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MOTIVATING LARGE GROUPS OF LAW STUDENTS TO THINK CRITICALLY AND WRITE LIKE LAWYERS: PART 2*

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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 began 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 went 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

This is the second part of a two-part article exploring the theoretical underpinnings behind two central themes – student[1] motivation and critical

* See Part 1 of this article in 2020 41(4) *Obiter* 751.

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

thinking – as they relate to teaching law students how to write like lawyers. The article as a whole examines these two themes through the lens of a case study of a legal writing programme, the Write it Like a Lawyer (WiLL) programme, which was implemented on the Howard College Campus of the University of KwaZulu-Natal (UKZN) in 2019; in so doing, the article focuses on the three key teaching principles that were drawn upon when designing and implementing the programme. All three principles – constructive alignment, learner participation and conversations in feedback – link closely to the article's central themes. The main contention of this article is that applying these principles to teaching legal writing in a participatory learning environment has the potential intrinsically to motivate law students to engage critically with context-embedded legal materials, thereby enabling them to improve their legal writing skills.[2]

Part 1 of this article began by focusing on the theoretical underpinnings behind the main themes of the article, pointing out that if students are to learn to write persuasively – like lawyers do – then legal educators must design their legal writing modules with both student intrinsic motivation and critical thinking in mind. It is argued that these two themes are intimately linked. Without being intrinsically motivated to engage deeply with the module materials and to think critically about the issues raised in those materials, learners will not be sufficiently invested in the process nor will they have sufficient depth or critical understanding of the materials to produce excellent, persuasive legal writing.

Part 1 also discussed the theory behind the three key teaching principles that were used in the design of the WiLL programme. It is argued that when designing a legal writing programme that aims to motivate students intrinsically to think critically and ultimately produce writing that persuades, first, all elements of the programme must be constructively aligned – from the choice of contextually relevant materials to the teaching techniques employed to the methods of assessment selected. Secondly, learner participation using constructivist teaching methods must be maximised, taking advantage of both vertical and horizontal learning opportunities. Thirdly, conversations in feedback must be implemented in order to provide a personalised learning experience for students, aimed at encouraging critical debate and eliciting justification for the use of sources and arguments. Finally, part 1 of the article described the WiLL programme in some detail and the significance of the two central themes to this programme.[3]

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[2] 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 skills, should also demonstrate an awareness of legal discourse and how to communicate within this community (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 15 *Stellenbosch Law Review* 3 6).

[3] The programme formed part of the 2019 Legal Research, Writing and Reasoning second-year LLB module (LRWR). Details of the LRWR module will be elaborated on below.

Part 2 of this article discusses the practical implications and challenges of employing the three main teaching principles – constructive alignment, learner participation and conversations in feedback – and how these principles were applied within a constructivist teaching paradigm in order to achieve the desired outcomes in the WiLL programme. The point is made that all three principles are at the same time both discrete and overlapping, and that giving equal attention to each of the principles when designing a legal writing programme provides learners with an interlinking web of sound pedagogical design that will support student motivation and critical thinking. Finally, part 2 concludes with recommendations for improvements that could be implemented in such future programmes.

2 OVERVIEW OF THE 2019 WRITE IT LIKE A LAWYER PROGRAMME (WiLL)

In 2019, the WiLL programme was incorporated as a pilot project in the latter half of a second-year LLB module – namely, the Legal Research, Writing and Reasoning module [LRWR]. Since part of the ethos of the WiLL programme was to encourage learner participation and peer-learning in small group lecture sessions, when the time came for learners to participate in this section of the LRWR module, the class of 300 was 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. The assessment of the legal writing programme (comprising two written assignments worth 20 per cent each) formed 40 per cent of the final assessment for the entire LRWR module. The first assignment required learners to draft a case summary; in the second assignment, they had to compose an article for a legal column in a newspaper.

Three key teaching principles were considered when designing the WiLL programme so as to encourage student motivation leading to a deep, critical engagement with the programme content. The first of the three principles – constructive alignment – is discussed below.

2 1 The constructive alignment teaching principle

It is argued in part 1 of this article that careful consideration of the constructive alignment of a legal writing programme can cultivate intrinsic learner motivation. Intrinsic motivation can be described as the will to engage without the need for external motivating factors, students being driven simply by the desire to learn.[4] If they are intrinsically motivated,

However, the focus of this article is on the 5-week legal writing intervention that formed part of the LRWR module. 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.

[4] Voke "Motivating Students to Learn" 2002 28 *Student Engagement* http://www.ascd.org/publications/newsletters/policy-priorities/feb02/num28/toc.aspx. (accessed 2021-02-02).

learners will be inspired to engage deeply with context-relevant materials and will be in a position to take advantage of the learning opportunities provided to develop their critical thinking and writing skills.[5] Thus, the programme design must consciously align the intended learning outcomes (ILOs), the programme materials (and the framework within which learners are to engage with those materials) as well as the process by which learners are assessed, so as to maximise opportunities for students to connect in a meaningful way with the programme content and to develop a desire to produce excellent written work.

In designing the constructive alignment of the WiLL programme, certain knowledge, skills and values outcomes were identified as being of particular importance. The programme's ILOs were specifically chosen so that learners achieving those outcomes would leave the programme having not only improved their critical thinking, reading and legal writing skills, but also having acquired the intrinsic motivation to think, read and write critically.[6] The ILOs were activated by a set of source materials selected for their contextual relevance and interesting, transformative nature – features that would motivate learners to critically engage with their content.[7] These materials, which pertained to South African dignity jurisprudence, aimed to inspire students by exposing them to excellent, persuasive legal writing that enhanced their knowledge of issues relating to this concept within an important social context. These contextually relevant materials also provided ample opportunity for values-based class discussions around the topic to demonstrate the importance of critical thinking, reading and writing.

The three key ILOs for this aspect of the module were:

1. knowledge outcomes, which encompassed an understanding of:
    - various case law and academic writings underpinning dignity jurisprudence in South Africa today;

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5 The theoretical underpinning to this concept of constructive alignment is discussed in more detail in part 1 of this article. See 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).

6 Collectively, the programme's ILOs link closely to the graduate attributes listed in the SAQA standards for the Bachelor of Laws degree. For example, one of the programme's values outcomes – "providing students with an opportunity to reflect on how to critically align one's own values with those embedded in South Africa's dignity jurisprudence, including the Constitution of South Africa" – links to the first graduate attribute listed in the SAQA standards – that is, "The learner will have acquired a coherent understanding of, and ability to analyse fundamental legal and related concepts, principles, theories and their relationship to values critically". See http://regqs.saqa.org.za/viewQualification.php?id=22993.

7 It must be noted that, although not always possible to select interesting, well-written legal materials when teaching substantive law subjects based on complex legal materials that many students might find tedious and boring to read, the concept of intrinsic motivation must always be considered. Thus, to counteract the potential boredom, additional, interesting, values-based materials can be sourced to supplement learning and to contextualise and personalise those complex legal materials and, in so doing, inject enthusiasm into the learning environment.

- what it is to write like a lawyer and the importance of persuasive writing and critical thinking, reading and writing in law; and
- the difference in writing styles employed in legal journal articles, cases and newspaper articles covering legal issues;

2. skills outcomes, which encompassed the ability to:
   - critically read statutes, cases and journal articles, having reference to the importance of dignity jurisprudence in South Africa today;
   - summarise case law;
   - think and write creatively, using a personal writing style within the parameters of a clear, concise, logically coherent legal argument; and
   - formulate an argument, accessible to the general public, for a legal newspaper column, justified by multiple sources, including cases, statutes and journal articles; and
3. values outcomes, which included providing students with an opportunity to reflect on:
   - the importance of dignity jurisprudence in a transformative constitutional South Africa;
   - how critically to align one's own values with those embedded in South Africa's dignity jurisprudence, including the Constitution of South Africa; and
   - how to reflect these values when writing like a lawyer.

Once the ILOs of the module were determined, constructivist teaching techniques were then chosen to facilitate the implementation of these learning outcomes.[8] Finally, the ILOs were mirrored in the assessment methods employed. Details of these teaching methods and assessments are discussed in more detail below.

The materials used in the WiLL programme comprised three sources of legal writing, showcasing three different writing styles. Each of these sources was eloquently and persuasively written, and each was specifically chosen because of its distinct link to the other so as to support the learners' comprehension of the subject matter as well as their comprehension of the arguments that each source put forward.

[8] Each level of Bloom's Taxonomy is addressed in the module's ILOs: knowledge (students are required to recall case information); comprehension (students are required to understand the argument and principles laid out in the journal article and case judgments, as well as understand the importance of persuasive legal writing, and summarise the cases); application (students are required to apply the knowledge gained from the case reading when discussing relevant current events); analysis (students are required to organise the ideas gained from the journal article and case judgments to create their own argument and analysis in the newspaper column assignment); synthesis (students are required to synthesise the information and ideas gleaned from the case notes and journal article to create a new argument in the newspaper column assignment, as well as during class and group discussions); evaluation (class discussions focus strongly on comparing ideas and values relating to current social issues and brainstorming ways to solve these issues and, in so doing, critically align their ideas to South Africa's dignity jurisprudence).

The first source that learners were required to engage with was an academic legal journal article written by Professor Stephen Peté [9] that critically discussed the importance of dignity jurisprudence in South Africa, with specific reference to the writings of eminent Constitutional Court Justice Albie Sachs in the *Fourie*[10] judgment. This article was chosen as the first source because it was written simply and concisely as well as the fact that it was closely linked to the second source that would be introduced to the learners in due course. Peté's article demonstrated to the learners what it means to discuss an issue critically (particularly since this was an opinion drafted by an experienced legal academic who had engaged deeply with the content of the *Fourie* judgment) as well as what specific writing skills and writing style are needed to produce a persuasive legal journal article. As an added bonus, learners could familiarise themselves with the arguments and assertions of the second source – the *Fourie* case – and identify on a logical as well as an emotional level with the more complex legal language, writing style and legal conventions of a judgment.[11]

The second source, the *Fourie* judgment, was introduced to learners next, in order to show them the more formal, complex style of case judgment writing and how to draft a case summary. Learners were taken through a critical reading of the judgment in some detail to illustrate how mini-summaries and sub-headings were used throughout the piece by Justice Sachs to break up chunks of text and to keep the reader engaged and up to speed with the arguments being presented. However, in addition to showing learners the necessity of a simple, structured writing style to aid in the comprehension of a lengthy legal text with complex, nuanced arguments, this judgment was selected as it showed Sachs's ability to engage in a creative, critical discussion of important social issues in such a way that readers are elegantly persuaded of his point of view. Learners were then taken, step-by-step, through the process of producing a case summary, after which they were given the opportunity to summarise the *Fourie* case in a small-group setting, using guiding worksheets.

The third source was a legal newspaper column article written by experienced legal journalist Carmel Rickard.[12] Although the subject matter of this source did not mirror the subject matter of the previous sources, it did link with them because of the skill applied in the article, which was case summarising. [13] Rickard's newspaper piece showed the learners a third and

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9 Peté "South Africa's Quixotic Hero and His Noble Quest: Constitutional Court Justice Albie Sachs and the Dream of a Rainbow Nation" 2010 31 *Obiter* 1.

10 *Minister of Home Affairs v Fourie (Doctors For Life International and Amici Curiae); Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 (1) SA 524 (CC).

11 The sources used and their order of presentation could be changed in future legal writing programmes. For example: first, introduce the students to the Marriage Act, so that they become familiar with reading and analysing legislation; second, bring in the *Fourie* case to demonstrate how the Act was interpreted by the courts in light of the key issue of dignity; and, finally, allow students to read Peté's article, which critically discusses the important issue of dignity jurisprudence in South Africa today as it relates to the *Fourie* case.

12 Rickard "Lessons for Courts on Domestic Violence" (2015-09-25) *Mail & Guardian*.

13 It would be preferable for the general themes of all the source materials studied in the programme to link more closely. In this way, for example, students could learn the important skill of summarising a case with the general public as the target audience, as well as how to

final style of legal writing – the informal, factual abbreviated writing style of newspaper journalists with a completely different target audience to that of an academic journal article or case judgment. Just as importantly, this source illustrated in a deft, uncomplicated fashion, the creative development of an argument.

Learners were assessed twice in the programme. The assessments were essential to anchor the programme within the LRWR module, which formed part of the mainstream LLB syllabus; they lent credibility to the programme and motivated learners to participate to the best of their abilities. The assessments used in the WiLL programme were closely aligned with the module's ILOs and therefore were designed to promote critical thinking (around issues such as the importance of social transformation, its practical implications and the value of dignity jurisprudence in South Africa today) and to motivate students to engage deeply with the source material by showing them that good legal writing can indeed make a practical difference.

The first assessment used was a case summary. The judgment that learners were required to summarise was drafted by Justice Langa in the *Pillay* case.[14] This judgment was chosen for the assessment not only because of the elegant, persuasive way in which it was written, but also because of its seamless alignment with the programme's theme of dignity jurisprudence to fit in with the ILO of understanding the value of dignity in South Africa today and testing their functioning knowledge. In addition, the *Pillay* case contains arguments with which learners would immediately be familiar, since both the *Fourie* and *Pillay* cases discuss issues relating to the violation of human dignity.[15] In this way, learners would be able to focus on applying their case summary and critical reading skills learnt during their interaction with the *Fourie* case without being unduly distracted by unfamiliar complex arguments.

The second and final assessment was to write an article for a newspaper's legal column discussing any aspect of South Africa's dignity jurisprudence. The assignment instructions clearly defined the maximum word count and writing style. However, the topic of the assignment was kept vague by design, encouraging learners to think creatively while maintaining the need for them to justify their arguments.

Thus, the WiLL programme was constructively aligned from inception to assessment with the goal of increasing learner motivation to apply themselves to understanding the materials, thereby giving them the best possible chance of enhancing their critical reading and critical thinking skills, and, as a consequence, their legal writing skills.

2 2 The learner participation teaching principle

structure a critical argument in such a newspaper article linking to the themes of the programme.

14 *MEC for Education, KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC).

15 In the *Fourie* case, the discrimination was based on sexual orientation, and in the *Pillay* case, it was based on cultural and religious practices.

As discussed in part 1 of this article, the WiLL programme is based on a constructivist teaching paradigm. Therefore, when designing the teaching techniques to be employed in the programme, careful attention was paid to the active role that students would play in the construction of knowledge within the classroom.[16] Learner participation, which is the second key teaching principle, is crucial for two main reasons. First, the intrinsic motivation of the learners is triggered, raising the energy levels in the learning environment and inspiring learners to engage deeply with the materials.[17] Secondly, learners are empowered to think, read and write critically. Thus, when designing a legal writing module, careful attention must be paid to the teaching techniques to be applied in the module to ensure that they support active class participation. This also enables learners to hear the diversity of views and voices of their peers, allowing them to engage critically with a wide range of arguments and justifications, modelling the way in which lawyers are required to constantly evaluate various legal positions.[18]

Since the overarching goal when choosing the teaching activities in the WiLL programme was to encourage class participation, as many practical vertical and horizontal peer-learning opportunities as possible were incorporated into the teaching design. The task-orientated activities presented to learners during the programme included:[19]

- lecturer-led class discussions to facilitate vertical learning;
- guided small-group peer work, including group discussions and group writing tasks using worksheets, to encourage horizontal learning;[20]
- the presentation of contextually relevant problems for critique and analysis both as a class and in small groups; and
- various blended-learning tasks.

The first step taken to encourage peer interaction was to split the class of around 300 learners into groups of no more than 50 students per group. Lectures were held in the computer LAN and each lecture was repeated six times per week in order to accommodate all the groups. Prior to attending lectures, learners were required to complete formal preparation. The two reasons behind this requirement were, first, to encourage independent learning, and secondly, to ensure learners came to lectures armed with the relevant knowledge in order to participate meaningfully in active class discussions. During the lectures themselves, vertical and horizontal peer

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16 Quinot "Transformative Legal Education" 2012 129 *The South African Law Journal* 411 420.

17 Voke 2002 *Student Engagement*. Also see Crocker 2018 *PER/PELJ* 11–12.

18 Bean *Engaging Ideas: The Professor's Guide to Integrating Writing, Critical Thinking, and Active Learning in the Classroom* (1996) 5.

19 The theoretical underpinnings of this concept are discussed in detail in part 1 of this article. See discussion on 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.

20 It would be interesting to introduce a group work task that would require learners to reflect on their own challenges experienced with legal writing, followed by a group brainstorm on ways to overcome these challenges.

learning took place in the form of lecturer-led class discussions and in the form of formal, guided, practical class activities in groups of three or four students per group.

2 2 1 Lecturer-led class discussions

The lecturer-led class discussions facilitated the assimilation of both declarative and functioning knowledge.[21] Topics discussed included:

- an analysis of contextualised persuasive writing techniques and the motivation behind improving the skills needed to write like a lawyer as well as the need to encourage a critical learning environment of justification rather than authority;[22]
- an analysis of the writing skills and writing style necessary to write an academic journal article as compared to those skills necessary to write a case judgment or a legal newspaper column;
- the relevance of academic journal articles for law students and lawyers and how to write an introduction and abstract for such an article;
- how to read a case and write a case summary;
- how to formulate a persuasive argument; and
- using critical reading and thinking skills to understand and critically assess the value of dignity jurisprudence in contemporary South Africa.

2 2 2 Guided small-group peer work

The small-group tasks incorporated two distinct aspects: first, the groups were encouraged to continue the lecturer-led discussions in small groups among their peers, thereby encouraging horizontal peer learning and critical discussion on values-based topics; and secondly, learners were encouraged to practise legal writing and thinking like a lawyer by completing practical writing tasks in class.

Groups were asked to complete a number of practical tasks, which were designed with two goals in mind: first to pique the students' interest and encourage them to think critically about values-based issues affecting ordinary South Africans; and secondly, to get them to practise legal writing

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21 As discussed in part 1 of this article, Biggs maintains that learners must acquire two different kinds of knowledge – namely, declarative and functioning knowledge. In other words, 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 (Biggs https://www.researchgate.net/profile/John_Biggs3/publication/255583992_Aligning_Teaching_for_Constructing_Learning/links/5406ffe70cf2bba34c1e8153.pdf).

22 This concept of encouraging learners to focus on providing justification for their ideas rather than simply relying on authority is particularly important when teaching, learning and practising law in the transformative, constitutional democracy of South Africa and is discussed in part 1 of this article. Quinot explains this concept as: "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."

as much as possible, using worksheets, short paragraphs, summaries and a series of drafts. Some of the small-group activities included:

- writing an abstract for an academic journal article;
- critically reading and summarising the *Fourie* case;
- comparing the majority and minority judgments in the *Fourie* case;
- completing a worksheet on the value of dignity jurisprudence in the *Fourie* case;
- completing a worksheet on creating and justifying an argument in a legal newspaper column; and
- writing a series of drafts of a legal newspaper column on the general topic of dignity jurisprudence in South Africa today.

While the groups were completing each task, there was a strong emphasis on scaffolded learning with the lecturer moving from group to group to take part in the group discussions by: playing devil's advocate where necessary to extend the learner's critical thinking opportunities; clarifying any points of confusion that learners might have had with respect to the source materials; and providing instantaneous feedback on the completed practical group writing. All of the tasks encouraged learners to think critically by having to debate the correct answer among themselves before committing their consensus to paper and then defending this in a plenary discussion at the end of the lecture.

2 2 3 The presentation of contextually relevant problems

Taking advice from Bean, who recommends piquing the curiosity of students in order to motivate them to engage deeply with a concept, when designing the class participation activities, every opportunity was used to present the learners with unique, contextualised problems to discuss as a class as well as in their small groupings.[23] These problems provided the perfect backdrop to motivate learners intrinsically to engage deeply and think critically. Table 1 below depicts how a number of Bean's suggestions for the unique presentation of problems were incorporated in the WiLL programme. [24]

Table 1: The presentation of problems in the WiLL Programme

Bean's Suggestion for Problem Presentation	WiLL Activity
"Problems presented as thought-provokers for exploratory writing" and "problems presented as tasks for small group problem solving"	Learners were required to complete in-class worksheets in groups. These worksheets required learners, after some group discussion, to provide critical opinions on questions on the text currently being studied.
"Problems presented as	The second assignment that learners were

[23] Bean *Engaging Ideas* 2–3.
[24] Bean *Engaging Ideas* 6–7.

formal writing assignments"	required to complete was a persuasive legal writing assignment, which formed part of their formal evaluation. This assignment had learners formulating an argument as part of a legal newspaper column. Students were instructed to draw justification for their argument from three sources: Peté's journal article; the *Fourie* case judgment; and the *Pillay* case judgment. All of these had been extensively covered in class by this time.
"Problems presented as starters for inquiry-based class discussions"	Contextualising learning and how to write persuasively was a central focus through the WiLL programme lectures. Learners were expected to apply their minds to this concept each time when justifying their viewpoints in a class discussion.
"Problems presented as think-on-your-feet questions for in-class 'cold calling'"	General discussions on the value of dignity jurisprudence involved the lecturer posing off-the-cuff questions to individual members of the class, asking them their opinions, as well as to the class in general to brainstorm ideas on the topic.

2 2 4 Blended-learning tasks

Learner participation was also encouraged by introducing a blended-learning aspect into the programme. The WiLL programme classes were held in the university computer LAN, with each group of three learners being assigned one computer. This enabled them to access materials and to complete group work tasks while in class. Class notes, PowerPoint presentations and assignment instructions were all made available on the university e-learning platform Moodle. However, learners were required to access additional source materials (such as the academic journal article and case judgments) directly from the Internet or legal databases for perusal during class. In addition, learners were given access to a podcast of an interview with Justice Albie Sachs, which was valuable in further contextualising the subject matter of the programme.[25] In the words of Greenbaum and Quinot, "confronting students with the real-world story behind a particular case in multimedia format can be a powerful instrument in facilitating engagement with the contextual nature of law and harness(ing) the "cognitive power of storytelling".[26]

In addition to active class participation, made possible by the use of constructivist teaching techniques and blended-learning opportunities,

[25] The Story of Judge Albie Sachs "I Was Born Into It – Judge Albie Sachs" What's Your Story? Heartlines https://www.youtube.com/watch?v=OkBialqGsis&feature=youtu.be&list=PLD46IzNE0l-ECl-4n5nTPGdFoDkS-aQmY (accessed 2021-02-02).

[26] Quinot and Greenbaum "The Contours of a Pedagogy of Law in South Africa" 2015 26 *Stell LR* 54.

learners were provided with unique, highly individualised conversations in feedback so as to promote motivation and enhance the critical learning process.

2 3 The conversations in feedback teaching principle

The final key teaching design principle (conversations in feedback) speaks to the idea of improving student motivation by providing more one-on-one, scaffolded learning opportunities for the learners, thus catering for different learning styles, while using a constructivist teaching methodology.[27] To facilitate these conversations, programme instructors are required to work with learners individually through guided group work as well as oral and written feedback on individual and group work student tasks and assessments. This principle makes use of expert-novice interaction in terms of which a relative expert in the field gives specific, directed instruction to the learners on an individual basis. Learners are encouraged to participate in conversations about the feedback received on their writing, both with their peers and with the person giving the feedback. Boughey likens these conversations in feedback to having a "critical friend" or a "sounding board", all of which aid in the writing process. He says:

> "[T]he process of having to justify, explain, rephrase or clarify arguments for a critical audience reinforces the writer's own understanding; knowing that one may subsequently be forced to justify what one has written makes writers more likely to anticipate some of that criticism as they write. The presence of a critical friend, or sounding board, can thus be instrumental in moving the writer towards the practice of 'expert writers' 'who treat the process of composing an essay as a complex task of shaping a communication that will appeal to and convince an intended audience rather than simply writing down everything they know on a topic."[28]

Thus, in implementing the principles mentioned above in the WiLL programme, care was taken to provide as much individual formative and summative feedback to the learners as possible. Cognisance was taken of previous writing interventions implemented at UKZN, which noted that providing in-depth, personalised, written feedback on a number of drafts of student written work was pedagogically sound.[29] However, in the current programme, the student feedback was enhanced by placing a greater focus on individual, instantaneous oral feedback.

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[27] The theoretical underpinnings of this concept are discussed in part 1 of this article. See Laurillard *Rethinking University Teaching: A Framework for the Effective Use of Educational Technology* (1993) 105; and 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* (LLM thesis, University of Natal, Durban) 2003 29–30.

[28] Boughey "Department-Specific Writing Centres Linked to Tutorial Programmes: The Quest for Quality" 2012 26 *SAJHE* 51 55, referencing Brumfit *Problems and Principles in English Teaching* (1980) and Resnick "*Instruction and the Cultivation of Thinking"* in Entwistle (ed) *A Handbook of Educational Ideas and Practices* (1990) 698.

[29] See Crocker 2018 *PER/PELJ* 20.

Learners were required to attend the penultimate lecture of the programme having completed a first draft of their newspaper legal column assignment. Then, after discussing the first stage of their progress in developing an argument for their assignment in a large-group setting, with learners also providing feedback on their peers' progress, the class was divided into small groups and instructed as follows:

1. Learners must interrogate the lecturer-led class discussion further with their peers in their small groups.
2. Learners must then each present their arguments to the other members of their group who must give oral feedback on these arguments. This feedback should not be limited to the nature of arguments, but should also interrogate the justification[30] for the argument.
3. Learners must also give feedback on grammar, punctuation, logical flow, structure and the presence of critical thinking in the presentation.

While the small groups were interacting, the module lecturer moved from group to group, providing instant oral feedback on students' arguments and taking part in the small-group discussions. After completing this exercise and receiving advice from the programme expert and peers in their groups, students were then required to write and rewrite subsequent drafts.

So, having had the opportunity to brainstorm arguments during class and the space to refine their thinking and writing in this regard in small groups and in their own time, learners were afforded the opportunity to receive focused, one-on-one oral feedback from the module lecturer during individual feedback consultations. Learners used these consultations to explain the thought process behind the development of their arguments, and then debated with the module lecturer their justification for these arguments. These sessions thus operated as an extension of the peer discussions that the learners had participated in during the class small-group sessions. Discussion in these individual consults also centred around the argument and flow of the article, as well as the target audience, effectiveness of writing style, grammar and punctuation, and overall persuasiveness of the writing. Learners were then given a chance to reflect on this discussion before making the necessary amendments to their writing and submitting a final draft for formal assessment, which received summative written feedback. It was encouraging to note that the process of having conversations in feedback and negotiating reasons for revisions on student writing worked effectively and a marked improvement was noticed by the lecturer in terms of learners' subsequent drafts.

In carrying out this series of writing tasks, which required numerous drafts and an in-depth, ongoing critical dialogue with an expert in the field around formative and summative feedback comments, learners were forced to engage fully in the process of writing. This process then, is best implemented using a scaffolded teaching methodology within the framework of the expert-novice theory, with a strong emphasis on repetition and

[30] The idea of justifying an argument rather than merely quoting authority is developed by Quinot and discussed in more detail in part 1 of this article (Quinot 2012 *SALJ* 417).

individualised feedback. In this way, students are guided step-by-step by a relative expert in the field through multiple drafts of a piece of writing, gradually moulding their first draft attempts into polished final drafts.

The three principles of constructive alignment, learner participation and conversations in feedback discussed in part 1 and applied in part 2 of this article represent significant positive features of the WiLL programme. However, the programme also encountered a number of challenges that would need to be resolved in future legal writing programmes. These challenges are addressed below.

3 CHALLENGES ENCOUNTERED ON THE WiLL PROGRAMME AND RECOMMENDATIONS FOR IMPROVEMENT

Three main challenges were encountered during the implementation of the WiLL programme: insufficient staffing resources; limited use of digital tools to enhance constructivist teaching activities; and lack of learner preparation. In one way or another, all of these challenges diminished the intrinsic motivation of the learners and reduced their opportunities to engage and think critically.

3 1 Insufficient staffing resources

The first challenge encountered was that of insufficient staffing resources. Only one lecturer was appointed to run – that is, design, teach, consult and assess – the five-week legal writing programme with 300 students. The structure of the WiLL programme (featuring repeat-teaching as well as oral, formative feedback and written, summative feedback on assessments and group writing tasks) generated an extremely heavy teaching load for one lecturer, who, of course, also had other teaching and research responsibilities. In addition, it was an impossible task for one lecturer to engage critically in every small-group discussion and attend to every query generated during the double lecture period allocated to the module each week; thus some students missed out on this valuable learning experience. It was also impossible for one lecturer to consult individually with all 300 learners in order to hold a meaningful conversation in feedback; this would obviously affect student motivation for those learners who were not given the chance to engage in these sessions.

However, although the lecture load required by the programme was tiring and time-consuming, it was at the same time extremely gratifying for the lecturer to notice learners coming alive during class discussions on values-based topics. Learners who at first were shy to speak up during class began responding with energy and enthusiasm to questions posed as the participatory teaching techniques were rolled out in the programme. Spontaneous debate also broke out on numerous occasions among learners during the small-group activities, with students commenting time and again that they had received fresh insights into the importance of protecting dignity in South Africa today. On many occasions, a number of students continued debating issues for some time after the allotted lecture time was over,

showing intrinsic motivation to learn and to subject the issues at hand to critical analysis.

There are two potential solutions to the problem of insufficient staffing resources:

1. Written and oral feedback could be shared among all School of Law lecturers. Legal writing and the ability to think critically are skills that must permeate all aspects and levels of the LLB programme and, as such, this load should be shared across the curriculum, which would work to ease the teaching load. Synergy between skills-based modules and substantive law modules within the same academic year could also be explored. Assignments could be linked across two modules, with lecturers sharing the marking burden across the modules, taking advantage of the legal writing instruction given in the skills module and the legal content disseminated in the substantive law module. This recommendation would require some debate among School of Law staff members and, of course, authorisation from the School of Law executive staff since there is a strong chance that it would only be supported by other staff if the additional teaching was factored into their formal teaching loads.
2. Alternatively, final-year LLB students who have taken on the role of tutors as part of the final-year Public Law elective module "Teaching Legal Skills" at UKZN, Howard College, and who have received substantial peer tutor training as part of this module, could be used to provide immediate oral feedback on in-class, small-group written work and discussions.[31] In addition to the inherent legal writing skills that the Law School tutors possess by virtue of the fact that they are final-year law students, these students also receive weekly training on providing feedback on student work, as well as in the teaching methodologies relating to small group facilitation. The use of student tutors, rather than School of Law staff members, could be an important way of addressing the resource constraints of the programme.[32]

3 2 Lack of learner preparation

The second challenge encountered was the lack of learner preparation. Some learners did not complete the lecture preparation tasks, reducing the quality of class and small-group discussions. The classroom tasks were implemented to encourage learners to think critically by teaching them to justify their ideas and to communicate those justifications effectively. However, those students who were under-prepared were reluctant to speak out in class discussions, which adversely affected class motivation as well

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31 See Greenbaum *Teaching Legal Writing in a South African Context: An Evaluation of the Work of Student Tutors in Assisting with the Development of Legal Writing Skills in First Year Law Students at One South African Law School* (Master of Education dissertation, University of Natal) 2001 79–83. Also see Boughey 2012 *SAJHE* 55.

32 See detailed discussion in Crocker "Developing Factors to Underpin a Legal Writing Programme at the University of KwaZulu-Natal, Howard College, School of Law: An Analysis of Two Writing Interventions", submitted for publication.

as the depth of critical debate. For example, learners were required to come to class prepared to give informal presentations of the arguments contained in the first draft of their newspaper column assignments in small-group clusters. However, there were some groups where certain students were simply not prepared and thus could not give a meaningful presentation of their arguments; thus these individuals did not receive valuable peer critique and the group could not participate in an in-depth, critical discussion during this time. It must be noted, however, that although this lack of learner preparation did have some negative effect on student motivation and critical discussion, there were a number of learners who did prepare effectively and participate meaningfully in class discussions and critical debates. The participation from these learners was sufficient to demonstrate that the constructively aligned, participatory teaching techniques implemented were effective in increasing student motivation to think critically and to instigate vigorous debate on various values-based discussion topics. Learner motivation and participation could also possibly be improved if the materials studied and skills learnt in this legal writing skills module were more overtly linked to the students' other substantive law modules for which they were registered in the same year. If students' participation and success or failure in the Legal Writing module was closely linked to their success or failure in other second-year modules, this could be a strong motivating factor.

A potential remedy for the lack of learner preparation is suggested by Fink, who makes the point that learners can be intrinsically motivated to prepare and read ahead of lectures by making them aware that they will be held accountable for their preparation. Here are two examples of how students can be held accountable for their lecture preparation:

1. An assessment quiz on the relevant material can be administered before beginning the class activities.[33] These in-class assessment quizzes can be administered online. These quizzes are easy to set up online and, since the lectures all take place in the computer LAN, they will also be easy to administer. Learners will also be discouraged from skipping class since doing so will mean that they will miss the quiz and a chance to earn marks in the module.
2. Learners can be forewarned that they are expected to take part in an informal presentation or small-group discussion and that a mark – albeit a low percentage of the overall module mark – will be allocated for their effective participation. School of Law student tutors could be used to facilitate and evaluate these presentations. Alternatively, learners could be expected to hand in a single page, setting out their argument and justification, taking into account their individual learning styles, and receive a mark for this. So, for example, visual learners could submit a flow diagram or mind map of their argument, and linear learners could submit this information in point form. This lecture preparation could be marked by the School of Law tutors.

[33] Fink *Creating Significant Learning Experiences: An Integrated Approach to Designing College Courses* (2003) 115.

3 3 Limited use of digital tools

The third challenge encountered was that although some digital tools, such as the Albie Sachs Life Story podcast, were used during the WiLL programme in order to enhance the teaching and learning experience, more could have been done to exploit such resources. It is well documented that incorporating e-learning and digital tools into a constructivist teaching strategy will enhance student learning.[34] These digital resources can have a positive effect on intrinsic motivation and critical thinking in a number of ways, four of which are mentioned below.

First, learners can witness, via videos and podcasts posted on the Internet, actual court scenes, thought-provoking debates or inspirational speeches by prominent leaders. Secondly, learners can be given opportunities to connect with other learners and educators at institutions around the world, enabling them to tap into the wider digital community and allowing them to contextualise information in a very real way. Thirdly, exposing learners to digital tools can also improve their computer and digital research skills, which will serve them well on entering the legal profession. Fourthly, the 2019 Open University Innovation report makes the interesting observation that using digital tools as a pedagogical enhancement can allow learner thinking to become visible. For example, digital response systems can allow individual learner responses around a class discussion question to be represented visually as the discussion continues; visually comparing and contrasting responses, then and there, allows for inclusivity from a greater number of participants and adds depth and contextualisation to the discussion.[35] Finally, the Open University report also mentions that digital tools can be used to facilitate "just-in-time" teaching strategies. These are online activities that learners are required to complete as preparation for lectures. Educators can then integrate these learner responses into their upcoming teaching activities, essentially extending the constructivist teaching methods outside of the classroom, again adding depth to class participation. Most importantly, the report posits:

> "The assignments and the way in which they're used is not only about making student thinking visible for the teacher. This approach makes students more aware of their own thinking and prompts them to reflect on their learning process. They have opportunities to shed light on their misunderstandings. Students become aware of what they can do and what they understand, and can identify topics that are important to work on further."[36]

However, it is important to remember that, as exciting as the opportunity to make student thinking visible through new technology may seem, one must

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34 For example, see Crocker "Blended Learning: A New Approach to Legal Teaching in South African Law Schools" 2006 31 *Journal for Juridical Science* 1–25.

35 Ferguson, Coughlan, Egelandsdal, Gaved, Herodotou, Hillaire, Jones, Jowers, Kukulska-Hulme, McAndrew, Misiejuk, Ness, Rienties, Scanlon, Sharples, Wasson, Weller and Whitelock *Innovating Pedagogy 2019: Open University Innovation Report* 7 (2019) 36.

36 Ferguson *et al Innovating Pedagogy 2019* 37.

not lose sight of the fact that, first and foremost, sound pedagogical principles must always be followed.[37]

4 CONCLUSION

This article as a whole examines the two central themes of student motivation and critical thinking in the context of teaching the skill of persuasive legal writing to second-year law students at the University of KwaZulu-Natal, Howard College, in the WiLL legal writing programme. The teaching design of the WiLL programme fits within a constructivist teaching paradigm and employs three key teaching design principles: constructive alignment, learner participation and conversations in feedback – all of which are closely linked in educational theory.

Part 1 of this article examined the theoretical underpinnings of the two central themes as well as the three teaching design principles employed in WiLL. It was pointed out that in order for students to learn how to think and write like lawyers it was imperative that they were able to engage critically with the values-based knowledge being disseminated and with the persuasive legal writing skills being demonstrated in the programme. However, students would need to be intrinsically motivated to spend the time and energy required to hone these skills. Part 2 of this article has discussed the practical application of the three key teaching principles in the WiLL programme. All three of these teaching principles represent significant positive features of the programme and the student response to the use of these techniques was overwhelmingly positive.

The constructive alignment of the programme (beginning with a focus on the critical reading of a journal article setting the scene for the Constitutional Court case to follow) allowed students to come to grips with the complex wording and values-based arguments contained in the judgment. It is submitted that without this initial soft introduction to the themes contained in the judgment, students might have struggled to comprehend the subtle writing nuances that added to the persuasiveness of the judgment and might not have noticed the logical persuasive links contained in the writing. After receiving a critical introduction to the case and to the life and personality of the man who penned the judgment, students were eager to read further and motivated to take part in an in-depth critique of the ideas put forward in the case.

The constructive, participatory teaching activities incorporated in the programme further motivated the learners and resulted in lively, critical debate during class on current values-based issues affecting ordinary South Africans. Many students continued to participate in discussions on the contextually relevant materials even after the lecture was over, inspired by the valuable insights that they were getting into their peers' backgrounds and world views. The digital tool in the form of an inspiring podcast on the life of a Constitutional Court Justice also played a part in motivating students to engage deeply with the material being studied.

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[37] Ferguson *et al Innovating Pedagogy 2019* 38.

The views formed during the class and peer-group discussions translated into a critical writing style as persuasive arguments were developed in the participatory writing tasks that students completed both in small groups and individually. This was complemented by the conversations in feedback initiated during peer-group discussions and in the oral feedback given by the lecturer. A marked improvement in writing style, logical linkages in arguments and overall persuasiveness of students' written class activities and assessments was noticed over the course of the semester, after students had received extensive oral feedback from both their peers and their lecturer.

However, in a resource-constrained environment such as that at UKZN, there are a number of challenges to overcome before it is feasible to implement a high quality resource-hungry programme such as this. The challenges identified during the implementation of the WiLL programme include: insufficient staffing resources; lack of learner preparation; and limited use of digital tools. A number of creative solutions to the challenges highlighted above were suggested, including: employing the services of student tutors to provide ongoing formative oral and written feedback in both group and individual settings to help alleviate the staffing resource deficits; incorporating online quiz assessments to encourage students to prepare for lectures; and making better use of digital tools to enhance the constructivist teaching methods already employed, such as student digital response tools to make student thinking visible.

In conclusion, from the insights gleaned in parts 1 and 2 of this article, it is submitted that, with creative thought, it is possible to motivate large groups of second-year law students at UKZN, Howard College to put in the time and effort necessary to improve their legal writing skills and to teach them how to think and write critically about values-based issues affecting ordinary South Africans today.

SURROGACY AGREEMENTS AND THE RIGHTS OF CHILDREN IN NIGERIA AND SOUTH AFRICA

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SUMMARY

Surrogacy agreements help to provide children for persons who cannot achieve conception or carry a child to term themselves. This practice has improved several lives over the years but can also be exploitative for some parties involved, if not adequately regulated.

Using the doctrinal research method, this study discusses the rights of children in surrogacy agreements and examines the regulation of the practice in Nigeria and South Africa. This study found that a comprehensive framework regulating surrogacy agreements is lacking in Nigeria, while the practice is regulated in South Africa under Chapter 19 of the Children's Act 38 of 2005 (Children's Act). The lack of a legal framework in Nigeria implies that the rights of children born through surrogacy agreements may be violated. Two Bills are however awaiting passage into law in Nigeria.

This study thus recommends the enactment of these Bills into one comprehensive law so as to regulate surrogacy agreements effectively in Nigeria and safeguard the well-being of children. Legislation regulating surrogacy agreements in Nigeria should include provisions similar to those found in the Children's Act of South Africa. Policies that promote the best interests of the child should be adhered to and their rights to know their biological heritage, identity and nationality, and to prevention from harm, should be protected and promoted.

1 INTRODUCTION

Surrogacy gives hope to couples who have been unsuccessful in their efforts to have children, whether through miscarriages, inability to conceive or health issues. The practice was recorded in the Holy Bible[1] when Abraham

[1] The Holy Bible: Genesis 16: 1–16.

and Sarah had difficulties bearing children and used their Egyptian slave girl, Hagar, to bear a child for them. Nevertheless, while Abram had sexual contact with Hagar, the modern reproduction technique of surrogacy can be done without the need for sexual contact.[2] Surrogacy has been defined as "an arrangement whereby a woman agrees to become pregnant and deliver a child for a contracted party".[3] The surrogacy agreement will state that after the birth the surrogate mother breaks her parental link with the child and hands him or her over to the commissioning parents who legally become his or her parents.[4] The woman delivering the child is known as the surrogate mother while the couple to whom she is handing over the child are known as the commissioning or intending parents.

Surrogacy has become a more viable option than it was a few decades ago. This is largely due to the increasing awareness of Assisted Reproductive Techniques (ART),[5] an increase in ART knowledge, and demand in several countries as well as the complex requirements and processes involved in adoption processes.[6] Abortion of children has also reduced the availability of babies who could be adopted by interested persons.[7] While surrogacy agreements assist people to have the children they desire, children are at risk of being subjected to human rights violations owing to their vulnerability.[8] Children have rights that have been recognised in several international human rights documents, including the United Nations Convention on the Rights of the Child[9] (UNCRC) and the African Charter on the Rights and Welfare of the Child[10] (ACRWC).[11] According to Gerber and O'Byrne,[12] "whatever their parentage or the means of their conception and birth, children are not properties, but human beings and rights-holders in law." However, these rights are usually in conflict with the rights of other parties involved in surrogacy agreements.

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2 Emiri *Medical Law and Ethics in Nigeria* (2012) 79.

3 US Legal "Surrogacy Law and Legal Definition" https://definitions.uslegal.com/s/surrogacy/ (accessed 2020-12-01).

4 Danna *Contract Children: Questioning Surrogacy* (2015) 19.

5 These are techniques used to achieve conception when it is difficult for a person to achieve pregnancy the natural way. These include surrogacy, artificial insemination and in-vitro fertilisation (IVF).

6 Caamano "International, Commercial, Gestational Surrogacy Through the Eyes of Children Born to Surrogates in Thailand: A Cry for Legal Attention" 2016 96(2) *Boston University Law Review* 571 575 576.

7 Marianne and Zavodny "Did Abortion Legalization Reduce the Number of Unwanted Children? Evidence from Adoptions" 2002 34(1) *Perspectives on Sexual and Reproductive Health* 25 25.

8 United Nations Human Rights "Children Risk Being 'Commodities' as Surrogacy Spreads, UN Rights Expert Warns" https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22763&LangID=E (accessed 2020-12-01).

9 United Nations General Assembly *Convention on the Rights of the Child* (20 November 1989) 1577 UNTS 3 https://www.ohchr.org/en/professionalinterest/pages/crc.aspx.

10 Organisation of African Unity *African Charter on the Rights and Welfare of the Child* (11 July 1990) CAB/LEG/24.9/49 (1990).

11 Olusegun and Idowu "Child Abuse in Nigeria: Dimension, Causes and Reasons for Its Persistence" 2016 4(1) *Child and Family Law Journal* 1 2 3.

12 Gerber and O'Byrne "Souls in the House of Tomorrow: The Rights of Children Born via Surrogacy" in Gerber and O'Byrne (eds) *Surrogacy, Law and Human Rights* (2015) 82.

This article aims to discuss the rights of children in surrogacy agreements, with the aim of ensuring that they are not abused through people's desire to have children. Furthermore, the types of surrogacy agreement as well as the legal frameworks in Nigeria and South Africa respectively are discussed to determine how these countries regulate the practice of surrogacy to protect the rights of children. South Africa is compared with Nigeria because they are both developing African countries and South Africa's comprehensive legislation on surrogacy agreements may be of benefit to Nigeria. A child, according to the UNCRC, is defined as a person below the age of 18 years.[13] However, references to "children" in this article are to those who were born through surrogacy as well as to the unborn foetus.

2 TYPES OF SURRROGACY AGREEMENT

The practice of surrogacy comprises two types – namely, partial or traditional surrogacy, and full or gestational surrogacy; each works in its distinct way.

2 1 Traditional or partial surrogacy

In traditional or partial surrogacy, the surrogate donates her eggs for fertilisation with the commissioning man's sperm either through artificial insemination or sexual relations.[14] Partial surrogacy is less expensive and might not need medical assistance.[15] The disadvantage, however, is that the surrogate mother is genetically linked to the child and she might be able to lay claim to the child upon his or her delivery.[16] In South Africa, for example, a surrogate who is genetically connected with a child has the right to terminate an agreement within a period of 60 days after the birth of the child.[17]

2 2 Gestational or full surrogacy

Zaidi[18] describes gestational or full surrogacy as the procedure carried out when a commissioning couple donates their gametes to be carried to term by a third party, and the child is handed over as soon as he or she is born. The child is related to the commissioning couple genetically; while the womb of the surrogate mother is used, she will have no genetic relationship with the child.[19] Full surrogacy has been called a form of womb leasing and it

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13 Art 1 of the UNCRC.

14 Blauwhoff and Frohn "International Commercial Surrogacy Arrangements: The Interests of the Child as a Concern of Both Human Rights and Private International Law" in Paulussen (eds) *Fundamental Rights in International and European Law: Public and Private Law in Perspective* (2016) 215.

15 Rispel *The Scope and Content of the Child's Right to Identity in the Context of Surrogacy* (unpublished LLM dissertation, University of the Western Cape, South Africa) 2017 29.

16 *Ibid*.

17 S 298 of the Children's Act.

18 Zaidi *Ethics in Medicine* (2014) 192.

19 Dada *Legal Aspects of Medical Practice in Nigeria* (2013) 263.

necessarily involves the technique known as in-vitro fertilisation (IVF).[20] In gestational surrogacy, the surrogate could be implanted with donor eggs, donor sperm or donor embryo, in cases where both commissioning parents do not have viable gametes.

3 RIGHTS OF CHILDREN BORN VIA SURROGACY AGREEMENTS

Surrogacy has various implications for the rights of children. Without adequate regulation and monitoring, abuse and exploitation can occur, which affects the well-being of children born of surrogacy.[21] In a survey conducted by the World Health Organisation (WHO) in 2015, it was reported that only 46 per cent of the 68 participating countries had ART legislation that included children in its provisions.[22] The rights of children, which must be protected in surrogacy agreements, are discussed below.

3 1 The rights to non-discrimination

Children may be deprived of certain rights based on their gender, race, colour, disability, language, sexual orientation, religion and/or the circumstances of their birth. Discrimination against children is usually due to their dependence on adults for basic needs, their immaturity and their inadequate access to justice.[23] Article 2 of the UNCRC provides that the rights of children should be respected without any form of discrimination based on their birth or parents' status. The United Nations (UN) Committee on the Rights of the Child, which monitors the enforcement of the UNCRC,[24] affirmed this position by stating in General Comment 7 that States Parties must monitor and combat discrimination against children based on circumstances of their birth that deviate from the traditional process.[25] Therefore, children born through surrogate mothers must enjoy the same rights as children born through natural methods.[26] Their status, role and

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20 IVF is a medical procedure where gametes are fertilised in a laboratory dish and thereafter injected into a woman's body for possible implantation (De Cruz *Medical Law in a Nutshell* (2005) 164).

21 University of Chicago Law School: Global Human Rights Clinic "Human Rights Implications of Global Surrogacy" (2019) Global Human Rights Clinic 10 https://chicagounbound.uchicago.edu/ihrc/10 (accessed 2020-11-11).

22 Global Reproductive Health: International Federation of Fertility Societies "IFFS Surveillance 2016" (September 2016 1(e1)) https://journals.lww.com/grh/Fulltext/2016/09000/IFFS_Surveillance_2016.1.aspx (accessed 2020-11-12) 1–143; Lind "The Rights of Intended Children: The Best Interests of the Child Argument in Assisted Reproduction Policy" https://journals.sagepub.com/doi/10.1177/ 0907568219853331 (accessed 2020-12-15).

23 CRIN "Discrimination and the CRC" https://archive.crin.org/en/guides/introduction/discrimination-and-crc.html (accessed 2020-12-02).

24 Art 43(1) of the UNCRC.

25 United Nations Committee on the Rights of the Child *General Comment No. 7 (2005): Implementing Child Rights in Early Childhood* (20 September 2006) CRC/C/GC/7/Rev.1 http://www.refworld.org/docid/ 460bc5a62.html (accessed 2018-04-16); Gerber and O'Byrne in Gerber and O'Byrne (eds) *Surrogacy, Law and Human Rights* 87.

26 University of Chicago Law School: Global Human Rights Clinic https://chicagounbound.uchicago.edu/ihrc/10 23.

position in the home and society should not be different from those of children born through natural methods.[27] In schools and communities, children born through surrogacy agreements should not be stigmatised. All privileges obtained by other children should be available to them.

3 2 The right to know one's biological origins

Article 7 of the UNCRC provides that "a child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents". The right to know one's parents in article 7 has been interpreted to mean providing children with information concerning their biological origins and the circumstances surrounding their birth.[28] In the case of *Rose v Secretary of the State for Health*,[29] the European Convention on Human Rights (ECHR) held that the applicant had a right to be given details about her father. Failure to avail children of this information affects their ability to develop a sense of identity. Identity is a person's unique profile of which genetic origin is a key feature.[30] Article 8(1) of the UNCRC recognises a child's right to preserve his or her identity, including nationality, name and family relations. Article 8(2) further states, "where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity". Therefore, States Parties are to assist children in achieving their right to identity and this right cannot be achieved if children are not aware of their biological origins, as this is one of the determining factors that make them understand who they are.[31]

Donor gametes, particularly sperm, have been used to conceive children since ancient times, and this practice has "traditionally been shrouded in secrecy" so as to protect men who have challenges with fertility.[32] Sperm donors were also granted anonymity out of concern that a lack of anonymity would reduce the willingness to donate and cause a shortage in the availability of gametes to cure infertility.[33] However, the secrecy involved in this practice is declining as medical science advances.[34]

In surrogacy agreements, donor gametes are sometimes used when either of the intending parents cannot use their own. However, lack of information about biological origin deprives children born through surrogacy

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27 Wade "The Regulation of Surrogacy: A Children's Rights Perspective" 2017 29(2) *Child Family Law Quarterly* 113 131.

28 South African Law Reform Commission "The Right to Know One's Own Biological Origins" Issue Paper 32 http://pmg-assets.s3-website-eu-west1.amazonaws.com/170720righttoknowonesownbiologicalorigns.pdf (accessed 2019-12-24).

29 (2002) E.W.J NO 3823 (H.C.J).

30 McCombs and Gonzalez "Right to Identity" 2007 *International Human Rights Law Clinic* 1.

31 Rispel *The Scope and Content of the Child's Right to Identity in the Context of Surrogacy* 32.

32 Clark "A Balancing Act? The Rights of Donor-Conceived Children To Know Their Biological Origins" 2012 40(3) *Georgia Journal of International and Comparative Law* 619 621.

33 Mason and Ekman *Babies of Technology: Assisted Reproduction and the Rights of the Child* (2017) 189.

34 Clark 2012 *Georgia Journal of International and Comparative Law* 619 621.

agreements of the freedom to define their genetic relationships and connect with their heritage.[35] It can also pose medical risks as uninformed decisions can be made in the absence of a person's family medical history.[36] This is contrary to article 24 of the UNCRC, which protects the rights of the child to the highest attainable standard of health.[37] Jancic[38] is of the opinion that sharing information concerning the biological parents of children does not mean that a relationship will be established between them, but it can fulfil a usual human desire (on the part of the child) to discover from whom they originated. Many countries have ruled against the child's right to know his or her parents owing to privacy protection established by law for donors in these countries.[39] Parents also prefer the non-disclosure rule because of the connection they have with the child and the fear that the attitude of the child might change when he or she learns of his or her biological origin. They also do not want to destabilise the child and disclose the fertility status of the parent(s).[40]

However, some countries have placed the rights of children to know their origins ahead of the rights of donors to privacy, with Sweden leading the way in 1984, followed by other jurisdictions.[41] Factors that have increased the support for children learning about their biological origins include the realisation that keeping such secrets could be harmful to families, as well as the support received from government-appointed committees including the UK's Warnock Committee, and laws like the Human Fertilisation and Embryology Act, 1990 in the UK, which absolves a donor from the responsibility of caring for a child resulting from a donated gamete.[42] The UN Committee on the Rights of the Child also states that article 7 of the UNCRC should take preference where there is a conflict between a child's right to information about his or her biological parents and the rights of others to privacy.[43] The issue remains a contentious one and has not been regulated in several countries, including the Solomon Islands, Iran, Japan and Uzbekistan, which means parents can choose either to notify the child or conceal the circumstances behind a child's birth. In other countries like the Netherlands, a child conceived by sperm or egg donation has the right to non-identifying information about the donor upon reaching 12 years, and at

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35 Shalev, Moreno, Eyal, Leibel, Schuz and Eldar-Geva "Ethics and Regulation of Inter-Country Medically Assisted Reproduction: A Call for Action" 2016 5 *Israel Journal of Health Policy Research* 59 66.

36 Ravitsky "The Right to Know One's Genetic Origins and Cross-Border Medically Assisted Reproduction" 2017 6(3) *Israel Journal of Health Policy Research* 1 3.

37 Child Rights International Network "A Children's Rights Approach to Assisted Reproduction" https://archive.crin.org/sites/default/files/a_childrens_rights_approach_to_assisted_reproduction_0.pdf (accessed 2020-10-13).

38 Jancic "Introduction" in Jancic (ed) *Rights of the Child in a Changing World: The UN Convention on the Rights of the Child: 25 Years After* (2015) 15 16.

39 See for e.g., the Canadian case of *Pratten v British Columbia (Attorney General)* 2012 BCCA 40, where this right was denied to a woman.

40 Clark 2012 *Georgia Journal of International and Comparative Law* 619 621.

41 Child Rights International Network https://archive.crin.org/sites/default/files/a_childrens_rights_approach_to_assisted_reproduction_0.pdf.

42 Blyth and Farrand "Anonymity in Donor-Assisted Conception and the UN Convention on the Rights of the Child" 2004 12 *The International Journal of Children's Rights* 89 90.

43 Art 7 of the UNCRC provides that a child shall have the right "to know and be cared for by his or her parents".

the age of 16 years, may apply to have access to identifying information. In Denmark, in cases of gestational surrogacy with donor sperm, a child's right to such information is dependent on the agreement between the legal parents and the sperm bank.[44]

Disclosing information about the biological origin of a child is the duty of the intended parents, although this duty might be carried out indirectly by the State through the issuing of a birth certificate. However, there have been reports of low levels of disclosure of this information, even in countries where parents are mandated to make such disclosure. It is nevertheless difficult to enforce such complicated family matters.[45] The rights of a child to a name and nationality are essential to preserving his or her identity and the registration of a child's birth enables enjoyment of such rights.[46] For children born through surrogacy agreements, birth registration is an essential right, as it is the first step to the process of determining their legal parentage and nationality.[47]

3 3 Protection from harm

Children conceived through surrogacy agreements can experience various forms of harm and exploitation if their rights are not considered. In the event of parents losing a legal claim, a child could experience psychological trauma if taken from the parents who had cared for him or her and given to the surrogate.[48] The child's right to be protected from harm would mean parties not making decisions that negatively affect his or her well-being and health. Medical screening for genetic diseases and counselling before implantation in the surrogate will protect the child from harm. There should also be a limit to the number of agreements in which surrogates can participate, as the higher the number of pregnancies and births achieved, the higher the risk to the children produced. Another form of preventable harm is the risk of sexual, physical or emotional abuse by the partner of a single parent who has a child through a surrogate mother when that partner is not the biological parent of the child.[49]

3 4 Best interests of the child

The consideration of the best interests of the child is a fundamental legal principle borne out of the realisation that most decisions concerning children are made by adults. These decisions must not be detrimental to children, since they are too immature to make their own choices.[50] Article 3(1) of the

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44 Jancic in Jancic (ed) *Rights of the Child in a Changing World: The UN Convention on the Rights of the Child: 25 Years After* 16 17.

45 Clark 2012 *Georgia Journal of International and Comparative Law* 619 623.

46 UNICEF "Birth Registration and Armed Conflict" https://www.unicef.org/protection/birth_registrationandarmedconflict(1).pdf (accessed 2018-02-08).

47 Gerber and O'Byrne in Gerber and O'Byrne (eds) *Surrogacy, Law and Human Rights* 91.

48 Shanley *Making Babies, Making Families: What Matters Most in an Age of Reproductive Technologies, Surrogacy, Adoption, and Same Sex and Unwed Parents* (2001) 46.

49 University of Chicago Law School: Global Human Rights Clinic https://chicagounbound.uchicago.edu/ihrc/10 23.

50 Van Bueren *Child Rights in Europe* (2007) 30.

UNCRC provides that the best interests of children shall be a primary consideration in all issues concerning them. According to the UN Committee on the Rights of the Child, the above provision means that the effects of laws and policies on children must be considered in all issues concerning them before they are enacted or adopted.[51]

Identifying the best interests of the child is especially difficult in surrogacy agreements because it involves several ethical and moral issues[52] and deals with choices in respect of unborn children.[53] Cohen[54] has, for example, argued that the best interests principle cannot be extended to unborn children since they do not yet have an identity. Mutcherson,[55] however, contends that children who have been born cannot be the sole focus, as those unborn are equally important. Mutcherson's opinion is agreeable, as protecting unborn children helps to prevent further harm when they are eventually born. It also brings a certain consciousness to all parties who, at an early stage, come to understand the implications of the best interests principle. In this context, all decisions that have consequences for children must be well considered to ensure that decisions made do not adversely affect the child's health and well-being.[56]

Parents play a great role in ensuring that the best interests of their children born through surrogacy are protected.[57] It is thus important that intending parents are appropriately examined so that their willingness and commitment to safeguarding their children's rights are confirmed.[58] Failure to make investigations concerning the background of intending parents, as is done in adoption processes, undermines the best interests principle.[59] It is

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51 University of Chicago Law School: Global Human Rights Clinic https://chicagounbound.uchicago.edu/ihrc/10 23.

52 Daniels, Blyth, Hall and Hanson "The Best Interests of the Child in Assisted Human Reproduction: The Interplay Between the State, Professionals, and Parents" 2000 *Politics and the Life Sciences* 33 34.

53 Gerber and O'Byrne in Gerber and O'Byrne (eds) *Surrogacy, Law and Human Rights* 89.

54 Cohen "Regulating Reproduction: The Problem with Best Interest" 2011 96 *Minnesota Law Review* 423 426.

55 Mutcherson "In Defence of Future Children: A Response to Cohen's Beyond Best Interests" 2012 96 *Minnesota Law Review* 49.

56 Wade 2017 *Child Family Law Quarterly* 113 116.

57 United Nations Committee on the Rights of the Child *General Comment No 7 (2005): Implementing Child Rights in Early Childhood* (20 September 2006) CRC/C/GC/7/Rev 1) par 13; United Nations Committee on the Rights of the Child *General Comment No 5 (2003): General Measures of Implementation of the CRC (arts 4, 42 and 44, para 6)* CRC/GC/2003/5 par 54 56 66.

58 University of Chicago Law School: Global Human Rights Clinic https://chicagounbound.uchicago.edu/ihrc/10 23.

59 Owing to inadequate background checks, surrogates had babies for a cancer patient who later died, and in another instance, for an Australian man, David Farnell, who had previously been convicted of 22 child sex offences. See Murdoch "Australian Couples Caught in Thailand's Surrogacy Crackdown" (2014-09-14) *Sydney Morning Herald* https://www.smh.com.au/business/australian-couples-caught-in-thailands-surrogacy-crackdown-20140913-10gess.html; Mail Online "'You Have Robbed Them of the Opportunity to Have a Normal Life': What Judge Told Paedophile Father Convicted of TWENTY-TWO Child Sex Offences – as Welfare Officers Step Up Hunt for Couple in Baby Gammy Case" https://www.dailymail.co.uk/news/article-2717364/Australian-parents-Gammy-met-Chinese-mail-order-bride-agency.html; Caamano 2016 *Boston University Law Review* 571 586.

against the best interests of a child to be separated from his or her parents after birth. Article 9 of the UNCRC prohibits separation without the consent of the parents except when abuse or maltreatment has been judicially determined. This principle also applies to commissioning parents who have no genetic link with the child as it has been reported that "strong and positive ties" also exist between them and their children born through surrogacy.[60] Thus, when children are taken away from intending parents owing to restrictions on surrogacy, this might deprive children of the benefits of living with a caring family and violate their rights. For example, owing to the ban on commercial surrogacy in Cambodia, some surrogate mothers were mandated to bring up the children they gave birth to until they were 18 years old or risk being imprisoned for 20 years.[61] This is contrary to the best interests of the child as the surrogates might not be mentally and financially capable of caring for those children, which could lead to neglect and abuse.[62]

The National Board of Health and Welfare (NBHW) in Sweden, in collaboration with the Swedish Society for Obstetrics and Gynaecology and the Swedish Paediatric Society, claimed in their reports that the transfer of multiple embryos is contrary to the best interests of the child, because they tend to increase the risk of pre-term births, low birth weight and disabilities like cerebral palsy. They thus recommended instead that single embryos be transferred to prevent multiple pregnancies. However, they added that the above conditions stated to be common in multiple embryo transfers also happen to single embryos. The single embryo transfer recommendation has been criticised on the basis that the transfer of single embryos reduces the chances of conception in ART.[63]

To protect the best interests of the child, more attention should be placed on avoiding lengthy custody battles and reducing the rate at which children move from one family to another.[64] The risk of disputes increases when more than two persons can claim to be parents of a child, when the surrogacy agreement involves people residing in more than one jurisdiction and when laws governing surrogacy agreements are not clear and comprehensive.[65] Determining the best interests of the child requires careful scrutiny of each case and rules must be subject to review and changes as new developments arise.[66]

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60 Golombok, Murray, Jadva, Lycett, MacCallum and Rust "Non-Genetic and Non-Gestational Parenthood: Consequences for Parent-Child Relationships and the Psychological Well-Being of Mothers, Fathers and Children at Age 3" 2006 21 *Human Reproduction* 1918 1922.

