed with no malicious intentions and according to legislative requirements, as is discussed below, no crime is committed.

3 Ancestral beliefs

Followers of traditional African religions believe that ancestors maintain a spiritual connection with their relatives still living. Ancestors are held to be the deceased members of a family. Most ancestral spirits are generally good and kind. It is believed that if they are unhappy, they may cause minor illnesses to warn people they are on the wrong path. To please these unhappy ancestors, offerings of beer and meat are usually made. Ancestral worship is "founded on the belief that the dead live on and are capable of influencing the lives of those who are still living" (Bogopa "Health and Ancestors: The Case of South Africa and Beyond" 2010 *Indo-Pacific Journal of Phenomenology* 1). It is thus believed that ancestors have mystical powers and authority over the living. Traditional healers often facilitate communication between the living and the dead. Bogopa mentions an example that appeared in a newspaper. A 28-year-old man had been told to pay his father's bride-wealth (*ilobola*) or else he must live with the consequences. The man was advised by a traditional healer (*sangoma*) that

his poor health was a direct result of his father's failure to pay *ilobola* for his mother. The ancestors were now holding him (the young man) responsible for the outstanding *ilobola* ("Outstanding Lobola" 1999 *City Press* 25 and "Son to Pay" 1999 *The Sunday Times*).

Lee refers to a man who could not attend his brother's funeral. He later heard that the corpse had fallen out of the coffin while on the way to the burial. Speaking through the man's dreams, the deceased brother stated that he was not comfortable. The man then consulted the elders of the family, as well as the ancestors, about his dreams. The dreams were interpreted to mean that the deceased wanted to be reburied with dignity at the family home (Lee "Death 'on the Move': Funerals, Entrepreneurs and the Rural-Urban Nexus in South Africa" 2011 *Africa* 239).

Lee also refers to funeral directors in Cape Town, who had noted a growing proportion of their business being taken up by exhumations, especially for re-burial at homes in rural areas. She states that the exhumation process is often initiated by a visitation by the dead person to a family member in a dream or a series of dreams. She gives an example of a father who "visited" his child while the child was sleeping. The father said: "I'm not sleeping well in this place. I'm getting cold". The child then went to dig him out, wrapped the bones in a blanket, bought a coffin and re-buried him at home. Lee concludes by saying that exhumation presents an opportunity for a prolonged conversation with the material remains of the body (Lee 2011 *Africa* 240–241).

The examples above are analogous to the case of the deceased pregnant woman who reportedly communicated to her mother, via the ancestors and the traditional healer, saying she is not comfortable in the grave with the fetus still inside her body. The request by the mother for an exhumation also seems to be constitutionally acceptable.

The Constitution of the Republic of South Africa, 1996 clearly states in Chapter 2 (the Bill of Rights) that "[e]veryone has the right to freedom of conscience, religion, thought, belief and opinion" (s 15(2). Section 30 states that "[e]veryone has the right to use the language and to participate in the cultural life of their choice". Section 9, the equality clause, also states that no one may discriminate directly or indirectly against anyone based on religion, conscience, belief or culture, among other criteria.

If the mother thus believes the ancestors communicated the discomfort of her daughter in the grave to her and that she must do something to assist the deceased, it should be accepted as a constitutionally valid reason to exhume the body of her daughter. Based on the mother's culture and her belief in the role of the ancestors, the remains of the fetus should be removed from her daughter's corpse and be cremated as requested by the deceased. Apart from the constitutionally valid reason for the request for the exhumation, there is other legislation with which the family should comply in order to effect the exhumation and cremation legally.

4 Legislation

4 1 National Health Act 61 of 2003 (NHA)

The NHA does not address the issues of exhumation or reburials directly but section 68(1) authorises the Minister of Health to make regulations regarding, among others, the disposal of human bodies. This has been done in the Regulations Relating to the Management of Human Remains, 2013 (*GG* No. 36473 of 2013-05-22). The Regulations address the exhumation and reburial of human remains directly. Regulation 26 of the Regulations determines that permission should be granted by the local government having jurisdiction in the location where the exhumation and reburial will take place. If, as in the example above, the remains of the fetus need to be cremated, a cremation permit should be sought from local government by a registered undertaker, who must be based in the same jurisdiction as the local government issuing the exhumation permit (reg 26(2) and (4)). To exhume human remains for cremation is legal (reg 23(3)) as is the reburial of the mother's remains in the same grave.

Whenever an exhumation is to take place, the officer-in-charge of the local government must inform the Provincial Commissioner of the South African Police Service (SAPS) (reg 27(1)(*a*)). A member of SAPS must be present while the exhumation takes place, as must the local government representative (reg 27(1)(*b*) and (*c*)). If human remains are to be removed from the grave, an environmental health practitioner (EHP) of the relevant health authority, or if not available, an EHP from another health authority, or in private practice, but registered with the Health Professions Council of South Africa (HPCSA), should also be present (reg 27(1)(*d*)). Only people with a direct involvement in the exhumation may be present and it must be done when the cemetery is closed to the public (reg 27(1)(*c*) and (*e*)). The EHP must see to it that all health requirements are met during the exhumation process (reg 27(*f*)). After the remains have been removed, the grave should be covered and sealed again.

4 2 By-Laws

As the Regulations (above) require the involvement of the local government in whose jurisdiction the exhumation takes place, notice should also be taken of the by-laws of the specific municipal area where the exhumation is to take place. As examples, the City of Tshwane Metropolitan Municipality Cemetery and Crematorium By-Law (published in the *Provincial Gazette Extraordinary*, 9 February 2005, Volume No. 42, Local Authority Notice 266), the City of Johannesburg Metropolitan Municipality Cemeteries and Crematoria By-Law (published under Notice 824 in Gauteng *Provincial Gazette Extraordinary* No 179 dated 21 May 2004) and the City of Cape Town: Cemeteries, Crematoria and Funeral Undertakers By-Law, 2011 (published in Province of Western Cape: Provincial Gazette no. 6898 on 2011-08-12) are analysed.

4 2 1 The Tshwane By-Law

Section 53 of the Cemetery and Crematorium By-Law of the Metropolitan Municipality of Tshwane states that human remains may be exhumed only if:

> "(1) the Premier of Gauteng, the Attorney-General or a magistrate and the reservation certificate holder authorise the exhumation in writing;
> (2) the authorisation contemplated in subsection (1) is handed to the [Strategic Executive Officer (SEO)] or his nominated representative in advance;
> (3) the family of the deceased person or the funeral director notifies the SEO or his nominated representative or the General Manager not less than three working days in advance of the date and time proposed for the exhumation;
> (4) the Senior Administrative Officer is present at the exhumation; and
> (5) at least one member of the South African Police Service, who must be notified by the family of the deceased person or the funeral director, is present at the exhumation."

A "reservation certificate holder" is defined in section 1 as a person to whom the right to bury a corpse in a certain grave has been granted. A "Senior Administrative Officer" (SAO) is defined as the person appointed by the municipality to be the officer-in-charge of a cemetery or his or her duly authorised representative. The by-law further determines that the area where the exhumation will take place should be screened off so that the public cannot view the exhumation (s 54). Section 59 states that if an exhumation takes place to remove a corpse from a grave, the reservation certificate holder retains his or her rights in respect of the grave if the corpse is to be returned to that grave. The Tshwane Municipality also has a Fine Schedule for By-law Policing (September 2006 http://www.tshwane.gov.za). According to Code 91929, section 53(1), the approved fine for the execution of an exhumation without official permission by the Premier or the Attorney-General or a magistrate shall be determined by a court of law. In other words, there is no specified amount indicated as a fine, and fines may vary. The same stipulation applies to being present at an exhumation without written permission (Code 91930, s 56). If any of the instructions of the SAO or SAPS are disobeyed at an exhumation, the prescribed fine is R200.00 (Code 91931, s 58).

4 2 2 The Johannesburg By-Law

The Cemeteries and Crematoria By-Law of the City of Johannesburg Metropolitan Municipality states in section 20(1) that no person may exhume or cause to be exhumed a body without the written consent of the–

> "(a) Premier of the Gauteng Provincial Government;
> (b) the Council;
> (c) the provincial Department of Health;
> (d) the Administrator of cemeteries; and
> (e) the Council's Medical Officer of Health."

Section 20 further determines that the officer-in-charge of the exhumation must inform the Provincial Commissioner of SAPS, as a member of SAPS must always be present when an exhumation takes place (s 20(2) and (3)). An exhumation must not take place when the cemetery is open to the public and only the undertaker, under the supervision of the officer-in-charge, may cause the grave to be excavated for an exhumation (s 20(4) and (5)). If a grave is to be excavated for exhumation, 48 hours' written notice must be given to the officer-in-charge and the administrator of cemeteries before the time of the exhumation, and a prescribed fee must accompany such notice (s 20(6)(*a*) and (*b*)). An "officer-in-charge" means the registrar of a crematorium appointed in terms of regulation 21 of the Regulations Relating to Crematoria and Cremations, made in terms of Ordinance No. 18 of 1965, and includes a person authorised by the Council to be in control of any cemetery (s 1).

In a document published online by the City of Johannesburg Parks division, it is stated that a seven-working-day period is required for administrative purposes before an exhumation may be carried out ("Exhumations" http://www.jhbcityparks.com (accessed 2019-09-19)). Permission for an exhumation must be obtained from the office of the Minister of Development and Planning, Gauteng. Permission must also be obtained from the Gauteng Provincial Department of Health, as well as the Medical Officer of Health of the metropolitan council. A fee for the exhumation and/or re-burial is payable at the office of the relevant cemetery. The Johannesburg Metropolitan Council also requires a certified copy of the deceased's death certificate when an application for the exhumation is made. Reference is also made to the Removal of Graves and Dead Bodies Ordinance 7 of 1925. According to this Ordinance, the following must be adhered to at all times: the Commissioner of the Municipal Police Service must be informed by the person executing the exhumation; graves older than 60 years or unknown will need approval from the South African Heritage Resource Agency (SAHRA); exhumation of these graves must be done under the supervision of an accredited archeologist; to get permits from the Provincial Government and SAHRA for unknown graves, there should be a full public participation/ social consultation process recorded. This includes newspaper advertisements in three local and provincial newspapers for a period of 30 days for response and on-site notices for a period of 60 days as well as door-to-door family interviews.

4 2 3 The Cape Town By-Law

The exhumation of bodies is addressed in Chapter 9 of the City of Cape Town: Cemeteries, Crematoria and Funeral Undertakers By-Law, 2011. According to section 45(1), an application for exhumation must be submitted to the City and should include an application form, a copy of the death certificate, a letter or affidavit from the next of kin of the deceased consenting to the exhumation and the prescribed fees should be paid. No exhumation may take place without the written consent of the City and the Provincial Department of Health (s 46(1)). These written documents must be submitted to the environmental health practitioner five working days prior to

the approved exhumation date (s 45(2)). An experienced environmental health practitioner and a registered funeral undertaker must be present at the exhumation (s 46(4)). If a re-burial or cremation is to take place, it should happen within 48 hours of the exhumation.

4 2 4 Summary

Different local authorities have different specific requirements –for example, the fees payable and who should or may be present during the exhumation. The Regulations in terms of the Act should be complied with, as it is national legislation. The Regulations state that permission for an exhumation is necessary from local government. In Tshwane, permission should be sought from the Premier, the Attorney-General or a magistrate and the reservation certificate holder. In Johannesburg, there is a list of five people who should give permission, but the Johannesburg by-law differs from the document on their website. The Cape Town by-law only states that the "City" must give permission. Thus, permission is essential although there is a difference in who should give permission. The Regulations also state that the Provincial Commissioner of SAPS should be notified, and that a member of SAPS should be present. This is therefore not negotiable at the local level and should be complied with. Finally, the Regulations require an EHP to be present at an exhumation and this should also be implemented at local level. The requirement of the presence of an EHP is not the case in the different by-laws.

5 The fetus

As the request to the funeral undertaker (in the subject case of this note) was to remove a fetus from the exhumed deceased body, it is also necessary to explain the position of a fetus in South African law. According to the Births and Deaths Registration Act 51 of 1992, a corpse "means any dead human body, including the body of any still-born child" (s 1). "Still-born" in relation to a child "means that it has had at least 26 weeks of intra-uterine existence but showed no sign of life after complete birth" (s 1). The relevance of these definitions is that if the fetus was in the deceased body for less than 26 weeks before the woman died, the fetal tissue should be seen and treated as medical waste. If the fetus was in her body for more than 26 weeks when she died, the fetus would be a stillborn baby (see Slabbert "Pregnancy Loss: A Burial or Medical Waste 2017 *THRHR* 102–112). It is the author's argument that this should be irrelevant in the current scenario. The deceased only wanted the fetal remains to be removed so that she would be comfortable. This should be done irrespective of the gestational age of the fetus, which would by now have decomposed. If the grave is exhumed, the fetal material would most probably be found between the legs of the deceased. The gases that form part of decomposition would excrete the fetal material out of the dead body. What could be found might only be the little bones left of the fetus. If a cremation order is then granted, these remains should be cremated in the manner asked for by the deceased mother via the ancestors.

6 Conclusion

If a funeral undertaker gets a request such as the one described in this note, it should not be discarded as illegal or impossible to do. It is clear from our legislation that an exhumation for a valid reason is possible. The request to the funeral undertaker was thus valid. The wish of the dead mother communicated to her living relative is valid on constitutional grounds, as it is a cultural belief that the dead can communicate with the living; discrimination against such beliefs is prohibited. It thus seems clear that if the family follows the Regulations in terms of the NHA, as well as the by-laws in the jurisdiction where the exhumation would take place, that it could legally be done.

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A CONSIDERATION OF SECTIONS 249, 250 AND 259 OF THE PROPOSED THIRD AMENDMENT BILL TO THE CHILDREN'S ACT IN LIGHT OF THE BEST INTERESTS PRINCIPLE

1 Introduction

When Nelson Mandela was elected as the President of the Republic of South Africa in 1994, no one doubted that he was concerned about the children of South Africa and especially those in need of care. He stated:

> "There can be no keener revelation of a society's soul than the way in which it treats its children'' (Abrahams and Matthews *Promoting Children's Rights in South Africa: A Handbook for Members of Parliament* (2011) 3)

With the promulgation of the Constitution in 1996, national legislative recognition was given to the principle that a child's best interests are of paramount importance in every matter concerning the child (s 28(2) of the Constitution of the Republic of South Africa, 1996). Section 28(1)*(b)* expressly provides for the right of a child to family care, parental care or appropriate alternative care. Based on economic and other factors, developing countries like South Africa experience difficulties in meeting the constitutional right of a child to have his or her best interests met and the placement of an orphaned or abandoned child (OAC) in appropriate alternative care is no exception. In light hereof, the current note considers whether the proposed amendments to the Children's Act (CA, Act 38 of 2005 as amended) introduced by the Third Amendment Bill (*GG* 42005 of 2019-02-25), with particular reference to sections 249, 250 and 259 comply with this constitutional right. These three sections are of particular relevance to placing a child in permanent care in the form of both national and intercountry adoption. In particular, section 249 makes provision that no consideration may be given in respect to adoption, section 250 limits the persons who are allowed to provide adoption services and section 259 makes provision for the accreditation for the provision of intercountry adoption services. All three sections are relevant to the adoption process of an OAC. Alternative care options available and the basis for determining which placement decided upon is deemed to be the most appropriate for the child concerned, are considered in light of the proposed amendments. A consideration of the current status of the child welfare system in South Africa as well as the statistics of the many children in need of alternative care, serves to provide a background in determining whether the proposed amendments meet and further the vulnerable OAC's best interests.

2 Current statistics and options

A reflection of current statistics of children in need of care in South Africa confirms that many children are in need of both permanent and temporary alternative care (s 150(1)*(a)* of the CA states that a child is "in need of care and protection" if the child "has been abandoned or orphaned and is without any visible means of support"). The vulnerability of parents, families and children has intensified by recent global, regional and national developments, including the global economic crisis, devastating consequences of the HIV/AIDS pandemic, widespread poverty (Smart *Children Affected by HIV/AIDS in South Africa: A Rapid Appraisal of Priorities, Policies and Practices* (2003) 3), unwanted pregnancies (Blackie *Sad Bad and Mad: Exploring Child Abandonment in South Africa* (*Unpublished doctoral thesis*, University of the Witwatersrand) 2015 19), child abandonment (Vorster "Abandoned Children: South Africa's Little Dirty Secret" (2015) *Daily Maverick* http://www.dailymaverick.co.za/ (accessed 2017-05-31). Vorster refers to the fact that as of 2015, approximately 3 500 children are abandoned annually in South Africa. The National Adoption Coalition estimate that while there are no statistics available, there is reason to believe that the number of abandoned children has increased http://www.adoptioncoalitionsa.org (accessed 2017-05-31)), rapid urbanisation, and the increased migration of adults and children into and within South Africa in search of economic and political refuge (Department of Social Development *South Africa's Child Care and Protection Policy* (2018) https://www.sacssp.co.za/NDSD_CCPP_19_DECEMBER.docx 47 (accessed 2019-01-01)). In particular, the impact of the HIV pandemic on children in South Africa cannot be understated and with the largest percentage of HIV/AIDS-infected persons in the world, many children in South Africa are deprived of being nurtured in a family environment (Högbacka "Maternal Thinking in the Context of Stratified Reproduction: Perspectives of Birth Mothers from South Africa" in Gibbons and Rotabi (eds) *Intercountry Adoption* (2012) 147).

In 2015, Vorster (http://www.dailymaverick.co.za/) noted that approximately 3 500 children are abandoned annually in South Africa and the National Adoption Coalition estimates that about 3,000 children are abandoned each year (Holmes "A Helping Hand for the Young and Forsaken" (2019) https://www.usnews.com/news/best-countries/articles/2019-08-08/south-africa-struggles-to-care-for-abandoned-babies (accessed 2020-05-05)) and that while there are no statistics available, there is reason to believe that the number of abandoned children has increased (Wolfson Vorster Reach Out: The State of Adoption in South Africa http://www.adoptioncoalitionsa.org (accessed 2020-05-30)).

In 2017, South Africa had 1 728 000 paternal orphans, 530 000 maternal orphans, and 505 000 double-orphans (Hall "Children in South Africa" (2018) http://childrencount.uct.ac.za/indicator.php?domain=1&indicator=1#6/-28.692/24.698 (accessed 2020-04-24)). (A paternal orphan is a child whose father has died but whose mother is alive, a maternal orphan is a child whose mother has died but whose father is alive, and a double orphan is a child who has lost both mother and father. See also Hall "Children Count: Statistics on Children in South Africa" (2018) http://childrencount.uct.ac.za/indicator.php?domain=1&indicator=4 (accessed 2020-01-29)). Single-orphan children may have a parent who is able to care for them; double-orphaned children do not. While many of these children are absorbed into the extended family structure, a form of alternative care which is well established in South Africa, many OACs are still placed in state institutions (Blackie *Sad, Bad and Mad* 9). (Kinship care is family-based care in the child's extended family or with close family friends who are known to the child. An extended family is a multi-generational family that may or may not share the same household. It includes family members who share blood relations, relation by marriage, cohabitation and/or legal relations. Kinship care, which can be formal or informal in nature, is the care for children up to the age of 18, who are, by legal definition, children "in need of care". Kinship care is a form of alternative care of a child within the child's extended family or, in some instances, with close family friends who are known to the child. Kinship carers therefore may include relatives of the child, members of the tribe or clan into which the child is born, godparents, stepparents, or any adult who has a kinship bond with a child.) This approach to placement in alternative care in South Africa must be questioned in light of the internationally accepted best interests of a child principle and it is in this vein that we consider the proposed amendments to sections 249, 250 and 259 of the CA.

Provision is made for various forms of alternative care in the CA. These options can be considered in terms of permanent and impermanent care as follows:

Permanent care

(a) National adoption
(b) Intercountry Adoption
(c) Kinship care can be considered as relatively permanent in nature (Kinship care is extraordinary because, while it is recognised as a means of alternative care, it is generally not temporary in nature. In South Africa, care of an OAC by a relative, or relatives, is common and well established. Besides a few exceptional instances, this form of care is generally not court-ordered. Kinship care is, as a rule, permanent in nature and an important form of care in South Africa).

Impermanent (temporary) care

(a) Foster care, both formal and informal (Kinship care is generally a form of informal placement. The distinguishing characteristic between kinship care and foster care in the general sense is that, except in exceptional circumstances, kinship care is not court-ordered);
(b) Child and youth care centres (CYCC; s 46(1)(*a*)(ii));
(c) Temporary places of safety (s 46(1)(*a*)(iii));

(d) Child-headed households (CHH; s 46(1)(*b*));
(e) *Kafalah* (Adoption is not recognised in terms of Islamic principles. Instead, kafalah is exercised, meaning that a child is taken care of by a family other than his or her biological family, while familial ties to the biological family remain intact).

The concept that the family forms the foundation of our society is well-established in national and international law. The family unit provides a child with a sense of security and identity. Moreover, the family as a unit plays a pivotal role in the upbringing of children, enabling them to develop to their full potential. Children who have inadequate or no parental care are clearly at risk of being denied such a nurturing environment. Harden opines as follows:

> "[C]hild development can be understood as the physical, cognitive, social, and emotional maturation of human beings from conception to adulthood, a process that is influenced by interacting biological and environmental processes. Of the environmental influences, the family arguably has the most profound impact on child development." (Harden "Safety and Stability for Foster Children: A Developmental Perspective" 2004 14(1) *The Future of Children: Children, Families, and Foster Care* 33.)

Notwithstanding the benefits that permanent care offers and OAC, adoption is ostensibly under threat with the DSD's proposed amendments in its Third Bill. This is a disturbing factor when one considers the number of children in need of placement in South Africa, and where such placement must at all times be in the best interests of the child concerned.

The advantages offered by alternative care that is permanent in nature cannot be underestimated and national adoption undoubtedly remains a placement of priority as it ensures that, as far as is possible, the best interests of the children are met as the placement is permanent and as such, *inter alia* the stability and sense of belonging that comes with such permanence, allows the child to grow into his or her best self (Trow Van der Walt *Intercountry Adoption and Alternative Care: A Model for Determining Placement in the Best Interests of the Child* (LLD Nelson Mandela University) 2018 3).

However, national adoption rates remain low (Gerrand and Stevens "Black South Africans' Perceptions and Experiences of the Legal Child Adoption Assessment Process" *Scielo* (2019) http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S0037-80542019000100005&lng=en&nrm=iso&tlng=en (accessed 2020-06-15)) as evidenced by the decline to only 1,033 adoptions registered adoptions in 2017 and 2018, as opposed to the 2,436 adoptions registered in the 2010 – 2011 recording period (Holmes https://www.usnews.com/news/best-countries/articles/2019-08-08/south-africastruggles-to-care-for-abandoned-babies). On the one hand social workers regard a rigorous time consuming assessment process as essential to ensure that adoption applicants are fit and proper to adopt, a factor not shared by prospective adoptive parents (Gerrand and Stevens http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S0037-80542019000100005&lng=en&nrm=iso&tlng=en). The rigorousness of the adoption assessment process is contentious and remains a hotly debated issue. A factor contributing to a low adoption rate is the cultural principle

against adopting a child outside one's clan (Ntongana and GroundUp Staff "Adoption and Race: We Unpack the Issues" (2014) *GroundUp* https://www.groundup.org.za/article/adoption-and-race-we-unpack-issues_2294/ (accessed 2020-05-19)). In many black cultures a child is seen as, belonging to and being guided by, the ancestors that carry the same clan name. Where such child is adopted, that order is disturbed (Ntongana and GroundUp Staff https://www.groundup.org.za/article/ adoption-and-race-we-unpack-issues_2294/). The status of the alternative form of permanent care available to an OAC in terms of the CA (s 254), namely intercountry adoption, is uncertain, not least of all following the publication of the proposed amendments to sections 249, 250 and 259 of the CA. (The National Adoption Coalition states that 153 intercountry adoptions were processed in South Africa from 2017–2018 http://www.adoptioncoalitionsa.org (accessed 2019-05-31)).

