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# PREDATORY PRICING: SINGLE-FIRM DOMINANCE, EXCLUSIONARY ABUSE AND PREDATORY PRICES (PART 2)

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**SUMMARY**

Important pronouncements of legal principle were recently made by the Competition Appeal Court and Constitutional Court on the determination of predatory pricing under section 8 of the Competition Act 89 of 1998. These pronouncements must now be seen in the context of the subsequent commencement of certain provisions of the Competition Amendment Act 18 of 2018, which affect predatory pricing cases under section 8 of the Act. In light of these developments, the main aim of this series of three articles is to evaluate the law relating to the economic concept of predatory pricing under the Competition Act. In this context, the main constituent elements of a predatory pricing case – namely dominance, identifying an exclusionary abuse, and predatory prices – are discussed in three parts. Part 1 has critically evaluated the law on the determination of single-firm dominance under section 7 of the Competition Act. Part 2 starts to focus on the abuse analysis and discusses the basic forms of abuse, the meaning of abuse, tests that have been developed to identify exclusionary abuse, the criticism of the traditional theory of predatory pricing, the main strategic economic theories of predatory pricing and non-pricing theories of predation. Part 3 then specifically deals with the law of predatory prices under section 8(*c*) and (*d*)(iv) of the Competition Act. Pursuant to section 1(3) of the Competition Act, when interpreting or applying the Competition Act, appropriate foreign and international law may be considered. This is complementary to section 1(2)(*a*), which directs that the Competition Act must be interpreted in a manner that is consistent with the Constitution and gives effect to the purposes set out in section 2. In light hereof, where appropriate, the South African position is mainly compared with the position in the European Union and the United States.

## 1 INTRODUCTION

In light of the *Media24* case,[1] in which several important pronouncements of legal principle were made, as well the subsequent commencement of certain provisions of the Competition Amendment Act 18 of 2018, the aim of this series of three articles is to evaluate the law and elements relating to the economic concept of predatory pricing under the Competition Act 89 of 1998 (the Act). Part 1 has critically evaluated the law on the determination of single-firm dominance under section 7 of the Act. If a firm is found to be dominant under section 7 of the Act, it must then be determined whether the conduct in question is prohibited by the abuse-of-dominance provisions under section 8. The abuse provisions are aimed at preventing anti-competitive harm caused by the unilateral exclusionary conduct of a dominant firm. Harm means a loss to consumer welfare, but also includes certain macro-economic considerations as well as broader public-interest goals.[2] In the context of the abuse analysis, predatory pricing is considered to be an exclusionary abuse. The general concept of an abuse, its meaning and, the different standards used to identify an exclusionary abuse, present many issues, some of which are not settled. Thus, the main focus of Part 2 is on these issues. The main theories of predation are also considered. Part 3 then specifically deals with the law of predatory prices under section 8(*c*) and (*d*)(iv) of the Act.

Heading 2 of this article provides a brief overview of the structure of section 8 of the Act in order to show under which sub-sections of that provision an allegation of predatory pricing may fall. In order to distinguish an exploitative abuse from an exclusionary abuse, heading 3 discusses the basic forms of abuse and the meaning of an abuse. Heading 4 builds on this latter section by examining the various standards relevant to identifying exclusionary conduct. The main aim of this section is to assess the elements of these standards and, for purposes of identifying predatory pricing as a form of exclusionary conduct, some of the pros and cons of these tests – not their consistency with the existing cost benchmarks and case law. Heading 5 discusses the criticism of the traditional theory of predatory pricing, the main strategic economic theories of predatory pricing and non-pricing theories of predation. Heading 6 provides a conclusion.

## 2 BASIC STRUCTURE OF SECTION 8

Paragraphs (*a*) and (*b*) of section 8 of the Act prohibit, respectively, excessive pricing and refusal to grant access to an essential facility. These two provisions are often referred to as *per se* prohibitions.

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1 *Competition Commission of South Africa v Media 24 (Pty) Limited* [2019] ZACC 26; *Media 24 Proprietary Limited v Competition Commission of South Africa* 146/CAC/Sep16 and *Competition Commission of South Africa v Media Limited* CT 013938/CR154Oct11.