61 Chong and Whewell "Paid to Carry a Stranger's Baby: Then Forced to Raise it" (2019-02) *BBC* https://www.bbc.co.uk/news/resources/idt-sh/surrogates (accessed 2020-11-10).

62 University of Chicago Law School: Global Human Rights Clinic https://chicagounbound.uchicago.edu/ihrc/10 23.

63 Lind https://journals.sagepub.com/doi/10.1177/0907568219853331.

64 Caamano 2016 *Boston University Law Review* 571 586.

65 Child Rights International Network https://archive.crin.org/sites/default/files/a_childrens_rights_approach_to_assisted_reproduction_0.pdf.

66 Daniels *et al* 2000 *Politics and the Life Sciences* 33 38.

3 5 Citizenship and nationality of the child in cross-border surrogacy agreements

In accordance with article 7 of the UNCRC, it is important that States Parties assign a nationality to children when they are born, thus providing the jurisdiction where their rights can be enforced and protected.[67] When a child is born in a country different to that of the commissioning parents, he or she could sometimes be denied their nationality upon birth.[68] The country whence the intending parents come could have banned surrogacy while some countries require a genetic link with the intending parents before a child could be accepted as a citizen of their country. Denial of citizenship results in a child being rendered stateless, which affects his or her ability to obtain passports for travelling, receive medical care, get quality education and other public service benefits.[69] Storrow[70] suggests that the best solution is the doctrine of comity, which is the recognition given by a state to the legislative, executive or judicial acts of another jurisdiction, bearing in mind its own public policies.[71] Under this principle, agreements concluded in other jurisdictions where surrogacy is legal will be declared valid by the court.[72] Shalev *et al* on the other hand opine that those children should be offered nationality in the country in which they were born as well as the country where the intended parents are citizens.[73]

3 6 Commercial surrogacy

Commercial surrogacy refers to a situation where a woman is compensated for giving birth to a child whom she hands over to the commissioning parents in return for payment. When no payment is made, the situation is referred to as altruistic surrogacy.[74] Over the years, there have been ethical, legal and policy considerations to determine whether commercial surrogacy presents children as commodities and violates their rights.[75] Countries that prohibit commercial surrogacy give ethical reasons to defend their position. Some regard the payment of surrogate mothers as renting or buying the human

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67 Child Rights International Network https://archive.crin.org/sites/default/files/a_childrens_rights_approach_to_assisted_reproduction_0.pdf.

68 Saxena, Mishra and Malik "Surrogacy: Ethical and Legal Issues" 2012 37(4) *Indian Journal of Community Medicine* 211 213.

69 France, for e.g., bans surrogacy and before 2015, children born through surrogate mothers, were not recognised legally and were denied a legal tie to their parents. This led to various challenges for these children due to their "incomplete identities". See Mason and Ekman *Babies of Technology: Assisted Reproduction and the Rights of the Child* 199 200; Lin "Born Lost: Stateless Children in International Surrogacy Arrangements" 2013 21 *Cardozo Journal of International and Comparative Law* 546 559.

70 Storrow "The Phantom Children of the Republic: International Surrogacy and the New Illegitimacy" 2012 12 *Journal of Gender, Social Policy & the Law* 602.

71 *Hilton v Guyot* 159 U.S. 113, 164 (1895); Childress "Comity as Conflict: Resituating International Comity as Conflict of Laws" 2010 44 *University of California, Davis* 11 14.

72 Gerber and O'Byrne in Gerber and O'Byrne (eds) *Surrogacy, Law and Human Rights* 89.

73 Shalev *et al* 2016 *Israel Journal of Health Policy Research* 59 67.

74 Wilkinson "The Exploitation Argument Against Commercial Surrogacy" 2003 17(2) *Bioethics* 169.

75 Allan "The Surrogate in Commercial Surrogacy: Ethical and Legal Considerations" in Gerber and O'Bryne (eds) *Surrogacy, Law and Human Rights* 116.

body or human life. They claim that mothers should always want to give birth, not for financial gain, but out of their obligation to such children, who cannot be sold.[76] Furthermore, in consideration of the well-being of the child, it is believed that a child's knowledge that his or her mother was paid to give birth might affect the child psychologically, which could also ruin the relationship with his or her parents.[77] In contrast, those in favour of commercialisation cite the free choice individuals should have to enter into contracts and the right to autonomy – that is, to do whatever they like with their own bodies.[78]

Commercial surrogacy, especially one involving parties who live in different countries, thereby effecting a transfer of the resulting child from one country to another, has been likened to human trafficking.[79] Through deceit and promises for a better life, some women are introduced into prostitution and slavery, for the purpose of selling their babies.[80] Article 35 of the UNCRC prohibits the "abduction of, the sale of or traffic in children for any purpose or in any form". In some countries, when surrogates deliver more babies than the planned or desired number, the "extra ones" are not accepted by the intending parents and are then sold. Some intending parents also do not accept the children they initially wanted because of a birth defect, among other reasons.[81] In 2012, an attorney specialising in reproductive law in the United States was convicted for her involvement in a baby-selling scheme where childless couples were deceived into believing that children sold to them were the results of legal surrogacy agreements from which the original intended parents had withdrawn.[82] To eliminate the possibility of child trafficking in surrogacy agreements, the Supreme Court in Israel ruled that there must be a genetic connection between one of the intending parents and the child.[83] It has also been recommended that children are better protected when surrogate mothers are relatives or friends of intending parents, with the caveat of ensuring that they have not been coerced into participating and have been informed of all risks.[84] The UN Special Rapporteur (SR) on the Sale and Sexual Exploitation of Children also recommends that payment to a surrogate mother that is only for

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76 Reilly "Surrogate Pregnancy: A Guide for Canadian Prenatal Health Care Providers" 2007 176(4) *Canadian Medical Association* 483.

77 Casparsson "Surrogacy and the Best Interest of the Child" (LLM dissertation, Centre for Applied Ethics, Linköping University) 2014 11.

78 Vidlicka, Hrstic and Kirin "Bioethical and Legal Challenges of Surrogate Motherhood in the Republic of Croatia" 2012 3(5) *JAHR* 37 43.

79 Child Rights International Network "A Children's Rights Approach to Assisted Reproduction" https://archive.crin.org/sites/default/files/a_childrens_rights_approach_to_assisted_reproduction_0.pdf (accessed 2020-10-13).

80 Reilly 2007 *Canadian Medical Association* 483.

81 Shalev *et al* 2016 *Israel Journal of Health Policy Research* 59 65.

82 The Federal Bureau of Investigation "Prominent Surrogacy Attorney Sentenced to Prison for Her Role in Baby-Selling Case" https://archives.fbi.gov/archives/sandiego/press-releases/2012/prominent-surrogacy-attorney-sentenced-to-prison-for-her-role-in-baby-selling-case (accessed 2020-10-10).

83 Ba'am (Administrative Appeal Motion) 1118/14 *Anonymous v Ministry of Welfare and Social Services* (1 April 2015); Shalev *et al* 2016 *Israel Journal of Health Policy Research* 59 65.

84 Shalev *et al* 2016 *Israel Journal of Health Policy Research* 59 65.

gestational services rendered, and not for the transfer of the child, would not amount to the sale of a child.[85]

4 LEGAL FRAMEWORK REGULATING SURROGACY AGREEMENTS IN SOUTH AFRICA

In South Africa, the rights of children are regulated in the Children's Act[86] and by the Constitution of the Republic of South Africa.[87] The relevant subsections of the South African Constitution are section 28(1), which spells out the rights of children, and section 28(2), which provides that "the best interests of the child are of paramount importance in all matters concerning such a child".

The first known case of surrogacy in South Africa took place in 1987, when a 48-year-old mother, Karen Ferreira-Jorge, agreed to carry her daughter's baby and gave birth to triplets.[88] Subsequently, the publicity generated by the birth of the Ferreira-Jorge triplets, and the consciousness of the existence of surrogacy in the country, led the South African Law Commission (SALC) to advocate for legislation that would specify the rights and duties of all parties to a surrogacy agreement.[89] Surrogacy agreements are regulated by Chapter 19 of the Children's Act. Before enactment of the Children's Act, surrogacy agreements were regulated by the law of contract as well as by rules pertaining to artificial insemination, such as the Human Tissue Act 65 of 1983.[90]

Section 292 of the Children's Act provides for the criteria that must be complied with before surrogacy agreements can be declared valid. They must be in writing, signed by all parties and entered into in South Africa.[91] One of the commissioning parents, as well as the surrogate mother and her husband or partner, must be domiciled in South Africa at the time the agreement is entered into.[92] However, the court will be willing to overlook this requirement for a good reason – for example, in the event that a foreign relative of the commissioning parents who is not living in South Africa is willing to act as an altruistic surrogate mother.[93] Furthermore, a high court judge who has jurisdiction in the area where the commissioning parents are domiciled must confirm a surrogacy agreement before the surrogate mother

85 *Ibid*.

86 Children's Act 38 of 2005.

87 Constitution of the Republic of South Africa, 1996.

88 Lewis *The Constitutional and Contractual Implications of the Application of Chapter 19 of the Children's Act 38 of 2005* (LLM dissertation, University of the Western Cape, South Africa) 2011 13.

89 Filander *The Enforceability of International Surrogacy in South Africa: How Would a South African Court Proceed in Determining an International Surrogacy Case?* (LLM dissertation, University of Western Cape, South Africa) 2016 25.

90 The Human Tissue Act 65 of 1983 was repealed and replaced by the National Health Act (NHA) 61 of 2003; Slabbert "Legal Issues Relating to the Use of Surrogate Mothers in the Practice of Assisted Conception" 2012 5(1) *The South African Journal of Bioethics and Law* 1.

91 S 292(1)(*a*) and (*b*) of the Children's Act.

92 S 292(1)(*c*) and (*d*) of the Children's Act.

93 Slabbert 2012 *The South African Journal of Bioethics and Law* 2.

is artificially inseminated.[94] According to section 293(1) and (2), where a commissioning parent as well as a surrogate mother are married or involved in a permanent relationship, the spouses or partners must give their consent in writing to the agreement and therefore become parties to the agreement. However, in the event of the unreasonable refusal of consent by the husband or partner of a surrogate who is not genetically related to the child, the court may confirm the agreement.[95]

A surrogacy agreement will not be sanctioned by a court unless it is certain that the commissioning parents are permanently unable to have a child.[96] Furthermore, the surrogate mother must be fit and capable of performing all her relevant roles as a surrogate, must not be paid for her services, and must comprehend the legal implications of the agreement. She must have been pregnant before and given birth to her own child, who must still be alive.[97] Although the condition and situation of all parties will be considered, the court will not approve the surrogacy agreement if its terms are against the interests of the children and has the potential of harming them.[98] In the case of *Ex Parte Applications for the Confirmation of Three Surrogate Motherhood Agreements*,[99] it was emphasised that the confirmation of agreements by courts is not automatic, as courts are under an obligation to ensure that the interests of children are prioritised, and cases are considered on their merits, in accordance with their duty.[100]

Adequate arrangements must be made to ensure that children are born in a secure environment and they must be cared for and well brought up. The agreement must consider the child's status on the occasion that one or both of the commissioning parents dies, divorces or separates before the birth of the child.[101] In full surrogacy agreements, the child belongs to the commissioning parents upon birth. Therefore, the surrogate mother or her husband lacks the right to get in touch with the child, except where provision is made to this effect in the agreement.[102] However, in partial surrogacy agreements, the rights of the commissioning parents to the child are suspended until the surrogate mother makes a decision either to renege or abide by the terms of the agreement. Thus, she has the right to terminate the agreement within the period of 60 days after the child's birth through notice to the court, on condition that she pays back the money spent on her care by the commissioning parents.[103] It has been argued that the distinction between full and partial surrogacy is made because the surrogate mother's rights to dignity, privacy and autonomy are violated by being compelled to give up the baby contrary to her wishes.[104] Commercial surrogacy is

94 S 292(1)(*e*) of the Children's Act.
95 S 293(3) of the Children's Act.
96 S 295(*a*) of the Children's Act.
97 S 295 9(*c*)(i)–(vii) of the Children's Act.
98 S 295(*e*) of the Children's Act.
99 2011 (6) SA 22 (GSJ).
100 Louw "Surrogacy in South Africa: Should We Reconsider the Current Approach?" 2013 76 *THRHR* 564 567.
101 S 295(*d*) of the Children's Act.
102 S 297(1)(*a*)–(*d*) of the Children's Act.
103 S 298(1) and (3) of the Children's Act.
104 Slabbert 2012 *The South African Journal of Bioethics and Law* 4.

prohibited and the only financial payment allowed is with respect to expenses in fertilising the surrogate, birthing the child, confirming the agreement in the court, loss of earnings owing to absence of the surrogate from work and insurance for the surrogate in the event of death or disability.[105] Legal and medical professionals who helped to further the objectives of the surrogate agreement are also to be compensated.[106] The identity of a person born through a surrogacy agreement, as well as other parties involved, must not be revealed through any publication.[107]

According to section 294 of the Children's Act, the gamete of at least one of the commissioning parents must be used for a valid surrogate agreement. In other words, at least one of the parents must be biologically related to the child. This is based on the SALC's rationale that where both parents cannot have children, adoption will be an adequate substitute.[108] The committee reasoned that being related genetically to at least one parent would protect children emotionally as their connection to the commissioning parents will be stronger than when they use donor gametes. It will also restrict the undesirable practice of searching for gametes to create children with specific characteristics.[109]

The genetic link prerequisite has, however, been criticised by several authors. For example, Metz[110] argues that the rationale given for the provision is not sufficient and should be repealed so as to respect the privacy of commissioning couples and allow them to "create loving and intimate relationships".[111] Furthermore, in the case of *AB v Minister of Social Development,*[112] the respondents contended that not being related to at least one parent would mean the child might not know his or her parents, which would violate the child's right to dignity. There is also the risk of the child being abandoned in the event he or she is born disabled.[113] The court disagreed and declared section 294 of the Children's Act to be discriminatory and a violation of the constitutional rights to non-discrimination, dignity, privacy, healthcare, and bodily and psychological integrity of people who are incapable of using their own gametes. Unfortunately, the invalidity of section 294 of the Children's Act posited by the High Court was not confirmed by the Constitutional Court on the basis that the High Court placed more emphasis on the interests of the commissioning parent(s) than on the best interests of children.[114]

Section 41(1) of the Children's Act makes it mandatory for a child to have access to information, including medical information, concerning his genetic

105 S 301 of the Children's Act.

106 S 301(3) of the Children's Act.

107 S 302(2) of the Children's Act.

108 Louw 2013 *THRHR* 564.

109 Filander *The Enforceability of International Surrogacy in South Africa: How Would a South African Court Proceed in Determining an International Surrogacy Case?* 25.

110 Metz "Questioning South Africa's 'Genetic Link' Requirement for Surrogacy" 2014 7(1) *SAJBL* 34.

111 *Ibid*.

112 [2016] 4 All SA 24 (GP) par 115; 2016 (2) SA 27 (GP).

113 Boniface "Surrogacy in South Africa" (2016) http://www.kansai-u.ac.jp/ILS/publication/asset/nomos/43/nomos43-07.pdf (accessed 2019-12-29).

114 *Ibid*.

parents, as soon as he or she is 18 years old. However, according to section 41(2), such revealed information must not extend to the identity of the donor and surrogate mother. This is contrary to section 7 of the UNCRC, which gives a child the right to know his or her origins. The SALC has condemned countries that prohibit the availability of such information to the child as well as those who allow anonymous birth and have suggested the reformation of their laws.[115] This is so that children will enjoy their right to identity as stipulated in the UNCRC.[116] Authors have suggested that information concerning the biological origin of a child can be divulged before a child is 10 years of age because, at that age, children can process vital information in a simpler manner before they start forming their identity. They are also old enough to distinguish between biological and non-biological parents.[117]

5 LEGAL FRAMEWORK REGULATING SURROGACY AGREEMENTS IN NIGERIA

Nigeria has yet to provide specific comprehensive legislation to regulate surrogacy; there are also no judicial decisions made in that respect. The implication is that the rights of children in surrogacy agreements are not protected and parties could choose to make any decision concerning them, whether harmful or not. There are, however, certain provisions in Rule 23 of the Code of Medical Ethics, 2004[118] that regulate assisted conception and related practices. Rule 23 recognises gestational surrogacy and permits the donation of gametes for that purpose. It states that necessary statutes to govern assisted reproduction have not yet been established; nevertheless, medical practitioners must resolve all ethical issues that may arise with respect to the counselling and consent of the donor. The Code states that gamete and embryo donation should not be commercialised. With respect to children, the Code notes that in the absence of a legal framework protecting them in these agreements, the basic principles applied in child adoption cases should be considered as best practice.

However, in 2016, a Bill was introduced in the Nigerian National Assembly to amend the National Health Act and includes the regulation of ART.[119] The Bill mandates the Federal Ministry of Health to regulate the practice of ART and establish a National Registry of Assisted Reproductive Technology

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115 South African Law Reform Commission http://pmg-assets.s3-website-eu-west1.amazonaws.com/170720righttoknowonesownbiologicalorigns.pdf (accessed 2019-12-24).

116 Rispel *The Scope and Content of the Child's Right to Identity in the Context of Surrogacy* 29.

117 See Van Bueren *The International Law on the Rights of the Child* (2006) 36; Midford *Disclosure: How, Why and When to Tell Your Child About Their Origins?* Australian Conference (26-27 May 2012) *perthpsychology.com.au/wp-content/uploads/DisclosureSurrogacy.Midford.pdf* (accessed 2017-08-17).

118 The Code of Medical Ethics is a guideline for medical practitioners in Nigeria and any form of misconduct against this Code will amount to professional misconduct by the medical practitioner.

119 An Act to Amend the National Health Act to provide for the Regulation of Assisted Birth Technology, for Safe and Ethical Practice of Assisted Reproductive Technology Services and for Related Matters http://placbillstrack.org/upload/HB610.pdf (accessed 2019-12-29) – referred to hereafter as the National Health Act (Amendment) Bill 2016.

Clinics and Banks, which will have the function of creating and maintaining a central database of ART data in Nigeria. Medical tests and screening are required for surrogates and donors to ensure that children are not harmed in any way. Clinics are also to counsel the commissioning parents on the options available to them and the consequences and risks involved.

Before surrogacy will be supported, a medical report must confirm the inability of the commissioning mother to carry a child to term.[120] Written consents must also be obtained by all parties to the agreement for every stage of the assisted reproduction process.[121] They may, however, withdraw such consent any time before the surrogate is implanted with the required gametes.[122] Children are protected through the prohibition of implantation of gametes from more than one man and woman,[123] sex pre-determination or selection[124] and freezing of embryos without consent from all parties.[125] Clinics must also inform the commissioning couple of the rights of children born through ART.[126] The Bill allows ARTs, except surrogacy, for married infertile couples.[127] This provision is not drafted clearly as that would mean surrogacy is declared illegal by the Act, when it has already been deemed lawful in previous provisions in the same Act.[128]

In 2017, a Bill for the regulation of reproductive technology[129] was also introduced in the National Assembly. This Bill has yet to be passed but has scaled the second reading.[130] The ART Bill spells out more clearly the rights and duties of all parties in assisted reproduction. The status and welfare of children born through ARTs are included. For example, it is a crime for commissioning parents to refuse to accept a child, regardless of any disability that he or she may have.[131] The child must be registered at birth in the name of the commissioning parents.[132] Only one surrogate may be employed at a particular point in time[133] and a woman cannot be a surrogate more than three times in her lifetime, in order to prevent harm to the resulting children.[134] As in the case of the South African Children's Act, a child has the right to apply for information concerning his or her biological parents, with the exception of information concerning their identity. However,

120 Clause 68(10) of the National Health Act (Amendment) Bill 2016.
121 Clause 69 of the National Health Act (Amendment) Bill 2016.
122 Clause 69(4) of the National Health Act (Amendment) Bill 2016.
123 Clause 71(3) of the National Health Act (Amendment) Bill 2016.
124 Clause 72(1) and (2) of the National Health Act (Amendment) Bill 2016.
125 Clause 69(2) of the National Health Act (Amendment) Bill 2016.
126 Clause 68(7) of the National Health Act (Amendment) Bill 2016.
127 Clause 75(1) of the National Health Act (Amendment) Bill 2016.
128 See Clause 68(5) and (10) of the National Health Act (Amendment) Bill 2016.
129 An Act to Provide for a National Framework for the Regulation and Supervision of Reproductive Technology and Other Matters Connected Therewith http://placbillstrack.org/upload/SB325.pdf (accessed 2019-12-29) – referred to hereafter as the ART Bill.
130 Umoru "Senate Moves to Approve Birth via In-Vitro Fertilization" https://www.vanguardngr.com/2017/10/senate-moves-approve-birth-via-vitro-fertilization/ (accessed 2019-12-27).
131 Clause 34(11) of the ART Bill.
132 Clause 34(10) and (11) of the ART Bill.
133 Clause 34(20) of the ART Bill.
134 Clause 34(5) of the ART Bill.

a child could apply to know the biological parents' identity if there were a medical emergency that required the physical testing of the biological parents. The consent of the biological parents is, however, required before the release of such information.[135] The Bill also allows the payment of compensation to surrogate mothers, unlike the South African Children's Act and the Nigerian National Health Act (Amendment) Bill, which prohibit the practice.

6 COMPARISON OF CHILD RIGHTS PROTECTION IN SURROGACY AGREEMENTS IN NIGERIA AND SOUTH AFRICA

In South Africa, there are still some criticisms inherent in the regulation of surrogacy. For example, surrogacy agreements can only be undertaken by persons domiciled in South Africa, and it has been argued that this regulation is restrictive to citizens from other countries. Also, the prohibition of commercial surrogacy, the genetic link requirement and knowledge of biological origin by the child are also issues that have been subject to debates. However, despite these criticisms, the fact that the practice of surrogacy has been regulated in the Children's Act has helped to protect the rights of children born through surrogacy agreements in South Africa.

Chapter 19 of the Children's Act aims to promote the best interests of children through the confirmation of surrogacy agreements in South African courts. This ensures that clauses harmful to children are not included in these agreements. Thus, the capacity of surrogate mothers to carry the child and the ability of the commissioning parents to care for him or her will be considered by the courts so that the child's welfare will not be put at risk. It is a laudable requirement that spouses of the surrogate and commissioning parent give their written consent as it prevents subsequent conflicts and neglect of the child after his or her birth. The best interests principle is also to be made a priority in surrogacy agreements. Parties are also screened to ensure they are capable of handling their duties without causing harm to the child. The fact that surrogates are required to have at least one child who is alive reduces the risk of a refusal to hand over the babies, thus leading to legal disputes that affect such children psychologically. The court is also interested in what would happen to the child upon divorce or separation of the commissioning parents. The Children's Act aims for surrogacy to be the last option for commissioning couples, which is why it is preferred that they have a medical condition that has affected their ability to conceive naturally. Thus, a surrogacy agreement can only be termed as valid when other ARTs have been unsuccessful and this ensures that the practice is not taken lightly and abused.

On the other hand, in Nigeria, the rights of children have not been sufficiently protected in surrogacy agreements. The lack of specific comprehensive legislation to regulate the practice has the implication of increasing the risk of abuse of children. It has, for example, led to the illegal sale of gametes without screening or counselling, while some people

[135] Clause 36(1)–(3) of the ART Bill.

encounter health risks from quack doctors. In addition to this, the lack of regulation has increased the prevalence of "baby factories", where girls are impregnated and their babies sold to people in need of children. Baby factories cause a lot of harm to children in several ways. The mothers housed in these factories are not screened and there is a risk of diseases being passed on to the children as well as the possibility of deformity through inadequate care of the mothers. The surrogates are also at risk of contracting sexual infections through multiple sexual partners who try to impregnate them, in addition to physical abuse that could affect the health and safety of the babies.[136]

7 A WAY FORWARD FOR NIGERIA

A step in the right direction in Nigeria is the tabling of the National Health Act (Amendment) Bill and the ART Regulation Bill. These Bills, with some adjustments, are adequate to serve as a foundation for regulating ART, including surrogacy agreements in Nigeria. The Bills include important provisions similar to the South African Children's Act, such as requiring consent of parties as well as spouses and partners, medical screening, proof of inability of the commissioning parents to give birth to a baby, legal status of children, among others. The two Bills, which to a large extent have similar provisions, should, however, be merged together into a single piece of comprehensive legislation so as to prevent inconsistencies and to provide a simple process for all parties. The Bills, for example, have different standards concerning commercial surrogacy. Also, the laudable provisions in the South African Children's Act, which are absent in the Bills, should be considered in Nigeria. For example, the confirmation of surrogacy agreements by courts will help in protecting children. The requirement that a surrogate mother must have given birth to her own child who is alive should also be incorporated into Nigeria's legislation as it reduces the risk of surrogates refusing to give up the child. To avoid children having several parents as a result of different donors and to establish a good child-parent relationship, the genetic link requirement should also be incorporated in Nigeria. However, there should be an exception, whereby those who have been unsuccessful with adoption for a specific period of years, could be given an opportunity to use a surrogate.

Concerning disclosure of biological origins to a child, the South African Children's Act and the ART Bill both prohibit the identity of the genetic parents being divulged to the child. The right of children to know their biological origin may compete with the right of the donor to be anonymous and the right of parents to have a private life and keep their reproductive choices private.[137] The best interests of the child should, however, be primarily considered as stated by the UNCRC. It is thus recommended that this provision be modified and the right to identity of children be protected. Specific conditions like the age of the child, persons who should disclose

[136] Makinde, Olaleye, Makinde, Huntley and Brown "Baby Factories in Nigeria: Starting the Discussion Toward a National Prevention Policy" 2017 18(1) *Trauma, Violence & Abuse* 98–105.

[137] Rispel *The Scope and Content of the Child's Right to Identity in the Context of Surrogacy* 18.

such information, and other conditions that would make the information easier for the child to process, should be included. The identity of the parties should however not be made public knowledge.

Clause 75(1) of the National Health (Amendment Bill), which prohibits surrogacy for married couples who cannot have children, should be amended and spelt out more clearly.

8 CONCLUSION

The practice of surrogacy is becoming more common in Nigeria. Adequate regulation is therefore important so as to create standards for the practice and to prevent the abuse of parties, especially children who are the most vulnerable and are brought innocently into the world. It is important for Nigeria to join the rank of countries, such as South Africa, that have established and legally enforceable ART laws. All parties must consider the best interests of children when drafting agreements and clauses. Medical practitioners must conduct medical and psychological evaluations to access the fitness of surrogate mothers and such reports must be attached with the surrogacy agreements for confirmation. All medical processes should be performed in registered hospitals and by qualified doctors to prevent harm to the child. Commissioning parents must also be seen to have the capacity to care for the child in a safe environment and should be informed about their rights. Children should be registered at birth so that their right to identity and nationality is ensured. It is also important for parents to inform their children of their biological heritage when they are old enough to understand.

COLLECTIVE BARGAINING MISJUDGED: THE MARIKANA MASSACRE[1]

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SUMMARY

The tradition of violence during collective bargaining processes in South Africa (particularly during a strike) can be traced back to the colonial period, where the struggle for better employment terms and conditions was conflated with the struggle for freedom from political oppression, apartheid and the colonial regime. An example in this regard is the Sharpeville uprising. In this case, the State's reaction to the uprising was to call upon the armed forces to quell the situation, and in the process, lives and limbs were lost; nobody was held accountable for this. This was surely a bad legacy to leave for modern times! However, fifty-two years later, South Africa experienced a *déja vu* moment in the form of the Marikana massacre, which was also chillingly reminiscent of the massacre by apartheid police at Sharpeville in 1960. The writing of this article is informed by the need to avoid another Marikana massacre. The authors bemoan the manner in which this tragic event was handled and argue that, with the right attitude and the right application of resources, the massacre could have been avoided. The authors also lament the approach employed in dealing with the aftermath of the Marikana massacre and conclude that the status quo gives credence to the saying that "an apple does not fall far from the tree". The prosecution of the perpetrators is delayed, no compensation is given to bereft families, and it remains to be seen who was at fault, even after a "good-for-nothing" yet costly Commission of Inquiry[2] has completed its task.

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1 Marikana is a mining town near Rustenburg, in the North West Province of South Africa.

2 The Marikana Commission of Inquiry, chaired by retired Judge Farlam per Proc 50 of 2012 in *GG* 35680 of 2012-09-12 (the Farlam Commission of Inquiry).

1 INTRODUCTION

The Marikana incident will remain etched in the minds of many as either a "wrong-turn moment" or a collective bargaining re-invention in the history of collective labour law in South Africa, just as the Sharpeville massacre and the 16 June 1976 uprisings do in the political arena.[3] The common feature of these two phases is that people wanted to be freed from the unfavourable and exploitative living conditions imposed by the government. Their efforts were met by a committed and formidable police force that claimed lives. Interestingly, the Marikana tragedy happened in the year democratic South Africa came of age – it had recently celebrated its eighteenth birthday.[4] Worst of all, it did not seem important for the democratic government to look into the reasonableness of mineworkers' demand, in line with one of the general purposes of labour laws and a constitutional imperative – namely, the advancement of social justice.[5] The authors give context to the concept "social justice" insofar as it connects to and forms part of the demands of the mineworkers. The article adopts the viewpoint that, in general and by design,

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[3] The Sharpeville massacre occurred on 21 March 1960 at the police station in the South African township of Sharpeville, Transvaal. After a day of demonstrations against pass laws, a crowd of between 5 000 and 7 000 Black protesters went to the police station. The South African Police opened fire on the crowd, killing 69 people. On 16 June 1976, an uprising that began in Soweto and spread throughout South Africa changed the country's socio-political landscape. The events were rooted in apartheid policies that resulted in the introduction of the Bantu Education Act in 1953. The rise of the Black Consciousness Movement (BCM) and the formation of the South African Students Organisation (SASO) raised the political consciousness of many students while others joined the wave of anti-apartheid sentiment within the student community. When the language of Afrikaans, alongside English, was made compulsory as a medium of instruction in schools in 1974, Black students began mobilising. On 16 June 1976, between 3 000 and 10 000 students, mobilised by the South African Students Movements Action Committee and supported by the BCM, marched peacefully to demonstrate and protest against the government's directive. The march was meant to culminate in a rally at Orlando Stadium. On the way, heavily armed police met the students. They fired teargas and later live ammunition. The media revealed the brutality to the world, which resulted in an international outcry. Images of the police firing on peacefully demonstrating students led to international revulsion against South Africa (South African History Online "The June 16 Soweto Youth Uprising" http://www.sahistory.org.za/topic/june-16-soweto-youth-uprising). See also Chetty "The Marikana Massacre: Insurgency and Counter-Insurgency in South Africa" 2016 25(2) *New Labour Forum* 62 69.

[4] August 2012. South Africa became a democratic country in 1994.

[5] S 1 of the LRA provides that one of the purposes of the Act is to advance social justice; see also *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46; 2000 (11) BCLR 1169 par 1; *South African Transport and Allied Workers Union (SATAWU) v Moloto NO* 2012 (6) SA 249 (CC); 2012 (11) BCLR 1177 (CC); [2012] 12 BLLR 1193 (CC); (2012) 33 ILJ 2549 (CC) par 21. See also Alexander "Marikana, Turning Point in South African History" 2013 40(138) *Review of African Political Economy* 605–619 607 where the latter describes the working conditions in Lonmin in the following terms: "the working conditions were dangerous, with risks intensified by pressure to work in hazardous locations; the arduous character of work, which often, because of production targets, included shifts lasting 12 hours or more; doubled-up bodies endlessly shaken by heavy drills; artificial air full of dust and chemicals; high levels of sickness, including TB; and managers who were disrespectful and adversarial. In many cases, workers were caught in a debt trap, leading to forced deductions from wages and payments to micro lenders and lawyers, which resulted in some workers paying 15 times the value of their original loan."

mineworkers in South Africa do not enjoy the benefits of social justice. They are low-income employees and their safety is a serious concern.

On the day of the massacre, employees were simply asserting a demand that sought to free mineworkers from the plight to which they were subjected over the years by mining houses, aided and abetted by the government, which successfully played the role of a middleman.[6] The posture and tone of some of the government leaders in the build-up to the Marikana massacre raises serious concerns. Chetty captured this well when she quoted a senior government leader, the Deputy Minister of Safety and Security, as saying to the police, prior to the Marikana massacre: "You must kill the bastards if they threaten you or your community. You must not worry about the regulations. That is my responsibility."[7] Chetty also reminds us that the same government had made a deal with mining houses in 1994 to improve the conditions of mineworkers.[8] In such circumstances, the government should rise above any possible self-interest in order to protect both parties, rather than to take sides as it did. The posture taken by the government seeks to undermine the synergy between mining houses and mineworkers in the mining industry. The authors' view is that the mining industry would not exist without mineworkers. The purpose of this article is to provide a critical analysis of the way in which the Marikana saga was handled from the beginning – that is, the efforts taken to control the situation, the police's defence of their actions, and the subsequent measures adopted to try and uncover the truth, in order to establish liability. The authors also express their disappointment that, to date (seven or more years later), no action has been taken despite the revelations contained in the report compiled by the Farlam Commission of Inquiry.[9] The authors also provide comments about the revelations made in the report, and suggest that legal issues should, in principle, be resolved legally.

The date of 16 August 2012 will, undeniably in the authors' view, go down in the history of the labour relations regime of South Africa and the people in the mining sector in particular, not only as the day that things went horribly wrong, but also the day that they were made to go wrong. On this day, lives of mineworkers were lost simply because they demanded better working conditions[10] – that is, engaging in an act (collective bargaining) that is protected in terms of the Constitution,[11] the Labour Relations Act[12] and

6 Chetty 2016 *New Labour Forum* 63.

7 Chetty 2016 *New Labour Forum* 66.

8 *Ibid*.

9 Marikana Commission of Inquiry *Report on Matters of Public, National and International Concern Arising out of the Tragic Incidents at the Lonmin Mine in Marikana, in the North West Province* (31 March 2015) (the Marikana Report).

10 Thirty-four were killed and about 70 injured at the hands of the South African Police Services (SAPS).

11 S 23 of the Constitution of the Republic of South Africa, 1996 (the Constitution).

12 S 4 read with s 64 of the Labour Relations Act 66 of 1995 (LRA). The purpose statement, captured in s 1 of the LRA provides for collective bargaining to be used as a vehicle to advance social justice.

international law.[13] It is common cause that employees shot at during the Marikana massacre were engaged in a collective bargaining process. Collective bargaining is a recognised form of regulating employment relations between employer and employee.[14] In this case, Marikana employees demanded a pay increase to secure minimum monthly wages of R12 500 from Lonmin, their employer, by means of strike action. Strike action is a component of collective bargaining sanctioned by the law.[15] Naturally, a strike involves employees' refusal to work.[16] This is exactly what happened in Marikana; mineworkers refused to offer normal services to the employer until their demand was met. Mineworkers were exercising their constitutional right to strike. Making an observation about the importance of a strike in the collective bargaining process, Ngcobo J noted that a strike is to the process of collective bargaining what an engine is to a vehicle.[17] In the prior case before the LAC, the court held that without a strike, collective bargaining becomes collective begging.[18] These observations show how central a strike is to the process of collective bargaining. A long-standing labour relations principle is that once the employer and trade union choose bargaining to solve a labour dispute, it becomes a case of an economic power play between the two.[19]

However, on the day under discussion, fully uniformed and heavily armed South African Police Services (SAPS) members were called upon openly to shoot and kill the protesting mineworkers, resulting in the Marikana massacre.[20] Soon after this event, the National Police Commissioner made an astonishing remark, commending the police for their good work, and thereby, in the authors' view, trying to exonerate the police's "blind

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13 The ILO's Right to Organise and Collective Bargaining Convention, 1949. South Africa has ratified this convention in 1996. In terms of this convention, member states should not hamper the freedom of collective bargaining. See also Du Toit, Godfrey, Cooper, Giles, Cohen, Conradie and Steenkamp *Labour Relations Law: A Comprehensive Guide* (2015) 280 and 281.

14 S 23(5) of the Constitution; Du Toit *et al Labour Relations Law: A Comprehensive Guide* 277.

15 S 23(1)(*c*) of the Constitution and s 64 of the LRA.

16 See the definition of a strike in terms of s 213 of the LRA.

17 *National Union of Metal Workers of South Africa v Bader Bop (Pty) Ltd* 2003 (2) BCLR 182; 2003 (3) SA 513 (CC); [2003] 2 BLLR 103 (CC) 67.

18 *Bader Bop (Pty) Ltd v National Union of Metal and Allied Workers of SA* (2002) 23 ILJ 104 (LAC) par 11.

19 Du Toit *et al Labour Relations Law: A Comprehensive Guide* 277; Jordaan "Collective Bargaining Under the New Labour Relations Act: The Resurrection of Freedom to Contract" http://www.saflii.org/za/journals/LDD/1997/2.pdf (accessed 2018-06-06) 4; *Afrox Ltd v SA Chemical Workers Union* (1997) 18 ILJ 406 (LC) 410D–E; *South African Transport and Allied Workers Union (SATAWU) v Moloto NO supra* par 56; s 68(1) of the LRA read with the Code of Good Practice: Dismissal in Schedule 8; Patil *Collective Bargaining: Perspective and Practices* (1993) 8.

20 Chinguno "Unpacking the Marikana Massacre" (2013) *column.global-labour-university.org/2013/02/unpacking-marikana-massacre.html* (accessed 2018-03-08) 2; Boettger and Rathbone "The Marikana Massacre, Labour and Capitalism: Towards a Ricoeurian Alternative" http://www.koersjournal.org.za/index.php/koers/article/view/2263/pdf (accessed 2018-06-06) 2.

obedience" to the officials' orders.[21] Indeed, and as a matter of principle, in every organisation, decisions are taken from the top and escalated down for implementation by so-called subordinates; in the case of Marikana, the subordinates were the police. In light of this, urgent questions arise. Should subordinates be so blind as to do everything that the top says? Should our police act like "hired guns"? These questions are answered later in the discussion.

It is argued that the involvement of the heavily armed SAPS members was not only an unnecessary and unprecedented move for labour relations in the democratic South Africa, but was also a clear indication that police were in a "war mode".[22] In addition, the presence of police mortuary vehicles at the scene prior to the shooting adds an interesting dimension to the equation – particularly with reference to the mindset of the police on the day;[23] strangely, no arrangements were made for an ambulance.[24] These facts, collectively viewed, give credence to our argument that the Marikana massacre was a premeditated execution.

As already mentioned, the weapon of a strike is sanctioned by the LRA for use by employees to achieve the fundamental ideals set out in the LRA. A strike by employees, whether protected or not, is to date not a criminal offence in South Africa. Therefore, the use of lethal force, as happened in Marikana, contradicts the LRA ideals. It suppresses the weak and the exposed – in this case, the mineworkers, who earned extremely low wages for their immeasurably hard work. Resorting to strike action was the only way to register their discontent. It should be noted that collective bargaining processes in South Africa are regulated in terms of the LRA. Nowhere do the LRA provisions require the use of police force to give effect to the purposes of the Act.

In essence, the Marikana massacre violated the following rights: the victims' right to life,[25] their right to freedom and security of their persons,[26] their right not to be subjected to slavery,[27] the right of their families to dignity, and the victims' right to attain decent work. For the purposes of this article,

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21 S 199(6) of the Constitution of South Africa provides that no member of any security service may obey a manifestly illegal order.

22 In terms of the Resolution 25/38 taken by the United Nations Human Right Council, namely the Promotion and Protection of Human Rights in the Context of Peaceful Protests, the use of excessive or indiscriminate force is prohibited and, further, lethal force cannot be used merely to disperse a gathering (see www.ohchr.org/Documents/Issues/Executions/A-HRC-RES-25-38.pdf (accessed 2019-06-20) 1 and 2).

23 The Marikana Report at 194, 342 and 361.

24 Chetty 2016 *New Labour Forum* 67.

25 *S v Mankwanyane* 1995 (3) SA 391 CC; s 11 of the Constitution of the Republic of South Africa, 1996.

26 S 12 of the Constitution.

27 S 13 of the Constitution. The word "slave labour" is defined in Hornby *Oxford Advanced Learner's Dictionary of Current English* (2000) as work that is very hard and very badly paid. See also an article published online by South African History Online "History of Slavery and Early Colonisation in South Africa", which states, "Today, the term slavery is used to indicate a wide range of human rights abuses and exploitative labour practices" http://www.sahistory.org.za/article/history-slavery-and-early-colonisation-south-africa (accessed 2019-06-17).

the concept of decent work is also briefly touched on, in order to give context to its connectedness to the dignity of workers, as the authors believe that it was the foundation of this eventful strike.

Decent work, as Somavia observes, is productive work in which rights are protected, and adequate income and social protection are generated.[28] "Decent work" is a globally accepted goal through which people's lives can be improved.[29] Underlying this ideal is a commitment to creating a socially inclusive economy, as aspired to by the International Labour Organisation (ILO), to which South Africa is party. Therefore, the killing that occurred in Marikana amounts to suppression of the employees' right to uplift their lives. This is reminiscent of the 1922 revolt/rebellion, or its re-incarnation in the democratic context.[30]

Collective bargaining naturally entails employees withdrawing their labour if negotiations fail, and effectively forfeiting their wages[31] while causing the employer to lose the profit and production of the days lost to the strike. The potential loss of production on the part of the employer and of wages on the part of the employees provide a necessary impetus for parties to make the necessary concessions in order to avoid or mitigate the twofold effects of the strike. This whole process is called collective bargaining, which is discussed below. A strike is a fundamental weapon for use by employees against the mighty employer.[32] Therefore, if need be, it can be resorted to without fear of employer, police or state victimisation.[33]

Furthermore, it could never have been intended by the struggle of the National Democratic Revolution (NDR)[34] for the government to use the

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28 "The Decent Work Agenda in Africa: 2007–2015: Eleventh African Regional meeting Addis Ababa: Report of the Director-General" https://www.ilo.org/public/english/standards/relm/rgmeet/11afrm/dg-thematic.pdf (accessed 2019-07-12) 15 par 52.

29 *Ibid.*

30 The Rand Rebellion of 1922 was an armed uprising, also referred to as the Rand Revolt or Red Revolt, which occurred during a period of economic depression following World War I. After the war, mining companies were faced with rising costs and a fall in the price of gold. A general strike was organised by white trade unions in Johannesburg, South Africa, in 1922. This was in response to intensified exploitation of the miners and a decision by gold-mining industry leaders to replace many white workers with black workers.

31 It should be noted that one of the principles of a strike in the South African labour relations regime is the principle of "no work, no pay". This means that the employer is not obliged to pay the employees who are involved in a strike, regardless of whether or not the strike is protected.

32 Slabbert, Prinsloo and Bekker *Managing Industrial Relations in South Africa* (1990) 4–16; Martin, Keaveny and Allen *Readings and Cases in Labour Relations and Collective Bargaining* (1985) 98–99; Perrins *Trade Union Law* (1985) 30 and 33. See also Sayles *Behavior of Industrial Work Groups: Predication and Control* (1958) 56–57 and Forrest *The Metal That Will Not Bend: National Union of Metalworkers of South Africa 1980–1995* (2011) 481; Glassman and Cummings *Industrial Relations: A Multidimensional View* (1985) 165–166.

33 *Fawu v Pets Products (Pty) Ltd* [2000] 7 BLLR 781 (LC). In this case, the employer had given non-striking employees a R200.00 voucher as a reward for not joining the strike, which the court found to be in contravention of s 5(3) of the LRA. See also *NUM V Namakwa Sands* [2008] 7 BLLR 675 (LC).

34 The main goals of the South African Communist Party, as described in its 1984 Constitution, is to liberate "the African people in particular, and the black people in general, the destruction of the economic and political power of the racist ruling class, and the

State's apparatus to suppress employees from exercising their democratic right to engage and participate in the collective bargaining process, thereby rendering it, in Zondo J's observation, "collective begging".[35] Meanwhile, the former Secretary-General of the Congress of Trade Unions of South Africa, (COSATU), Mr Zwelinzima Vavi, warned, "freedom without addressing the social conditions of our people is hollow".[36]

The social conditions of those killed in Marikana deteriorated even under the government that, at least in its rhetoric, claimed to be on the side of the same workers or equity. It is the miners' argument that at the time of Marikana massacre, they earned as a take-home, a paltry R3 000 – 4 000.00 a month in 2012, whilst executives at the same mine would take home R1.2 million.[37] The National Union of Mineworkers (NUM), as the collective representative, was alive to this reality.

In direct response to the massacre, the government of the Republic of South Africa established a Judicial Commission of Inquiry, chaired by former Supreme Court of Appeal judge Ian Gordon Farlam,[38] whose investigatory role, like a dog on a leash, was restricted by the (heavily criticised) investigation guidelines that were the terms of reference.[39] It is the authors' view that the investigation was not, from the time of its inception, meant to uncover the whole truth, but only the selected aspects sanctioned by the terms of reference, thereby rendering all the efforts an unnecessary exercise. Instead, criminal and civil processes would have been appropriate measures, and would have delivered social justice as a value recognised and aspired to in terms of the Constitution[40] and the labour laws.[41]

establishment of one united state of people's power in which the working class will be the dominant force and which will move uninterruptedly towards social emancipation and the total abolition of exploitation of man by man." (see Slovo "The South African Working Class and the National Democratic Revolution" (1988) https://www.marxists.org/subject/africa/slovo/1988/national-democratic-revolution.htm (accessed 2019-06-17).

35 *Bader Bop (Pty) Ltd v National Union of Metal and Allied Workers of SA* (JA50/00) [2001] ZALAC 27 (29 November 2001) par 11.

36 Speech by Zwelinzima Vavi (15-12-2006) http://www.polity.org.za/article/zwelinzima-vavis-address-to-the-young-communist-league-national-congress-15122006; Finnemore *Introduction to Labour Relations in South Africa* (2013) 127.

37 Dyveke Styve *From Marikana to London: The Anti-Blackness of Mining Finance* (Thesis for the degree of Philosophiae Doctor, University of Bergen, Norway) 2019 42 https://bora.uib.no/bora-xmlui/bitstream/handle/1956/20832/Maria%20Dyveke%20Styve%20v2_Elektronisk.pdf?sequence=1&isAllowed=y (accessed 2021-03-12).

38 Farlam Commission of Inquiry.

39 The desktop definition of the word "terms of reference" is the scope and limitations of an activity or area of knowledge. See also Collins Advanced English Dictionary, which defines "terms of reference" as the instructions given to someone when they are asked to consider or investigate a particular subject, telling them what they must deal with and what they should ignore. See Anstey "Marikana – And the Push for a New South African Pact" 2013 37(2) *SALJ* 133.

40 Preamble of the Constitution, which reads: "We, the people of South Africa, Recognise the injustices of the past; Honour those who suffered for justice and freedom in our land; Respect those who have worked to build and develop our country; and Believe that South Africa belongs to all those who live in it, united in our diversity. We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to – Heal the divisions of the past and establish as society based on democratic

2 WHAT IS SOCIAL JUSTICE?

Social justice is said to be a value that is permeated by equality and fairness.[42] It is also held that the commitment to achieve social justice requires the law to be loaded in favour of the weak and exposed.[43] Craig[44] describes social justice as a framework of political objectives, pursued through social, economic, environmental and political policies, based on an acceptance of difference and diversity, and informed by values concerned with the following: achieving fairness and equality of outcomes and treatment; recognising the dignity and equal worth and encouraging the self-esteem of all; meeting basic needs; maximising the reduction of inequalities in wealth, income and life chances; and the participation of all, including the most disadvantaged.

Indeed, the Marikana people and, in particular, those killed on this fateful day, quite clearly represent the disadvantaged members of our society who are employed in a sector that is seen as the locomotive of South Africa's economic development.[45] In other words, mining, which drives the economy, as well as those killed in Marikana, and their like, is the force behind this reality. And for what in return for their labour?[46]

It is common cause that the working conditions of mineworkers are physically demanding, risky and are disproportionately disconnected from the occupational risk to which they are exposed on a daily basis. The Marikana incident started with mineworkers' demands for better working conditions through a collective bargaining process. Collective bargaining is the most recognised and effective way of resolving labour disputes between employer and employees, with the latter generally being in a unionised form

values, social justice and fundamental human rights; Lay the foundation for a democratic and open society in which the government is based on the will of the people and every citizen is equally protected by law; Improve the quality of life of all citizens and free the potential of each person; and Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations." See also the equality clause in s 9 of the Constitution.

41 See the purpose statement in Chapter I of the Labour Relations Act, 1995.

42 Van Deventer *Management Strategies for Effective Social Justice Practice in School*s (2013) https://*dspace.nwu.ac.za/bitstream/handle/10394/8558/Van_Deventer_I_Chapter_7.pdf?* (accessed 2019-08-07) 450.

43 Scarman *English Law: The New Dimension* (1974) 28–29; Nyenthi "Access to Justice in the South African Social Security System: Towards a Conceptual Approach 2013 46(4) *De Jure* 901 916.

44 Craig "Poverty, Social Work and Social Justice" 2002 *British Journal of Social Work* 32 2 669–682; O'Brien "Equality and Fairness: Linking Social Justice and Social Work Practice" 2011 *Journal of Social Work* 11 2 143 145.

45 Fedderke and Pirouz "The Role of Mining in the South African Economy" 2000 34 5(1) *South African Journal of Economic and Management Sciences* 1; see also *www.econrsa.org/system/files/publications/policy_papers.../pp09_interest.pdf* (accessed 2019-07-20) 1.

46 It is widely reported that rock drillers at the time of the infamous Lonmin mine strike earned up to R4 000.00 a month, whilst the CEO, Ian Farmer, collected pay and bonuses of £1.2m the previous year. See http://www.politicsweb.co.za/news-and-analysis/how-much-do-rock-drillers-at-lonmin-really-earn (accessed 2019-08-25). See also Chetty 2016 *New Labour Forum* 63.

as a trade union[47], but even with non-unionised employees in so-called wild-cat strikes.[48] It is regarded as a principal weapon for employees to counter-balance the bargaining strength of the employer.[49] This is well supported by the existing literature, which also led us to believe that collective bargaining works for the developing labour relations law.[50]

Collective bargaining is said to have been coined in the 18th century by Sidney and Beatrice Webb, mainly to defuse the strength of the employer by means of graduated processes of bargaining with organised employees, beginning with negotiations and progressing to the threat of a strike in the event that parties do not resolve the dispute. In other words, parties negotiate first, and if negotiations fail, employees may embark on a strike.[51] Kahn notes that the purpose of collective bargaining is to restore social justice.[52] Collective bargaining is further seen as implying a win-lose situation, whereby labour will not be sold if the price is not right.[53] Essentially, this wholesale process of bargaining involves power, confrontation and compulsion. Sometimes, the sanity of the intended goal is overtaken by desperation, which leads to employees (wrongly) resorting to violence and other criminal activities as a means to an end.[54] Rycroft describes this as the tyranny of the mob, which remains an urgent concern, undermining democratic processes and rational negotiation.[55] This should rather be dealt with through appropriate criminal or civil processes.

3 THE LEGAL FRAMEWORK FOR COLLECTIVE BARGAINING IN SOUTH AFRICA

As previously mentioned, collective bargaining is a recognised tool in the labour relations environment to regulate relations between employer and employees. Collective bargaining entails progressive engagements between the employer and employees, with the aim of reaching a collective agreement. It begins with negotiations, which are naturally non-confrontational, and if concessions cannot be made, a strike is the inevitable course of action. Section 23 of the Constitution sanctions the employees' right to strike as a component of collective bargaining. The right to strike is

47 Du Toit *et al Labour Relations Law: A Comprehensive Guide* 277.

48 Du Toit *et al Labour Relations Law: A Comprehensive Guide* 358.

49 Du Toit *et al Labour Relations Law: A Comprehensive Guide* 277.

50 See the purpose statement in terms of the LRA; Davies *Perspectives on Labour Law* (2009) 178; Jenkins and Sherman *Collective Bargaining* (1977) 6; *In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (10) BCLR 1253 par 64.

51 Hutt *The Theory of Collective Bargaining* (1954) 21; Godfrey *Collective Bargaining: The Past, The Present and the Future* (2010); s 64 of the LRA.

52 Davies and Freedland *Labour and Law* (2008) 18.

53 Nel and Van Rooyen *Worker Representation in Practice in South Africa* (1985) 93; Harrison "Collective Bargaining Within the Labour Relationship: In a South African Context" (2004) https://dspace.nwu.ac.za/bitstream/handle/10394/2409/harrison_ds.pdf?sequence=1 (accessed 2019-09-26) 26.

54 *South African Transport and Allied Workers Union v Garvas* 2012 (8) BCLR 840 (CC); [2012] 10 BLLR 959 (CC); (2012) 33 ILJ 1593 (CC); 2013 (1) SA 83 (CC).

55 Hepple, Le Roux and Sciarra *Laws Against Strikes: The South African Experience in an International and Comparative Perspective* (2015) 122 (read online).

reiterated and given content in terms of the provisions of the LRA.[56] This section sets out the procedure for a protected strike.

In light of the procedural aspects discussed above, it is clear that the action embarked on by Marikana mineworkers was a strike action. A strike can be either protected or unprotected. In the case of the former, a strike is protected if it complies with section 64 of the LRA or any other procedure set out in terms of a collective agreement that is made between the employer and the trade union representing the employees. If the procedure is not followed, the strike is said to be unprotected, which has various

[56] Ss 4, 64 and 187(*a*)–(*c*) of the LRA. S 64(1) provides: "Every employee has the right to strike and every employer has recourse to lock-out if–

(a) the issue in dispute has been referred to a council or to the Commission as required by this Act, and–
   (i) A certificate stating that the dispute remains unresolved has been issued; or
   (ii) A period of 30 days, or any extension of the period agreed to between the parties to the dispute, has elapsed since the referral was received by the council or the Commission; and after that–

(b) in the case of a proposed strike, at least 48 hours' notice of the commencement of the strike, in writing, has been given to the employer, unless–
   (i) The issue in dispute relates to a collective agreement to be concluded in a council, in which case, notice must have been given to that council; or
   (ii) the employer is a member of an employers' organisation that is a party to the dispute, in which case, notice must have been given to that employers' organisation; or

(c) in the case of a proposed lock-out, at least 48 hours' notice of the commencement of the lock-out, in writing, has been given to any trade union that is a party to the dispute, or if there is no such trade union, to the employees, unless the issue in dispute relates to a collective agreement to be concluded in a council, in which case, notice must have been given to that council, or

(d) ……."

However, subsection (3) provides that "the requirements of subsection (1) do not apply to a strike or a lock-out if–

(a) the parties to the dispute are members of a council, and the dispute has been dealt with by that council in accordance with its constitution;

(b) the strike or lock-out conforms with the procedures in a collective agreement;

(c) the employees strike in response to a lock-out by their employer that does not comply with the provisions of this Chapter;

(d) the employer locks out its employees in response to their taking part in a strike that does not conform with the provisions of this Chapter; or

(e) the employer fails to comply with requirements of subsections (4) and (5)."

Closely linked to subsection (3) in terms of the restrictions on the employees' exercise of the right to strike are the provisions of section 65(1). In terms of this section, "[n]o person may take part in a strike or lock-out or in any conduct in contemplation or furtherance of a strike or a lock-out if–

(a) that person is bound by a collective agreement that prohibits strike or a lock-out in respect of the issue in dispute;

(b) that person is bound by an agreement that requires the issue in dispute to be referred to arbitration;

(c) the issue in dispute is the one that a party has the right to refer to arbitration or to the Labour Court in terms of the Act;

(d) that person is engaged in–
   (i) an essential services; or
   (ii) a maintenance service."

consequences for the participants. Ordinarily, the living law in South Africa would have required the employer to do one of the following:[57]

- issue an ultimatum warning employees involved to desist from what they are doing;[58]
- issue a threat of dismissal;[59]
- obtain an interdict;[60] or
- claim just and equitable damages from the employees for not honouring their side of the contract, or locking them out.[61]

Furthermore, the employer retains the power to discipline wrongdoers on an individual basis or as a group.[62] Essentially, an unprotected strike constitutes a potentially dismissible offence.[63] However, dismissal in relation to an unprotected strike does not follow as a matter of course. Employers are

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57 *Stuttafords Department Stores Ltd v Southern African Clothing and Textile Workers Union* [2001] 1 BLLR 46 (LAC) 658 par 41.

58 *Mzeku v Volkswagen SA (Pty) Ltd* [2001] 8 BLLR 857 (LAC) par 29. In *NUM v Billard Contractors CC* [2006] BLLR 1191 (LC), the court held that the purpose of an ultimatum is to provide a cooling-off period before a final decision to dismiss is taken, and that there is a discrete right to be heard after the ultimatum has expired. See also *National Union of Metalworkers v Lectropower (Pty) Ltd* (2014) 35 ILJ 3205 (LC) par 25; *National Union of Mineworkers v Goldfields Security Ltd* (1999) 20 ILJ 1553 (LC) 36; *Professional Transport Workers Union v Fidelity Security Services* (2009) 30 ILJ 1129 (LC) 43; *Performing Arts Council of the Transvaal v Paper Printing Wood and Allied Workers Union* 1994 (2) SA 204 (A) par 217D and *Plaschem (Pty) Ltd v CWIU* (1993) 14 ILJ 1000 (LAC) 1006H–I.

59 In terms of Schedule 8 of the LRA (Code of Good Practice: Dismissal) item 6(2) on dismissals and industrial action provides that "the employer should, at the earliest opportunity, contact a trade union official to discuss the course of action it intends to adopt. The employer should issue an ultimatum in clear and unambiguous terms that states what is required of the employees and what sanction will be imposed if they do not comply with the ultimatum. The employees should be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it. If the employer cannot reasonably be expected to extend these steps to the employees in question, the employer may dispense with them." See also *Mzeku v Volkswagen SA (Pty) Ltd supra*; *Mondi Paper (a Division of Mondi Ltd) v Paper Printing Wood & Allied Workers Union* (1997) 18 ILJ 84 (D); *Eskom Ltd v National Union of Mineworkers* (2001) 22 ILJ 618 (W); *Sappi Fine Papers (Pty) Ltd Adams Mill v Paper Printing Wood & Allied Workers Union* (1998) 19 ILJ 246 (SE).

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

61 S 68(1) of the LRA. See Du Toit *et al Labour Relations Law: A Comprehensive Guide* 358–359; *Stuttafords Department Stores Ltd v Southern African Clothing and Textile Workers Union supra* par 12; *Algoa Bus Co v SATAWU* [2010] 2 BLLR 149 (LC) par 44. In this case, the court held that just and equitable compensation is not equivalent to all the damages the employer may have suffered as a result of the unprotected strike.

62 *CEPPWAWU v Metrofile* (Pty) Limited (JA37/01) [2003] ZALAC 22 (19 December 2003) par 27 and 54; *Imperial Car Rental (Pty) Ltd (Jet Park) v Transport and General Workers Union* (LAC) Transvaal Division case no: NH11/2/22436. See also *Moahlodi v East Rand Gold and Uranium Co Ltd* (1988) 9 ILJ 597 (IC). In this case, the court formulated the test as follows: "An employer need not be satisfied beyond reasonable doubt that an employee has committed an offence. The test to be applied is whether the employer had reasonable grounds for believing that the employee has committed the offence. It is sufficient if, after making his own investigations, he arrives at a decision on a balance of probabilities, that the offence was committed [by the employee] provided that he affords the employee a fair opportunity of stating his story in refutation of the charge." See item 3(4) of the Code of Good Practice: Dismissal in terms of the LRA.

63 The LRA recognises three grounds of dismissal – namely misconduct, operational requirements or incapacity (s 188(1)(*a*)).

warned against a knee-jerk approach when dealing with dismissals following unprotected strikes.[64] In determining whether to dismiss employees engaged in an unprotected strike, the Act requires consideration of factors such as the reasonableness of the demand or whether employees' action is not in reaction to an injustice on the part of the employer.[65]

Except for counter-productive violence, or lest we be wrongly understood to suggest that the end justified the means in the Marikana context, one should not lose sight of the fact that mineworkers in Marikana were fighting against economic injustice perpetuated by the employer. In addition, the frustration caused by the absent NUM, which failed to show support at this crucial time, should not be discounted.[66] Under these circumstances, employees arguably felt it was up to them to take action or direct their own struggle. This may also explain why NUM subsequently lost some of its membership to the Association of Mineworkers and Construction Union (AMCU).

Since there was no court decision on the Marikana incident, relaying and prosecuting what transpired on that fateful day, we have to rely on the findings of the Commission, the rich legal literature at our disposal, and the LRA. The report of the Farlam Commission of Inquiry established that the Marikana workers' action was in contravention of strike law, and hence that their action was unprotected; in the authors' view, it generally fell short of the description of crime.[67] According to this viewpoint, the employees' action did not warrant police force.

4 THE USE OF A COMMISSION OF INQUIRY TO UNCOVER THE TRUTH

Commissions of inquiry have become fashionable these days, but unfortunately, their prevalence cannot be linked to many positive results. A

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64 Item 6 of Schedule 8 of the Code of Good Practice: Dismissal provides: "(1) Participation in a strike that does not comply with the provisions of Chapter IV is misconduct. However, like any other act of misconduct, it does not always deserve dismissal. The substantive fairness of dismissal in these circumstances must be determined in light of the facts of the case, including–

(a) the seriousness of the contravention of this Act,

(b) attempts made to comply with this Act, and

(c) whether or not the strike was in response to unjustified conduct by the employer.

(2) Prior to dismissal, the employer should, at the earliest opportunity, contact a trade union official to discuss the course of action it intends to adopt. The employer should issue an ultimatum in clear and unambiguous terms that states what is required of the employees and what sanction will be imposed if they do not comply with the ultimatum. The employees should be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it. If the employer cannot reasonably be expected to extend these steps to the employees in question, the employer may dispense with them."

65 Item 6(1)(*c*) of Schedule 8 of the LRA; *Stuttafords Department Stores Ltd v Southern African Clothing and Textile Workers Union supra*.

66 Finnemore *Introduction to Labour Relations in South Africa* 50; Alexander 2013 *Review of African Political Economy* 605–619 607.