Since the advent of democracy in South Africa, the discourse on a child's rights has focused on the realisation of the child as a bearer of rights (South African Human Rights Commission "Twenty-five Years of Children's Rights" (2014) https://www.sahrc.org.za/index.php/sahrc-media/news/item/58-twenty-five-years-of-children-s-rights (accessed 2017-12-07)). South Africa's commitment to this approach is evident within *inter alia* the provisions of the Constitution (s 28) and the CA (Preamble of the CA) and it is with the above-mentioned statistics in mind and the duty that the state bears to protect the rights of the most vulnerable members of the South African society, that serious contemplation must be given to the proposed amendments provided for Third Amendment Bill (the Children's First Amendment and Second Amendment Bills were promulgated in January 2018).

What follows is a consideration of the current procedure followed prior to the publication of the proposed amendments followed by a reflection of the proposed amendments to the three sections of the CA. In conclusion, concerns are raised about the ultimate effect such amendments will have on effecting permanent placements for OACs in need of care in South Africa.

3 The proposed Third Amendment Bill

3 1 The procedure

The Department of Social Department (DSD) started the consultation process on the proposal of the amendments to the CA in 2016 (South African Government "Social Development on Proposed Removal of Adoption Fees in Children's Act Amendment" (2019) https://www.gov.za/speeches/ adoption-fees-10-jan-2019-0000 (accessed 2020-05-19)). Discussions of the proposed amendments at the National Child Care and Protection Forum (NCCPF) continued for a further two years (the Children's Amendment Bill and the Children's Second Amendment Bill were promulgated in January 2018 and are not the subject of the current note). The subsequent Child Care and Protection Policy (drafted by the DSD) led to the gazetting of the Third Amendment Bill (*GG* 42248 of 2019-02). The Bill proposes several substantial amendments to the CA, including *inter alia* amendments in relation to adoption. Several concerns have been raised in respect to the amendments, both substantively and with respect to the procedure followed

by the DSD preceding the publication of the Bill. Whilst the DSD did consult with adoption practitioners about the amendments to the CA during 2018, sections 249, 250 and 259 remained unnoticed and were not discussed at the National Child Protection Forum meeting. In fact, those parties involved in the process first became aware of the submissions on the publishing of the Government Gazette in October 2019 and the first consultation about the three afore-mentioned provisions was on 21 November 2019 at the NCPF, just one week prior to the closing of public comments (*GG* 42248 of 2019-02). The late submission left very little time for a co-ordinated comeback from relevant parties in the adoption sector. Upon scrutiny of the documentation, it became apparent that the three sections were in fact included with the other amendments some three weeks prior to the NCPF meeting. Preceding the final additions to the Third Amendment Bill, interested parties had undergone intensive consultation with respect to the provisions proposed. However, despite allegations by the DSD to the contrary, no consultation was had with respect to the changes with respect to sections 249, 250 and 259 of the CA (Wolfson Vorster Adoption-Related Amendments to the Children's Act: The Arguments and the Elephants in the Room (2019) *Daily Maverick* https://www.dailymaverick.co.za/opinionista/2019-02-18-adoption-related-amendments-to-the-childrens-act-the-arguments-and-the-elephants-in-the-room/#gsc.tab=0 (accessed 2020-06-15)). The DSD made no effort to meaningfully engage with the adoption community regarding the implications of the proposed amendments and the impact on adoptions and adoptable children as a whole. This approach of the DSD has led to criticism, with the adoption community referring to the sudden and unexpected amendments as "an ambush" by Government (Wolfson Vorster https://www.dailymaverick.co.za/opinionista/2019-02-18-adoption-related-amendments-to-the-childrens-act-the-arguments-and-the-elephants-in-the-room/#gsc.tab=0). Criticism of the late submission has led to the suspicion by service providers that the DSD's aim was that these amendments be rushed through without the opportunity for co-ordinated opposition.

Should these amendments be promulgated, they will have a serious effect on those participating and ensuring an adoption process that meets the best interests of the child concerned. In effect, adoptions would effectively become the sole responsibility of the state's social workers. The charging of fees by professionals is already provided for in the DSD's *Child Care and Protection Policy* (https://www.dailymaverick.co.za/opinionista/2019-02-18-adoption-related-amendments-to-the-childrens-act-the-arguments-and-the-elephants-in-the-room/#gsc.tab=0). The role played by professionals in the effective process of adoption in South Africa at present, is vital and it is submitted that the proposed amendments will have a negative impact on adoptions in and from South Africa.

3 2 Proposed amendments

A consideration of these proposals forms the essence of this note, with respect to both the procedure followed as well as the substantive nature of the proposals. In response to civil society comments on the Bill, the DSD responded by stating that adoption is not a commercial transaction and that

the amendments did not bar private social workers or attorneys from provide the adoption service (Department of Social Development "DSD Response to Civil Society Comments on the Draft Children's Amendment Bill" https://www.smartstart.org.za/dsd-response-to-civil-society-comments-on-the-draft-childrens-amendment-bill/ (accessed 2020-06-02)). This has not halted speculation as to the true intention and objective of the DSD concerning these amendments not least of all, the proposed removal of the so-called adoption fee clause (Wolfson Vorster: Proposed New Law Could Do Irreparable Harm to SA's Most Vulnerable (2019) *Daily Maverick* https://www.dailymaverick.co.za/opinionista/2019-12-05-adoptions-proposed-new-law-could-do-Adoptionsirreparable-harm-to-sas-most-vulnerable/ (accessed 2020-05-19)).

3 2 1 Section 249

The existing section 249 provides for the giving and receiving of fees in respect of adoption services. This section provides:

"(1) No person may–
  (a) give or receive, or agree to give or receive, any consideration, in cash or in kind, for the adoption of a child in terms of Chapter 15 or Chapter 16; or
  (b) induce a person to give up a child for adoption in terms of Chapter 15 or Chapter 16.
(2) Subsection (1) does not apply to–
  (a) the biological mother of a child receiving compensation for–
    (i) reasonable medical expenses incurred in connection with her pregnancy, birth of the child and follow-up treatment;
    (ii) reasonable expenses incurred for counselling; or
    (iii) any other prescribed expenses;
  (b) a lawyer, psychologist or other professional person receiving fees and expenses for services provided in connection with an adoption;
  (c) the Central Authority of the Republic contemplated in section 257 receiving prescribed fees;
  (d) a child protection organisation accredited in terms of section 251 to provide adoption services, receiving the prescribed fees;
  (e) a child protection organisation accredited to provide intercountry adoption services receiving the prescribed fees;
  (f) an organ of state; or
  (g) any other prescribed persons."

Currently, adoption is administered by the DSD. Social workers in the department process adoptions and the DSD also accredits adoption organisations and private social workers. According to a statement made by Oliphant, spokesperson for the department, there are accredited 102 organisations that assist the 59 social workers processing adoptions (Reynolds "Debate Rages on About Law Change That Will Make It Illegal to Charge for Adoption Services (2019) *News24* https://www.news24.com/news24/SouthAfrica/News/debate-rages-on-about-law-change-that-will-make-it-illegal-to-charge-for-adoption-services-20190209 (accessed 2020-06-15)).

There is a variety of legally recognised adoptions. Consequently, the need for specialist adoption social worker service providers and professionals is

required to serve the best interests of the child in processing such adoptions. The professional services of *inter alia* lawyers, psychologists and medical practitioners have proved to be of great assistance in ensuring the rights of the child are promoted and protected.

This proposed amendment will prohibit those service providers from charging their fees and in doing so it will not serve the interest of the children. It is, in fact, highly impractical as there will be a restriction on accessing these services which the court may need in making a decision.

The adoption fee clause amendment provides that adoption is one of the designated child protection services as stipulated in section 105 (5) of the CA (s 105(5) provides that: "Designated child protection services include– (a) services aimed at supporting– (i) the proceedings of children's courts; and (ii) the implementation of court orders; (b) services relating to– (i) prevention services; (ii) early intervention services; (iii) the reunification of children in alternative care with their families; (iv) the integration of children into alternative care arrangements; (v) the placement of children in alternative care; and (vi) the adoption of children, including inter-country adoptions; (c) the carrying out of investigations and the making of assessments, in cases of suspected abuse, neglect or abandonment of children; (d) intervention and removal of children in appropriate cases; (e) the drawing up of individual development plans and permanency plans for children removed, or at risk of being removed, from their family; and (f) any other social work service as may be prescribed.") The proposed amendment provides that section 249 of the CA is amended by the deletion of subsection (2) paragraphs (b), (c), (d), (e), (f) and (g). The legal effect hereof is that all professionals involved in the assessing and processing of adoptions, both national and intercountry adoption, would be prohibited from charging *any* fees in the execution of their professional services. Where an attempt is made to charge for services rendered in the adoption process would be unlawful. Adoptions would effectively become the sole responsibility of the social workers employed by the state. The fact that social workers in the employ of the DSD have unreasonably high caseloads and the serious backlogs have received much attention and concern for the children, leading to a judgment by the Gauteng High Court in *Centre for Child Law v Minister of Social Development* (North Gauteng High Court) Case number 21726/11.It is evident that the role played by the relevant NGOs and the private sector take great strain away from the DSD as they competently process adoptions for those parties who elect to use accredited private services. The impact of the proposed amendment will have a serious effect on adoptions, not only slowing down adoptions but potentially stopping adoptions altogether. The rationale behind this thinking is questionable especially because the adoption service fees are often calculated on a sliding scale and are not a "revenue generator" but rather to provide handling the costs of a complex process of adoption. The government presently controls the process of adoption, including placements and fees charged. Pieterse, chairperson of the National Adoption Coalition of South Africa, an umbrella organisation with over 100 members, has stated that while the national department subsidises some adoption organisations, most funding" is not comprehensive" and a no-fee legal provision will force some of the organisations to close and cut social workers (Reynolds "Law Change

will Make it Illegal to Charge for Adoption Services" (2019) *Legislation News South Africa* https://www.bizcommunity.com/Article/ 196/717/187177.html (accessed 2020-06-15)).

The DSD avers that the proposed amendments are justified in that access to adoption processes will be made available to all, including those who are not in a position to pay the legislated professional fees incurred when professionals assist in the process. The justification for the amendment in principle is that "fees should not be charged for adoption because it is not a business but a child protection measure" (South African Government https://www.gov.za/speeches/adoption-fees-10-jan-2019-0000). The concern raised by the DSD that *exorbitant* fees were being charged by professionals involved in the adoption process is questionable (Wolfson Vorster https://www.dailymaverick.co.za/opinionista/2019-02-18-adoption-related-amendments-to-the-childrens-act-the-arguments-and-the-elephants-in-the-room/) specifically when considered in light of the promulgation of the Second Amendment Act (Children's Second Amendment Act, 2016) in terms of which social workers in the DSD are legally permitted to carry out adoptions as from 2017. In terms of the existing provisions of the CA, relevant professionals render their services at the capped rate as prescribed (Social and Associated Worker Act, 110 of 1978). While the state is not permitted to limit the fees charged by private social workers, all fees must be disclosed and justified at court before an adoption order can be granted (Wolfson Vorster https://www.dailymaverick.co.za/opinionista/2019-02-18-adoption-related-amendments-to-the-childrens-act-the-arguments-and-the-elephants-in-the-room/#gsc.tab=0.)

Lastly as free adoptions are currently available through the DSD thereby contradicting the argument forwarded. One is thus left questioning the true intention of the proposed new amendment. It is noted that few adoptions have been processed by the DSD.

One cannot consider the impact of the proposal without having regard to the current realities faced by social workers in South Africa, who would now be faced with the task of assessing and processing *all* applications for the adoption or otherwise of a child in need of care, without any form of "outside" assistance in achieving the goal of placing a child in appropriate care. Given that all amendments are expected to give effect to the best interests' principle, one has reason to be concerned. Social workers employed by the DSD and involved in the process of determining and monitoring alternative care placements have long found themselves in the unfortunate position of having large unusually high caseloads (Parliamentary Monitoring Group Foster Care System Backlog: Progress Report (2019) https://pmg.org.za/committee-meeting/28808/ (accessed 2020-05-05)). Organisational challenges have been identified as the cause for ineffectiveness among social workers currently employed by the DSD. Included in these causes are *inter alia* insufficient training, lack of role clarity, inadequate leadership, unrealistic expectations by the DSD, lack of resources or funding and low salaries (Nhedzi and Makofane "The Experiences of Social Workers in the Provision of Family Preservation Services" 2015 51(1) *Social Work/Maatskaplike Werk* 357).

It is submitted that external professionals play a positive role in ensuring that adoptions (national or abroad) are professionally and timeously

processed. In light of the difficulties social workers employed the state face, the effective removal of the external professionals by the propose amendment raises a serious concern and the proposed amendment should be questioned.

3 2 2 Section 250

This section in the proposed Bill concerns those who may or may not provide adoption services in South Africa. Section 250 of the CA currently provides that:

> "(1) No person may provide adoption services except–
> (a) a child protection organisation accredited in terms of section 251 to provide adoption services;
> (b) an adoption social worker;
> (c) the Central Authority in the case of intercountry adoptions; or
> (d) a child protection organisation accredited in terms of section 259 to provide intercountry adoption services.
> (2) Subsection (1) does not prohibit the rendering of professional services in connection with the adoption of a child by a lawyer, psychologist or a member of any other profession."

The proposed amendment to section 250 provides that certain additions and deletions to the article's subsections must be affected. The effect of the proposed deletion of subsection 3 of section 250 prohibits the involvement of any professionals other than social workers in the adoption process. This follows the promulgation of the Second Amendment Act in terms of which social workers from the DSD are now legally permitted to perform adoptions (Children's Second Amendment Act 18 of 2016).

The reality remains that social workers are currently and understaffed in South Africa and the high caseloads that social workers carry at present, seems to make the objective of the state implausible. Few adoptions have been processed by the social workers employed by the DSD since the Second Amendment Act came into operation in 2017 (See also Wolfson Vorster https://www.dailymaverick.co.za/opinionista/2019-02-18-adoption-related-amendments-to-the-childrens-act-the-arguments-and-the-elephants-in-the-room/). This failure to process adoptions is not due to any question of legality regarding the process, but rather to the inability of already overburdened social workers to further stretch their work load. Although the CA aims to ensure the protection of children's rights and ensure that informed decisions are made in their best interests, the number of social workers employed by the DSD is inadequate to keep abreast with the constant demands they face (Trow Van der Walt *Intercountry Adoption and Alternative Care in South Africa: A Model for Determining Placement in the Best Interests of the Child*). This quandary is aggravated by the fact that many social workers in the DSD lack the necessary specialisation to process adoptions.

3 2 3 Section 259

Section 259 outlines those who are able to perform international adoptions and provides:

> "(1) The Central Authority may, on application by a child protection organisation–
> (a) accredit such organisation to provide inter-country adoption services; and
> (b) approve adoption working agreements contemplated in section 260, as long as the prescribed requirements are met.
> (2) The Central Authority may accredit a child protection organisation to provide inter-country adoption services for such period and on such conditions as may be prescribed.
> (3) A child protection organisation accredited in terms of this section to provide inter-country adoption services–
> (a) may receive the prescribed fees and make the necessary payments in respect of inter-country adoptions; and
> (b) must annually submit audited financial statements to the Central Authority of fees received and payments made.
> (4) Subsection (1) does not prohibit the rendering of professional services in connection with the adoption of a child by a lawyer, psychologist or a member of another profession."

An amendment to section 259 proposes that the CA be amended to ensure that only state social workers, who are already inundated with cases and untrained in adoptions, would be able to facilitate adoptions.

As regards the effect the amendments will have on the placement of OACs in alternative care, the state referred to section 22 of the Constitution of the Republic of South Africa, maintaining that the proposed amendments do not prohibit private social workers and social workers at Child Protection Organisations from providing adoptions but rather only prohibits them from charging fees as provided for in the principal Act. It is submitted that the consequence will be the same as no organisation can exist without income. The importance of professional and cautious screening of prospective adoptive parents is of utmost importance.

4 Constitution

The Constitution provides for the robust protection of children's rights. Section 28 of the Constitution ensures that the "best interests of the child" are paramount in any matter concerning the child. The Constitution expressly provides for a child's right to family and parental care, and to protection of such rights (s 28(1)(*b*)). Adoption has been recognised as a means of providing the child with care and protection that is unsurpassed by any other form of permanent placement. Louw confirms this approach stating that

> "[adoption], more so than any other placement option, must thus in a given case be the best way of securing stability in that particular child's life". (Louw "Intercountry Adoption" in Boezaart (ed) *Child Law in South Africa* (2017) 184)

The Courts have confirmed that a child's right to family care or parental care as provided for in the Constitution includes the right to be adopted

(*Fletcher v Fletcher* 1948 (1) SA 130 (A) 143. See also *Fraser v Naude* 1999 (1) SA 1 (CC) 5B–C,1998 11 BCLR 1357 (CC); *Jackson v Jackson* 2002 (2) SA 303 (SCA) 317 par F). In the constitutional decision of the *Minister for Welfare and Population Development v Fitzpatrick* (s 259), considered the right of a child to be adopted by a non-South African citizen. Given that the best interests of a child are paramount in all matters concerning a child, Goldstone stated that section 28(1) of the Constitution did not constitute an exhaustive list of children's rights (par 17), and that the provision for the best interests' principle in section 28(2) created a right of a child that had to be interpreted beyond the reach of the provisions in section 28(1). This includes the subjective right of and OAC to be adopted.

5 International law

International policy and national legislation have recognised adoption as a preferred solution where natural parents or guardians are unable or unwilling to provide a home for the child concerned (UNGA *Guidelines for the Alternative Care of Children adopted by the General Assembly* (24 February 2010) A/RES/64/142. The South African Children's Act 38 of 2005 recognises the right of a child to grow up in a family environment and in an atmosphere of love, happiness and understanding. The Hague Convention recognises the right a child has to family care and further provides that intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be founds in his or her state of origin. See South African Law Commission *Discussion Paper 103 Project Review of the Child Care Act* (2002) 1181). International policy (and national legislation) recognises adoption as a preferred solution where natural parents or guardians are unable or unwilling to provide a home for the child concerned. The placement of a child is an obligation that rests on the state and the Constitution guarantees that when growing up in a family environment is not a viable option, appropriate placement of such child must be sought. The primary aim of adoption is to provide a child who cannot be cared for by his or her own parents with a permanent family. The Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children with special reference to Foster Placement and Adoption Nationally and Internationally (1986 Declaration) envisages that the first measure of alternative care should resemble, as far as is possible, a "typical" family environment, and, only when such an environment is unavailable, should regard be had to other "so-considered" less desirable options. This is reflected in all international Declarations and Conventions, which include *inter alia*, The Convention on the Rights of the Child (ratified by South Africa in 1995), The African Charter on the Rights and Welfare of the Child (ratified by South Africa in 2000) and The Hague Convention on the Protection of Children and Co-operation in respect of Inter-country Adoption (ratified by South Africa in 2003).

6 Conclusion

Pro-amendment contenders have stated that the amendments related to child adoption aim to make adoption a free service for all South

Africans. The proposed national legislation can only make it more difficult for potential adoptive parents to adopt an OAC. Consequently, the most vulnerable children in our society are denied an opportunity to enjoy a better life. The best interest principle appears to have received little if no attention of the drafters of the amendments. The best-interests principle has been known and used since the nineteenth century (Caufmann, Shulman, Bechtold and Steinberg "Children and the Law" in Bornstein, Leventhal and Lerner (eds) *Handbook of Child Psychology and Developmental Science Vol. 4: Ecological Settings and Processes in Developmental* Systems 7ed (2015) 616 653). The best interests of the child should be protected in every decision concerning a child's placement. It is submitted that the principle itself, albeit not the sole concern, should moderate any mechanical application of conflicting legal rules. The concept that the family forms the foundation of our society is well established in national and international law (Department of Social Development Republic of South Africa *Green Paper on Families: Promoting Family Life and Strengthening Families in South Africa* (2011) 73. See also Department of Social Development Republic of South Africa *White Paper on Families in South Africa* (2013) 3). The family unit provides a child with a sense of security and identity (Moyo *The Relevance of Culture and Religion to the Understanding of Children's Rights in South Africa* (LLM dissertation, University of Cape Town) 2014 15; Amoateng, Richter, Makiwane and Rama *Describing the Structure and Needs of Families in South Africa: Towards the Development of a National Policy Framework for Families* (2004) 4). Moreover, the family as a unit plays a pivotal role in the upbringing of children, enabling them to develop to their full potential (Amoateng *et al Describing the Structure and Needs of Families* 4), opine when referring to the importance of a "family" as follows: "Families are the primary source of individual development and they constitute the building blocks of communities"). The plight of large numbers of children needing family, parental or alternative care is characteristically common in poorer nations. Promoting adoption as a means of permanent placement for a child could play a pivotal role in connecting a child to a safe and nurturing family relationship to last a lifetime. Within the range of options considered to be appropriate alternative care, national adoption is generally the first choice, an approach which is founded on the principle that the child concerned is granted the opportunity to develop in a secure and permanent family environment within the child's country of origin (Kinship care is well established in South Africa and is akin to traditional family/parental care in that the child concerned is raised within a family environment characterised by the stability found in permanent care).

National adoption and international adoption may be viable placement options for children left without parental care. Statistics indicate that a significant number of South African orphans fall into this category, and it is apparent that policies and laws must be set in place to afford such children necessary protection and care. The overall approach of the legislature in South Africa in the past decade has changed from a parent-centred approach to a child-centred approach and judicial decisions have confirmed the paramountcy of a child's best interests as an accepted principle of South African law.

The proposed amendments result in the further burdening of already overworked social workers employed by the DSD and the proposed

amendments to sections 249, 250 and 259 appear to go in the face of the duty of the state to ensure that it does everything in its capacity to safeguard a child's rights and guarantee that these rights are protected and promoted. This includes the right to family or parental care where possible. The proposed amendment allegedly aims to make adoptions more accessible to those wishing to adopt an OAC, but the consequential reality is rather the total shut down of all adoptions in South Africa.

With respect to adoption services, the DSD opined that

> "[a]doption service should not be commodified but be viewed as a means of protecting the best interests of children by placing them with *permanent and suitable families*".