2 S 2 of the Competition Act.

Section 8(*d*) lists six specific types[3] of prohibited exclusionary act. Predatory pricing, and the other specific types of exclusionary act, are prohibited if the complainant can show that the act in question had an anti-competitive effect and if the respondent fails to show that the act resulted in technological, efficiency or other pro-competitive gains that outweigh the anti-competitive effect of its act.

Section 8(*c*) refers generally to an "exclusionary act". Accordingly, this section prohibits all those exclusionary acts (including predatory pricing allegations that are not specifically listed in section 8(*d*)), but only if the complainant shows that the anti-competitive effect of the act in question outweighs any technological, efficiency or other pro-competitive gain shown by the respondent.

Paragraphs (*c*) and (*d*) of section 8 are both said to be rule-of-reason prohibitions.

## 3 BASIC FORMS AND MEANING OF ABUSE

### 3 1 Basic forms of abuse

As discussed, the Act specifically regulates the behaviour of dominant firms to ensure that they are not abusing their dominant positions to the detriment of competition and consumers.[4] Broadly speaking, two main forms of abusive behaviour by dominant firms under section 8 of the Act have been distinguished. One category relates to exploitative abuse, which concerns pricing and other practices[5] that result in direct harm to consumers.[6] Another category relates to exclusionary abuse, which is perhaps, to date, the more common and important category of abuse.

Exclusionary abuses concern strategic conduct by dominant firms directed against competitors that *indirectly* cause a loss to consumer welfare.[7] The conduct is exclusionary in the sense that it unlawfully excludes or forecloses the competitors' production, participation or growth in the market. If the competitors are sufficiently important for the functioning of competition in the market and the exclusion or foreclosure is significant enough, this will lead to the creation, enhancement or maintenance of the dominant firm's ability to exercise market power. In turn, this will have the effect of distorting competition in the market for the end-consumers and can therefore adversely affect consumer welfare. Since legitimate competition that excludes competitors is a crucial element of consumer welfare maximisation, the main element is the loss to consumer welfare.

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3 These are: requiring or inducement not to deal; refusal to supply scarce goods or services to a competitor or customer; tying or bundling; predatory pricing; buying up a scarce supply of intermediate goods or resources required by a competitor; and margin squeeze.

4 *Competition Commission of South Africa v Media 24 (Pty) Limited supra* par 31 and 59.

5 For example, monopsony purchasing power (abuse of buyer power) and abusive or "unfair" contractual clauses.

6 S 8(*a*) of the Consumer Act states that "it is prohibited for a dominant firm to charge an excessive price to the detriment of consumers".

7 *Competition Commission of South Africa v Media 24 (Pty) Limited supra* par 59*;* s 8(*c*) and (*d*) prohibit examples of this kind of conduct.

This means that not every exclusionary effect is necessarily detrimental to competition; the function of section 8 is not to protect competitors that are less efficient than the dominant firm.

Predatory pricing is an example of conduct that can be considered to be an exclusionary abuse under both paragraphs (*c*) and (*d*)(iv) of section 8.

## 3 2 Meaning of abuse

A central issue that competition law and policy seek to address is how to discriminate between unilateral conduct that is deemed to be normal competition or competition on the merits, and unilateral conduct that is anti-competitive. Only the latter should be considered unlawful. However, dominant firms that are efficient may be able to exclude or foreclose competitors from the market (or from parts of the market) by competition on the merits as well as by anti-competitive conduct. This means that commercial behaviour by firms with market power can appear to be both anti-competitive and pro-competitive at the same time. Antitrust jurisdictions around the world have found it hard to create administrable legal rules and precedents that are good at discriminating between competition on the merits and anti-competitive conduct.

The Act does not define what an "abuse" is. An essential element of a section 8(*c*) or 8(*d*) case is proof that the dominant firm has engaged in an "exclusionary act". Building on the basic forms of abuse, the Act defines an "exclusionary act" as an act that impedes or prevents a firm from entering into, participating in or expanding within a market.[8] In turn, "participate" refers to the ability of or opportunity for firms to sustain themselves in the market.[9] A reading of these two elements together means that the definition of an act that may be considered to be an (exclusionary) abuse is broad and does not provide much insight into how to discriminate between conduct that is competitive or anti-competitive. The definition seems mainly to focus on the nature of the conduct under consideration, which makes it hard to follow.[10]

In *Patensie Sitrus Beherend Beperk v Competition Commission*,[11] the Competition Appeal Court, in considering whether an exclusionary abuse had been committed, referred to the decision of the European Court of Justice in *Hoffmann-La Roche & Co. AG v Commission*,[12] which it quoted in part as follows:

> "The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of the market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the

8 S 1(1) of the Competition Act.

9 *Ibid*.