67 Ch 4 of the Marikana report 53.

classic and most recent example is the Seriti Commission.[68] There has been general discomfort expressed in recent years about the use of commissions of inquiry and their effectiveness. Questions are being asked about their relevance. Are commissions of inquiry truly aimed at uncovering injustice or do they just record wrongs? Are they simply lame ducks that are costing victims and taxpayers dearly? Do they serve any purpose at all? Are they merely elaborate ruses aimed at distracting the public and delivering outcomes favourable to only a few? Perhaps most importantly, are they an effective use of public resources?[69] Summing up his observations about commissions of inquiry, Terry Crawford-Browne noted that commissions of inquiry have traditionally become places to park a hot potato until it gets cold.[70]

The authors share the views above and scrutinise the Marikana Commission against this backdrop. The terms of reference in the Commission were, among other things, to "inquire into, make findings, report on and make recommendations concerning" the conduct of Lonmin, the SAPS, AMCU and NUM, the role of the Department of Mineral Resources or any other government entity implicated in the events, and "[t]he conduct of individuals and loose groupings in fermenting and/or otherwise promoting a situation of conflict and confrontation which may have given rise to the tragic incident".[71]

It would appear that one of the witnesses who testified before the Commission, Lieutenant-General Mbombo, mentioned that when she spoke to the then-Minister of Police, he (the latter) had said that the Lonmin executive was calling him and pressurising him.[72] In this regard, she said that the National Commissioner had asked her the previous evening who the shareholders were, to which she replied that she did not know, but that the Minister had mentioned a businessman and African National Congress (ANC) leader, whereupon the National Commissioner had said that she "got it".[73]

In light of all this, and with police having received a signal to "shoot the bastards" from the then-Minister of Mineral Resources[74] – a reference to mineworkers, and political pressure being brought to bear on certain individuals – it seems necessary to determine the meaning of the words "putting pressure on someone". The term "to put pressure on some(one)" is an idiom, which simply means "to try to influence or persuade one to do

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68 See *Corruption Watch v The Arms Procurement Commission* (81368/2016) [2019] ZAGPPHC 351, where the court held that the Commission failed to conduct the task assigned to it through its terms of reference and the Constitution in line with the principle of legality (summary).

69 Crawford-Browne "Parking a Hot Potato: Are Commissions of Inquiry (in)effective" (13 August 2013) http://www.enca.com/opinion/parking-hot-potato-are-commissions-inquiry-ineffective.

70 *Ibid*.

71 The mandate of the Farlam Commission of Inquiry.

72 Marikana Report 163.

73 Marikana Report 163.

74 Bruce "Marikana and the Doctrine of Maximum Force" (13 September 2012) www.mampoer.co.za (accessed 2019-07-27) 14.

something or act a certain way; to make demands on or expect something from someone".[75]

The view of the authors is that the statements above are sufficient to justify a further inquiry into the implicated individuals' actions or inactions, given the status, interests and (political) influence that each of them possesses. There is, arguably, no way that Mr Ramaphosa's influence as a government leader and businessperson with interests in Lonmin could have fallen off the Farlam Commission's radar so easily, if the priority was to establish the truth. What exactly was the relevance of knowing who the shareholders were?[76] Furthermore, the statement "to kill bastards" is, first, degrading, and secondly, it dehumanises the affected mineworkers, thereby suggesting that their lives deserved to be taken in such a manner. Besides, incidents such as Marikana (labour unrests) were and still are being experienced in the farming sector, where people are killed or injured. Another example is the #fees must fall campaign. However, there was not the same reaction from the elite to these cases as to the Marikana tragedy. The personal interests in Lonmin were arguably a factor that prompted the interference and support of the different ministries indicated above. It is submitted that the time has come for laws to be introduced to prevent those with influential roles, such as senior politicians in government, from doing business with the same government that they are serving, for fear of conflicting interests. A mere disclosure of interests is not enough.

Under the circumstances, one would have expected, at the very least, an intervention by the labour ministry, unless the ministry was not aware of all the incidents leading up to the Marikana massacre. This is unlikely, given the attention that this tragic event received, both locally and internationally. The point here is that the labour ministry seems to us to be the most appropriate entity to intervene, where necessary, in labour matters such as this one. In the authors' view, the Commission was a bad horse to ride in pursuit of closure for the Marikana massacre; its ineffectiveness, which is still felt by many today, reinforces this view, as there have still been no consequences. No compensation has been paid to bereft families and no conviction has been made – only apologies from people cleansed by the same Commission. However, it is simple logic that an apology only becomes necessary where something is done wrongfully.

5 DUTY OF EMPLOYEES TO OBEY LAWFUL AND REASONABLE ORDERS OF THE EMPLOYER

The duty of subordinates to obey superior orders is inherent to the proper functioning of every organisation, including state institutions.[77] It is implied in any contract of employment.[78] However, orders should be given by a

[75] The Free Dictionary "Put Pressure On" https://idioms.thefreedictionary.com/put+pressure+on (accessed 2019-09-19).

[76] Marikana Report 163.

[77] Eden "Criminal Liability and the Defence of Superior Orders" 1991 *South African Law Journal* 640.

[78] Joubert (ed) *The Law of South Africa* (*LAWSA*) Vol 6 (2004) par 66.

competent person and must be reasonable and lawful; otherwise, an employee cannot be expected to comply with an order, if to do so would break the law.[79] Collier *et al* observed:

> "an employee may refuse to follow an instruction that contravenes any law or public policy or subjects employee to personal danger. An employee's refusal may furthermore be justified where the instruction falls outside the ambit of the employees' contractual duties."[80]

This means that although an employee may refuse to obey unlawful and unreasonable orders without fear of being charged with insubordination, the employer retains the right to dismiss under the circumstances. However, all employees are protected against unfair dismissals. In *R v Smit,*[81] the court held that if an order is manifestly unlawful, the subordinate may choose not to obey it; otherwise he or she would be acting unlawfully.

In the case of *S v Mostert,*[82] the court referred to the American court decision in *United States v Calley*.[83] In this case, the court said:

> "[A] determination that an order is illegal does not, of itself assign criminal responsibility to the person following the order for acts done in compliance with it … (such) acts of a subordinate … are excused and impose no criminal liability upon him unless the superior's order is one which a man of ordinary sense and understanding would, under the circumstances, known to be unlawful, or if the order in question is actually known to the accused to be unlawful."

In *Motor Industry Staff Association v Silver Spray Painters & Panel-Beaters (Pty) Ltd,*[84] the court outlined the circumstances of an employee that may constitute a valid cause to refuse an order given by an employer. These include the following:

- where the employee is not capable of performing the instruction, as he or she does not have the requisite qualification to attend to the task, which will effectively render the instruction unreasonable;
- where the instruction issued by the employer does not fall within the ambit of the employer's job description and amounts to a unilateral amendment of the employer's contract; and
- where an unreasonable instruction is being issued by the employer.

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79 S 199(6) of the Constitution. S 47(1) of the South African Police Services Act provides that subject to subsection (2), a member shall obey any order or instruction given to him or her by a superior or a person who is competent to do so: provided that a member shall not obey a patently unlawful order or instruction. See also Collier, Fergus, Cohen, Du Plessis, Godfrey, Le Roux and Singlee *Labour Law in South Africa: Context and Principles* (2018) 131; Burchell and Hunt *South African Criminal Law & Procedure* Vol I (1997) 108–9.

80 Collier *et al Labour Law in South Africa* 131.

81 (1900) 17 SC 561. See *S v Banda* 1990 (3) SA 466 (B); Brassey, Cameron, Cheadle and Olivier *The New Labour Law: Strikes, Dismissals, and the Unfair Labour Practice in South African Law* (1987) 430–432.

82 (AR 842/03) [2005] ZAKZHC 27; [2006] 4 All SA 83 (N) (8 March 2005) 6.

83 (1973) 22 USMCA 534 (US Court of Military Appeals); *S v Banda supra* 494F–G.

84 (2013) 34 ILJ 1440 (LAC) par 32.

The guidelines for the use of lethal force are well regulated in terms of the Criminal Procedure Act,[85] of which any police official should reasonably be assumed to have knowledge. In terms of section 49 of the Criminal Procedure Act, use of force by the police should be proportional to the threat that is faced. It is public knowledge that automatic rifles were used in the Marikana case, and that most victims were shot at close range and in their backs, an act that suggests that they were no longer a threat to police, as the victims were running away from the police.[86]

6 CONCLUSION AND RECOMMENDATIONS

As demonstrated in the discussion above, the Marikana massacre could have been avoided if the deliberate interference and sheer disrespect of the rule of law by all stakeholders had not been allowed. Similarly, good faith bargaining on the part of both employer and trade union representatives, and between the latter and its own membership, could have played an important role in easing the tension between the bargaining parties and, by extension, facilitated the bargaining process. Lawmakers should consider incorporating good-faith bargaining into the law, as this would, in all probability, enable parties involved in collective bargaining to commit to the aims and aspirations of their constituency (membership), informed by the truth, reasons and relative dynamics associated with the circumstances. The opposite will not work. The National Union of Mineworkers provides a good example.[87] The frustration among employees in the case of Marikana was that NUM traded off its members' loyalty to maintain its cosy friendship with the management for purposes of self-aggrandisement.[88] The members of NUM may therefore sue the trade union for damages.[89]

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85 S 7 of Act 122 of 1998, as amended.

86 Alexander 2013 *Review of African Political Economy* 605–619 607 www.tandfonline.com/doi/abs/10.1080/03056244.2013.860893 (accessed 2019-09-25) 608; Finnemore *Introduction to Labour Relations in South Africa* 50.

87 The NUM union officials and shop stewards had clearly lost touch completely with their membership and allegedly become too close to management who paid their salaries and provided them with many perks such as cars and cell phones (see Marinovich "Conflict of Interest, Inc: Mining Unions' Leaders Were Representing Their Members While in Corporations' Pay" (24 April 2013) https://www.dailymaverick.co.za/article/2013-04-24-conflict-of-interest-inc-mining-unions-leaders-were-representing-their-members-while-in-corporations-pay/ (accessed 2017-06-11)). See also Harvey "Marikana as a Tipping Point? The Political Economy of Labour Tensions in South Africa's Mining Industry and How Best to Resolve Them" (2013) *South African Institute of International Affairs Occasional Paper NO 164* 17.

88 It is public knowledge that mineworkers were (and still are) exploited and living in squalor, and that nothing was done by either the government (as the highest body in terms of policy making in the country) or NUM (as the then-majority trade union in the sector). Instead, the latter chose to detach itself from the cause to liberate employees from economic enslavement at the altar of self-aggrandisement. See also Peter, Lekgowa, Mmope, Sinwell and Xezwi "Marikana: A View From the Mountain and a Case to Answer" 143–5 https://www.researchgate.net/publication/339043292_MARIKANA_A_View_from_the_Mountain_and_a_Case_to_Answer (accessed 2017-07-21) 16.

89 *SAMWU v Jada* (2003) 24 ILJ 1344 (W); *FAWU v Ngcobo NO* [2013] 12 BLLR 1171 (CC).

The use of the SAPS to supervise the collective bargaining process, as happened in the Marikana case, should be discouraged in the most emphatic possible terms. The Marikana Report revealed that there had been a mishandling of certain information by the police,[90] people whose sole responsibility is to ensure the safety and protection of the community they serve.[91] According to the Marikana Report, a memory stick containing 'top secret information' was lost between the police and could not be presented to commission for examination. For a successful investigation, the collection of data is critical. In the authors' view, determined police would not wish to lose the collected data (especially for a sensitive case such as Marikana); otherwise they would not, in the authors' view, be on the SAPS' payroll. Their conduct in Marikana amounts to an obstruction of justice. In line with this, it is the authors' view that a private investigation be considered, first with regard to the police's conduct, and secondly, into all people whose names were highlighted in the Marikana report. This view is premised on the fact that police cannot be used to investigate themselves or their own conduct, since the results would be questioned from a credibility perspective. In addition, there is a serious need to subject our police to further training on issues related to Marikana, such as crowd control and the like.

Furthermore, trade unions (and officials alike) require further training to conscientise them about their responsibilities and roles when they assume union positions. Webb[92] stated that a trade union is a continuous association of wage earners having the purpose of maintaining or improving the conditions of their working lives, and not those of anyone else. The guidelines drawn up by NEDLAC, which are used when considering the applications for registration of trade unions, also warned against what is called "sweetheart unions", requiring instead that unions be genuine and independent.[93] Cohen *et al* took this point even further when they observed that trade unions owe a duty of care (in the same way that directors of companies do) to their members, and can be held liable in delict if they breach this duty.[94] In line with this observation, it is suggested that NUM should be made accountable to its constituency for the lacklustre performance it displayed in the period leading up to and during the Marikana incident.

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90 Marikana Report 452 par 74.

91 S 205 of the Constitution.

92 Sidney and Beatrice Webb quoted in Green *Industrial Relations* 2ed (1985) 10–12. See the definition by Sydney and Beatrice Webb in Bendix *Industrial Relations in South Africa* 5ed (2010) 161; see *Encyclopaedia Britannica Vol 3* 554.

93 S 95 of the LRA; *Municipal and Allied Trade Union of South Africa (MATUSA) v Crouse N.O* [2015] 11 BLLR 1172 (LC); (2015) 36 *ILJ* 3122 (LC) par 13.

94 Cohen, Rycroft and Whitcher *Trade Unions and the Law in South Africa* (2009) 83; Manamela *The Social Responsibility of South African Trade Unions: Labour Law Perspective* (doctoral dissertation, University of South Africa) 2015 *uir.unisa.ac.za/bitstream/handle/10500/20069/thesis_manamela_me.pdf?sequence=1* (accessed 2019-09-11) 16; Du Toit *et al Labour Relations Law: A Comprehensive Guide* 243.

Finally, the crafting of a rule to regulate state officials (those with power, influence, access and control over state funds by virtue of their occupations) in their business intercourse with the government or its institutions is long overdue. This should put them in the same position as directors of companies who, in terms of the principle regulating insider information (trading), cannot take advantage of being privy to sensitive information to compete in business opportunities created by the same market or organisation, as this would constitute unfair dealing.[95] This, in the authors' view, will help deter conflicted people who are often powerful politically, economically and otherwise, from having or enjoying an unfair advantage over others.

Many years have passed since the Marikana massacre, and affected communities have yet to see or experience justice in action. Fortunately, or unfortunately, a turnaround from this state of affairs depends largely on political will. Perhaps a leaf can be taken from how the Life Esidimeni Arbitration unfolded under retired former Deputy Chief Justice of the Constitutional Court Moseneke.[96] Interestingly, Marikana victims were breadwinners whose families relied solely on their small income, and their deaths amounted to terminating a source of living for their families. However, the Commission did not reach a resolute decision on the issue of compensating the victims' families.[97] Like the Seriti Commission, the Marikana Commission has been yet another distinct flop. Resources were not optimally used.

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95 Cassim, Cassim, Cassim, Jooste, Shev and Yeats *Contemporary Company Law* (2011) 833 and 839; s 72 of the Securities Services Act 36 of 2004.

96 The Life Esidimeni Arbitration was established following Recommendation 17 of the Health Ombudsperson's "Report into the circumstances surrounding the deaths of about 144 mentally ill patients at Life Esidimeni Health Facility: Gauteng Province" (Ombud's Report). See *In the Arbitration Between: Families of Mental Health Care Users Affected by the Gauteng Mental Marathon Project and National Minister of Health of the Republic of South Africa* www.saflii.org/images/LifeEsidimeniArbitrationAward.pdf (accessed 2020-12-21).

97 Marikana Report 518–520.

THE JURISTIC NATURE OF *iLOBOLO* AGREEMENTS IN MODERN SOUTH AFRICA

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SUMMARY

The practice of *ilobolo* has been referred to by many names, including bridal-price, bridewealth, marriage goods or dowry. These concepts are misleading as they suggest that a woman is being bought. There are sections of society who argue that the practice is unconstitutional as it discriminates against women and must be abolished. There are also sections who argue that the practice of *ilobolo* is firmly rooted in customary marriages and cannot be dispensed with. They add that the practice is not discriminatory against women as it is men who are required to pay *ilobolo* and not women. Often the agreement that underlies *ilobolo* is referred to as the *ilobolo* contract. This brings into purview the question of the juristic nature of the *ilobolo* agreement; whether it is a contract or a merely an agreement. A conclusion in this regard is important because it sheds some light on the enforceability of an agreement to pay *ilobolo*. This article sets out to analyse the juristic nature of the *ilobolo* agreement and concludes that the *ilobolo* agreement is a *sui generis* agreement with legal consequences and should be enforceable in a court of law.

1 INTRODUCTION

The practice of *ilobolo*[1] has often been misunderstood. It has also been referred to by many misleading names, especially when attempts are made to come up with a corresponding English equivalent. Bridal-price, bridewealth,[2] marriage goods[3] or dowry are some of the misleading concepts. These are misleading as they suggest that the person in respect of whom the *ilobolo* is paid is being bought.[4] This approach is a form of

[1] This practice is also known as *bogadi, bohali, xuma, lumalo, thaka, ikhazi, magadi* or *emabheka* depending on the ethnic group concerned. See s 1 of the Recognition of Customary Marriages Act 120 of 1998 (Recognition of Customary Marriages Act).

[2] The South African Law Reform Commission (SALRC) contemplated using the term "bridewealth". The reason for this was to avoid being seen as preferring one ethnic group over the other. It is interesting to note that the commission considered preferring a foreign concept and almost imposed it. It is submitted that the commission was correct in settling on *ilobolo*, because it has become a South African concept rather than one belonging to a particular group. See South African Law Reform Commission *The Harmonisation of the Common Law and the Indigenous Law: Report on Customary Marriages* (1998) 49.

[3] Bekker and Buchner-Eveleigh "The Legal Character of Ancillary Customary Marriages" 2017 *De Jure* 80 88.

[4] Mndaweni "African Marriages Still at the Crossroads in South Africa" 1990 23 *CILSA* 361 366. The author submits that the erroneous view of *ilobolo* as a purchase of a woman finds

indirect discrimination on the grounds of gender, as *ilobolo* is only paid in respect of women, and not men. In simple terms, *ilobolo* is said to objectify women by comparing them to property that is *res in commercio.* In addition, it is argued to be indirect discrimination on the ground of culture. As is noted below, *ilobolo* is firmly rooted in African practices and traditions. Both women and men value and treasure it. To say otherwise is to completely disregard the culture of a majority of people.

Unfavourable opinions on *ilobolo* are, to a large extent, a result of the incorrect labelling mentioned above. There is a fallible currency of views that the entire practice of *ilobolo* should be abolished on the ground that it discriminates against women.[5] The difficulty that these views face is that, as pronounced above, *ilobolo* is deeply rooted and widely practised by all African ethnic groups across South Africa.[6] Those who practise *ilobolo* are adamant that it should stay. Academics submit that should the legislature decide to abolish it, the result will probably be paper law of very little significance, if any.[7]

However, there is sound argument in some of the negative perceptions about *ilobolo*. *Ilobolo* is seen to be a financial barrier to those younger men who are emotionally ready to settle down with their partners and start a family, but who are unable to do so because of the expenses involved coupled with the traditional implications of *ilobolo*.[8] It must be added that in African culture, it is regarded as disrespectful for a man to take a woman and stay with her without at least paying *ilobolo*.[9] There is also a belief that a woman who agrees to stay with a man "for free" undertakes a risk that should the man start abusing her, she may enjoy very little or no support from both her family and her man.[10] The same may result should their "household" run out of finances.

Nonetheless, despite the negative perceptions about *ilobolo*, it is submitted that the practice has recently been elevated, thus keeping it abreast with modern ways of life. One has to think no further than a man

its roots in the early Dutch settlers; see, generally, Ngema "Considering the Abolition of *Ilobolo*: *Quo Vadis* South Africa?" 2012 2 *Speculum Juris* 30 39.

5 See, generally, Ngema 2012 *Speculum Juris* 30; see also Hlophe ("The KwaZulu Act on the Code of Zulu Law, 6 of 1981: A Guide to Intending Spouses and Some Comments on the Custom of Lobolo" 1984 17 *CILSA* 163 169), who made a call for the abolition of *ilobolo* before the constitutional era.

6 One should point out that the practice of *ilobolo* is not unique to South Africa. The practice is widely understood, especially in southern Africa. Furthermore, it is also not unique to African cultural practices as it is traceable in the Bible.

7 See Hlophe 1984 *CILSA* 169; Ngema 2012 *Speculum Juris* 46. Dlamini ("Should iLobolo Be Abolished? A Reply to Hlophe" 1985 18 *CILSA* 361 368–370) states: "A law that flies in the face of popular convictions has the potential of being disobeyed. It is equally true that law does not compel action but merely persuades people to a particular course of action. The element of effectiveness is important in a law."

8 Hlophe 1984 *CILSA* 169 and Dlamini 1985 *CILSA* 361.

9 Bekker and Coertze *Seymour's Customary Law in Southern Africa* 4ed (1982) 150.

10 See Bekker and Coertze *Seymour's Customary Law* 150; Dlamini "The Transformation of a Customary Marriage in Zulu Law" 1983 16 *CILSA* 383 387. Dlamini (1985 *CILSA* 361), seconding Hlophe (1984 *CILSA* 163), avers that there is no concrete evidence to support the claim that *ilobolo* ensures good treatment of the wife.

named Jabulani Mahlangu. The latter, having sat through at least five[11] *ilobolo* negotiations for family members, decided to draft a document and named it "*Ilobolo* Agreement".[12] This standard document comprises different sections. It provides for the details of emissaries from both the negotiating families, a record of what was agreed upon and details, including full names and identity numbers, of the intending bride and groom.[13]

This is not the first document of this kind. During 2004, a similar document was introduced by Mpho Lebogo; however, the details of this document are unclear.[14] It appears that this was rather an online document that focused on quantifying *ilobolo*.

According to Mahlangu, he has sought and obtained legal opinion to the effect that the document is "legally binding" and will stand up in court. It is also referred to as the "*ilobolo* contract". Such references not only bring into assessment the document, but also redirect attention to the juristic nature of *ilobolo* agreements in South African law. This is important, especially currently when matters relating to customary marriages frequently land up in court; often the legal issue turns on *ilobolo*.

The purpose of this article is to examine the juristic nature of *ilobolo* in South Africa. Noting that a document, of whatever form, make or nature, containing resolutions from *ilobolo* negotiations is often referred to as a "*lobola* contract" or "*lobola* agreement", should rules relating to contracts apply to *ilobolo*? It is trite in our law that contracts are sacred and ought to be performed.[15] Depending on how we determine the juristic nature of the *ilobolo* agreement, a person who fails to make right his undertaking to pay *ilobolo* may be in breach of contract. On the other hand, we may see the resolutions from *ilobolo* negotiations as merely a social agreement. This too, has legal implications, as is shown below. This article starts by looking at the functions of *ilobolo*, its various functions providing some insight into its legal nature. It then examines whether *ilobolo* is a contract or a social agreement. A conclusion is made based on the discussions.

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11 Dlamini "Legal Form to Seal Lobolo Agreement" (2019-08-29) *Sowetan Live* https://www.sowetanlive.co.za/news/south-africa/2019-08-29-legal-form-to-seal-lobolo-agreement/ (accessed 2020-02-10).

12 Mavundza "You Can Now Get a Legally Binding 'Lobola Agreement' From Shoprite at R99: Here's What It Entails" (2019-09-02) *Business Insider* https://www.businessinsider.co.za/lobola-agreement-contract-2019-8 (accessed 2020-02-02).

13 Qukula "New-Age Lobola Agreement Form Covers All the Legal Bases: For Just R99" (2019-09-09) *Cape Talk* http://www.capetalk.co.za/articles/360223/new-age-lobola-agreement-form-covers-all-the-legal-bases-for-just-r99 (accessed 2020-02-10).

14 Bregmans Attorneys "Lobola Contract Will End Cost-Of-Cows Rows" (9 May 2014) https://www.bregmans.co.za/lobola-contract-will-end-cost-of-cows-row/ (accessed 0.12020-02-10).

15 This is expressed as the sanctity of contract or as *pacta sunt servanda*. See Tromp *Freedom of Contract and the Enforceability of Exemption Clauses in View of Section 48 of The Consumer Protection Act* (LLM dissertation, North West University) 2014 32–33; Pillay *The Impact of Pacta Sunt Servanda in the Law of Contract* (LLM dissertation, University of Pretoria) 2015 7 and Mupangavanhu "Fairness a Slippery Concept: The Common Law of Contract and the Consumer Protection Act 68 of 2008" 2015 *De Jure* 116 119 on the sanctity of contracts.

2 THE FUNCTIONS AND ABUSE OF *ILOBOLO*

Ilobolo has three functions: legal functions, social functions and economic functions.[16] Equally true is that the practice is open to abuse. The discussion below focuses first on the functions of the practice, and then on its abuse.

2 1 Legal functions[17]

It remains debatable whether *ilobolo* is a *sine qua non* of a customary marriage.[18] The South African Law Reform Commission (SALRC) proposed that the practice of paying *ilobolo* should be made optional and should not be a barrier to a valid customary marriage.[19] According to the recommendations of the SALRC, consent was to be the only essential of a customary marriage. The problem with consent as a requirement is that in African marriages, marriage is a thing done between two families. To require only the consent of the potential spouses certainly overlooks this essence of African marriages. On the other hand, those who advocated for the retention of the practice of *ilobolo* argued that there should be something that distinguishes a customary marriage from a civil marriage.[20] This appears to be the basis for the requirement that a customary marriage must be negotiated and celebrated in accordance with customary law.

Ilobolo is not an express requirement of a customary marriage. Mofokeng argues that *ilobolo* is a silent requirement of a customary marriage.[21] This analogy is correct for two principal reasons. First, although section 3(1)(*b*) of the Recognition of Customary Marriages Act,[22] which provides for the requirements of a valid customary marriage, is silent on *ilobolo*, nonetheless the use of the words "must be negotiated" suggests that the legislature had the negotiation of *ilobolo* and ancillary matters in mind. This view is widely

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16 Other authors classify the function of *ilobolo* differently. Ansell ("'Because it's our Culture!' (Re)Negotiating the Meaning of *Lobola* in Southern African Secondary Schools" 2001 27 *Journal of Southern African Studies* 697) identifies material functions, lineage functions, social control functions and identity functions; Rudwick and Posel ("Zulu Bridewealth (*Ilobolo*) and Womanhood in South Africa" 2015 41(2) *Social Dynamics* https://www.researchgate.net/publication/281934987_Zulu_bridewealth_ilobolo_and_womanhood_in_South_Africa (accessed 2020-03-17)) identify compensating parents for the transfer of their daughter's reproductivity and labour, establishing relations between the families, and legitimising and stabilising the marriage. Dlamini (1985 *CILSA* 361) submits that *ilobolo* had a psychological function in that, although under the KwaZulu Act and the Code of Zulu law *ilobolo* was not essential for a civil and customary marriage, Black Africans did regard it as an essential requirement.

17 Dlamini 1983 *CILSA* 386.

18 *Ndlovu v Mokoena* 2009 (5) SA 400 (GNP) and *Mxiki v Mbata* in re: *Mbata v Department of Home Affairs* unreported case A844/2012 of 23 October 2014 (GP).

19 South African Law Reform Commission *The Harmonisation of the Common Law and the Indigenous Law: Report on Customary Marriages* (1998) 61.

20 South African Law Reform Commission *The Harmonisation of the Common Law and the Indigenous Law* 49–53.

21 Mofokeng "The Lobolo Agreement as the Silent Requisite for the Validity of a Customary Marriage in Terms of the Recognition of Customary Marriages Act" 2005 68 *THRHR* 277–288.

22 Recognition of Customary Marriages Act 120 of 1998.

accepted in case law[23] and academic circles.[24] Furthermore, it is very difficult to think of any other meaning to attach to the word "negotiated". It certainly means something more than the planning of the wedding.

Secondly, for the purposes of registration of a customary marriage, proof of *ilobolo* is required.[25] A study of case law shows that what is required is not proof that payment was made, but that it was negotiated and agreed upon. Such proof may take many forms; it may be written proof,[26] photography,[27] a standard document (such as the one mentioned in the introduction above) or an affidavit by a person who was part of the negotiations. Thus, *ilobolo* serves an evidential function. The absence of such proof may lead a registering officer to refuse to register a supposed customary marriage.

It must, however, be stated that the legislature is unequivocal that non-registration of a customary marriage does not affect its validity.[28] It is submitted that this is an anomaly because a person who cannot prove a customary marriage for the purposes of registration cannot obtain a marriage certificate. In the absence of a marriage certificate, they cannot access spousal benefits such as maintenance or pension interest. The result is that, as far as other aspects of the law are concerned (for example, pension interest law), such person is not a spouse. This is the case unless such a person is able to persuade the court to make an order directing the registering officer to register the marriage. It is difficult to imagine a situation where a court will condone registration of a marriage that does not meet the requirements.

2 2 Social functions

There are social connotations associated with *ilobolo* in African culture.[29] *Ilobolo* symbolises the groom's love and respect for his wife.[30] It is also an indication that the potential groom has respect and high regard for his in-laws. Similarly, families usually receive a bride whose *lobolo* has been paid with warmth and welcome. The matriarch of the family is usually willing or bound to hand over the baton to the incoming bride. This does not only symbolise continuity of the family, it also symbolises continuity of the larger clan. Of course, continuity is a variable depending on whether the incoming bride will bear children or not. However, in African culture, a bride need not necessarily bear a child to ensure continuity; families do work around this.

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23 *Fanti v Boto* 2008 (5) SA 405 (C). Note that this judgment is criticised for not referring to the provisions of the Recognition of Customary Marriages Act. Nonetheless, it does provide useful insight.

24 Himonga and Nhlapo *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* (2014) 103.

25 S 4(4)(*a*) of the Recognition of Customary Marriage Act.

26 The written proof is also referred to as the "*lobola* letter". See *Rahlaga v Malatja* unreported case no 2015/21836 of 13 May 2016 (GJ); *Dalasile v Mgoduka* unreported case no 5056/2018 of 2 October 2018 (ECM) par 5–6.

27 *Moropane v Southon* unreported case 755/2012 of 29 May 2014 (SCA) par 9 and *Sengadi v Tsambo; In re Tsambo* [2019] 1 All SA 569 (GJ) par 8.

28 S 4(9) of the Recognition of Customary Marriages Act.

29 Dlamini 1985 *CILSA* 364.

30 Ngema 2012 *Speculum Juris* 38.

The latter is a very broad practice that might overburden the scope of this article.

It is often said that *ilobolo* facilitates the "transfer" of the woman's womb in that her children will now belong to her in-laws.[31] A woman who gives birth out of wedlock does so in her homestead. This means that her offspring belong to her maiden family. It is possible for the father of the child to pay *ilobolo* for the sole purpose of transferring his child from the maternal family to the paternal family.[32] This happens where the relationship between the mother and the father has ended.

Ilobolo also establishes a bride's status in her new family.[33] It initiates the process of making her a full member of the family. It is hereby submitted that mere payment of *ilobolo* does not conclude a customary marriage. In other words, a bride is not a full member of the family (or a member at all) until a customary marriage, in terms of which the bride is handed over to her in-laws, is concluded. The requirement of the handing-over of the bride is controversial. On the one hand, it is argued that the handing-over of the bride is an indispensable requirement of a customary marriage. This argument must be supported. On the other hand, it is argued that the handing-over of the bride is a variable requirement with which the parties may, if they choose, dispense. These proponents suggest a "symbolic delivery". This symbolic delivery has not been explained, but one supposes that it is a mere intention to transfer. It therefore follows that the proponents of a symbolic delivery see mere payment or agreement to pay *ilobolo* as the conclusion of the marriage. The Supreme Court of Appeal has not been decisive on this matter, as it has spoken in favour of both arguments.

Ilobolo also functions as a connection between the ancestors of both families. Some families, especially those that adhere to ancestral rituals, burn incense (*impepho*) before the groom's emissaries leave to inform the groom's ancestors that they are about to depart and the reason for such a departure. If cattle will be given, the cattle are "shown" to the ancestors. If money will be used, the notes will be placed near the incense while the ancestors are being informed. Both cattle and money may be shown to the ancestors. Likewise, the family of the bride, upon receiving the cattle or money, will present the same to their ancestors. It must be stated that it is common practice to inform the ancestors of each step taken leading to the marriage.

2 3 Financial function

Ilobolo also serves a financial function. Indeed, it pays for the various processes that a customary marriage entails. A poor family relies on this payment to prepare for the customary marriage of their daughter. Even families that are above average in wealth fall back on the funds. Nowadays, it is accepted that it is almost impossible to profit from *ilobolo* as all of it goes

31 Bekker and Coertze *Seymour's Customary Law* 49.

32 Sibisi "Breach of Promise to Marry Under Customary Law" 2019 *Obiter* 340 349.

33 Hlophe submits that the main purpose of *ilobolo* is to ensure proper treatment of the bride in her new home. See Hlophe 1984 *CILSA* 163; and Ngema (2012 *Speculum Juris* 37), who adds that *ilobolo* guarantees good treatment for the bride.

toward the costs of the various events that are associated with a customary marriage.[34] Nonetheless, as will be seen below, attempts are still made at profiting.

During a customary wedding, particularly a Zulu wedding, the bride gives gifts to selected members of her family-in-law (her family usually receives their gifts during *umembeso* – a ceremony that occurs at her homestead usually long before the wedding). This is called *umabo*.[35] She usually buys some or all of these gifts using the *ilobolo* fund. Thus, a poor bride relies on *ilobolo* to make her wedding day memorable. The gifts serve a strategic purpose. They are the bride's way of introducing herself into the family. Since the gifts serve a strategic purpose, the bride must be careful of the quality she prefers for certain people. She does not have a choice as to who among her in-laws must get a gift – she merely receives a list bearing the names of the people for whom she must purchase gifts.[36]

Ilobolo also assures the bride of financial security in the event of a depletion in the finances of her married household. This way she can easily go back to her maiden family and ask for help. The family is likely to assist her out of mutual respect for their son-in-law. This may be seen as returning the respect shown by the groom when he decided to pay *ilobolo* for his bride; as has been stated above, by doing this, he shows respect for the bride's family.

The money paid during *ilobolo* is usually depleted by this time. As has been pointed out above, in light of current economic trends, the wedding itself consumes most, if not all, of *ilobolo*.[37] If anything remains, it is usually very little. Even if the wedding does not deplete the money, what remains is negligible unless the family is wealthy or the bride was able to fund her own customary wedding without resorting to the *ilobolo* fund.

Nonetheless, when the bride goes back to her family to ask for financial provision, the family usually draws from its coffers. This happens out of love and pride – pride in the dignity with which their daughter has carried herself all the way to marriage. They find joy in knowing that the money will be used to further the family of a man they regard as honorable. Even if the groom is, for whatever reason, no longer honorable, they are inclined to help their daughter.

A woman's family will be unlikely to provide financially for her if she has decided to live with a man without any *ilobolo* being paid.[38] This is not to say that her family dislikes her; instead, it is an indication that they disapprove of her choice to live in "sin". Perhaps the reason for withholding financial assistance is to get her to come back home. It is submitted that a response of this nature is inspired by the belief that the woman is less likely to receive better treatment from a man who has not made a financial sacrifice for her. After all, even if the woman decides to leave, the man has nothing to lose.

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34 Dlamini 1985 *CILSA* 365.

35 Magwaza *Orality and its Cultural Expression in Some Zulu Traditional Ceremonies* (MA dissertation, University of Natal) 1993 53.

36 Magwaza *Orality and its Cultural Expression* 53.

37 Dlamini 1985 *CILSA* 365.

38 Dlamini 1985 *CILSA* 364.

There are exceptional cases where the man is willing to make a financial sacrifice but is unable to do so owing to difficult economic circumstances. This, coupled with treating the woman with respect, may draw a favorable response from the family of the woman. However, in certain cases, the family may overlook the good treatment that their daughter is receiving from the man as their way of indicating their abhorrence of their daughter's choice of a poor man; this is the case especially if there are stable suitors whom she has ignored. It must be stated that these trends are not unique to African families.

In light of the submissions above on the financial function of *ilobolo*, it is fitting to reflect on the notion that payment or delivery of *ilobolo* is not a *conditio sine qua non* of a customary marriage. A lot of money is expended on a customary marriage; it is difficult to imagine a situation where the family of the bride expends taxing amounts on the wedding of their daughter to a man who has not paid anything towards *ilobolo*. Furthermore, African communities are built on trust and honesty, and a person who promises, must honour his promise. Therefore, the notion that customary marriages merely require an "agreement that *ilobolo* will be paid"[39] cannot stand.

2 4 Abuse of ilobolo practice

As with everything that involves money, *ilobolo* practice is open to abuse. As has been elaborated above, *ilobolo* serves very noble legal, social and financial functions. Unfortunately, these functions are also exploited; the most common form of exploitation involves people who seek to profit from it. Overcharging flows from this form of malpractice.[40] While the amount payable as *ilobolo* does largely depend on status and wealth, overcharging is impermissible.

In a strained economy, any money paid as *ilobolo* assists with wedding preparations. The flipside is that those who participate in the negotiations must account for all the money they receive during *ilobolo* negotiations. Unfortunately, in some sections of our society, patriarchy dominates *ilobolo* negotiations – only men negotiate *ilobolo*.[41] The risk is that the fate of the *ilobolo* money is left in the hands of an unscrupulous father or uncle who may regard the money as his own and use it for things that will not benefit the bride.

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39 See Manthwa "*Lobolo,* Consent as Requirements for the Validity of a Customary Marriage and the Proprietary Consequences of a Customary Marriage: *N v D* (2011/3726) [2016] ZAGPJHC 163" 2017 *Obiter* 438 439.

40 Hlophe 1984 *CILSA* 169 and Dlamini 1985 *CILSA* 361.

41 Patriarchy in *ilobolo* negotiations featured in *Mabena v Letsoalo* 1998 (2) SA 1068 (T), where a shameful argument was raised to the effect that the mother of the bride (the only parent) could not validly negotiate the marriage of her daughter simply because, under customary law, a woman does not participate in *ilobolo* negotiations. The court correctly treated this argument with the contempt that it deserves. It has no place in a South Africa with a justiciable Bill of Rights embodying rights such as equality and dignity. It is submitted that the right to culture does not trump these rights.

3 THE LEGAL NATURE OF *ILOBOLO*

Despite so much having been said about *ilobolo* over more than a century, the legal nature of *ilobolo* remains obscure. It has been pointed out above that there is an evident tendency in academic circles and the judiciary to refer to the agreement underlying *ilobolo* as a contract. This raises the question of the nature of the *ilobolo* agreement in South African law. It is trite in our law that, whereas all contracts are agreements, not all agreements are contracts.[42] The discussions below are limited to whether the *ilobolo* agreement is a contract or an agreement that falls short of the essence of a contract.

3 1 Contract

A contract is an agreement that is entered into with the intention of creating a binding obligation or obligations.[43] A valid contract must comply with requirements such as agreement, contractual capacity, possibility of performance, legality, formalities, and intention to be bound.[44] An agreement that is not intended to create a legally binding obligation is not a contract[45] – no matter how serious the parties may be.[46] This being said, not all obligations are legally binding; a distinction is drawn between civil obligations and natural obligations. A civil obligation (*obligatio civilis*)[47] entails a right to claim performance that may be enforced through the courts.[48] A natural obligation (*obligatio naturalis*)[49] cannot be enforced in a court of law, but it may be enforced indirectly through set-off or a pledge.[50] A natural obligation creates a moral duty to perform, rather than a legal one.[51]

For a contract to be formed, the parties must seriously intend to be bound.[52] In other words, there must be *animus contrahendi* or an intention to contract.[53] It is possible to enter into an agreement without intending to be bound. Entering into a contract means that a party must intend certain legal consequences (such as enforcement through specific performance) should

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42 See Joubert (*General Principles of the Law of Contract* (1987) 11), who points out that this notion originated in Roman law. See also Sharrock *Business Transactions Law* 9ed (2017) 3.

43 Van der Merwe, Van Huyssteen, Reinecke and Lubbe *Contract: General Principles* 3ed (2007) 9.

44 Van der Merwe *et al Contract* 8.

45 Dlamini *A Juridical Analysis and Critical Evaluation of Ilobolo in a Changing Zulu Society* (doctoral thesis, University of Zululand) 1983 315 and Sharrock *Business Transactions Law* 87.

46 Kerr *The Principles of the Law of Contract* 5ed (1998) 41.

47 Christie *The Law of Contract in South Africa* 5ed (2006) 4.

48 Van der Merwe *et al Contract* 4. One may add that a civil obligation (*obligatio*) is a legal bond that creates a legal relationship or *vinculum iuris*. See Christie *The Law of Contract* 3.

49 Christie *The Law of Contract* 4.

50 Van der Merwe *et al Contract* 4. Under Roman law, although a natural obligation was not enforceable like a civil obligation, a party who had received payment in terms of a natural obligation could raise such obligation as a defence against any action for the recovery of the money. See also Christie *The Law of Contract* 4.

51 Joubert *General Principles* 11.

52 Bayi and Hawthorne "Colonialisation of *Lobolo*" 2018 81 *THRHR* 576 579.

53 Christie *The Law of Contract* 30.

the contract not be performed.[54] Should a party intend otherwise, what is reached is no more than a moral obligation (natural obligation) or an obligation of honour.[55]

In this light, can it be said that an *ilobolo* agreement is a contract? The answer lies in whether it complies with the requirements of a contract, as briefly set out above. On the face of it, the *ilobolo* agreement appears to be a contract. However, do parties really intend to create legally binding obligations? In other words, does a party who sends emissaries to negotiate *ilobolo* intend that, should he fail to perform (pay *ilobolo*) in terms of whatever agreement is reached, he may be sued? If this is the case, then an *ilobolo* agreement constitutes a contract. If not, then no contract is created.

To put the discussions above into perspective, it is accepted that *ilobolo* is an integral part of a customary marriage.[56] However, our courts are not unanimous on whether a customary marriage requires payment (full or partial) or a mere agreement to pay *ilobolo*.[57] It is submitted that there must at least be some payment; otherwise, the negotiations would be an exercise in futility. Can it then be said that a party who sends emissaries to negotiate *ilobolo* does so without any intention to pay? In such a case, *animus contrahendi* is lacking and no contract is created. To say that people enter into *ilobolo* negotiations without intending to be bound undermines the seriousness of the practice and hypocritically overlooks cultural rights as espoused in the Bill of Rights.

Instead, people who send emissaries to negotiate *ilobolo* do so intending to be bound. To prove this, certain monies are paid as a token, including *pula mulomo* and *ukucela*. These monies are not *ilobolo*, but they precede it. A person who pays *pula mulomo* and related monies displays an intention to perform in terms of the *ilobolo* agreement once reached. The question remains, can such intention to perform in terms of the *ilobolo* agreement be equated with the intention to create a legally binding obligation? In other words, does it turn out that by virtue of intending to perform in terms of an *ilobolo* agreement, a party may be said to intend to create a legally binding obligation? As has been noted above, this question should be answered in the affirmative only if a party also intends that non-performance be visited by an action for specific performance. In reality, there are no known cases for enforcement of an agreement to pay *ilobolo*.

One should be careful in interpreting the reason for non-enforcement of an *ilobolo* agreement. It may be a reflection on the parties' intention; that is, it may indicate that the parties entering into *ilobolo* negotiations do not intend to create legally binding obligations, thus finalising the argument on whether

54 Sharrock *Business Transactions Law* 2.

55 Kerr *The Principles* 43.

56 *Maluleke v Minister of Home Affairs* unreported case no 02/24921 of 9 April 2008 (GP) and Himonga and Nhlapo *African Customary Law in South Africa* 103.

57 Bayi and Hawthorne (2018 *THRHR* 588) argue that a customary marriage will only occur following partial or full payment of *ilobolo*. On the other hand, Nkosi and Van Niekerk ("The Unpredictable Judicial Interpretation of Section 3(1)(*b*) of the Recognition of Customary Marriages Act 120 of 1998: *Eunice Xoliswa Ngema v Sifiso Raymond Debengwa* (2011/3726) [2016] ZAGPJHC 163 (15 June 2016)" 2018 *THRHR* 345 346) argue that the father of the bride could waive the right to receive *ilobolo*. However, it is acknowledged that waiver is a different concept to the subject of this reference.

an *ilobolo* agreement is a contract or agreement in favour of the notion that it is not a contract. On the other hand, the reasons for non-enforcement may be historical.[58] The settlers looked down on customary marriages. They abhorred the practice of *ilobolo* and regarded it as the purchase of a woman.[59] This being the case, *ilobolo* agreements, historically, were not enforced in the courts.[60] Even if they had been enforced, Roman-Dutch law or English law might have infiltrated them. If not infiltrated, they might have been caught in the crossfire in the ideological war between the Dutch and the British on which system of law should apply in the Cape of Good Hope, Natal, Transvaal and the Orange Free State.[61] This may have been what prompted Hlophe to argue that *ilobolo*-related matters should not be adjudicated in a court of law. However, the preceding submission is made with doubt.[62]

3 2 Social agreement

Since not all agreements are contracts, a distinction must be drawn between a contract and other agreements – the so-called social agreements, gentlemen's agreements or moral or natural obligations. Sharrock submits that agreements made in a domestic, family and social context are not binding because the parties do not intend them to be.[63] In other words, parties do not intend that a legal suit should follow should they not perform in terms of such an agreement. By implication, Sharrock's views leave out agreements in a commercial context. This is understandable, because the root of the law of contract appears to be in commerce rather than in a social setting.[64]

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58 Dlamini (1984 *CILSA* 372) points out that s 182 of the 1891 Code barred any action for recovery of *ilobolo* for marriages already concluded. This provision was deeply resented by Black Africans.

59 Mndaweni 1990 *CILSA* 366.

60 It is important to add that the Xhosa people practised the custom of *ukutheleka*. In terms of this custom, if the father or guardian of the wife demands a reasonable amount of *ilobolo*, and the husband fails to deliver such, the father or guardian may take away the wife and her children back to her maiden home until such time that her husband complies with his obligation to pay *ilobolo*. See Ngema "The Enforcement of the Payment of Lobolo and Its Impact on Children's Rights in South Africa" 2013 16 *PER* 405 408. Whether the Zulus knew such practice is unclear to the author. However, the author is aware of a practice called "*ukudla isibaya*". In terms of this practice, a creditor could resort to self-help by taking away cattle belonging to a delinquent debtor. There were defined instances when "*ukudla isibaya*" could be resorted to. Probably, this practice is falling into disuse; see also Dlamini (*A Juridical Analysis* 323-324), who asserts that *ukutheleka* was only practised among the Xhosa and not the Zulus. He further submits that the Zulus saw the *ilobolo* agreement as a contract of good faith.

61 Van den Bergh "The Remarkable Survival of Roman-Dutch Law in Nineteenth-Century South Africa" 2012 18 *Fundamina* 71 73–81.

62 Hlophe 1984 *CILSA* 171. It is difficult to make out the author's reason for the submission that courts should be barred from adjudicating *ilobolo* matters. In light of the main idea of the article (the abolition of *ilobolo* practice), there is doubt that he intended to protect the sacred practice of *ilobolo* from the influence of foreign legal systems such as Roman-Dutch law and English law.

63 Sharrock *Business Transactions Law* 84.

64 Joubert *General Principles* 6 and Christie *The Law of Contract* 3–7.

Certainly, *ilobolo* is something more than a mere social agreement. While it cannot be averred that *ilobolo* is a contract in the strict sense of the word, the willingness to comply with the agreement is, nevertheless, as noted above, present. The potential groom also creates the impression to his in-laws that he will deliver *ilobolo* as agreed. An agreement on *ilobolo* is a serious one. It has far-reaching legal, social and economic consequences; it unites families, establishes bonds among family ancestors and establishes the wife's status in her new family. One may add that it also establishes the husband's status in his wife's family (his new family). Therefore, it is difficult to reach a conclusion that an *ilobolo* agreement is a social agreement that merely attracts a moral obligation.

3 3 Conclusion on the juristic nature of ilobolo

To conclude that an *ilobolo* agreement is a contract could easily lead to the conclusion that it is a contract of sale in terms of which a wife is sold and bought – something that is repugnant.[65] At the same time, reducing the meaning of *ilobolo* to a social agreement with very little, if any, juristic relevance undermines the entire practice. A conclusion on the juristic nature of *ilobolo* agreement is very important, because it spells out the consequences. For instance, some remedies for breach of contract are specific performance and damages. Should it be concluded that an *ilobolo* agreement is a contract, it follows that a person who fails to honour the agreement is in breach of contract and specific performance may be pleaded.

The issue of specific performance in the context of marriage evokes interest. Under the common law, specific performance has long been ruled out in cases of breach of promise to marry.[66] Nonetheless, it is essential to be vigilant: legal developments under the common law are not binding on customary law. Customary law must be understood in its own terms and not through the lens of the common law.[67] The guiding principles are constitutional norms such as equality,[68] human dignity[69] and the right to culture[70] – read with the constitutional imperative to develop customary law, as stated in section 39(2) of the Constitution.[71]

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65 Dlamini (*A Juridical Analysis* 319) concludes that an *ilobolo* agreement is a contract. However, he concedes that this contract has features that are foreign to the common law.

66 See Sibisi (2019 *Obiter* 342), who, in turn, cites *Sepheri v Scanlan* 2008 (1) SA 322 (C) 331. By the 20th century, it was no longer possible to claim specific performance for breach of promise to marry. Instead, the jilted party could claim damages in contract and delict. The contract claim was for actual loss incurred (wasted expenditure preparing for a wedding) and prospective loss (depending on the envisaged matrimonial property system). For the sake of clarity, it is accepted that it is no longer possible to claim for prospective loss. A jilted party could also claim for damages in delict provided that the manner in which the promise to marry was breached is objectively wrongful in the delictual sense.

67 *MM v MN* 2013 (4) SA 415 (CC) 423.

68 S 9 of the Constitution of the Republic of South Africa, 1996 (the Constitution).

69 S 10 of the Constitution.

70 S 30 and 31 of the Constitution.

71 S 39(2) of the Constitution provides: "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

Customary law must be distinguished from the common law on the issue of enforcement of an *ilobolo* agreement through specific performance. *Ilobolo* is unknown in the common law.[72] Therefore the bar on specific performance in cases of breach of promise to marry cannot be sustained under customary law. Furthermore, it is not clear that a failure to pay *ilobolo* may be construed as a breach of promise to marry. All depends on the conduct of the parties. For instance, it is not uncommon for parties to continue living together as husband and wife in cases where the "husband" is failing to honour his obligation to pay *ilobolo* as per the agreement. It is difficult to reconcile the latter case with a breach of promise to marry.

It is therefore submitted that the juristic nature of an *ilobolo* agreement is that of an agreement *sui generis* with the essence of a contract in that the parties do seriously intend to be bound by the agreement. This agreement *sui generis*, which does appear to resemble a contract, is not one of sale. Instead, it is an innominate agreement in that it is unclassified.[73] However, it is possible to enforce an *ilobolo* agreement since the amount agreed upon is always certain.[74]

4 CONCLUSION

Ilobolo is firmly entrenched in customary law. It has survived various intrusions, the earliest being the settlers' attitude towards the practice. They saw it as a sale contract, which it is not. It has also survived other negative and uninformed views, the latest being that the practice is unconstitutional in that it objectifies women. There are sections of our community calling for the complete abolition of the practice. Despite all these things, the practice of *ilobolo* remains undisturbed.

Ilobolo serves various functions. It serves a legal function in that it facilitates, among other things, the registration of a customary marriage. It also serves a social function in that it establishes a wife's status in her new family; it unites the two families as well as their ancestors. *Ilobolo* also serves a financial function. It provides funds to plan the wedding. In certain instances, it may provide financial security should the spouses encounter financial difficulties during the course of their marriage. A wife may go back to her guardian and ask for financial assistance; this is less likely to happen if *ilobolo* has not been paid in the first place.

It is essential to ascertain the juristic nature of *ilobolo* in South Africa. The conclusion reached above is that *ilobolo* is an agreement *sui generis* entered into by the parties with a serious intention to be bound. It is not a contract of sale, but an innominate agreement that is capable of being enforced through a remedy of specific performance.

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72 Dlamini *A Juridical Analysis* 315.

73 Hutchison "Reciprocity in Contract Law" 2013 1 *Stell LR* 3 5.

74 This is to counter the difficulty with enforcing innominate agreements. See Hutchison 2013 *Stell LR* 5. See also Du Plessis "The Unilateral Determination of Price: A Question of Certainty or Public Policy" 2013 16 *PER* 67 91.

WHEN IS A DONOR A DADDY? INFORMAL AGREEMENTS WITH KNOWN SPERM DONORS: LESSONS FROM ABROAD

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SUMMARY

Individuals are increasingly entering into informal agreements with known sperm donors in order to either circumvent the costs involved in using fertility centres or owing to personal beliefs and preferences. When they do so, the legal protection that ordinarily accompanies the use of a fertility centre is either sparse or lacking. The question is what happens when one of the parties reneges on the agreement, either by demanding parental responsibilities or rights in the case of the donor or, in the case of the recipient, by demanding that the donor assumes a parental role when this was never his intention. The position in South Africa is currently unregulated. This article, therefore, examines the position in a number of foreign jurisdictions with the aim of making recommendations for the way forward in South Africa.

1 INTRODUCTION

Where sperm is donated via a licensed doctor/fertility centre and artificial fertilisation occurs, a donor acquires no parental responsibilities and rights in respect of the child.[1] This appears to be the case regardless of whether or not the donation occurred anonymously.[2] This is the position in most countries.[3] In this respect, South Africa is no exception.[4] Under these

[1] This position is confirmed in foreign legislation such as the UK's Human Fertilisation and Embryology Act 1990. While s 1 of the South Africa's Children's Act 38 of 2005 (Children's Act) does not specifically make reference to donation via a licensed doctor or fertility centre, the Act defines artificial fertilisation as "the introduction other than [by] natural means of a male gamete or gametes into the internal reproductive organs of a female person for the purpose of human reproduction". This is presumed to exclude sexual reproduction. It is uncertain whether insemination by means of a turkey baster qualifies as natural means, although, in the UK, it has been confirmed that reproduction that occurs in this manner does not qualify as the use of medical technology. See Volokh "The Term 'Medical Technology' Does Not Encompass a Kitchen Implement Such as a Turkey Baster" (21 April 2015) https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/04/21/the-term-medical-technology-does-not-encompass-a-kitchen-implement-such-as-a-turkey-baster/ (accessed 2020-03-06).

[2] Luetkemeyer and West "Paternity Law: Sperm Donors, Surrogate Mothers and Child Custody" 2015 112(3) *Missouri Medicine* 162 163. In this case, the distinction affects the amount of information that the child is entitled to upon attaining majority.

[3] Including Canada and most states in the USA.

circumstances, it is acceptable for biological parents to contract away their parental rights. The position is, however, less straightforward where the parties know each other,[5] and when they reach an informal arrangement and the donation occurs without the intervention of a medical practitioner. In these cases, the legal consequences that ensue are more complex.[6]

This article examines the use of informal agreements in cases of known sperm donation and, in particular, the rationale behind these arrangements. It further examines the legal landscape for sperm donation in South Africa. Thereafter cases that have emerged from various countries involving the use of informal agreements are discussed as well as lessons that can be learnt from these jurisdictions. Suggestions are then made for the possible regulation of agreements with known sperm donors in South Africa.

2 THE RATIONALE BEHIND INFORMAL AGREEMENTS

Informal agreements and home insemination are increasingly appealing owing to the high costs involved in engaging the services of a legal practitioner and the costs involved in undergoing *in vitro* fertilisation, both of which can be circumvented by doing things oneself.[7] The challenge posed by this is that where parties decide to proceed without the involvement of a fertility centre, the accompanying legal agreements that delineate the roles and responsibilities of the various parties are either incomplete or sparse. As a result, the protection that is ordinarily afforded to the parties is lacking.[8]

Furthermore, there may be some comfort in knowing the identity of the donor or being intimately acquainted with him.[9] In addition, informal arrangements and natural insemination may be pursued out of beliefs about the quality of fresh sperm as opposed to the frozen kind.[10] Individuals may also prefer this option because it takes place in a non-clinical environment, with fertilisation occurring within the privacy and comfort of a person's

4 This position is regulated by s 40(3) of the Children's Act.

5 In some instances, the recipient may merely know the identity of the donor or they may be personally acquainted with the recipient (in the case of a friend) and possibly intimately acquainted (in the case of an ex-boyfriend or lover).

6 Legal disputes typically arise when the donor reneges on the agreement and decides to play a more active role in the child's life. Alternatively, the woman, herself, may change her mind about the role that the donor should play.

7 IVF treatment costs in the region of R74 492.00, although this excludes some of the other costs that may be incurred. See MedFem Fertility Clinic "Treatment Costs" (undated) https://medfem.co.za/treatment-costs/ (accessed 2020-03-06).

8 Harper, Jackson, Spoelstra-Witjens and Reisel "Using an Introduction Website to Start a Family: Implications for Users and Health Practitioners" 2017 4 *Reproductive BioMedicine and Society Online* 13 16–17.

9 Silver "Known Donor or Sperm Bank?" (25 July 2016) https://www.elisilvernd.com/health-news/known-donor-or-sperm-bank (accessed 2019-06-19).

10 McGovern and Schlaff "Sperm Donor Anonymity: A Concept Rendered Obsolete by Modern Technology" 2018 109(2) *Fertility and Sterility* 230 231.

home.[11] Personal beliefs regarding the reproductive process thus impact on a decision to follow this route.

3 THE SOUTH AFRICAN LEGAL FRAMEWORK

In recent years, South African courts have on at least two occasions[12] considered questions regarding the position of known sperm donors. The reason that this phenomenon is still uncommon is because gamete (that is, sperm and egg) donation in this country is predominantly anonymous and is processed through a fertility clinic where agreements are concluded beforehand.[13] Anonymous donation is therefore regulated. The current legal position is provided for by section 41(2) of the Children's Act, which states:

> "Information disclosed in terms of subsection (1)[14] may not reveal the identity of the person whose gamete was or gametes were used for such artificial fertilisation or the identity of the surrogate mother."

The position in section 41 is further bolstered by regulation 19 in the Regulations relating to the Artificial Fertilisation of Persons[15] promulgated in terms of the National Health Act.[16] This regulation provides:

> "No person may disclose the identity of any person who donated a gamete or received a gamete, or any matter related to the artificial fertilisation of such gametes, or reproduction resulting from such artificial fertilisation except where a law provides otherwise or a court so orders."

Furthermore, in terms of the definition of "parent" in section 1[17] and section 26(2)(*b*)[18] of the Children's Act, men who only contribute gametes to the production of a child do not acquire parental responsibilities and rights. These individuals are, as such, prohibited from claiming paternity and parental rights on this basis alone. The position ostensibly differs where individuals are able to provide additional proof of parenthood, in which case

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11 Picciuto "Have Sperm, Will Travel: The 'Natural Inseminators' Helping Women Avoid the Sperm Bank" (undated) https://www.thedailybeast.com/have-sperm-will-travel-the-natural-inseminators-helping-women-avoid-the-sperm-bank (accessed 2019-06-19).

12 See Anonymous "Appropriate Contact and Maintenance Guidelines for Sperm Donors" 2017 *De Rebus* 51 and *R v S* 2018 (5) SA 308 (KZD).

13 While the South African Law Reform Commission in Issue Paper 32 (Project 140) is investigating the right to know one's own biological origins with a view to law reform, the legal position regarding donor anonymity remains unchanged in the interim.

14 S 41(1) of the Children's Act limits the information to which a child born by means of gamete donation may have access. This provision states: "A child born as a result of artificial fertilisation or surrogacy or the guardian of such child is entitled to have access to–

(a) any medical information concerning that child's genetic parents; and

(b) any other information concerning that child's genetic parents but not before the child reaches the age of 18 years."

15 GN 1165 in *GG* 40312 of 2016-09-30.

16 61 of 2003.

17 "Parent" is defined as excluding "any person who is biologically related to a child by reason only of being a gamete donor for purposes of artificial fertilisation" (s 1 of the Children's Act).

18 S 26(2)(*b*) of the Children's Act excludes a person who is *only* a gamete donor from claiming paternity.

they may acquire parental responsibilities and rights.[19] This was confirmed in *R v S*.[20]

4 *R v S* 2018 (5) SA 308 (KZD)

R v S is the first reported South African decision dealing with known sperm donation. The facts of this case are as follows: the respondent, S, gave birth to a son, E, who had been "naturally conceived" with the applicant, R. The application before the court was one in which the applicant sought full parental responsibilities and rights in respect of his "donor-conceived" son on the basis of section 21(1)(*b*) of the Children's Act.[21]

Prior to the birth of their son, the parties had been romantically involved and had even cohabited for some time until their relationship ended.[22] In 2014, the respondent approached the applicant asking him to "impregnate her through natural insemination", although no obligations would be imposed on him.[23] The respondent averred that she merely wanted her child to know his biological origins.[24]

During her pregnancy, the applicant however attended prenatal doctor's visits and scans with the respondent, contributed towards the costs of some of these visits as well as lying-in expenses for the respondent. He further attended antenatal classes with the respondent and was registered as the father on the minor's birth certificate.[25] Thereafter, he had contact with the child on terms decided by the respondent. He attended paediatrician check-ups with the respondent. He even took E to visit his paternal grandmother. In addition, he offered to pay maintenance.[26] At some point, however, the respondent decided to limit the amount of interaction between the applicant and E. This resulted in his requesting that a parenting plan be concluded to formalise the arrangement between them. In response to this request, the respondent alleged that "the appropriate" agreement between the parties amounted to a "known donor agreement" and as such he was not entitled to parental responsibilities and rights that would permit him to conclude a

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19 In terms of s 21(1) of the Children's Act, an unmarried father may acquire full parental responsibilities and rights, or he may apply for contact with the child in terms of s 23 of the Act.

20 *Supra*.

21 *R v S supra* par 9(a). S 21(1)(*b*) states: "The biological father of a child who does not have parental responsibilities and rights in respect of the child in terms of section 20, acquires full parental responsibilities and rights in respect of the child–

(b) if he, regardless of whether he has lived or is living with the mother–

(i) consents to be identified or successfully applies in terms of section 26 to be identified as the child's father or pays damages in terms of customary law;

(ii) contributes or has attempted in good faith to contribute to the child's upbringing for a reasonable period; and

(iii) contributes or has attempted in good faith to contribute towards expenses in connection with the maintenance of the child for a reasonable period."

22 *R v S supra* par 9(b).

23 *R v S supra* par 9(e).

24 *R v S supra* par 9(d).

25 *R v S supra* par 9(f)–(h) and (k).