The recognition of the importance of placing children in a permanent family environment if further confirmed in section 229 of the CA, which provides the purposes of adoption as being:

> "to protect and nurture children by providing a safe, healthy environment with positive support; and to promote the goals of *permanency planning* by connecting children to other safe and nurturing *family* relationships intended to last a lifetime." (South African Government https://www.gov.za/speeches/adoption-fees-10-jan-2019-0000)

No one could debate the importance of the benefit of placing an OAC in an environment of permanence. It is submitted with respect that the proposed amendments are not achieving this aim. The importance of permanence in creating a sense of stability and of belonging in an OAC child's life cannot be underestimated, and it is submitted that where no appropriate alternative care can be found in the child's country of origin, namely South Africa, seeking a permanent placement for a child is a priority.

The proposed national legislation will make it more difficult for potential adoptive parents to adopt a South African OAC and it is apparent that the proposed amendments would bring an end, or at least seriously decrease adoption and more specifically intercountry adoption. Such a policy denies the most vulnerable children in our society of an opportunity to enjoy a better life. When considering the placement of a South African child by intercountry adoption, one must question when, and to what extent, the "best interests of a child" principle can play a role in giving more children the chance to enjoy a permanent family life within a family environment. To be effective, the stringent rules involved in the processing of intercountry adoptions is at present largely reliant on the assistance of professional services. It appears the state has chosen to overlook the potential placement of a child abroad, even although such placement could potentially serve the best interests of the child concerned. The proposed amendments will curtail, if not cease, these services. In effect the rights of children to permanent alternative care through adoption will cease.

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CASES / VONNISSE

JUDICIAL GUIDANCE ON THE APPLICATION OF SECTION 49 OF THE CONSUMER PROTECTION ACT 68 OF 2008

Van Wyk t/a Skydive Mossel Bay v UPS SCS South Africa (Pty) Ltd [2020] 1 All SA 857 (WCC)

1 Introduction

> "A significant portion of consumer law development can indeed be ascribed to legislative responses to business' disclaimers of accountability for negative consequences attendant upon their dealings with consumers." (Van Eeden and Barnard *Consumer Protection Law in South Africa* (2017) 3)

In South Africa, the legislature's response to the negative consequences resulting from the pervasive use of disclaimers by suppliers has been to regulate the use of these terms through the enactment of a number of provisions in the Consumer Protection Act 68 of 2008 (CPA), including sections 48, 49 and 51. A number of publications have considered the meaning of these provisions and the impact they may have on the use of disclaimers in consumer contracts. (See, for instance, Naudé "The Consumer's 'Right to Fair, Reasonable and Just Terms' Under the New Consumer Protection Act in Comparative Perspective" 2009 *SALJ* 505; Mupangavanhu "Fairness as a Slippery Concept: The Common Law of Contract and the Consumer Protection Act 68 of 2008" 2015 *De Jure* 116; Mupangavanhu "Exemption Clauses and the Consumer Protection Act 68 of 2008: An Assessment of *Naidoo v Birchwood Hotel* 2012 6 SA 170 (GSJ)" 2014 *PELJ* 1168; Tait and Newman "Exemption Provisions and the Consumer Protection Act, 2008: Some Preliminary Comments" 2014 35(3) *Obiter* 629.) As a consequence of the widespread use of disclaimers and the adverse consequences they may hold for consumers, any judicial pronouncement on the impact of the CPA on these clauses is significant. In *Van Wyk t/a Skydive Mossel Bay v UPS SCS South Africa* ([2020] 1 All SA 857 (WCC) (*Skydive v UPS*)), the Western Cape High Court was afforded the opportunity to consider the impact of aspects of section 49 specifically on the use of a clause in a consumer agreement excluding the risk or liability of suppliers (referred to as an "exemption clause" in this note).

Section 49 of the CPA applies to four distinct types of clause enumerated in section 49(1) – namely, clauses limiting the risk or liability of suppliers in respect of any other person; clauses constituting an assumption of risk or liability by the consumer; clauses imposing an obligation on the consumer to indemnify the supplier for any cause; and clauses requiring a consumer to

acknowledge a particular fact. As indicated, in *Skydive v UPS*, the contentious clause was one excluding the risk or liability of the supplier. The focus of this note then is on the interpretation and application by the court in *Skydive v UPS* of the relevant provisions of section 49 of the CPA to an exemption clause.

2 Facts and legal question

The plaintiff, who operates a skydiving business under the name "Skydive Mossel Bay", instituted action against the defendant for payment of an amount of R386 140,30 plus interest (par 1). The plaintiff had sent an aircraft engine to the United States of America (USA) for an overhaul and subsequently obtained the services of the defendant to collect and transport the engine from the USA to an address in George, South Africa. In terms of the agreement between the parties, the engine was delivered to the agent of the defendant, who had accepted delivery (par 5). The defendant failed to deliver the engine as agreed or at all and in fact informed the plaintiff that the engine had been damaged while in transit resulting in a total loss to the value of the amount claimed (par 6 and 32).

In securing the services of the defendant for the transport of the engine, the parties had negotiated via email. As part of the negotiating process, the defendant had required the plaintiff to complete and sign a credit application form, which was duly done and provided to the defendant (par 27). Although the plaintiff disputed whether this credit application form signed by him (and the terms it contained) formed part of the agreement between the parties, the plaintiff was "constrained to concede that it [the credit application] was a requirement for the agreement between himself and the defendant, and for the delivery of the aircraft engine to eventuate, for him to sign the credit application" (par 66) and that "no agreement could have come into existence without the [p]laintiff having signed the credit application" (par 67). The relevance for current purposes of whether the credit application formed part of the agreement between the parties is that the form signed by the plaintiff contained an exemption clause excluding the liability of the defendant in respect of the plaintiff in certain instances. It is on this clause of the contract excluding his liability that the case of the defendant largely rested. The defendant raised a number of defences, including a special plea in respect of the jurisdiction of the court, but for current purposes the exclusion of liability and the application of section 49 to such an exemption clause are the pertinent issues. Another defence raised – that the CPA does not apply to the agreement between the parties because it is a credit agreement – is considered later.

The defendant relied on the exemption clause contained in the credit application form and signed by the plaintiff. The clause provided that the defendant shall not be liable in respect of the plaintiff for any loss or damage of the goods transported, be it on the grounds of a breach of contract or due to negligence, unless the goods were in the actual possession of the defendant at the time of the loss occurring. It was the defendant's case that the engine was not in the actual possession of the defendant at the time of the loss and that the defendant was therefore not liable for the loss, as provided for in the contract (par 11). In the alternative, the defendant argued

that should it be found that the engine was in the possession of the defendant at the time of the loss, then the defendant cannot be held liable for the loss as the contract excluded the liability of the defendant for such loss unless the defendant was found to be grossly negligent – in respect of which the defendant pleaded that it was not negligent, alternatively not grossly negligent, nor that its negligence caused the damage to the engine (par 12).

At this point, it is relevant to point out that the plaintiff's view in respect of the completed and signed credit application form was that it was

> "a formality required of the [p]laintiff for the purpose of allocation to him, by the [d]efendant, of an account number (which was a requirement of the US authorities), and not for the purposes of seeking any credit." (par 20 and 72)

The plaintiff testified that he never had the intention of entering into a credit agreement with the defendant nor to exclude the liability of the latter for the loss the plaintiff had suffered but, in completing and signing the credit application form, he had hoped to "facilitate and expedite the process" of having the aircraft engine returned to him from the USA (par 65). It was the version of the plaintiff that the terms of the relevant exemption clause were not pointed out to him nor were they explained to him before signing the document and he did not understand these terms and conditions to be incorporated into or be part of the contract between the parties (par 21 and 43). The plaintiff, however, during cross-examination had to acknowledge:

> "he had agreed to the terms and conditions therein, and that all the business would be governed by and be subject to the terms of the standard trading conditions and the terms of the conditions of carriage printed overleaf, and that he had agreed to be bound thereby." (par 71)

Perhaps foreseeing that the completed credit application would be found to constitute the agreement between the parties (or at least be a fundamental part thereof), the plaintiff argued that the agreement between the parties was regulated by the CPA and that, as the agreement between the parties incorporated terms:

> "purporting to limit the risk of liability of the [d]efendant, the [p]laintiff was at no relevant time aware thereof and these clauses were not drawn to the [p]laintiff's attention by the [d]efendant, in a manner and/or form satisfying the requirements of section 49(3) to 49(5) of the CPA." (par 7 and 68)

The plaintiff thus asked for an order in terms of section 52(4)(*a*)(ii) of the CPA to sever from the agreement between the parties the clause limiting the risk of liability of the defendant (par 8).

In response, the defendant denied that the CPA applied to the agreement and submitted that the plaintiff, as a businessperson and the owner of a skydiving business, had signed the agreement and should accordingly be held to the terms thereof (par 15). Also, the defendant averred that the clauses in question were written in plain language, were "sufficiently conspicuous in the circumstances to attract the attention of an ordinary alert consumer, such as the [p]laintiff" (par 16), and that

> "the [p]laintiff, as a businessman and owner of a skydiving business, would have understood the meaning and import of the terms and conditions of the

agreement, and specifically those limiting the liability of the [d]efendant." (par 16)

The court held that the credit agreement did indeed form an integral part of the written agreement that existed between the parties (par 69). The question for decision then was simply whether the agreement between the parties complied with the requirements of the CPA (par 70). Stated differently, did the clause in the agreement purporting to limit the liability of the defendant in respect of the plaintiff comply with the requirements contained in section 49(3) to (5) of the CPA?

3 Finding of the court

The court found that the defendant was not entitled to rely on the exemption clause in the agreement and consequently made an order in terms of section 52(4)(*a*)(ii) of the CPA severing the clause from the contract. Consequently, the defendant was held to be liable to the plaintiff in the amount claimed because of the loss of the engine the former had undertaken to transport from the USA and to deliver to the plaintiff in George (par 95 and 116).

4 Reasoning of the court and discussion

The court held that the relevant clause of the agreement between the parties fell within the ambit of agreements to which section 49(1)(*a*), (*b*) and (*c*) are applicable, as the clause on which the defendant relied clearly sought to limit exposure to, or indemnify the defendant against, any liability for damages sustained by the plaintiff due to the loss of the aircraft engine (par 89). Having concluded thus, the court considered the purpose of section 49 and then analysed it with a view to ascertaining the legal obligations imposed by the section and how these obligations in turn were, or were not, complied with in the context of the particular facts of this case.

The relevant provisions of section 49 read as follows:

"(1) Any notice to consumers or provision of a consumer agreement that purports to–
  (a) limit in any way the risk or liability of the supplier or any other person;
  (b) constitute an assumption of risk or liability by the consumer;
  (c) impose an obligation on the consumer to indemnify the supplier or any other person for any cause; or
  (d) be an acknowledgement of any fact by the consumer, must be drawn to the attention of the consumer in a manner and form that satisfies the formal requirements of subsections (3) to (5).

(2) …

(3) A provision, condition or notice contemplated in subsection (1) or (2) must be written in plain language, as described in section 22.

(4) The fact, the nature and effect of the provision or notice contemplated in subsection (1) must be drawn to the attention of the consumer–
  (a) in a conspicuous manner and form that is likely to attract the attention of an ordinary alert consumer, having regard to the circumstances; and
  (b) before the earlier of the time at which the consumer–

(i) enters into the transaction or agreement, begins to engage in the activity, or enters or gains access to the facility; or

(ii) is required or expected to offer consideration for the transaction or agreement.

(5) The consumer must be given an adequate opportunity in the circumstances to receive and comprehend the provision or notice as contemplated in subsection (1)."

The court expressed the fundamental purpose of section 49 as one of ensuring improved access to quality information, which, in turn, will allow consumers to make informed choices based on individual circumstances (par 80). The court later emphasised the importance of informing the consumer "properly, and in practical terms, … where the provisions in an agreement as stated in subsections (49)(1)(*a*)–(*d*) would be applicable" as it would enable consumers to understand the nature and import of the clauses referred to in section 49(1)(*a*)–(*d*) when used in a contract (par 85). As a result, consumers would be protected from "a situation where the consumer is caught off-guard, or where a consumer would be tripped up by an unscrupulous or indifferent supplier" (par 88). It is exactly for this reason, the court states, that section 49 was "necessary and long overdue" (par 86). Section 49 serves to ameliorate "the unjust and unfair application of the *caveat subscriptor* rule" (par 81) and also to "prevent the formalistic application and harsh consequences thereof, as happened in *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA), which applied the principle that was laid down in *George v Fairmead (Pty) Ltd* 1958 2 SA 465 (A)" (par 82). (The principle enunciated by the Appeal Court in the latter case provides that when a person is required to append his or her signature to a document, the person assents to whatever words appear above such signature and a failure to familiarise himself or herself with the contents of such document cannot serve later to form the basis of a claim of *iustus error* (472 A–473 A).)

Section 49 (applied in the present context and excluding the obligations imposed by subsection (2), which are not relevant for current purposes) provides for four distinguishable obligations with which a supplier must comply in order for a clause falling within the ambit of section 49(1)(*a*)–(*d*) to pass the so-called incorporation requirements set out in section 49(3), (4) and (5) (see Naudé 2009 *SALJ* 505, as well as Tait and Newman 2014 *Obiter* 632–636). These are that the clause: (1) must be written in plain language (s 49(3)); (2) that the clause must be drawn to the attention of the consumer in a conspicuous manner (s 49(4)(*a*)); (3) that the consumer's attention must be so drawn to the clause before the advent of the actions specified in section 49(4)(*b*); and (4) the consumer must be given an adequate opportunity to receive and comprehend the clause (s 49(5)). (See also Naudé 2009 *SALJ* 508 and Naudé "Section 49" in Naudé and Eiselen *A Commentary on the Consumer Protection Act* (Original service, 2014) 49–2. The learned author refers to three requirements, reading the provisions of section 49(4)(*a*) and (*b*) as one requirement consisting of two aspects. It is submitted that nothing turns on these slightly different approaches.)

4 1 Section 49(4)(a) and the requirement of conspicuousness

Of particular relevance in the present context is the requirement posed in section 49(4)(*a*). As indicated, section 49(4)(*a*) requires that the fact, nature and effect of the relevant clause are to be drawn to the attention of the consumer in a conspicuous manner and form likely to attract the attention of an ordinarily alert consumer, having regard to the circumstances.

In this regard, the court stated that section 49 imposes an obligation on a supplier, wishing to rely on an exemption clause, "to explain the existence, the content and the consequences of such clauses" to the consumer (par 83). It is submitted that the words "existence", "content" and "consequences" are a clearer and simpler version of the terms used in section 49(4)(*a*) – namely, "fact", "nature" and "effect" – and may assist suppliers in better understanding what is expected of them when making use of an exemption clause.

Noteworthy is the fact that the court stated that suppliers are to ensure these aspects are to be *explained* to the consumer. Requiring the clause to be explained to the consumer gives rise to the question whether it is the duty of the supplier in a one-on-one type situation to explain verbally to a consumer the fact, nature and effect of the exemption clause. Practically, this may certainly not be possible in a vast majority of situations and to read such a meaning into the provision may well be an "insensible or unbusinesslike" interpretation. In this regard, in *Natal Joint Municipal Pension Fund v Endumeni Municipality* (2012 4 SA 593 (SCA)), the SCA in setting out the proper approach for interpreting legal texts, including legislation and contracts, stated the following:

> "Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation." (par 18)

The dictionary meaning of "explain" means "to tell somebody about something in a way that makes it easy to understand" (Wehmeier *Oxford Advanced Learner's Dictionary of Current English* (2005) 513) and to "tell", in turn, means "to give information to somebody by speaking or writing" (Wehmeier *Oxford Advanced Learner's Dictionary of Current English* 1522). Considering these meanings, it seems that the court should not be understood to require anything more of a supplier, in terms of section 49(4)(*a*), than for the supplier to provide the consumer with information – in a conspicuous manner and form and which may be in writing – about the existence, content and consequences of the relevant exemption notice or clause.

The court *in casu* proceeded to state that the CPA "now clearly places a legal duty upon a supplier of goods or services to bring such clauses clearly and unambiguously to the attention of a consumer when it concludes a transaction with such a consumer" to which the CPA applies (par 84); the court explained that before the CPA came into effect such a legal duty only existed if the clause was considered to be "unexpected" in the particular contract (see par 83 and *Afrox Healthcare Bpk v Strydom supra* par 36; *Hartley v Pyramid Freight (Pty) Ltd t/a Sun Couriers* 2007 (2) SA 599 (SCA); *Mercurius Motors v Lopez* 2008 (3) SA 572 (SCA); see also the discussion in Christie and Bradfield *Christie's The Law of Contract in South Africa* (2011) 181–186). The benefit introduced by section 49(4)(*a*) specifically is to require that an exemption clause be brought to the attention of the consumer whenever it is sought to be incorporated into an agreement between the supplier and the consumer and not just in cases where it might be considered, for instance, to be unexpected.

It then seems clear that the expression used by the court for the supplier to explain the existence, the content and the consequences of an exemption clause to the consumer, means to bring "such clauses clearly and unambiguously to the attention of the consumer" (par 84). The court thus understands the duty imposed by section 49(4)(*a*) to require that a supplier must first provide the consumer with enough information so as to be aware of the existence of the exemption clause. The court further explains that such a clause cannot be

> "concealed in an obscure and opaque section of the agreement which the consumer is not aware of, or in a provision of an agreement which would be meaningless to the ordinary consumer. The supplier must be open, transparent, and honest in its dealings with a consumer, if it wants to rely on such a provision in a consumer agreement." (par 87)

Section 49(4)(*b*) requires that the bringing of the exemption clause to the attention of the consumer must be done before the agreement is concluded, takes effect or the consumer starts to engage in an activity as a consequence of the transaction (par 87).

As indicated, the court expressed the view that one of the purposes of section 49 is to prevent a situation where a consumer is caught unawares of the existence of such a clause or notice by an indifferent or unscrupulous supplier and that may as a result lead to undue hardship and prejudice "if not properly explained or brought to the attention of the consumer" (par 88). The court found:

> "The [p]laintiff was furthermore presented with two full pages, which was not very conspicuous or clearly delineated, and in relation to which no effort was made to draw [p]laintiff's attention to any of the provisions. It was furthermore written in extremely small font, which even this court on the original document found extremely difficult to read, and which contains the very clauses mentioned in section 49(1), against which the act seeks to protect the consumer." (par 89)

Naudé (in Naudé and Eiselen *A Commentary on the Consumer Protection Act* (Revision service 5, 2020) 49–3) points out that it is unclear what would be regarded as sufficiently conspicuous, but that if the relevant clause "is

printed in contrasting typeface close to the primary terms of the contract, and must therefore be noticed by any consumer who reads the primary terms, this may be sufficient." One may argue that where a supplier has drawn the consumer's attention to the clause in a manner such as by physically pointing it out in the contract and specifically then verbally explaining or mentioning it, such action should be considered sufficiently conspicuous for purposes of the CPA, irrespective of where in the contract the exemption clause appears and in what typeface it is. (Of course, proving such a course of action may potentially pose problems for the supplier.) Drawing the clause to the attention of the consumer in a conspicuous manner does not mean that the supplier is obliged orally to explain the clause, its content and consequences to the consumer but, if this is done, this should in all but the most exceptional cases constitute compliance with the requirement that the clause or notice is to be drawn to the attention of the consumer in a conspicuous manner.

In the situation of, for example, a shopping mall where a notice board is employed to convey the exemption clause, different techniques will have to be employed and suppliers must carefully consider the manner and form used to ensure that the exemption clause is conspicuous. Suppliers must think of: the size of the notice board and the font size used for writing the clause; where and how the notice board and the clause thereon are positioned (see *Hanson v Liberty Group Ltd* (4633/2009) [2011] ZAGPJHC 195); whether the notice is in a well-lit place (see *Naidoo v Birchwood Hotel supra*); as well as the correct use of headings (see *Stearns v Robispec* (*Pty*) *Ltd* (27949/2017) [2020] ZAGPJHC).

The whole notice (understood here to be terms and conditions including the exemption clause, as well as other information, often written on a notice board and usually placed at the entrance to a facility such as a shopping mall) may be very conspicuous while the exemption clause is hidden. In this regard, in *Stearns v Robispec (Pty) Ltd* (*supra*), the court found that although the notice containing the exemption clause was "prominently displayed" (par 31), the "disclaimer should be pertinently brought to the attention of the consumer and not by an inconspicuous clause" (par 32). (It must be noted that this case deals with the use of an exemption clause, but does not consider the application of the CPA to such clause.) Simply put, a supplier may have a large notice board that is very conspicuous in itself, but when the notice board contains a variety of information such as trading hours and that the keys to the safe are not kept on the premises, the exemption clause may easily be hidden inconspicuously in the midst of this information.

However, it is not just the fact (existence) of the exemption clause that must be made conspicuous; section 49(4)(*a*) requires also that the nature (content) and the effect (consequences) of the exemption clause be brought to the attention of the consumer. The wording of the clause or notice must be in a format and manner that enables the consumer to understand and appreciate the content and consequences of such a clause or notice (see also Van Eeden and Barnard *Consumer Protection Law in South Africa* 245). An exemption clause may be very conspicuous without the content or consequences necessarily being so. Ensuring that the existence of the exemption clause is made conspicuous is not the same as ensuring the

content and consequences of the exemption clause are made conspicuous. It is suggested that the court *in casu* was sensitive to this – hence the emphasis on suppliers having to be open, transparent and honest in their dealings with a consumer. As the existence of the clause must be conspicuous to a reasonably alert consumer, so too must the content and consequences thereof be easy to ascertain. It may entail, depending on the context, that the exemption clause must, at a first reading and even a cursory one at that, inform the consumer that certain risks are imposed on the consumer or certain liabilities of the supplier are limited or excluded. This may often be the case. In *Stearns v Robispec (Pty) Ltd* (*supra*), the court was of the view that the exemption clause contained in the notice and which read "Pick n Pay will not be held responsible for any loss, damage or injury sustained on its premises" (par 30) was "simple, unambiguous and makes it plain that the defendant will not be liable for any loss, damage or injury sustained by anyone on its premises" (par 26). In this matter, the content and consequences of the clause were conspicuous; however, the fact or existence of the clause was found to be inconspicuous. On the other hand, the opposite may also be the case. In *Skydive v UPS*, for instance, the court said about the exemption clause in this matter:

> "I am furthermore in agreement with the submission that even the most experienced business person is unlikely to understand the nature and effect of the clauses in question, without explanation." (par 93)

Clearly, the content and consequences of the exemption clause were not conspicuous, clear and transparent. Ensuring that the content and the consequences of an exemption clause are conspicuous must of necessity pertain to the language employed by the supplier in the clause, which makes the interplay between this requirement and the plain and understandable language requirement contained in section 49(3) particularly relevant.

Enabling the consumer to understand the contents and appreciate the consequences of an exemption clause is largely dependent upon the language used – hence the requirement in section 49(3) that the clause or notice must be written in plain and understandable language as provided for in section 22 of the CPA (par 85). (For more on plain language see the discussion by De Stadler *Consumer Law Unlocked* (2013) 104–112, as well as Stoop "Section 22" in Naudé and Eiselen *A Commentary on the Consumer Protection Act* (Revision service 3, 2018) 22-1–22-17. See also Otto "A Consumer's Right to Plain Language and to be Informed in an Official Language That He Understands as Required by the National Credit Act: *Standard Bank of South Africa Ltd v Dlamini* 2013 1 SA 219 (KZD)" 2014 *THRHR* 162–163; Newman "The Application of the Plain and Understandable Language Requirement in Terms of the Consumer Protection Act: Can We Learn From Past Precedent?" 2012 33(3) *Obiter* 637; Louw "Simply Legal" 2011 *De Rebus* 22–25; Gouws "A Consumer's Right to Disclosure and Information: Comments on the Plain Language Provisions of the Consumer Protection Act" 2010 *SA Merc LJ* 79.)