10 Sutherland and Kemp *Competition Law of South Africa* Issue 21 (2017) 7–80.

11 [2003] 2 CPLR 247 (CAC) 264–265.

12 Case 85/76 *Hoffmann-La Roche & Co. AG v Commission of the European Communities* [1979] ECR 461 par 91.

> effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."

This definition is usually the starting point for the assessment of alleged exclusionary conduct under European Union (EU) competition law – that is, practices of a dominant firm that supposedly have an adverse effect on the process of competition.[13] While this legal definition also appears hard to follow, its formulation indicates that abusive conduct is likely to influence the structure of the market, weaken the existing degree of competition in the market, and involves the dominant firm having recourse to methods different from those governing normal competition.

Other definitions of abuse have also been put forward – for instance, anything that is not legitimate competition or competition on the merits,[14] conduct that lacks an objective economic justification,[15] or conduct that has the effect of causing harm to consumers.[16] There is a great deal of uncertainty surrounding all these formulations, including what the definition of an exclusionary abuse is or should be.[17] However, the importance of the definition in *Hoffmann-La Roche & Co. AG v Commission* is its emphasis on the need to analyse the effect of the conduct in order to establish an abuse.[18] It is important to focus on the negative effect that the conduct has on competition and the structure of the market rather than any potentially more transient behavioural effects.[19] In line with these arguments, later on in the *Patensie Sitrus Beherend Beperk v Competition Commission* decision, the Competition Appeal Court noted that the effect of offending conduct was to hinder the maintenance of the degree of competition that exists and to hinder the growth of competition.[20]

## 4 ASSESSING EFFECTS: GENERAL STANDARDS FOR IDENTIFYING EXCLUSIONARY CONDUCT

It can be seen that the nature of the definition of what conduct constitutes an "exclusionary act" is uncertain and vague. In this light, progression has been made by antitrust experts to help identify when dominant firm behaviour is unlawfully exclusionary, as distinct from being competition on the merits.[21] In particular, several economic tests have been advanced to distinguish anti-

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13 Bellamy and Child *European Union Law of Competition* 8ed (2018) 894.

14 Case IV/30.698 *ECS/AKZO*, European Commission Decision of 14 December 1985, *OJ* L374/1 par 81 upheld on appeal in Case C-62/86 *AKZO Chemie BV v Commission of the European Communities* [1991] ECR I-03359.

15 T-203/01 *Manufacture française des pneumatiques Michelin v Commission of the European Communities* [2003] ECR II-04071 par 107 and 110.

16 Case C-209/10 *Post Danmark A/S v Konkurrencerådet* EU:C:2012:172 par 24.

17 See further O'Donoghue and Padilla *Law and Economics of Article 102 TFEU* 2ed (2013) 217–220, where the authors write about the various difficulties of the definition of an abuse and fn 20 where the authors refer to noteworthy publications on the issue.

18 Bellamy and Child *European Union Law of Competition* 894.

19 *Ibid*.

20 *Patensie Sitrus Beherend Beperk v Competition Commission supra* 264–265.

21 Generally, see Elhauge "Defining Better Monopolization Standards" 2003 56 *Stanford Law Review* 253; Vickers "Abuse of Market Power" 2005 115(504) *The Economic Journal* F244; Werden "Identifying Exclusionary Conduct Under Section 2: The 'No Economic Sense Test'" 2006 73(2) *Antitrust Law Journal* 413.

competitive conduct from competition on the merits. These tests include the profit-sacrifice test, the no-economic-sense test as a variant of the profit-sacrifice test, the equally-efficient-competitor test (or as-efficient-competitor test) and the consumer-welfare test. In principle, predatory pricing in its most basic form can satisfy all these tests or principles.