26 *R v S supra* par 9(m), (o), (q), (s) and (u).

parenting plan with the respondent.[27] She averred that while such agreements were novel in South Africa and were not expressly recognised by law, the law should be developed in recognition of her constitutional rights to dignity and sexual preference and her choice of single motherhood as a chosen family structure.[28]

The court found that given the level of involvement by R, he qualified for parental responsibilities and rights as he was not merely a gamete donor.[29] On the question of whether parental responsibilities and rights could be excluded in agreements with known sperm donors, the court was unwilling to decide whether these agreements were legal.[30] Within the South African context, this question thus remains unanswered.

5 CURRENT TRENDS INVOLVING INFORMAL AGREEMENTS WITH KNOWN SPERM DONORS

Globally, views regarding sperm donation differ vastly. In Sweden and the UK, anonymous sperm donation is banned, with Sweden becoming the first country to outlaw the practice in 1985.[31] Since then, a number of countries have followed suit. These include Austria,[32] Germany,[33] Switzerland,[34] parts of Australia,[35] the Netherlands,[36] Norway,[37] New Zealand[38] as well as Ireland.[39]

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27 *R v S supra* par 9(v)–(w).

28 *R v S supra* par 11.

29 *R v S supra* par 30–31.

30 *R v S supra* par 15–16. The reason advanced by Koen J for not deciding the question was the fact that in the absence of detailed argument on the subject, he did not feel the need to address the issue as a separate legal concern.

31 Donor anonymity in Sweden was abolished with the promulgation of the Act on Insemination (SFS 1984:1140), which has since been repealed. See Stoll "Establishing Paternity by Court Judgment Following Sperm Donation: Some Reflections on Two Judgments Rendered by the Svea Court of Appeal" in Jänterä-Jareborg, Maarit; Brattström, Margareta (ed.) *För barns bästa: Vänbok till Anna Singer* (2017) 317–344 318.

32 In Austria, donor-conceived children gained access to donor information when the Reproductive Medicine Law, Law No. 275, was passed on 1 July 1992.

33 Donor Offspring Europe notes that Germany recognised the right of individuals to know their genetic origins as part of their constitutional rights in 1988 http://donoroffspring.eu/country-reports/germany/ (accessed 2020-10-22).

34 Anonymous sperm donation has been banned in Switzerland since the amendment of the Constitution in 1992. The incorporation of article 24 into the Constitution recognised the rights of individuals to know their genetic origins, which includes donor-conceived children.

35 Victoria passed the Infertility Treatment Act in 1995 and Western Australia reviewed its Human Reproductive Technology Act in 1999 to abolish donor anonymity.

36 The Netherlands passed the Donor Information Insemination Act (Wet donorgegevens kunstmatige bevruchting, 2002), which allowed for non-anonymous sperm donation since 2004.

37 This is in terms of the Biotechnology Act, No. 100 of 5 December 2003.

38 The Human Assisted Reproductive Technology Act 2004, which entered into force on 22 August 2005, provided that all sperm donations must be non-anonymous.

39 The Children and Family Relationships Act 2015 entered into force in 2015 and effectively prohibits donor anonymity.

In contrast, the United States of America and Spain continue to offer anonymous sperm donation[40] – although a large number of fertility clinics in these countries offer donor recipients the option of using gametes from known sperm donors.[41]

Where known sperm donation occurs by means of artificial fertilisation, the legal position is that donors are not legal parents.[42] In contrast, where insemination occurs naturally or outside the clinic setting and an informal agreement has been reached, donors are increasingly being recognised as legal parents.[43] This is evident from developments in countries such as Australia, the USA and Canada.

5 1 Australia

The year 2019 saw the end of a five-year-long legal battle between a sperm donor and a lesbian woman who had been artificially inseminated in 2006 and later gave birth to a baby girl. According to the donor, the parties allegedly agreed that he would be involved in the child's upbringing. He was listed as her father on her birth certificate and she even called him "Daddy". The mother, who had entered into a new relationship, wanted to move to New Zealand with the child. The "donor" opposed the move and asked that his parental rights be recognised.[44] The High Court ruled in his favour, finding that he qualified as a father rather than as a known sperm donor.[45]

This judgment is extraordinary, as mere involvement in a child's life does not normally equate to an entitlement to parental rights.[46] However, in this case, the court interpreted this differently based on the level of the applicant's involvement. These facts clearly contributed to the court reaching the decision that it did. What is worth noting in this case is that the court attached some value to the applicant's intention to parent, even though artificial insemination had taken place. However, this decision, while lauded by some, failed to clarify the extent of involvement needed in order to qualify individuals for parental rights in other situations.[47]

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40 This may be attributed to the absence of federal regulation on the subject. Cohen, Coan, Ottey and Boyd "Sperm Donor Anonymity and Compensation: An Experiment With American Sperm Donors" 2016 *Journal of Law and the Biosciences* 471. In Spain, the situation is regulated by *Law 14/2006—Human Assisted Reproduction Techniques*, which entered into force in May 2006. See, for e.g., Melo-Martin "How Best to Protect the Vital Interests of Donor-Conceived Individuals: Prohibiting or Mandating Anonymity in Gamete Donations?" 2016 3 *Reproductive Biomedicine & Society Online* 100 101.

41 Clark "A Balancing Act? The Rights of Donor-Conceived Children to Know Their Biological Origins" 2012 40(3) *Georgia Journal of International and Comparative Law* 619 639.

42 See fn 1 above.

43 In terms of Irish law, sperm donors who are involved in home insemination qualify as fathers. See O'Loughlin "Fertility Struggles: Irish Women Are Buying Sperm Online and Inseminating Themselves at Home" (10 November 2019) https://extra.ie/2019/11/10/lifestyle/health/women-buying-sperm-online-inseminating (accessed 2020-03-08).

44 *Masson v Parsons* [2019] HCA 21 19 June 2019 S6/2019 par 4.

45 *Masson v Parsons supra* par 24.

46 *Masson v Parsons supra* par 25. In the earlier decision before the Family Court, the court found that the appellant was not a parent.

47 See "Can a Sperm Donor Be a Legal Parent? In Landmark Decision, the High Court Says Yes" (2019-06-19) *The Conversation* https://theconversation.com/can-a-sperm-donor-

Based on this judgment, use of artificial insemination where the sperm donor is known is not a primary consideration. Instead, other factors, such as active involvement in the child's life, may feature more prominently.

5 2 United States

In 2007, the Kansas Supreme Court was confronted with a question regarding the status of a known sperm donor in the case of *In the interest of KMH and KCH*.[48] At the time of artificial insemination (AI), the parties had failed to enter into a written contract, although the donor claimed that an oral agreement had been concluded that permitted him to assume the role of father to any children born as a result of AI.[49] Following the birth of the twins, the mother sought a court order confirming that the donor did not enjoy any parental rights.[50] The defendant in turn sought an order seeking joint custody.[51] At the time, Kansas law provided that sperm donors, in the absence of a written agreement stating the contrary, did not acquire parental rights in respect of children born from their donations.[52] The court found in the mother's favour.[53] The absence of a written agreement was clearly a deciding factor in this case, although AI was performed by a physician.[54]

In the same year, in *Ferguson v McKiernan*,[55] the Pennsylvania Supreme Court considered the same question in circumstances that were somewhat different. In this case, the parties had had a previous sexual relationship. They later agreed that McKiernan would donate sperm to Ferguson, but he would not have any parental rights in respect of the twins and would not have any contact with them.[56] However, five years after the twins' birth, Ferguson instituted a claim against McKiernan for child support.[57] The trial court had found in the mother's favour.[58] It concluded that while the existence of the agreement between the parties had been proved, it would

be-a-legal-parent-in-landmark-decision-the-high-court-says-yes-115553 (accessed 2019-06-23); and Anonymous "Sperm Donor is Child's Legal Father, Australian Court Rules" **(**2019-06-19) https://www.bbc.com/news/world-australia-48686216 (accessed 2019-06-20).

48 169 P.3d 1025, 1025 (Kan. 2007).

49 *KMH and KCH supra* 1029.

50 *Ibid*. She alleged that "the donor had no parental rights under Kansas law". The basis of her petition is that the parties had not agreed beforehand that he would acquire parental responsibilities in respect of the children born from his donation.

51 *KMH and KCH supra* 1030. He also expressed his commitment to maintain his children in compliance with his legal obligations as their father.

52 See s 38–1114(f) of the Kansas Code 2006, which states: "The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the birth father of a child thereby conceived, unless agreed to in writing by the donor and the woman."

53 *KMH and KCH supra* 1042–1043.

54 Conversely, in *Jhordan C v Mary K* 179 Cal.App.3d 386 (Cal. Ct. App. 1986) where the child had been conceived by means of natural insemination, the court concluded that the sperm donor qualified for parental rights.

55 940 A.2d 1236 (Pa. 2007).

56 *Ferguson v McKiernan* (2007) *supra* 1246.

57 *Ferguson v McKiernan* (2007) *supra* 1238.

58 *Ferguson v McKiernan* 855 A.2d 121 (Pa.Super.2004). In terms of the order granted on 31 December 2002, McKiernan was recognised as the legal father of twin boys born as a result of *in vitro* fertilisation (IVF) and was therefore obligated to pay child support.

allow her claim for child support as the agreement was against public policy and therefore unenforceable as it was contrary to the children's best interests.[59] This decision was confirmed on appeal.[60] On a further appeal, the Supreme Court overturned the previous decisions, finding that where parties enter into sperm donor agreements, whether in a clinical or private setting, these agreements are enforceable and not against public policy despite the impact on the children's best interests.[61] Here, much emphasis was placed on the intention of the parties.[62] The decision was further bolstered by the fact that the donor was not involved in the children's lives at all[63] and had since gone on to have his own child, who would be severely prejudiced by a decision ordering the donor to pay child support.[64]

In this case, consideration was thus given to the interests of all parties, including the best interests of the children born from the donation, and those of the donor's other child. What is worth noting is that the court observed that the method of conception is not a primary factor in disputes of this nature.[65] If one can thus exclude parental responsibilities and rights by making use of a fertility centre, then one should also be able to do so in the case of conception elsewhere. The level of involvement and the intention of the parties are pivotal in these cases. The decision in this case provides an answer to the question that the court omitted to answer in *R v S*.[66]

In *Kansas v WM*,[67] a lesbian couple, Bauer and Schreiner posted an advertisement on Craigslist seeking a sperm donor. William Marotta responded and the parties subsequently signed an agreement whereby Marotta relinquished all parental rights to a child born from the donation. He delivered his sperm to the couple's home and they then engaged in home insemination to fall pregnant. A daughter was later born from the donation.

A number of years later, the relationship between Bauer and Schreiner ended. Schreiner subsequently contracted an illness and applied for state funding to care for her daughter. However, Kansas law required the identity of the child's biological father to be disclosed before a child could qualify for state funding. Kansas law further stated that where artificial insemination is performed outside a clinic setting, the sperm donor acquires parental responsibility and rights. The state thus wanted to hold Marotta liable for child support. It argued that the sperm donor agreement concluded with Bauer and Schreiner was invalid and as such Marotta qualified as a parent,

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59 *Ferguson v McKiernan* 855 A.2d 121 (Pa.Super.2004).

60 *Ferguson v McKiernan (2004) supra* 124.

61 *Ferguson v McKiernan (2007) supra* 1248.

62 *Ibid.*

63 *Ferguson v McKiernan (2007) supra* 1240.

64 *Ferguson v McKiernan (2007) supra* 1248.

65 *Ferguson v McKiernan (2007) supra* 1245.

66 *Supra.*

67 While this decision is unpublished, a summary is provided by Grossman "Why a Craigslist Sperm Donor Owes Child Support" (27 January 2014) https://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=1364&context= faculty_scholarship (accessed 2019-06-20). See also Neil "Man Who Responded to Craigslist Ad for a Sperm Donor Is a Dad, Must Pay Child Support, Judge Rules" (22 January 2014) https://www.abajournal.com/news/article/man_who_responded_to_craigslist _ad_for_a_sperm_donor_is_a_dad_must_pay_chil (accessed 2019-06-20).

which imposed an obligation on him to maintain the child. Here a lack of intention to parent and the absence of involvement carried no weight. Instead, the court focused solely on the mode of insemination.[68]

This decision has since been overturned.[69] On appeal, the court found that Mr Marotta's lack of involvement in the child's life was indicative of his intention not to be a parent.[70]

5 3 Canada

In 2017, a Canadian court in *MRR v JM*[71] had to decide a dispute between applicant MRR and respondent JM, who had had a previous sexual relationship. While their relationship had terminated, they remained friends. In 2012, MRR tried unsuccessfully to reproduce using anonymous sperm donation. Upon hearing his, JM offered to assist. Conception occurred by means of sexual intercourse, allegedly after MRR's failed attempts using artificial fertilisation.[72]

Prior to conception, the parties allegedly agreed that, if MRR fell pregnant, JM would not acquire any parental responsibilities and rights in respect of the child. However, this agreement was only confirmed in writing nine months after JRR had been born.[73] Nonetheless, MRR brought an application for child support soon thereafter.[74] She argued that although the parties had originally agreed that JM would not be a parent, their intentions had since changed.[75] Apparently JM treated the child as his and in light of

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68 Judge Mattivi ruled: "Kansas law is clear that a 'donor of semen *provided to a licensed physician* for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the birth father of a child thereby conceived, unless agreed to in writing by the donor and the woman.' … This court finds that, because the parties did not provide the donor sperm to a licensed physician, the statutory basis for preclusion of paternity does not apply, and the donor therefore *can* be determined to be the father of the child." WUNC 91.5 North Carolina Public Radio "Court to Sperm Donor: You Owe Child Support" (12 February 2014) https://www.wunc.org/post/court-sperm-donor-you-owe-child-support (accessed 2020-10-27). In this instance, the fact that insemination was performed at home meant that Marotta could not be considered a sperm donor under state law and was found to be the child's presumptive father instead (Starza-Allen "Craigslist Sperm Donor Not Legally Child's Father" (2 December 2016) https://www.bionews.org.uk/page_95806 (accessed 2020-10-22)).

69 On 22 November 2015, the court ruled that the birth mother's former partner should be considered the child's second parent rather than Marotta. The reason for this was partly because he had had minimal contact with the child. CBS Sacramento "Judge: Sperm Donor Who Helped Lesbian Couple Doesn't Owe Child Support" (1 December 2016) https://sacramento.cbslocal.com/2016/12/01/judge-sperm-donor-who-helped-lesbian-couple-doesnt-owe-child-support/ (accessed 2020-10-10).

70 See Anonymous "Craigslist User Who Donated His Sperm to a Lesbian Couple for $50 so They Could Have a Baby Will Not Have to Pay Child Support After Judge Rules He Is Not the Child's Legal Father" (29 November 2016) *Mail Online* https://www.dailymail.co.uk/news/article-3983756/Kansas-judge-rules-sperm-donor-not-hook-child-support.html (accessed 2019-06-20).

71 2017 ONSC 2655.

72 *MRR v JM supra* par 6–8.

73 *MRR v JM supra* par 9 and 25.

74 *MRR v JM supra* par 10.

75 MRR allegedly withdrew her offer before JM signed it and it is accordingly invalid (par 13).

this, the child should not be deprived of child support.[76] JM, in turn, argued that his intention had not changed and that he had no desire to be a father.[77]

Justice Fryer found that JM is presumed to be the father of the child since conception had occurred naturally.[78] The basis of this decision was section 7(1) of the Children's Law Reform Act 1990, which states that where conception occurs through sexual intercourse, a sperm donor is legally recognised as the parent of a child. The exception to this rule only applied to persons who had confirmed in writing before conception had taken place that they did not intend to parent.[79] Because JM delayed signing the agreement, the exception did not apply to him.[80] The court nonetheless found that he was not a parent based on his pre-conception intention, which had not changed.[81]

6 LESSONS LEARNT

From the aforementioned cases, a number of lessons can be learnt.

6 1 The legality of known sperm donor agreements

The decision in *Ferguson v McKiernan*[82] supports the opinion that agreements with known sperm donors should be viewed as legal.[83] If one can exclude parental responsibilities at a clinic, then the same should apply where artificial insemination occurs outside the clinic setting, provided that an agreement is concluded using the services of legal practitioners who will make provision for the interests of the potential child. This, in the author's opinion, should be the overriding concern. In *R v S*, no such agreement had been concluded but, had this been the case, S should have been able to enforce her rights.[84] It is only regrettable that she wished to enjoy the benefits of having a co-parent without awarding him the rights that accompany parenthood.

6 2 The distinction between sexual and assisted reproduction

In *Ferguson v McKiernan*,[85] the court also indicated that no distinction should be made between whether reproduction occurs by means of sexual

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76 *MRR v JM supra* par 12.

77 *MRR v JM supra* par 27 and 88.

78 *MRR v JM supra* par 61–62.

79 The exception is provided for in s 7(4) of the Children's Law Reform Act.

80 *MRR v JM supra* par 82.

81 *MRR v JM supra* par 135. In par 130 Fryer J added: "It is conceivable that in certain cases, the actions of the parties following the conception of the child could be so different from the pre-conception intentions that a declaration of non-parentage would not be appropriate. However, the overall legislative purpose of Part I of the (Children's Law Reform Act) suggests that the parties' pre-conception intent is to be given significant weight."

82 940 A.2d 1236 (Pa. 2007).

83 *Ferguson v McKiernan (2007) supra* 1248.

84 In particular, her rights to choose single motherhood as a chosen family structure.

85 *Ferguson v McKiernan (2007) supra.*

intercourse or artificially.[86] In South Africa, the fall-back position has always been that where reproduction occurs sexually, parental responsibilities and rights are generally applicable, whereas with artificial fertilisation they are not.[87] Given the manner in which the world has developed, is this distinction still valid? Should men (or women for that matter) be able to engage in sexual intercourse that results in pregnancy and then claim it was a donation, so releasing "the donor" from all responsibility? It is submitted not. Entering into a sperm donor agreement before conception occurs still provides all parties concerned with some level of protection. In this respect, the court in *R v S* was correct in finding that the agreement between the parties did not qualify as a sperm donor agreement and that the donor was in fact a father.[88]

6 3 Factors that are prioritised

The level of involvement in a child's life appears to receive the most attention from courts in deciding whether or not a donor qualifies as a father. This factor serves as evidence of intention to parent. Where there is active involvement in the child's life, a court is reluctant to find that the donor is just that. In such cases, courts base their decisions on the fact that removing an active participant from the child's life would not be in the child's best interests.

The second factor that plays a decisive role is the existence of an agreement between the parties. Where such an agreement exists, courts attempt to abide by the agreement in recognition of the parties' autonomy. The method of reproduction, although also a factor, seems to be of least importance.

6 4 The best interests of the child

From the cases considered above, courts have found that, where a donor was involved in the child's life, it is in the child's best interests for him to be recognised as a legal parent. The converse is also true. What is equally true is that courts may set aside a valid sperm donor agreement if it is in the best interests of the child to do so. The Australian decision of *Re Patrick* is one example of this approach.[89]

The challenge posed by applying the best interests' principle is that a man with no intention to parent may be foisted with parental responsibilities and rights and a woman may be saddled with a co-parent when it was never her intention. In *R v S*, the respondent urged the court to have regard to her

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86 *Ferguson v McKiernan (2007) supra* 1245.

87 The only exceptions to this are where the child is a result of rape or incest. In these cases, the father will not acquire parental responsibilities and rights. These exceptions are provided for in the definition of "parent" in s 1 and s 26(2)(*b*) of the Children's Act.

88 *R v S supra* par 2, 10, 13 and 14.

89 [2002] FamCA 193. In this case, the court per Guest J found that while the sperm donor was not a parent, he qualified for contact with the child. The mother, who was unable to deal with the sperm donor's increased role in her child's life, subsequently killed herself and the child.

constitutional rights to dignity and sexual preference and her choice of single motherhood as a chosen family structure.[90] In genuine cases involving agreements with known sperm donors (unlike the one in *R v S*), such a concern is valid. In South Africa, the Constitution recognises the rights of individuals to equality, which includes the right not to be discriminated against on the basis of marital status, conscience or belief.[91] Choosing to be a single parent is an expression of this right. The Constitution further recognises the right of individuals to make decisions concerning reproduction.[92] This includes deciding when to reproduce and how to do so. Yet, despite the existence of these rights, South African courts are increasingly finding that the rights of (prospective) parents may be justifiably limited in the interests of the (potential) child.[93] This suggests that there may be a perception that the choice to be a single parent is contrary to the child's best interests.[94] This leaves single parents in a compromised position: where their rights are viewed as secondary to that of their potential offspring. This undermines the prospective parent's autonomy.

It is perhaps for this reason that it is better for parties to confirm their agreements before conception takes place and to abide by the terms thereof. While there is no guarantee that a court may not override such an agreement, it is better for prospective parents to err on the side of caution.

6 5 Prejudice to single and lesbian women

Regrettably, situations where disputes arise involving known donors more frequently involve single and lesbian women.[95] Cases have yet to be reported where an egg donor claims parental responsibilities and rights in respect of a child born.[96] This raises an interesting question: do women engage in behaviour that renders them more vulnerable to claims of this nature or does the problem lie with the donors who fail to obtain clarity about their roles prior to fertilisation?[97] Case law on this subject seems to suggest that the problem lies on both sides. So, what is the solution?

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90 *R v S supra* par 11.

91 Van der Walt "The Meaning of (Unfair) Discrimination: Constitutional Law" 2019 19(5) *Without Prejudice* 36–37.

92 Van Niekerk "Assisted Reproductive Technologies and the Right to Reproduce Under South African Law" 2017 20(1) *PELJ/PER* 15.

93 *AB v Minister of Social Development* 2017 (3) SA 570 (CC) and *Ex parte CJD* 2018 (3) SA 197 (GP) both serve as evidence. In the former case, the court found that a divorcee's right to reproductive autonomy may be limited, and, in the latter case, the court found that the second applicant's right to conceal his sexual orientation was not in the child's best interests. It accordingly declined to confirm the surrogacy agreement.

94 Pimentel "Protecting the Free-Range Kid: Recalibrating Parents' Rights and the Best Interest of the Child" 2016 38 *Cardozo L. Rev.* 1.

95 As opposed to married couples and single or gay men.

96 This is because donors donate their eggs and then relinquish their rights to them. However, the position is different where the egg donor is also the surrogate. In certain jurisdictions, such as the United Kingdom, the surrogate is viewed as the legal mother until a parental order is granted to the commissioning parents. See Hodsen and Bewley "Parental Orders and the Rights of Surrogate Mothers" 2018 *Royal College of Obstetricians and Gynaecologists* 352.

97 Riggs "Lesbian Mothers, Gay Sperm Donors, and Community: Ensuring the Well-Being of Children and Families" 2008 17(3) *Health Sociology Review* 228.

7 THE WAY FORWARD

In instances where fertilisation occurs with the intervention of a licensed medical practitioner and a fertility centre, the legal position is regulated and therefore clear. Problems arise where fertilisation does not occur in this manner. The reality remains that individuals are likely to continue to determine their own path to parenthood without the intervention of licensed medical practitioners and fertility centres. There is a need to provide some guidelines for those who opt for this route (either by making use of a turkey baster[98] or by sexual reproduction). The following is thus proposed:

1. The focus on the place of fertilisation as an indication whether someone qualifies as a legal parent or donor should fall away.[99] The deciding factor should be the intention of the parents before fertilisation takes place.
2. The term "known sperm donor" should be more broadly defined. Such definition should include a male who is known to the recipient, either intimately or otherwise, and who acts as her donor at her request.[100] The distinction between a known donor and a single father should be clear. Among other indicators, the known donor should not provide the recipient with financial support, nor refer to the child as "his", and should have contact only as agreed upon between the parties.
3. The timing of the conclusion of the agreement and the consequences thereof should be clarified. Ideally, all agreements should be concluded before fertilisation takes place. Where such agreement is concluded after fertilisation, the following distinction should apply:
    a. In cases where fertilisation has occurred, but the child is not yet born, the agreement can apply retrospectively; alternatively,
    b. In cases where fertilisation has occurred and a child has subsequently been born, regard must be had to the intention of the parties as well as their subsequent actions to determine what is in the child's best interests. Where there has been minimal contact between the donor and the child, the mother's rights should be prioritised. However, where there has been substantial contact, the child's rights should be prioritised. That said, courts should avoid imposing a heteronormative family model where this was never the desire of the commissioning

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98 The turkey baster method is a technique of artificial insemination (intracervical insemination) practised by the woman herself, usually in the comfort of her own home. It involves the collection of sperm that can either come from a sperm bank or from a known donor. After being collected, the semen is slowly injected with a syringe as close to the cervix as possible in order for the sperm to fertilise the egg. Many women find this method of becoming pregnant at home useful (CoParents.com "The Turkey Baster Method: What It Is and How to Perform It" https://www.coparents.com/blog/the-turkey-baster-method-what-is-it-and-how-to-perform-it/ (accessed 2020-10-22)). Also see BabyMed "At-Home Artificial Insemination: The Turkey Baster Method" https://www.babymed.com/home-artificial-insemination-get-pregnant-turkey-baster-method (accessed 2020-22-10).

99 Nadraus ("Dodging the Donor Daddy Drama: Creating a Model Statute for Determining Parental Status of Known Sperm Donors" 2015 53(1) *Family Court Review* 180 192) suggests that "failure to use a physician to assist in the insemination process [should] not be determinative in establishing parental rights or obligations to the resulting child".

100 According to s 68-3-306 of the 2014 Tennessee Code, a "known donor" is defined as "a donor who the inseminated woman knows and chooses to be her donor at her request".

parent. An outcome similar to that of *Re Patrick* should be avoided at all costs.[101]

4. The donor's rights and obligations should be clearly defined. Where there is an intention to parent, the status of the donor should be in question.
5. It should be required that a known sperm donor agreement be in writing. Where this requirement is lacking, a donor should be required to provide proof that he qualifies for parental responsibilities and rights.[102] Here, the court should consider:
   a. the relationship between the parties before conception and thereafter;
   b. evidence of an oral agreement;
   c. the level of contact that the donor has with the child;
   d. the level of financial commitment of the donor towards the child;
   e. the child's opinion on the donor's role in his/her life.[103]

Of the requirements listed, the level of contact with the child should be the overarching consideration. Someone with an active role in the child's life should be recognised. At the same time, parties should be clear about their intentions before concluding such agreements and should abide by the terms thereof to avoid being foisted with responsibilities that they do not desire. This prevents the child suffering from the removal from their lives of individuals who should not have played a role to begin with.

It is hoped that implementing these guidelines will go a long way to avoiding some of the concerns that inevitably arise with disputes of this nature.

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101 See heading 6 4 above.

102 For example by meeting the requirements of s 21(*b*) of the Children's Act.

103 Some of the factors listed here are already contained in s 23 of the Children's Act, which deals with "the assignment of contact and care to [an] interested person by order of court". However, Nadraus (2015 *Family Court Review* 192) suggests additional factors that may be considered.

SUITABILITY OF THE REMEDY OF DIVESTITURE IN NON-MERGER CASES: A SOUTH AFRICAN PERSPECTIVE

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SUMMARY

This article considers the suitability of the remedy of divestiture in non-merger cases, particularly in markets where high concentration levels may embolden incumbents to engage in abusive conduct. The article observes that the prevailing practice in competition-law enforcement is that, while divestiture is an acceptable remedy in merger cases, it is generally eschewed in non-merger cases. The article argues that economic conditions in South Africa provide justification for the use of the divestiture remedy in non-merger cases, particularly in cases of abuse of dominance in concentrated markets. The article observes that there is sufficient legal authority and history supporting the use of the remedy in non-merger cases.

1 INTRODUCTION

After two and a half decades of the South African democratic experiment, it may be appropriate to review the effectiveness of some of the policy tools and legal instruments that were introduced to improve the social and economic welfare of citizens. At the end of apartheid, among the most pressing economic problems (at least to the incoming ANC government and the majority of those disadvantaged by policies of the past) were the racially skewed patterns of ownership of the productive assets of the economy and anticompetitive market structures that were characterised by economic concentration.[1] Economic concentration refers to the extent to which a small number of firms account for the bulk of sales in a given market.[2] In simple

[1] OECD "Competition Law and Policy in South Africa: An OECD Peer Review" (May 2003) https://www.oecd.org/daf/competition/prosecutionandlawenforcement/2958714.pdf (accessed 2020-04-08) 10; Roberts "The Role for Competition Policy in Economic Development: The South African Experience" (June 2004) https://www.tips.org.za/research-archive/trade-and-industry/centre-for-real-economy-study-crest/item/385-the-role-for-competition-policy-in-economic-development-the-south-african-experience (accessed 2020-04-08) 1–2.

[2] See Competition Amendment Bill 2017 GN 1345 in *GG* 41294 of 2017-12-01 7.

terms, it is the accumulation of market and economic power in the hands of a few firms.

At the beginning of the democratic era, high on the agenda of the new ANC-led government was a strong competition policy system, complete with strong legislation and institutions that were expected to hit the ground running in addressing historical imbalances in the structure of the economy.[3] However, more than 20 years after the coming into force of the Competition Act,[4] the problem of concentration in the economy has remained,[5] if not worsened. By the same token, collusive and abusive conduct by firms in concentrated markets has not abated.[6]

There is broad consensus in the competition policy and law community that highly concentrated markets provide the ideal environment for collusion and abuse of dominance to take place.[7] Therefore, highly concentrated markets provide the perfect justification for competition policy and law intervention to ensure that there is competition in such markets. In cases of abuse of dominance, particularly in highly concentrated markets, there may be need for competition authorities to be bolder and more interventionist in designing competition-law remedies,[8] particularly where other remedies may be less effective.

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3 OECD https://www.oecd.org/daf/competition/prosecutionandlawenforcement/2958714.pdf 9. The Reconstruction and Development Programme (RDP) policy document, for example, proposed that strict antitrust legislation was needed in the country, systematically to eliminate the high market concentration levels that existed in South Africa; see *White Paper on Reconstruction and Development* GN 1954 in *GG* 16085 of 1994 par 3.8.1.

4 89 of 1998.

5 Following a study of about 2 150 merger reports of the Competition Commission between January 2009 and March 2016, Buthelezi, Mtani and Mncube observe that at least 70,45% of South African sectors have defined markets with dominant firms, which – according to them – indicates the static level of market concentration in the South African economy. That the majority of South African sectors are concentrated, the authors further observe, also accords with various studies that have been conducted on the concentration levels of South African industries; see Buthelezi, Mtani and Mncube "The Extent of Market Concentration in South Africa's Product Markets" (2018) https://www.ellipsis.co.za/wp-content/uploads/2018/09/The-extent-of-market-concentration-in-South-Africa's-product-markets-CC-Working-Paper.pdf 3.

6 In the 2018–2019 financial year, the Competition Commission received between 252 and 256 complaints relating to cartels and abuse of dominance. During this period, the Commission was also involved in litigation in some 138 cases relating to cartels and abuse of dominance; see Competition Commission of South Africa "Annual Report" (2018–2019) http://www.compcom.co.za/wp-content/uploads/2019/10/Annual-Report-2018-2019.pdf 24–32.

7 This is in line with the Structure-Conduct-Performance paradigm, which, in its simplest form, holds that the structure of the market dictates the conduct of firms, which in turn dictates performance (Buthelezi, Mtani and Mncube https://www.ellipsis.co.za/wp-content/uploads/2018/09/The-extent-of-market-concentration-in-South-Africa's-product-markets-CC-Working-Paper.pdf 3). The trend towards concentration and oligopoly, it has been observed, raises a serious threat to the maintenance of properly functioning and competitive markets (Scala "Advertising and Shared Monopoly in Consumer Goods Industries" 1973 9 *Columbia Journal of Law and Social Problems* 241 241–245). See also Sullivan "The Jurisprudence of Antitrust Divestiture: The Path Less Travelled" 2002 86 *Minnesota Law Review* 565 572.

8 O'Connor "The Divestiture Remedy in Sherman Act 2 Cases" 1976 13 *Harvard Journal on Legislation* 687 691; Scala 1973 *Columbia Journal of Law and Social Problems* 242.

The Competition Act[9] provides a number of mechanisms for competition authorities to use in dealing with the problem of concentration in the economy as well as with the resultant collusive and abusive practices. Among such mechanisms is the remedy of divestiture. With divestiture, sometimes loosely referred to as "break-up",[10] a firm (usually one with substantial market share) is ordered to disinvest or sell its shares or assets in a given market.[11] Following divestiture, the hope is that the market will become free and open to entry and expansion by other firms, thereby facilitating much-needed competition.

This article considers the suitability of the remedy of divestiture in repeat or serious abuse of dominance cases, particularly in concentrated markets and where there is no better alternative remedy. The article also considers the suitability of the remedy of divestiture in circumstances where, as recent amendments to the Competition Act suggest,[12] the Competition Commission (after the conclusion of a market enquiry) finds that the structure of the market (in particular, the concentrated or oligopolistic nature of such market) has or is likely to have an adverse effect on competition in the market.[13]

To avoid confusion as to the true objective of this article, it must be emphasised that the proposal here is not for large-scale divestitures in all cases where dominance and market concentration are found to exist. The article considers and advocates the use of divestiture in two limited circumstances already recognised and provided for under the law – that is, in cases of repeat or serious abuse of dominance that cannot adequately be remedied by other remedies provided for in the Act,[14] and at the conclusion of a market inquiry, where the Competition Commission is of the opinion that the concentrated nature of the market is likely to have an adverse effect on competition.[15] This means that less serious and some first-time abuse-of-dominance cases are excluded from the scope of this article. Also excluded are instances of market concentration where there has been no market inquiry conducted, or where a market inquiry conducted has not determined that divestiture is a suitable remedy.

Following the introduction provided in section one above, the ensuing discussion is structured as follows: section two provides the background to the main issues and problem dealt with in the article; section three highlights the problem of concentration in the South African economy; section four outlines the legislative framework for divestiture in non-merger cases in South African competition law; section five considers the feasibility and

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9 89 of 1998.

10 O'Connor 1976 *Harvard Journal on Legislation* 689–690; Oppenheim "Economic Background" 1950 19 *George Washington Law Review* 120 126; Tajana "If I Had a Hammer: Structural Remedies and Abuse of Dominant Position" 2006 7 *Competition and Regulation in Network Industries* 3 6.

11 S 60(1) and (2) of the Competition Act.

12 See Competition Amendment Act 18 of 2018 (2018 Amendment Act).

13 S 43C(1) and (2) of the Competition Act as introduced by s 26 of the 2018 Amendment Act.

14 S 60(2) of the Competition Act.

15 S 43D(2) of the Competition Act as introduced by s 26 of the 2018 Amendment Act, read together with s 60(2) of the Competition Act as amended by s 34 of the 2018 Amendment Act.

constitutionality of the remedy of divestiture; section six considers some notable cases, in South Africa and abroad, in which divestiture was preferred or considered as a suitable remedy in non-merger cases; and section seven provides a summary of the main observations and conclusions of the article.

2 BACKGROUND

After celebrating the twentieth anniversary of the coming into force of the South African Competition Act it may be an opportune time to assess the effectiveness of the Act in achieving its goals. Among the ills the Act was intended to cure were high levels of industrial concentration in the economy and the racially skewed patterns of ownership of the productive assets in the economy.[16] However, various reports have suggested that the Competition Act has not been very successful in this regard.[17] While the Act provides some remedies, including divestiture, that may be useful in addressing the problem of concentration, divestiture as a remedy has been underused. A major part of the reasons for the underuse of the remedy of divestiture in our law is that divestiture is treated as a remedy of last resort, especially in non-merger cases.

While divestiture may be acceptable in merger cases, the prevailing practice in competition-law enforcement is to eschew the remedy in non-merger cases. The underuse of the divestiture remedy in non-merger cases is directly linked to how the remedy is seen in society. Divestiture is considered the most drastic and aggressive competition-law remedy.[18] Structural remedies, of which divestiture is a major one, are seen as having the effect of modifying the allocation of property rights.[19] As former American Senator, Howell T Helflin, also observed in a Senate hearing on proposed amendments to the Federal Trade Commission Act,[20] "divestiture raises the question whether private property can be taken away by a government agency action."[21]

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16 See Preamble to the Competition Act.

17 Citing various World Bank studies, Buthelezi, Mtani and Mncube observe that the South African economy remains highly concentrated, even with years of the application of the Competition Act (Buthelezi, Mtani and Mncube https://www.ellipsis.co.za/wp-content/uploads/2018/09/The-extent-of-market-concentration-in-South-Africa's-product-markets-CC-Working-Paper.pdf 4–7).

18 Kovacic "Designing Antitrust Remedies for Dominant Firm Misconduct" 1999 31 *Connecticut Law Review* 1285 1294.

19 Tajana 2006 *Competition and Regulation in Network Industries* 6. Binge and Van Eeden *Remedy Design and Application in South Africa* Paper presented at the Fourth Annual Competition Commission, Competition Tribunal and Mandela Institute Conference on Competition Law, Economics and Policy in South Africa, University of the Witwatersrand, Johannesburg, (August 2010) 5.

20 1914.

21 Federal Trade Commission–Divestiture *Hearing Before the Subcommittee for Consumers of the Committee on Consumers, Science, and Transportation United States Senate Ninety-Sixth Congress* (30 November 1979) SN 96–67 1.

By virtue of the significance of the Constitution in the application of law in South Africa,[22] the author in due course considers the question of the constitutionality of divestiture as a remedy.[23] It is, however, appropriate to point out that while the question of the constitutionality of divestiture is significant, it is a question that nonetheless lies beyond the main scope of this article. As a result, consideration of the constitutionality question will be relatively brief. The article, in large part, proceeds from the point of view that, because the kind of divestiture advocated for here is that which is already provided for under the Competition Act, such divestiture is clearly legal and possibly, from the perspective of the principle of legality, also constitutional.

Another difficulty faced by the remedy of divestiture is that it is also seen as a departure from the well-established idea that state interference in the economy should be limited, as free markets are seen as capable of self-correcting.[24] The argument against divestiture may also be more persuasive from an investment perspective. Investors are not likely to want to invest their capital in a country whose government, through their competition agencies, will freely interfere with investments through divestiture. As a result, competition authorities may refrain from decreeing aggressive competition-law remedies, such as divestiture, even when such measures may be necessary. They may feel that they are constrained (politically, economically and socially) from imposing remedies that may be seen as market-unfriendly and may potentially also lead to job losses.

The above background about difficulties that may be encountered in the use of the divestiture remedy may provide some perspective from which the continued concentration of many markets in the South African economy may be understood.[25] To the extent that the structure of the South African economy has remained largely concentrated, abusive and anticompetitive conduct have remained a permanent feature of many markets in the economy.[26] Indeed, the South African Competition Commission is inundated with complaints of abusive and anticompetitive conduct on a daily basis.[27] In line with the Structure-Conduct-Performance Paradigm, anticompetitive conduct is often a product of markets in which it occurs: the more concentrated the market, the more likely it is that abuse of dominance and collusion will occur.[28] In such a scenario, traditional antitrust remedies (such as an administrative penalty or fine) may be less effective. Undeterred firms

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22 Under s 2 of the Constitution of the Republic of South Africa, 1996 (the Constitution), the Constitution is the supreme law of the land, and any law or conduct inconsistent with it is invalid and unconstitutional.

23 See section 5 of the article.

24 However, the policy preference away from government controls toward free-market principles, it has been argued, is also not without its own problems; see Intoccia "Governing Telecommunications: A New Regime in Public Law and Public Policy" 1991 10 *Glendale Law Review* 1 2.

25 Buthelezi, Mtani and Mncube https://www.ellipsis.co.za/wp-content/uploads/2018/09/The-extent-of-market-concentration-in-South-Africa's-product-markets-CC-Working-Paper.pdf 4–7.

26 See Competition Commission of South Africa http://www.compcom.co.za/wp-content/uploads/2019/10/Annual-Report-2018-2019.pdf 24–32.

27 *Ibid*.

28 Buthelezi, Mtani and Mncube https://www.ellipsis.co.za/wp-content/uploads/2018/09/The-extent-of-market-concentration-in-South-Africa's-product-markets-CC-Working-Paper.pdf 3.

may simply embrace the fine as just another cost of trading, which unfortunately may eventually be passed on to the consumer.[29]

Divestiture may, in appropriate circumstances, be the most suitable and effective remedy. The remedy of divestiture, when applied to disrupt the stranglehold of one or a few firms in the market and to encourage entry and broader participation and competition in the market, may be more desirable. As Adams observed, from a competition-law point of view, the hard core of the monopoly problem is the concentration of economic power – particularly the ownership and control of a large proportion of the economy – in the hands of a small number of corporations and individuals.[30] In his view, this problem can only be solved in one way: dissolution.[31] With inequality constituting a major problem in many societies, it is becoming clear that the sustainability of many democracies will in part depend on promoting inclusivity in the economy.[32]

The Competition Commission of South Africa has redesigned its 2030 Vision and its mission statements to make bold references to its commitment to regulate competition to achieve "a growing and inclusive economy".[33] This means that a tailor-made application and enforcement approach for the Competition Act, suited to our own circumstances, will be required. The National Development Plan acknowledges as much, stating that "to pave the way for accelerated economic growth …, South Africa needs to make tough decisions", including the encouragement of "vigorous competition in markets through the application of competition laws."[34]

Chicago-School-inspired competition-law enforcement theory, which holds generally that the goal and focus of competition law should be limited to efficiency and consumer welfare,[35] cannot work effectively in a society like South Africa, where the majority of citizens are poor and excluded from any meaningful participation in the economy. Indeed, the Chicago-School-inspired efficiency-driven competition-law enforcement model is likely to further impoverish communities and deepen inequality,[36] especially if applied without regard to our circumstances.

Although investment considerations may favour a reluctance to use drastic competition-law remedies, such as divestiture, there is sufficient legal authority and history, in South Africa and abroad, to support effective use of divestiture as a competition-law remedy. The economic and social arguments in favour of divestiture are also profound: any society that

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29 Munyai *A Critical Review of the Treatment of Dominant Firms in Competition Law: A Comparative Study* (doctoral thesis, University of South Africa) 2016 120–121.

30 Adams "Dissolution, Divorcement, Divestiture: The Pyrrhic Victories of Antitrust" 1951 27 *Indiana Law Journal* 1 1.

31 *Ibid*.

32 Bogus "The New Road to Serfdom: The Curse of Bigness and the Failure of Antitrust" 2015 49 *University of Michigan Journal of Law Reform* 1 2.

33 Competition Commission of South Africa "About Us" http://www.compcom.co.za/about-us-2/ (accessed 2020-04-08).

34 South African Government, *National Development Plan 2030* (15 August 2012) 114–115.

35 Kelly, Unterhalter, Youens, Goodman and Smith *Principles of Competition Law in South Africa* (2017) 6.

36 Bogus 2015 *University of Michigan Journal of Law Reform* 1.

excludes the majority of its population from any meaningful participation in the economy is bound to fail.[37] For this reason, the Competition Act expressly makes provision for the remedy of divestiture,[38] which could be relevant in circumstances where anticompetitive conduct is made possible by the concentrated and oligopolistic structure of the market.

It may be encouraging to note that advanced economies and mature competition-law jurisdictions, such as the United States, have effectively also used the divestiture remedy when economic circumstances required.[39] For a society founded on democracy, capitalism and the free-market idea, the effective use of the divestiture remedy at a time when the American economy was highly concentrated makes America an interesting case study for South Africa. The South African economy has a long history of monopolies and industrial concentration,[40] which has also been organised along racial lines. In the discussion that follows, the author considers the problem of economic concentration in the South African economy.

3 THE PROBLEM OF CONCENTRATION IN THE SOUTH AFRICAN ECONOMY

It is not the aim of this part to provide a grand-scale review of the structure of the South African economy. Such an exercise may be suitable for an article on industrial organisation.[41] For purposes of this article, it suffices to show that there is evidence to support the view that the South African economy is highly concentrated. The demonstration of evidence of concentration in the South African economy is appropriate to establish a competition-law perspective from which the remedy of divestiture may appear relevant.

The fact that concentration and monopolies have long been characteristic features of the structure of the South African economy is so central to the understanding of the South African economic structure that it is now taken for granted. In 1949, addressing Parliament, the then-Minister of Economic Affairs observed, "there was an undoubted tendency towards the creation of

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37 In the background note accompanying the 2018 Amendment Act, the Minister of Economic Development, Mr Ibrahim Patel, stated: "[i]t is important to note the *economic* argument for transformation. Concentrated markets that inhibit new entrants and that, accordingly, exclude large numbers of black South Africans from the opportunity to run successful enterprises, are not a basis for strong and sustained growth. They continue to limit the talent pool of entrepreneurs on which the growth potential of the economy relies. An inclusive growth path requires that we address these barriers to entry – whether they are regulated or presently hidden from scrutiny." See Competition Amendment Bill 2017, GN 1345 in *GG* 41294 of 2017-12-01 7.

38 S 58(1)(*a*)(iv) and 60 of the Competition Act, as amended by ss 32 and 34 of the 2018 Amendment Act.

39 Letwin *Law and Economic Policy in America* (1967) 15, 54 and 59; Thorelli *The Federal Antitrust Policy: Origination of an American Tradition* (1954) 1–5.

40 Cowen "A Survey of the Law Relating to the Control of Monopoly in South Africa" 1950 8 *South African Journal of Economics* 124 124; Bekker *Monopolies: Review of the Role of the Competition Board* (1992) 13; Bekker "Monopolies and the Role of the Competition Board" 1992 *Journal of South African Law* 618 625.

41 This is the study of markets and their structure; see Carlton and Perloff *Modern Industrial Organization* (2015) 26.

monopolies in South Africa".[42] At the end of apartheid, many sectors of the economy were characterised by their monopolies and high levels of concentration.[43] The incoming ANC government also inherited an economy with many state-owned monopolies, conglomerates and high market concentration levels.[44] As Roberts observed, "not more than five conglomerate groupings controlled the majority of economic activity in the country".[45] There is also little doubt that, to this day, many key markets in the South African economy remain highly concentrated.[46]

While there are different methods that can be used to measure concentration, the most commonly accepted method for measuring market concentration is the Herfindahl-Hirschman Index (HHI).[47] This model measures concentration levels in markets by allocating scores to the aggregate market shares of all market participants, ranging from zero (representing a state of perfect competition in the market where concentration is replaced by several firms of equal size competing in the market) to 10 000 (representing a state of imperfect competition in the market where competition is replaced by monopoly).[48] In the United States of America, antitrust agencies consider markets in which the HHI is between 1 500 and 2 500 to be moderately concentrated and markets in which the HHI is in excess of 2 500 to be highly concentrated.[49] In the United Kingdom, a market with an HHI exceeding 1 000 may be deemed to be concentrated whereas a market with an HHI exceeding 2 000 may be regarded as highly concentrated.[50]

In a study spanning 2 150 merger decisions between January 2009 and March 2016, the South African Competition Commission's investigation has

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42 Cowen 1950 *South African Journal of Economics* 124; Bekker *Monopolies: Review of the Role of the Competition Board* 13; Bekker 1992 *Journal of South African Law* 625.

43 Tregenna-Piggott *An Assessment of Competition Policy in South Africa* Occasional Paper No. 8 Economic Research Unit Department of Economics, University of Natal (1980) 6; Roberts "The Role for Competition Policy in Economic Development: The South African Experience" (March 2004) https://www.researchgate.net/publication/227610905_The_Role_for_Competition_Policy_in_Economic_Development_The_South_African_Experience 1–2.

44 Smit *The Rationale for Competition Policy: A South African Perspective* Paper presented at the Biennial ESSA Conference, Durban (2005) 1.

45 Roberts https://www.researchgate.net/publication/227610905_The_Role_for_Competition_Policy_in_Economic_Development_The_South_African_Experience 1–2.

46 Background Note accompanying the Competition Amendment Bill, 2017, GN 1345 in *GG* 41294 of 2017-12-01 10.

47 The United States Department of Justice "Herfindahl-Hirschman Index" https://www.justice.gov/atr/herfindahl-hirschman-index (accessed 2020-04-08); Buthelezi, Mtani and Mncube https://www.ellipsis.co.za/wp-content/uploads/2018/09/The-extent-of-market-concentration-in-South-Africa's-product-markets-CC-Working-Paper.pdf 4.

48 The United States Department of Justice, https://www.justice.gov/atr/herfindahl-hirschman-index; Buthelezi, Mtani and Mncube https://www.ellipsis.co.za/wp-content/uploads/2018/09/The-extent-of-market-concentration-in-South-Africa's-product-markets-CC-Working-Paper.pdf 4.

49 See US Department of Justice and Federal Trade Commission *Horizontal Merger Guidelines* (2010) 19.

50 The United States Department of Justice, https://www.justice.gov/atr/herfindahl-hirschman-index; Buthelezi, Mtani and Mncube https://www.ellipsis.co.za/wp-content/uploads/2018/09/The-extent-of-market-concentration-in-South-Africa's-product-markets-CC-Working-Paper.pdf 5.

revealed the following: 70,45 per cent of South African sectors have dominant firms in defined product markets;[51] the average HHI across defined product markets is approximately 2 986;[52] and some priority sectors,[53] such as the information communication technologies sector, have an HHI as high as 3 539.[54] Although these figures were based only on the 2 150 merger decisions in the affected sectors, rather than the entire economy, the concentration picture painted by the Competition Commission's study is worrying.

A number of recent market inquiries conducted by the Competition Commission into specific sectors of the South African economy have also revealed worrying levels of concentration in those sectors. For example, the Competition Commission's Market Inquiry Into the Liquefied Petroleum Gas Sector has found the market to be highly concentrated and dominated by five firms.[55] The Competition Commission's market inquiry into the South African private healthcare sector has also identified concentration as among the major problems affecting competition in the market. In particular, the inquiry has revealed that 70 per cent of the open medical schemes market is controlled by two players;[56] the market for restricted medical aid schemes is dominated by one player;[57] the medical scheme administrators market is controlled by three players;[58] and the market for private hospital facilities is dominated by three hospital groups.[59]

Furthermore, in its recent Grocery Retail Market Inquiry Final Report, the Competition Commission has found that the South African formal grocery retail sector is also highly concentrated.[60] The Commission's report notes specifically that the concentration ratio for the top five largest retailers of grocery products in South Africa (these being Shoprite, Pick n Pay, SPAR, Woolworths and Massmart) is approximately 64 per cent.[61] And the Competition Commission's Data Services Market Inquiry has further

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51 Buthelezi, Mtani and Mncube https://www.ellipsis.co.za/wp-content/uploads/2018/09/The-extent-of-market-concentration-in-South-Africa's-product-markets-CC-Working-Paper.pdf 5 and 7.

52 Buthelezi, Mtani and Mncube https://www.ellipsis.co.za/wp-content/uploads/2018/09/The-extent-of-market-concentration-in-South-Africa's-product-markets-CC-Working-Paper.pdf 7.

53 The Competition Commission has identified some sectors it considers priority sectors – namely, food and agro-processing; infrastructure and construction; intermediate industrial products; financial services; energy; and information communication technologies sectors.

54 Buthelezi, Mtani and Mncube https://www.ellipsis.co.za/wp-content/uploads/2018/09/The-extent-of-market-concentration-in-South-Africa's-product-markets-CC-Working-Paper.pdf 7.

55 Competition Commission of South Africa *Market Inquiry Into the LPG Sector: Final Report* (2017) par 17. See also par 5.17, 6.10–6.12 and 18.

56 Competition Commission of South Africa *Health Market Inquiry* (2019) 105 par 12.

57 Competition Commission of South African *Health Market Inquiry* 105 par 13.

58 Competition Commission of South African *Health Market Inquiry* 106 par 16 and 125 par 155.

59 Competition Commission of South African *Health Market Inquiry* 101 par 229.1.

60 Competition Commission of South Africa *Grocery Retail Market Inquiry Final Report* (2019) 63–65.

61 *Ibid*.

revealed that the market is also highly concentrated and specifically dominated by two players.[62]

It should be of concern that the trend towards industrial concentration in the South African economy has not shown signs of decreasing, despite the Competition Act having been in operation for over 20 years. This concern is informed by the fact that the development of competition policy in South Africa was directly connected to the State's efforts to address the problems of monopoly and the excessive concentration of economic power in the hands of a few individuals and firms.[63] The role of the Competition Act in South African society must, to a large extent, be seen in this context. The Act makes explicit reference to the problem of concentration,[64] and enjoins competition authorities to find ways, within the framework of the Act, to address this problem. Among the many mechanisms provided for in the Act to address the problem of concentration and the abuse of market power is the remedy of divestiture.[65]

4 DIVESTITURE IN NON-MERGER CASES UNDER THE COMPETITION ACT

Among the lesser-known provisions of the Competition Act, even among those with a fair understanding of competition law, are those relating to the remedy of divestiture, particularly as applied to non-merger cases. The Competition Act makes explicit provision for the remedy of divestiture, even in non-merger cases. Section 58 of the Competition Act empowers the Competition Tribunal to make an order of divestiture in relation to a prohibited practice.[66] The Act defines a prohibited practice as a practice prohibited under Chapter Two of the Act. Chapter Two of the Act prohibits various forms of anticompetitive practices, including the abuse of a dominant position.[67] Section 58 further provides that, when making an order of divestiture, the Competition Tribunal must have regard to the provisions of section 60 of the Act. Section 60 provides, in relevant parts, that the Competition Tribunal may impose the remedy of divestiture in cases involving the abuse of dominance, provided that the abusive conduct (i) cannot adequately be remedied under any other provision of the Act;[68] or

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62 Competition Commission of South Africa *Data Services Market Inquiry Final Report* (2019) 21 par 20, 41 par 76, 81 par 199, 85 par 205.1, 86 par 206, 87 par 210, 92 par 216, 94 par 217 and 219.

63 Roberts https://www.tips.org.za/research-archive/trade-and-industry/centre-for-real-economy-study-crest/item/385-the-role-for-competition-policy-in-economic-development-the-south-african-experience 7; Australian Competition and Consumer Commission *Better Regulation of Economic Infrastructure: Country-Based Review* Working Paper No. 8 (2013) 10.

64 The explicit reference to the structural and transformative objectives in the Competition Act, it is submitted, "clearly indicates that the legislature intended that competition policy should be broadly framed, embracing both traditional competition issues, as well as these explicit transformative public interest goals"; see Competition Amendment Bill 2017, GN 1345 in *GG* 41294 of 2017-12-01 6.

65 S 60 of the Competition Act.

66 S 58(1)(iv) of the Competition Act.

67 S 8 of the Competition Act.

68 S 60(2)(*b*)(i) of the Competition Act.

(ii) is substantially a repeat by the same firm of conduct previously found by the Tribunal to be prohibited.[69] The Act further provides that an order of divestiture by the Tribunal is of no force or effect unless confirmed by the Competition Appeal Court.[70]

The provisions of section 60 of the Competition Act, particularly those that limit the application of the remedy of divestiture to cases of serious abuse of dominance that cannot adequately be remedied through other remedies under the Act, and repeat abusive conduct, indicate the legislature's view that divestiture must be used sparingly and as a remedy of last resort.[71] This may explain why the remedy of divestiture is almost unknown in South African competition law. It is no surprise then that, after more than 20 years of the application of the Competition Act, the structure of the South African economy remains largely concentrated. However, the recent Competition Amendment Act[72] appears to take the remedy of divestiture quite seriously when regard is had to the problem of concentration in the economy.

The Competition Amendment Act, which came into force on 12 July 2019,[73] was passed against a backdrop of political concerns that the Competition Act did not sufficiently empower competition authorities to take measures to address the problem of concentration in the economy.[74] As the most radical competition statute to date, the Amendment Act seeks, among other things, to reinforce existing provisions of the Competition Act relating to prohibited practices (particularly abuse of dominance) and to strengthen market inquiries.[75] Fundamental to the Amendment Act is the desire "to address two persistent structural constraints on the South African economy, namely, the high levels of economic concentration in the economy and the skewed ownership profile in the economy".[76]

Under the Amendment Act, market inquiries will probably become the chief instrument to address the problems of economic concentration and skewed ownership in the economy. Following the Amendment Act, the focus of market inquiries will no longer just be on the general state of competition in a market, but also on the levels of concentration and the structure of the market.[77] In a market inquiry, the Competition Commission is required to determine whether any feature of the market, including the structure and levels of concentration, may have an adverse effect on competition.[78]

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69 S 60(2)(*b*)(i) of the Competition Act.

70 S 60(3) of the Competition Act.

71 Cise "Limitations Upon Divestiture" 1950 19 *George Washington Law Review* 147 148. The classic and basic argument for divestiture is that the defendant or defendants have assumed such complete domination of the market that free competitive conditions cannot be restored by injunctive relief alone. See Timberg "Some Justifications for Divestiture" 1950 19 *George Washington Law Review* 132 133.

72 Competition Amendment Act 18 of 2018.

73 Presidential Proclamation No. 46 of 2019 in *GG* 42578 of 2019-07-12.

74 Background Note accompanying the Competition Amendment Bill GN 1345 in *GG* 41294 of 2017-12-01 9 and 11.

75 See Memorandum on the Objects of the Act in its Bill stage, Competition Amendment Bill B 23B–2018 par 2.2.

76 Competition Amendment Bill B 23B–2018 par 2.2.

77 S 43A(1) of the Competition Act as amended by s 23 of the 2018 Amendment Act.

78 S 43C(1) and (2) of the Competition Act, as introduced by s 26 of the 2018 Amendment Act.

If the Competition Commission finds any feature of the market to have an adverse effect on competition, the Amendment Act obliges the Commission to determine steps to be taken to remedy that adverse effect. Such steps may include the Commission itself taking steps to remedy, mitigate or prevent the adverse effect on competition or could consist of making a recommendation to the Competition Tribunal for an appropriate order.[79] One of the orders that the Competition Tribunal may make to remedy an adverse effect on competition following a recommendation of the Competition Commission is an order of divestiture.[80] Should the Tribunal make an order of divestiture, such an order will require confirmation by the Competition Appeal Court.[81]

The Amendment Act clearly makes good on a promise (made in the statement of purpose in the preliminary Bill introducing the Amendment Act) to address the problems of high levels of concentration and skewed ownership in the economy.[82] Whenever a market inquiry reveals that any feature of a market, including the structure and levels of concentration in the market, has an adverse effect on competition, the Amendment Act places a duty on competition authorities to take appropriate remedial steps.[83] If there were ever any doubt as to whether South African competition authorities are required or even empowered to intervene in the economy to address the problem of concentration through bold measures such as divestiture, now such doubts must be considered extinguished. Whereas divestiture in non-merger cases was initially only allowed in very limited cases under the Competition Act,[84] now divestiture can also be used to address the problem of concentration if a market inquiry finds such concentration to have an adverse effect on competition. However, despite the now more explicit and bold provisions of the law providing for divestiture in concentrated markets, the important question is whether there will be enough will on the part of competition authorities to implement this remedy. An equally important and relevant question is whether divestiture, especially as provided for under the Amendment Act, can survive constitutional scrutiny.

5 FEASIBILITY AND CONSTITUTIONALITY OF DIVESTITURE

Divestiture is not new or alien to competition law.[85] It is in fact a widely accepted remedy in competition law, particularly in merger cases. At least

79 S 43D(1) and (2) of the Competition Act, as introduced by s 26 of the 2018 Amendment Act.

80 S 43D(2) of the Competition Act, as introduced by s 26 of the 2018 Amendment Act, read together with s 60(2) of the Competition Act as amended by s 34 of the 2018 Amendment Act.

81 S 60(3) of the Competition Act, as amended by s 34 of the 2018 Amendment Act.

82 Background Note accompanying the Competition Amendment Bill GN 1345 in *GG* 41294 of 2017-12-01 6–12.

83 S 43D(1)–(3) of the Competition Act as introduced by s 26 of the 2018 Amendment Act.

84 These would be cases involving the abuse of a dominant position under section 8 of the Act and where the abuse cannot adequately be remedied by any other provision of the Act or where such abuse is essentially a repeat by the same firm of conduct previously found to constitute an abuse of dominance.

85 Anonymous "Aspects of Divestiture as an Antitrust Remedy" 1963 32 *Fordham Law Review* 135 136.

from a merger perspective, this means that there is already considerable precedent and expertise in the use of the divestiture remedy in competition law. Thus, in formulating and enforcing the remedy in non-merger cases, competition authorities will be able to draw on the experience and expertise they already have in administering the divestiture remedy – in merger cases, for the most part.

In merger cases, competition authorities across the world, it is submitted, prefer imposing structural remedies (of which divestiture is a major example) over behavioural remedies.[86] Even some of the most respected competition authorities around the world, including in the United States, the European Commission and United Kingdom, have expressed their preference for the use of structural remedies in merger cases.[87] Other European nations like Netherlands and Germany are also among countries that favour structural remedies in merger cases.[88] South African competition authorities have also expressed their preference for structural remedies in merger cases, although in practice they have mostly imposed more behavioural remedies.[89] However, South African competition authorities have also not shied away from imposing structural remedies and divestiture when circumstances required.[90]

As far as mergers are concerned, the European Commission has explicitly made clear its preference for structural remedies. In a 2008 notice, the European Commission announced that structural remedies, and divestiture in particular, "are, as a rule, preferable from the point of view of merger control, as they prevent, durably, the competition concerns which would be raised by a merger."[91] A 2005 study by the European Director-General for Competition had earlier also shown that 84 per cent of merger remedies imposed by the European Commission between 1996 and 2000 were structural.[92] In its merger remedy guide issued in 2004, the United States Department of Justice also indicated that "structural remedies are preferred

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86 Binge and Van Eeden paper presented at the Fourth Annual Conference on Competition Law, Economics and Policy in South Africa 27.

87 Ngwenya and Robb "Theory and Practice in the Use of Merger Remedies: Considering South African Experience" 2011 4 *Journal of Economic and Financial Sciences* 203 204.

88 Ngwenya and Robb 2011 *Journal of Economic and Financial Sciences* 209. See also Hoehn "Structure Versus Conduct: A Comparison of the National Merger Remedies Practice in Seven European Countries" 2010 *International Journal of the Economics of Business* 9–32.

89 Mariotti "South African Merger Remedies: What Have We Learnt in the Last Ten Years" 2010 6 *Competition Law International* 55 55 and 57.

90 *Astral Foods/National Chick* Case No. 69/AM/Dec01; *Distillers/Stellenbosch Farmers Winery* Case No. 31/CAC/Sep03; *Roofing/Kula Enterprises* Case No. 63/LM/Jul06; *ATC Telecoms/Aberdare* Case No. 70/LM/Aug06; *Oceana Group Limited/Foodcorp (Pty) Ltd* Case No: 018101.