At the heart of the right to plain and understandable language is the right to information and disclosure. Receiving information in plain and understandable language improves consumer awareness, informed decision-making and greater consumer responsibility (Stoop in Naudé and

Eiselen *A Commentary on the Consumer Protection Act* 22–2). The learned author points out that the requirement of plain language promotes procedural fairness in the process of contracting, thereby enabling "consumers to look after their own interests when dealing with suppliers" (Stoop in Naudé and Eiselen *A Commentary on the Consumer Protection Act* 22-2–22-3). Plain language facilitates transparency, which is vital to procedural fairness (Stoop in Naudé and Eiselen *A Commentary on the Consumer Protection Act* 22-3). The critical role of plain language in the context of conveying information to the consumer to make the existence, content and consequences of an exemption clause conspicuous cannot be over-emphasised. Making language plain is not as plain as it may sound and Stoop (in Naudé and Eiselen *A Commentary on the Consumer Protection Act* 22-5–22-10) points out various problematic aspects with the definition of plain language and its implementation. For a notice or document to be in plain language requires, among other things, that a consumer understand the content of a clause and its effect on the consumer. Stoop (in Naudé and Eiselen *A Commentary on the Consumer Protection Act* 22-7) states that "the consumer must at least clearly understand the legal consequences of a document or terms, and its express and implied meaning". *In casu*, the court stated in the context of the plain language requirement that it

> "places an obligation on a supplier to properly, and in practical terms, inform a consumer where the provisions in an agreement as stated in subsections (1)(*a*)–(*d*) would be applicable." (par 85)

It is not immediately clear exactly what the court is referring to when it talks of *where* the relevant provisions would be applicable. It may be that the court is referring to the potential legal consequences that an exemption clause may hold for the consumer and that, as explained above, the consumer must at least be able to understand and appreciate the legal consequences of such a clause.

The argument by the defendant that the plaintiff is an experienced businessman, and thus should have been aware of the exemption clauses in the agreement (par 90), was rejected by the court when it stated that a supplier cannot be exempted from the obligations imposed by the CPA (par 91), which obligations the court found to be "absolute" (par 93). It does not follow, according to the court, that even people experienced in business would necessarily expect this type of clause in a particular context (par 92). As mentioned, the court expressed the view that even an experienced businessperson would have been unlikely to understand the clauses of the agreement in question, without explanation. (The clauses in question were not quoted in the judgment, thus not allowing for a consideration thereof.)

From the above, it is clear that the formal requirements contained in section 49(3) to (5) are to be tested objectively and that the level of education and experience of a consumer will not be considered as factors influencing that determination.

4 2 Section 49 and credit agreements

In a final attempt by the defendant to avoid liability, it was argued that in terms of section 5(2)(*d*) of the CPA, the Act was not applicable to the

agreement as it was in fact a credit agreement, and therefore subject to the provisions of the National Credit Act 34 of 2005 (NCA). Section 5(2)(*d*) of the CPA provides that the CPA does not apply to a transaction if it is a credit agreement in terms of the NCA, "but the goods or services that are the subject of the credit agreement are not excluded from the ambit of this Act". The court held that the agreement between the parties did constitute a credit agreement, but what was at stake here was the supply of a service for consideration, and that service – the transportation of an aircraft engine – was not excluded from the ambit of the CPA in terms of section 5(2)(*d*) (par 97–98).

Section 5(2)(*d*) seems to provide a relatively simple formula for determining whether the CPA or the NCA applies in a context where goods or services are supplied in terms of a credit agreement. However, a number of authors have pointed out that this is not as simple as it may seem. (See for instance Melville and Palmer "The Applicability of the Consumer Protection Act to Credit Agreements 2010 *SA Merc LJ* 272; Stoop "The Overlap Between the Consumer Protection Act 68 of 2008 and the National Credit Act 34 of 2005: A Comparison with Australian Law" 2014 *THRHR* 135; De Stadler *Consumer Law Unlocked* 14; Otto, Van Heerden and Barnard "Redress in Terms of the National Credit Act and the Consumer Protection Act for Defective Goods Sold and Financed in Terms of an Instalment Agreement" 2014 *SA Merc LJ* 247; De Stadler "Section 5" in Naudé and Eiselen *Commentary on the Consumer Protection Act* (Original service, 2014) 5–32).

In the specific context of the application of section 49, De Stadler in Naudé and Eiselen *Commentary on the Consumer Protection Act* (Revision service 1, 2016) (5–33) submits that Part G of the CPA, which is the part providing for the consumer's right to fair, just and reasonable terms and conditions and includes section 49, does not apply to credit agreements. Melville and Palmer also suggest (2010 *SA Merc LJ* 274–275) that section 49 of the CPA would relate to the agreement for the supply of goods or services and would not apply to a credit agreement. The learned authors argue (2010 *SA Merc LJ* 274 and 278) that if the credit agreement and the agreement for the supply of goods or services (for eg., a sale agreement) are contained in separate agreements then the NCA and CPA may apply to the two agreements respectively – the NCA to the credit agreement and the CPA to the agreement of sale (see also Stoop 2014 *THRHR* 136). But what if there is one document containing both? Melville and Palmer (2010 *SA Merc LJ* 274) suggest that where the two agreements are contained in the same document, then the NCA would apply.

It is not clear why (only) the NCA should apply where a single document contains both credit agreement and agreement of purchase and sale (or agreement for the provision of a service, as *in casu*). Melville and Palmer (2010 *SA Merc LJ* 274) themselves suggest that "[t]o identify those CPA provisions that do not apply to transactions falling within the NCA, one must start by deciding whether a provision relates to the transaction itself or to the goods and services supplied in terms thereof. The NCA applies to the former, and the CPA applies to the latter" (2010 *SA Merc LJ* 274). Such an approach, it is submitted, will allow for an assessment on whether a specific

clause in the agreement (and when applied in a specific context) is governed by the CPA or the NCA.

It is submitted that this is what transpired *in casu*. The court considered the exemption clause and the context within which it was sought to be applied and found that it related to the service the parties had contracted for – the delivery of the engine – and not to the credit agreement of which it formed part. The defendant tried to exempt itself from any and all liability that might arise from the loss, damage or non-delivery of the goods it undertook to transport and deliver to the plaintiff while they were not in the actual possession or control of the defendant (par 11), or if in the actual possession or control of the defendant, then liability should only arise where the defendant were found to have been grossly negligent (par 12). It seems clear that these provisions of the agreement pertain to the actual service that was contracted for (in the written email exchanges) and had nothing to do with the credit agreement (contained in the credit application form signed by the plaintiff). It is submitted that the court *in casu* correctly found that the fact that the clauses exempting the defendant of liability were contained in a document titled “credit application” or “credit agreement” should not change the fact that they related to the service contracted for and that the CPA should therefore find application.

The necessary consequence of this is that an agreement may have to be analysed on a clause-by-clause basis if it comprises both a credit agreement and an agreement for the sale of goods or the provision of a service. Arguably, this may mean that a particular clause, such as an exemption clause, in a given contract and context, may be both subject to and not subject to the CPA (particularly s 49), depending on the end to which the supplier is relying on the exemption clause. If the exemption clause is relied upon to exclude liability for any loss or damage resulting from the performance or non-performance of the service, as in the present case, the CPA will apply and the clause can be tested against the requirements of section 49. However, the clause may also be relied upon to exclude liability on the part of the credit provider for losses or damages resulting for the credit receiver from the manner in which the credit agreement was administered by the credit provider. In such a case, the CPA will not apply and Chapter 5 of the NCA will regulate the situation.

The pragmatic approach of the court *in casu*, it is submitted, may provide greater clarity on how to address the uncertainty of whether the CPA finds application in a situation involving a credit agreement.

5 Concluding remarks

In *Skydive v UPS*, the court had the opportunity to consider the interpretation and application of the formal incorporation requirements contained in section 49 of the CPA to exemption clauses. The widespread use of these clauses in consumer agreements makes the courts’ interpretation and application of these provisions greatly significant for suppliers and consumers alike.

In *Skydive v UPS*, the court explained that the aim of section 49 is to ensure that consumers are provided with improved access to quality information, which in turn will allow consumers to make informed choices,

thus avoiding a situation where consumers are caught unawares by the existence, content or consequences of an exemption clause, and which in turn may lead to harsh consequences for the consumer. To give effect to this end, section 49(4) of the CPA provides that the fact, nature and effect of an exemption clause must be brought to the attention of a consumer in a conspicuous manner and form. What will be considered conspicuous will depend on the facts of the case and one must remember that regard must be had to the particular circumstances prevailing at the time of the conclusion of the agreement. In the final analysis, it will be objectively determined whether the consumer was provided with enough information so as to be aware of the existence of the exemption clause and enough information to allow the consumer to understand the content and appreciate the consequences of the exemption clause. The exemption clause itself, but also its content and consequences, must be open and transparent – that is, conspicuous – to the consumer. Although the clause may itself be conspicuous, the content and consequences of the exemption clause may not be – and *vice versa*. Making the content and consequences of the exemption clause transparent will depend largely on the effective use of plain and understandable language.

As judicial guidance increasingly assists a better understanding of how to use exemption clauses to ensure compliance with the requirements of the CPA, suppliers will learn and adapt their practices to ensure that their use of exemption clauses are (almost) immune to legal challenge. This will eventually result in the consumer again being in a position where he or she has little protection against the negligence of the supplier. For instance, if all supermarkets comply with the requirements of section 49 when using exemption clauses, consumers will be aware of these clauses and will even understand its content and appreciate its consequences, but will have no choice but to accept these clauses. The consumer could then be said to be informed but not protected. The grey-listing of certain contract clauses may provide some comfort to consumers, in that the onus to prove that the use of such a clause is fair in terms of section 48 of the CPA rests on the supplier. In particular, regulation 44(3)(a) of the Regulations to the CPA provides that clauses exempting suppliers from liability for death or personal injury of consumers are presumed unfair; it would be very interesting to see under what circumstances using an exemption clause to exclude liability for death or personal injury would be fair. In the meantime, could it be that ignorance is bliss?

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THE CONTEST BETWEEN RELIGIOUS INTERESTS AND BUSINESS INTERESTS

TFD Network Africa (Pty) Ltd v Faris (2019) 40 *ILJ* 326 (LAC)

1 Introduction

The right to freedom of religion is one of the fundamental human rights. This is evident from several sections of the Constitution of the Republic of South Africa, 1996 (the Constitution), including sections 9, 15 and 31. Section 9(4) prohibits unfair discrimination (whether direct or indirect) against anyone on one or more of the grounds listed in section 9(3), which includes religion. Section 15(1) states that everyone has the right to freedom of conscience, religion, thought, belief and opinion, while section 31(1)(*a*) provides that persons belonging to a religious community may not be denied the right to practise their religion with other members of the community.

In line with the Constitution, labour legislation such as the Labour Relations Act 66 of 1995 (LRA) and the Employment Equity Act 55 of 1998 (EEA) also protects this right. Section 187(1)(*f*) of the LRA provides that if an employee is discriminated against and is dismissed based on religion, among other grounds, such a dismissal will be deemed to be an automatically unfair dismissal. Section 6(1) of the EEA prohibits unfair discrimination, whether direct or indirect, in any employment policy or practice based on prohibited grounds such as religion. It is evident from all the above provisions that the right to freedom of religion is vital to people's lives, including employees' lives (see Bilchitz and De Freitas "Introduction: The Right to Freedom of Religion in South Africa and Related Challenges" 2012 28 *SAJHR* 141).

Although an employee has the right to practise religion, he or she also has the common-law duty to render services or to put his or her labour potential at the disposal of the employer as agreed in terms of the contract of employment – except during the employee's annual leave, sick leave and maternity leave. (see Garbers, Le Roux, Strydom, Basson, Christianson, Germishuys-Burchell *The New Essential Labour Law Handbook* 7ed (2019) 35; *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A) 61C; Rycroft "Accommodating Religious or Cultural Beliefs in the Workplace: *Kiviets Kroon Country Estate v CCMA*; *Dlamini v Green Four Security*; *POPCRU v Department of Correctional Services*" 2011 *SA Merc LJ* 109). An employee may therefore be in breach of this duty if he or she refuses to work or deserts his or her employment or absconds from his or her employment or is absent from work without permission. In addition to the above duty, employees have a duty to serve the employer's interests and to act in good faith (Grogan *Workplace Law* 12ed (2017) 93; Mischke "Acting in Good

Faith: Courts Focus on Employee's Fiduciary Duty to the Employer" 2004 14(1) *CLL* 1).

Often, employees' right to freedom of religion collides with their duty to render services and to serve the employer's interests; employees present various reasons related to their religious practices for their failure to render services (Rycroft 2011 *SA Merc LJ* 106–113). As a result, employers are regularly required to be lenient and make efforts to accommodate employees' religious beliefs in the workplace. At times, this becomes a burden to employers as they have to accommodate employees with diverse individual religious interests, but also ensure that their businesses remain operational (McGregor "Employees' Right to Freedom of Religion Versus Employers' Commercial Interests: A Balancing Act in Favor of Religious Diversity: A Decade of Cases" 2013 25 *SA Merc LJ* 223). In a recent Labour Appeal Court (LAC) case of *TFD Network Africa (Pty) Ltd v Faris* ((2019) 40 *ILJ* 326 (LAC)) (*TFD Network Africa v Faris*), the employee could not work on Saturdays because her religion did not allow her to do so. Ultimately, the employer dismissed her based on incapacity. However, the court found that the dismissal was actually automatically unfair because it was based on religion. Religion remains one of the most contentious and problematic areas for employees and employers to deal with in the workplace.

The discussion that follows evaluates the court's finding in view of relevant constitutional provisions, labour law legislation and common law. It further considers the position under American law regarding religion and reasonable accommodation in the workplace.

2 Facts

Deidre Faris (Faris) was employed by TFD Network Africa (Pty) Ltd (TFD) in 2012 as part of its graduate management training programme. When Faris was interviewed telephonically and on several other occasions, she informed TFD that she was a Seventh-Day Adventist and therefore she could not work on the holy Sabbath, which falls on a Saturday (par 3 and 5). However, TFD maintained that, during an on-site interview, Faris was told that she would be required to work over weekends as it was an operational requirement of the job, to which she indicated that she had no problem. Clause 3.3 of the contract of employment signed by Faris stated as follows:

> "By signing this contract, you undertake and agree to perform such overtime duties as may be reasonably required of you from time to time, provided this does not exceed the limitations laid down in relevant legislation." (par 7)

In terms of her religion, she was required to reserve Saturdays for her religious practices when followers of the religion are not permitted to work. TFD was involved in logistics and warehousing services and it had to conduct monthly stocktaking on weekends. As a result, a roster was drawn up in terms of which TFD managers had to attend monthly stocktakings. However, Faris never attended such stocktakings for religious reasons. Faris was called to a meeting regarding her failure to work on Saturdays, where she confirmed that she could not take part in stocktaking on Saturdays as she was prohibited in terms of her religion from working on Saturdays before sunset. She suggested that she could instead work on Sundays (par 47) but

TFD stated that it could not make an exception for Faris. It then continued to institute proceedings against her based on incapacity, which resulted in her dismissal.

Faris referred the matter to the Commission for Conciliation, Mediation and Arbitration (CCMA) and after receiving a certificate of non-resolution, referred the matter to the Labour Court, contending that TFD discriminated against her on religious grounds. The Labour Court found that Faris's dismissal was automatically unfair and granted her 12 months' compensation as well as R60 000 for unfair discrimination. TFD appealed the finding, arguing that Faris was not dismissed because of her religion, but because she could not work on Saturdays, which was an inherent requirement of her job. The LAC, however, also found that Faris was dismissed because of her religion, as there was a direct link between her inability to work on Saturdays and her religious convictions. The court considered the fairness of the discrimination – that is, whether it was connected to a legitimate purpose and whether it impacted unduly on Faris's dignity. In this regard, the court drew a distinction between *TFD Network Africa v Faris* (*supra*) and *FAWU v Rainbow Chicken Farms* ((2000) 21 *ILJ* 615 (LC)), which involved Muslims who refused to work on Eid. The court found that the company's insistence that employees work on Eid had not amounted to unfair discrimination because had the employer allowed affected employees to take leave, the factory would have closed. Regarding legitimate purpose, the court in *TFD Networks v Faris* (*supra*) held that it was possible for TFD to accommodate Faris without imposing undue hardship or operational difficulty. In relation to Faris's dignity, the court stated:

> "[W]ithout question, an employment practice that penalizes an employee for practicing her religion is a palpable invasion of her dignity in that it supposes that her religion is not worthy of protection or respect. It is a form of intolerant compulsion to yield to an instruction at odds with sincerely held beliefs on pain of losing employment. The employee is forced to make an unenviable choice between conscience and livelihood. In such a situation, the dictates of fairness and our constitutional values oblige the employer to exert considerable effort in seeking reasonable accommodation." (par 45)

The LAC therefore found that the employer had an obligation to reasonably accommodate an employee's religious freedom unless it imposed undue hardship on the employer; it upheld the award of 12 months' compensation but discarded the R60 000 that the Labour Court awarded on the basis that it was unduly onerous.

3 Protection of the right to freedom of religion in South Africa

3 1 Religion under the Constitution

As stated in the introduction, the right to freedom of religion is protected and referred to in a number of constitutional provisions. Everyone, including employees, has this right and would generally want to enjoy and practise it freely. Courts in general are reluctant to become involved in doctrinal disputes of a religious character (see *Taylor v Kurtstag NO* 2005 (1) SA 362

(W) par 39). In *Prince v President of the Law Society of the Cape of Good Hope* (2001 (2) SA 388 (CC) par 97), it was stated that it is undesirable for courts to enter into debates about whether a particular practice is central to a religion, unless there is a genuine dispute as to the centrality of the practice.

In terms of section 39 of the Constitution, when interpreting the Bill of Rights, it is required that international law, among others, be considered. With this in view, it is appropriate to consider article 1 of the United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, which protects the right to "thought, conscience, and religion or belief", however, without offering any definition of the term "religion". The right to freedom of religion covers, among other things, the right to have a belief, to express that belief publicly and to show or display the belief through, among others, worship and practice (see Currie and De Waal *The Bill of Rights Handbook* 5ed (2005) 388). In *S v Lawrence* ((1997) 4 SA 1176 CC), Chaskalson borrowed the definition of the concept of religion from the Canadian Courts (see *R v Big M Drug Mart Ltd* 1985 1 SCR 295) and stated:

> "The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal and the right to manifest religious beliefs by worship and practice or by teaching and dissemination." (par 92)

It is evident from this definition that freedom of religion is a belief of a personal nature that an individual has the right to exercise freely. Although employees are free to exercise their right to freedom of religion, it must be noted that, just like any other right, this right is not absolute as it can be limited in terms of section 36 of the Constitution. Therefore, each case involving this right should be considered on its merits.

3 2 Religion under the EEA

3 2 1 Discrimination based on religion

The purpose of the EEA is to achieve equity in the workplace and one of its primary means of achieving this is through the elimination of unfair discrimination (s 2 of the EEA). Section 3 of the EEA states that this Act must be interpreted in compliance with the Constitution, so as to give effect to the purpose of the Act, taking into account any relevant code of good practice issued in terms of the Act or any other employment law, and in compliance with South Africa's international law obligations – in particular those contained in the International Labour Organisation (ILO) Convention 111 concerning Discrimination in Respect of Employment and Occupation, 1958.

Section 6(1) of the EEA prohibits unfair discrimination, whether direct or indirect, in any employment policy or practice on grounds such as religion. At times, employers introduce and implement policies and practices that have an effect on employees' right to freedom of religion. According to section 1 of the EEA, an "employment policy or practice" includes, among others, recruitment procedures, advertising and selection criteria, appointments and

appointments processes, job classification and grading, job assignments, the working environment and facilities, and dismissal (see also *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd* (1998) 19 *ILJ* 285)). As is evident from this definition, the list of employment policies or practices includes dismissal; section 10(1) of the EEA provides that disputes about discriminatory dismissal should be dealt with in terms of Chapter VIII of the LRA. In relation thereto, section 187(1) of the LRA declares a dismissal based on any of the listed grounds to be automatically unfair.

It must be noted that at the heart of unfair discrimination is differentiation. Differentiation in the employment context means that an employer treats employees or applicants for employment differently or it uses policies or practices that exclude certain groups of employees. However, differentiation cannot be equated with discrimination. Differentiation only becomes discrimination when it is made for unacceptable reasons (see Garbers *et al The New Essential Labour Law Handbook* 354). These reasons include, but are not limited to, those listed under section 6(1) of the EEA. Not all acts of discrimination will be regarded as unfair since section 6(2) of the EEA provides that it is not unfair discrimination to take affirmative action measures consistent with the Act or to distinguish, exclude or prefer any person on the basis of an inherent requirement of a job. The latter exception is relevant to this discussion and is discussed in detail later.

3 2 2 Reasonable accommodation

In line with the above, section 15(2)(*c*) of the EEA requires designated employers to make attempts to reasonably accommodate the needs of their employees. Those needs include those related to the employees' religion. It must however be noted that in accommodating an employee, the employer must not incur undue hardship. "Reasonable accommodation" is defined as "any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or participate or advance in employment in the workforce of a designated employer" (s 1 of the EEA). Employers may therefore be required to reasonably accommodate employees' religious beliefs and practices in order for their policies or practices not to be seen as unfair discrimination against such employees.

The issue of reasonable accommodation was further emphasised in *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi* ([2012] 11 BLLR 1099 (LAC)), where the following was stated:

> "It would be disingenuous of anybody to deny that our society is characterised by a diversity of cultures, traditions and beliefs. That being the case, there will always be instances where these diverse cultural and traditional beliefs and practices create challenges within our society, the workplace being no exception. The Constitution of the country itself recognises these rights and practices. It must be recognised that some of these cultural beliefs and practices are strongly held by those who subscribe to them and regard them as part of their lives. Those who do not subscribe to the others' cultural beliefs should not trivialise them … What is required is reasonable accommodation of each other to ensure harmony and to achieve a united society." (par 26)

Furthermore, in *MEC for Education, Kwazulu-Natal v Pillay* (2008 (1) SA 474 (CC) par 73), the court stated that reasonable accommodation requires that an employer must take positive measures, even if it means incurring additional hardship or expenses, to ensure that all employees enjoy their right to equality. It was held in *FAWU v Rainbow Chicken Farms* (*supra*) that a refusal to allow Muslim employees to take a day off for their religious holidays would only be unfair if some employees were allowed to do so and others were not. Furthermore, if the absence of these employees (Muslim butchers) would disrupt the employer's business, the employer was entitled to insist that they remain at work for operational reasons. In *SA Clothing and Textile Workers Union v Berg River Textiles – A Division of Seardel Group Trading (Pty) Ltd* ((2012) 33 *ILJ* 972 (LC)), the Labour Court said:

> "[I]n particular, the employer must establish that it has taken reasonable steps to accommodate the employee's religious convictions. Ultimately the principle of proportionality must be applied. Thus, an employer may not insist on the employee obeying a workplace rule where that refusal would have little or no consequence to the business." (par 38)

From the above cases, it is evident that employers are expected to make an effort to accommodate their employees for religious reasons for as long as they do not incur unreasonable hardship.

3 3 Religion under the LRA: automatically unfair dismissal

In terms of section 185 of the LRA, employees have the right not to be unfairly dismissed. In the case of dismissal, it is upon the employee to show that there has indeed been a dismissal (see *De Beer v SA Export Connection CC t/a Global Paws* [2008] 1 BLLR 36 (LC) par 13; *Atkins v Datacentrix (Pty) Ltd* [2010] 4 BLLR 351 (LC) par 15) and thereafter it is upon the employer to prove that the dismissal was fair. However, the approach is different in cases of an automatically unfair dismissal.

The concept of "automatically unfair dismissal" originates from article 5 of the ILO Convention 158 of 1982 on Termination of Employment. Under the LRA, section 187 provides for this type of dismissal. If an employee is dismissed for one of the reasons contained in section 187 of the LRA, it means there has been an infringement of a basic human right and the dismissal will be regarded as automatically unfair (see Garbers *et al* The New *Essential Labour Law Handbook* 151). Through this concept, several constitutional rights (such as the right to equality (s 9), the right to dignity (s 10) and the right to fair labour practices (s 23)) are protected. In terms of section 187(1)(*f*) of the LRA, it is automatically unfair to dismiss an employee if the reason for the dismissal is that the employer has discriminated unfairly on any one of or more of the grounds listed in the section, which includes religion (see also *Department of Correctional Services v POPCRU* [2013] 7 BLLR 639 (SCA) par 25). Unlike other forms of dismissal, in the case of an automatically unfair dismissal, the employer cannot defend termination of the employment contract by proving that it was for a fair reason.

An employee who has been dismissed on a prohibited ground may claim unfair discrimination in terms of the EEA in addition to pursuing an

automatically unfair dismissal claim (see *Gauteng Shared Services Centre v Ditsamai* [2012] 4 BLLR 328 (LAC); *Atkins v Datacentrix (Pty) Ltd supra*); the applicable principles are generally the same in both cases (see also Du Toit, Godfrey, Cooper, Giles, Cohen, Conradie and Steenkamp *Labour Relations Law* 6ed (2015) 675). In *SACTWU v Berg River Textiles (supra)*, employees did not agree with a new shift that was introduced because of a downturn in trade. They wanted to strike in order to show their resistance to the new system. Before the strike, Williams informed the employer that he could not work on Sundays owing to his religion (Apostolic Faith Mission), which prohibited work on Sundays. He also lodged a grievance in this regard. Mr Williams was later dismissed with others who took part in an unprotected strike. While others pleaded guilty of misconduct, Mr Williams did not plead guilty to misconduct on the basis that his right to freedom of religion entitled him not to work on Sundays (par 23). The Labour Court held that all the other employees were dismissed fairly, but that Mr Williams's dismissal was automatically unfair in terms of section 187(1)(*f*) of the LRA. In *Dlamini v Green Four Security* ((2006) 27 *ILJ* 2098 (LC)), members of the Baptised Nazareth Church who were security guards were dismissed because of their refusal to shave or trim their beards as it was against their religious convictions. They argued that their dismissal was automatically unfair because they were discriminated against on religious grounds. The court found that the security guards were selective about the religious rules they chose to obey and held that the employer had proved that the rule requiring them to be clean shaven served a clear purpose and was seen as an inherent requirement of a security officer's job.

It is imperative, when establishing whether the reason for a dismissal amounts to unfair discrimination, to determine whether the ground for discrimination was "arbitrary" or otherwise unfair on a listed or unlisted ground. Section 187(2) of the LRA, however, states that despite subsection 1(*f*), a dismissal may be fair if the reason is based on an inherent requirement of the particular job (see also *Woolworths (Pty) Ltd v Whitehead* [2000] 6 BLLR 640 (LAC) par 41) or a dismissal is based on age if the employee has reached the normal or agreed retirement age for persons employed in that capacity (see also *Schmahmann v Concept Communications Natal (Pty) Ltd* 1997 *ILJ* 1333 (LC); *Rubenstein v Prices Daelite (Pty) Ltd* 2002 *ILJ* 528 (LC) pars 19-28). The defence is an exception to the general rule on automatically unfair dismissals.

3 4 Exception to the rule: Inherent requirements of a job under the EEA and the LRA

The inherent requirements of a job appear as an exception to the rule against unfair discrimination under both the EEA (s 6(2)) and the LRA (s 187(1)(*f*)). Neither the EEA nor the LRA define the concept "inherent requirements of a job". "Inherent" has been interpreted by Cooper (see Cooper "The Boundaries of Equality in Labour Law" 2004 25 *ILJ* 813) to mean:

> "existing in something as a permanent attribute or quality; forming an element, especially an essential element, of something, intrinsic, essential' and as an

> 'indispensable attribute' which 'must relate in an inescapable way to the performing of the job". (835)

According to Grogan (see Grogan *Workplace Law* 104; Grogan *Employment Rights* 3ed (2019) 258), the word "inherent" suggests that possession of a particular personal characteristic should be necessary for effectively carrying out the duties attached to a particular position. In *IMATU v City of Cape Town* ([2005] 11 BLLR 1084 (LC) par 102), it was indicated that this concept means "existing in something, a permanent attribute or quality; forming an element, especially an essential element, of something". In terms of article 2 of the ILO Convention 111, "any distinction, exclusion or preference in respect of a particular job based on an inherent requirement thereof shall not be deemed to be discrimination". It is therefore important that the inherent requirements of a job must relate to the job itself and not the individual employee, in order to qualify as such (see also *Dlamini v Green Four Security supra* par 52). These are the requirements without which the job cannot be done (see Van Niekerk, Smit, Christianson, McGregor and Van Eck *Law@work* 4ed (2017) 285–286). It is upon the employer to establish that some inherent characteristic is important for the effective performance of the obligations that attach to a specific job. In *Department of Correctional Services v POPCRU* (*supra*), the court considered the inherent-requirement-of-the-job defence where prison officials who wore dreadlocks refused to comply with the employer's rules relating to hairstyles. The court found:

> "no evidence was adduced to prove that the respondents' hair, worn over many years before they were ordered to shave it, detracted in any way from the performance of their duties or rendered them vulnerable to manipulation and corruption. Therefore, it was not established that short hair, not worn in dreadlocks, was an inherent requirement of their jobs. A policy is not justified if it restricts a practice of religious belief – and by necessary extension, a cultural belief – that does not affect an employee's ability to perform his duties, nor jeopardise the safety of the public or other employees, nor cause undue hardship to the employer in a practical sense." (par 25)

In *Association of Professional Teachers v Minister of Education* ((1995) 16 *ILJ* 1048 (IC) 1081B), the Industrial Court held that a differentiation based on the inherent requirements of a job should only be allowed in very limited circumstances and should not be allowed where the decision to differentiate is based on subconscious perceptions. In *Ntai v SAB Ltd* ([2001] 2 BLLR 186 (LC) par 88), a stricter test was adopted; the court rejected "mere" commercial rationale as a criterion and adopted a test more akin to business necessity (see *Whitehead v Woolworths (Pty) Ltd* [1999] 8 BLLR 862 (LC) par 30; Du Toit *et al Labour Relations Law* 694).

The exception "inherent requirements of the job" will therefore be accepted if a requirement is an essential or permanent element of the job and does not relate to an individual employee.

4 Protection of the right to freedom of religion under American Law: The Civil Rights Act of 1964

The Civil Rights Act of 1964 prohibits discrimination based on race, colour, religion, sex or national origin. Title VII of the Civil Rights Act of 1964, in particular, prohibits employers from discriminating against individuals based on religion in hiring, firing and in other terms and conditions of employment (see also *EEOC v Abercrombie & Fitch Stores, Inc*, 135 S. Ct. 2033 (U.S. 2015). According to Title VII, the term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business. Title VII is applicable to employers who have 15 or more employees for each working day. These employers are required to reasonably accommodate the religious practices of an employee or prospective employee, unless doing so would create an undue hardship upon the employer. Employees may therefore not be treated more or less favorably because of their religion and may not be required to participate or refrain from participating in a religious activity as a condition of employment. Reasonable accommodation may include the following: shift swaps between employees, flexible scheduling, and transfers to other positions within the company. An employer who claims that accommodation is not feasible because it would result in undue hardship must prove undue hardship and its effect on the business. However, employers are not expected to provide the specific accommodation requested by employees, as long as they have reasonably accommodated the employee (see *Ansonia Board of Education v Philbrook*, 479 U.S. 60 (1986)). With regard to undue hardship, the United States Supreme Court in *Trans World Airlines, Inc v Hardison* (432 U.S. 63 (1977)) held that the employer need not incur more than minimal costs in order to accommodate an employee's religious practices. Among other considerations, an accommodation may cause undue hardship if it is costly, compromises workplace safety, decreases workplace efficiency, or infringes on the rights of other employees.

Under American law, an employer is permitted to discriminate against an employee based on a "protected trait" where the trait is "a *bona fide* occupational qualification, reasonably necessary to the normal operation of that particular business or enterprise". The *bona fide* occupational qualification must, however, meet three requirements – that is, there must be a direct relationship between the protected trait and the ability to perform the duties; the *bona fide* qualification must relate to the essence or central mission of the employer's business and there must be no less-restrictive or reasonable alternative (see *United Automobile Workers v Johnson Controls, Inc*, 499 U.S. 187 (1991)).

5 Employee's duty to tender services and the duty of good faith

Under common law, an employee has a duty to tender his or her services (see *Smit v Workmen's Compensation Commissioner supra*). An employee must make his or her services personally available to the employer. He or she is also required to render his or her services in a satisfactory manner and in accordance with contractual provisions (see *NUM v Libanon Gold Mining Co Ltd* (1994) 15 *ILJ* 585 (LAC)). An employee who refuses to work or who deserts his or her employment or who absconds from his or her employment or is absent without permission will be in breach of this duty (see Garbers *et al* The New *Essential Labour Law Handbook* 35). Such conduct may also amount to misconduct, which is one of the grounds for the employer to dismiss the employee.

The relationship between employer and employee is one of trust and confidence (see *Council for Scientific & Industrial Research v Fijen* (1996) 17 *ILJ* 18 (A) par 26D). The employee owes the employer a fiduciary duty. The duty of good faith requires that an employee should always give priority to the interests of his or her employer (see *Nel v Ndaba* 1999 *ILJ* 2666 (LC) par 25). Therefore, his or her conduct when tendering services should not result in his or her private interests conflicting with the execution of his or her duties or interests of the employer (see *IMATU v Rustenburg Transitional Council* [1999] 12 BLLR 1299 (LC) par 7).

6 Evaluation of the court's finding

As a citizen of South Africa, Faris had a right to exercise her constitutionally protected right to freedom of religion without being discriminated against. She had a right to enjoy and practise her religion freely, including to display her belief through worship and practice (see Currie and De Waal *The Bill of Rights Handbook* 388; article 1 of the United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief). Faris had a right to entertain her religious beliefs and declare them openly, without fear of reprisal (see *S v Lawrence supra*). It must however be noted that Faris's right to freedom of religion is not absolute as it can be limited in terms of section 36 of the Constitution, as long as the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

Faris also had protection in terms of section 6(1) of the EEA, which prohibits direct or indirect unfair discrimination based on religion, among other grounds, in any employment policy or practice. TFD had an employment policy or practice that required employees, including Faris, to attend monthly stocktaking. "Employment policy or practice" includes job assignments and dismissal (s 1 of the EEA; *Leonard Dingler Employee Representative Council v Leonard Dingler supra*). Faris failed to attend to a job assignment in the form of stocktaking for religious reasons and practices. TFD's employment policy or practice therefore discriminated against Faris based on her religion; if she attended the stocktaking, she would not be able to practise her religion. Faris was a Seventh-Day Adventist and could not

work on the Sabbath, which is a Saturday, whereas TFD required employees to work on Saturdays. Based on her religion, Saturdays had to be reserved for her religious practices.

Furthermore, that Faris was dismissed for her failure to work on Saturdays meant that she was treated differently based on the employment policy or practice. The differentiation was unfortunately based on religion, which is one of the listed prohibited grounds (see s 6(1) of the EEA; Garbers *et al The New Essential Labour Law Handbook* 346) and was therefore regarded as unfair discrimination. After the matter was referred to the Labour Court, it found that the dismissal was automatically unfair based on religion as provided for in terms of section 187(1)(*f*) of the LRA. On appeal, TFD argued that Faris was not dismissed based on religion but because she could not work on Saturdays, which was an inherent requirement of the job. The LAC, however, found that there was a link between her inability to work on Saturday and her religious practices, and therefore that the dismissal was based on religion.

Both the EEA and the LRA provide for the "inherent requirements of a job" to be one of the exceptions in unfair discrimination cases. However, it must be noted that, to qualify as such, the requirement (among others) must be a permanent attribute or quality of the job and if it is so, such distinction or exclusion shall not be regarded as discrimination (see article 2 of the ILO Convention 111; *IMATU v City of Cape Town supra*). This should be allowed only when it is not based on subconscious perceptions (see *Association of Professional Teachers v Minister of Education supra*) but it is necessary for the effective carrying out of the duties (see Grogan *Workplace Law* 104) and is a business necessity (see *Ntai v SAB supra; Whitehead v Woolworths (Pty) Ltd supra*). Nevertheless, section 15(2)(*c*) of the EEA requires employers to make attempts to reasonably accommodate the needs of employees (s 15(2)(*c*); *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi supra*). However, in doing so, employers must not incur undue hardship. This includes the modification or adjustment of a job to enable an employee to have access to or participate or advance in employment. The employer should take positive steps, even if it means incurring additional hardship or expenses, to ensure that employees enjoy their right to equality (see *MEC for Education, Kwazulu-Natal v Pillay supra*). When she was employed, Faris informed TFD that she was a Seventh-Day Adventist and that she would not be able to work on Saturdays as it is regarded as the holy Sabbath. In addition, at the meeting that was called to discuss her failure to work on Saturdays, she confirmed that she could not take part in stocktaking on Saturdays. She even suggested that she could instead work on Sundays, but TFD stated that it could not make an exception for her. It is submitted that TFD failed to make any reasonable effort to accommodate Faris.

Similar to the South African position, under Title VII of the Civil Rights Act, 1964 employees may not be treated more or less favourably because of their religion and may not be required to refrain from participating in a religious activity. Nonetheless, the employer also need not incur more than minimal costs in order to accommodate the employee (see *Trans World Airlines, Inc v Hardison supra*). If a "protected trait" is used as a defence, there must be a direct relationship between the protected trait and the ability

to perform duties. The requirement must relate to the essence or central mission of the employer's business and there must be no less-restrictive or reasonable alternative (see *United Automobile Workers v Johnson Controls supra*). This is similar to the "inherent requirements of a job" exception under South African law.

If Faris's dismissal was based on religion, it qualified as an automatically unfair dismissal in terms of section 187(1)(*f*) of the LRA (see also article 5 of the ILO Convention 158 of 1982 on Termination of Employment; *Department of Correctional Services v POPCRU supra*). TFD could therefore not defend the dismissal by proving that it was fair unless it was indeed based on the inherent requirements of the job. These requirements must relate to the job itself and not to the employee (see *Dlamini v Green Four Security supra*). However, in Faris's case, it was her religion that was an impediment to her working on Saturdays and therefore the discrimination and dismissal were directly linked to the practice of her religion and not to her ability to perform her duties based on the nature of her job. For Faris, there was an alternative to working on Saturday as she offered to work on Sunday, but TFD refused to make reasonable concessions to accommodate her. It must however be stated that, despite her right to freedom of religion, Faris still had a duty to render services or to make her services available to TFD (see *Smit v Workmen's Compensation Commissioner supra*). Faris had to make efforts to give priority to the interests of TFD (see *Nel v Ndaba supra*).

Indeed, Faris did this by offering to work on Sundays instead of working on Saturdays, which TFD refused. With this in mind, it is submitted that the court was correct in finding that Faris's dismissal was automatically unfair based on her religion.

7 Conclusion

The fact that employees have a right to freedom of religion does not mean that they can neglect their duties to the employer or always put their religious interests above business interests. The right to freedom of religion can be limited and should be exercised in view of other rights and duties such as the duty by the employee to tender services. There must therefore be a balance between the right to freedom of religion and employees' duty to tender services and to act in the interest of the employer. A contract of employment is reciprocal in nature and therefore each party must fulfil its duties in the employment relationship. Employers should however also make efforts to reasonably accommodate religious needs of employees (s 15(2)(*c*) of the EEA), to enable them to perform their duties, as long as the employer does not as a result incur undue hardship (see *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi supra*; *MEC for Education, Kwazulu-Natal v Pillay supra; SA Clothing and Textile Workers Union v Berg River Textiles supra*). It is imperative for employers to offer reasonable accommodation, even if they do not provide the specific accommodation requested by the employee (see *Ansonia Board of Education v Philbrook supra*). Such a concession by the employer can improve the morale of employees and assist the employer to retain hard-working employees who are staunch in their religious beliefs and practices.

Employees should also from the beginning of an employment relationship inform the employer about their religious commitments and practices at that time or as soon as they arise in order to avoid unnecessary conflict. In *Lewis v Media 24 Ltd* ((2010) 31 *ILJ* 2416 (LC)), the applicant (who was a Jewish male) was required to work long and late hours and this caused him to be unable to observe the Sabbath. The employee's contract of employment was as a result terminated because of his absence from work without permission. He alleged that he had been unfairly discriminated against based on religious, cultural and political beliefs. The court found that, when appointed, the employee did not declare to his employer that he was a Jew and neither did he object to work on the Sabbath. The application was accordingly dismissed.

Employers should also avoid hiding behind the "inherent requirements of the job" exception provided for by the EEA and the LRA when dismissing employees based on religion, unless it is relevant and necessary. A refusal by the employer to accommodate an employee based on religion should be based on actual facts. In this constitutional dispensation, employers have an obligation to ensure that employees are treated with respect and dignity regardless of their religion.

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DURESS BY INDIRECT CIRCUMSTANCES IN ENGLISH AND SOUTH AFRICAN LAW: A COMPARISON

R v Brandford
[2017] 2 All ER 43; [2016] EWCA Crim 1794

1 Introduction

While duress by means of direct threats can provide a defence in criminal law, the legal question is whether threats conveyed indirectly are capable of providing a valid defence in criminal law. More specifically, can indirect threats then also be used as a means of defending another party's interests that are under attack? There appears to be both academic support and precedent to answer this question in the affirmative (*S v Pretorius* 1975 2 SA 85 (SWA); Burchell *Principles of Criminal Law* (2016) 279). In the *Pretorius* case, the court made it clear that while *mens rea* is not relevant to the enquiry, the defence must be "confined within the strictest and narrowest limits because of the danger attendant upon allowing a plea of necessity to excuse criminal acts" (289). These limits include that the threat must have been imminent and, more specifically, it must have been necessary for the accused to avert the danger by any reasonable means (285). This is the legal question that arose in *R v Brandford* ([2017] 2 All ER 43; [2016] EWCA Crim 1794), and which will be examined in the light of a comparison between English law and South African law in relation to the defence of duress and necessity respectively.

2 Facts

The accused and her boyfriend were arrested by the police in the course of a police operation that involved the supply and distribution of Class A drugs in the London Borough of Lewisham. A number of drug runners, acting as street dealers, were charged and tried alongside each other (par 6), including the accused's boyfriend, Alford, and one Karemera. The accused was charged with concealing drugs in her vagina. There were 121 packages. Seven consisted of wraps of crack cocaine and 44 wraps contained heroin with an estimated street value of between £1,500 and £2,300 (par 8). It was alleged by the accused that she had only become involved in the conspiracy on the night before her arrest on 26 August 2014. She had agreed to carry drugs for her boyfriend, so assisting the conspiracy (par 9). Her defence was that Alford had approached her for assistance on the basis that he had inherited a debt from a former friend, "Allman", who had been murdered. He

alleged that his life would be in danger if the drugs were not distributed (par 10).

On the basis of these facts, a criminal trial resulted in the conviction of each accused on two counts (count 1, concerning cocaine, and count 2, concerning heroin) of supplying controlled drugs in contravention of s 1 of the Criminal Law Act 1977 (par 2). Following the majority verdict of the court on these two counts, Brandford was sentenced to 28 months' imprisonment on count 1 and 28 months' on count 2, which sentences were to run concurrently (par 3).

In the judge's summing up, the judge noted that the appellant had not been physically compelled to secrete the drugs, but had done so at the "urgent request" of her boyfriend (par 20). The judge therefore withdrew the defence of duress from the jury (par 26). The judge was of the view that Brandford's belief in a threat to kill Alford was not reasonable, and nor would a reasonable person of ordinary firmness view it as such, in the absence of immediate conclusive proof that the threat would also be carried out (par 24). This was because she had no first-hand knowledge of the threats (also called "hearsay duress")(par 23). This was so because Alford made use of coded quotes, such as "it would not be nice for me" (par 24). Furthermore, both Alford and Karemera had testified that a loss of drugs would simply result in an extended period of drug dealing (par 24). The appellant had argued unsuccessfully that the judge was incorrect in withdrawing the defence from the jury because the threats had not been conveyed directly to the appellant (par 24).

The grounds of appeal thus related to the judge's treatment of hearsay evidence – that is, the question whether threats always had to be conveyed directly for a successful reliance on a defence of duress (par 23).

3 Judgment

In the Court of Appeal, the crux of the appellant's argument concerned the judge's decision to withdraw the defence of duress from the jury (par 1). More specifically, the argument centered on the judge's treatment of "hearsay duress", which, was rejected since there was nothing precluding the use of "hearsay duress" (par 23). The appellant contended that there was no "basic irreconcilability" between the pressure created by a relationship, and fear, which forms the basis of duress (par 23). The court noted that the former term makes use of affection whereas the latter is based on fear. The distinction between these two terms was important since the former term involves pressure bought to bear by one party against another in order to manipulate that person without serious threat of death or injury, and is based on affection shared between the parties.

This distinction between pressure and fear is also noteworthy since pressure will not establish a defence of duress (par 24). The distinction is also important since the English legal system "leans heavily" against use of hearsay evidence, especially where the threat has not been directly conveyed (par 25). The defence counsel argued that the evidence should have been placed before the jury. Defence counsel contended that

Brandford was of good character and had in fact only appreciated the severity of the situation the night before the crime was committed and therefore had not voluntarily associated herself with any criminal activity. This, the defence contended, should have been left within the purview of the jury to determine (par 27). However, on analysis of the accepted principles of duress, the court would eventually confirm that that such a defence would not have been accepted by the jury (par 47) and therefore dismissed the ground of appeal and the appeal against Brandford's conviction as a whole (par 51).