91 European Commission *Commission Notice on Remedies Acceptable Under Council Regulation (EC) No 139/2004 and Under Commission Regulation (EC) No 802/2004 (2008/C 267/01)* 4 par 15.

92 European Commission, DG Competition *Merger Remedies Study* (October 2005); Ngwenya and Robb 2011 *Journal of Economic and Financial Sciences* 209.

to conduct remedies in merger cases, because they are relatively clean and certain."[93]

However, in abuse of dominance and monopolisation cases, structural remedies, and divestiture in particular, are not popular. Most agencies, it has been observed, prefer behavioural remedies because they are viewed as more light-handed.[94] In South Africa, competition authorities also seem to prefer behavioural remedies over structural remedies in cases involving prohibited practices.[95] This is because there are some risks associated with the remedy and process of divestiture. The International Competition Network has classified these risks as follows: composition risk (which refers to the scope of the remedy); purchaser risk (which relates to the risk related to the purchase – in particular, finding a suitable purchaser for the affected asset); and asset risk (the risk of the asset depreciating in value).[96] In sum, the article notes that there are indeed many criticisms and concerns that have been directed at structural remedies in general and divestiture in particular.

However, this does not of course mean that non-structural remedies, in particular behavioural remedies, are perfect. Behavioural remedies have their weaknesses too. One of the major criticisms levelled against behavioural remedies is that they do not deal effectively or directly with the problem of concentration and market power.[97] By contrast, structural remedies (particularly divestiture) have the advantage that they can directly address the problem of concentration and encourage competition.[98]

There may be cases where dominant firms in concentrated markets are emboldened by their market power to engage in anticompetitive conduct.[99] As far as abusive conduct is concerned, it is sometimes not enough for a competition authority merely to put an end to the conduct. In some cases, there may also be a need to ensure that measures are in place to prevent a future repeat of the same conduct by the same or even other firms. A remedy designed only to put an end to the anticompetitive conduct may miss the important fact that the defendant, through such anticompetitive conduct, may have already gained and protected a position of dominance from which it may continue to benefit if nothing more is done.[100] In such cases, divestiture may be a suitable remedy.

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93 US Department of Justice (Antitrust Division) *Antitrust Division Policy Guide to Merger Remedies* (October 2004) 7 par A.

94 OECD *Remedies and Sanctions in Abuse of Dominance Cases* (2006) 9; Binge and Van Eeden paper presented at the Fourth Annual Conference on Competition Law, Economics and Policy in South Africa 5.

95 Binge and Van Eeden paper presented at the Fourth Annual Conference on Competition Law, Economics and Policy in South Africa 7.

96 International Competition Network *Merger Remedies Review Project. Report for the Fourth ICN Annual Conference, ICN Merger Working Group: Analytical Framework* (2005) 8 par 3.9.

97 OECD *Remedies and Sanctions in Abuse of Dominance Cases* 8.

98 *Ibid*.

99 OECD *Remedies and Sanctions in Abuse of Dominance Cases* 9.

100 *Standard Oil Co of New Jersey v United States* 221 US 1 (1911) 77; Binge and Van Eeden paper presented at the Fourth Annual Conference on Competition Law, Economics and Policy in South Africa 2.

However, by its nature, divestiture may raise some constitutional questions, especially from the perspective of property rights. A study of some foreign case law, in which the legality and constitutionality of divestiture was challenged, shows that divestiture may survive these challenges.

In *United States v American Tobacco Co*,[101] one of the early and notable monopolisation cases under section 2 of the Sherman Act, the Supreme Court of the United States, per Chief Justice White, stated that when imposing a remedy such as divestiture, a court must, among a list of factors to be considered, also give due consideration to any possible hardship that may result to private property interests.[102] However, the court was of the view that any possible hardships that could result to private property interests in this case were outweighed by the public interest promoted by maintaining healthy competition in the market; it thus concluded that divestiture was the most appropriate and effective remedy.[103] Years later, in *United States v E.I. du Pont de Nemours & Co*,[104] the US Supreme Court, per Justice Brennan, remarked that where alternative remedies will not be effective in providing redress to the dangers posed to the economy by monopoly, the occasion to consider private property interests, prior to a decree of divestiture, may not even arise.[105]

In *Du Pont*,[106] the Supreme Court also emphasised that divestiture is an equitable remedy designed to protect the public interest.[107] The court further remarked that, if a court is of the view that other measures will not effectively address an antitrust violation, and that complete divestiture is a necessary element of effective relief, the Government will not be denied the remedy of divestiture simply because economic hardship, however severe, may result.[108] The possibility that divestiture will have harsh consequences for those against whom it is directed, the court further found, will hardly be of material assistance to those who seek to rely on this argument as a basis to challenge divesture.[109] Confident in its decision, that divestiture was the most appropriate remedy in this case, the Supreme Court noted that decrees mandating divestitures have never meaningfully been challenged, as divestiture was deeply rooted in American antitrust law.[110]

As the modern American economy became deconcentrated, divestiture orders have become rare. However, some modern cases, like *United States v Microsoft Corp*,[111] have decreed divestiture. Although the District Court's decision in *Microsoft* was later overturned on appeal,[112] it is important to note

[101] 221 U.S. 106 (1911).
[102] *United States v American Tobacco Co supra* 185.
[103] *United States v American Tobacco Co supra* 187.
[104] 366 U.S. 316 (1961).
[105] *United States v E.I. du Pont de Nemours & Co supra* 328.
[106] *Supra*.
[107] *United States v E.I. du Pont de Nemours & Co supra* 326.
[108] *United States v E.I. du Pont de Nemours & Co supra* 327.
[109] *United States v E.I. du Pont de Nemours & Co supra* 326.
[110] *United States v E.I. du Pont de Nemours & Co supra* 327.
[111] 87 F. Supp. 2d 30 (D.D.C. 2000).
[112] *United States v Microsoft Corp* 253 F. 3d 34 (D.C. Cir. 2001).

that the Court of Appeals overturned the decision for other reasons[113] and not on the unconstitutionality of divestiture itself. Some American commentators hold the view that divestitures still have a place in modern American antitrust law. In a recent article, Bogus (inspired by Brandeis's *Curse of Bigness*)[114] calls for a radical change in American antitrust policy to tackle "behemoth corporations, consolidated industries, and enormous wealth flowing into the hands of a few".[115] He also argues that antitrust law should be used to break up large financial institutions, the failure of which may result in significant economic hardships, as witnessed during the 2008 global financial crisis.[116]

Down under, particularly in Australia, there are no doubts as to the constitutional validity of divestiture provisions.[117] A few cases have declared that divestiture is valid and constitutional, notably *Trade Practices Commission v The Gillette Company (No 2)*[118] and *Wsgal Pty Limited v Trade Practices Commission, the Gillette Company, Wilkinson Sword Limited and Registrar of Trade Marks*.[119] In *Wsgal Pty Limited*, upholding the constitutional validity of the divestiture provision (section 81) of the Australian Trade Practices Act of 1974,[120] the Full Federal Court found that the provision seeks to adjust the competing rights of different parties in an area of activity where Parliament is most concerned about the maintenance of competition in trade and commerce in the public interest.[121]

In South Africa, where the constitutionality of divestiture as a competition-law remedy has not yet been considered by our courts, it is reasonable to suggest that the measure, if employed sensibly,[122] will survive constitutional scrutiny. As foreign case law referred to above guides us, divestiture orders seek to balance the competing commercial and property interests of the divested firm and the public interest in having markets that are competitive. In cases where South African competition authorities are of the view that divestiture would be the most effective remedy through which the public interest in maintaining competition in markets could be protected, it would

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113 These included that a number of the District Court's liability determinations were flawed and could not survive appellate review; the District Court failed to hold an evidentiary hearing to address remedies-specific factual disputes; and that the trial judge engaged in impermissible *ex parte* contacts by holding secret interviews with members of the media and made numerous offensive comments about Microsoft officials in public statements outside of the courtroom, giving rise to an appearance of partiality.

114 McGraw *Prophets of Regulation: Charles Francis Adam, Louis D. Brandeis, James M. Landis, Alfred E. Kahn* (1986); Brandeis *The Curse of Bigness: Miscellaneous Papers of Louis D. Brandeis* Fraenkel (ed) (1934).

115 Bogus 2015 *University of Michigan Journal of Law Reform* 2–3.

116 Bogus 2015 *University of Michigan Journal of Law Reform* 115.

117 Steinwell "Constitutional Validity of Divestiture Orders" 1994 17 *University of New South Wales Law Journal* 651.

118 1993 118 ALR 280.

119 1994 FCA 1079; (1994) 122 ALR 673.

120 *Wsgal Pty Limited v Trade Practices Commission supra* par 36 and 41.

121 *Wsgal Pty Limited v Trade Practices Commission supra* par 40.

122 For e.g., in serious or repeat cases of abuse of dominance and where no alternative remedy will be effective in remedying the problem, as well as in cases where a market inquiry determines that no alternative remedy, other than divestiture, will be sufficient to remedy the adverse effect on competition brought about by the high levels of concentration.

seem that such a decision could be justified under section 36 of the Constitution.[123]

It is therefore not surprising that there have been some non-merger cases where courts and competition authorities have had to consider and administer the remedy of divestiture. These cases are looked at in the discussion that follows.

6 DIVESTITURE IN NON-MERGER CASES

Although European competition law empowers the European Commission, in abuse of dominance cases, to adopt structural remedies as a means to bring infringement of the rules of competition to an end, the Commission has rarely used divestiture.[124] The United States leads the way in this regard. In a 2001 study, Crandall examined remedies imposed in 336 monopolisation cases, of which he found 95 involved structural remedies, and 63 of these involved divestiture.[125] Although divestiture is traditionally not a popular remedy in abuse of dominance and monopolisation cases, these figures show that structural remedies have indeed been used to a respectable extent in monopolisation cases in the United States. Below, the author considers some notable monopolisation and abuse of dominance cases in the United States and South Africa, in which structural remedies and divestiture were considered.

In *Standard Oil of New Jersey v United States*[126] (an historically significant case in American antitrust law), the Supreme Court ordered that Standard Oil, which had monopolised various sectors of the American economy in contravention of section 2 of the Sherman Act, be broken up into over 30 independent corporations.[127] *Standard Oil*, it has been observed, set the tone for the next century of monopolisation cases in the United States.[128] In *United States v American Tobacco*[129] (another monopolisation case under section 2 of the Sherman Act), American Tobacco had monopolised the tobacco market to the point where it accounted for over 90 per cent of sales of different tobacco products. It had also grown to include over 100 different companies conducting businesses in the United States and other countries around the world.[130] The government filed a monopolisation case against the company, seeking to dissolve it entirely. The Supreme Court approved the dissolution of the company but directed a lower court to hear evidence to

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123 S 36 provides for the limitation of rights in the Bill of Rights, including the right to property. It would seem that where individual rights to property clash with the public interest to maintain markets that are competitive, the protection of the public interest could carry more weight.

124 See Council Regulation (EC) No. 1/2003 of December 16th 2002 on the implementation of the rules on competition law laid down in Articles 81 and 82 of the Treaty *OJ* L 1, 4.1.2003; Tajana 2006 *Competition and Regulation in Network Industries* 3–4.

125 Binge and Van Eeden paper presented at the Fourth Annual Conference on Competition Law, Economics and Policy in South Africa 26; Crandall *The Failure of Structural Remedies in Sherman Act Monopolization Cases* Working Paper 01–05 10 (2001).

126 221 US 1 (1911) 77.

127 *Standard Oil of New Jersey v United States supra* 77–82.

128 Sullivan 2002 *Minnesota Law Review* 571.

129 *Supra*.

130 Crandall *The Failure of Structural Remedies in Sherman Act Monopolization Cases* 27.

enable it to decide on an appropriate dissolution decree.[131] The lower court eventually dissolved the company into three cigarette-producing entities.[132] *Standard Oil* and *American Tobacco* are considered two of the most significant early monopolisation cases decided under section 2 of the Sherman Act,[133] enunciating some of the basic remedial policy underlying a divestiture decree.[134]

In *United States v Aluminium Company of America (Alcoa),*[135] Alcoa was charged with restraining trade and monopolising the American aluminium industry. While the district court initially absolved Alcoa of wrongdoing,[136] the government's appeal to the Court of Appeals was partly successful; Alcoa was found guilty of monopolising a limited part of the market for aluminium.[137] However, Judge Hand postponed the implementation of divestiture, observing that changes in the aluminium industry, necessitated by America's involvement in World War II, made it impossible for the court to instruct divestiture at the time, as it was not clear what the state of the market would be post-war.[138]

However, it was Judge Hand's remarks about the effects of monopoly in *Alcoa* that were more telling: "possession of unchallenged economic power deadens initiative and discourages thrift and for that reason the Sherman Act outlawed monopoly in all its manifestations".[139] Hand observed further that "throughout the history of the Sherman Act, the purpose of the law was to discourage monopoly at all costs and to encourage the existence and preservation of several small independent operators".[140] As Waller would later observe, the Supreme Court's interpretation of the Sherman Act was rapidly endorsed and set the ground rules for the enforcement of the Sherman Act for a generation.[141]

In *United States v AT&T,*[142] the government's complaint was that AT&T had monopolised the telecommunications market in a variety of ways in violation of the Sherman Act.[143] By means of a consent agreement, the parties reached a settlement agreement, which had to be approved by the court. One of the major issues before the court was the issue of remedy, in particular divestiture, as proposed in the consent agreement between the

131 *United States v American Tobacco supra* 187.

132 Crandall *The Failure of Structural Remedies in Sherman Act Monopolization Cases* 28.

133 15 USC ch 1, 1890.

134 Adams 1951 *Indiana Law Journal 1.*

135 148 F.2d 416 (2d Cir. 1945).

136 *United States v Aluminium Company of America* 44 F. Supp. 97 (S.D.N.Y 1942).

137 *United States v Aluminum Co. of America* (2d Cir. 1945) 447.

138 *United States v Aluminum Co. of America* (2d Cir. 1945) 445–446. As Waller also observed, the court deferred the question of remedy until after the end of World War II (Waller "The Past, Present, and Future of Monopolization Remedies" 2009 76 *Antitrust Law Journal* 1 16). See also Crandall *The Failure of Structural Remedies in Sherman Act Monopolization Cases* 40.

139 *United States v Aluminum Co. of America* (2d Cir. 1945) 427.

140 *United States v Aluminum Co. of America* (2d Cir. 1945) 429.

141 Waller "The Story of Alcoa: Enduring Questions of Market Power, Conduct, and Remedy in Monopolization Cases" in Fox and Crane (eds) *Antitrust Stories* (2007) 132.

142 552 F. Supp. 131 (D.D.C. 1982).

143 *United States v AT&T supra* 160.

government and AT&T.[144] The court approved the divestiture, breaking the company into eight separate entities.[145] In approving the divestiture, the court was particularly concerned about the extent of AT&T's dominance in the telecommunications market, which the court found to be against the object of antitrust laws.[146] The court observed that antitrust laws embody "a desire to put an end to great aggregations of capital".[147] Endorsing the remedy of divestiture, the court observed that, following divestiture, AT&T will no longer have the ability to act to the detriment of its competitors in the relevant markets.[148]

In *United States v Microsoft Corp*,[149] a District Court Judge found that Microsoft had established an unlawful monopoly and abused its dominance, and in a separate opinion on remedies,[150] made an order of divestiture, effectively breaking the corporation into two separate units, one to produce computer operating systems, and the other, software components.[151] While this decision was later overturned on appeal,[152] some observers, like Litan and Nordhaus,[153] still contend that divestiture was an appropriate remedy in that case. They contend that where anticompetitive conduct is made possible mainly by the dominant position of the defendant in the market, divestiture may be a suitable remedy because "it goes to the root cause of the problem".[154]

In South Africa, there have not been many non-merger cases in which the remedy of divestiture was preferred or considered. In *Harmony Gold Mining Company Ltd v Mittal Steel South Africa Ltd*[155] (an abuse of dominance case involving allegations of excessive pricing), the Tribunal boldly proclaimed that, although its power to impose structural remedies in cases of abuse of dominance may be limited, "a proven allegation of excessive pricing is one of the few instances in which we are empowered to impose structural remedies in the case of a first offence".[156] The Tribunal outlined that the appropriate approach to resolving a case of this nature was to ask two questions: whether the structure of the market in question enabled firms in that market to charge excessive prices; and whether Mittal SA engaged in conduct designed to take advantage of or abuse the structure of the

144 *United States v AT&T supra* par IV of the judgment, 160–165.

145 *United States v AT&T supra* par IV of the judgment, 163 and 165. See also Shelanski and Sidak "Antitrust Divestiture in Network Industries" 2001 68 *University of Chicago Law Review* 1.

146 *United States v AT&T supra* 163.

147 *Ibid*.

148 *United States v AT&T supra* 165.

149 87 F. Supp. 2d 30 (D.D.C. 2000).

150 *United States v Microsoft Corp*., 97 F. Supp. 2d 59, (D.D.C. 2000).

151 *United States v Microsoft Corp*., 97 F. Supp. 2d 59, (D.D.C. 2000) 64–65.

152 *United States v Microsoft Corp* 253 F. 3d 34 (D.C. Cir. 2001) 119.

153 Litan and Nordhaus "Effective Structural Relief in U.S. v. Microsoft" (2000) https://www.brookings.edu/wp-content/uploads/2016/06/05_microsoft_litan.pdf (accessed 2020-04-09).

154 Litan and Nordhaus https://www.brookings.edu/wp-content/uploads/ 2016/06/05_microsoft _litan.pdf 2.

155 (13/CR/FEB04).

156 *Harmony Gold Mining Company Ltd v Mittal Steel South Africa Ltd supra* par 82.

market.[157] The Tribunal then concluded that, "if both questions are answered in the affirmative, the excessive pricing must be proscribed, by imposing a remedy which addresses the underlying structural basis for the excessive price".[158] It is clear from the language of the Tribunal in the above-quoted passages, that the remedy it was referring to was a divestiture.[159] However, the Tribunal did not order divestiture in this case because it felt there were other adequate remedies available under the Act that it could still use effectively.[160] The Tribunal's decision was eventually overturned by the Competition Appeal Court on appeal.[161]

Perhaps the most notable case in South African competition law in which divestiture was considered a suitable remedy in a non-merger case is *Competition Commission v Sasol Chemical Industries Ltd*.[162] Here, the Tribunal ordered divestiture of a significant part of the assets of the offending firm, Sasol Chemical Industries, as part of a remedial plan to prevent future abuse of dominance from occurring. This case is significant, it is submitted, in that it marked the first time that the South African Competition Tribunal ordered divestiture in an abuse of dominance case.[163]

7 OBSERVATIONS AND CONCLUSIONS

We often hear that South Africa is among countries with an ability to develop what may be considered the "best policies in the world". But we are certainly not known for being adept at implementing our own policies. Competition policy and law in South Africa arose primarily as part of a government plan to address the problems of monopolies and industrial concentration. The policy paper that preceded the adoption of the Competition Act,[164] and the preamble to the Act itself, explicitly identify economic concentration and the ownership profile in the economy as among the main ills the Act is meant to cure. Some of the most important substantive provisions of the Act, such as those dealing with the abuse of a dominant position, are of significant relevance and importance to concentrated markets.

The Act also empowers competition authorities, in appropriate circumstances, to make use of different remedies available under the Act to redress infringements of the Act and to ensure the achievement of the objectives of the Act. Among such remedies is divestiture. The article observes that while South African competition authorities have used divestiture in merger cases, the remedy is almost never used in cases of abuse of dominance. This may have to do with perceptions around divestiture as a remedy. It is considered drastic, risky and market-unfriendly.

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157 *Harmony Gold Mining Company Ltd v Mittal Steel South Africa Ltd supra* par 84.

158 *Ibid*.

159 *Harmony Gold Mining Company Ltd v Mittal Steel South Africa Ltd supra* par 217.

160 *Harmony Gold Mining Company Ltd v Mittal Steel South Africa Ltd supra* par 218.

161 *Mittal Steel South Africa Limited v Harmony Gold Mining Company Limited* (70/CAC/Apr07) [2009] ZACAC 1.

162 (45/CR/May06, 31/CR/May05) [2010] ZACT 48.

163 Maree *A Comparative Appraisal of the Application of Divestiture as a Remedy Under the South African Competition Act* (masters dissertation, University of Pretoria) 2017 18.

164 See Department of Trade and Industry *A Framework for Competition, Competitiveness and Development* (1997).

This article argues that divestiture can be an important and effective remedy in non-merger cases, especially in abuse of dominance cases in concentrated markets. The view that divestiture is risky, market-unfriendly and possibly unconstitutional is not consistent with existing legal and economic reality. The legal reality is that divestiture is already a popular remedy that is used extensively in merger cases in many competition jurisdictions around the world. Concerns about the safety, suitability and constitutionality of divestiture as a remedy in non-merger cases appear ill considered, especially when such concerns are not equally raised when the remedy is used in merger cases. Divestiture is divestiture, whether it is used in merger cases or cases of abuse of dominance. Divesture does not change its character or effect depending on the type of transaction or conduct to which it is applied. On the contrary, it has the same effect in the market regardless of the type of setting in which it is applied. It beneficially alters the structure of the market and eliminates the ability of one or a few firms to use market power anticompetitively.

Economically, the argument for the use of divestiture as a competition-law remedy in non-merger cases in South Africa could not be stronger. The structure of the South African economy exhibits all the traits of an economy ripe for the divestiture remedy. The concentrated nature of many markets in the South African economy cannot be overemphasised. In this context, the United States can be a useful model as to the use of divestiture to redress anticompetitive unilateral practices in concentrated markets. When the American economy was confronted with the problem of monopoly and concentration, competition law, in particular the Sherman Act, was adopted and used effectively to address the problem. American competition authorities and the courts were willing to use the remedy of divestiture to break up monopolies. Perhaps the answer to the question whether the Competition Act, bolstered by recent amendments brought into effect by the 2018 Competition Amendment Act, will be successful in addressing the problem of concentration in the South African economy will depend on the willingness of competition authorities and the courts to use the remedy of divestiture, especially in non-merger cases.

A CRITICAL APPRAISAL OF DISMISSALS AT THE BEHEST OF A THIRD PARTY: THE IMPACT OF THE CONSTITUTIONAL LABOUR RIGHTS

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SUMMARY

The pivotal judgments on dismissals at the behest of a third party – *East Rand Proprietary Mines Ltd v UPUSA*,[1] *Lebowa Platinum Mines v Hill*,[2] *NUMSA v Hendor Mining Supplies a Division of Marschalk Beleggings (Pty) Ltd*,[3] *TSI Holdings (Pty) Ltd v NUMSA*,[4] *NUPSAW obo Mani v National Lotteries Board*[5] and *NUMSA v High Goal Investments t/a Chuma Security Services*[6] – deeply implicate discrimination in all its manifestations, accountability, gendered precariousness and social justice. This contribution explores the focal questions raised in recent times concerning the fairness of a dismissal at the instance of a third party. First, there are fundamental points relating to the constitutional and statutory protection of security of employment. Secondly, there are those familiar problems often associated with substantive and procedural fairness that surface here under the guise of questioning the disciplinary power of the employer. In this context, inroads into managerial prerogative and disciplinary procedure are amplified where there has been no fault on the part of the employee and no breakdown of the trust relationship, or where the employee has been disciplined, but not dismissed and the employer did not want to terminate the employee's employment but was coerced by the third party to do so. Thirdly, there is the thorny issue of the reason behind the third-party demand and the related issue of intolerability caused by the targeted employee. And finally, there is the issue of striking in support of a demand for dismissal of a co-employee.

1 INTRODUCTION

A third party's steadfast demand that a co-employee be dismissed is one of the most intractable problems that may confront modern management.[7]

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1 (1996) 27 *ILJ* 1135 (LAC) (*ERPM)*.

2 (1998) 19 *ILJ* 1112 (LAC) (*Lebowa Platinum Mines*).

3 [2007] ZALC 26 (*Hendor Mining Supplies)*.

4 [2006] 7 BLLR 631 (LAC) (*TSI Holdings*).

5 2014 (3) SA 544 (CC) (*National Lotteries Board*).

6 [2016] ZALCCT 34 (*Chuma*).

7 The fallout surrounding the Clicks/TRESemme online advertisement is a textbook illustration. The Economic Freedom Fighters' demands included that all the companies, Clicks managers, directors and employees involved in making the advertisement be

Faced with a catch-22 situation, an employer is caught in an invidious position. On the one hand, the employer is expected to make persistent efforts to persuade the third party to drop the demand for dismissal of a co-employee. On the other hand, the employer is expected to exhaust all alternatives to dismissal, taking into account the injustice likely to be suffered by the targeted employee.

It is only in relatively recent years that a significant body of case law dealing with fairness of dismissal in response to third-party pressure has begun to be generated. The decision of the Labour Court in *Chuma*[8] following hot on the heels of *National Lotteries Board*[9] sets the tone of this inquiry into the impact of constitutional labour rights. The interesting, and in some respects disconcerting, body of jurisprudence concerning dismissals at the instance of a third party is constructed around a series of cases: *ERPM*,[10] *Lebowa Platinum Mines*,[11] *Hendor Mining Supplies*[12] and *TSI Holdings (Pty) Ltd*.[13] Examining the evolving jurisprudence on the fairness of dismissals at the instance of a third party is important because it is a fruitful site for appraisal of the extent to which South Africa has come to grips with the complexities of employment vulnerability. Issues raised by dismissals at the instance of a third party clearly implicate the rights to dignity and equality, and how intolerability and gendered precariousness in the workplace might affect the right to fair labour practices.

2 THE NATURE OF DISMISSAL AT THE BEHEST OF A THIRD PARTY

A dismissal at the instance of a third party shares facial similarities with incompatibility[14] in the sense that it assumes almost infinite diversity of

dismissed with immediate effect and their names made public. See "EFF Gives Clicks Until Saturday to Meet Its List of Demands" (5 September 2020) https://www.sabcnews.com/sabcnews/eff-gives-clicks-until-saturday-night-to-meet-list-of-demands/ (accessed 2020-09-07); Mthombothi "Idiocy Was Mind-Boggling, but SA Will Regret Clicks Making Common Cause With Thuggery" (2020-09-13) *Sunday Times* and Wilson "Unilever Must Do More" (2020-09-13) *Sunday Times*.

8 *Supra*.

9 *Supra.*

10 *Supra*.

11 *Supra.*

12 *Supra.*

13 *Supra.*

14 Grogan *Dismissal* (2002) 279–280 points out that "[d]ismissals at the behest of third parties are more closely akin to classic dismissal for operational reasons than dismissal for incompatibility, because the tension arising from the employee's continued presence cannot be alleviated even if the employees concerned adapt their conduct. However, the two classes of dismissal may shade into each other because the employees' demand that offending employees be dismissed may be caused by the latter's unacceptable conduct. However, the distinguishing aspect of dismissal at the instance of third parties is that, had it not been for the pressure exerted by the third party, the employer would not have dismissed the employee. Such dismissals are effected because employers regard the cost of keeping offending employees on their payroll as outweighed by the actual or potential costs of the third parties' reaction if the employees are not dismissed." In *Zeda Car Leasing (Pty) Ltd t/a Avis Fleet v Van Dyk* [2020] ZALAC 4, incompatibility formed the basis of dismissal for operational requirements.

forms.[15] The most prevalent form of dismissal at the instance of a third party arises when there is a termination of an employee's services by a client of a temporary employment service.[16] The delicate nature of the relationship between a client and a temporary employment service is emblematic of the rampant abuse of workers in many jurisdictions.[17] Compounding precariousness is the pervasive issue of sham arrangements.[18] The persistent problems around triangular employment relationships[19] also reflect on the elusiveness of the ILO's quest for decent work.[20]

It is trite that in appropriate circumstances the intolerability of a continued employment relationship can rightfully justify dismissal.[21] This is consistent with the proposition that business risk is "predominantly based on the trustworthiness of company employees and that the accumulation of individual breaches of trust has significant economic repercussions".[22] In the context of third-party pressure for dismissal for intolerability, the *leitmotif* has

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15 The most intriguing and unusual example is provided by the unreported case discussed by Marais "Bad Smell Leads to Fair Dismissal of Employee" (2004-02-25) *Cape Argus*. There the employer's dilemma emanated from the unpleasant body odour of one of its female employees. The reason for this body odour was not known, although co-workers alleged that it came from "something that she smears on herself"'. The employee had 15 years' service, a clean disciplinary record and was an excellent worker. The employee was a trade union member and the company, with the shop stewards and later the union officials had tried to deal with the smelly situation for nine months. The shop stewards tried to discuss the situation with the employee but she would not acknowledge any problem or smelly condition. The employer, with the union's consent followed a two-pronged approach, dealing with the matter in terms of the procedural requirement of an incapacity dismissal and of an operational requirements dismissal. The employee's services were terminated owing to her "incapacity", making her "redundant" to the "employer's operational requirements". The union agreed by means of a signed collective agreement.

16 See Geldenhuys "The Effect of Changing Public Policy on the Automatic Termination of Fixed-Term Employment Contracts in South Africa" 2017 20 *PER/PELJ* 1; Cohen "Legality of the Automatic Termination of Contract of Employment" 2011 32 *Obiter* 665.

17 ILO Convention concerning Private Employment Agencies C181 of 1997 (adopted 1997, came into force 10 May 2000); ILO Recommendation 198. See generally Fudge and Strauss (eds) *Temporary Work, Agencies and Unfree Labour: Insecurity in the New World of Work* (2015); Leighton and Wynn "Classifying Employment Relationships: More Sliding Doors or a Better Regulatory Framework?" 2011 40 *ILJ (UK)* 5.

18 For a textbook illustration of artificial arrangements, see *Dyokhwe v Coen de Kock NO* (2012) 33 *ILJ* 2401 (LC); *Building Bargaining Council (Southern & Eastern Cape) v Melmons Cabinet CC* [2001] 3 BLLR 329 (LC). For a helpful analysis, see Cohen "Debunking the Legal Fiction: *Dyokhwe v De Kock NO & Others*" 2012 33 *ILJ* 2318 and Cohen "Placing Substance Over Form: Identifying the True Parties to an Employment Relationship" 2008 29 *ILJ* 87.

19 Theron "Prisoners of a Paradigm: Labour Broking, the 'New Services' and Non-Standard Employment" in Le Roux and Rycroft (eds) *Reinventing Labour Law: Reflecting on the First 15 Years of the Labour Relations Act and Future Challenges*" (2012) 50.

20 Hepple "Equality and Empowerment for Decent Work" 2001 140 *ILR* 5; Van Eck "Revisiting Agency Work in Namibia and South Africa: Any Lessons From Decent Work Agenda and Flexicurity Approach?" 2014 30 *IJCLLIR* 49.

21 Illustrative is the breakdown of the trust relationship in *Masetlha v President of the RSA* 2008 (1) SA 566 (CC), *Moyane v Ramaphosa* [2019] 1 All SA 718 (GP), *Gama v Transnet (SOC) Ltd* [2018] ZALCJHB 452 and *Old Mutual v Moyo* [2020] ZAGPJHC 1. See also Rycroft "The Intolerable Relationship" 2012 33 *ILJ* 2271.

22 *Miyambo v CCMA* [2010] 10 BLLR 1017 (LAC) par 13; *De Beers Consolidated Mines v CCMA* [200] 9 BLLR 995 (LAC) par 22.

been the use of racial slurs.[23] The *Lebowa Platinum Mines* principles[24] are generally applied in determining the substantive fairness of a dismissal in response to a demand by a third party.

3 *EAST RAND PROPRIETARY MINES LTD V UPUSA (ERPM)*[25]

The issues put before Cameron JA (as he then was) in *ERPM* concerned a situation where mass dismissal of employees of one ethnic group was effected to placate the demand of another. The circumstances surrounding the demand by a section of the workforce for the dismissal of employees belonging to another ethnic group are aptly captured with customary lucidity:

> "[t]he concerned employees addressed a letter to the general manager of ERPM. It asked of management an answer to the following question: '*Are the employees have the right to dismiss other employees just because they don't want them?'* [sic] *No amount of verbal elaboration or supposed legal sophistication can express more powerfully the question a dismissal at behest of a third party raises."* [26]

This graphically underscores a difficult problem in fair employment practice when an employer faces a demand for dismissal by a third party. To make things worse, the demand for the dismissal of the targeted employees was predicated on an illegitimate foundation.[27] Put bluntly, it amounted to

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[23] See e.g., *Lebowa Platinum Mines supra; Kroeger v Visual Marketing* (2003) 24 *ILJ* 1979 (LC) (*Kroeger*); *Govender v Mondi Kraft-Richards Bay* (1999) 20 *ILJ* 2881 (LC) (*Govende*r); *TSI Holdings supra; Hendor Mining Supplies supra*. See also Botha "Managing Racism in the Workplace" 2018 *THRHR* 671; Khumalo "Racism in the Workplace: A View From the Jurisprudence of Courts in the Past Decade" 2018 30 *SA Merc LJ* 377; Thabane and Rycroft "Racism in the Workplace" 2008 29 *ILJ* 43. Recent cases of aversive workplace racism include: *Rustenburg Platinum Mines v SAEWA obo Bester* (2018) 39 *ILJ* 1503 (CC); *Duncanmec (Pty) Ltd v Gaylard NO* (2018) 39 *ILJ* 2633 (CC); *SARS v CCMA* (2017) 38 *ILJ* 97 (CC).

[24] Kroon JA in *Lebowa Platinum Mines supra* 671–673 formulated the following principles:

- the mere fact that a third party demands the dismissal of an employee does not render such dismissal fair;
- the demand for the employee's dismissal must have good and sufficient foundation;
- the threat of action by the third party if its demand was not met had to be real or serious;
- the harm that would be caused if the third party were to carry out its threat must be substantial – mere inconvenience is not enough to justify dismissal;
- the employer must make reasonable efforts to dissuade the party making the demand to abandon the demand – if the third party cannot be persuaded to drop the demand, the employer must investigate and consider the alternatives to dismissal; and
- in the process of considering alternatives, the employer must consult the employee and make it clear to him or her that the rejection of any possible alternative will result in dismissal.

[25] *Supra.*

[26] *ERPM supra* 1150D (emphasis added).

[27] In De Doorns, locals demanded dismissals of mainly Zimbabwean nationals. See Misago *Violence, Labour and the Displacement of Zimbabweans in De Doorns, Western Cape* 2009 Issue Brief 2 African Centre for Migration & Society: University of Witwatersrand http://migration.org.za (accessed 2018-03-18); Visser *Farm Workers' Living and Working Conditions in South Africa: Key Trends, Emergent Issues, and Underlying and Structural Problems* ILO (2015).

discrimination on the basis of ethnicity impinging upon the affected employees' human dignity. If the demand does not enjoy legitimate foundation, there must be special considerations that exist to sustain such dismissals. The learned judge explained:

> "Where a dismissal is actuated by operational reasons which arise from ethnic or racial hostility, the court will in my view countenance the dismissal only where it is satisfied that management not only acted reasonably, but it had no alternative to dismissal ... In a country that consists of linguistic, ethnic and other minorities, public policy ... requires that a test of necessity, and not reasonableness, should be applied in scrutinising management's action in dismissing workers in such circumstances."[28]

ERPM and *CWIU v Boardman Bros (Pty) Ltd*[29] are different sides of the same coin. *Boardman Bros* concerned the dismissal of black workers following illegal industrial action that was triggered by the recruitment of coloured employees. The black workers had demanded that coloured workers be dismissed. In an appeal against their dismissal, the workers contended that, although their strike was illegal, it was justified because of the fear that their job security was in jeopardy as a result of the change in recruitment policy.

The Industrial Court found that the fears of black workers that the introduction of coloured employees would lead to their dismissal were unfounded. Maritz AM felt that their discontent was understandable, but not morally defensible. In upholding the fairness of the dismissals, it was stressed that the striking workers' stance was unjustified and that their demand enjoyed no legitimate foundation.

4 THE CORPORATE GOVERNANCE MIGRAINE AND WORKERS' DEMANDS FOR ACCOUNTABILITY

Unlike the outright bigotry displayed in *ERPM* and *Boardman Bros*, in *National Lotteries Board*[30] the demand for the board to dismiss the CEO resonated with the foundational constitutional tri-norms of accountability, responsiveness and openness.[31] Moreover, the demand touched on corporate governance *angst*.[32] The piercing truth was eloquently delivered by Professor Njabulo Ndebele during the Mandela Centenary Lecture. Ndebele castigated those public officials who, "by wilful intent, cause the propeller of the state to stop spinning in mid-air".[33] In the present context, the

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28 *ERPM supra* 1151B and F–G.

29 (1991) 12 *ILJ* 864 (IC) (*Boardman Bros*).

30 *Supra.*

31 *President of RSA v SARFU* 2001 (1) SA 1 (CC) par 133. See also Okpaluba "The Constitutional Principle of Accountability: A Study of Contemporary South African Case Law" 2018 33 *SAPL* 1.

32 Thabane and Snyman-Van Deventer "Pathological Corporate Governance Deficiencies in South Africa's State-Owned Companies: A Critical Reflection" 2018 21 *PER/PELJ* 1.

33 Klaas "Failure to Face Tribal Strongmen Will Be Cyril's Downfall" (2018-07-22) *IOL* https://www.msn.com/en-za/news/editorpicks/failure-to-face-tribal-strongmen-will-be-cyril%E2%80%99s-downfall/ar-BBKVH4W?li=AAaxc0E&ocid=spartanntp (accessed 2018-07-24).

employees, through their shop stewards, had addressed a letter to the Board raising grievances about the leadership of the Board's CEO: "the employees said they had 'suffered adversely under [the CEO's] bureaucratic leadership style and his inept management approaches.'"[34] In this regard, they sought information about the CEO's terms of contract from the employer.[35] The employer refused to disclose them.

Unconvinced with the Board's response, they referred the matter to the CCMA. During the conciliation processes, the employees wrote a letter containing various allegations against the CEO. This letter was leaked to a national newspaper. Subsequently, the employees addressed a petition to the Board making further allegations against the CEO, and passing a vote of "no confidence" in him. The conciliation process was not resolved. The employer warned that if the petition was not withdrawn it would institute disciplinary proceedings. When some employees refused to withdraw the petition, the employer instituted disciplinary proceedings. During this process, the employees were offered another opportunity to withdraw their names from the petition and be issued with written warnings. The employees chose not to withdraw their names and were subsequently dismissed.

The employees unsuccessfully challenged their dismissals in the Labour Court. In challenging the dismissals, the union's cresting argument was that the dismissals were automatically unfair because the employees' conduct constituted participation in the lawful activities of the union.[36] In the alternative, it was submitted that even if the dismissals were not automatically unfair, they were nevertheless substantively unfair.

The Labour Court found that, although a union may vigorously pursue the rights of its members, the right to freedom of expression does not afford a union and its members the right to engage, without consequences, in acts of gross insubordination. The employees did not prevail in their appeal to the Supreme Court of Appeal,[37] which unanimously found that the cause of their dismissal was the offensive content they had communicated in the petition, not the act of petitioning itself.

The Constitutional Court reversed the judgment of the Supreme Court of Appeal. In the majority judgment, the court held that the statements made by the employees were in pursuit of the ongoing statutory conciliation process, and in the exercise of their rights to participate in collective bargaining. Zondo J found that the employees' conduct constituted lawful activities of a union. Their dismissals were accordingly automatically unfair. Furthermore, the failure to use the statutory dispute-resolution mechanisms or to table their grievances internally did not render them guilty of insubordination. In the result, the Board was ordered to reinstate the employees.

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34 *National Lotteries Board supra* par 114.

35 *National Lotteries Board supra* par 4 and 109–113.

36 Ss 5(2)(*b*) and 5(2)(*c*)(iv) of the LRA. *National Lotteries Board supra* par 28–30 and 136–149.

37 *NUPSAWU obo Mani v National Lotteries Board* (2014) 34 *ILJ* 1885 (SCA).

5 STRIKING IN SUPPORT OF A DEMAND THAT A CO-EMPLOYEE BE DISMISSED?

The question whether employees can embark upon a collective refusal to work in support of a demand that another employee be dismissed brings to the fore the fairness or otherwise of a dismissal at the behest of a third party. Section 23 of the Constitution,[38] as amplified by sections 185 and 64 of the Labour Relations Act[39] (LRA), provide the anvil upon which the details will be beaten in order that a clear position can emerge.

There can be no doubt that to demand an employee's dismissal without a fair hearing is unlawful – as is a situation where a third party insists on dismissal of an employee who has been disciplined but not dismissed. Can management review the outcome of the disciplinary hearing in order to placate those demanding the dismissal of their fellow employee? Put another way, can the employer proceed against the employee twice over for the same offence? This takes us back to the complex problem of double jeopardy[40] or duplicated disciplinary hearings.[41] Whether a second disciplinary enquiry may be opened against an employee depends on whether it is, in all circumstances, fair to do so.[42] The paramount consideration, however, is fairness to both sides.[43] Subjecting an employee to a second disciplinary hearing and dismissing him or her so as to assuage a third party would certainly be unfair and amount to double jeopardy. In sum, it would be wrong for an employer to overrule the decision of a presiding officer in response to a coercive third party demand.

Intolerability of an employee in *Hendor Mining Supplies*[44] was triggered by a supervisor's alleged racial and degrading utterances. The supervisor was disciplined and a final written warning was issued. Unfortunately, however, the disciplinary enquiry was a sham. It left the employees unsatisfied, bitter and still disgruntled. They subsequently embarked on a work stoppage. Despite attempts by the union to resolve the dispute, the employees were dismissed as a consequence of their unlawful conduct. Subsequently, an agreement was reached in terms of which the employees were reinstated on a final warning and on condition that they undertook to report to the supervisor. Notwithstanding the agreement, the employees persisted with the demand that the supervisor's services be terminated.

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38 Constitution of the Republic of South Africa, 1996 (Constitution).

39 66 of 1995.

40 This concept was developed by the United States Supreme Court based on the interpretation of the Fifth Amendment to the American Constitution. See e.g., *Barktus v Illinois* 359 US 121 1959; *Benton v Maryland* 395 US 784 1969. The constitutional proscription on double jeopardy is enshrined in s 35(3)(*m*) of the 1996 Constitution. For a detailed analysis, see *S v Basson* 2005 (1) SA 171 (CC) par 61–69.

41 Le Roux "Can Employers Review the Outcomes of Disciplinary Proceedings?" 2016 25(7) *CLL* 70; Grogan "Double Jeopardy: Are Duplicated Disciplinary Inquiries Allowed?' 2000 16(1) *EL* 15.

42 *BMW (SA) (Pty) Ltd v Van der Walt* (2000) 21 *ILJ* 113 (LAC) par 21.

43 *Woolworths (Pty) Ltd v Whitehead* (2000) 21 *ILJ* 571 (LAC) 599H–I.

44 *Supra.*

Management's stance was that there was no dispute as the dispute regarding the supervisor had been resolved by the agreement that had reinstated the employees on condition that they report to the supervisor. The employer issued an ultimatum to the effect that the striking employees would be dismissed if they failed to return to work. After the union could not obtain an interdict restraining the employer from dismissing employees,[45] they tendered their services. They also withdrew their demands in regard to the supervisor. Management reciprocated by declining the tender and by suspending them on full pay. Following disciplinary proceedings, the employees were dismissed.

The Labour Court noted that the strike was conducted in a peaceful manner. Moreover, the strikers tendered services as soon as they come to the realisation that their interdict application was dismissed. Cele J reinstated the employees reasoning that the unfairness of the enquiry against the supervisor rendered subsequent dismissals unfair.[46]

TSI Holdings[47] did not settle the question whether a work stoppage in support of a demand for the dismissal of a manager would be protected where the dismissal would not infringe the targeted employee's right not to be dismissed unfairly. As a consequence of threats of industrial action, the employer suspended the manager with full benefits for alleged use of foul language against staff. The suspension was "pending the outcome of negotiations and legal proceedings to be held".[48] It was contended by the appellant that the demand for the manager's dismissal was unlawful and a strike made up of a concerted refusal to work in support of an unlawful demand could not be a protected strike. The union countered by pointing out that the strike's purpose was to get the employer to subject the manager to a fair disciplinary process. More importantly, the employees were willing to accept whatever outcome would flow from a fair disciplinary process. In turn, the employer drew attention to the fact that, when it suspended the manager and asked the union also to suspend the strike, it refused to do so.

The Labour Appeal Court found that the concerted refusal at hand is one that had a demand – namely, to compel the employer to dismiss the offending manager.[49] It followed that the union cannot plausibly argue that this was a strike where no demand has been articulated. The next question that fell to be determined was whether such a demand was an unlawful one. Although the learned judge declined to provide a categorical answer, it is nonetheless safe to assume that it is permissible for employees to engage in a concerted refusal to work in support of a demand that an employer dismiss an employee fairly. Zondo JP elaborates:

> "I have in mind the case of an employee who has been charged with, and found guilty of, misconduct that is sufficiently serious to render his dismissal fair but whom the employer decides not to dismiss. Let us say that employees found guilty of fraud have consistently been dismissed in a particular company

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45 *NUMSA v Hendor Mining Supplies (A Division Marschalk Beleggings) (Pty) Ltd* (2003) 24 *ILJ* 2171 (LC).

46 *Hendor Mining Supplies (2007) supra* par 39.

47 *Supra.*

48 *TSI Holdings supra* par 8.

49 *TSI Holdings supra* par 38.

> for many years but in one case the employer decides that in a particular case he will not dismiss the employee because of some unacceptable reason such as that he is white and the others who had been dismissed for similar offences were black.[50] Let us assume that the loss resulting from such fraud for the employer is a million rand. It seems that in such a case, if the employee was guilty of such serious misconduct that would, quite clearly, be a fair reason for his dismissal. In such a case it may well be that, if there was a disciplinary inquiry and such employee was found guilty of such serious misconduct but was not dismissed on such unacceptable grounds as racist grounds, a demand that the employer dismiss such employee cannot be said to be a demand for the employer to act unfairly. It may well be that in such a case it is arguable – and I put it no higher than that – that such a demand may form part of a protected strike."[51]

If the targeted manager's dismissal was to be sustained as being fair and, therefore, not abridging his right not to be dismissed unfairly, it goes without saying that there must be evidential foundation for alleged use of racial invective. In the instant matter, there was no admissible evidence because the persons who were with the offending manager when he allegedly made the offensive remarks and who allegedly heard the remarks did not depose to any affidavits.[52] If the employees persisted with the demand that the employer dismiss the manager in violation of his rights provided for in section 185 read with section 188 of the LRA, "he might well have been able to approach a court or forum of competent jurisdiction and sought either a declarator that such dismissal, if effected, would be unfair and in breach of sections 185 and 188 or he could have sought an interdict restraining the appellant from dismissing him".[53] Provided that the usual requirements for an interdict could be met, and an interdict is granted, the employer would definitely be entitled to refuse to comply with the employees' demand.[54] It also means that the union and its members could not persist with the demand at that stage as the demand would in effect be requiring the employer to act in contempt of an order of court and, therefore, to commit the crime of contempt. In short, the demand made by the respondents to the appellant fell "outside the category of demands that can be supported by a concerted refusal to work, retardation or obstruction of work envisaged in the definition of the word 'strike' in section 213 of the Act".[55]

Returning to the *National Lotteries Board* case,[56] Zondo J found that the union and employees did not demand the CEO's dismissal, but strongly recommended his dismissal.[57] A reading of the petition disclosed that there was no justification for the suggestion that the employees demanded that the CEO be dismissed without a hearing. The board could have put the

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50 This brings to the fore the tension between consistency or the parity principle and progressive discipline in determining an appropriate sanction. See e.g., *Absa Bank v Naidu* (2015) 36 *ILJ* 602 (LAC); *Seakamela and Magalies Water* (2014) 35 *ILJ* 1132 (CCMA); *NUM v Amcoal Colliery t/a Arnot Colliery* [2008] 8 BLLR 869 (LAC).

51 *TSI Holdings supra* par 39.

52 *TSI Holdings supra* par 44.

53 *TSI Holdings supra* par 47.

54 *TSI Holdings supra* par 47.

55 *Bader Bop (Pty) Ltd v NUMSA* (2002) 23 *ILJ* 104 (LAC) par 40–50; *NUMSA v Bader Bop (Pty) Ltd* (2003) 24 *ILJ* 305 (CC) par 24.

56 *Supra.*

57 *National Board Lotteries supra* par 199.

allegations to him to deal with before deciding to dismiss him if there was a fair reason for his dismissal. The petition also revealed that the employees did not threaten to stop working after 30 June if the CEO was still employed in that capacity. They held back from stating what would happen if he was still the CEO after 30 June 2008.

6 GENDERED PRECARIOUSNESS AND DISCRIMINATORY RETRENCHMENTS

The case of *Chuma*[58] presents the opportunity to consider some of the interesting problems raised by the dismissal of 28 female security guards, ostensibly for operational reasons as a result of pressure exerted by the client of the temporary employment service. The reason was that Chuma Security Services' client, Metrorail, requested it to employ fewer women and more men as security guards. Chuma was presented with a Hobson's choice: either it could retain reliable female security officers and risk losing the Metrorail contract, or it would have to terminate the services of the targeted employees, thereby contravening section 187(1)(*f*) of the LRA by unfairly discriminating against the female employees on the basis of gender. In order to assuage the client, and at the same time avoid losing a lucrative contract, Chuma chose to retrench the female security guards.

6 1 Did the demand for removal of female guards have legitimate foundation?

If not siblings, *Nape v INTCS Corporate Solutions (Pty) Ltd*[59] and *Chuma* are certainly first cousins. In *Nape*, the essential dispute concerned the dismissal by a labour broker of an employee at the behest of a third party. The employee had sent an email containing offensive material at the client's premises and the client demanded the removal of the employee. It was a term of the contract between the client and the labour broker that the client could demand the removal of an employee for any reason whatsoever. In defending an unfair dismissal claim brought by the employee, the employer relied on *Lebowa Platinum Mines*[60] and argued that there was nothing it could do after the client demanded the removal of the employee. It also argued that in the circumstances it could legitimately invoke the provisions of section 189 of the LRA as it had very little bargaining power with the client. The Labour Court found that the employer and the client could not structure their contractual relationship in a way that would effectively treat employees as commodities to be passed and traded at the whims and fancies of the client and that the contractual relationship should not be structured in a way that undermines the employee's constitutionally guaranteed rights. In holding the client's demand illegitimate, the Labour Court invoked the following rationale:

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58 *Supra.*

59 (2010) 31 *ILJ* 2120 (LC) (*Nape*). See Nkhumise "Dismissal of an Employee at the Instance of a Client: Revisiting *Nape v INTCS Corporate Solutions (Pty) Ltd in the Context of the Labour Relations Amendment Act 6 of 2014*" 2016 20 *LLD* 106.

60 *Supra.*

> "An illegal demand can never found the basis to justify a dismissal based on operational requirements just as it cannot form the basis of a lawful strike. By the same token s189 cannot be used to disguise the true reason for dismissal."[61]

On the facts in *Chuma*, two things are immediately notable about the unlawfulness of the demand for removal of female security personnel. The first is that its focus on female employees constitutes a serious encroachment on the right to equality, dignity and fair labour practice as amplified in the Employment Equity Act (EEA)[62] and the LRA. Indeed, "Chuma conceded that, but for the fact that the applicants were women, their employment would not have been terminated. They were dismissed to make way for male security officers."[63] The second is the relative lack of substantive reasons for the dismissal of the affected employees. To put it bluntly, the female security officers were good workers because "they did not miss work and they did not attend work with a hangover".[64] Compared to the road rage killer in *Kroeger v Visual Marketing*,[65] there was no fault or degree of moral turpitude that could be attributed to the retrenched female security officers aside from the fact that the call for their replacement was predicated on their gender. To this may be added that Chuma was alive to the fact that the demand by Metrorail that resulted in the dismissal of the applicants was unlawful and in fact contravened the equality laws.[66] This means that the dismissals were automatically unfair as envisaged by section 187(1)(*f*) of the LRA.

6 2 The tension between the third-party demand and the norm of accountability

A reading of *Chuma*[67] leads one to an inevitable tension between the third-party demand for replacement of female security officers and the norm of accountability. Foremost, PRASA/Metrorail as an organ of state is bound to uphold and respect fundamental rights while acting both ethically and accountably.[68] The constitutional tri-norms of accountability, responsiveness and openness are embodied in section 1(*d*) of the Constitution. Apart from playing a focal role in adjudication,[69] the accountability norm[70] closely

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61 *Nape supra* par 72.

62 55 of 1998.

63 *Chuma supra* par 50.

64 *Chuma supra* par 7.

65 (2003) 24 *ILJ* 1979 (LC).

66 *Chuma supra* par 53.

67 *Supra.*

68 S 195(1)(*f*) of the Constitution. See *Families of Mental Health Care Users Affected by the Gauteng Mental Marathon Project and National Minister of Health of the RSA* (2018) par 157–159. See also Maloka and Jili "The Role of the Judiciary in Promoting Accountability, Responsiveness and Openness: Lessons from *Life Esidimeni Arbitration* and *Black Sash/SASSA* Litigation" 2019 54 *Journal of Public Administration* 105; Van der Merwe "*Life Healthcare Esidimeni*: A (Human Rights) Dream Deferred" 2018 39 *Obiter* 289.

69 Okpaluba and Osode *Government Liability: South Africa and the Commonwealth* (2010) 223–226.

intersects with the protection and advancement of fundamental rights of women[71] and children.[72] *Carmichele v Minister of Safety and Security*[73] and *K v Minister of Safety and Security*[74] have given authoritative views on the norm of accountability when fundamental rights are at stake. Clearly, a demand for the removal of female security guards is at variance with the norm of accountability. It involved gendered harms[75] and encroachment on the fundamental rights of vulnerable employees in the wake of incidents of sexual assaults while on duty. In addition, it cannot be said that the posture adopted by Metrorail and Chuma accords with the spirit, objects and purport of the Bill of Rights.

In the same breath, it is also unethical as it reinforces intersecting patterns of race and gender discrimination in society.[76] It is widely accepted that black women in South Africa have suffered multidimensional oppressions

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70 Okpaluba "Delictual Liability of Public Authorities: Pitching the Constitutional Norm of Accountability Against the 'Floodgates' Argument" 2006 20 *Speculum Juris* 248.

71 See e.g., *Tshabalala v S* 2020 (3) BCLR 307 (CC); *Omar v Government of the RSA* 2006 (2) SA 289 (CC); *Bhe v The Magistrate, Khayelitsha* 2005 (1) SA 563 (CC).

72 See e.g., *Tshabalala v S; Ntuli v S* 2020 (5) SA 1 (CC); *Levenstein v Estate of the Late Sydney Frankel* 2018 (2) SACR 283 (CC); *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 (2) SA 168 (CC); *HOD, Department of Education, Free State Province v Welkom High School* 2014 (2) SA 228 (CC); *Bannatyne v Bannatyne* (*Commission for Gender Equality as Amicus Curiae*) 2003 (2) SA 363 (CC).

73 2001 (4) SA 938 (CC).

74 2005 (6) SA 419 (CC). See also Roederer "The Constitutionally Inspired Approach to Vicarious Liability in Cases of Intentional Wrongful Acts by the Police: One Small Step in Restoring the Public's Trust in the South African Police Services" 2005 21 *SAJHR* 575.

75 The essence of "gendered harm" theory is that the quality of women's suffering is different from that of men. Conaghan ("Gendered Harms and the Law of Tort: Remedying (Sexual) Harassment" 1996 16 *OJLS* 407 407) elucidates: "From a societal perspective, feminists have argued that women suffer particular harms and injuries *as women*: their experience of pain and injury is distinguishable, to a large extent, from the experience of men. This claim has at least two dimensions. On the one hand pregnancy and childbirth, menstrual and/or ovulation pains are obvious examples of gender-specific "harms". Men do not/cannot experience these traumas directly. On the other hand, the concept of gendered harm can also embrace those harms which, although not exclusive to women in any biological sense, are risks which women are more likely to incur than men – the risk of rape, incest, sexual harassment, spousal abuse or, more contentiously, the risk of harmful medical intervention. Although men can and do experience these harms also, they are, arguably, less likely to do so. Moreover, in so far as they do incur such risks, their experience of them as men is different and distinct from how they are experienced by women."

76 *Brink v Kitshoff NO* [1996] 6 BCLR 752 (CC) par 44. This also brings to the fore the grotesque facts of *Ntsabo v Real Security* (2003) 24 *ILJ* 2341 (LC) and *Moatshe v Legend Golf & Safari Resorts Operations (Pty) Ltd* [2014] 12 BLLR 1213 (LC). See generally, Zalesne "The Effectiveness of the Employment Equity Act and the Code of Good Practice in Reducing Sexual Harassment" 2001 17 *SAJHR* 507 509; Rycroft and Perumal "Compensating the Sexually Harassed Employee" 2004 25 *ILJ* 1153; Le Roux "Sexual Harassment in the Workplace: Reflection on *Grobler v Naspers*" 2004 25 *ILJ* 1897; Whitcher "Two Roads to an Employer Liability for Sexual Harassment: *S Grobler v Naspers Bpk en Ander* and *Ntsabo v Real Security CC"* 2004 25 *ILJ* 1907; Mukheibir and Ristow "An Overview of Sexual Harassment: Liability of the Employer" 2006 27 *Obiter* 248; Whitear-Nel "'Do You Want a Lover Tonight?' *Simmers v Campbell Scientific Africa (Pty) Ltd* (2016) 37 *ILJ* 116 (LAC)" 2017 38 *ILJ* 769; McGregor "'Do You Want a Lover Tonight?' Does This Question Constitute Sexual Harassment? *Simmers v Campbell Scientific Africa (Pty) Ltd* (2014) 35 *ILJ* 2866 (LC)" 2016 79 *THRHR* 324. See also "Sexual Harassment: Why Do Victims So Often Resign? *E v Ikwezi Municipality* 2016 37 *ILJ* 1799 (ECG)" 2019 22 *PER/PELJ* 1.

and have been marginalised by virtue of being both black and female.[77] Examined through the prism of critical race theory,[78] the retrenchment of female security guards as a result of mounting third-party pressure more than typifies the precariousness of triangular employment relationships; it underscores the porous boundary between gendered vulnerability and the double jeopardy of subordination: female and black. Indeed, precariousness is inherently gendered and racialised.[79]

6 3 The intersection of public authority liability and the demand for replacement of female security officers

As already noted, cogent reasons exist for denigrating the demand for removal of female security personnel. One might ask: how, if the demand is both unlawful and discriminatory, is there a scope for finding that management's call makes sense and is indeed rational? The answer lies in the South African law of public authority liability, a site of burgeoning jurisprudence.[80]

Behind Metrorail's insistence on the removal of female security officers, lie business imperatives aligning with the pressing concern for rail commuter safety. Its hardened attitude can be ascribed to the freighted issue of public authority liability. To the extent that this is true – that is, to the extent that the demand for the replacement of female security officers was to enhance safety and minimise the risk of vicarious liability – it taps into important reality. The apex court in *Rail Commuters Action Group v Transnet Ltd t/a Metrorail*[81] recognised that the rail commuter services carry a positive obligation to implement reasonable measures to ensure the safety of rail commuters who travel on the trains, and that such obligation should give rise to delictual liability where there is a risk of harm to commuters resulting from falling out of the crowded trains running with open doors, which is foreseeable.

It is widely acknowledged that rail commuter services carry a positive obligation to implement reasonable measures to ensure the safety of all

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77 See generally, O'Regan "Equality at Work and the Limits of the Law: Symmetry and Individualism in Antidiscrimination Legislation" 1994 *AJ* 64 65; Romany "Black Women and Gender Equality in a New South Africa: Human Rights Law and the Intersection of Race and Gender" 2017 21 *Brook J Int. L* 857 861. For an historical account of intersectionality between race, class and inequality, see Seekings and Nattras *Class, Race and Inequality in South Africa* (2006).

78 For a sampling of critical race theory research, see Crenshaw "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Anti-Discrimination Doctrine, Feminist Theory and Anti-Racist Politics" 1989 1 *University of Chicago Legal Forum* 139; "Mapping Margins: Intersectionality, Identity Politics, and Violence Against Women of Colour" 1991 43 *Stan LR* 1241 and "Twenty Years of Critical Race Theory: Looking Back to Move Forward" 2011 43 *Conn LR* 1253.

79 Cooper "Women and the Right to Work" 2009 25 *SAJHR* 573 578–579.

80 Okpaluba "The Law of Bureaucratic Negligence in South Africa: A Comparative Commonwealth Perspective" 2006 *AJ* 117.

81 2005 (2) SA 359 (CC) (*Rail Commuters Action Group*) par 84.

commuters who travel on the trains.[82] The primary responsibility for ensuring that measures are in place, irrespective of whether a service provider is assigned to implement them, rests with Metrorail and the Commuter Corporation.[83] Seen through the prism of public authority liability, it is submitted that Metrorail's hostile approach is not necessarily underpinned by antipathy towards the deployment of female officers *per se* – the problem was their alleged ineffectiveness. If regard is had to the risk of delictual liability, the stance adopted by Metrorail makes perfect sense. Therefore, the insistence on a change of security personnel in circumstances where services were inadequately performed was simply to ensure that constitutional and statutory obligations are fulfilled.

6 4 How serious and imminent must the threat be?

The other important element for an employer to establish is that the third party's threat (if its demand is not met) was real or serious. In this regard, the employer must lead convincing evidence as to the outside pressure it was under as well as demonstrate that non-compliance would have brought the company to a standstill resulting in irreparable harm.[84] A mere inconvenience would not be enough. In many instances, the economic consequences to the employer should a third-party threat materialise would not be challenged. The decisive question is whether the employer properly assessed the threat as being sufficiently serious and imminent for it not to be overlooked, and for it to take a drastic step in respect of the offending employee's position?

Although Chuma appreciated that the client's request lacked substance and was patently unlawful, it contended that the threat of losing the Metrorail contract loomed large. It should be remembered that the underlying rationale of outsourcing is that the outsourcer is in a position to bring in a specialist service provider and to ensure quality of service via the terms of the outsourcing contract (so-called "management by contract") and the threat of non-renewal of that contract if such services are not adequately performed.[85] Defying the client meant non-renewal of the contract. Metrorail wanted fewer female security officers and, as service provider, Chuma has to do as demanded by the client.[86] The threat of non-renewal of the monthly contract

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82 Reporter "Prasa Worker in Stable Condition After Attack on CT Northern Line" https://ewn.co.za/2018/02/08/prasa-worker-in-stable-condition-after-attack-on-ct-northern-line (accessed 2018-07-19).