The court proceeded to examine whether duress can indeed be regarded as a defence where the duress in question does not include direct threats that lead to the criminal conduct; it came to the conclusion that while it may not necessarily be a fatal bar to a defence, the manner in which the threat is conveyed is but one of the circumstances that the court will take into consideration. Hearsay evidence in cases of duress can be used to demonstrate a defendant's state of mind and that he or she had "good reason to fear death or personal injury" (par 28; see *Subramaniam v Public Prosecutor* [1956] 1 WLR 965 970).

Another reason that duress should not be available as a defence is based on policy grounds since such a defence would frustrate the legitimate aims of government in controlling the A-class drug trade (par 25). The court proceeded to examine several pertinent decisions in this regard to determine whether defence counsel was correct in its submission that a defence of duress could equally be applicable in the context of threats that were made indirectly. Defence counsel noted there was no authority that precluded the applicability of hearsay duress (par 27).

On the facts of the case, the Court of Appeal noted that while fear (which forms the foundation of duress) and pressure (that emanates from an intimate relationship and which exploits a person's affection) are different, the trial court was incorrect in concluding that they are irreconcilable (par 40). They can operate in a cumulative manner (par 40). In addition, whether or not a defence of duress can be founded rests on whether the pressure based on exploitation of relationship is accompanied by threat of death or serious bodily injury (par 40).

The court confirmed the conviction but allowed the appeal against the sentence, deeming the sentence passed to have been manifestly excessive despite the fact that the accused played a significant role in a category 3 offence as a willing courier of 121 wraps of Class A drugs, with knowledge they would be sold in Portsmouth (par 53). The court substituted her sentence with 21 months' imprisonment (par 56).

As to the question whether the judge should have withdrawn the defence from the jury, the court noted that judges always have a discretion to exercise a "robust and reasoned approach" when it comes to "fanciful" defences such as duress (*R v Brandford supra* par 44; see also *R v Hammond* [2013] EWCA Crim 2709 14). Although in this case the trial court judge's "imperfect" reasoning had led to the exclusion of the evidence, it essentially made no difference to the end result: there was no immediacy of threat nor an inability to take evasive action (Laird "Case and Comments:

R v Brandford (Olivia)" 2017 *Criminal Law Review* 554 556; see also *R v Hasan)* [2005] 4 All ER 685 28). This was because there was no immediate threat to Alford since the threat had been conveyed the night before they left for London. Furthermore, Brandford had knowingly participated by buying latex gloves and had proceeded to watch him parcel the drugs as well as continued to carry drugs on her person, long after Alford had disposed of his (par 46). This was clearly an example of voluntary association where the jury would have no choice but to convict (par 46).

4 The nature of the defence of duress in English law

Brandford raised the question of whether duress can successfully be invoked as a defence (*R v Hasan* [2005] UKHL 22, [2005] 2 AC 467) in the case of drug trafficking or drug dealing (Storey "Duress by Indirect Threats" 2017 *Journal of Criminal Law* 91 94. In this respect, see *R v Aikens* [2003] EWCA Crim 1573; *R v McDonald* [2003] EWCA Crim 1170, where the defence was raised, albeit not successfully). The central question is therefore is not whether it can be a defence, but rather whether the defendant can satisfy all the grounds in order for the defence to be successful. For instance it would be beneficial if it could be shown that there is no voluntary association with criminals. (Storey 2017 *Journal of Criminal Law* 91 94).

The defence of duress by threats can be characterised as necessarily involving a choice of unsavoury alternatives:

> "Thus, although the defendant must honestly believe that force is necessary, this belief is not required to be reasonable, as opposed to the requirement that the response be reasonable." (Freer "Driving Force: Self-Defence and Dangerous Driving" 2018 *Cambridge Law Journal* 9 10)

This choice of alternatives plays a key role since it has the ability to exculpate the defendant in a particular case. However, policy considerations demand that such a defence be narrowly circumscribed Therefore, the defence is only available if the two-prong test is satisfied:

> "Would the defendant have been impelled to act as they did because, as a result of what they reasonably believed the threatener had said or done, they had good cause to fear that if they did not so act the threatener would kill or seriously injure them?" (*R v Hasan* [2005] UKHL 22; [2005] 2 AC 467)

Notably, the above quote suggests that only a limited category of threats could qualify as a defence – that is, if there were threats of death or serious bodily harm (*R v Hasan* [2005] UKHL 22, [2005] 2 AC 467 par 21) or a threat directed to a member of the defendant's immediate family or a person for whose safety the defendant would reasonably regard themselves as being responsible (*R v Brandford supra* par 32). In instances where the second stage of the test is reached – that is, where death or serious bodily injury is a likelihood – then the matter was one left for jury determination (see *R v Lynness* [2002] EWCA Crim 1759 24–25). Thus the question of whether the appellant held a reasonable belief in death or serious bodily harm from Alford becomes a crucial question that needs to be determined (Ashworth

and Horder *Principles of Criminal Law* 7ed (2013) 206), and this is where the primary source of criticism in this case lies. Where no circumstances existed where the defence could be found, then such a defence has to be withdrawn from the jury (*R v Bianco* [2001] EWCA Crim 2516). Circumstances where such a defence would be withdrawn, for instance, can be found where there was no immediacy of threat, or through the doctrine of prior fault – that is, where a person had voluntarily joined a criminal enterprise (*R v Ali* [1995] Crim LR 303; *R v Heath* [2000] Crim LR 109; *R v Harmer* [2001] EWCA Crim 2930; *R v Ali* [2008] EWCA Crim 716; *R v Hussain* [2008] EWCA Crim 1117; see also Percival "Cases in Brief: Brandford [2016] EWCA 1794; December 2, 2016" 2017 1 *Archbold Review* 2). In *Hasan*, the court noted:

> "[N]othing should turn on foresight of the manner in which, in the event, the dominant party chooses to exploit the defendant's subservience. There need not be foresight of coercion to commit crimes." (*R v Hassan supra* par 37)

A line of authorities on duress by threats seems to suggest that, while indirect threats can in principle be relied upon (see *R v Hudson*, *R v Taylor* [1971] 2 All ER 244, [1971] 2 QB 202), the courts follow a direct approach – that is, the more directly the threat is conveyed, the more likely it will be capable of establishing defence (*R v Brandford supra* par 39; see also *Northern Ireland v Lynch* [1975] 1 All ER 913 932, [1975] AC 653 687). However, central to withdrawing the defence from a jury was the view that the crux of the issue is not the manner in which the threat is transmitted, but rather whether the threat was immediate, imminent and whether it was made with sufficient potency to have influenced the accused (Laird 2017 *Criminal Law Review* 554 556). In other words, the manner in which the threat is relayed is but one fact that the courts take into consideration and does not widen the scope of the defence (Laird 2017 *Criminal Law Review* 556).

One aspect that was particularly noteworthy about this judgment was the trial court judge's discussion of the context in which indirect threats could be made. The judge was of the view that there was a clear distinction between a person whose free will was overwhelmed as a result of fear as opposed to the case in question where the accused was merely pressurised to act as a result of the romantic relationship that she shared with Alford (*R v Brandford supra* 23).

The Court of Appeal rejected the trial court's position, noting that the two concepts are different and could in fact operate in a cumulative manner (Laird 2017 *Criminal Law Review* 557). This is because the pressure based on a relationship exploits infatuation or affection, whereas the second concept (fear, which lies at the heart of duress) is based on fear (*R v Brandford supra* par 40). Laird points out that this raises two questions: (1) do compulsion and pressure that arise in the context of a certain type of relationship give rise to a new form of defence? (Laird 2017 *Criminal Law Review* 557); and (2) was there any immediacy of threat to constitute a complete defence? (par 33).

What is noteworthy about this "new" defence is that, like duress, it is also predicated on the principle of compulsion (Laird "Evaluating the Relationship Between Section 45 of the Modern Day Slavery Act 2015 and the Defence

of Duress: An Opportunity Missed?" 2016 6 *Criminal Law Revie*w 395 398). Furthermore, compulsion must be ascribed to some form of "relevant exploitation" (Laird 2016 *Criminal Law Revie*w 395 398). Section 76 of the Serious Crimes Act 2015 provides for the new offence of controlling and coercive behaviour, which is limited to intimate or family relationships and which behaviour is capable of causing harm and special vulnerability to victims in these settings (Edwards "Coercion and Compulsion Re-Imagining Crimes and Defences" 2016 *Criminal Law Review* 876 877).

The implications of accepting such a defence are radical and problematic at best. First, since compulsion is not defined, it will have to be interpreted broadly. This means that since compulsion is subjectively tested, no evidence of threats or outward action is necessary (Laird 2016 *Criminal Law Review* 398). Therefore, viewed from the defendant's perspective, she could not have helped but act as she did. Such an approach does not accommodate the restrictive nature of the rest of the elements of the defence (Laird 2016 *Criminal Law Review* 398). Secondly, what criteria are envisaged in relation to the causation element? It appears that the strict requirement for causation – namely, the "but for" test – is relaxed and a lower criterion would suffice (Laird 2016 *Criminal Law Review* 398).

Thirdly, the common-law approach to duress, which is expressed in the case of *Valderrama-Vega* ([1985] Crim. L.R. 220), has raised the problem of the cumulative effect of the pressure under which the defendant operated. In that instance, the Court of Appeal, despite upholding the defendant's conviction, noted that juries should not be directed on the basis of whether the defendant acted solely as a result of threats of death or grievous bodily harm (Laird 2016 *Criminal Law Review* 397). As Laird notes, this element requires a strict interpretation and if the defendant would have committed the crime irrespective of any "relevant exploitation" or cumulative impact of the relationship, then Brandford would not necessarily have been able to rely on the defence (Laird 2016 *Criminal Law Review* 397). Not only does such an approach require "mental gymnastics" in determining if defendants would have acted as they did, but, further, it has the potential to greatly narrow the ambit of the defence (Laird 2016 *Criminal Law Review* 397). For instance, determining the meaning of "compulsion", or more specifically "coercion and controlling" behaviour, is dependent on "case specific factual context" (Edwards 2016 *Criminal Law Review* 878). Furthermore, practical problems arise in relation to proof concerning what degree of coercion is required and the type of evidence necessary to demonstrate that the defendant was compelled (Edwards 2016 *Criminal Law Review* 878).

What appears to be clear is that Brandford did not appreciate the true nature of the threat to Alford until the night before the events of 27 August, and any notion of voluntary association could be discounted (*R v Brandford supra* 27). However, in this instance, the jury was not given an opportunity to canvass this defence and therefore their jurisdiction was usurped in respect of this matter (*R v Brandford supra* 27). Despite flawed reasoning concerning the basic irreconcilability between fear and pressure based on a relationship, the judge was entitled to withdraw the defence. Therefore, an exploitation of a relationship without a "relevant threat of death or serious

injury of sufficient potency, cannot found duress" (*R v Brandford supra* 40).

In this case, it was clear from the evidence that there was no immediacy of threat. This was demonstrated by the following factors: first, the vagueness of the threats made as well as the absence of the identity of the perpetrator making the threats (*R v Brandford supra* par 46); secondly, the absence of an immediate threat on the night in question – that is, she was able to purchase latex gloves and other items freely, and was able to contemplate the option of contacting either her father for assistance to pay off those threatening Alford or even the police; thirdly, the existence of the opportunity of escaping from the threat by disposal of the drug (Storey 2017 *Journal of Criminal Law* 93; see also *R v Pommell* ([1995] 2 Cr App R 607), despite which, Brandford insisted that Alford continue with the course of action; and finally, Brandford's reaction to the threats in this instance, and threats made on previous occasions such as the January pepper spray incident, the murder of Allman and the June stabbing, which did not correspond with the conduct of an individual who was fearful for Alford's life (*R v Brandford supra* par 46). These factors demonstrate the point that while indirect threats may form the basis of a defence of duress, in practice, they may provide a reason for withdrawing the defence from the jury (Laird 2017 *Criminal Law Review* 556).

In relation to the contention that indirect threats can form the basis of new defence as set out in section 45 of the Modern Slavery Act 2015, it has been held that they are insufficient to form the basis of duress on the basis of the above discussion (Laird 2017 *Criminal Law Review* 557). Nowhere is this more clearly demonstrated than in the traditional test used to assess duress as expounded in *R v Graham* ([1982] 1 All ER 891, and followed in the subsequent cases of *R v Howe* [1987] 1 All ER 771; [1987] AC 417); *R v Hasan* [2005] 2 WLR). In *R v Brandford* (*supra*), the court again highlighted the accepted objective test for duress:

> "[Would] the sober person of reasonable firmness, sharing the characteristics of the defendant, … not have responded to whatever he reasonably believed [the threatener] said or did by taking part [in the offence]?" (par 31)

The first leg of the test is subjective in nature – that is, did the defendant entertain an honest belief, as opposed to a reasonable belief, that their life was in danger? (James "Duress: Objective Test" 2007 *Journal of Criminal Law* 193 194). This means that the reasonable person would share the same characteristics, including psychiatric impairments that would not make them more vulnerable or timid but in fact genuinely more susceptible to threats (James 2007 *Journal of Criminal Law* 194; see also *R v Bowen* [1996] 2 Cr App R 157). Does this mean that if the standard for a "reasonable person" is a "reasonable victim of exploitation", does this turn the enquiry into a subjective one? (Laird 2016 *Criminal Law Revie*w 400). In addition, the question of what constitutes a relevant characteristic has yet to be determined but would appear to suffer from the same deficiencies as its common-law predecessor (Laird 2016 *Criminal Law Revie*w 400).

5 South African law

It is instructive to compare the English legal position in relation to the defence of duress as dealt with in *Brandford* with the position in South African law. In this regard, the defence of necessity in South African law will be juxtaposed with the English law counterpart of duress of circumstances, in order to compare and contrast the nature of the respective defences, and to see whether South African law would take a similar approach to the factual scenario that arose in *Brandford*.

The legal position pertaining to necessity has been set out in *S v Goliath* (1972 (3) SA 1 (A)). Necessity can constitute a complete defence, even in cases of murder (*S v Bailey* 1982 (3) SA 772(A) on the basis that heroism is not expected from ordinary people in life-and-death situations (25B–D). No distinction is made between threats induced by natural causes or by means of human agency (Yeo "Compulsion and Necessity in African Criminal Law" (2009) *Journal of African Law* 90 93; see also *S v Goliath supra* 24). For such a defence to be successful, certain conditions must be met. These include that:

a) a legal interest be threatened;
b) the threat have already commenced or be imminent;
c) the threat not be caused by the accused's fault;
d) the threat makes it necessary for the accused to avoid the danger; and
e) reasonable means be used to avert the danger (Burchell *South African Criminal Law and Procedure: General Principles of Criminal law* (2011) Vol 1 148).

English law requires that the existence of the threat need only be based on an honest belief on the part of the defendant. However, in South African law, because necessity operates as a justification ground, not only must the threat be real, but it must be of such a degree that no reasonable person would be able to withstand it (*S v Goliath supra* 11D; *S v Peterson* 1980 (1) SA 938 946 E–F; Burchell "Unravelling Compulsion Draws Provocation and Intoxication Into Focus" 2001 *South African Journal of Criminal Justice* 363). In other words, the accused's beliefs are not considered a factor regarding the enquiry into unlawfulness (Burchell *Criminal Law* 4ed (2013) 162). The accused's beliefs only become relevant when his or her conduct is proved to be unlawful – that is, where fault is present on the accused's part (Burchell *Principles of Criminal Law* 4ed (2013) 166–167). This point is crucial, in light of our new constitutional dispensation, as well as the culture of crime and violence and "blatant" disregard for human life (*S v Mandela* 2001 (1) SACR 156 (C) 166i–j).

Noting these points, the court in *Mandela* rejected a defence of necessity where certain factors were absent, such as the immediacy of life-threatening compulsion (168b). After the pronouncement in *Mandela*, it appears as if necessity has been relegated to the realm of criminal excuse: achieving a compromise between limits of human fortitude and constitutional ideals, such as the right to life (Le Roux "Killing Under Compulsion, Heroism and

the Age of Constitutional Democracy" 2002 *South African Journal of Criminal Justice* 100 104; *S v Mandela supra* 168c–d). While fault is a requisite condition for necessity (*S v Bradbury* 1967 (1) SA 387 (A) 404H; *S v Lungile* 1999 (2) SACR 597 (SCA) 603c–d), case law has demonstrated that convictions will not solely be based on association with an organised crime syndicate that is known for a vengeful disciplinary code of conduct (per Holmes JA in *S v Bradbury supra* 404H, quoted in *S v Mandela supra* 164i–j). Rather, fault is merely one of the factors that courts use to determine whether an accused can successfully rely on the defence (Le Roux 2002 *South African Journal of Criminal Justice* 101). The ruling in *Bradbury* would be confined to members of a gang who at least know or foresee the violent nature of the gang and its code of vengeance, which they may be compelled to follow (Burchell 2001 *South African Journal of Criminal Justice* 363).

Although, in theory, the defence could be available in the *Brandford* scenario if it could be shown that there was no question of voluntary association, it would fail since the issue turns not solely on the question of whether she joined the gang, but rather on the absence of immediacy of life-threatening compulsion *(S v Mandela supra* 168b) and therefore any action taken was not necessary to avert the danger. Although the appellant in that case had argued that she had not appreciated the true nature of the threat up until the night in question (*R v Brandford supra* par 27), any reasonable person in the position of the appellant would have appreciated the nature of the threat that Alford faced (par 46). This is because of the length of the appellant's association with Alford and his dealings with the criminal syndicate (*R v Brandford supra* par 46). These included three previous incidents known to the appellant, which included the January pepper spray incident, the Allman murder,and the June stabbing (*R v Brandford supra* par 27), which she alleged she only "half believed" (par 27). Further, Brandford's general demeanour and conduct was not indicative of a person who was unduly fearful following this series of linking events (*R v Brandford supra* par 27).

The effect of the *Mandela* decision, in a particular context other than that of *Brandford*, is that the defence of necessity has been relegated to the realm of criminal excuse. Since the accused is exercising a choice to protect his life over that of another person, the defence will only prevail where heroic acts that extend beyond the capacity of a reasonable person would have been necessary to avert any possible harm. In such cases, it would be evident that the accused lacked the requisite culpability needed (*S v Mandela supra* 167c–e; Le Roux 2002 *South African Journal of Criminal Justice* 103).

Does this mean that the *Mandela* case is advocating the normative approach? (Le Roux 2002 *South African Journal of Criminal Justice* 104). Le Roux notes that in light of the rejection by Davis J of compulsion as a justification ground, a compromise solution was reached: acknowledging the constitutional principle of the right to life but also acknowledging the "limitations of human fortitude: heroism cannot be expected of people who are facing their own death" (Le Roux 2002 *South African Journal of Criminal Justice* 104). In other words, killing under compulsion would only be a

defence where the accused committed the offence without a blameworthy state of mind – that is, with an absence of criminal capacity or knowledge of unlawfulness (Le Roux 2002 *South African Journal of Criminal Justice* 104). Le Roux noted that the normative evaluation of blameworthiness takes place, not because *mens rea* is absent, but where and precisely because it is present in terms of the psychological approach (Le Roux 2002 *South African Journal of Criminal Justice* 104).

However, it is submitted that a move towards a normative approach is problematic for a number of reasons. First, it places traditional necessity and putative necessity on an equal footing as a defence to fault. This could lead to an obfuscation of the two defences since with traditional necessity all requirements for the defence must be met, whereas with putative necessity, the normative concept of fault rests on whether or not the necessity arose from a mistake of law or "unavoidable ignorance" (Van Oosten "The Psychological Fault Concept Versus the Normative Fault Concept: Quo Vadis South African Criminal Law (Continued)" 1995 *THRHR* 568 574). In contradistinction, relying on putative necessity implies that the requirements for traditional necessity have not been met. The normative concept of fault implies that the defence will only be successful on the basis of circumstances of mistake of law or "unavoidable ignorance" (Van Oosten 1995 *THRHR* 568 574). However, it seems that if the accused lacked awareness of unlawfulness and there was therefore an absence of intention in terms of psychological fault, the defence would still not be available. Real necessity, on the other hand, affords a full defence despite the presence of intention. It also raises the issue of how an unlawful killing committed in circumstances of necessity with the presence of intention can be harmonised with a conviction on the basis of crime with intention, where awareness of unlawfulness is absent on account of mistake of law or unavoidable ignorance (Van Oosten 1995 *THRHR* 568 574). Lastly, necessity as a defence to fault, as opposed to unlawfulness, leads to the same result as necessity as a defence to unlawfulness rather than to fault (Van Oosten 1995 *THRHR* 568 574).

It is submitted that the position in South African law, pre *Mandela*, is preferable since the traditional justification ground of necessity adequately takes the accused's personal characteristics into account when personalising the objective standard. It does not require, like English law, a standard of heroism (*S v Goliath supra* 25) that the accused cannot reasonably be expected to meet (Williams "Necessity: Duress of Circumstances or Moral Involuntariness" 2014 *Common Law World Review* 1 5). Not only is it "morally unfair" to punish those that fall short of the standard but it also breaches the principle of fault (Williams 2014 *Common Law World Review* 6). South African courts would also not face the dilemma that English courts have faced in deciding which factors should be taken into consideration in the objectiveness enquiry (Virgo "Are the Defence of Provocation, Duress and Self-Defence Consistent?" 2002 *Archbold Review* 4 6). Although the English approach has been that characteristics are only relevant if sufficiently defined (Virgo 2002 *Archbold Review* 4 6; see also *R v Bowen* [1997] 1 W.L.R. 294, 300) and not self-induced (Virgo 2002 *Archbold Review* 4 6; *Cochrane v Her Majesty's Advocate* 2001 S.C.C.R. 655 par 21),

the problem still rests with the notion that a defence of compulsion may be available in the context of close relationships (Virgo 2002 *Archbold Review* 6) The problem with this approach is that excuse requires that human frailties be considered as part of the standard of the "reasonable person" whereas "abnormality of mind" denotes a shift of the defence to the realm of excuse. However, as has correctly been pointed out, pressure must always be accompanied by threat of death or serious bodily injury (Laird 2017 *Criminal Law Review* 557). This was not the case in *Brandford*, and it therefore would also not be successful in terms of South African law.

In relation to the question whether such a defence would be available under a similar set of facts, the following points are noteworthy. The central focus is whether there was voluntary association. The ruling in *Bradbury* would be confined to members of a gang who at least know or foresee the violent nature of the gang and its code of vengeance that they may be compelled to follow (Burchell 2001 *South African Journal of Criminal Justice* 363). Although the appellant argued that she had not appreciated the true nature of the threat up until the night in question (*R v* Brandford *supra* par 27), any person in the position of the appellant would have appreciated the nature of the threat that Alford faced (par 46). This is because of the length of the appellant's association with Alford and his dealings with the criminal syndicate (*R v Brandford supra* par 46). These included three previous incidents known to the appellant, which included the January pepper-spray incident, the Allman murder and the June stabbing (*R v Brandford supra* par 27), which she alleged she only "half believed" (par 27). Her conduct was also not that of an individual who was unduly fearful following this series of linking events. Her evidence indicated that she only "half believed" what Alford had told her about the modus operandi of the syndicate (for instance, the January pepper spray incident, the Allman murder and the June stabbing (*R v Brandford supra* par 27)). Even if the defence of necessity were in principle available on the basis of the "relatively low standard" for assessing necessity as set out in *S v Goliath* (*supra*), she would not be viewed as having acted reasonably in the circumstances. This is because she had other reasonable alternatives, which clearly demonstrates that she did not act reasonably (*S v Goliath supra*). These circumstances include a lack of immediacy of life-threatening compulsion (*S v Goliath supra*) and the fact that she had the opportunity to change her mind, contact the police or ask her father for assistance (*S v Mandela* 2001 (1) SA 156 (C)).

6 Concluding remarks

It is submitted that a bifurcated approach, which is currently followed in the English law of compulsion and duress, is problematic and ought to be avoided at all costs. This approach was given prominence in the case of *Mandela*, where the court implied that, in cases of compulsion, a normative approach ought to be adopted. It is submitted that a "one-size-fits-all approach" as followed prior to the *Mandela* decision is to be preferred for the following reasons. First, the dichotomy between justification and excuse plays an indispensable role in extrapolating and expounding the goals that criminal law seeks to achieve. One of these goals is ensuring legitimacy by

elucidating the problems in criminal responsibility, which are essentially geared at reflecting community values. The second goal of criminal law is efficiency. This can be achieved by ensuring that the distinction in the law maintains coherence and clarity needed for correctly attributing blame (Mousourakis "Distinguishing Between Justifications and Excuses in the Criminal Law" 1998 *Stellenbosch L. Rev*. 165 180). These goals can be attained by maintaining the traditional approach to necessity– that is, by treating it as a justification ground. The primary difficulty with adopting a pragmatic approach as has been followed in *Mandela* and in the English law is that such an approach does not sufficiently maintain key distinctions. The case of *Mandela*, taken to its logical conclusion, leads to the same primary problems that have been critiqued in the English approach – namely, a failure to maintain critical distinctions. For example, consider the defence of necessity and duress of threats and circumstances. The English courts have gone on to develop duress of circumstances as an excusatory defence, which is problematic since the defence now covers circumstances that are viewed as necessity in other jurisdictions (Williams 2014 *Common Law World Review* 5). The English approach also appears to incorporate into the liability enquiry aspects that belong in the sentencing enquiry. This is clear when one considers how the courts have grappled with which factors to take into consideration in the test for duress, whether by threats or circumstances. The test now incorporates a subjective criterion: did the defendant in the circumstances as she reasonably believed them to be have good reason to fear that serious bodily harm or death would follow if the offence was not committed (Virgo 2002 *Archbold News* 4). Excuse requires that human frailties be considered as part of the standard of the "reasonable person", possibly denoting a shift to the realm of excuse (Mousourakis *Stellenbosch L. Rev*. 178). To prevent this, the courts will have to exercise circumspection when determining which factors should be imputed to the reasonable person standard to ensure that such a standard is not rendered inapplicable. "Abnormality of mind" is a completely different legal defence, one which falls outside the realm of "human frailty" (Mousourakis *Stellenbosch L. Rev*. 179). The introduction of a novel defence of compulsion, as suggested by Laird, would merely create more confusion, not only conflating two very different defences but also introducing a subjective element into the liability enquiry. In addition, diminished capacity is an issue that is to be dealt with at the sentencing stage of the trial. This novel defence highlighted by Laird was not raised in *Brandford*. However, it bears reiterating that while courts are final arbiters of the meaning of legal terminology, certainty is essential. If it is correct that, for a defence to qualify as an excuse, it is not essential that the coercive circumstances substantially reduce the decision-making capabilities of the actor involved (Chiesa "Duress, Demanding Heroism, and Proportionality" 2008 *Vand. J. Transnat'l L*. 741 759), then it creates a misleading understanding of the term "emotional pressure". The implication is that, although the actor may have been faced with a hard choice, it merely had the effect of limiting his capacity, not excluding it. In other words, he retained the capacity to choose (Chiesa 2008 *Vand. J. Transnat'l L*. 741 759). This distinction plays an important role in South African law. The basic tenets of criminal liability demand that the conduct of the *actus reus* be proved to be voluntary, or put

another way, that it be subject to the conscious will of the accused. Once the accused is shown to be acting voluntarily, there is no need to ask for a second time whether the conduct is voluntary (Louw "The End of the Road for the Defence of Provocation?" (2004) *South African Journal of Criminal Justice* 200 204). Capacity is not capable of gradation in South African law, but is taken into account at the sentencing phase (*S v Bradbury supra* 394 F–G; Van Oosten 1995 *THRHR* 568 579).

In contradistinction, it could be pointed out that in English law, the courts still punish those who substantially lack capacity to control their actions (Chiesa 2008 *Vand. J. Transnat'l L.* 741 760). Chiesa makes use of the example of the defendant who loses self-control, shoots his wife's rapist, and injures him. In such an instance, the law does not provide the defendant with a partial or full excuse for his conduct should the rapist survive (760). The opposite is also true in South African law. Louw has noted that courts have acquitted the accused despite the presence of capacity (Louw "S v Eadie: Road Rage, Incapacity and Legal Confusion" 2001 *South African Journal of Criminal Justice* 206 215, discussing *S v Moses* 1996 (1) SACR 701 (C) 714H–I). Since diminished capacity should rightly be taken into consideration at the sentencing stage of the trial, there must be another important theoretical reason to maintain the distinction between justification and excuse for determining liability (McCauley "Necessity and Duress in Criminal Law: The Confluence of Two Great Tributaries" 1998 *Irish Jurist* 120 127). This is despite the fact that both justification and excuse could in principle lead to an acquittal.

Another problem that arises concerning the justification/excuse dichotomy is that it presents certain practical problems. For instance, in cases of duress and excuse, a person who assists another in the commission of a crime should be convicted as an accessory, even though the principal offender is excused (Mousourakis 1998 *Stellenbosch L. Rev*. 166). In contradistinction, an accessory to a crime would escape criminal liability if the principal successfully pleads a justification-based defence (Mousourakis 1998 *Stellenbosch L. Rev*. 166). The basis for an acquittal would be putative defence. This is the position in South African law, and it is submitted that it would be preferable for a defence of necessity to be assessed on the basis of a test that reflects the proper nature of the inquiry: in general terms, an objective assessment for the *actus reus*, and a subjective assessment for *mens rea* (Taitz "Compulsion as a Defence to Murder: South African Perspectives" 1982 *Law & Just. – Christian L. Rev.* 10 17).

The distinction between justification and excuse is important and should remain a justification ground: the basis on which an acquittal rests serves a "symbolic function in criminal law since if it is raised as legitimate defence, it assumes that the holder of the right can use force against an unlawful attack" (McCauley 1998 *Irish Jurist* 120 127). Describing a defence as one of justification sends a clear message that the conduct is approved. Furthermore, a person

> "cannot turn away from his concrete interests when he is evaluating the [dilemmatic choice with which he is confronted] … the state acknowledges that, even though from an objective point of view the interests of a person who acts under duress have no more weight than the interests of the actor's

> innocent victim, it is comprehensible that citizens attach more value to their own ends." (Chiesa 2008 *Vand. J. Transnat'l L.* 760)

Finally, in accordance with the approach of the Court of Appeal in *Brandford*, it may be concluded that there is no logical basis for excluding an accused from a defence of necessity on the basis of indirect threats. However, the success of such a defence would be dependent on whether there was "immediacy of life-threatening compulsion".

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THOUGHTS ON THE DECRIMINALISATION OF THE USE OR POSSESSION OF CANNABIS WITHIN PRIVATE SETTINGS

Minister of Justice and Constitutional Development v Prince 2019 (1) SACR 14 (CC)

1 Introduction

> "The illegality of cannabis is outrageous, an impediment to the full utilization of a drug which helps produce the serenity and insight, sensitivity and fellowship so desperately needed in this increasingly mad and dangerous world." (Carl Sagan)

The use or possession of drugs has been a phenomenon since time immemorial. In South Africa, the essential offences pertaining to drugs are provided for in the Drugs and Drug Trafficking Act 140 of 1992 (the Act). The two most important crimes provided for in the Act are "dealing in drugs" and the "use or possession of drugs" (s 4 and 5 of the Act; Snyman *Criminal Law* (2014) 420–426; Burchell and Milton *Principles of Criminal Law* (2013) 797–806). The Act divides drugs into three general categories – namely, dependence-producing substances; dangerous dependence-producing substances; and undesirable dependence-producing substances. The specific drugs resorting in each of these categories are listed in Schedule 2 of the Act (Burchell and Milton *Principles of Criminal Law* 803; Snyman *Criminal Law* 420). The punishment prescribed for the possession, use or dealing in dangerous dependence-producing substances and undesirable dependence-producing substances is harsher than that for possession, use or dealing in dependence-producing substances (Snyman *Criminal Law* 420). It is interesting, and topical for purposes of the current discussion, that cannabis or dagga is classified in terms of Schedule 2 as an *undesirable* dependence-producing substance.

The case under discussion (*Minister of Justice and Constitutional Development v Prince* 2019 (1) SACR 14 (CC)) is of particular importance as the use or possession of cannabis within private settings was addressed from a constitutional perspective and, more pertinently, on a question as to the constitutionality of the criminalisation thereof. Upon first glance, it seems as though the issues addressed in this case correspond with the disputes addressed in the earlier case of *Prince v The President, Cape Law Society* (2002 (2) SA 794 (CC) (*Prince* (*2*)). As is indicated in this contribution, the issues in these two judgments are distinct and differ in many instances.

A critical analysis of the decision under discussion reveals that although the use or possession of cannabis within private settings has, by virtue of the

case, been decriminalised against a constitutional backdrop, it also opens the door to critical debate pertaining to various substantive and procedural issues.

2 Facts

The salient facts of the decision appear from the judgment delivered by Zondo ACJ (Cameron J, Froneman J, Jafta J, Kathree-Setiloane AJ, Kollapen AJ, Madlanga J, Mhlanta J, Theron J and Zondi AJ concurring; see also judgment of Davis J in *Prince v Minister of Justice* 2017 (4) SA 229 (WCC) (*Prince* (*1*)). The case under discussion dealt essentially with the use or possession of cannabis (dagga) for personal consumption or use within private settings and whether the criminalisation thereof was constitutional.

The applicants brought an application to declare invalid the legislative provisions prohibiting the use of cannabis and the possession, purchase and cultivation thereof for personal use (*Prince* (*1*) *supra* par 4–5). The relevant provisions that were sought to be declared as invalid were sections 4(*b*) and 5(*b*) of the Act read with section 22A(10) of the Medicines and Related Substances Control Act 101 of 1965 (Medicines Act) insofar as it related to, and prohibited, the possession and use of cannabis by adults within private settings (*Prince* (*1*) *supra* par 5). More specifically, the applicants argued that the criminal prohibition of the use and possession of cannabis in private settings, such as the home environment or "properly designated places", was unconstitutional (*Prince* (*1*) *supra* par 11). It was submitted that fundamental rights such as equality, dignity and freedom of religion were infringed upon.

The core challenge against the relevant legislative provisions was founded on the right to privacy (*Prince* (*1*) *supra* par 11). It was, in addition, contended that the distinction between cannabis and other harmful substances such as alcohol and tobacco was irrational and accordingly that the limitation to the right to privacy was unjustifiable in terms of section 36(1) of the Constitution, 1996 (the Constitution). After conducting a thorough analysis of the nature and ambit of the right to privacy as provided for in the Constitution as well as the arguments in favour of the limitation of this right, the High Court concluded that the relevant provisions infringed the right to privacy (*Prince* (*1*) *supra* par 21–34). The High Court, in addition, held that the expert evidence presented by the applicants as to why the limitation of the right to privacy was unjustifiable weighed more heavily than the evidence presented by the respondents (*Prince* (*1*) *supra* par 91–92). The High Court further emphasised that the case under discussion was concerned exclusively with the conduct of individuals within the privacy of their own homes or private settings having due regard to the numerous challenges surrounding drug abuse as well as drug abuse among minors (*Prince* (*1*)*)* *supra* par 107). The High Court embarked on an in-depth analysis with regard to the right to privacy in terms of the Constitution coupled with the justification analysis as provided for in terms of section 36 (*Prince* (*1*) *supra* par 21–34*)*. The High Court further held:

> "The evidence, read as a whole, cannot be taken to justify the use of criminal law for the personal consumption of cannabis. The present prohibition contained in the impugned legislation does not employ the least restrictive means to deal with a social and health problem for which there are now a number of less restrictive options supported by a significant body of expertise. The additional resources that may be unlocked for use or policing of serious crimes cannot be over emphasised." (*Prince* (*1*) *supra* par 106)

The High Court, in addition, found that it would be practical and objectively possible for legislation to provide for a distinction between the use of cannabis and the possession, purchase or cultivation thereof for private use as opposed to other uses (*Prince* (*1*)*) supra* par 110).

The High Court accordingly declared sections 4(*b*) and 5(*b*) of the Act read with Part 3 of Schedule 2 of the Act, as well as sections 22A(9)(*a*)(i) and 22(10) of the Medicines Act, to be inconsistent with the Constitution to the extent that they prohibited the use of cannabis by an adult in a *private dwelling* where the possession, purchase or cultivation is for the personal consumption by an *adult* (*Prince* (*1*) *supra* par 132).

The matter was thereafter referred to the Constitutional Court for confirmation of the High Court's order in terms of section 172(2) of the Constitution. The Constitutional Court accordingly had to assess whether the relevant provisions did indeed limit the right to privacy and, if so, whether such limitation was reasonable and justifiable (par 18–19). The Constitutional Court reiterated that the provisions that were attacked on constitutional grounds were only those that prohibited the use, cultivation or possession of cannabis in private by an adult for his or her own personal consumption in private by an adult (par 19).

3 Legislative framework

It is from the outset important to take a closer look at the relevant provisions of the Act and the Medicines Act that were declared inconsistent with the Constitution. As stated above, the Act provides for two main offences: the use or possession of drugs, and dealing in drugs (Snyman *Criminal Law* 420–426; Burchell and Milton *Principles of Criminal Law* 799–806). Dealing in drugs is the more serious of the two offences, concomitantly carrying harsher sentences or penalties (see s 17(*c*) and (*e*) of the Act read with s 13(*e*) and (*f*); *S v Cwele* 2013 (1) SACR 478 SCA; *S v Gcoba* 2011 (2) SACR 231 (KZP); *S v Naidoo* 2010 (1) SACR 369 (KZP); *S v Mtolo* 2009 (1) SACR 443 (O); *S v Mlombo* 2007 (1) SACR 664 (W); *S v Tshabalala* 2007 (2) SACR 263 (W)).

To "possess" is defined in the Act "in relation to a drug, [to] include[…] to keep or to store the drug, or to have it in custody or under control or supervision".

The word "include" in terms of the definition clearly denotes that both the conventional meaning of possession and the extended interpretation of possession in terms of the Act will serve to establish whether possession took place. As such, the prosecution can rely on either to prove possession

(see Snyman *Criminal Law* 421–422). Section 4 of the Act deals with the use and possession of drugs. Section 4 reads as follows:

> "No person shall use or have in his possession–
> (a) any dependence-producing substance; or
> (b) any dangerous dependence-producing substance or any undesirable dependence-producing substance, unless …"

Section 4 proceeds then to provide for an elaborate selection of circumstances in terms of which the possession or use of these substances will be justified, such as a patient acquiring any of the substances in terms of a prescription from a medical practitioner, or a pharmacist who is legally in possession of these substances (Snyman *Criminal Law* 422; Burchell and Milton *Principles of Criminal Law* 804).

In Schedule 2 of the Act, cannabis is listed under Part 3 as an undesirable dependence-producing substance. Section 13 of the Act provides for the offences in terms of the Act. Read with section 17, section 13 provides that any person convicted of the use or possession of an undesirable dependence-producing substance, which includes cannabis, potentially faces a sentence or such fine as the court may deem fit to impose or to imprisonment for a period not exceeding 15 years, or to both a fine and imprisonment (see s 13 of the Act; Snyman *Criminal Law* 423).

The decision under discussion dealt with the application of section 4(*b*) within the context of the use of possession of cannabis in private settings and whether the criminalisation of it was constitutional.

Section 5 of the Act reads as follows:

> "No person shall deal in–
> (a) any dependence-producing substance, or
> (b) any dangerous dependence-producing substance or any undesirable dependence-producing substance, unless …"

Similar to section 4, section 5 provides for a selection of instances that would normally be classified as dealing, but which are justified in terms of the Act, such as substances acquired by a patient from a medical practitioner in terms of a written prescription, or from a pharmacist in terms of a written prescription (see s 5 of the Act; Snyman *Criminal Law* 423, 425).

The Act defines "deal in" in relation to a drug as "performing any act in connection with the transhipment, importation, cultivation, collection, manufacture, supply, prescription, administration, sale, transmission or exportation of the drug". It is specifically the "cultivation" of cannabis for personal use and possession thereof that was also placed under constitutional scrutiny in the decision under discussion. As stated above, cannabis is classified in terms of Schedule 2, Part 3 of the Act as an undesirable dependence-producing substance. Accordingly, the punishment prescribed for dealing in cannabis is imprisonment for a period not exceeding 25 years or to both a fine and imprisonment (see s 13(*f*) of the Act, read together with s 17(*e*); Snyman *Criminal Law* 426). In the past, an individual found to have "cultivated" cannabis for personal use could face a

harsh sentence for dealing in cannabis (see, for example, *S v Mbatha* 2012 (2) SACR 551 (KZP)).

Note that the order by the High Court provided for the decriminalisation of the cultivation of cannabis in a private dwelling by an adult for his or her personal use or consumption in private and it was accordingly held that the particular provisions were inconsistent with the right to privacy entrenched in the Constitution (*Prince* (*1*) *supra* par 132). Section 5(*b*) specifically becomes relevant when assessing the definition of "deal in" as provided for in the Act as discussed above.

Section 22A(9)(*a*)(i) of the Medicines Act reads as follows:

> "No person shall–
> (i) acquire, use, possess, manufacture or supply any Schedule 7 or Schedule 8 substance, or manufacture any specified Schedule 5 or Schedule 6 substance unless he or she has been issued with a permit by the Director-General for such acquisition, use, possession, manufacture, or supply: Provided that the Director-General may, subject to such conditions as he or she may determine, acquire or authorise the use of any Schedule 7 or Schedule 8 substance in order to provide a medical practitioner, analyst, researcher or veterinarian therewith on the prescribed conditions for the treatment or prevention of a medical condition in a particular patient, or for the purposes of education, analysis or research."

In terms of Schedule 7 to the Medicines Act, cannabis is one of the listed substances and as such section 22A(9)(*a*)(i) of the Medicines Act prohibits the acquisition, use, possession, manufacture or supply of cannabis, among other substances.

Section 22(10) provides as follows:

> "Notwithstanding anything to the contrary contained in this section, no person shall sell or administer any Scheduled substance or medicine for other than medicinal purposes: Provided that the Minister may, subject to the conditions or requirements stated in such authority, authorise the administration outside any hospital of any Scheduled substance or medicine for the satisfaction or relief of a habit or craving to the person referred to in such authority."

Section 22(10) prohibits the sale or administration of any scheduled substance or medicine for any purpose other than medical purposes.

4 Judgment

In delivering judgment, the Constitutional Court had to assess whether to confirm the order of the High Court and if so, to what extent. The court conducted a thorough analysis of the nature and ambit of the right to privacy in terms of section 14 of the Constitution (see also *Bernstein v Bester NNO* 1996 (2) SA 751 (CC)). With respect to the right to privacy, Zondo ACJ held as follows:

> "What this means is that the right to privacy entitles an adult person to use or cultivate or possess cannabis in private for his or her personal consumption. Therefore, to the extent that the impugned provisions criminalise such

> cultivation, possession or use of cannabis, they limit the right to privacy." (par 58)

The court further proceeded to conduct the limitation analysis in terms of section 36 of the Constitution in order to assess whether the limitation of the right to privacy was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom (par 59). It was argued on behalf of the State that the goal behind the prohibition pertains to the protection of the health, safety and psychological well-being of the individuals affected by the use of cannabis (par 63).

After analysing the report by the South African Central Drug Authority, it was held that on an assessment of all available data in other countries, it is clear that alcohol causes the most individual and social harm and that the immediate aim should fall on decriminalisation (par 78). The court further emphasised that in many other jurisdictions the possession of cannabis, in small quantities for personal use, has been decriminalised (par 79). The court, in addition, also with reference to *Prince* (*2*), pointed out that based on the medical evidence presented there is no indication as to the amount of cannabis that should be consumed in order to be regarded as harmful (par 81). It was accordingly held that the limitation of the right to privacy was not reasonable and justifiable in an open and democratic society (par 101).

In terms of section 5(*b*) of the Act, Zondo ACJ held as follows:

> "The issue of the cultivation of cannabis in private by an adult for personal consumption in private should not be dealt with on the basis that the cultivation must be in a dwelling or private dwelling. It should be dealt with simply on the basis that the cultivation of cannabis by an adult must be in a private place and the cannabis so cultivated must be for that adult person's personal consumption in private.
>
> I am of the view that the prohibition of the performance of any activity in connection with the cultivation of cannabis by an adult in private for his or her personal consumption in private is inconsistent with the right to privacy entrenched in the Constitution and is constitutionally invalid." (par 85–86)

The order of the High Court further declared the provisions dealing with the purchase of cannabis to be inconsistent with the Constitution. The Constitutional Court per Zondo ACJ, however, declined to confirm the order of the High Court in that regard and held:

> "If this court were to confirm the order declaring invalid provisions that prohibit the purchase of cannabis, it would, in effect be sanctioning dealing in cannabis. This the court cannot do. Dealing in cannabis is a serious problem in this country and the prohibition of dealing in cannabis is a justifiable limitation of the right to privacy." (par 88)

The Constitutional Court declined to confirm the part of the order of the High Court pertaining to section 22A(10) as it was held that this section prohibits the sale and administration of, among others, cannabis for purposes other than medicinal purposes unless it resorts under one of the exceptions. It was held, however, that the order of the High Court made no reference to the sale or administration of cannabis (par 89). The court, in addition, held that the declaration of invalidity of the use, or possession, or cultivation of

cannabis should extend further than merely when it occurs in a *home or private dwelling* as stipulated by the High Court order. It was accordingly held by Zondo ACJ:

> "In my view, as long as the use or possession of cannabis is for the personal consumption of an adult, it is protected. Therefore, provided the use or possession of cannabis is by an adult person in private for his or her personal consumption, it is protected by the right to privacy entrenched in s 14 of our Constitution." (par 100)

It was further held that the order of invalidity would operate prospectively and not retrospectively (par 102).

It was accordingly held that the provisions of section 4(*b*) and 5(*b*) of the Act, read with Part 3 of Schedule 2 to the Act, as well as section 22(9)(*a*)(i) of the Medicines Act, were inconsistent with the right to privacy entrenched in section 14 of the Constitution. It was ordered that during the period awaiting intervention by Parliament, interim relief in the form of reading-in would be granted (par 105). In terms of section 4(*b*), it was ordered that a sub-paragraph should be included to provide as follows:

> "No person shall use or have in his possession–
>
> …
>
> (b) any dangerous dependence-producing substance or any undesirable dependence-producing substance, unless
>
> …
>
> (vii) in the case of an adult, the substance is cannabis and he or she uses it or is in possession thereof in private for his or her personal consumption in private."