83 *Rail Commuters Action Group supra* par 73–78 and 84; *Mashongwa v PRASA* 2016 (3) SA 528 par 52; *PRASA v Mobil* [2017] 4 All 648 (SCA) par 32–34. See Okpaluba and Osode *Government Liability* 225–226.

84 For e.g., in *ABI (Pty) Ltd v Jonker* (1993) 14 *ILJ* 1232 (LAC), the court was not convinced that a threat of a national strike by 1.2 million workers and its likely effect on the company's operations was sufficient to justify the dismissal of the targeted manager. In that case, FAWU had demanded that Jonker be dismissed because of past affiliations with the security police and his involvement in the assault of union members. The fact that termination would ensure normal operations was found not to be compelling justification; the employer was required to satisfy the court that the problem created by the third party could only be solved by terminating the employee's services. See also *Mnguni v Imperial Systems (Pty) Ltd t/a Imperial Distributors* (2002) 23 *ILJ* 492 (LC).

85 Grogan "Outsourcing Workers: A Fresh Look at Section 197" 2000 16 *EL* 15 24.

86 *Chuma supra* par 8

could not be taken lightly because "the e-mail from Blom had been copied to senior people within PRASA, who had the powers to terminate the contract".[87] With the threat of the Metrorail contract cancellation in mind, Chuma acted with deliberate speed in informing PRASA that 50 female employees would be retrenched.

Although the threat of non-renewal of contract was imminent, the question that may be asked is: what measures are at the disposal of a labour broker when a client demands unlawful removal of an employee? Answering this question, the Labour Court in *Nape*[88] expressed the view that:

> "[t]he labour broker is in fact not powerless to resist its client's attempt to wield its bargaining power in a way which undermines the fundamental rights of employees. The labour broker is entitled to approach a court of law to compel the client not to insist upon the removal of an employee where no fair grounds exist for that employee to be removed."[89]

This is what Chuma ought to have done as it rightly conceded that the client's demand infringed upon employees' fundamental rights. The point is aptly driven home by the court in *Nape* as follows:

> "The respondent labour broker could have accordingly resisted the client's attempts to invoke clauses in its contract with the client which undermined the applicant's rights. It was unfair of it not to do so before invoking its right to terminate the contract of employment for operational requirements and also because the demand of the client was unlawful and unfair." [90]

If Metrorail terminated the contract because of Chuma's failure to comply with its unlawful demand, the labour broker could approach the Labour Court for urgent relief. This brings to the fore a perennial headache for the Labour Court.[91] The shores of the Labour Court's urgent roll are littered with wrecks from unsuccessful declaratory and interlocutory applications in which the court is asked to intervene in disciplinary proceedings that were hardly out of the starting block and certainly not finalised.[92] The Labour Court's orthodox position is clear – namely, that courts will only intervene on an urgent basis if truly exceptional circumstances are shown to exist – for instance, where the constitutional rights of an employee are being "trampled".[93]

It is appropriate to refer to some striking illustrations where such exceptional circumstances were found to exist. A proper practical illustration is the decision in *Minister of Labour v PSA*[94] itself, which dealt with the

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87 *Chuma supra* par 23.

88 *Supra.*

89 *Nape supra* par 77.

90 *Nape supra* par 86.

91 Cohen "Precautionary Suspensions in the Public Sector: *MEC for Education, North West Provincial Government v Gradwell* (2012) 33 *ILJ* 2012 (LAC)" 2013 34 *ILJ* 1706.

92 See Maloka "Interdicting an In-House Disciplinary Enquiry With Reference to *Rabie v Department of Trade and Industry* 2018 ZALCJHB 78" 2019 44 *JJS* 10; Maloka and Peach "Is an Agreement to Refer a Matter to an Inquiry by an Arbitrator in terms of Section 188A of the LRA a Straightjacket" 2016 49 *De Jure* 368. This aspect of labour dispute resolution continues to generate countless cases: *Matlala v Greater Tzaneen Local Municipality* [2020] ZALCJHB 2; *Long v SA Breweries* (2019) 40 *ILJ* 965 (CC).

93 *Bargarette v PACOFS* 2007 ZALC 182.

94 (2017) 38 *ILJ* 1075 (LAC).

revocation of an employee's designation as a Registrar of Labour Relations in terms of the LRA, and his resultant removal from that position, for reasons that were entirely irrational and invalid and where there was in reality no alternative remedy. Another illustration is the well-known matter of *Solidarity v SABC*,[95] which concerned the dismissal and victimisation of reporters for being critical of policy decisions by the SABC as a public broadcaster, which conduct violated the constitutional rights of the employees, and even infringed on the right of the public to be properly informed. The situation in *Chuma*[96] is a classic example of exceptional circumstances that may warrant the Labour Court to grant an interim order restraining a party from exercising contractual power in a manner that impairs the fundamental rights of female employees.

It is clear from eminent authorities[97] that the general thrust of section 8(2) of the Constitution is not to obstruct private autonomy or to impose on a private party the duties of the State in protecting the Bill of Rights. Put simply, the requirement is rather that private parties not interfere with or diminish the enjoyment of a right.[98] If Metrorail terminated the contract with Chuma as a result of the latter's failure to remove female security personnel, such a measure would negatively infringe upon the rights of affected employees. Given that Metrorail is an organ of state, the intensity of the obligation not to negatively diminish constitutionally protected rights is greater.

6 5 Did the employer make reasonable endeavours to dissuade the third party to drop its demand?

Having regard to the pertinent facts in *Chuma*,[99] could it be said that management pressed the fruit while still green and expected it, unreasonably, to ripen? To put it differently, was the dismissal of female security officers precipitate? The question whether management had made efforts to persuade the third party to abandon its demand for the employee's dismissal would depend on the facts of each case. In most cases, the employer would be constrained by the nature of the misconduct that gave rise to the demand or the unreasonable conditions put by the third party as a precondition for withdrawing its demand.[100]

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95 (2016) 37 *ILJ* 2888 (LC) par 65–66. See also *Chubisi v SABC (SOC)* (2021) 42 *ILJ* 395 (LC).

96 *Supra.*

97 See *Jaftha v Schoeman* 2005 (2) SA 140 (CC) par 33–34; *Rail Commuters Action Group supra* par 68–71; *Minister of Health v TAC* 2002 (5) SA 721 (CC) par 46.

98 *Governing Body of the Juma Musjid Primary School v Essay NO* [2011] 8 BCLR 761 (CC) par 58.

99 *Supra.*

100 In *Govender supra*, the workforce's condition for abandoning their demand for dismissal proved unacceptable to the employer. Black employees would only accept the employee's continued employment with the company if it reinstated a black employee who had been dismissed for assaulting an Indian employee three years earlier. This would have opened a floodgate of claims for reinstatement by ex-employees who were dismissed for misconduct. Furthermore, a transfer was proposed by management but rejected by the workers on the basis that the problem itself would be transferred.

It needs to be stressed that the paramount consideration in persuading the third party to abandon the demand for dismissal is to avoid an injustice to the targeted employee. The facts in *Chuma* reveal that the employer was focused on not jeopardising its commercial relationship with the client. What is more, Chuma's representative in his testimony felt that "he was to be applauded because he has succeeded in getting Metrorail to back down on the big number of female security officers that they wanted replaced by male security officers."[101] Furthermore, the point must be made that Chuma had ammunition in resisting the unlawful, unjustified and discriminatory demand made by Metrorail. The terms of the contract with PRASA did not require the deployment of male security guards. This all points distinctly to the fact that no steps were taken by Chuma to persuade Metrorail to drop its demand; and it neither investigated the specific incidents that Metrorail relied upon in support of its demand for the removal of female security officers, nor attempted to secure alternative positions for the dismissed employees.[102] The rationale for the dismissal was to placate the client and safeguard commercial interests. Steenkamp J explains:

> "There can be no debate that termination of the employment of the applicant caused injustice to these employees, who were not at fault. They had done nothing wrong. Chuma ought to have considered this factor. There is no evidence that the factor was considered and if it was, what weight, if any, it had on the decisions ultimately made by the respondent. Against those facts, the test of necessity or fairness has not been passed by the respondent. Chuma did not have a fair reason for dismissing the applicants." [103]

In sum, the dismissal of female security officers for operational reasons was simply a ruse.

6 6 Were alternatives to dismissal genuinely explored?

At what point does dismissal become appropriate and what alternatives should an employer have explored? These considerations are central to an assessment of the fairness of dismissal at the behest of a third party. It has been suggested that fairness in this context does not require that the employer should exhaust every possibility to avoid termination but that it should act reasonably and *bona fide* and take into account alternatives to its intended course of conduct. Indeed, there is no hard-and-fast rule.

The termination of an employee's services actuated by pressure imposed upon management sits uneasily within the realm of dismissal for operational reasons. Where the demand for dismissal is attributable to the targeted employee's own reprehensible conduct,[104] then fault-based dismissal arises

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101 *Chuma supra* par 8.

102 *Chuma supra* par 60 and 67.

103 *Chuma supra* par 71.

104 In *Kroeger*, the demand for the employee's dismissal was based on his conduct – namely, the brutal killing and shooting of a black motorist during a road rage incident, coupled with the use of racial slurs at work.

for operational reasons[105] as opposed to statutory dismissal for operational reasons.[106] The fault-based termination for operational reasons prompts a closer scrutiny of management's motives and the actuating causes. This is more so when there is no culpable conduct on the part of the affected employee(s).

In *Chuma*, the decision to retrench was presented as a *fait accompli*. Chuma ignored the statutory guidelines in section 189. Pointers include that it avoided NUMSA despite the fact that the verification process had established that it had 49,5 per cent membership. In effect, NUMSA was not afforded an opportunity to put proposals on the table on possible measures to avoid dismissals. Therefore, it cannot be said that the dismissal could not have been avoided. The Labour Court cannot be faulted for holding that the retrenchment exercise embarked upon was both substantively and procedurally unfair.

6 7 Gendered and gendering dimension of precariousness

Leaving aside the obvious problem of employment vulnerability for a moment, from a critical feminist standpoint, *Chuma* illustrates in a specific way the re-production of gendered violence. Also arising is the spatial and temporal distancing through which violence is constructed. The posture assumed by the temporary employment service and the client is reflective of a masculine approach to human security. Equally, it is important to note that the demand for removal and subsequent retrenchment of female security officers casts a spotlight on how vulnerability to violence is problematised, and what kind of gendered meanings are thereby produced, mobilised and reinforced.

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[105] In *ERPM supra* 1150A–B, a distinction was drawn between normal dismissals for operational reasons and "fault" based dismissal for operational requirements. Cameron JA (as he then was) explained: "These dismissals *at the behest of third parties* were not, however, as in *Atlantis Diesel Engines,* the product of operational reasons arising from serious financial difficulties in consequence of a declining market-share. Nor were they retrenchments arising from 'outsourcing' of a portion of the enterprise's business. Nor, again, were they the product of reorganization or technological developments or electronic supersession of previous employee functions. There was in fact work for these workers to do. It was urgent that they should return it. The company could, at least in the foreseeable short term, pay them to do it. They were not dismissed because their job had disappeared. They were dismissed because the company was unable to guarantee their safety at the premises because of ethnic hostility in the workplace." The jurisprudential foundations for *sui generis* fault-based dismissal for operational reasons is the touchstone case on derivative misconduct, *Chauke v Lee Service Centre CC t/a Leeson Motors* (1998) 19 *ILJ* 1441 (LAC) par 12. In treating the misconduct as a collective issue, Cameron J explained that it is justified where one of only two employees is known to have been involved in 'major irreversible destructive action' but management is unable to pinpoint which of them is responsible for the act. In this instance, the employer may be entitled to dismiss both of them, including the innocent one, where all avenues of investigation have been exhausted. The rationalisation here is that of operational requirement – namely, that action is necessary to save the life of the enterprise. See Maloka "Derivative Misconduct and Forms Thereof: *Western Platinum Refinery Ltd v Hlebela* 2015 *ILJ* 2280 (LAC)" 2016 19 *PER/PELJ* 1.

[106] S 189 of the LRA.

Returning to *Chuma*, Metrorail raised the issue of increased crime on sites serviced by Chuma and surmised that this was due to the deployment of mostly female security officers, "who according to Metrorail could not arrest crime".[107] This was particularly true with respect to two incidents involving female guards. In one incident, a female security officer was sexually assaulted while doing cable patrol in the company of a male security officer. The other incident involved a female security guard who was attacked whilst in a guardroom on Metrorail's premises.

It can be recalled that there was no serious case of misconduct or incapacity linked to the female security officers that could perhaps justify Metrorail's demand for drastic action. On the contrary, female security guards were at a great risk of sexual assault while on patrol. The vulnerability of female security officers to violence is illustrative of "a disturbingly dark side to the often-stated miracle of our constitutional democracy."[108] Against the backdrop of intolerable levels of gender-based and sexual violence,[109] incidents of sexual assault involving female security officers on duty in a high-risk environment were fairly routine. With the police failing to contain a gendered security crisis in the Western Cape,[110] and Cape Town dubbed South Africa's real crime capital,[111] it can be argued that Metrorail was taking cheap shots by blaming female security guards for failing to arrest crime[112] South Africa's notoriety for gender-based violence hardly needs explanation.

Metrorail's keenest objections about the ineffectual female security officers and the demand for the deployment of male security guards demonstrates how gender impinges significantly on human security. In addressing the client security concerns, Chuma distanced itself from the plight of its reliable female workforce. This underscores the way in which "security" is still dominantly conceived as relating primarily to the ruptures of normal life rather than violence embedded *within it*.[113]

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107 *Chuma supra* par 6.

108 Per Van der Westhuizen J in *Loureiro v Imvula Quality Protection (Pty) Ltd* 2014 (3) SA 394 (CC) par 2.

109 See *Gender-Based Violence (GBV) in South Africa: A Brief Review* April 2016; Maloka "Rape Shield in the Wake of *S v M*" 2004 18 *Speculum Juris* 264 and "Childhood Sexual-Abuse Narratives: Taking Their Place in a Long Line of 'Gendered Harms' and 'Mirrored Silence'" 2006 20 *Speculum Juris* 78.

110 See Commission of Inquiry Into Allegations of Police Inefficiency in Khayelitsha and a Breakdown in Relations Between the Community and Police in Khayelitsha *Toward a Safer Khayelitsha* (August 2014).

111 See Nicolson "National Crime Statistics Offer Only Cursory Indicator To Understand Crime" (2017-08-22) *Daily Maverick* https://ww.dailymaverick.co.za/.../2017-08-22-urban-crime-in-the-cities-report; Staff Writer "Cape Town is South Africa's Real Crime Capital" 23 August 2017 https://ww.news24.com/SouthAfrica/.../crimestats-western-cape-is-the-murder-centre (accessed 2018-04-18).

112 *Chuma* par 61–62.

113 Marhia *Everyday (In)Security/(Re)securing the Everyday: Gender, Policing and Violence Against Women in Delhi* (Unpublished PhD Thesis, University College of London) 2012 14. Generally, Shepherd "Gender, Violence and Global Politics: Contemporary Debates in Feminist Security Studies" 2009 7 *Political Studies Review* 208; Fox "Girl Soldiers: Human Security and Gendered Insecurity" 2004 33 *Security Dialogue* 465; Gasper "Securing Humanity: Situating 'Human Security' as Concept and Discourse" 2005 6 *Journal of Human*

7 CONCLUSION

The evolving jurisprudence on the fairness of dismissals at the instance of a third party provides a telling site for appraisal of the extent to which South Africa has come to grips with the complexities of precarity. The article answers a central part of this question by illuminating the difficult tension between employment protection and the constitutional and statutory right not be unfairly dismissed, on the one side, and third-party pressure for dismissal, on the other. More centrally, the tension between the vulnerable position of the targeted employee and the coercive demand of the third party is juxtaposed with the interests and the survival of the enterprise itself.

The cases of *ERPM, Lebowa Platinum Mines* and *TSI Holdings*[114] demonstrate that bigotry is often the driving force behind third-party pressure for dismissal of an offending employee. On closer inspection, the reality is that the workplace remains a centrepoint of contestation, sparking fierce debate about reconciliation, non-racialism, transformation,[115] and commitment to an open and democratic society based on human dignity, equality and freedom. It is also evident in *TSI Holdings* that where the demand is for the misconducting co-employee to be subject to a fair disciplinary process, such a demand would constitute a legitimate issue in dispute for purposes of strike action as defined in section 213 of the LRA. In other words, a strike in support of a demand that an offending employee be hauled before a disciplinary hearing would be protected. The factual scenario in *National Lotteries Board*[116] is a partial but revealing source of the corporate governance migraine and of malfeasance in public office. This having been said, however, it bears emphasising that the judgment is an important pillar of the evolving accountability jurisprudence.

Chuma[117] illustrates how violence against women arises out of and contributes to reproducing wider, "multiple intersecting axes of inequality and discrimination". Analysed from the vantage point of a "preservation-through-transformation" thesis,[118] attempts to dismantle precariousness at work and

Development 221; Hudson "'Doing' Security as Though Humans Matter: A Feminist Perspective on Gender and the Politics of Human Security" 2005 34 *Security Dialogue* 155.

114 *Supra*.

115 The glaring example, of course is fierce contestation over the validity and implementation of affirmative action and employment equity plans. See e.g., the *Barnard* litigation in *SAPS v Solidarity obo Barnard* (2014) 35 *ILJ* 2981 (CC). See generally, Albertyn "Adjudicating Affirmative Action Within a Normative Framework of Substantive Equality and the Employment Equity Act: An Opportunity Missed" 2015 132 *SALJ* 711; Fergus "Towards Unity-Reconciling Fairness and Rationality in Affirmative Action Disputes" 2015 36 *ILJ* 41; Gaibie "Affirmative Action: Concepts and Controversies" 2014 35 *ILJ* 2655; Dupper "In Defence of Affirmative Action in South Africa" 2004 121 *SALJ* 187. Contrarian views have been expressed to the effect that affirmative action amounts to reverse discrimination; see Benatar "Justice, Diversity and Racial Preference: A Critique of Affirmative Action" 2008 125 *SALJ* 274; Louw "The Employment Equity Act, 1998 and Other Myths About the Pursuit of 'Equality', 'Equity' and 'Dignity' in Post-Apartheid South Africa (Part 1)" 2015 18 *PER/PELJ* 28 and (Part 2) 2015 18 *PER/PELJ* 29.

116 *Supra.*

117 *Supra.*

118 See Siegel "Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action" 1997 49 *Stan LR* 1111 and "'The Rule of Love': Wife Beating as Prerogative and Privacy" 1996 105 *Yale LJ* 2117.

the inequality regime may well improve the material and dignitary circumstances of subordinated workers' groups. Repudiating some of the abusive practices constitute a change in the *status quo* and further emphasises the continuities between gendered precariousness and the norms of hegemonic masculinities.

AN ANALYSIS OF THE RIGHT OF A MUSLIM CHILD BORN OUT OF WEDLOCK TO INHERIT FROM HIS OR HER DECEASED PARENT IN TERMS OF THE LAW OF SUCCESSION: A SOUTH AFRICAN CASE STUDY

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SUMMARY

This article analyses the right of a Muslim child born out of wedlock to inherit from his or her deceased parent in terms of the law of succession within the South African context.[1] The status of the child in the South African and Islamic law of intestate succession is first investigated. Thereafter, the status of the child in the South African and Islamic law of testate succession is discussed. The article further looks at the possibility of applying the Islamic law of succession provisions concerning a Muslim child born out of wedlock to the distribution of a deceased estate within the South African legal framework. The article concludes with an analysis of the findings and makes recommendations.

1 INTRODUCTION

This article analyses the right of a Muslim child born out of wedlock to inherit from his or her deceased parent in terms of the law of succession.[2] Muslims are required by their religion to ensure that, upon their demise, their estates are distributed in terms of the Islamic law of succession.[3] This article

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1 It should be noted that a child born out of wedlock is currently referred to as a child born from unmarried parents, which is the more modern term. The term "born out of wedlock" is used here as it is the wording found in the Intestate Succession Act 81 of 1987, which is analysed in this article.

2 South African Muslims follow the religion of Islaam. These persons constitute a religious minority group. The laws found within the religion of Islaam find its basis in two primary sources known as the Quraan and Sunnah.

3 It should be noted that Muslims believe that the Quraan is the word of Allaah (God Almighty). See Khan *The Noble Qur'an: English Translation of the Meanings and Commentary* 1404H (4) 13, where it states "[t]hese are the limits (set by) Allah (or

investigates the application of the Islamic law of succession provisions concerning a Muslim child born out of wedlock to the distribution of a deceased estate within the South African legal framework. The scenario that is looked at throughout this article assumes a Muslim couple (husband C and wife D) are married to each other in terms of Islamic law. Three children are born from the relationship – X, a son, Y, another son, and Z, a daughter. X was born two months before C and D concluded their Islamic marriage, Y was born two years after conclusion of the Islamic marriage, and Z was born four years after conclusion of the Islamic marriage. C, D, X, Y and Z are all Muslims in terms of this scenario. This article looks at the various possibilities of how X (the child born out of wedlock) would inherit from his deceased parent should his mother or father die either without a will (intestate), or with a will (testate). The right of a child born out of wedlock to inherit from the intestate estate of his or her deceased parent prior to 1987 is looked at by way of introduction. Thereafter the position after 1987 is discussed regarding both the South African and Islamic laws of intestate and testate succession. The options available to a parent to ensure that a child born out of wedlock would inherit from his or her estate within the South African context are then looked at. The article concludes with an overall analysis of the findings, and recommendations are made as to a way forward in this regard.

2 INTESTATE SUCCESSION LAW WITHIN THE SOUTH AFRICAN CONTEXT

In terms of Islamic law, a person is deemed to be married upon conclusion of certain requisites found within the religion of Islaam – the meeting of these requisites is referred to hereafter as an Islamic marriage. South African Muslims also have the option of concluding a marriage in terms of South African law (in addition to the Islamic marriage). Such a marriage is referred to hereafter as a civil marriage. It should be noted that, for purposes of this article, C and D have concluded only an Islamic marriage and have opted not to enter into an additional civil marriage.[4]

The South African law of intestate succession applies where a deceased (including a South African Muslim deceased who was married in terms of Islamic law) did not bequeath his or her net estate in terms of a will prior to his or her death.[5] The South African law of intestate succession is applicable to that part of his or her estate not governed by a will. The South African law

ordainments as regards laws of inheritance), and whosoever obeys Allah and His Messenger (Muhammad PBUH) will be admitted to Gardens under which rivers flow (in Paradise), to abide therein, and that will be the great success"; and 4(14), where it states "[w]hosoever disobeys Allah and His Messenger (Muhammad PBUH), and transgresses His limits, He will cast him into the Fire, to abide therein; and he shall have a disgraceful torment." The number in brackets refers to the chapter number of the Quraan. The number outside the brackets refers to the verse in the chapter.

4 This is done to highlight how South African law applies to children born from Islamic marriages.

5 See Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 and Intestate Succession Act 81 of 1987. The net estate refers to the estate left behind by a deceased person, less his or her liabilities. The liabilities would include the funeral costs, debt, and administration costs.

of intestate succession is governed primarily by the Intestate Succession Act[6] (common law of intestate succession) and the Reform of Customary Law of Succession and Regulation of Related Matters Act (customary law of intestate succession).[7] The contents of these two Acts are similar with some minor variations. The main difference (relevant to this article) lies in the fact that the customary law of intestate succession provides for a larger number of persons in the category of descendants (including children).[8] It additionally includes acceptance and union ties as a basis to inherit as descendants in terms of intestate succession law.[9] A further discussion on this issue is beyond the scope of this article.

Prior to 1988, a child born out of wedlock did not qualify to inherit from the intestate estate of his or her deceased "father" in terms of South African law. However, he or she did qualify to inherit from his or her deceased mother.[10] The status of a child born out of wedlock was changed in 1988 when the Intestate Succession Act came into operation.[11] Section 1(2) of the Intestate Succession Act states: "Illegitimacy shall not affect the capacity of one blood relation to inherit the intestate estate of another blood relation."[12] A child born out of wedlock is therefore now entitled to inherit as a descendant of both parents in terms of the South African law of intestate succession. X would now be entitled to inherit from the intestate estate of D, his deceased mother, as well as from the deceased estate of C, his deceased father.[13]

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6 81 of 1987 (Intestate Succession Act).

7 11 of 2009 (Reform of Customary Succession Act).

8 This is highlighted as the article looks at the rights of children born out of wedlock.

9 See s 1 of the Reform of Customary Succession Act, which states that a descendant "means a person who is a descendant in terms of the Intestate Succession Act, and includes (*a*) a person who is not a descendant in terms of the Intestate Succession Act, but who, during the lifetime of the deceased person, was accepted by the deceased person in accordance with customary law as his or her own child." This could be referred to as an acceptance tie. An example of where an acceptance tie applies to a person would be where X (who practises African culture) accepts a person (non-biological child) as his own child in accordance with customary law. The child would be deemed his descendant for intestate succession purposes. See s 1(*a*) of the Reform of Customary Succession Act. This tie is not recognised in common law. Customary law also recognises a tie based on union, which could be termed a union tie. An example is where X enters into a union with a woman in accordance with customary law for the purpose of providing him with children. The woman would be regarded as the descendant of X for purposes of the Intestate Succession. See s 1(*b*) read with s 2(*b*) of the Reform of Customary Succession Act, which states "a woman, other than the spouse of the deceased, with whom he had entered into a union in accordance with customary law for the purpose of providing children for his spouse's house must, if she survives him, be regarded as a descendant of the deceased".

10 See De Waal and Schoeman-Malan *Law of Succession* (2015) 30–31. It should be noted that a child born (or even conceived) out of wedlock is also entitled to inherit from the mother in terms of Islamic law.

11 See De Waal and Schoeman-Malan *Law of Succession* 30–31.

12 See s 1(2) of the Intestate Succession Act, which states: "[n]otwithstanding the provisions of any law or the common or customary law, but subject to the provisions of this Act and sections 40(3) and 297(1)(*f*) of the Children's Act, 2005 (Act No. 38 of 2005), having been born out of wedlock shall not affect the capacity of one blood relation to inherit the intestate estate of another blood relation."

13 It should be noted that Y and Z are deemed to born from married parents in terms of South African law, as the Islamic Marriage is recognised in terms of s 1 of the Children's Act 38 of 2005 where it states that a "'marriage' means a marriage – (*a*) recognised in terms of South

Section 1(*b*) of the Intestate Succession Act is now looked at as a case study to illustrate how the South African law of intestate succession impacts on the rights X, Y and Z. Section 1(*b*) of the Intestate Succession Act states:

> "[i]f after the commencement of this Act a person (hereinafter referred to as the 'deceased') dies intestate, either wholly or in part, and – … (*b*) is survived by a descendant, but not by a spouse, such descendant shall inherit the intestate estate."

For example, s 1(*b*) would apply where C, the father, dies leaving behind a net estate of R150 000. He also leaves behind son X (born out of wedlock), son Y (born in wedlock) and daughter Z (born in wedlock) as his only relatives. X would inherit R50 000, Y would inherit R50 000 and Z would inherit R50 000. The fact that X was conceived out of wedlock has no impact on the distribution in this scenario. The same distribution would apply in the event where D, the mother, leaves behind a net estate of R150 000, and son X (born out of wedlock), son Y (born in wedlock) and daughter Z (born in wedlock) as her only relatives. X would inherit R50 000, Y would inherit R50 000 and Z would inherit R50 000.[14] It can clearly be seen that the provision is gender neutral.

The Islamic law of succession provisions are not the same as the South African law of succession provisions in the above scenario.[15] This can be

African law or customary law; or (*b*) concluded in accordance with a system of religious law subject to specified procedures."

14 S 1(*b*) of the Intestate Succession Act.

15 There are 35 verses in Al Quraan that refer to succession laws. See Hussain *The Islamic Law of Succession* (2005) 29. There are, however, only three verses in Al Quraan that provide specific details of succession laws. These three verses are Al Quraan (4) 11, 12, and 176. The prophetic traditions elaborate and clarify how the verses must be interpreted and applied. See Hussain *The Islamic Law of Succession* 29. Al Quraan (4) 11 states: "Allah commands you as regards your children's (inheritance); to the male, a portion equal to that of two females; if (there are) only daughters, two or more, their share is two thirds of the inheritance; if only one, her share is half. For parents, a sixth share of inheritance to each if the deceased left children; if no children, and the parents are the (only) heirs, the mother has a third; if the deceased left brothers or (sisters), the mother has a sixth. (The distribution in all cases is) after the payment of legacies he may have bequeathed or debts. You know not which of them, whether your parents or your children, are nearest to you in benefit, (these fixed shares) are ordained by Allah. And Allah is Ever All-Knower, All-Wise." See Khan *The Noble Qur'an: English Translation of the Meanings and Commentary* 1404H (4) 11. Al Quraan (4) 12 states: "[i]n that which your wives leave, your share is a half if they have no child; but if they leave a child, you get a fourth of that which they leave after payment of legacies that they may have bequeathed or debts. In that which you leave, their (your wives) share is a fourth if you leave no child; but if you leave a child, they get an eighth of that which you leave after payment of legacies that you may have bequeathed or debts. If the man or woman whose inheritance is in question has left neither ascendants nor descendants, but has left a brother or a sister, each one of the two gets a sixth; but if more than two, they share in a third; after payment of legacies he (or she) may have bequeathed or debts, so that no loss is caused (to anyone). This is a Commandment from Allah; and Allah is Ever All-Knowing, Most-Forbearing." See Khan *The Noble Qur'an: English Translation of the Meanings and Commentary* 1404H (4) 12. Al Quraan (4) 176 states: "[t]hey ask you for a legal verdict. Say: 'Allah directs (thus) about Al-Kalalah (those who leave neither descendants nor ascendants as heirs). If it is a man that dies, leaving a sister, but no child, she shall have half the inheritance. If (such a deceased was) a woman, who left no child, her brother takes her inheritance. If there are two sisters, they shall have two-thirds of the inheritance; if there are brothers and sisters, the male will have twice the share of the female. (Thus) does Allah make clear to you (His Law) lest you go astray. And Allah is the All-Knower of everything.'" See Khan *The Noble Qur'an: English Translation of the*

seen by looking at the example of where C, the father, dies leaving behind a net estate of R150 000.[16] He also leaves behind son X (born out of wedlock), son Y (born in wedlock) and daughter Z (born in wedlock) as his only relatives. X would not inherit as he was born out of wedlock,[17] Y would inherit R100 000 and Z would inherit R50 000. The fact that X was conceived out of wedlock has an impact on the distribution in this scenario, as he does not inherit.[18] A different distribution would apply in terms of the Islamic law of succession in the event that D, the mother, passes away leaving behind a net estate of R150 000, and son X (born out of wedlock), son Y (born in wedlock) and daughter Z (born in wedlock) as her only relatives. X would inherit R60 000, Y would inherit R60 000 and Z would inherit R30 000.[19] The fact that X was conceived out of wedlock does not have an impact on the right of X to inherit from the estate of D, his mother,

Meanings and Commentary 1404H (4) 176. See also Khan *The Translation of the Meanings of Sahih Al Bukhari* 2004 (724) vol 8, 477, where it states: "[t]he Prophet said, 'Give the Fara'id (the shares of the inheritance that are prescribed in the Qur'an) to those who are entitled to receive it. Then whatever remains, should be given to the closest male relative of the deceased.'" The number in brackets (after the year of publication) refers to the number of the ḥadeeth in the book.

16 It should be noted that Muslims are required in terms of their religion to ensure that their estates are distributed in terms of the Islamic law of succession. See Khan *The Noble Qur'an: English Translation of the Meanings and Commentary* 1404H (4) 13 and 14, where it states: "[t]hese are the limits (set by) Allah (or ordainments as regards laws of inheritance), and whosoever obeys Allah and His Messenger (Muhammad [PBUH]) will be admitted to Gardens under which rivers flow (in Paradise), to abide therein, and that will be the great success. And whosoever disobeys Allah and His Messenger (Muhammad [PBUH]), and transgresses His limits, He will cast him into the Fire, to abide therein; and he shall have a disgraceful torment."

17 It is interesting to note that X would have inherited in terms of Islamic law (in this example) if he were conceived out of wedlock, on condition that he was born six months or more after the marriage was concluded between his parents. See Council of Ulamaa Eastern Cape ((2021) http://www.councilofulama.co.za/index.php?option=com_content&view=article&id=1086:child-conceived-before-marriage&catid=49:marriage&Itemid=56 (accessed 2021-01-29)), where it states: "[t]he Fuqaha (jurists) mentions that if one was to marry a woman whom one had impregnated and after six months the child is born then the child will be considered legitimate and will be attributed to the father and will inherit from him. If the child is born before six months, then it will be known as a child of Zina (illegitimate) and will not be attributed to the father but will be attributed to the mother and will inherit from her." This is also the view followed by the Muslim Judicial Council (SA) based in the Western Cape. See Muslim Judicial Council (SA) Fatwa Committee "MJC Position on Succession Law and Related Matters" (2017) document on file with the author of this article.

18 See Khan *The Noble Qur'an: English Translation of the Meanings and Commentary* 1404H (4) 11, where it states: "Allah commands you as regards your children's (inheritance); to the male, a portion equal to that of two females." It must be noted here that s 9(4) of the Constitution of the Republic of South Africa, 1996 (Constitution) prohibits discrimination based on sex. A further discussion on this issue is however beyond the scope of this article. See s 9 of the Constitution, where it states "(3) The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3)."

19 See Khan *The Noble Qur'an: English Translation of the Meanings and Commentary* 1404H (4) 11, where it states: "Allah commands you as regards your children's (inheritance); to the male, a portion equal to that of two females."

but has an impact on his right to inherit from the estate of C, his father.[20] C has a number of options if he wishes to ensure that son X (born out of wedlock) will inherit in terms of the Islamic law of succession.[21] The option available to C within the Islamic law of intestate succession is looked at under this heading 2, whereas, the options available to him within the Islamic law of testate succession is looked at under heading 3 of this article.

There is consensus by the Islamic scholars that, in the absence of some valid link, a child born out of wedlock would not qualify to inherit as an intestate beneficiary of his or her biological father in terms of Islamic law.[22] A possible link would be an acknowledgment by the biological father in this regard. The father C can thus ensure that son X (born out of wedlock) inherits from his intestate estate by acknowledging that he is the father of X. There are however differences of opinion regarding the validity of the acknowledgment. The reason for the differences of opinion is primarily based on the understanding of the hadeeth of the Prophet Muhammad (Peace Be Upon Him), where he states: "the child is for the owner of the bed, and the adulterer receives the stones."[23] This hadeeth would apply where, for example, husband J and wife K are married to each other in terms of Islamic law, and husband L and wife M are also married to each other in terms of Islamic law. If L impregnates K, then the child born from the pregnancy would be attributed to J, and not L. This is because the owner of the bed would be the husband of K in this case. The bed refers to K, and L would be deemed the adulterer as stated in the hadeeth.[24]

The question then arises as to whether the situation would be different where the parties who engaged in the sexual act causing the pregnancy were both unmarried, as is the scenario stated at the beginning of this article. Neither C nor D was married to other persons when X was conceived. The majority opinion in this regard is that the fornicator cannot have the child attributed to him by way of acknowledgment as the hadeeth

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20 It should be noted that children conceived out of wedlock are automatically entitled to inherit from their deceased mother but not automatically from their deceased father. A child born out of wedlock is disqualified from inheriting from his or her deceased father as an intestate beneficiary in terms of Islamic law.

21 It should be noted that it is possible for a child born in wedlock not to inherit from his father if he was conceived out of wedlock. Islamic law looks at the moment of conception and not the moment of birth.

22 See Al Subaa'ee M *Sharh Al Qaanoon Al Ahwaal Al Shakhshiyyah* 3ed (2000) vol 2 part 3 173.

23 See Khan *The Translation of the Meanings of Sahih Al Bukhari* 2004 (741) vol 8 490, where it relates the narration: "Utba (bin Abi Waqqas) said to his brother Sa'd, 'The son of the slave girl of Zam'a is my son, so be his custodian.' So when it was the year of the Conquest of Mecca, Sa'd took that child and said, 'He is my nephew, and my brother told me to be his custodian.' On that, 'Abd bin Zam'a got up and said, 'But the child is my brother, and the son of my father's slave girl as he was born on his bed.' So they both went to the Prophet (ﷺ). Sa'd said, 'O Allah's Apostle! (This is) the son of my brother and he told me to be his custodian.' Then 'Abd bin Zam'a said, '(But he is) my brother and the son of the slave girl of my father, born on his bed.' The Prophet (ﷺ) said, 'This child is for you. O 'Abd bin Zam'a, as the child is for the owner of the bed, and the adulterer receives the stones.' He then ordered (his wife) Sauda bint Zam'a to cover herself before that boy as he noticed the boy's resemblance to 'Utba. Since then the boy had never seen Sauda till he died."

24 It should be noted that the owner of the bed could either be the woman's husband as in the scenario of J, K, L and M; or the slave master as in the case stated in the hadeeth stated above. A further discussion on this issue is beyond the scope of this article.

specifically states that the child is for the owner of the bed.[25] There is, however, a minority opinion stating that there is nothing preventing the fornicator from acknowledging that the child is his, as there is no owner of the bed present.[26] It is quite interesting to note that the Muslim Judicial Council (SA) based in the Western Cape supports the minority opinion and advises it should be considered when necessary.[27] It is submitted that a person in the position of C should make use of the acknowledgment provision in order to have both his sons inherit in terms of the Islamic law of

[25] The term "adulterer" is used where a party is married when the sexual act was committed whereas the term "fornicator" is used where the party is not married.

[26] Al Munajjid ("230367: What is the ruling on calling an illegitimate child after the father?" https://islamqa.info/en/answers/230367/what-is-the-ruling-on-calling-an-illegitimate-child-after-the-father (accessed 2019-04-12)) states "1. That the illegitimate child is not to be attributed to the zaani even if he acknowledges him and names him after himself. This is the view of most of the scholars of the four madhhabs, and of the Zaahiris (literalists) and others. Based on this view, the illegitimate child – whether male or female – is not to be attributed to the zaani and is not to be described as his child; rather he is to be attributed to his mother, and he is a mahram to her and inherits from her like her other children. Fatwas were issued on the basis of this view by Shaykh Ibn Ibraaheem, as in his Fataawa (11/146); Shaykh Ibn Baaz, as in Majmoo' al-Fataawa (18/124); and by the Standing Committee (al-Lajnah ad-Daa'imah, 20/387). That is because the Prophet (blessings and peace of Allah be upon him) said: "The child is to be attributed to the bed (i.e., to the husband) and the adulterer deserves nothing." Agreed upon. The relevant point here is that the Prophet (blessings and peace of Allah be upon him) did not describe the child as belonging to anyone other than the bed (i.e., the husband), and he said that the adulterer did not deserve anything at all. Attributing the child to the adulterer is attributing the child to someone other than the husband. The words: "The child is to be attributed to the husband" imply that attribution of the child is to be to the marriage only. 2. That if the zaani acknowledges his illegitimate child, then he is to be attributed to him. This is the view of 'Urwah ibn az-Zubayr, Sulaymaan ibn Yasaar, al-Hasan al-Basri, Ibn Sireen, Ibraaheem an-Nakha'i, and Ishaaq ibn Raahawayh, as was narrated from them by Ibn Qudaamah in al-Mughni (9/123). This view was favoured by Shaykh al-Islam Ibn Taymiyah (may Allah have mercy on him) and his student Ibn al-Qayyim. Among contemporary scholars it was also favoured by Shaykh Muhammad Rasheed Rida in Tafseer al-Manaar (4/382), and by Shaykh Ibn 'Uthaymeen (may Allah have mercy on him), as in ash-Sharh al-Mumti' (12/127). That is because this child was born from his sperm, so he is his son in reality, and there is no clear, sound, shar'i evidence to indicate that he should not be attributed to him. With regard to the hadith "The child is to be attributed to the bed (i.e., to the husband) and the adulterer deserves nothing", it refers to the case where there is a marriage, and the issue under discussion here has to do with a case where there is no marriage. This is supported by what is mentioned in the story of the devoted worshipper Jurayj, when he spoke to the child whose mother had committed zina with the shepherd: "He said: 'Who is your father, O child?' The child said: 'The shepherd.'" Agreed upon. The speech of this infant was by way of a miracle and extraordinary event bestowed by Allah, and he stated that the shepherd was his father, even though the relationship was one of zina. This proves that paternity may be attributed to the zaani. Moreover, the Lawgiver seeks to protect lineages and take care of children, and to give them the best upbringing and protect them from being lost. We have previously discussed the matter in detail and explained the different scholarly opinions concerning it, and the evidence for each view, in the answer to question no. 192131. Conclusion: The view that it is forbidden or permissible (to attribute an illegitimate child to his father) are two scholarly views that carry weight. This issue is one of the matters that are open to ijtihaad, so every case should be examined on its own merits. If the child will miss out on some religious or worldly interests (by not being attributed to his father), then we should adopt the view that it is permissible to attribute him to his father, in the interest of protecting him and ensuring that he will be taken care of, which is a legitimate shar'i interest. And Allah knows best."

[27] Muslim Judicial Council (SA) Fatwa Committee "MJC Position on Succession Law and Related Matters" (2017) document on file with the author of this article.

intestate succession. It is further submitted that the acknowledgment should be done by way of a sworn affidavit in this regard. It should be noted that acknowledgment on its own would not be sufficient to ensure that the net estate of C is distributed in terms of Islamic law within the South African context. It would further be required that C should draft a will stating his wishes. This is looked at in the next section.

3 TESTATE SUCCESSION LAW WITHIN THE SOUTH AFRICAN CONTEXT

South African law recognises the common-law principle of freedom of testation.[28] The freedom generally allows a person to bequeath assets in his or her estate as he or she pleases.[29] The principle of freedom of testation can be used by C, the father, to ensure that his net estate devolves in terms of Islamic law. Two situations should be distinguished in this regard. The first situation is where C acknowledges paternity of X (born out of wedlock) by way of affidavit. The second situation is where he does not acknowledge the paternity of his biological son.

In the instance where C acknowledges paternity, he could have made use of a will to ensure that his estate is distributed in terms of the Islamic law of intestate succession. This could be done using three methods.

The first method is for C to state in his will that each of his two sons (without mentioning their names) should inherit R60 000 and that his daughter (without mentioning her name) should inherit R30 000. These types of stipulation in a will are referred to as class bequests. The question then arises as to whether X is the child of C for the purposes of the South African law of testate succession even though he was born out of wedlock. Section 2D(1)(*c*) of the Wills Act 7 of 1953 deals with the interpretation of wills. The section states "the fact that any person was born out of wedlock shall be ignored in determining his relationship to the testator or another person for the purposes of a will". The provision in the will is thus valid and enforceable in terms of both Islamic law and South African law. It should be highlighted here that C is making use of the South African law of testate succession within the South African context to apply the Islamic law of intestate succession as required by him in terms of Islamic law.

The second method that can be used by C to ensure that his estate is distributed in terms of the Islamic law of intestate succession is to state in his will that he bequeaths R60 000 in favour of X (giving full details of his son), R60 000 in favour of Y (giving full details of his son) and R30 000 in favour of Z (giving full details of his daughter). These bequests are less complicated as the beneficiaries are clearly defined. The issue concerning X having been born out of wedlock does not feature in this instance. The provision in the will is thus valid and enforceable in terms of Islamic law and South African law.

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[28] Jamneck "Freedom of Testation" in Jamneck and Rautenbach *The Law of Succession in South Africa* (2009) 115.

[29] There are a few limitations to this freedom.

The third method that can be used by C to ensure that his estate is distributed in terms of the Islamic law of intestate succession is to state in his will that his estate must be distributed in terms of the Islamic law of intestate succession and that the executor of his estate must approach an institution like the Muslim Judicial Council (SA), for example, to execute an Islamic Distribution Certificate stating who his Islamic law beneficiaries are at the time of his death.[30] This could be referred to as an Islamic will.[31] It would be advisable for the executor to approach an institution that recognises as valid the minority opinion regarding acknowledgment in order for the child to be listed as a beneficiary on the certificate. It is recommended that the testator should also state in his will that he has acknowledged paternity of X.[32] He should then also attach the sworn affidavit of acknowledgment to his will in this regard. The Islamic Distribution Certificate would then state that X (acknowledged son) should inherit two-fifths of R150 000 = R60 000, Y (son) should inherit two-fifths of R150 000 = R60 000, and Z (daughter) should inherit one-fifth of R150 000 = R30 000.[33] The provision in the will would therefore be valid and enforceable in terms of South African law as well as Islamic law.

Where C does not acknowledge paternity of X (his son born out of wedlock), it would then mean that X would not be entitled to inherit in terms of the Islamic law of intestate succession. The Islamic law of testate succession provides that a testator may bequeath up to a maximum of one-third of his or her net estate in favour of a person who does not inherit in terms of the Islamic law of intestate succession.[34] C could therefore bequeath up to a maximum of one-third of the net estate in favour of X in terms of a will. C could, for example, state in his will that he bequeaths R37 500 (which is less than one-third of R150 000) in favour of X (son born out of wedlock). He can further state in his will that Y (son born in wedlock) should inherit R75 000 and that his daughter Z (who was born in wedlock)

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30 The Muslim Judicial Council (SA) offers the services of issuing Islamic distribution certificates. See Muslim Judicial Council (SA) "Fatwa" (2020) https://mjc.org.za/departments/fatwa/ (accessed 2020-04-13).

31 The interpretation of the provisions found in an Islamic will was looked at by the Constitutional Court in *Moosa v Minister of Justice and Correctional Services* [2018] ZACC 19. The case concerned renunciation of benefits by beneficiaries who were listed in the Islamic Distribution Certificate issued by the Muslim Judicial Council (SA). See Abduroaf "An Analysis of Renunciation in terms of s 2C(1) of the Wills Act 7 of 1953 in light of the Moosa *NO and Others v Harnaker and Others* judgment" 2019 7 *Electronic Journal of Islamic and Middle Eastern Law* 15 21 for a discussion on the consequences of renunciation in terms of South African law and Islamic law.

32 It is interesting to note that the Muslim Judicial Council (SA) based in the Western Cape supports the minority opinion and advises it should be considered when necessary. See Muslim Judicial Council (SA) Fatwa Committee "MJC Position on Succession Law and Related Matters" (2017) document on file with the author of this article.

33 See Khan *The Noble Qur'an: English Translation of the Meanings and Commentary* 1404H (4) 11, where it states: "Allah commands you as regards your children's (inheritance); to the male, a portion equal to that of two females."

34 See Khan *The Translation of the Meanings of Sahih Al Bukhari* 2004 (6) vol 4 4, where it is narrated that Ibn Abbaas said: "I recommend that people reduce the proportion of what they bequeath by will to the fourth (of the whole legacy), for Allah's Messenger (ﷺ) said, 'One-third, yet even one third is too much.'"

should inherit R37 500.[35] It is interesting to note that X and Z inherit equal shares.

4 CONCLUSION

This article looked at the right of a Muslim child born out of wedlock to inherit from his or her deceased parents within the South African context. The findings have shown that the status of the child in terms of the Islamic law of succession and the South African law of succession is quite different and that Muslims are required in terms of Islamic law to ensure that their estates are distributed in terms of the Islamic law of succession upon their demise. It has also shown that children conceived and born within Islamic marriages are deemed children born out of wedlock for purposes of South African law. The findings have also shown that there are ways in which a testator or testatrix can ensure that his or her estate devolves in terms of Islamic law. This includes making use of succession law provisions found within the South African context. It is recommended that South African Muslims should make use of the options available to put children conceived out of wedlock on a similar footing to those conceived in wedlock.

[35] See Khan *The Noble Qur'an: English Translation of the Meanings and Commentary* 1404H (4) 11, where it states: "Allah commands you as regards your children's (inheritance); to the male, a portion equal to that of two females."

REGULATING CONSTRUCTION PROCUREMENT LAW IN SOUTH AFRICA – DOES THE NEW FRAMEWORK FOR INFRASTRUCTURE DELIVERY AND PROCUREMENT MANAGEMENT UNDERMINE THE RULE OF LAW?

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SUMMARY

Recently, there have been numerous challenges in the legal regulation of construction procurement in South Africa. The Construction Industry Development Board and the National Treasury have brought about a number of new rules in the form of standards and frameworks in order to remove any contradictions and misalignment with applicable legislation. This article looks at the changes that have taken place in the regulation of construction procurement law and whether the new rules indeed assist in removing the challenges posed by previous rules. The research question to be answered is whether the new rules are in fact lawful.

1 INTRODUCTION

Public procurement is generally known as the process through which the government contracts with a private party for the provision of goods, works or services to or on behalf of the government. In South Africa, public procurement is constitutionally regulated by section 217, which provides that when organs of state contract for goods or services, they should do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.[1] Public procurement is further regulated by various statutes, including the Public Finance Management Act (PFMA),[2] the Preferential Procurement Policy Framework Act[3] and the Promotion of Administrative

[1] See s 217(1) of the Constitution of the Republic of South Africa, 1996 (the Constitution).
[2] 1 of 1999.
[3] 5 of 2000.

Justice Act (PAJA).[4] Further legislation includes the Local Government: Municipal Finance Management Act,[5] the Local Government: Municipal Systems Act (MSA),[6] the Broad-Based Black Economic Empowerment Act (BBBEEA)[7] and the Promotion of Access to Information Act (PAIA).[8] These statutes regulate procurement throughout South Africa, irrespective of the type of procurement or the industry in which it takes place. When it comes to specific types of procurement, these laws and additional industry-specific rules apply. This is the case for the procurement of works and services in the construction industry. The construction industry is regulated by the Construction Industry Development Board Act 38 of 2000, which establishes the Construction Industry Development Board (CIDB) as the regulatory body for the industry. Its sphere of regulation includes procurement in the industry (or better known as construction procurement). The CIDB is empowered to regulate and create best practice guidelines that regulate construction procurement beyond the Act and its regulations. The CIDB is thus given powers to create subordinate legislation for construction procurement in the form of these guidelines, which form the subject of this article.

In addition to the above, section 76 of the PFMA grants the National Treasury the authority to publish further rules for the regulation of public procurement.[9] Therefore, public procurement, and construction procurement in particular, is regulated within a highly fragmented legal framework.

In 2016, National Treasury published an instruction note based on section 76 of the PFMA, in terms of which the Standard for Infrastructure Procurement and Delivery Management (SIPDM) was brought into operation and created a parallel legal system for the regulation of construction procurement. The standard effectively created a new system based on infrastructure delivery, and not construction works, as does the CIDB Act, its regulations, CIDB best practice guidelines and practice notes. This conclusion is based on the contradictory terms and definitions used in the SIPDM compared to the CIDB prescripts. Much misalignment between the SIPDM and CIDB prescripts ensued and an attempt was made to correct this. The result has been the new Framework for Infrastructure Delivery and Procurement Management (FIDPM) that came into operation on 1 October 2019, and which repealed the SIPDM. The FIDPM appears to be only a framework, as it is couched in very wide and vague terms that leave much

4 3 of 2000.

5 56 of 2003.

6 32 of 2000.

7 53 of 2003.

8 2 of 2000.

9 S 76(4) of the PFMA provides: "National Treasury may make regulations or issue instruction applicable to all institutions, to which this Act applies, concerning

(a) any matter that may be prescribed for all institutions in terms of this Act;
(b) financial management and internal control;
(c) the determination of a framework for an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective;
(d) audit committees, their appointment and their functioning;
(e) internal audit components and their functioning;
(f) the administration of this Act; and
(g) any other matter that may facilitate the application of this Act."

room for the exercise of discretion. It therefore does not contain any substantive rules. The term "framework" is not defined in the document; however, the Oxford English Dictionary describes it as "a basic structure underlying a system, concept, or text". It would therefore be logical to conclude that the document does not and was not intended to provide detailed rules. The problem this creates is that open-ended terminology leaves room for the exercise of too much discretion, which is not appropriate in a public procurement setting as it threatens to result in unfair procedures that ultimately undermine the pillars of procurement in section 217 of the Constitution. This article explores whether the new framework will in fact remove the current contradictions and misalignment brought about by the SIPDM and whether it assists in the regulation of construction procurement law in any way. The article will also determine whether the publication of this document undermines the rule of law and is thus unlawful.

2 CONFUSING LAWS WITH GUIDELINES

In the first instance, it is interesting that the title of the document has been changed from "infrastructure procurement and delivery management" to "infrastructure delivery and procurement management". This indicates that the new document (FIDPM) is aimed at a different process. Neither "delivery management" nor "procurement management" is defined in the SIPDM and FIDPM. Therefore, it is unclear what the purpose of the change in title is. The title of the SIPDM appears to regulate infrastructure procurement and manage the delivery of such infrastructure, whereas the FIDPM intends to regulate the delivery of infrastructure while managing the procurement process in achieving this. The importance in the difference lies in the interpretation of certain terms that are either unclear, vague or are undefined. Often a court will take cognisance of the title of a document in attributing meaning to a word, phrase or provision by determining what the document aims to regulate. The difference in title is thus problematic since the FIDPM will repeal the SIPDM. Normally, when one law repeals another, the former is merely indicated as an amendment law so as to avoid confusion with regard to which law is being repealed.

Secondly, it is interesting to note that the document has been changed from a standard to a framework. A "standard" is defined by the Oxford English Dictionary as "something used as a measure, norm or model in comparative evaluations". Therefore, based on the definitions of the words "standard" and "framework", it can be said that the SIPDM was intended to act as a model against which all infrastructure procurement must be measured. The framework, on the other, suggests that it serves merely as a concept that underlies a greater system, thereby creating the impression that further rules will be published for the regulation of infrastructure delivery and procurement management. By implication, the lack of detailed rules in the FIDPM and the consequent repeal of the SIPDM leaves the construction industry with the CIDB prescripts and the framework as its source of regulation. Since the rules in the CIDB prescripts are detailed and regulate every part of the construction procurement process and are also aligned with the CIDB Act and its regulations, it is difficult to understand the purpose of the FIDPM. It is noted in the foreword of the document that it is intended to

"prescribe the minimum requirement for effective governance of infrastructure delivery and procurement management". However, these terms are not used in the CIDB Act, its regulations or its prescripts. It is thus unclear how it is meant to supplement the rules already enacted in terms of the CIDB Act.

Based on the legal status of a framework vis-à-vis that of an Act and its subordinate legislation, the framework will be an optional document for organs of state and contractors to implement. Furthermore, until the CIDB Act has been repealed, the legal regulation of construction procurement (as opposed to infrastructure procurement) in terms of the Act is still applicable. However, the CIDB and FIDPM are aimed at different types of procurement in that the former is aimed at "construction procurement" and the latter at "infrastructure procurement". This difference and the legal implications thereof have been traversed by the current author (see Anthony "Re-Categorising Public Procurement in South Africa: Construction Works as a Special Case" 2019 22 *Potchefstroom Electronic Law Journal* 1–21). If the FIDPM is intended to replace the SIPDM, it will need more substantial rules to create a standard model for infrastructure procurement. Moreover, the FIDPM will need more rules of substance and not merely operational guidelines for the procurement process, as it currently provides.

3 WORKING OF THE FIDPM

It appears that the FIDPM is intended to serve as a guide for implementation of the Infrastructure Delivery Management System (IDMS), which the FIDPM states must be done through infrastructure delivery management processes; these consist of portfolio, programme, projects, operations and management of infrastructure as well as infrastructure procurement gates. This terminology is inconsistent with that used in the CIDB Act and its regulations, thereby once again, as in the case of the SIPDM, creating a parallel system for the regulation of construction procurement. The FIDPM further states that it allocates responsibilities for activities and decision making at control points, stages (defined in the FIDPM as "a collection of periodical and logically related activities in the Project Management Control Stages that culminates in the completion of an end of stage deliverable") and procurement gates (defined as "a control point at the end of a process where a decision is required before proceeding to the next process or activity"). Furthermore, the framework refers to "construction" only and not "construction works" as the CIDB system does. "Construction" is defined as "everything constructed or resulting from construction operations". The latter is not defined. Another problematic definition is that of "contract management", which is indicated as "applying the terms and conditions, including the agreed procedures for the administration thereof". This definition should refer to the terms and conditions stated in the written contract; in the absence thereof, this could refer to terms and conditions agreed upon orally. The "administration thereof" could refer to the contract or the actual construction, which may differ at times, especially in the case of oral terms and conditions that were added subsequent to signing the contract. The definitions that refer to "infrastructure" in the framework are the same as those in the SIPDM, which means that these have not been aligned

to the CIDB Act or any other legislation that regulates public procurement. They thus remain contrary to the law currently regulating construction procurement. Furthermore, where legislation is referred to in the framework, it is done either incorrectly or such references are incomplete. It could therefore refer to any version of the legislation, since the law is ever-changing and often amended. The same applies to National Treasury guidelines. It is submitted that perhaps this was done deliberately in an attempt to avoid constant review of the framework.

In addition, paragraph 5 of the FIDPM states that "project processes are typically linear". This section of the document refers to stages of the procurement process that must be followed and "gates" at the end of each stage where approval for a "stage deliverable" is required before the next stage can be started. This reinforces the so-called "check-box" attitude towards public procurement generally found among officials instead of a relational approach to the interlinked phases of the procurement process. This "check-box" approach can be described as each role player in the supply chain simply doing its part and handing the work over to the next role player in line. A relational approach to procurement, on the other hand, can be described as a chain in which each element of the chain is interlinked with the next. This means that each role player's action is connected to the previous and the next action in order to bring about the desired result, which is the effective and efficient procurement of goods, works and services. Actors of each activity should approach the activity with the understanding that it links to the activity before and after it. In other words, it is not an isolated action that is disposed of after the activity is completed. Therefore, the wording of the FIDPM is important in delivering the message to procurement officials that public procurement is a process in which each activity relates to the previous and the next one in order to deliver the outcome, which is infrastructure. However, the manner in which the FIDPM is (not only) written, but also illustrated, is indicative of a check-box process to be followed by officials.

4 NEW TERMINOLOGY

The FIDPM further introduces a range of new acronyms to the regulation of procurement in the construction industry. The Infrastructure Asset Management Act (IAMP), Infrastructure Procurement Strategy (IPS), Infrastructure Programme Management Plan (IPMP), Infrastructure Programme Implementation Plan (IPIP), Operations Management Plan (OMP) and the Maintenance Management Plan (MMP) are new to the regulation of construction procurement. These programmes have technical definitions, indicating that they are aimed at regulating operations within the procurement process. These should be aligned with the existing legislation or the legislation should be amended accordingly.

5 COMPARISON OF THE RULES AND DOCUMENTS

What follows is an illustration in table form of the contradictory provisions of the three different systems in construction procurement law.

CIDB (Act, regulations & prescripts)	**SIPDM (Standard)**	**FIDPM (Framework)**
Construction procurement: construction procurement in the construction industry including the invitation, award and management of contracts	*Infrastructure procurement:* procurement of goods and services including any combination thereof with the acquisition, refurbishment, rehabilitation, alteration, maintenance, operation or disposal of infrastructure	*Infrastructure procurement:* same definition as SIPDM
Construction works: combination of goods and services including development, extension, installation, repair, maintenance, renewal, removal, renovation, alteration, dismantling or demolition of a fixed asset	*Infrastructure:* immovable assets which are acquired, constructed or which result from construction operations or movable assets which cannot function independently from purpose-built immovable assets	*Infrastructure:* same definition as SIPDM
Class of construction works: various class of works including civil engineering, electrical engineering (infrastructure and buildings) and general building works (mechanical and specialist works)	*Infrastructure delivery:* combination of all planning, technical, administrative and managerial actions associated with the construction, supply, renovation, rehabilitation, alteration, maintenance, operation, or disposal of infrastructure	*Infrastructure delivery:* same definition as SIPDM
		Infrastructure delivery management: the application of infrastructure delivery management processes of portfolio, programme, operations, maintenance and project management, to plan and implement

		the work required to sustain the performance of infrastructure assets, for public service delivery
		Infrastructure delivery management system: the government management system that guides and enables infrastructure delivery in the public sector

From this table, it can be clearly seen that the systems under the various documents are vastly different. The CIDB Act as legislation gives the CIDB (as a juristic entity) the power to regulate public procurement. National Treasury is empowered in terms of section 76 of the PFMA to issue instructions for the regulation of public procurement. However, these instruments do not have the same legal status as the CIDB Act. They thus need to be brought in line with the Act and its procurement process, which is based on construction procurement, construction works and classes of construction works. The CIDB Act does not make any reference to infrastructure procurement, delivery or management. This difference is significant since the definitions for goods and services to be provided under these documents differ greatly. What is procured in terms of each document differs, which effectively creates two different systems of procurement in the construction industry. The FIDPM continues along the same vein as the SIPDM, and therefore the misalignment with legislation continues.

6 LAWFULNESS OF THE FIDPM

It is submitted that the FIDPM adds little, if any, value to the construction procurement process from a legal perspective. For it to add value, it would need to fill a particular gap in the legal framework, address a specific problem or make implementation of the process easier. This it fails to do. More importantly, the FIDPM is entirely contradictory to the legal framework of construction procurement and therefore goes against the rule of law. What follows is a discussion on the various ways in which the FIDPM undermines the rule of law.

6 1 Uncertain and vague

It is submitted that legal certainty and predictability are principles of the rule of law. This means that legal rules should be clear and understandable to those who must apply them. This was confirmed by the Constitutional Court in *Dawood v Minister of Home Affairs*,[10] where it was held that "[i]t is an

[10] 2000 (3) SA 936 (CC).

important principle of the rule of law that rules be stated in a clear and accessible manner".[11] In *Affordable Medicines Trust v Minister of Health*,[12] the court confirmed this principle again by holding that although absolute legal certainty is not required, the law must "indicate with reasonable certainty to those who are bound by it, what is required of them so that they may regulate their conduct accordingly".[13] The question to be answered is whether the law conveys a reasonably certain meaning to those affected by it.[14] Based on the parallel system created by the SIPDM initially, and continued by the FIDPM, it is submitted that the rule of law is undermined. The court in the *Affordable Medicines Trust* case further held:

> "The doctrine of vagueness is founded on the rule of law, which … is a foundational value of our constitutional democracy. It requires that laws must be written in a clear and accessible manner. … The doctrine of vagueness must recognise the role of government to further legitimate social and economic objectives. And should not be used unduly to impede or prevent the furtherance of such objectives."[15]

Furthermore, Kidd notes that clarity applies to:

> "all administrative decisions which require persons to act in a particular way. Delegated legislation … would be the obvious arena in which clarity would be important. Legislation might provide for administrators to issue directives (or similar notices) to persons requiring them to take specified steps in order to comply with the law. Moreover, most permits, licences or other types of authorisations would require persons to comply with conditions stipulated in those authorisation documents. These would all have to be sufficiently clear in order that the affected person would know what was required of him or her."[16]

Moreover, the court in *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency*[17] held that "vagueness can render a procurement process … procedurally unfair under s 6(2)(*c*) of PAJA".[18]

Furthermore, in *Minister of Health NO v New Clicks South Africa (Pty) Ltd,*[19] the Constitutional Court held that it "is implicit in all empowering legislation that regulations must be consistent with, and not contradict, one another".[20] The FIDPM, which contradicts the CIDB prescripts, is not in line with this.