With regard to section 5(*b*) of the Act, it was held that the definition of "deal in" should be amended in the following manner in terms of reading-in:

> "deal in, in relation to a drug, includes performing any act in connection with the transhipment, importation, cultivation other than the cultivation of cannabis by an adult in a private place for his or her personal consumption in private …" (par 106)

In terms of section 22A(9)(*a*)(i) of the Medicines Act, it was held that the following words should be read in after the word "unless":

> "in the case of cannabis, he or she, being an adult, uses it or is in possession thereof in private for his or her personal consumption, in private or, in any other case …" (par 107)

It was, in addition, held that the implications of the reading-in would entail the following:

- an adult may use or be in possession of cannabis in private for his or her personal consumption in private;
- the use, including the smoking of cannabis in public or in the presence of non-consenting adults would not be permitted;
- the use or possession of cannabis in private would only relate to adults; and

- the cultivation of cannabis by an adult in a private place for his or her personal consumption in private would no longer be an offence (par 109).

It was held that the amount of cannabis found in an individual's possession would be an indication as to whether that individual was in possession of cannabis for a purpose other than personal consumption (par 110).

5 Assessment

From a constitutional perspective, the judgment under discussion seems sound and in line with the values enshrined in the Constitution. The judgment, however, opens the door to a critical debate on a number of aspects.

The use or possession of cannabis for private use was also challenged on constitutional grounds in *Prince* (*2*). In the latter decision, the provisions of section 4(*b*) of the Act and section 22A of the Medicines Act were challenged on the grounds that they were inconsistent with section 15(1) of the Constitution in terms of failing to provide for an exemption to Rastafari individuals who possess and use cannabis for religious purposes.

The facts, briefly, were that the appellant sought to enter the attorneys' profession and had to register his contract to do articles of clerkship. Since the appellant had had two previous convictions for possession, the second respondent in the matter, the Cape of Good Hope Law Society, declined to register his contract on the basis that the appellant had disclosed that he uses cannabis for religious purposes as he was a member of the Rastafarian religion and was not intending to cease using it (*Prince* (*2*) *supra* par 1–2). In *Prince* (*2*), it was contended that the relevant provisions were unconstitutional to the extent that they failed to provide an exemption applicable to the use or possession of cannabis for religious purposes (*Prince* (*2*) *supra* par 27). As indicated above, section 4 of the Act creates a number of exceptions in terms of which the use or possession of cannabis is justified, such as for medical purposes. Accordingly, the decision in *Prince* (*2*) did not pertain to the complete decriminalisation of the private use or possession of cannabis, but concerned rather the failure to include religion as one of the exemptions to the prohibition of the private use or possession of cannabis and the question whether the provisions of the Act were overbroad. This is where the judgment under discussion differs essentially from *Prince* (*2*) (see in essence *Prince* (*2*) *supra* par 31).

The essential submission in *Prince* (*2*) was that the impugned provisions were so overbroad that the unlimited nature of the proscriptions also encompassed the use or possession of cannabis by Rastafarians for religious purposes (*Prince* (*2*) *supra* par 33). In *Prince* (*2*), the court had to assess whether a limited exemption from the prohibition of the use or possession of cannabis should be granted to individuals of the Rastafarian religion. The case under discussion, however, dealt with the complete decriminalisation of the use of possession of cannabis for private consumption. It is interesting to reflect on these polar opposites for purposes of assessment of the judgment under discussion.

Prince (*2*) indicated that providing for limited exemptions to the use or possession of cannabis could become problematic. The majority in *Prince* (*2*) (per Chaskalson CJ, Ackerman J and Kriegler J) held:

> "There is no objective way in which a law enforcement official could distinguish between the use of cannabis for religious purposes and the use of cannabis for recreation. It would be even more difficult, if not impossible, to distinguish objectively between the possession of cannabis for the one or the other of the above purposes. Nor is there any objective way in which a law enforcement official could determine whether a person found in possession of cannabis, who says that it is possessed for religious purposes, is genuine or not. Indeed in the absence of a carefully controlled chain of permitted supply, it is difficult to imagine how the island of legitimate acquisition and use by Rastafari for the purpose of practicing their religion could be distinguished from the surrounding ocean of illicit trafficking and use." (*Prince* (*2*) *supra* par 130).

The majority in *Prince* (*2*) dismissed the appeal. The minority judgments by Sachs J and Ngcobo J, however took the stance that religion could have been accommodated in terms of an exemption in the provisions of the Act (*Prince* (*2*) *supra* par 81–89 and 170–171).

In his minority judgment, Ngcobo J found the relevant provisions of the Act to be inconsistent with the Constitution and commented as follows:

> "I accept that the goal of the impugned provisions is to prevent the abuse of dependent-producing drugs and trafficking in those drugs. I also accept that it is a legitimate goal. The question is whether the means to employ that goal are reasonable. In my view, they are not. The fundamental reason why they are not is because they are overbroad. They are ostensibly aimed at the use of dependence-producing drugs that are inherently harmful and trafficking those drugs. But they are unreasonable in that they target uses that have not been shown to pose a risk of harm or to be incapable of being subjected to strict regulation and control. The net they cast are so wide that uses that pose no risk of harm and that can be effectively be regulated and subjected to government control like other dangerous drugs are hit by the prohibition." (par 81)

There seems to be merit in Ngcobo J's reasoning as the provisions of the Act are in a sense very broad; on the other hand, creating exemptions could become extremely problematic in terms of the practical enforcement thereof. The latter dilemmas are clearly canvassed in the judgment.

It is submitted that the majority decision in *Prince* (*2*) should be supported as it would be virtually impossible to enforce such exemptions. The practical and logistical dilemmas would be endless. The case under discussion, however, took the debate to the next level in terms of seeking the complete decriminalisation of the use or possession of cannabis for private consumption as well as of the cultivation of cannabis for personal use on the basis that the provisions of the Act infringed the right to privacy in terms of section 14 of the Constitution. The practical implication of the decriminalisation of the use or possession or cultivation of cannabis for personal use or consumption would entail that an adult person found in possession of small quantities of cannabis or, for example, cultivating cannabis in the form of growing a dagga plant in his or her garden would not be guilty of either possession of drugs in terms of section 4 of the Act, or of

dealing in drugs in terms of section 5 of the Act. It is important to note that the judgment only pertains to cannabis and only to adult persons using or possessing cannabis for personal use.

A clear-cut example of the issues canvassed in the judgment under discussion came before the court in the not-too-distant past in *S v Mbatha* (*supra*). The latter case is relevant within the current discussion as it illustrates one of the fundamental reasons that a revisitation of the provisions of the Act became pivotal. The facts, briefly, were that the South African Police Services proceeded to the home of the accused as a result of information received. While searching the premises of the accused, the police found a parcel of loose dagga in a clear plastic wrapping alongside the bed. On proceeding with their search outside the premises, they found a clear-plastic bread packet containing dagga seeds alongside the house. In addition, they also found a newspaper bundle containing loose dagga. On further searching the yard of the premises, they found a fully grown dagga plant.

The accused was subsequently charged in the magistrates' court of the district of Dundee of dealing in dagga in contravention of the provisions of section 5(*b*) of the Act read with sections 1, 13(*f*), 17(*e*), 18, 19, 25 and 64 and, in the alternative, with possession or use of dagga in contravention of sections 1, 13(*d*), 17(*d*), 18, 19, 25 and 64 of the Act.

The trial magistrate convicted the accused of dealing in dagga and sentenced the accused to eighteen months' imprisonment, wholly suspended for a period of three years on condition that he was not again convicted of contravening sections 5(*b*) or 4(*b*) of the Act committed during the period of suspension. The accused was, in addition ordered to pay a fine of R1 000.00 or in default thereof undergo six months' imprisonment. The case was referred for automatic review to Wallis J who referred the matter for argument before the full court in relation to the precise meaning of the word "cultivation" contained in the definition of "deal in" in the Act.

With reference to the interpretation of the term "cultivation", the majority of the court (*S v Mbatha supra* par 8) relied primarily on the *dictum* of Cillié JP and Bekker J in the decision of *S v Kgupane* (1975 (2) SA 73 (T) 75H), where the term "cultivate" was assessed in terms of the forerunner to the Act, namely the Abuse of Dependence Producing Substances and Rehabilitation Centres Act 41 of 1971 (see also *S v Guess* 1976 (4) SA 715 (A)). Bekker J stated as follows:

> "Na my mening geld die volgende: Dat 'n kweker van dagga skuldig is aan 'handeldryf' is nie te betwyfel nie. Hy word regstreeks getref en val binne die trefwydte van die statutêre omskrywing van 'handeldryf' wat verskyn in art 1 van die Wet. Kweek van dagga is handeldryf. Die afleiding wat gemaak moet word uit hoofed van omskrywing van 'handeldryf', gesien in die lig van die voorgeskrewe vonnis, is dat dit die bedoeling van die Wetgewer is om die nekslag toe te dien aan kweek van dagga al sou dit deur die kweker vir eie gebruik bestem wees. Met ander woorde, soos ek die artikel vertolk is die verbod gemik op die kweek van die plant ongeag vir watter doel dit ook al bestem is. Natuurlik is dit terselfdertyd dan ook so dat die kweker 'in besit' van die daggaplant is en dat 'n pas ontkiemde plant minder as 115 gram kan weeg. Dit egter, gesien in die lig van die omskrywing van 'handeldryf' bied hom geen uitkoms nie. Die klem val nie op die word 'besit' nie maar op

> 'kweek' van dagga, wat hom dan binne die trefwydte van handeldryf insleep." (*S v Kgupane supra* 75H)

In applying the *dictum* in the *Kgupane* decision, the majority of the court, per Gyanda J, held:

> "I am of the view therefore, that, in spite of the sympathy that may be felt for a user of dagga, who plants a single dagga plant for his own use, but is convicted of dealing in dagga rather than possession thereof, … it is quite clear that the intention of the legislature was that, in its pursuit of the sharks, unfortunately some minnows might be caught in the same net." (*S v Mbatha supra* par 12)

The court rejected the argument that "cultivate" should be interpreted within the context of "raising" or "growing" plants for commercial purposes and as such not bringing within the ambit of "cultivate" a user who grew a solitary plant for his or her own use (par 14). A person falling in the latter category would as such not be deemed a "dealer". It was held that such circumstances would at most be relevant for purposes of assessing the question of sentences to be imposed (par 14). It was accordingly held that the court could not assist the ordinary user of dagga who cultivates a dagga plant for his or her own personal use and, as such, not with the motive of cultivating it for the purpose of dealing (par 15). It was held that the accused had correctly been convicted of dealing in dagga (par 16).

It was held by the minority, per Madondo J, that the object of the Act was, *inter alia*, to provide for the prohibition of the use or possession of, or dealing in drugs as well as acts relating to the manufacture or supply of certain substances or the acquisition or conversion of the proceeds of certain crimes, the recovery of the proceeds of drug trafficking and matters connected thereto (563 f–g). Madondo J, in addition, held as follows:

> "It is apparent … that the Act aims at eliminating financial incentives from illicit trafficking in dagga, but not to brand any act relating to dagga-handling as dealing. Therefore it is appropriate to conclude that the word 'cultivation' should not be interpreted in isolation, but with reference to dealing in dagga. For an accused person to be convicted of dealing in dagga, merely on the basis that he or she has cultivated dagga, a link must be established between cultivation of and dealing in dagga. In other words, the evidence must show beyond a reasonable doubt that the accused person cultivated dagga for the purpose of selling or supplying it to other people. In fact, the state must prove cultivation, prohibition, i.e. dealing in dagga and intention." (*S v Mbatha supra* 563 g–h)

It was held by Madondo J that the intention of the legislature in prohibiting cultivation of dagga was to prevent its *sale* or *supply* and as such the provisions relating to "deal in" should not be construed so as to render a person possessing dagga for personal use, or therapeutic purposes, a dealer (564 e).

An important aspect to which Madondo J alluded in the minority decision relates to the penalties prescribed in the Act in respect of the offence of dealing in drugs. Section 17(*e*) of the Act provides that any person guilty of the offence of dealing in dagga shall be liable to imprisonment for a period not exceeding 25 years or to both imprisonment and such fine as a court

may deem fit (see also Snyman *supra* 434). It was held that the imposition of minimum imprisonment for an offence that may be committed unknowingly and without the requisite intention depriving the accused person of his or her liberty "[o]ffends against the principles of fundamental justice" (568 g–h).

Madondo J held that there is no indication that the interpretive approach ascribed to the meaning of the word "cultivation", which inherently infringes on the right to be presumed innocent and the right to freedom and security of the person, constituted a legitimate limitation of the rights, nor that such infringement serves a legitimate purpose (570 a–b). It was further held that there is no evidence to indicate that the cultivation of a single dagga plant or a few plants presents a reasonable risk of serious, substantial or significant harm to either the individual concerned or society (570 c–e). As such, an accused person who grows a single dagga plant or a few plants for own use, may face severe punishment and potentially be exposed to the full extent of the confiscation provisions. In terms of section 25 of the Act, such an accused person stands to lose his or her assets, including homes, as section 25 of the Act provides that a conviction of dealing in dagga may be followed by an order for confiscation of assets (570). In terms of section 25 of the Act, a court convicting an accused person of dealing in drugs may, in addition to any punishment that the court may impose, declare that any property, including the immovable property used for the purpose of or in connection with the commission of the offence, be forfeited to the State (570 i–j).

It was held that the legislature had not intended to exclude *mens rea* as an essential ingredient of the offence of dealing in drugs by including the word "cultivation" in the definition of "deal in" in the Act (572 a–b). It was further held that where a statutory provision imposes an obligation upon an accused person to establish certain facts in order to escape criminal liability, it constitutes a breach of the presumption of innocence enshrined in section 35(3)(*h*) of the Constitution (572 f–g). In respect of the interpretation of the term "cultivation", Madondo J held:

> "The word 'cultivation' should be interpreted restrictively to mean cultivation for commercial purposes or to supply to other people. In order to secure a conviction of dealing, on the ground of dagga cultivation, the state must prove beyond reasonable doubt cultivation, dealing and the *mens rea* to commit such an offence on the part of the accused. In other words, a connection between cultivation of and dealing in dagga must be proved beyond all reasonable doubt." (573 c–d)

The minority of the court held that the appeal against conviction should succeed and that the conviction of dealing in dagga should be set aside and substituted with a conviction for possession of dagga (573 g).

The decision in *Mbatha* illustrates the dilemma pertaining to the application of sections 4 and 5 prior to the decriminalisation of possession or use of cannabis, or cultivation thereof, for personal use. The accused was convicted of dealing in dagga merely for cultivating a dagga plant for personal use. As correctly noted in the minority judgment, serious repercussions flow from such conviction in terms of the Act. Had the same accused been charged after judgment in the decision under discussion had been handed down, the accused would not have been guilty of any offence.

Reflecting on the judgment in *Mbatha*, it becomes clear that the judgment under discussion is constitutionally sound and in line with the foundational principles enshrined in the Constitution.

It is submitted however, that there are certain critical aspects to which the legislature should have regard when drafting the amended legislation in line with the order granted by the Constitutional Court. These aspects open the door to a debate on other constitutional concerns that could be forthcoming after the handing down of the judgment under discussion. Note that the only way to assess whether an individual is in possession of cannabis only for personal consumption is to look at the quantity found in a person's possession. The larger the quantity of cannabis found in an individual's possession, the more likely it is that it is not possessed only for personal consumption. Bear in mind too that, to be lawful, the possession, or use, or cultivation should take place in private. The judgment, however, clearly indicates that "in private" is not confined to a home or private dwelling, as long as the place is not a public space.

Section 40(1)(*h*) of the Criminal Procedure Act 51 of 1977 (CPA) provides as follows:

> "Arrest by peace officer without warrant
> (1) A peace officer may without warrant arrest any person–
> …
> (h) who is reasonably suspected of committing or of having committed an offence under any law governing the making, supply, possession or conveyance of intoxicating liquor or of dependence-producing drugs or the possession or, disposal of arms and ammunition."

Section 40 of the CPA was not included in the order of the court as one of the provisions held to be constitutionally invalid (par 91–93). After the handing down of the judgment of the Constitutional Court, it is no longer an offence for an adult to use or be in possession of cannabis in private for his or her own personal consumption. Accordingly, an individual found in possession of cannabis can no longer be arrested by a peace officer for being in such possession. Such possession obviously depends on the quantity found in possession but little to no guidance is provided as to the amount of cannabis found in a person's possession that could lead to a reasonable inference of dealing. It should be borne in mind that dealing in cannabis remains a criminal offence. The problem is alluded to by Zondo ACJ where he held:

> "The police officer will need to have regard to all the relevant circumstances and take a view whether the cannabis possessed by a person is for personal consumption. If he or she takes the view, on reasonable grounds, that that person's possession of cannabis is not for personal consumption, he or she may arrest the person. If he or she takes the view that the cannabis in the person's possession is for that person's personal consumption, he or she will not arrest him or her." (par 113)

It is submitted that it will become crucial to educate police officials as to the practical impact of this judgment and, eventually, also the amended sections of the Act. It is trite that providing for a set quantity of cannabis above which

a person will be potentially guilty of dealing in cannabis, would be tantamount to reinstating presumed dealing.

Presumed dealing can, in addition, no longer assist the prosecution in terms of proving the offence of dealing in drugs as the presumptions contained in section 21 of the Act were declared unconstitutional (see specifically *S v Zuma* 1995 (1) SACR 568 (CC) (1995 (2) SA 642; 1995 (4) BCLR 401) par 33; *S v Bhulwana* 1995 (2) SACR 748 (CC)*; S v Gwadiso* 1995 (2) SACR 748 (CC) (1996 (1) SA 388; 1995 [12] BCLR 1579; (1996) 1 ALL SA 11) par 15; *S v Mbatha supra; S v Prinsloo* 1996 (1) SACR 371 (CC) (1996 (2) SA 464; 1996 (3) BCLR 293) par 12; *S v Julies* 1996 (2) SACR 108 (CC) (1996 (4) SA 313; 1996 (7) BCLR 899) par 3; *S v Ntsele* 1997 (2) SACR 740 (CC); *S v Mjezu* 1996 (2) SACR 594 (NC)).

Proper and adequate training and education on these practical aspects are not only necessary, but also pivotal as, in their absence, numerous unlawful arrests could be made.

A further criticism that could be levelled at the judgment relates to dealing in cannabis. The question could be posed as to whether the outcome of the decision does not amount to promoting dealing in cannabis or dagga. The Preamble to the Act makes it specifically clear that the Act intends to provide for:

> "the prohibition of the use or possession of, or the dealing in, drugs and of certain acts relating to the manufacture or supply of certain substances or the acquisition or conversion of the proceeds of certain crime."

It should be emphasised that the judgment did not decriminalise the act of dealing in cannabis, but only decriminalised the *cultivation* of cannabis for personal consumption. It could be argued that since individuals are now free to possess cannabis for personal use, dealing in cannabis will concomitantly escalate. The latter inadvertently arises from the fact that despite the possession of cannabis being legal, it will still not be freely available and will have to be obtained, in the majority of cases, from a dealer. The latter will result in the dealer incurring liability for selling and dealing in drugs, whereas the possessor will not be criminally liable. It could thus be argued that the result of the judgment conflicts with the inherent objects of the Act as stipulated in the Preamble to the Act. It could accordingly be argued that the judgment will indirectly lead to the promotion of dealing in drugs.

Another most important aspect not addressed in the judgment relates to the impact of the judgment on the principle of the best interests of the child, which is paramount in terms of section 28(2) of the Constitution. It is trite that the decriminalisation of the possession or use of cannabis for personal consumption only applies to adult persons. This becomes problematic when parents of children possess or use cannabis for personal use. The question arises as to how this will impact on the best interests of children within those households. How will children be adequately protected from being exposed to the abuse of cannabis by their parents and further from being exposed to using it themselves? Note that minor children under the age of 18 are still subject to the provisions of the Act as well as the Medicines Act. No exception to criminalisation was made for the possession or use of cannabis

by children. Children can thus still be criminally prosecuted for possession of cannabis. A child living with parents who use or possess cannabis could be prosecuted if found in possession of cannabis that he or she has obtained while living with parents using or possessing it.

In such a scenario, the parent or parents will not face criminal prosecution, but the child will. It remains an undeniable reality that children often explore and, owing to their youth, do not always comprehend the implications of their actions. As such, they could possess cannabis after seeing their parents using it and not realise that it is a criminal offence for them to possess it. It could be argued that the decriminalisation should also apply to possession by children. However, that would be tantamount to sanctioning the use or possession of cannabis by children, which also conflicts with the best interests of the child principle. If children are found in possession of cannabis while at school, for example, further implications in terms of the South African Schools Act arise (see s 8 as well as s 8A(12) of the South African Schools Act 84 of 1996 (SASA)). Accordingly, exposing children to the possession or use, or cultivation of cannabis could be detrimental to the best interests of the child. It is further important to note that, in terms of section 8A(1) of SASA, all schools are declared as drug-free zones (see Joubert "The South African Schools Act" in Boezaart (ed) *Child Law in South Africa* 2ed (2017) 886). Children may be subjected to random searches in terms of section 8A(3)(*a*) and if a child is found in possession of drugs, he or she may be instructed to leave the premises or be denied access (see Joubert in Boezaart *Child Law in South Africa* 586–587).

An in-depth assessment of the impact of the decision under discussion on the best interests of the child principle falls beyond the scope of this contribution. Suffice it to state that the paramount nature of the best interests of the child principle is well entrenched, not only in the Constitution but also in international instruments (see Article 3 of the United Nations Convention on the Rights of the Child (1989), as well as Article 4 of the African Charter on the Rights and Welfare of the Child (1990); see also Skelton "Constitutional Protection of Children's Rights" in (ed) Boezaart *Child Law in South Africa* 345–347; *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC) par 121).

It is submitted that the finding of the Constitutional Court could impact negatively on the best interests of children who are exposed to the possession and use of cannabis. The decriminalisation of the possession or use of cannabis, as stated above does not apply to children. Accordingly, children can still be prosecuted in terms of the Act for possession or use or cultivation of cannabis. It is submitted that this is a serious concern of which the legislature should take account when formulating the amendments flowing from this decision.

6 Conclusion

The decision under discussion dealt with a contentious area of criminal law that is not a novel dilemma – the use or possession of cannabis for personal consumption. From the outset, this contribution has indicated that the

judgment opens the door to a critical debate on a multitude of aspects. From *Prince* (*2*), it was already clear that courts grappled with this issue. It became clear from *Prince* (*2*) that merely catering for additional exemptions to the prohibition on the possession or use of cannabis could become problematic in terms of practical enforcement and implementation. The decision in *Mbatha* illustrated the injustices that could flow from the application of the relevant sections of the Act prior to their being declared constitutionally invalid and the effect of decriminalisation. From a constitutional perspective, the decision by the Constitutional Court seems in line with the basic principles enshrined in the Constitution.

However, there are various concerns in terms of the application of this judgment, with specific reference to the best interests of children within the realm of the decriminalisation of the use or possession of cannabis for private use. It is submitted that these are pivotal aspects of which Parliament should take heed in the ultimate pursuit of bringing the provisions of the Act in line with the foundational principles of the Constitution and further ensuring that other constitutional rights are not overlooked in the process.

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