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11 Par 47.

12 2006 (3) SA 247 (CC) par 108–110.

13 See par 108. See also *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2001 (1) SA 545 (CC) par 24, where the court held that the legislature "is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them". This, it is submitted, should be extended to the executive which is given powers to create delegated legislation.

14 *Affordable Medicines Trust v Minister of Health supra* par 110.

15 Par 108.

16 Kidd "Reasonableness" in Bleazard, Budlender, Corder, Kidd, Maree, Murcott and Webber *Administrative Justice in South Africa: An Introduction* (2015) 186–187.

17 2014 (1) SA 604 (CC).

18 Par 88.

19 2006 (2) SA 311 (CC).

20 Par 246.

6 2 Irrational

It is trite that the principle of legality is a component of the rule of law. This principle is the general constitutional principle under which the exercise of all public power is tested for lawfulness. It expresses the idea that the exercise of all public power is only legitimate when it is lawful.[21] It entails rationality, which requires that the reason for the action (in this case, the creation of the FIDPM) must be rationally connected to the objective sought to be achieved (in this case, alignment of the rules in construction procurement).[22] To this end, the Constitutional Court held in *Albutt v Centre for the Study of Violence and Reconciliation*[23] that:

> "[t]he Executive has a wide discretion in selecting means to achieve its constitutionally permissible objectives … [b]ut, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved … if objectively speaking they are not, they fall short of the standard demanded by the Constitution."[24]

In order to determine whether a decision is rational, the court in *Democratic Alliance v President of the Republic of South Africa*[25] held that the enquiry entails asking, first, whether any relevant factors may have been ignored, secondly, whether failure to consider material factors is rationally related to the purpose for which the power was conferred, and lastly, whether ignoring the relevant factors taints the process with irrationality and thus renders the final decision irrational.[26]

It is submitted that the purpose of the FIDPM – that is, removing the misalignment created by the SIPDM by replacing it with the FIDPM – is not achieved. Furthermore, the failure to consider the implications of the FIDPM on the legal framework of construction procurement results in the rules being arbitrary. The decision to publish the FIDPM is thus irrational.

6 3 Procedurally unfair

With regard to procedural unfairness, Murcott notes:

> "[L]egality imposes a duty to consult where a failure to consult will amount to failure to take into account information at the disposal of the decision-maker which ought rationally to be taken into account by the decision-maker." [27]

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21 *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) par 59.

22 Rationality was said to be the "minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries" in *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) par 90.

23 2010 (3) SA 293 (C).

24 Par 51.

25 2013 (1) SA 248 (CC).

26 See par 39.

27 Murcott "Procedural Fairness" in Bleazard *et al Administrative Justice in South Africa: An Introduction* 168.

She notes this in light of *Freedom Under Law v National Director of Public Prosecutions*,[28] in which the court held that the principle of legality requires that a decision-maker exercises the powers conferred on him or her lawfully, rationally and in good faith. Rationality includes a procedural element[29] and a refusal to include relevant stakeholders, or a decision to receive representations from some to the exclusion of others, may render a decision irrational.[30]

The court in *Masethla v President of the Republic of South Africa*[31] held that the principle of legality consists not only of rationality, but also "*fundamental fairness".*[32] To this end, the court held:

> "The Constitution requires more; it places further significant constraint on how public power is exercised through the Bill of Rights and the founding principle enshrining the rule of law. It is a fundamental principle of fairness that those who exercise public power must act fairly. In my view, the rule of law imposes a duty on those who exercise executive powers not only to refrain from acting arbitrarily, but also to act fairly when they make decisions that adversely affect an individual."[33]

The court further held that the goals of the Constitution include accountability, responsiveness and openness. It is apparent from the Constitution that the democratic government envisioned is one that is accountable, transparent and requires participation in decision-making.[34] Therefore, to comply with the *audi alteram partem* rule as a component of procedural fairness, the decision makers (National Treasury) should not only have given stakeholders an opportunity to make submissions, but were also under an obligation to take those submissions into account. Relevant and material factors such as the contradiction of the FIDPM with previous CIDB rules should have been considered before publishing the rules. In the absence of such consideration, the rules were brought into operation in a procedurally unfair manner.

In the *Carmichele v Minister of Safety and Security*[35] matter, the court held that the Constitution is not merely a formal document that regulates public power. It is a document that embodies an objective, normative value system.[36] The court in *Masethla* held:

> "The requirement to act fairly is part of this objective normative value system and must therefore guide the exercise of public power. It imposes a duty on decision-makers to act fairly. Acting fairly provides the decision-maker with the opportunity to hear the side of the individual to be affected by the decision. It enables the decision-maker to make a decision after considering all relevant facts and circumstances. This minimises arbitrariness. There is indeed an inter-relationship between failure to act fairly and arbitrariness. In this sense, the requirement of the rule of law that the exercise of public power should not

28 2014 (1) SA 253 (GNP).
29 Par 127.
30 Par 165.
31 2008 (1) BCLR 1 (CC).
32 See par 179 (author's own emphasis).
33 Par 179–180.
34 Par 181.
35 2001 (4) SA 938 (CC).
36 Par 54.

> be arbitrary, has both a procedural and substantive component. Rationality deals with the substantive component, the requirement that the decision must be rationally related to the purpose for which the power was given and the existence of lawful reason for the action taken. The procedural component is concerned with the manner in which the decision was taken. It imposes an obligation on the decision-maker to act fairly. To hold otherwise would result in executive decisions which have been arrived at by a procedure which was clearly unfair being immune from review."[37]

7 JUDICIAL REVIEW OF THE FIDPM

In order to manage decisions made in terms of an unlawful FIDPM, organs of state may have to take such decisions on judicial review. A decision may be taken on review by either the National Treasury itself, or organs of state that implement the FIDPM.

7 1 Judicial review by National Treasury

National Treasury, as the author of the FIDPM, would be entitled to approach a court of law to set aside decisions that are made based on the FIDPM and which may be unlawful. Such decisions would be judged against the principle of legality. This was confirmed by the Constitutional Court in *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Ltd.*[38] The action could be challenged on all the above grounds of vagueness, rationality, legal certainty and procedural fairness in not having taken relevant factors into consideration.

7 2 Judicial review by organs of state

Based on the *Gijima* judgment, organs of state that implement the FIDPM and apply for decisions made in such implementation to be set aside may rely on PAJA to do so. Organs of state would then challenge such decisions on any of the grounds of review listed in section 6 of PAJA. This would entail challenging decisions based on vagueness and the lack of reasonableness and lawfulness of the rules. The grounds of review include a catch-all ground in section 6(2)(*i*), which provides that administrative action may be set aside if such action is otherwise unconstitutional or unlawful in that it undermines the rule of law.

8 THE PUBLIC PROCUREMENT BILL

In February this year, after much speculation as to what the new procurement law would entail, the Public Procurement Bill[39] was published for public comment. The Bill is aimed at unifying all pieces of legislation that regulate public procurement in South Africa, including infrastructure procurement. It is disappointing that the Bill does not address the issue of contradictory rules in the construction industry. Instead, it perpetuates this by providing in section 82(2) of the Bill that a

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37 *Masethla v President of the Republic of South Africa supra* par 183–184.

38 2018 (2) SA 23 (CC). See specifically par 27–28.

39 *GG* 43030 of 2020-02-19.

> "procurement system for infrastructure … must provide for matters that comply with any standard for infrastructure procurement and delivery management as may be determined by instruction."

Therefore, it appears that the FIDPM will still be in operation, contrary to the rules of the CIDB, which are legally authorised to regulate infrastructure procurement.

9 CONCLUSION

Based on the above contradictions, unexplained additions and vague or incomplete definitions, it is submitted that the FIDPM should not come into operation unless it is aligned with the CIDB legislation and prescripts. Any misalignment or contradiction can be solved by updating the prescripts of the CIDB, instead of the onerous process of creating standards and frameworks of which the legal status is questionable. If a new system in terms of infrastructure procurement as opposed to construction procurement is desired, the CIDB Act and its regulations can be amended to provide for such an amended system. Furthermore, in the absence of repeal, the CIDB system remains in force. Therefore, a procurement process based on infrastructure in terms of the standard or framework and a process based on construction in terms of the CIDB legislation exist alongside one another. The FIDPM states in paragraph 6:

> "Infrastructure procurement shall be undertaken in accordance with all applicable Infrastructure Procurement-related legislation and this Framework … Infrastructure procurement shall be implemented in accordance with procurement gates prescribed in clause 6.2 and the CIDB prescripts."

The implications of this go without saying. It is thus submitted that the regulation of procurement in the construction industry should remain the mandate of the CIDB, which was established in legislation for this purpose. This will ensure that the financial, operational and legal interests of the industry are regulated by a body that is legally appointed and equipped to do so. The recent attempts at various bodies regulating the industry and consequently causing disjointed processes and stakeholder confusion is certainly leading to a situation in which too many cooks in the kitchen are spoiling the broth.

NOTES / AANTEKENINGE

VOLUNTARY WITHDRAWAL IN THE CONTEXT OF ATTEMPT – A DEFENCE?

1 Introduction

Once a crime has been committed, full repentance and restoration do not have any bearing on liability (Simester and Sullivan *Criminal Law: Theory and Doctrine* (2001) 305), but may be taken into account in mitigation of sentence. (For a discussion of the concept of remorse in sentencing, in respect of which repentance and restoration may be strong indicators, see Terblanche *A Guide to Sentencing in South Africa* 3ed (2016) 229–230). On the other hand, there is no question of criminal liability ensuing for an attempt at a crime if there is a withdrawal from the envisaged crime while still in the stage of preparation, and before, in South African law, reaching the watershed moment of the "commencement of the consummation" (*S v Kudangirana* 1976 (3) SA 563 (RA) 565–566; Snyman *Criminal Law* 6ed (2014) 284; on the commencement of the consummation test, see Hoctor "The (Surprising) Roots of the Test for Criminal Liability for Interrupted Attempt in South African Law" 2015 *SACJ* 363). However, what occurs between the moment when the attempt begins, and the moment when the crime has been completed, where there has been a withdrawal from the criminal purpose, is more contested terrain. The disagreement does not apparently arise in the South African case law, where the few judgments that refer to this question have consistently held that where the accused withdraws after the commencement of the consummation of the crime, there will be attempt liability and, at best, the accused may rely on the abandonment as a mitigating factor in sentencing (see Rabie "Die Verweer van Vrywillige Terugtrede by Poging: 'n Tweede Mening" 1981 *SACC* 56, 61; the view that abandonment should only be a mitigating factor, rather than a substantive defence, is supported by Lee "Cancelling Crime" 1997 *Connecticut Law Review* 117 152 and Yaffe *Attempts* (2010) 291). However, as is discussed, prominent South African academic commentators, along with comparative sources in both the civil-law and common-law jurisdictions, demur from such an "unyielding analysis" (the phrase is that of Simester and Sullivan *Criminal Law* 305), and would regard such withdrawal as giving rise to a defence to criminal liability. Which approach ought to be applied in South African law? The difficulties inherent in making this choice are evident in the words of Yaffe (*Attempts* 309):

> "Change of mind, as common as it is, is puzzling from a moral point of view. It is hard to know how to react to the person who acts in a way of which we disapprove, but changes his mind later. As the agent of a bad act, he seems

> worthy of censure; as the agent who prevented the bad act's occurrence, he seems worthy of praise. The puzzle arises from the fact that he is, indeed, both of these agents."

The question may be posed as to how to categorise a defence of voluntary withdrawal? It is neither a justification ground nor a ground excluding fault, but rather a ground excluding punishment (Rabie 1981 *SACC* 58). The uniqueness of the defence is demonstrated in that the accused has already met all the requirements for liability, and thus it is not an *intending* criminal, but an *actual* criminal who is being considered (Rabie 1981 *SACC* 58 (author's own emphasis). This is at least true of the common-law approach (also adopted by South African law), where a two-stage approach is applied to the trial, relating first to establishing criminal liability and followed, if guilt is so established, by an inquiry into sentence. At the outset, it may be stated that the view that is taken in the discussion that follows is that there is no good reason to treat voluntary abandonment as a special defence. (For further evaluation, see Rabie 1981 *SACC* 56). As Yaffe (*Attempts* 293) has stated, to grant a defence on the basis of abandonment is to mistake the *absence of a reason to issue a particular sanction rather than a lower one* for *a sufficient reason to issue no sanction at all*.

In the discussion that follows, the current case law is examined, whereafter the alternative approach contended for by some academic writers (and used in other jurisdictions) is discussed; the arguments for and against a renunciation defence are set out, before these aspects are drawn together in a final concluding analysis.

2 Case law

The first case dealing with the issue of abandonment – that of *Q v Töpken and Skelly* ((1880–1884) 1 Buch AC 471), which related to a successful appeal against convictions of attempted robbery and attempted murder – does not provide much clear authority or guidance as to the question of what the legal consequences of voluntary withdrawal from an attempt might be. De Wet (*Strafreg* 4ed (1985) 170) comments that the court did not pay serious attention to the matter. The court comments (474) that

> "[t]he evidence is quite consistent with the view that, however criminal their intentions may have been, they repented before the time arrived for carrying their intentions into practical effect; and if this view be correct, the charge of an attempt to commit a crime falls to the ground."

The facts were that the accused intended robbery, but got the day wrong as to when the postal coach passed by the place where they were waiting, and so their waiting was in vain. They then went home. While the cited statement is compatible with a defence based on voluntary abandonment of the attempt, it may equally be a simple acknowledgement that the accused were still in the stage of preparation, and had yet to commit an attempt. The relatively undeveloped nature of attempt liability in South African law at this point is indicative that the latter option is more plausible. Rabie (1981 *SACC* 58) is in accord with this view.

The case of *Andrew* (1916 TPD 20 24) provided clearer, albeit *obiter*, guidance when it stated, in the context of a factual scenario that pertained to an interrupted attempt, that an attempt may be committed even though the completion of the offence was interrupted by the voluntary act of the accused. *In casu*, despite his attempt to pour the brandy out of the glasses that he was carrying when he saw the policeman, the accused was convicted of attempting to supply liquor contrary to the liquor laws. Rabie (1981 *SACC* 56) notes that this case should preferably be regarded as an interrupted attempt. A rather similar scenario applied in *Hlatwayo* (1933 TPD 441), where a young domestic worker wanted to poison her employers, and to this end threw caustic soda into their porridge. When this changed the colour of the porridge, she threw it away. She was nevertheless convicted of attempted murder, with the court holding that voluntary withdrawal has no bearing on liability.

The case of *B* (1958 (1) SA 199 (A)) related to apartheid legislation prohibiting inter-racial intercourse. When the accused was unable to perform sexually owing to alcohol and stress, he abandoned the attempt, but it was held that he was nonetheless guilty of contravening the statutory provision. The court confirmed the correctness of the approach taken in *Hlatwayo* with regard to voluntary withdrawal (*supra* 203A–B). The approach of the appeal court in *B* was cited with approval in the (erstwhile) Rhodesian case of *R v Khalpey* (1960 (2) SA 182 (SR) 186–187), which confirmed that an accused may still be guilty of an attempt even where he voluntarily desists from carrying out his original intention.

The question of withdrawal arose once again in *S v Agmat* (1965 (2) SA 874 (C)), where a pickpocket had unclasped the complainant's bag with a view to stealing her purse. The appellant argued that any theft was still in the stage of preparation, which would allow for the possibility that he had abandoned the attempt (*supra* 875D–E). However, the court decided that the appellant was indeed in the stage of execution and, that being so, it was quite immaterial whether the appellant went to look into a shop window because he now had changed his mind as to the carrying out of the crime, or whether he had merely gone to stand there to see if the complainant became aware that her bag had been opened so that, if she did not become aware, he would then follow her and complete the crime (*supra* 875E–F).

In *S v Du Plessis* (1981 (3) SA 382 (A)), which dealt primarily with an appeal against convictions of contravening the Official Secrets Act 16 of 1956, it was confirmed that voluntary withdrawal after commencement of consummation is not a defence, and that if the change of mind occurred before the commencement of the consummation, then the person concerned cannot be found guilty of an attempt, but "if it occurred after the commencement, then there is an attempt and it does not avail the person concerned to say that he changed his mind and desisted from his purpose" (*supra* 400D–E). The Appellate Division cited the cases of *Hlatwayo* (*supra* 444–445) and *B* (*supra* 203B) with approval. However, this statement was *obiter* as no definitive intention to commit the offence could be identified, and consequently no attempt was committed.

Whether the cases of *Hlatwayo* and *B* are indeed sound authority for the proposition that voluntary withdrawal does not constitute a defence to attempt, once the stage of preparation has been passed, has been doubted by some writers. Kemp, Walker, Palmer, Baqwa, Gevers, Leslie and Steynberg (*Criminal Law in South Africa* 3ed (2018) 302) simply follow the authority in *Hlatwayo* in excluding the possibility of a defence where there has been a change of mind. Snyman argues that the withdrawal in *Hlatwayo* was not voluntary, as the accused was "caught out by other people (other domestic workers in the house who saw what she had done) and for that reason decided not to proceed with her plan" (*Criminal Law* 284). Rabie (1981 *SACC* 56) agrees that this was a case of interrupted attempt. Similarly, Snyman (*Criminal Law* 4ed (2002) 289) comments regarding the case of *B* that it was not a genuine case of voluntary withdrawal, as external factors that came to the accused's attention at a late stage – thus founding an interrupted attempt rather than a withdrawal – induced him not to continue with his acts. De Wet (*Strafreg* 170) agrees that this was not a pure case of withdrawal, as it was not that the accused abandoned his intent as a result of better insights, but because the flesh was too weak, though the spirit was still willing. Rabie (1981 *SACC* 56) states that the facts of this case are more properly classified as a voluntary withdrawal. Burchell (*Principles of Criminal Law* 5ed (2016) 555) is of the view, given the less-than-determinative authority on the point, that the relevance of a truly voluntary withdrawal from an attempt to commit a crime – as opposed to an involuntary withdrawal as a result of being detected for instance – still falls to be determined in South Africa.

3 Is there a need for a voluntary withdrawal defence, and how should it be structured?

It is clear that a possible voluntary abandonment defence can only have application once the course of events, along with the accused's intent, satisfies the test for attempt liability. However, protagonists and those systems supportive of the defence do not describe it uniformly. One of the leading supporters of the test in South Africa, Snyman, does not dispute that if the withdrawal takes place after the first harm has already been done, the attempt should give rise to conviction and punishment. Hence, he argues, if in the course of committing assault, X "withdraws" after having struck the first blow, or if in the course of committing arson, she "withdraws" after the first flames have already damaged the building, the "withdrawal" is too late to afford X a defence (Snyman *Criminal Law* 284). However, Snyman contends that if X withdraws before having inflicted any harm or damage, even if her conduct up to that stage can be construed as having already passed the point where the "consummation has commenced", then there should not be liability for attempt (Snyman *Criminal Law* 284). Snyman relies on comparative jurisdictions that favour this defence, including those US states that follow the Model Penal Code and continental legal systems such as the Netherlands and Germany (for discussion of these provisions, see heading 4 below).

Burchell (*Principles of Criminal Law* 556) notes that the complexity associated with the issue of voluntary withdrawal relates to the balance that has to be drawn between antagonistic interests: on the one hand, the view taken by Snyman is that while harm has not yet been done to society, the law should encourage desistance from the intended purpose; on the other hand, there is the concern that the provision of a "fall-back" defence would encourage those who wish to embark on a criminal endeavour to do so in the knowledge that there will be an opportunity to avoid liability on the basis of withdrawing from the purpose. The point of departure for Burchell, like Snyman, is that there are "strong reasons" to allow for a voluntary withdrawal defence (*Principles of Criminal Law* 557), with two qualifications – namely, that there would nevertheless be attempt liability, despite withdrawal: (i) where the accused's intent to offend is still clear at the moment of renunciation, but he withdraws because he has decided that carrying out the purpose to offend at that particular opportunity was no longer suitable; and (ii) where the attempt has already been completed. Burchell further narrows the ambit of his conception of the voluntary withdrawal defence by pointing out that even where the withdrawal takes place in the context of an uncompleted attempt, there may yet be liability where the court simply does not believe in the authenticity of the withdrawal, or where the accused's acts already constitute an attempt at the impossible (*Principles of Criminal Law* 557–558).

Another proponent of the voluntary withdrawal defence is Labuschagne ("Vrywillige Terugtrede uit 'n Misdaadpoging en Menslike Gedragsbeheermeganismes: Opmerkinge oor die Persoonlikheidsregtelike Begrensing van die Strafreg" 1995 *Stell LR* 186), who associates himself with views expressed by both Snyman and Burchell, although his own specific point of departure is that the accused who withdraws has not yet broken through the psychological barrier to crime ("interne gedragsbeheermeganismes"); that criminal law should not apply in this private space; and that liability should consequently not follow.

The arguments raised by these writers in favour of the voluntary withdrawal defence are set out below. At this juncture, a further question may be posed: is it appropriate to base a voluntary withdrawal defence on a subjective basis? Rabie points out that if the issue is the demonstration of a remorseful state of mind, then it ought not to matter whether the accused had actually committed the crime originally intended, or had only committed the crime of attempt (1981 *SACC* 59). Proponents of the defence would certainly want to recognise the difference between these scenarios, given that there is no debate that remorse after completing a crime does not affect the attribution of criminal liability; Rabie suggests that such a defence may better be founded on the objective criterion that an accused who withdraws after an attempt would cause less harm to the community than an accused who is remorseful about committing a crime, even if he takes steps to ameliorate the harm caused after the commission of the crime (1981 *SACC* 59). Whether this is indeed an appropriate basis for such a distinction remains a moot question.

4 Some comparative observations

English common law has not recognised the possibility of a voluntary withdrawal defence (Ormerod and Laird *Smith, Hogan, and Ormerod's Criminal Law* 15ed (2018) 434, citing the case of *Taylor* (1859) 1 F&F 511; Horder *Ashworth's Principles of Criminal Law* 9ed (2019) 524; *Haughton v Smith* [1973] 3 All ER 1109 1115; but see *Simester and Sullivan Criminal Law* 305, who are more equivocal). The question was considered by the English Law Commission prior to the drafting of the 1981 Criminal Attempts Act, but no change was proposed to the common-law approach. Following the approach adopted in the United States Model Penal Code (MPC), which adopted an almost exclusively subjective approach to attempt liability (Dressler *Understanding Criminal Law* 5ed (2009) 412–413), a substantial number (roughly half of US states – see the list in Lee 1997 *Connecticut Law Review* 120n13) do provide for a voluntary withdrawal defence in the context of attempt (although exact requirements differ from state to state). The model provision may be found at section 5.01(4) of the MPC, which states:

> "*Renunciation of criminal purpose*: When the actor's conduct would otherwise constitute an attempt … it is an affirmative defense that he abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose … Within the meaning of this Article, renunciation of criminal purpose is not voluntary if it is motivated, in whole or in part, by circumstances, not present or apparent at the inception of the actor's course of conduct, that increase the probability of detection or apprehension or that make more difficult the accomplishment of the criminal purpose. Renunciation is not complete if it is motivated by a decision to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar objective or victim."

The nature of the voluntary abandonment defence contained in s 5.01(4) of the MPC bears closer scrutiny, however. First, its availability is limited by an "affirmative defence", which means that X bears the burden of proof to establish the defence on clear and convincing evidence. Simester and Sullivan (*Criminal Law* 306) also postulate the possibility of incorporating the requirement that the accused is required to prove the defence on a balance of probabilities, given the "highly exceptional" nature of the defence. However, as Burchell (*Principles of Criminal Law* 555) correctly (it is submitted) points out, given the antipathy towards placing a reverse onus on the accused in South African law, such a solution is unlikely to find favour in this jurisdiction. Secondly, not only is there a procedural limitation on the defence in terms of the MPC model, but the substantive qualifications on what constitutes "voluntary" renunciation in terms of this defence narrow its availability even further. In short, wherever the actor is motivated by circumstances that increase the probability of the actor being arrested for his actions, or that increase the difficulty of achieving the envisaged purpose, then the renunciation is not regarded as "voluntary". Hence, renunciation on the basis that the accused is choosing to transfer the criminal purpose to another target or until a more appropriate time does not avail the accused. At the least, it can be said that the American defence is limited to certain

situations and/or motivations only, and so it is clear that it is by no means a complete defence.

As Snyman notes (*Criminal Law* 285), voluntary withdrawal before the completion of the crime is treated as a defence in the Continental legal systems. The comparison with continental or civil legal systems should always be borne in mind; unlike the South African (and common law) two-stage trial, in these systems, the criminal trial comprises a single-phase hearing that examines both liability and punishment (Du Plessis "Hans Welzel's Final-Conduct Doctrine: An Importation From Germany We Could Well Do Without" 1984 *SALJ* 301 317). Hence, in continental systems, attempt liability is only seen as a stage of development in the consummation of the offence (Keiler and Roef (eds) *Comparative Concepts of Criminal Law* 2ed (2016) 228). While space constraints preclude a detailed examination of these systems, for present purposes it bears noting that there are significant differences in application between certain systems. Thus, the German system applies an essentially subjective approach to the defence, in terms of which the actor can rely on the defence if, at the moment of withdrawal, he has "*in his view* not done everything necessary to achieve his goal, but believes that by simply continuing to act he could reach it" (Keiler and Roef *Comparative Concepts of Criminal Law* 230, original emphasis). The Dutch system is much more objective in nature (for discussion on the Dutch law relating to attempt, see Jörg, Kelk and Klip *Strafrecht Met Mate* 14ed (2019) 151ff). Hence, for example, withdrawal from an attempt at murder, having inflicted severe injuries, would be regarded as a completed attempt in Dutch law, renunciation of which would not negate attempt liability. In Germany, such facts would merely give rise to an incomplete attempt, resiling from which would provide a voluntary withdrawal defence (Jörg *et al Strafrecht Met Mate* 151ff). Nevertheless, though applying different modes of classification of attempt, both systems allow a defence where the withdrawal is deemed "voluntary", and both seem to apply the following formula as a standard: "a withdrawal will be considered voluntary if the offender thinks 'I do not wish to carry on even if I could' while it will be involuntary if he thinks 'I cannot carry on even if I wanted to'" (Keiler and Roef *Comparative Concepts of Criminal Law* 232). As with the Model Penal Code definition of the defence, it is therefore clear that in Dutch and German law, an "involuntary" withdrawal on the basis of police intervention or fear of detection would not constitute a defence (Keiler and Roef *Comparative Concepts of Criminal Law* 232).

5 Arguments for and against the voluntary withdrawal defence

What is the rationale for allowing a defence based on voluntary withdrawal? It has been argued that the rationale for punishing attempt is to be found in the utilitarian theories of punishment (see e.g., Williams *Textbook of Criminal Law* 2ed (1983) 404) such as deterrence, prevention and reformation, which are justified by "the advantage [punishment] brings to the social order" (Burchell *Principles of Criminal Law* 3ed (2005) 73). If somebody therefore voluntarily resiles from his criminal scheme it means that he has already

been *deterred* from committing the crime (Horder *Ashworth's Principles of Criminal Law* 525) and its commission has already been *prevented*. No danger to society remains, if ever there was, and consequently no punishment is required (this argument is raised by Snyman *Criminal Law* 285). Simester and Sullivan (*Criminal Law* 305) explain that this approach is consistent with the principal rationales of attempt: "to allow timely interventions by law enforcement personnel prior to realisation of any harm and to allow lawful restraint of the socially dangerous". They argue that a genuine withdrawal prior to the harm being realised indicates that such intervention and restraint were not required (*Criminal Law* 305). As for the *reformative* theory, it is contended that there is nobody to be reformed because the accused has already reformed himself (Snyman *Criminal Law* 285). These are the arguments in favour of the defence based on sentencing theory.

Such arguments may be countered by the fact that once the requirements for an attempt have been met, the accused has consequently committed a crime, and the only issue to be determined is not guilt, but punishment. This accords with the "temporal logic of the law" (Horder *Ashworth's Principles of Criminal Law* 524), as explained by Hoeber ("The Abandonment Defense to Criminal Attempt and Other Problems of Temporal Individuation" 1986 *California Law Review* 377 380) in the following terms:

> "Criminal prohibitions have temporal dimensions in the sense that, given the definition of any crime, we may refer to later occurrences as 'post-crime' conduct or events. In relation to the crime of theft, for example, the return of stolen property is a post-crime event. In relation to the crime of attempt, abandonment is a post-crime event. Criminally prohibited states of affairs are thus … temporally individuated".

It is interesting that Hoeber's words are cited with approval by Labuschagne (1995 *Stell LR* 186), despite his support for a voluntary withdrawal defence. Nevertheless, Labuschagne goes on (198) to state that it amounts to circular reasoning to argue that since an attempt is an offence there must be liability, since, if the defence were accepted, there would not be any liability. Labuschagne's contention does not detract from the central truth that (as he acknowledges) liability for attempt is indeed established once the requirements are met. The point is that any voluntary withdrawal defence is a singular one, applied post-crime, expunging the liability already incurred through the application of the rules of attempt liability. Whether such a peculiar defence should exist is the point of contention, not whether liability for attempt arises.

Moreover, arguably the most fundamental theory of punishment, the theory of *retribution*, is entirely consistent with the approach that excludes a voluntary withdrawal defence (Rabie 1981 *SACC* 60–61; significantly (and somewhat contradictorily) Snyman *Criminal Law* 11–15 contends for the pre-eminence of retributive theory despite his support for a voluntary withdrawal defence; while Labuschagne 1995 *Stell LR* 196 is of the view that retribution is not consonant with modern punishment theory, which would allow for the voluntary withdrawal defence). As Lee (1997 *Connecticut Law Review* 142)

notes, the concept of retribution provides a basis for "some mitigation of punishment where abandonment is concerned".

This may be contrasted with the idea underlying the theories of punishment that are proffered in support of the withdrawal defence, where the inference of non-dangerousness on the part of the actor, and his consequent unsuitability to be punished, are inferred from the abandonment. Fletcher, who favours the voluntary withdrawal defence, states that this claim "raises the basic question whether the criminal law should be grounded in case-by-case assessments of personal dangerousness" (*Rethinking Criminal Law* (1978) 187). As Fletcher further inquires (*Rethinking Criminal Law* 187), would it not then be sound to inquire whether the actor was *generally dangerous* (author's own emphasis), even though on a particular occasion he abandoned the offence? He concludes that this is an unsatisfactory argument in the context of the attribution of criminal liability. It is submitted that this approach is to be preferred to that of Labuschagne (1995 *Stell LR* 197), who finds the argument founded on non-dangerousness compelling. Lee notes (1997 *Connecticut Law Review* 145–151) that unless the courts are convinced of a "genuine moral conversion", they are generally not receptive to the argument that non-dangerousness may be inferred from abandonment. In any event, Lee reasons (1997 *Connecticut Law Review* 152), while attempters who renounce their attempted crime are almost certainly less dangerous than attempters who persist, attempters who renounce are most probably more dangerous than members of the public at large.

A further argument adduced in favour of allowing voluntary withdrawal to function as a defence is that it accords with one of the basic reasons for distinguishing between acts of preparation and acts of consummation: a person ought not to be punished as long as there is still a possibility that she may change her mind for the better (Snyman *Criminal Law* 285). Snyman argues that "this is possibly exactly what Watermeyer CJ had in mind" in *R v Schoombie* (1945 AD 541 547–548) when he spoke of "the last series of acts which would constitute a continuous operation, *unbroken by intervals of time which might give an opportunity for reconsideration*" as acts of consummation (Snyman's emphasis; Burchell *Principles of Criminal Law* 556 cites this argument with apparent approval). However, what Watermeyer CJ was seeking to describe was the stage of attempt liability (the commencement of the consummation) that had progressed beyond the stage of preparation, and which could thus found criminal liability for attempt. Once this stage has been reached, liability for attempt has been established. The voluntary withdrawal defence only arises for consideration *after* this point, and so this dictum is not applicable to the current discussion. (For some comments on this dictum in the general context of incomplete attempt, see heading 6 below.)

Nevertheless, the question remains whether this argument in favour of a voluntary withdrawal defence is indeed valid, allowing maximum scope to the potential offender to change his mind so as not to transgress the law. This idea dovetails with the idea that the law ought to encourage prospective wrongdoers not to transgress, and that it cannot do this by punishing people

who decide to abandon their criminal plans (Snyman *Criminal Law* 285). The argument avers that the prospective criminal should know that he will be rewarded if he voluntarily abandons his criminal project (Snyman *Criminal Law* 285). Burchell (*Principles of Criminal Law* 556) contends that this will be more likely to serve to nullify the materialising of future harm, "since the accused in an attempt situation is often the sole author of his or her own fate", with his or her liability not customarily linked to that of others. However, whether the existence of a withdrawal defence really does motivate the accused not to complete her intended crime is by no means clear (Ormerod and Laird (*Smith, Hogan, and Ormerod's Criminal Law* 434) state that this "seems unlikely"; Fletcher (*Rethinking Criminal Law* 186) states that this claim "needs far more proof than any of its proponents have offered"; Labuschagne (1995 *Stell LR* 195) states that this approach is now regarded as naïve, although he contends that it has symbolic significance). If the accused has weighed up the risk of being caught, and nevertheless proceeded with her intended crime, why would her decision now change when the same criteria apply later in the course of conduct (see the discussion in Lee 1997 *Connecticut Law Review* 142–144)? If the reason for not proceeding is that the accused sees, rather than the error of her ways, the enhanced likelihood of being caught, then, as is the case in the Model Penal Code version of the defence as well as the Dutch and German law (discussed above at heading 4), it is rather doubtful, on policy grounds, that the accused should not be punished. After all, the accused's withdrawal is not *voluntary* in such circumstances, but rather dictated by self-preservation. Although withdrawal from a common purpose is crucially different from withdrawal from an attempt (as is argued below), it is nevertheless noteworthy that similar policy concerns would apply – the withdrawal must be voluntary.

Lee raises a further consequentialist argument against allowing the abandonment (or as he refers to it, renunciation) defence (1997 *Connecticut Law Review* 145). He notes, using the analogy of the money-back guarantee, which encourages a purchase on the basis that the decision to purchase can always later be reversed, that such a defence may reduce the deterrent effect of the criminal law and "embolden otherwise ambivalent actors" (1997 *Connecticut Law Review* 145):

> "The availability of a renunciation defense cannot entice people to take steps toward crime if they have no interest in committing crimes in the first place. But those who harbor some interest in committing crimes may decide that the renunciation defense effectively buys them more time to think."

A further argument in favour of the voluntary withdrawal defence is that the fact of withdrawal proves that the accused did not in fact have the intention at all material times to complete her act; in other words, that the accused's intention was not so strong as to "motivate" her to complete the crime (Fletcher *Rethinking Criminal Law* 187ff; Horder *Ashworth's Principles of Criminal Law* 524). After all, the argument contends, for a conviction of attempt to commit a crime, the State must prove that the accused had the intention to commit the *completed* crime, and not merely an intention to attempt to commit the crime (Snyman *Criminal Law* 285). It may be

countered that this argument does not fully accord with the nature of attempt liability – it is not simply focused on the intent of the actor, but on whether the actor has expressed that intent in terms of identifiable objective criteria (see Lee 1997 *Connecticut Law Review* 140). Simply put, where the accused has reached the stage of commencement of the consummation of the intended crime, she is *already* blameworthy. Renunciation does not avail her. Neither does remorse (as Labuschagne (1995 *Stell LR* 199) notes, voluntary withdrawal does not of itself indicate remorse). Neither does previous good character. All these factors will no doubt play a role in mitigating sentence, but liability has already been established (see generally Yaffe *Attempts* ch 11). Burchell (*Principles of Criminal Law* 557) suggests that a subsequent change of mind can indeed override an earlier convergence of *actus reus* and *mens rea*, given that intention "involves a *continuing* state of mind" (original emphasis). However, this logic would inevitably require that *any* change of mind, at *any* stage of the course of criminal conduct, would negate liability. This is not seriously defensible. Once liability has been established, the point of no return has been reached.

Proponents of a voluntary withdrawal defence also struggle to answer satisfactorily a crucial question: *how* do you know why someone abandons their criminal purpose? (Simester and Sullivan *Criminal Law* 305). The Australian case of *R v Page* ([1933] Argus LR 374 (Victoria)) is instructive. The accused, who had climbed a ladder, put the point of a crowbar under a window frame. Then he climbed down, and claimed that thoughts of his mother brought him back to his good self. Or perhaps it was that he had noticed the police watching him?

The final salvo in favour of a defence of voluntary withdrawal is that it is inconsistent not to recognise renunciation as a defence to a charge of attempt given the existence of the defence in voluntary withdrawal from a common purpose to commit a crime (on this defence, see Burchell *Principles of Criminal Law* 501–504; Snyman *Criminal Law* 263–264; Kemp *et al Criminal Law in South Africa* 281–283) or from a conspiracy (on conspiracy, see Burchell *Principles of Criminal Law* 540–545, and specifically on withdrawal 544–545; Snyman *Criminal Law* 286–289; Kemp *et al Criminal Law in South Africa* 306–307). Both Burchell (*Principles of Criminal Law* 556) and Snyman (*Criminal Law* 286) highlight this aspect. No such inconsistency exists however. Withdrawal from a common purpose occurs *before* the crime has been completed. In respect of attempt liability, the rationale for such liability is to intervene in the criminal course of conduct at the earliest moment when there is sufficient evidence of a criminal purpose. The person who successfully withdraws from a common purpose could well be convicted for attempt, and so it should be if she has commenced the execution of the crime, but she could not be held liable for the completed crime unless the common purpose continues throughout the commission of the crime. And so it should be. As for withdrawal from a conspiracy, this can only successfully occur *before* the requirements for conspiracy liability have been met (by way of comparison, the US Model Penal Code at section 5.03(6) and section 5.02(3) respectively allows for renunciation as a defence relating to conspiracy and solicitation, provided the actor prevents the crime from being committed – see Lee 1997 *Connecticut Law Review* 119–120). A

person who withdraws from a conspiracy before liability can ensue is in exactly the same position as one who withdraws from an attempt while still in the stage of preparation. No liability can apply, and there is no question of inconsistency of approach on this score.

6 Concluding remarks

In conclusion, it may be noted that, as Horder observes, those systems that have a voluntary withdrawal defence typically do not find it problematic, and members of the public in these jurisdictions seem to regard it as fair (*Ashworth's Principles of Criminal Law* 525). Moreover, the defence is rarely raised and considered in the courts, apparently affirming Fletcher's comment that the defence "is likely to remain an elegant artifact of criminal codes, viewed with admiration, yet rarely employed in the day-to-day affairs of the courts" (*Rethinking Criminal Law* 197).

Whether the defence really is or should be "viewed with admiration" is however uncertain, it is submitted. Having briefly adverted to the arguments generally raised for and against the defence in the previous discussion, the last section of this piece seeks to justify a final contention in favour of not allowing the defence in South African law, by examining selected theoretical and practical concerns.

In principle, if the voluntary withdrawal defence in the context of intent is compelled by the idea of recognising remorse, and responding with mercy (see Labuschagne 1995 *Stell LR* 199), then the same considerations should underpin an exculpatory defence in respect of completed crimes. However, as stated earlier, in relation to completed crimes, remorse is merely a mitigating factor. While withdrawal can reduce culpability (Simester and Sullivan *Criminal Law* 305) this begs the question why remorse in the context of attempt should be treated differently (i.e. as a substantive defence), as opposed to a factor that only has a bearing on sentencing. The question is further complicated by the existence of statutory offences that are formulated in terms not only of the completed act, but also an attempt to commit the completed act (see e.g., the offences in s 10 of the Sexual Offences Act 23 of 1957; s 47(2) of the Land and Agricultural Development Bank Act 15 of 2002; and s 215(2)(*f*) of the Companies Act 71 of 2008). The voluntary withdrawal defence has no application to these prohibitions. But if one were to allow a defence of withdrawal in the context of attempt, what would be the basis for distinction between the offence of attempt *per se* and these provisions? As Rabie points out, it would be much easier, and more consistent in principle, to apply the same approach to attempt generally, and for withdrawal to be considered, at most, in mitigation of sentence (1981 *SACC* 60).

As mentioned earlier, it might be argued that a distinction could be drawn between an actor who has already caused the harm, in the context of a completed offence, and one who has renounced his planned criminal course of action, and so has only inflicted limited harm, if any harm at all. It could be contended (as does Labuschagne (1995 *Stell LR* 197)) that the actor who withdraws from the attempt is no longer dangerous to the community.

However, this reasoning does not exactly accord with the approach adopted in the US Model Penal Code, and the Dutch and German law, which excludes the defence from those who withdraw "involuntarily", such as where the withdrawal is motivated by reasons pertaining to the probability of apprehension, or by a choice to postpone the criminal conduct to a more advantageous time. Surely this exclusion from the ambit of the defence recognises that those who withdraw on these grounds remain dangerous to the community, and like those who have already committed an offence, are blameworthy?

Another practical argument relates to the problems of law enforcement if such a defence existed, as accused persons caught before the final act could very well claim that they were in the process of withdrawing from their course of action and had no intention of going beyond the stage they had reached (Ormerod and Laird *Smith, Hogan, and Ormerod's Criminal Law* 434; Horder *Ashworth's Principles of Criminal Law* 524). Even Burchell (*Principles of Criminal Law* 556) concedes that the defence may be subject to abuse if applied in every case – but this then begs the question when it should apply.

It may be noted that the question whether such a defence ought to exist in South African law is not as obviously justifiable from the comparative sources as Snyman has suggested. In particular, as mentioned above, while the defence is favoured both in German law and in those US states following the Model Penal Code formula, the general approach to attempt liability in these jurisdictions is primarily *subjective* in nature, with a directed focus at the state of mind of the accused. The accepted approach in the South African law of attempt (with the exception of attempt at the impossible) is, however, *objective* in its orientation, as per the "commencement of the consummation" test applied to incomplete attempts (see, generally, Hoctor 2015 *SACJ* 363).

In fact, this point bears further amplification in that given that the objective "commencement of the consummation" test applies to both instances of interrupted attempt and voluntary withdrawal attempt, there is no good reason to deal with these categories of attempt differently. Moreover, the practical difficulties of distinguishing between these categories of attempt (see discussion at heading 2 above) militate against any efforts to do so. Thus, irrespective of whether the accused has experienced a moral epiphany, once the accused has been assessed to have gone beyond the preparatory stage of the attempt, "it makes no difference … whether a plan is not carried out because of some outside intervention [interrupted attempt] or because the doer changes his mind [voluntary withdrawal]" (*S v B supra* 203G). Schreiner JA, on behalf of a unanimous Appellate Division court, clarified that the phrase in the *Schoombie* judgment describing the consummation as including "all the last series of acts which would constitute a continuous operation, unbroken by intervals of time which might give an opportunity for reconsideration" (*Schoombie supra* 547–548, cited in *B supra* 203C) should not be understood to mean that the mere chance for reassessment, even if "ample" and "leisurely" in nature (*B supra* 203D) is

any obstacle in itself to the "commencement of the consummation" being attained:

> "[T]he factor of intervals of time obtains such importance as it has rather from the notion of a normal break between preparatory acts and acts that begin the consummation than from the notion of the opportunity for reconsideration that time affords" (*B supra* 203E–F).

This approach was followed in *R v Katz* (1959 (3) SA 408 (C)), where the court explained that there should be no uncertainty "as to intent or desire to proceed to completion" as opposed to "mere uncertainty as to whether the machinery or means being adopted would in fact lead to completion" (424A). In this case, the court held that any opportunity for reconsideration afforded by a time interval "loses practically all its force through the fact that voluntary turning back by the accused was 'in the natural course of events' extremely unlikely" (424G). The inevitable conclusion of the court was that the accused had proceeded to the stage where they were guilty of an attempt. Where the accused has reached the point of no return then whether the subsequent interruption proceeds from an external source, or from within, should be irrelevant for the purposes of liability.

The submission is therefore that there is no good reason to treat voluntary withdrawal as a separate defence (Rabie 1981 *SACC* 61). Instead, withdrawal should at most amount to a mitigating factor in the inquiry into sentence (see Yaffe *Attempts* 291; Horder *Ashworth's Principles of Criminal Law* 524; for a contrary view see Brink ("First Acts, Last Acts and Abandonment" 2013 19 *Legal Theory* 114 120), who regards mitigation as unsatisfactory as it is "typically discretionary and partial"). Yaffe ("Trying to Defend *Attempts*: Replies to Bratman, Brink, Alexander, and Moore" 2013 19 *Legal Theory* 178 188) compares two hypothetical accused who commit exactly the same acts, and inquires why the mere renunciation of the attempt should mean that the conduct of one of these would not result in any criminal liability for attempt, as opposed to mitigation. It may be concluded that voluntary withdrawal from the course of criminal conduct is not "sufficiently fundamental to warrant a complete defence to criminal liability" (Horder *Ashworth's Principles of Criminal Law* 525); and allowing the defence amounts to logic giving way to policy (Ormerod and Laird *Smith, Hogan, and Ormerod's Criminal Law* 434). Whatever the accused's moral character before or after the attempted crime may be, criminal law concerns itself with one act at a time – this is the temporal logic of the law (Lee 1997 *Connecticut Law Review* 141). While there certainly may be reduced culpability for a genuine change of heart, once the accused's firm intention to commit the crime, as revealed in his conduct, amounts to an attempt, there should be no basis for a substantive defence of voluntary withdrawal in the context of attempt liability.

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THE EFFICACY OF SECTION 2(4)(l) OF THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT IN THE CONTEXT OF COOPERATIVE ENVIRONMENTAL GOVERNANCE[1]

1 Introduction

Wetlands are regulated by a plethora of specific environmental management Acts (SEMAs). The mandate of these Acts sits within various environmental affairs departments. Thus, the same resource is regulated and managed by a series of different legislation and environmental administrators. The National Environmental Management Act 107 of 1998 (NEMA) is the national environmental framework Act and stresses in its purpose the need for cooperative environmental governance (CEG) which, arguably, raises no concern for the way wetlands are currently regulated and managed, as long as this is done in a manner that promotes CEG. Section 2 of NEMA sets out a series of sustainable development principles that all organs of state must apply in all matters relating to the environment; "environment" is read throughout to include wetlands. Section 2(4)(*l*) is dubbed the "co-operative governance principle" and mandates the "intergovernmental co-ordination and harmonisation of policies, legislation and actions relating to the environment". With this in mind, this note, by way of a document analysis, seeks to ascertain whether legislation and policies and action relating to the wetlands regulation and management are in fact coordinated. The presented findings indicate that coordination is lacking, which consequently adversely affects the management, conservation and protection of wetlands in South Africa. The recommendations aim to bring about law reform to improve coordination that bolsters wetlands management as well as their conservation and protection, while simultaneously promoting the objectives of section 41 of the Constitution of the Republic of South Africa, 1996 (the Constitution).

2 Sustainable development framework for wetlands

> "Wetlands contribute to all 17 SDGs (sustainable development goals) …Their conservation, wise use, and restoration represents a cost-effective investment." (Ramsar Secretariat (2018) Scaling up Wetland Conservation, Wise Use and Restoration to Achieve the Sustainable Development Goals https://www.ramsar.org/sites/default/files/documents/library/wetlands_sdgs_e.pdf (accessed 2020-09))

[1] This contribution forms part of an objective in Lemine *South Africa's Response in Fulfilling Her Obligations to Meet the Legal Measures of Wetland Conservation and Wise Use* (unpublished thesis, CPUT) 2018.

The concept and evolution of sustainable development can be traced to the Stockholm Conference of 1972. Sustainable development is encapsulated within South Africa's Constitution in section 24(*b*), which states that everyone has the right:

> "to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that– … (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

The word "environment" must be read throughout this note to include wetlands, as envisaged in NEMA, although it has been recommended that NEMA be amended to make specific reference to "wetland environment". The reason for the aforementioned is that within certain jurisdictions, wetlands enjoy higher standards of protection by virtue of specific inclusion in their constitutions. These jurisdictions include Switzerland (Art 78), Brazil (Art 20 (III), 21(XIX), and 231(2)) and Uganda (Ch 15, s 237(2)(*b*)) (De Klemm and Shine *Wetlands, Water and the Law: Using Law to Advance Wetland Conservation and Wise Use* (1999) 163–164).

Among other prompts, the constitutional mandate of promoting sustainable development led to the promulgation of NEMA. NEMA is the national environmental framework of South Africa, or the constitution of South Africa's environmental law. NEMA defines sustainable development as "the integration of social, economic and environmental factors into planning, implementation and decision-making to ensure that development serves present and future generations" (s 1).

Section 2 of NEMA makes provision for 18 key principles of sustainable development that must be adhered to by all organs of state in fulfilment of their duty to protect natural resources (which includes wetlands). These principles are not merely a wish list (Kidd *Environmental Law* 2ed (2011) 38), but serve as guidelines that must be observed by organs of state when performing or taking actions where the protection of the environment is concerned (Glazewski *Environmental Law in South Africa* (2020) par 7.2.2). Furthermore, they share features common to internationally accepted principles (Kidd *Environmental Law* (2008) 34). Reference to these principles feature prominently in NEMA regarding key plans, programmes and impact assessments of activities in the environment (Glazewski *Environmental Law in South Africa* par 7.2.4). Determining whether South Africa meets every sustainable development objective/principle is not the purpose of this note, as that would cast the net too broad; and not all the principles would be relevant or applicable. Rather, this note focuses on the following sustainable development principle of NEMA:

> "There must be intergovernmental co-ordination and harmonisation of policies, legislation and actions relating to the environment." (s 2 (4)(*l*))

Section 2(4)(*l*), dubbed the "co-operative governance principle", specifically mandates the coordination of policies and legislation and action relating to the (wetland) environment (Oosthuizen, Van der Linde and Basson "National Environmental Management Act (NEMA)" in Strydom and King *Environmental Management in South Africa* 3ed (2018) 144). The hypothesis is that if legislation and policies are not coordinated, then action

flowing from this failure is uncoordinated too, which abrogates the principle of sustainable development (Lemine *South Africa's Response in Fulfilling Her Obligations to Meet the Legal Measures of Wetland Conservation and Wise Use* 54).

With specific reference to sustainability and wetlands, article 3 of the Convention on Wetlands of International Importance Especially as Waterfowl Habitat of 1971 (referred to as the Ramsar Convention) requires signatories to formulate and implement their planning to promote wise use of wetlands within their jurisdiction. "Wise use of wetlands" is defined as "the maintenance of their ecological character, achieved through the implementation of ecosystem approaches, within the context of sustainable development" (Birnie and Boyle *International Law and the Environment* (2009) 674). The concept of "wise use" was introduced for the first time in 1987 by the conference of parties (Ramsar Convention Secretariat "Wise Use of Wetlands: Concepts and Approaches for the Wise Use of Wetlands" in *Ramsar Handbooks* 4ed vol 1 (2010) 9) and was first interpreted at the conference adopted by the contracting parties in the year that the World Commission on Environment and Development's Report was published (De Klemm and Shine *Wetlands, Water and the Law: Using Law to Advance Wetland Conservation and Wise Use* 47). Coincidentally, this was the same report that "coined" the term "sustainable development" (Birnie and Boyle *International Law and the Environment* 49). Wise use equates to the "maintenance of an ecosystem benefits/services to ensure long term maintenance of biodiversity as well as human well-being and poverty alleviation" (Ramsar Convention Secretariat *Ramsar Handbooks* 9). At the Regina Conference in 1987, wise use of wetlands was interpreted to mean: "their sustainable utilization (inter- and intragenerational principles) for the benefit of human kind in a way compatible with the maintenance of the natural properties of the ecosystem" (Birnie and Boyle *International Law and the Environment* 49).

De Klemm and Shine submit that the interpretation of the concept of wise use includes:

- sustainable use of wetlands for the benefit of mankind in a way that is compatible with maintaining the natural properties of the ecosystem;
- human use of a wetland so that it may yield the greatest continuous benefit to the present generation while maintaining its potential to meet the needs and aspirations of future generations; and
- recognizing that natural properties of the ecosystem include the physical, biological or chemical elements, such as soil, water, flora, fauna and nutrients, as well as the interactions between these elements (De Klemm and Shine *Wetlands, Water and the Law: Using Law to Advance Wetland Conservation and Wise Use* 47).

At the Kampala Conference in 2005, it was stipulated that "the maintenance of their (wetlands) ecological character [could be] achieved through the implementation of ecosystem approaches, within the context of sustainable development" (Birnie and Boyle *International Law and the Environment* 674).

It is thus clear that the accepted interpretation of wise use instructs contracting parties, which includes South Africa, to fit the mould of sustainable development. This is confirmed by the Ramsar administration's view that holds that the interpretation of wise use is in line with the objectives of sustainable development (Ramsar Convention Secretariat *Ramsar Handbooks* 10). One such objective is expressed in section 2(4)(*l*) of NEMA. Again, section 2(4)(*l*) is indicative of a cooperative approach to environmental management.

3 The cooperative approach

Section 7(2) of the Constitution mandates the State to respect, protect, promote and fulfil the rights contained in the Bill of Rights, in terms of which protection and conservation of the wetlands are fundamental – based on the valuable benefits they offer, as discussed below. Thus, state environmental affairs departments must act together for the improvement of the wetland environment. In Chapter 3 of the Constitution, the principles of cooperative government are set out. In this regard, section 41(1)(*h*) of the Constitution provides:

> "All spheres of government and all organs of state within each sphere must–
> (*h*) co-operate with one another in mutual trust and good faith by–
> (i) fostering friendly relations;
> (ii) assisting and supporting one another;
> (iii) informing one another of, and consulting one another on, matters of common interest;
> (iv) co-ordinating their actions and legislation with one another;
> (v) adhering to agreed procedures."

The intricate relationship between section 41(1)(*h*)(i)–(v) of the Constitution and wetland conservation is strengthened by section 2(4)(*l*) of NEMA, which demonstrates that various environmental affairs departments with a wetland management mandate must coordinate and communicate their actions, legislation and procedures with one another. Together, they inform the constitutional imperative of cooperative governance. It is submitted that if one factor listed in section 41(1)(*h*) is lacking, it has a domino effect on the others and ultimately adversely affects cooperative governance.

Intergovernmental coordination and the constitutionally entrenched principle of cooperative government are synonymous according to De Villiers ("Intergovernmental Relations in South Africa" 1997 12(1) *SA Public Law* 197). Du Plessis ("Legal Mechanisms for Cooperative Governance in South Africa: Successes and Failures" 2008 23(1) *SA Public Law* 87) submits that "South Africa's policy and legislation have served to strengthen cooperative governance, especially with regard to environmental matters". This further emphasises the realisation of the obligation placed upon the State to cooperate with matters pertaining to the environment. The legislation applicable to this note, more specifically to wetland conservation, is administered by various state environmental departments. The intricacies of the wetland legislative framework and administration, with respect to cooperative governance, is discussed later.

It has been submitted that the following factors hamper governance: fragmented and uncoordinated legislation, policies, processes and authorisation; disjointed decision-making processes; overlap and duplication of governance effort; inability to monitor the implementation of policies and legislation holistically; and governmental discord (Nel and Kotzé "Environmental Management: An Introduction" in Strydom and King *Environmental Management in South Africa* 2ed (2009) 18–19).

Relevant to this research is the notion of cooperative environmental governance (CEG), as cited by Du Plessis (2008 *SA Public Law* 87). CEG refers to the various organs of state and spheres of government mandated to perform functions relating to the environment (Bosman, Kotzé and Du Plessis "The Failure of the Constitution to Ensure Integrated Environmental Management From a Co-Operative Governance Perspective" 2004 19 *SA Public Law* 412). Here, governance focus is on matters relating to the environment, as opposed to governance in the broad sense. Du Plessis submits that despite this constitutional and legislative imperative, turf wars, unwillingness of officials, and fragmentation sometimes frustrate this ideal of cooperative environmental governance (Du Plessis 2008 *SA Public Law* 87).

Section 2(4)(*l*) as discussed stresses not only the need for cooperative environmental governance but for harmonisation of three elements: legislation, policies and actions related to wetland management. If legislation is consolidated or unified, then the achievement of harmonisation or alignment will be adequate. NEMA stresses the need for cooperative environmental governance in its stated purpose:

> "To provide for co-operative environmental governance by establishing principles for decision-making on matters affecting the environment, institutions that will promote cooperative governance and procedures for co-ordinating environmental functions exercised by the organ of state; to provide for certain aspects of the administration and enforcement of other environmental management laws; and to provide for matters connected therewith."

NEMA makes provision for mechanisms that promote cooperative environmental governance. Examples include environmental management plans (EMPs) and environmental implementation plans (EIPs) (Nel and Alberts "Environmental Management and Environmental Law in South Africa" in Strydom and King *Environmental Management in South Africa* 3ed (2018) 43). The primary purpose of these mechanisms is to "co-ordinate and harmonise environmental policies, plans and programmes" (Nel and Alberts in Strydom and King *Environmental Management in South Africa* 3ed (2018) 43). The wording is unclear as to whether, or the manner in which, uncoordinated legislation and policies are addressed within these mechanisms – in other words, whether amendments are made within uncoordinated legislation and regulation. This uncertainty is confirmed by the ensuing sections of NEMA, which make provision for the content of an EIP and EMP respectively; submission and scrutiny and adoption of the aforementioned; and compliance.

The NEMA- albeit a national framework act- enables the promulgation of specific environmental acts. Furthermore, it has been submitted that "framework legislation has the potential to enhance cooperative governance

between ministries" (Van der Linde "National Environmental Management Act 107 of 1998" in Strydom and King *Environmental Management in South Africa* 2ed (2009) 194). In this regard, wetland conservation, protection and management are, principally, the job of the Departments of: Water and Sanitation (DWS); Environment, Forestry and Fisheries (DEFF); and Agriculture, Land Reform and Rural Development (DALRRD).

4 The realisation of cooperative environmental governance for promoting wetland and human rights protection

Section 24(*a*) of the Constitution specifically provides everyone with a right to an environment that is not harmful to their health and well-being. It has been stated that the notion of well-being refers to the idea of "sense of place" (Kidd *Environmental Law* (2011) 23). Reference was specifically made to the threat of damage to the natural environment and the author makes direct reference to the St Lucia Ramsar Site (wetland of international importance) (Kidd *Environmental Law* (2011) 23). This further indicates the importance of wetland conservation. Section 24(*b*) of the Constitution requires, among other things, that the environment be protected by legislation and other measures that (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecological sustainable development. Reading section 24(*b*)(i)–(iii) in the context of cooperative governance notions gives a sense of how to realise CEG.

The combination of the principle of cooperative governance and section 24 creates an enforceable right for right-holders to use to bolster wetland conservation and protection. In the landmark constitutional case of *Government of the Republic of South Africa v Grootboom* (2001 (1) SA 46 (CC)), the Constitutional Court per Yacoob J held that "reasonable legislative and other measures" means that if government passes legislation pertaining to wetlands, this does not in itself constitute constitutional compliance for purposes of section 24(*b*) (par 42). Flowing from legislation must be well-directed policies and programmes, and these must be reasonable both in their conception and implementation (par 42). In other words, the legislative framework for wetlands cannot merely sit dormant in various state departments; it must be effective when conceived, and the state departments should implement them holistically – not in a disjointed and incoherent manner. Section 24 was not intended to create disjunction, since cooperative governance is a constitutional imperative. Failure of the environmental government departments to realise this right may have an adverse effect on other fundamental human rights.

In the Constitutional Court case of *Glenister v President of the Republic of South Africa* (2011 (3) SA 437 (CC)), it has been confirmed that incorporated international agreements become a source of rights and obligations. At a domestic level, this means that members of the public may enforce their right to have wetlands protected so that they may enjoy the benefits provided thereby; and the State is obliged to act in a manner that promotes wetland conservation, which includes the coordination and harmonisation of policies, legislation and actions relating to the environment. The benefits

offered by wetlands for humans are extensive (including as they do, food, shelter, water and aesthetics among others); if not conserved and if these benefits are foregone, it will have an adverse effect on corresponding socio-economic rights. It is against this backdrop that the Bill of Rights comprises several other clauses that are apposite to environmental concerns. These include socio-economic rights like the right to access health care, food, water and social security (Glazewski *Environmental Law in South Africa* par 5.1.1). Thus, if the State fails in its duty to conserve wetlands, then the socio-economic rights that the present generations enjoy will be diminished. Liebenberg (*Socio-Economic Rights: Adjudication Under a Transformative Constitution* (2010) 83) submits that the duty of the State to promote and protect the rights of its citizens (whether these be social, cultural or political rights) requires a positive action by the State. Inherent in NEMA are sustainable development principles that make direct and indirect reference to promoting socio-economic rights through protecting the environment, as envisaged in section 2(4)(*a*)–(*k*).

A series of SEMAs has been promulgated to give effect to NEMA. These Acts aim to regulate specific environmental sectors, and the administrative powers in relation to these are in the hands of various environmental departments. However, wetlands are regulated by SEMAs and therefore the administration and management of activities are the responsibility of various environmental departments having a duty of care for the environment as part of their mandate.

A duty of care for the environment is an internationally accepted principle and is legislated in section 28 of NEMA. The duty is elevated for wetlands by the principle set out in section 2(4)(*r*) of NEMA, which provides that "sensitive, vulnerable, highly stressed ecosystems, such as … wetlands require specific attention in management and planning procedures". Thus, the SEMAs regulating wetlands must be well coordinated. However, Paterson ("Biodiversity, Genetic Modification and the Law" in Glazewski *Environmental Law in South Africa* par 16.3.5) states that "South Africa lacks a dedicated wetland protection Act" and "a private member's wetlands Bill was tabled … but has not seen the light of day"; Booys (*An Assessment of the Adequacy of the Present Legal Regime for the Conservation of Wetlands and Estuaries in South Africa* (mini-thesis submitted in partial fulfilment of the requirements for the LLM Degree, University of the Western Cape 2012) 4) refers to "domestic legislation being un-coordinated and haphazardous"; and Kidd (*Environmental Law* (2011) 136) has said that "singling out wetlands for conservation has not been achieved by our legislation and this is, in my opinion, an opportunity missed". Nevertheless, Kidd has submitted that South Africa's legislative framework, which aims to conserve wetlands, "appears to be sufficiently comprehensive" (*Environmental Law* (2011) 137). Kidd does not provide a detailed explanation for this.

5 Specific environmental management Acts for wetlands: pitfalls and prospects

This passage provides a brief exploration of certain – but not all – SEMAs relevant to wetlands regulation. The exploration focuses on pitfalls existing

within SEMAs that exacerbate poor wetland management but also points to the prospective good. The SEMAs explored include the National Water Act 36 of 1998 (NWA), the National Environmental Management: Biodiversity Act 10 of 2004 (NEMBA), the Conservation of Agricultural Resources Act 43 of 1983 (CARA) and the National Climate Change Response White Paper of 2011.

5 1 National Water Act 36 of 1998

The National Water Act 36 of 1998 (NWA), as stated in its preamble, aims for water resource management to achieve the sustainable use of water, while recognising the need for integrated management of all aspects of water resources (which includes wetlands as stated in the definition), and while protecting the quality of water resources. The NWA is the mandate of the Department of Water and Sanitation (DWS).

Section 2 of the NWA sets out the purpose of the Act, which is to ensure that the nation's water resources are protected, developed, used, conserved, controlled and managed in ways that take into account, *inter alia*: meeting the basic human needs of present and future generations; protecting aquatic and associated ecosystems and their biological diversity; and reducing and preventing pollution and degradation of water resources. A wetland falls within various definitions used in the NWA – namely, in the definitions of "wetland", "water resource", and "watercourse", respectively. Therefore, SEMAs, for example CARA, that use any of the aforementioned expressions should be construed to include a wetland in the ordinary sense.

Chapter 3 of the NWA is titled "Protection of Water Resources". Embedded in this chapter is section 12, which prescribes a classification system for water resources. The significance of the classification system is that it is used to determine whether a water resource is minimally used, moderately used, or heavily used. Pursuant to this determination, the Act requires the establishment of resource quality objectives (RQOs) for each category (minimally used, moderately used or heavily used) (s 13(*b*)). The significance of RQOs in light of water resource management is that it encompasses:

> "[t]he quantity, pattern, timing, water level …; the water quality, including the physical, chemical and biological characteristics of the water; the character and condition of the instream … and the characteristics, condition and distribution of the aquatic biota." (s 1)

The description of RQOs therefore provides and addresses information that is pertinent to sustainable wetland conservation and monitoring. Moreover, the Ramsar Convention Secretariat Laws and Institution Guidelines indicate that "the absence of legal measures for environmental management of water quantity and quality" hinders the wise use of wetlands (Ramsar Convention Secretariat *Ramsar Handbook* 33). From a water resource management perspective, the incorporation into national legislation must be lauded. However, with specific reference to wetlands protection, it could lead to challenges as the management of this resource is multifaceted and ultimately requires the RQOs to be set cooperatively rather than by one

department. Although section 13(4)(*a*)(ii) of the NWA makes provision for the invitation of comments on the proposed classification and RQOs after the fact, it does not infuse the spirit of cooperative environmental governance. It is submitted therefore that a proposed class and RQO must be established by all affected departments prior to publication for comments. Failure to do so goes against the grain of section 41(1)(*h*)(iii) of the Constitution.

A failure by the State to give effect to the principle of CEG in setting RQOs could arguably lead to water quality issues not being adequately addressed, and to poor water security. This would hamper advancing human rights as guaranteed by the Constitution, as well as conservation, which is in conflict with its constitutional duty as prescribed by section 24(*b*)(i) and (iii) and section 41 of the Constitution.

The recommendation is that section 12 of the NWA should be amended to read: "The Minister, in concurrence with other environmental affairs departments, must prescribe a system for classifying water resources" (suggested insertion underlined). Section 41(1)(*h*)(iii) of the Constitution requires that they consult one another on matters of common interest. The recommendation is that the departments address wetland conservation and protection as part of the agenda when decisions are made, then agree on procedures in addressing these matters and adhere to them. Moreover, opportunity must be afforded to each department (DEFF, DWS and DALLRD) to ensure better coordination for the establishment of RQOs. In this way, the constitutional imperative of fostering friendly relations could be fulfilled.

5 2 National Environmental Management: Biodiversity Act 10 of 2004

The purpose of NEMBA is to provide for the conservation and management of South Africa's biodiversity; and for the protection of species and ecosystems that warrant protection, among other things. One object of the Act is to provide for cooperative governance in biodiversity management and conservation (s 2(*c*)). As a point of departure, it is evident that nowhere in NEMBA is reference made to a wetland *per se*, and nor does NEMBA include any of the other definitions describing or including wetlands, as envisaged by the other SEMAs. The task of administering the Act in terms of Chapter 8 of the NEMBA rests with the Minister (meaning the "Cabinet member responsible for national environmental management" (s 1(1))). Here, the meaning of "Minister" is not confined to, or does not refer to, a single department. It has been submitted that national laws of relevance to biodiversity fall within the remit of the DWS and DEFF (Paterson, "Biodiversity, Genetic Modification and the Law" in *Environmental Law in South Africa* (2018) par 13.4.2.4). The DEFF is backed by the South African National Biodiversity Institute (SANBI) in carrying out the former's mandate (Paterson, "Biodiversity, Genetic Modification and the Law" in Environmental Law in South Africa par 13.4.2.4). Among other things, SANBI contributes to the management of biodiversity resources (s 10).

Of relevance here is the protection afforded to ecosystems. An ecosystem is defined by NEMBA to mean "a dynamic complex of animal, plant and

micro-organism communities and their non-living environment interacting as a functional unit" (s 1). The definition of a wetland therefore merits inclusion in the meaning of an ecosystem.

Section 70 of NEMBA mandates the Minister or Member of the Executive Council (MEC) for environmental affairs in a province to publish a national or provincial list of alien and invasive species (AIS). In giving effect to this obligation, the national list, consisting of four Notice Listings, has been published and identifies AIS within the various provinces (GN 864 in *GG* 40166 of 2016-07-29: Alien and Invasive Species Lists). The introduction of AIS to wetland conservation has raised global concern as this leads to damage and ultimate loss of wetlands (Ramsar Convention Secretariat "The Fourth Ramsar Strategic Plan 2016–2024" in *Ramsar Handbooks* 5ed (2016)). What should be noted is that the Conservation of Agricultural Resources Act 43 of 1983 also makes provision for the listing and identification of Declared Weeds and Invader Plants (GNR 208 of 2001 Table 3).

5 3 The Conservation of Agricultural Resources Act 43 of 1983

The Conservation of Agricultural Resources Act 43 of 1983 (CARA) has been enacted to conserve natural agricultural resources by the maintenance of the production potential of land, by the combating and prevention of erosion and weakening or destruction of water sources (s 3). The mandate of CARA is within the remit of the Department of Agriculture, Land Reform and Rural Development (DALRRD).

CARA defines natural agricultural resources to mean "soil, the water sources and vegetation" (s 1). "Wetland" is not mentioned or defined in CARA. However, a wetland falls within the meaning of a water source as expressed earlier; and therefore, it is presumed that CARA, by its wording, is responsible for wetland conservation. This meaning is further given effect to in CARA's description of "soil conservation work", which means "any work which is constructed on land for the conservation or reclamation of any water source" (s 1). With specific focus on water sources, CARA empowers the Minister (DALRRD) to prescribe control measures that must be complied with by land users (s 6). Such control measures may relate to the utilisation and protection of vleis, marshes … and water sources; and the protection of water sources against pollution on account of farming practices (s 6(2)(*n*)). Section 18(1) of CARA vests powers of investigation in the executive officer, any other officer of the department and any member of a soil conservation committee to: "determine whether and to what extent the water sources on that land are polluted on account of farming methods or have become weaker or have ceased to exist" (s 18(1)(*e*)); make surveys, take samples (soil or plant) to make an assessment of the water sources (s 18(1)(*g*) and (*h*)), and may take photographs for purposes of the assessment as s/he deem fit (s 18(1)(*h*)). This officer is the same as an environmental management inspector (EMI). The functions of the EMI are set out in section 31G of NEMA. It includes monitoring and enforcing compliance with the law for which they have been designated. Designation of the EMIs could be in

any staff member of the department responsible for environmental management in the province. This includes the DWS (NWA), DEFF (NEMBA) and DALLRD (CARA). In terms of NEMA, the EMIs are empowered to investigate an offence in terms of the law for which they have been designated; a breach of such law; or a breach of a term or condition of an authorisation, permit or instrument issued in terms of such law (s 31G(*b*)(i)–(iii).

CARA, similar to NEMBA, sets out its goals in regulations for the combating of declared weeds and invader plants (GNR 208 of 2001 Table 3). The species named in the regulations to NEMBA and CARA are identical. This could lead to enforcement issues by the various departments' EMIs which would exacerbate wetland conservation challenges rather than bolster conservation.

With a view to managing or combating these plants, the CARA regulations list these categories of plants in its Table 3 (GNR 208 of 2001). As stated above, 50 per cent of the AIS listed and identified by NEMBA regulations are also covered by the CARA regulations. This creates an uncertain catch-22 situation regarding "CARA's" wetlands. Is the EMI appointed in terms of CARA required to do an assessment on this 50 per cent of AIS, while the remaining AIS (although on a "CARA" wetland – regulated by CARA) is managed by another environmental department or SANBI? Another concern is that EMIs empowered by NEMBA and CARA respectively could attend to the same AIS (as their mandate allows) by reporting on the exact same matters; this may lead to duplications in the performance of their duty and in reporting. This exacerbates the potential for inconsistency in the data. This also has the potential to instigate conflict among the departments, which goes against the constitutional directive to foster friendly relations. In addition, this flies in the face of cooperative environmental governance. Lastly, Van der Linde's theory (in Strydom and King *Environmental Management in South Africa* 2ed (2009) 194) – that sectoral laws, such as our SEMAs referred to above, provide greater and more specific protection – is hamstrung by the manner in which the wetland SEMAs are not only out of sync with each other, but also conflicting. As indicated above, the Ramsar Convention Secretariat Laws and Institution Guidelines listed conflicting sectoral laws as a factor hindering wise use (ramsar.org/sites/default/files/documents/pdf/ lib/hbk4-03.pdf).

Controlling, eradicating and managing AIS is an integral part of the "Ramsar Strategic Plan 2016–2024" (ramsar.org/sites/default/files/ documents/library/ hb2_strategic_plan_2016_24_e.pdf). The Plan advances protection and research with regard to AIS. To avoid duplication of duties by CARA and other departments' EMIs, it is recommended that the DALRRD have *carte blanche* to investigate AIS issues in "CARA" wetlands, and to have these demarcated. The EMI is at the heart of the administration and implementation of environmental legislation and enforcement (Glazewski *Environmental Law in South Africa* par 27.6). Furthermore, nothing prohibits joint ventures from expediting investigation, and lessons can be learned on a case-by-case basis.

5 4 National Climate Change Response White Paper of 2011

The United Nations stated unequivocally that

> "climate change not only exacerbates threats to international peace and security, it is a threat to international peace and security." (Strydom *International Law* (2016) 96–97)

The National Climate Change Response White Paper of 2011 (White Paper NCCR) is a presentation of the South African Government's vision for an "effective climate change response and long-term, just transition to a climate-resilient and lower-carbon economy and society" (White Paper NCCR). The White Paper NCCR commits South Africa to two objectives:

1. Effectively manage inevitable climate change impacts through interventions that build and sustain South Africa's social, economic and environmental resilience and emergency response capacity; and
2. Make a fair contribution to the global effort to stabilise greenhouse gas concentrations in the atmosphere at a level that avoids dangerous anthropogenic interference with the climate system within a timeframe that enables economic, social and environmental development to proceed in a sustainable manner.

In the 2018 Ramsar report on the State of the Wetlands, Martha Rojas Urrego, head of the Ramsar Convention on Wetlands, submitted that "we are losing wetlands three times faster than forests" (Ramsar Convention on Wetlands *Global Wetland Outlook: State of the World's Wetlands and their Services to People* 2018 (2018)). Given the natural services provided by wetlands acting as a carbon sink (Turpie "Environmental Management Resources Economics" in Strydom and King *Environmental Management in South Africa* 2ed (2009) 45), it is expected that these efforts should be integrated into functions rather than stand-alone provisions exercised in silos. As indicated above, coordination is a vital component of sustainable development.

The White Paper NCCR introduces the streamlining of climate change efforts to protect ecosystems with provisions that "conserve, rehabilitate and restore natural systems that improve resilience to climate change impacts or that reduce impacts, [f]or example … wetland ecosystems" (Ch 5 Adaptation 5.5.2). Irrespective of the terminology used for a wetland or the manner in which it is described in SEMAs, the effects of climate change on wetlands affect all environmental affairs departments concerned. In the same breath, however, it is clear that coordination is lacking; there is no coordination of actions and legislation, nor agreed procedures to manage these or to share information with all the relevant players on this common matter of interest – that is, to bolster wetland resilience cohesively. This leads to a diminished upholding of the provisions of section 41(1)(*h*) of the Constitution.

Of recent vintage and to implement the White Paper NCCR, is the draft Climate Change Bill of 2018 that has been published for comment. The Bill is a breath of fresh air in that it explicitly includes the promotion of integrating climate change efforts throughout the departments. The initial indication is the inclusion of the definition "sector department", which is read with a

scheduled list of functional areas. Briefly, the coordination is further embraced by the following provisions: section 8 of the Bill establishes a Ministerial Committee on Climate Change that comprises the Minister responsible for planning, monitoring and evaluation in the Presidency, the Minister, those Ministers in the Functional Areas in the Schedule to the Bill, as well as all MECs responsible for the environment; section 8(6)(*a*) obliges the Committee to "coordinate efforts across all sector departments and spheres of government"; section 10(3) obliges the Minister (DEFF) to consult with sector departments and provinces for the development and publication of the National Adaptation Strategy as well as the review thereof; and section 10(10) requires a sector department to submit a report on the "progress made in relation to the implementation of the climate change response implementation plan". The Draft Climate Change Bill is an outstanding model of a precursor to climate change law in South Africa through the vein of CEG.

6 Conclusion: getting the octopus into the jar

South Africa must be lauded for its body of SEMAs and the extent to which they bolster wetlands conservation and protection. However, the uncoordinated nature of the pieces of legislation and regulations appears to hinder cooperative environmental governance, and ultimately the proper management of wetlands. The result is apparent uncertainty and possible duplication by regulations – for example, in the management and control of invasive species. With reference to the NWA and the setting of RQOs, and although water quality and quantity by nature are administered by the DWS, when considering RQOs for wetland regulation and management with its tentacles in a series of acts and institutions, it is evident that RQOs cannot be designed and decided upon with a silo-mandate approach. The White Paper NCCR and the Climate Change Bill introduce a more cooperative and inclusive model for the manner in which future environmental laws should be adopted, and for the fulfilment of section 2(4)(*l*) of NEMA.

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CASES / VONNISSE

THE CONCEPT OF "INDIGENOUS LAND TENURE" SURFACES IN NAMIBIA: A COMPARATIVE OVERVIEW

***Agnes Kahimbi Kashela v Katima Mulilo Town Council* (SA 15/2017) [2018] NASC 409 (16 November 2018)**

1 Introduction

The facts in this case, which fell to be decided by the Supreme Court of Namibia in November 2018, can be succinctly put: in 1985, Ms Kashela's late father was allocated a piece of land as part of communal land by the Mafwe Traditional Authority (MTA) in the Caprivi region of the then-South West Africa (now Namibia). In 1985, the Caprivi region fell under the then-South West Africa Administration. Following the independence of Namibia on 21 March 1990, all communal lands became property of the state of Namibia by virtue of section 124 of the Constitution of Namibia Act 1 of 1990, read with Schedule 5 of the Constitution. (For an exposition of the Constitution of Namibia, see Naldi *Constitutional Rights in Namibia* (1993); Carpenter "The Namibian Constitution: *Ex Africa Aliquid Novi* After All?*"* 1989/90 15 *SAYIL* 22.) Paragraph (3) of Schedule 5 of the Constitution states that the afore-mentioned communal lands became property of the state "subject to any existing *right*, charge, *obligation* or *trust* existing on or over such property" (author's own emphasis).

2 Facts

At the time of Namibian independence (1990), Ms Kashela's father was still alive and continued to live, without interference, on the piece of communal land allocated to him by the MTA (the land in dispute) with his family, including Ms Kashela. Ms Kashela's father died in 2001 with Ms Kashela as his only surviving heir. She continued to live on the land in dispute – land that had been initially allocated to her deceased father by the MTA in 1985. In terms of Mafwe customary law, Ms Kashela was the heir to the land in dispute.

In 1995, the government of Namibia – as owner of all communal lands by virtue of section 124 of the Namibian Constitution, subject to Schedule 5

paragraph (3) – transferred a portion of communal land (including the land in dispute) to the Katima Mulilo Town Council (KTC) in terms of the Local Authorities Act 23 of 1992 (LAA). KTC, as the new registered title holder of the communal land, rented out certain portions (including the land in dispute) and subsequently offered to sell those rented portions for varying amounts.

3 The dispute in the High Court

Ms Kashela issued summons in the High Court, claiming that KTC had unlawfully rented out the land in dispute. She claimed that KTC was subsequently unjustly enriched to her prejudice and also that KTC had unlawfully expropriated her land without just compensation as determined by section 16(1) and (2) of the Constitution and section 16(2) of the Communal Land Reform Act 5 of 2002.

In the High Court, KTC submitted that Ms Kashela was not entitled to the relief sought because, at the independence of Namibia and also upon transfer of the land to KTC, the land in dispute had ceased to be communal land. Consequently, Ms Kashela could not claim communal land tenure as KTC had become absolute owner of the disputed land without any encumbrance thereon.

The High Court agreed with KTC, holding that the land in dispute ceased to be communal land upon Namibian independence and that no communal land right as claimed by Ms Kashela could exist therein. Ms Kashela appealed to the Supreme Court.

4 The appeal before the Supreme Court

The pertinent issues to be decided by the Supreme Court were: (a) whether Ms Kashela had validly acquired customary land rights over the land in dispute; and (b) whether she continued to hold such customary land rights after the independence of Namibia in 1990.

Ms Kashela submitted to the Supreme Court that her right to occupy and use the land in dispute (acquired under communal land tenure prior to Namibian independence) was a property right protected by section 16(1) of the Constitution. (S 16(1) guarantees the right to property and provides everyone with the right to acquire, own and dispose of property and to bequeath such property.) She submitted further that such a right was capable of being inherited by a child of a person in whom it vested and could be passed on in perpetuity from one family member to another. That such a right could not be extinguished by the State declaring the land in dispute as part of a local authority's land and upon such a declaration, the local authority acquiring ownership of such land with no encumbrances.

She submitted that paragraph (3) of Schedule 5 of the Namibian Constitution was clear in stating that communal lands upon independence became property of the State subject to any existing "right", "obligation" and "trust" on or over such communal land. Ms Kashela submitted that her right

to occupy and use the land in dispute was such a "right" or "obligation" and that it attached to the land in dispute upon the land being transferred to KTC.

She further submitted that section 16 and paragraph (3) of Schedule 5 of the Constitution must be purposively interpreted so as to give a value to customary land tenure rights that is equivalent to other real property rights under common law. The import of this argument was that the right of "ownership" of communal land should be accorded the same protection under the Constitution as those accorded to rights of freehold that are recognised under Roman-Dutch law.

In the Supreme Court, KTC (and seven other respondents, including the government of Namibia) presented an uncomplicated argument. It was submitted on their behalf that, after the communal lands had become state land upon independence and thereafter been transferred to KTC, it became KTC town land; whatever customary rights of use and occupation may have existed at the time of such transfer ceased to exist and could thus not have extended to Ms Kashela as a surviving heir of her late father; the land in dispute ceased to be communal land even while Ms Kashela's father was still alive as it lost its status as communal land when it became state land under section 124 of the Constitution and it was thereafter transferred to KTC as town land. They submitted that Ms Kashela's right to occupy the land was thus a precarious personal right that was not enforceable without registration under the Deeds Registries Act 47 of 1937.

5 Judgment of the Supreme Court

As seen in the Supreme Court's judgment, the appeal confronted it with three questions: (a) whether or not Ms Kashela had acquired a valid customary law tenure right in the land in dispute; (b) whether she still held such a right; and (c) if so, whether any liability or obligation attached to KTC arising from its interference with that right (par 41). This discussion focuses only on the issue of whether Ms Kashela had acquired and continued to hold a customary law tenure right in the land in dispute when her father died in 2001.

To put the dispute into proper context, the Supreme Court set out the legislative framework underlying the dispute before it (par 46–56). (For a detailed exposition of property law in Namibia, see Amoo *Property Law in Namibia* (2014)). This legislative framework can be summarised as follows: section 4 of the South West Africa Native Administration Act 56 of 1954 (Act 56 of 1954) made the South African Development Trust the owner of communal land in South West Africa (SWA). Since SWA then being a Mandate under South African administration, Act 56 of 1954 gave the Governor-General (GG) of South Africa the power by proclamation to set apart any land or area in SWA for the sole use and occupation of indigenous peoples of SWA. Section 6(2) of Act 56 of 1954 required the GG in that event to set apart land of pastoral or agricultural value for the "sole use and occupation" of an ethnic group. Such rescinded land then became unalienated state property. The Development of Self-Government for Native Nations in SWA Act 54 of 1968 transformed such tracts of land set aside for

the sole use and occupation of indigenous peoples in SWA into "homelands". This was followed by Proclamation AG 8 of 1980, section 3 of which empowered the Administrator-General (AG) of SWA to create representative authorities for the various ethnic groups. A myriad of proclamations then followed, introducing the concept of "communal land", which was placed under the jurisdiction of various representative authorities. Proclamation AG 29 of 1980 established a Representative Authority for Caprivians, which included the Mafwe Traditional Authority. Section 33 of Proclamation AG 29 of 1980 set out the circumstances under which land would cease to be communal land. Proclamation AG 29 of 1980 was repealed by Proclamation AG 8 of 1989 and all powers then vesting in the representative authorities were vested in the AG of SWA, who subsequently exercised jurisdiction over all communal land until the date of Namibian independence in 1990. Post independence, section 17(1) and (2) of the Communal Land Reform Act 5 of 2002 provided that all communal land areas vest in the State in trust for the benefit of the traditional communities residing in those areas. Furthermore, it provided that no right conferring freehold ownership is capable of being granted or acquired by any person in respect of any portion of communal land.

Against this backdrop, which on the face of it illustrates an absence of a coherent system of laws to protect the people living on communal land, the Supreme Court had to assess KTC's submission as opposed to Ms Kashela's submission. Had Ms Kashela lost whatever rights she might have had in communal land when such land became state land upon independence and, subsequently, municipal or town land? Or did paragraph (3) of Schedule 5 of the Constitution create a *sui generis* right in favour of Ms Kashela over the land in dispute, and did such right continue to exist even when transferred to a local authority such as KTC?

In answering the question whether Ms Kashela's deceased father (Andreas Kashela) retained or acquired any rights over the land in dispute upon its proclamation as town land, and whether those rights survived his death and passed on to his heir (Ms Kashela), the court had to interpret Schedule 5 of the Constitution. As seen by the court, Proclamation AG 8 of 1980 determined that the representative authorities held lands in trust for respective tribal communities over whom they had jurisdiction. By virtue of section 124 of the Constitution, these communal lands became property of the State upon independence. Paragraph (3) of Schedule 5 of the Constitution, however, determined that communal lands that became property of the State in this manner were subject to any "right", "obligation" and "trust" existing on or over such communal lands. The representative authorities of the various tribal communities were required to allocate land to members of their tribal communities for habitation or use. These rights of habitation or use, the court held (par 63), although not real rights as understood at common law, entitled the holders to live on and work the land, and sustain themselves from it. This right of habitation or use, the court held (par 65), could not be taken away relying merely on section 124 of the Constitution, because section 124 of the Constitution must be read with Schedule 5 of the Constitution, which states clearly that communal lands

that became property of the State upon independence were subject to any "right", "obligation" and "trust" existing on or over the communal lands.

This interpretation of section 124 and Schedule 5 of the Constitution, the court held (par 65), represents rationality and fairness as predicated by the substantive structures and ethos of the Constitution, which (as supreme law) enjoys primacy over all law subordinate and subject to it. This ethos, the court held, must permeate the judicial interpretation of the Constitution. This specific interpretational approach of the Constitution was previously accentuated by the Supreme Court of Namibia per Mahomed AJA in *S v Wyk* (1993 NR 426 (SC) 456G–H), where the court supported a benevolent interpretation of Schedule 5 so as to restore the dignity of pre-independence traditional communities. The court held further:

> "It cannot be correct that the State's succession to communal land areas at independence extinguished the communal land tenure that subsisted in the land … It could not have been the intention of the framers of the Constitution to grant a right which was unenforceable by the courts." (par 72)

As seen by the court (par 72), when the government of Namibia at independence took ownership of communal land areas as successor-in-title, it assumed an obligation under paragraph (3) of Schedule 5 to look after the interests of the people who lived on it. It never stopped holding that land in trust for the affected communities. Paragraph (1) of Schedule 5 employs language aimed at recognising that, in such communal land, there are interests that are short of rights in the black-letter law sense. As successor-in-title to communal land areas, the government of Namibia assumed the obligations of paragraph (3) of Schedule 5 that attached to such communal land. This obligation involved recognition and respect for the *rights* of the members of the community to live on the land, work it and sustain themselves. These rights were not of the kind that require registration under the Deeds Registries Act 1937 to have force of law.

Schedule 5 of the Constitution, the court held (par 76), must not be interpreted in a way that has the effect of perpetuating injustices of the past, which the Constitution has attempted to remove. By implication, the court here referred to over a century of methodical and systematic dispossession of indigenous communities of their lands by successive colonial administrations, which included the South African administration of South West Africa as a Mandate. (This history is graphically illustrated by Werner "A Brief History of Dispossession in Namibia" 1993 19 *Journal of Southern African Studies* 1. For a comprehensive exposition of the relationship between South Africa and South West Africa and South African policy in that territory, see Dugard *The South West Africa/Namibia Dispute* (1973)).

The court consequently held (par 77–78) that Ms Kashela acquired the exclusive customary law rights that her late father held in the land in dispute upon his passing. It held further that the fact that land ceased to be communal land upon Namibian independence did not necessarily result in the occupier of such land losing the protection given by paragraph (3) of Schedule 5, which states that communal land transferred to the government upon independence was "subject to any existing right, … obligation or trust on or over such property". Such a "right", the court held (par 78) "is a *sui*

generis right given under the Constitution (with a corresponding obligation on the successor to the land) and must take primacy". KTC thus, as a local authority and successor to the communal land, received the land in dispute for free but subject to any existing right or obligation over the property.

The court in conclusion held:

> "I come to the conclusion that Ms Kashela acquired a right of *exclusive use and occupation* of the land in dispute upon the passing of her father and that the right survived and attached to the land even after its proclamation as town land. That right is enforceable by the courts of law." (par 81, emphasis added by author)

Ms Kashela's claim that KTC was unjustly enriched to her prejudice and that her land was expropriated without just compensation was remitted to the High Court for further adjudication.

6 A comparative overview

This innovative judgment is to be welcomed. The Supreme Court could, however, have added much substance to its conclusion by seeking wider jurisprudential support. Such jurisprudential support in the African context is to be found in South Africa, Botswana and the African Commission on Human and People's Rights. Further afield, similar support can be found in jurisdictions such as Australia, Canada, Malaysia, Belize and in decisions of the Inter-American Court of Human Rights (IACHR).

With regard to South Africa, reference could have been made to the Richtersveld saga. The Richtersveld saga encompassed decisions by the Land Claims Court in *Richtersveld Community Alexkor Ltd* (2001 (1) SA 337 (LCC)), by the Supreme Court of Appeal in *Richtersveld Community v Alexkor Ltd* (2003 (6) SA 104 (SCA)) and by the Constitutional Court in *Alexkor Ltd v The Richtersveld Community* (2004 (5) SA 460 (CC)). The Richtersveld saga concerned the Richtersveld community, who historically lived in a large area of Namaqualand. This community (often referred to as the Khoisan or Nama) lived on their traditional lands long before 1847, when Namaqualand was placed under British rule through annexation by proclamation and their lands were then considered Crown land. In 1910, the British colonial government of the Cape Colony (which included Namaqualand) was replaced by the government of the Union of South Africa. In 1925, a rich deposit of diamonds was discovered in the area where the Richtersveld community had lived from time immemorial. The South African government considered this land to be "unalienated Crown" land owing to its annexation by Britain in 1847. Hence the land was proclaimed as alluvial diggings under the Precious Stones Act 44 of 1927, and mining rights were awarded to various stakeholders. The Richtersveld community was removed from this proclaimed land and denied access to the land by the erection of a fence and the creation of buffer farms. The community was eventually removed to a reserve. The prospecting and mining rights were allocated to a private stock company (Alexkor) with the State as the largest stakeholder.

In 1994, the Restitution of Land Rights Act 22 of 1994 came into being. Section 2(*d*) states that a community or part of a community shall be entitled to restitution of a "right in land*"* if it had been dispossessed of a "right in land*"* after June 1913 as a result of past "racially discriminatory*"* laws or practices.

The Richtersveld community approached the Land Claims Court (LCC) arguing that they were a "community" who had been "dispossessed" of a "right in land" as a result of past "racially discriminatory" practices. They claimed restitution and compensation. The community was unsuccessful in the Land Claims Court (LCC) but successful in the Supreme Court of Appeal (SCA) and the Constitutional Court (CC).

The SCA held (par 29) that the customary practices of the community disclosed a "right in land". The nature of this right in land, the SCA held, was that it was a customary law interest that had been present at the time of the British annexation and had continued until the dispossession in 1925. The substantive content of this interest, the SCA held (par 29), "was a right to exclusive beneficial *occupation* and *use*, akin to that held under common-law ownership". The CC concurred (par 62) with the SCA and saw the content of the right of the Richtersveld community under indigenous law as a "right to *exclusive occupation and use* of the … land by members of the Community … [T]he Community had a right to ownership in the land under indigenous law" (emphasis added by author).

The conclusions in the *Kashela* case (par 81) (that Ms Kashela had acquired a right of "exclusive use and occupation" of the land in dispute upon the passing of her father, that that right survived and attached to the land even after its proclamation as town land, and that that right is enforceable by the courts) resonate very strongly with the South African SCA and CC *Richtersveld* decisions. In both these decisions, it was held that a customary interest in land results in exclusive beneficial occupation and use of that land, akin to that held under common law ownership. This was pertinently held in paragraph 29 of the SCA decision and concurred with in paragraph 48 of the CC decision.

The CC *Richtersveld* decision (par 34) took cognisance of the Australian High Court case of *Mabo (No2) v Queensland* ((1992) 175 CLR) and the Canadian cases of *R v Van der Peet* ((1996) 137 DLR (4th) 289 (SCC)) (referred to *infra*) and *Delgamuukw v British Columbia* ((1997) 153 DLR (4th) 193 (SCC)) (referred to *infra*). *Mabo (No 2)* is unarguably universally accepted as the foundational case relating to so-called aboriginal or native or indigenous title. (In what follows, the terms "aboriginal" or "indigenous" or "native" are used as synonyms and interchangeably. These terms, broadly speaking, designate descendants of original inhabitants of territories colonised by foreigners, and whose culture, language, ancestry and land occupation have been continuous. Their cultures are distinct from the dominant society and they show a strong sense of identity.) In *Mabo (No2)*, it was held (par 60) that the Meriam Islands aboriginal people (despite the Australian continent having been colonised by Britain) had legal rights to their traditional lands. It was also held that Australian common law recognised the pre-existing land rights of the indigenous people, and that these rights (whether classified by the common law as proprietary,

usufructuary or otherwise) are ascertained according to the laws and customs of the aboriginal peoples, who by their laws and customs have a connection with the land. (*Mabo (No2)* is discussed by Barrie "Aboriginal Rights in Australia Remain an Unruly Horse" 2009 *TSAR* 155; see also Webber "The Jurisprudence of Regret: The Search for Standards of Justice in *Mabo"* 1995 17 *Sydney Law Review* 5.)

It is submitted that exactly the same principles that applied to the Richtersveld community applied to Ms Kashela as an individual in the sense that Ms Kashela was part of an indigenous community who had a continuous connection with the land in dispute. A reference to the *Richtersveld* SCA and CC decisions would decidedly have enhanced the conclusions reached by the Namibian Supreme Court in the *Kashela* case. (For a comprehensive discussion of the Richtersveld saga, see Barrie "Land Claims by Indigenous People: Litigation Versus Settlement" 2018 *TSAR* 344.)

In Botswana, support is to be found in *Sesana v Attorney-General* (*Botswana*) ([2006] BWHC 1). This case concerned the Baswara, a group of San hunter-gatherers who protested against their relocation by the Botswana government in 2002 out of the Kgalagadi Game Reserve, which had been proclaimed as a game reserve in 1961. (Prior to independence, Botswana had been a British Protectorate known as Bechuanaland.) The Baswara sought to retain the right to remain on their traditional territory, which was inside the proclaimed game reserve. The court found (par 79) that the Baswara were, by operation of the customary law in the area, in lawful occupation of the land prior to: (i) the creation of the Bechuanaland Protectorate; (ii) the independence of Botswana; and (iii) consequently, the creation of the game reserve in 1961. It found further (par 76) that the presumption of the legal continuity of the customary land rights of the Baswara had not been displaced. The court in effect held that the doctrine of "aboriginal title" that had been acknowledged in Australia in *Mabo (No2)* was applicable to Botswana. Phumapi J found *Mabo (No2)* to be "quite persuasive" (par 92).

The court's decision in *Sesana* is arguably applicable to similarly situated indigenous peoples on the African continent. The court in *Sesana* clearly acknowledged the application of the customary law of indigenous peoples in giving recognition and protection to their lands, as did the South African SCA and CC in the *Richtersveld* cases. (The *Sesana* case is discussed by Saugested "The Impact of International Mechanisms on Indigenous Rights in Botswana" 2011 15 *The International Journal of Human Rights* 187.) The intransigence of the Botswana government in implementing the *Sesana* decision was criticised by the United Nations Human Rights Council in 2010 (*The Situation of Indigenous Peoples of Botswana: UN Special Rapporteur Addendum Report* in Doc A/HRC/15/37/Add.2, 2 June 2010, par 73).

In Kenya, a former British colony, the history relating to land has been one of dispossession, exclusion and government pressure on use and access to land. *William Yatich Sitetalia, William Arap Ngasia v Baringo Country Council* HCKe (Civil Case No 188, 2000, Judgment of 19 April 2002) concerned the removal of the pastoralist Endorois Community from the environs of Lake Bogoria (their traditional territory) by the Kenya Wildlife

Service to create a game reserve. The Endorois community submitted that they had communal indigenous title to their traditional lands where they had lived for centuries, had cultivated the land and had enjoyed unchallenged rights to pasture. They submitted further that they consequently had an indigenous form of land tenure. They relied *inter alia* on *Mabo (No2)* and the South African SCA and CC decisions in the Richtersveld saga. The Endorois were unsuccessful in the Kenyan High Court, which held that the gazetting of the game reserve and the fact that compensation had been paid was conclusive against any claim. The case eventually gravitated to the African Commission on Human and Peoples' Rights in *Centre of Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* Communication (No 276/2003, 46th Ordinary Session, Banjul, The Gambia, 11–25 November 2009). (This case is discussed extensively in Barrie "The Quest for Indigenous Land Rights Intensifies" 2011 26 *SAPL* 497 and Beukes "The Recognition of 'Indigenous Peoples' and their Rights as a 'People': An African First" 2010 35 *SAYIL* 216.) Here, the Endorois, besides relying on their above-stated submissions to the Kenyan High Court, alleged a violation of Article 14 of the African Charter on Human and Peoples' Rights (1982 21 *ILM* 58). Article 14 of this Charter states that the "right of property" shall be guaranteed and may only be encroached upon in the general interest of the community, in the interest of public need and in accordance with the appropriate laws. The Endorois submitted that the "right to property" includes indigenous property rights. The African Commission agreed (par 196) with the Endorois, relying (par 94) *inter alia* on *Mabo (No2)* and the South African CC *Richtersveld* decisions. It held that the first step in the protection of traditional African communities is acknowledging that the rights, interest and benefits of such communities in their traditional lands constitute "property" under the African Charter. The African Commission recommended that Kenya recognise the rights of ownership of the Endorois and restitute their ancestral land. The African Commission concurred with various decisions of the IACHR – such as *Yakye Axa Indigenous Community* 15 IHRR 926, 2008, where it held (par 82) that indigenous communities who have exercised historical rights to their traditional lands are entitled to the recognition of such rights. The African Commission also concurred with the IACHR decision *Mayagna Awas Tingni v Nicaragua* (10 IHRR 758, 2003), which was the first major recognition of aboriginal land rights by an international adjudicative tribunal (see Anaya and Grossman "The Case of the *Awas Tingni v Nicaragua*: A New Step in the International Law of Indigenous People" 2007 19 *Arizona Journal of International and Comparative Law* 1). The African Commission further concurred (par 94) with the South African CC *Richtersveld* decision and the Australian High Court *Mabo (No2)* decision. The African Commission also concurred (par 56) with the Canadian decision of *R v Van der Peet* ([1996] 2 SCR 507) and *Delgamuukw v British Columbia* ([1997] 3 SCR 1010). In *Van der Peet*, the court accepted (par 30) that when Europeans arrived in North America the aboriginal people were already there, living on their traditional land in communities, and this led to their acquiring aboriginal rights. In *Delgamuukw*, it was held (par 140) that aboriginal title, which the court accepted as part of Canadian common law, conferred the right to use the

land for a variety of purposes based on the aboriginal peoples' "historic" occupation and relationship to their traditional lands.

Mabo (No2) was also accepted by the Malaysian Federal Court in *Superintendent of Lands v Madeli Bin Saleh, Superintendent of Lands and Surveys Miri Division v Madeli bin Saleh (suing as the administrator of the estate of the deceased, Saleh bin Kilonu* 2007 6 CLJ 509; 2008 2 MLJ 677). This case concerned the customary land rights of the indigenous Orang Asli. The court endorsed (par 19) the doctrine of customary aboriginal property rights as enunciated in *Mabo (No2)*, upholding the aboriginal land rights of the Orang Asli in Sarawak. The court held that *Mabo (No2)* reflected the legal position relating to aboriginal title throughout the British Commonwealth.

Mabo (No2), the *Richtersveld* SCA and CC decisions and *Madeli bin Saleh* all played an important role in the Supreme Court of Belize (former British Honduras) in *Mayan Leaders Alliance and the Toledo Alcades Association (on behalf of the Mayan Villages of Toledo District) v Attorney-General Belize* (Claim No 366 of 2008, Supreme Court Belize, 28 June 2010). The case concerned the rights of the Mayan indigenous people to their lands in southern Belize, based on historical use and occupancy. Relying on *Mabo (No2),* the South African *Richtersveld* cases and *Maleli bin Saleh*, the court held that the doctrine of aboriginal title applied and that there was an underlying presumption of legal continuity and cognisability of indigenous tribal property rights.

The IACHR has played a decisive role in recognising the customary rights to land of indigenous peoples. As stated above, *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (*supra*) was the first decision by an international adjucative tribunal to evolve a version of indigenous or aboriginal title to land based on customary land tenure. The court held:

> "Indigenous groups, by the very facts of their existence, have the right to live freely in their territory; the close ties of indigenous people with the land must be recognised." (par 149)

These sentiments were echoed in the *Case of the Kichwa Indigenous People of Sarayaku (Ecuador)* (2012 IACHR (Ser C) No 245 231) and the *Case of the Kalina and Lokono Peoples (Suriname)* (2015 IACHR (Ser C) No 196 161). In the latter case, the court interpreted (par 121) article 21 of the American Convention on Human Rights – the right to property – in light of the International Convention on Civil and Political Rights (1967 6 *ILM* 368) and the International Convention on Economic, Social and Cultural Rights (1967 6 *ILM* 360), and traced the collective rights, of indigenous people to property, to traditional occupation and use in keeping with their community-based traditions. This approach is similar to that of the Namibian Supreme Court, which as indicated above (par 81) held that Ms Kashela "acquired a right of *exclusive* use and occupation of the land in dispute upon the passing of her father and that the right survived and attached to the land even after its proclamation as town land" (emphasis added by author).

The Namibian Supreme Court could also have made reference to the United Nations Declaration of the Rights of Indigenous People 2007 (GA

Res 61/295 of 2007-08-13) (UNDRIP), which makes extensive provision for land rights of indigenous people. Section 26 of UNDRIP states that indigenous peoples have the "rights to the lands which they have traditionally owned, occupied or otherwise used". It provides further that states shall give legal recognition to such lands with due respect to the customs and land tenure systems of the indigenous peoples concerned. (For an exposition of UNDRIP, see Barrie "The United Nations Declaration on the Rights of Indigenous People" 2013 *TSAR* 292; Hartley, Joffe and Preston *Realising the UN Declaration on the Rights of Indigenous People* (2010); Barelli "The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous People" 2009 58 *ICLQ* 957.)

7 Conclusion

The cases discussed in this article all emanate from previously colonised states. South Africa, Australia, Canada, Botswana, Kenya, Belize and Malaysia were British colonies and consequently share similar colonial histories emanating from a particular Anglo constitutional-legal culture. The IACHR cases concerned previous Spanish colonies. Namibia itself has a German colonial history and was administered as a South African Mandate. This common colonial history was used to justify colonial control of the indigenous peoples themselves and their traditional lands. This has had an enduring impact that continues in modern times. As a result of the above innovative decisions of the courts, the judicial branches of the relevant countries are inexorably nudging the political powers to adapt their constitutional policies to accommodate the relatively recent judicial phenomenon of customary indigenous land tenure, which encompasses exclusive use and occupation.

In the African context, the *Kashela* decision is of great significance. By concluding (par 81) that Ms Kashela had acquired an enforceable "right of exclusive use and occupation" to the piece of communal land allocated to her deceased father, the Namibian Supreme Court echoed the conclusions reached in the African *Richtersveld, Sesana* and *Endorois* cases. It also came to a conclusion similar to those in the Australian, Canadian, Malaysian and IACHR cases referred to above.

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THE "REVOLVING DOOR" OF REQUIREMENTS FOR VALIDITY OF CUSTOMARY MARRIAGES IN ACTION

Mbungela v Mkabi [2019] ZASCA 134

1 Introduction

On the face of it, section 3 of the Recognition of Customary Marriages Act 120 of 1998 (RCMA) does not look ominous. The section provides:

> "For a customary marriage entered into after the commencement of this Act to be valid–
> (*a*) the prospective spouses–
> (i) must both be above the age of 18 years; and
> (ii) must both consent to be married to each other under customary law; and
> (*b*) the marriage must be negotiated and entered into or celebrated in accordance with customary law."

Notwithstanding the plain language of the above provision, there is abundant case law and academic articles dealing with the interpretation and/or application of section 3(1)(*b*) in particular. A decision of the Supreme Court of Appeal (SCA) in *Mbungela v Mkabi* ((820/2018) [2019] ZASCA 134) adds to what is fast becoming a jurisprudence of the salient issues relating to the understanding of paragraph *(b)* of subsection (1). The issue of the scope of this paragraph has become more relevant in the inquiry into the transfer and/or integration of the bride into the groom's family pursuant to the conclusion of a *lobolo* agreement. In his latest academic offering, Manthwa introduces this ongoing Achilles heel of customary marriages by referencing a number of cases and academic opinions (Manthwa "Handing Over of the Bride as a Requirement for Validity of a Customary Marriage" 2019 *THRHR* 652 652–653); the references serve to justify the relevance of his work in the presence of so much jurisprudence on the topic. It is prudent to highlight also that Bakker ("Integration of the Bride as a Requirement for a Valid Customary Marriage: *Mkabe v Minister of Home Affairs* [2016] ZAGPPHC 460" 2018 21 *PER/PELJ*) provided an insightful criticism of the court *a quo* in *Mkabe v Minister of Home Affairs* ((2014/84704) [2016] ZAGPPHC 460). On the whole, it is argued here that the judgment of the SCA is incorrect in a few material respects and that the criticism by Bakker of the court *a quo* is legally sound and contributes meaningfully to the jurisprudence in this area.

As this case note demonstrates, the SCA not only incorrectly interprets and applies the law, but the judgment also unjustifiably departs from precedents relating to the transfer and/or integration of the bride. In effect therefore, it is submitted, the SCA establishes a changeable attitude relating

to the transfer and/or integration of the bride. This attitude is symptomatic of an apparent constitutional interpretation that desires a specific outcome almost at any cost (Bishop and Brickhill "In the Beginning Was the Word: The Role of Text in the Interpretation of Statutes" 2012 *SALJ* 681 695). As such, this case note is relevant as it captures the latest instalment of the changing attitude towards the precepts of the transfer and/or integration of the bride. Thus, there is as much a need for continuous monitoring of this revolving door of interpretation and/or application as there is for cases dealing with this aspect. The matter is therefore considered as unsettled and merits ongoing academic discourse.

This issue of unsettled law finds resonance in the pronouncements of the Constitutional Court in *Bhe v Magistrate, Khayelitsha* ([2004] ZACC 17 par 112), where the court stated:

> "The problem with development [of living customary law] by the courts on a case by case basis is that changes will be very slow; uncertainties regarding the real rules of customary law will be prolonged and there may well be different solutions to similar problems."

In light of the foregoing, the casuistic and often contradictory jurisdiction on the issue of transfer and/or integration of the bride is considered in the context of the constitutional injunction in terms of section 39(2) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and the facts of the case in *Mbungela v Mkabi* (*supra*).

2 The facts

The first respondent, Mr Madala Philemon Mkabi, instituted action proceedings in the High Court of South Africa Gauteng Division, Pretoria (henceforth, the court *a quo)* seeking the following orders: (a) a declaration that he and Ms Ntombi Eunice Mbungela (henceforth, the deceased) had concluded a valid customary marriage; and (b) compelling the second respondent, the Minister of Home Affairs, to register and issue a certificate of registration of that customary marriage (*Mkabe v Minister of Home Affairs supra*).

The first respondent also sued the first appellant (Mr Piet Mbungela, the deceased's elder brother and head of her family), the second appellant (Ms Thobile Carol Mkhonza, the deceased's daughter and executrix of her estate) and the third respondent (the Master of the High Court, Nelspruit, who issued the second appellant's letter of executorship as the party to the proceedings). The first respondent later withdrew action against the first appellant, Piet Mbungela. The Minister and the Master of the High Court did not file any papers to defend the action. Only the second appellant defended the action (*Mkabe v Minister of Home Affairs supra* par 2).

On 2 April 2010, the first respondent sent his family to the deceased's home in order to negotiate *lobolo* for the deceased. The families agreed that he would pay an amount of R12 000 as *lobolo*. Pursuant to that agreement, an amount of R9 000, a cow, a suit, hat and shoes for the father-in-law, a blanket, two-piece costume for the mother-in-law, snuff, liquor, beers and other drinks were handed to the family of the deceased. The first respondent

contended that he had no plans for any celebration of the marriage or handover ceremony of the bride to his family since he had been living with the deceased from 2007 (*Mkabe v Minister of Home Affairs supra* par 6).

The appellants argued that no valid customary marriage had been concluded between the respondent and the deceased because there had been no handing over of the deceased to the respondent's family. Furthermore, the *lobolo* had not been paid in full, and thus the requirements for a valid customary marriage as contemplated under section 3(1)(*b*) were not met (par 16). The court concluded that a valid customary marriage had been entered into between the first respondent and the deceased on 2 April 2010 even though there had been no formal handing over of the bride to the family of the plaintiff (*Mkabe v Minister of Home Affairs supra* par 40). The appellants were granted leave to appeal against the order of the court *a quo*. The appeal is chiefly based on section 3(1)(*b*) of the RCMA.

3 The decision

According to the SCA, per Maya P, there was sufficient evidence before the court to enable it to resolve the matter with ease (*Mbungela v Mkabi supra* par 23). Notwithstanding this confidence, it is submitted that the decision as a whole does not display the apparent ease of which the court speaks. If anything, the judgment, read as a whole, indicates that the court was persuaded by facts and events that in our opinion have no bearing on the legal and factual considerations for the transfer and/or integration of a bride.

First, the court noted that the attendances by a delegation of each of the respective families at each other's funerals signified the existence of a marital bond between the Mkabi and Mbungela families (*Mbungela v Mkabi supra* par 23). While this may have been important circumstantial evidence in coming to some conclusions about the families' relationship, this fact stands in a context that is far removed from the celebration of a marriage. Suffice it to say that while funerals and weddings are both steeped in tradition and custom in indigenous communities, funerals share no discernible similarities to the transfer and/or integration of a bride. This point, therefore, should have no material effect on the case. Secondly, the court found itself persuaded by the celebration of the marriage in a church (*Mbungela v Mkabi supra* par 24). In the words of the court, "there can be no greater expression of the couple's consummation of their marriage". Thirdly, the court ignored the fact, as soundly aired by Bakker, that integration of the bride is the final step parties must take before they are regarded as legally married under customary law (2018 *PER/PELJ* 7). In effect, this step is peremptory and cannot be waived at will by the parties. In advancing this argument, Bakker relied on the academic works of others and on *Motsoatsoa v Roro* ([2010] ZAGPJHC 122) in particular (2018 *PER/PELJ* 7). Despite this precedent and the correct interpretation by Bakker and others, the SCA found the transfer and/or integration of the bride to be not necessarily key in the determination of the validity of a customary marriage (*Mbungela v Mkabi supra* par 30). According to it, this ranked below the parties' "clear volition and intent" to marry.

In the discussion below, the judgment is analysed in light of the above findings.

4 Discussion of the judgment

> "The evolving nature of indigenous law and the fact that it is unwritten have resulted in the difficulty of ascertaining the true indigenous law as practised in the community. This law is sometimes referred to as living indigenous law. Statutes, textbooks and case law, as a result, may no longer reflect the living law. What is more, abuses of indigenous law are at times construed as a true reflection of indigenous law, and these abuses tend to distort the law and undermine its value." (*Bhe v Magistrate, Khayelitsha supra* par 154)

The SCA, through its judgment, affirmed the above statement made by Ncgobo J more than a decade ago. The court failed to ascertain the true indigenous law practice of handing over of the bride, thus exposing the practice to a possible abuse and distortion. The flexibility, evolution and adaptability of customary law is something that has been written about (see Moore and Himonga "Living Customary Law and Families in South Africa" 2018 *South African Child Gauge* 61; Bakker 2018 *PER/PELJ*; Manthwa 2019 *THRHR* 652). It is worth noting that such flexibility, evolution and adaptability should not amount to and/or be construed as being tantamount to a complete disregard of lived customary law principles and practices. To this end, Manthwa very sensibly cautions against the creation of "paper law" at the expense of an authentic system of living customary law by which litigants and communities may be living (2019 *THRHR* 657). Inevitably, this puts into focus the appreciation of the distance between the courts and the communities whose law they seek to interpret and develop (Manthwa "Proof of the Content of Customary Law in Light of *MM v MN*: A Constitutional Approach" 2017 *THRHR* 300 304).

Section 3(1)(*a*) of the RCMA was not contested in this case. The decision revolved around whether the handing over of the bride is a peremptory, directive or even optional silent requirement in terms of section 3(1)(*b*). While there seems to be no agreement on the exactness of the answer to this inquiry, the changing attitudes in different cases towards what is required for validity create the unstable impression of a revolving door for validity requirements. In *Sengadi v Tsambo* ([2018] ZAGPJHC 613), it was remarked that the insistence on the aspect of handing over as an integral part of customary marriages cannot be sustainable (*Sengadi v Tsambo supra* par 20). This, to the court's mind, was largely because of the much-spoken-about flexibility, evolution and adaptability of customs. This flexibility, evolution and adaptability is further highlighted by the decision of *C v P* ([2017] ZAFSHC 57) where the court acknowledged something called "constructive delivery" of the bride (*C v P supra* par 52). In keeping with this trend, the court *a quo* noted that the transfer and/or integration requirement cannot be given more weight such that its absence invalidates a customary marriage (*Mkabe v Minister of Home Affairs supra* par 38). This legally incorrect interpretation of section 3(1)(*b*) was endorsed by the SCA as already highlighted above (*Mbungela v Mkabi supra* par 30).

This change in attitude is a departure from the earlier decisions of the High Courts and the SCA in *Motsoatsoa v Roro* (*supra*) and *Moropane v Southon* ([2014] ZASCA 76) respectively. The importance of this practice as an integral part of the conclusion of a customary marriage was advanced in the case of *Motsoatsoa* in the following express terms:

> "Handing over of the bride is not only about celebration with the attendant feast and rituals. It encompasses the most important aspect associated with married state namely go *laya/ukuyala/ukulaya* in vernacular. There is no English equivalent of this word or process but loosely translated it implies "coaching" which includes the education and counselling both the bride and the groom by the elders of their rights, duties and obligations which a married state imposes on them. This is the *most important and final step in the chain of events* happens in the presence of both the bride and the groom's families. *One can even describe this as the official seal in the African context, of the customary marriage*. The handing over of the bride is what distinguishes mere cohabitation from marriage. Until the bride has formally and officially handed over to the groom's people there can be no valid customary marriage." (par 19) (authors' own emphasis)

The position adopted above was previously heeded by the SCA. In *Moropane*, the court found, relying on expert testimony, that the transfer and/or integration of the bride "is the most crucial part of a customary marriage" (par 40). While agreeing with the decision in *Moropane*, it is safe to say that the case was confined to the Bapedi tribe in ascertaining the requirements for a valid customary marriage. However, what is of significance from that judgment is that the court invited expert testimony to assist it in ascertaining the position. In *Mkabe v Minister of Home Affairs* (court *a quo*), however, there is nothing to indicate that the services of an expert witness were employed. If anything, the judgment read as a whole indicates that the court proceeded to give judgment without a thorough inquiry into the position of the parties' indigenous practices of customary marriage.

Furthermore, the court *a quo*, and subsequently the SCA in *Mbungela*, presented the practice they condoned as if it is a general practice pertaining to customary marriages.

Despite a precedent set by the case of *Moropane*, the court *a quo* ignored the principle of *stare decisis* without even attempting to highlight that the judgment was bad in law (Manthwa 2019 *THRHR* 656). It is in keeping with the *stare decisis* principle that decisions of the higher courts are binding on lower courts and that lower courts can only depart from a precedent if it is shown to be bad in law.

The importance of the transfer and/or integration has also been underscored by Bennett (*Customary Law in South Africa* (2004) 217). This character of customary marriages, Bennett asserts, is necessary to distinguish customary marriages from "on the one hand, an informal partnership and, on the other, from a marriage according to other cultural or religious traditions".

The SCA made a few telling statements regarding the chain of events in the negotiation of the marriage between the first respondent and the deceased, none more significant than that noting that the parties had a white

wedding at the deceased's church (*Mbungela v Mkabi supra* par 7). It is common cause that a white wedding is not, for all intents and purposes, a customary marriage – this notwithstanding the fact of their proliferation in Black communities in recent years. It is unfathomable how the court reached a conclusion that parties who voluntarily opted to conclude a white wedding in a church have complied and/or waived the transfer of a bride requirement that is important for the conclusion of a customary marriage. In essence, therefore, it is our submission that the association of a white wedding with the completion of a valid customary marriage gives rise to three incorrect implications of both fact and law: first, that the conclusion of a white wedding by the parties is tantamount to handing over of the bride in terms of customary law irrespective of the location of that ceremony; secondly, that the conclusion of a white wedding by the parties waives a customary law practice of handing over; and thirdly, the parties' clear volition and intention to marry suffices if the section 3(1)(*a*) requirements are complied with (*Mbungela v Mkabi supra* par 30).

Whichever way these implications are looked at, there is no doubt that the inferences drawn here are not supported by the lived realities of the ethnic groups here involved – namely, the Swati and Tsonga people. This has the tendency of producing an ineffective "paper law" to which Manthwa sensitises us (2019 *THRHR* 657) and leads to the distortion, abuse and divergence of customary law principles and practices as cautioned by Ngcobo J in *Bhe* (*supra* par 154).

5 Invoking the Constitution

The injunction in section 39(2) of the Constitution has long been recognised as not merely discretionary but as creating also a general obligation on the court to interpret legislation, or develop both the common law and customary law, in a manner that promotes the spirit, purport and objects of the Bill of Rights (*Carmichele v Minister of Safety and Security* [2001] ZACC 22 par 39). Armed with this general obligation, the SCA concludes that the provision for the transfer and/or integration of the bride has been waived. According to the court, this finding "does not offend the spirit, purport and objects of the Bill of Rights" (*Mbungela v Mkabi supra* par 26). Devenish opines that this injunction creates a "value-based" theory of interpretation ("*African Christian Democratic Party v Electoral Commission*: The New Methodology and Theory of Statutory Interpretation in South Africa" 2006 *SALJ* 399 401) which flows necessarily from the so called "*Hyundai*-inspired" interpretation. The "*Hyundai*-inspired" interpretation obliges the courts to interpret, where possible, legislation in conformity with the Constitution (Maseko "The Inconsistency of the Constitutional Court on the Application of the *Hyundai*-Inspired Interpretation" 2017 *Obiter* 664). Essentially, this interpretation promotes constitutionalism and its values. Before one delves into the value system that is the hallmark of the constitutional interpretation, it is important to highlight that Devenish avers that the process of interpretation is "dependent also to some extent on the jurisprudential disposition of the judge(s)" (Maseko 2017 *Obiter* 408). Notwithstanding *Hyundai*-inspired interpretation, it must be noted that while such interpretation is entrenched in

our law, it is equally important for the court not to assume that every matter requiring interpretation of legislation or the development of customary law for that matter raises constitutional issues (Marais "A Common-Law Presumption, Statutory Interpretation and Section 25(2) of the Constitution – a Tale of Three Fallacies: A Critical Analysis of the Constitutional Court's *Arun* Judgment" 2016 *SALJ* 629 661).

Against this backdrop, two questions then arise. First, what is the scope of this value judgment on constitutional interpretation? Secondly, what is the jurisprudential disposition of presiding officers in customary law matters?

The first inquiry falls to be interrogated briefly. It is submitted that there is no clear meaning, and nor is it desirable to formulate a specific meaning, of the spirit, purport and objects of the Bill of Rights. The historical context of the legislation, the South Africa envisioned by the Constitution and the interpretative canons must provide clear guidelines. Nonetheless, the wording of legislation cannot and should not be disregarded (Bishop and Brickhill 2012 *SALJ* 682). After all, words do have meaning. Therefore, the court should not interpret legislation as if it were unwritten. A clear disregard of this cautionary rule appears in *Mbungela v Mkabi* (*supra* par 27) where the court, in less subtle terms, implies that compliance with the consent requirement in particular is sufficient for the validity of customary marriages. However, the authors align themselves with Manthwa who points out that consent is two-fold in customary marriages as distinct from other types of marriage (2019 *THRHR* 660). Thus, not only does a party consent to the marriage itself, but also to be married under customary law. To decide that the transfer requirement may adversely impact on the values of the Constitution without substantiating further is to question the constitutionality of the RCMA without both merit or reason. It would seem, unfortunately, that the court wanted to reach its decision at any cost. Our uncertain jurisprudence in this area could have benefitted from a well-reasoned and justified statement about the values underpinning the judgment.

The second inquiry relates to the jurisprudential disposition of judges. Manthwa opines that "courts will always try to justify decisions they make on customary law based on the Constitution" (2017 *THRHR* 306). This proposition is loaded and should be treated with circumspection. This is especially true if the courts have not erred in every judgment on customary law. Manthwa's view cannot be correct in light of judgments like *Motsoatsoa* and *Moropane*. However, in respect of the judgment under discussion, the authors are hard-pressed not to echo the views of Manthwa and submit that the SCA simply used the Constitution to justify its outcome. It is submitted that the judgment's conclusion is not sufficiently reasoned to support a "*Hyundai*-inspired" interpretation. This submission is supported by the summary that follows in the conclusion.

6 Conclusion

The perilous consequences of uncertainty in the interpretation and/or application of section 3(1)(*b*) of the RCMA no doubt will continue to breed opportunistic litigation by parties whose motives cannot always be good

(Manthwa 2019 *THRHR* 658). While this may not always be controlled by the courts, except to give punitive cost orders where appropriate, it is our view that judgments have to stamp out the revolving door attitude and ought to be good in law. Regrettably, the decision of the SCA is not an example of a judgment good in law. First, the court notes the attendance of a funeral by both families as significant (*Mbungela v Mkabi supra* par 23). There is no link between handing over of a bride and a funeral. In fact, it is not uncommon for families to attend functions and funerals of people who are merely dating. In effect, this point proves nothing and is therefore irrelevant. Secondly, the court entangles itself in the idea of the church wedding as an expression of the consummation of the marriage (*Mbungela v Mkabi supra* par 24). It would be ill-advised to argue that purported customary marriages cannot be concluded in a church. However, for the validity of a customary marriage to be established, the transfer and/or integration aspect must occur expressly in line with the specific community and ethnic group's customs. To simply celebrate in a church is not sufficient for the conclusion of a customary marriage. It is our view that a marriage between the first respondent and the deceased was concluded, or at least was purported to have been concluded. However, on the facts, there is nothing to justify a conclusion that the marriage is a customary one. Thirdly, the value-judgment consideration in paragraph 26 jumps out of nowhere, so to speak. There is nothing in context for that conclusion to be drawn except, the authors submit, the fact that the court wanted to lay claim to the injunction in section 39(2) of the Constitution. Unfortunately, the court is guilty of the habit described by Manthwa of using the Constitution to justify its decisions on customary law in general (2017 *THRHR* 306). Finally, but by no means least, the court makes an error of law in an effort to caution against the possible dangers of opportunistic litigation (*Mbungela v Mkabi supra* par 28). The court ought to have known that the children born of marriages that do not meet the threshold for validity are in fact protected by intestate succession laws (Jamneck and Rautenbach *The Law of Succession in South Africa* 3ed (2017) 29). A reading of the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 in section 1 answers the hypothetical inquiry of the court.

In conclusion, the judgment is bad in law and not satisfactorily justified. In the end, the question that needs further interrogation by scholars is just how flexible are the requirements for the validity of customary marriages? At some point, the authors submit, the revolving door for validity requirements must be settled.

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