## 4 1 The profit-sacrifice test

Generally, the profit-sacrifice test asks whether the conduct in question is more profitable in the short term than any other conduct the dominant firm could have engaged in that did not have the same (or greater) exclusionary effect.[22] If the conduct is not more profitable, the short-term sacrifice of profits might have been an investment in an exclusionary scheme, whereby the dominant firm seeks to strengthen or maintain market power and recoup the foregone profits in the future. Therefore, the exclusionary conduct requires the dominant firm deliberately to forego profits or incur losses in the short term, so as to impede or prevent one or more of its actual or potential competitors from entering into, participating in or expanding within the market, with a view to strengthening or maintaining its market power, thereby causing consumer harm.

In the context of predatory pricing and on a general level, this line of analysis is attractive. Predatory pricing involves a short-term sacrifice of profits in the expectation of greater profits in the future due to the exclusion or foreclosure of competitors. On a conceptual approach, it is also simpler to assess than consumer welfare. The test does not require the balancing of the conduct's ultimate effects on consumer welfare. Instead, the test focuses on the financials of the dominant firm.

However, there are significant practical difficulties with this test for purposes of using a profit sacrifice as an indicator of predatory pricing.[23] First, there are legitimate commercial reasons why a firm may deliberately sacrifice profits in the short term other than to foreclose competitors.[24] It is

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[22] According to Areeda and Turner ("Predatory Pricing and Related Practices Under Section 2 of the Sherman Act" 1975 88 *Harvard Law Review* 697 698), predation in any meaningful sense cannot exist unless there is a temporary sacrifice of net revenues in the expectation of greater future gains. Indeed, the classically feared case of predation has been the deliberate sacrifice of current profits for the purpose of driving rivals out of the market and then recouping the losses through higher profits earned in the absence of competition; see also, for example, Bork (*The Antitrust Paradox: A Policy at War With Itself* (1978) 156), who states that predation may be defined "as a firm's deliberate aggression against one or more rivals through the employment of business practices that would not be considered profit maximizing except for the expectation either that (1) rivals will be driven from the market, leaving the predator with a market share sufficient to command monopoly profits, or (2) rivals will be chastened sufficiently to abandon competitive behavior the predator finds inconvenient or threatening."; and Ordover and Willig ("An Economic Definition of Predation: Pricing and Product Innovation" 1981 91 *Yale Law Journal* 8 9–10), who state that predatory behaviour is "a response to a rival that sacrifices part of the profit that could be earned under competitive circumstances, were the rival to remain viable, in order to induce exit and gain consequent additional monopoly profit."

[23] O'Donoghue and Padilla *Law and Economics of Article 102 TFEU* 227; Vickers 2005 *The Economic Journal* F244–F261; Salop "Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard" 2006 73 *Antitrust Law Journal* 311 341.

[24] Elhauge 2003 *Stanford Law Review* 253.

also uncertain whether the profit-sacrifice test requires a firm to choose the most profitable commercial behaviour to avoid a finding of exclusionary conduct. Moreover, what is the alternative pricing policy? Is it feasible and, if so, how much profit would it generate? Secondly, it can be very difficult to assess whether a particular pricing strategy represents a profit sacrifice. For firms to assess for themselves whether their conduct is profit maximising is difficult and so they could easily fail to maximise profits by mistake, not by design. It is also unclear what degree of sacrifice is required to establish exclusionary conduct, or whether the rule is strict in that any profit sacrifice indicates abuse.

Despite its claimed objectivity,[25] an assessment of profit sacrifice requires a consideration of how much profit a firm would make under a counterfactual situation where it maximised profits. This requires far more detailed information and sophisticated analysis than a competition authority can realistically carry out.

## 4 2 The no-economic-sense test

In response to these criticisms, the United States (US) has adopted variants of a test that is broadly called the no-economic-sense test.[26] One version applies the no-economic-sense test by comparing the non-exclusionary profits from the conduct to the profits the firm would have earned from alternative, legal conduct in which it would have engaged (the "but-for" scenario).[27] If the non-exclusionary profits would be greater, the conduct would make economic sense without exclusionary effects and thus be legal. If the non-exclusionary profits were lower, the conduct would not make economic sense and would thus potentially be unlawful.

Another version of the no-economic-sense test asks whether the conduct in question would make economic sense for the dominant firm to pursue save for its tendency to eliminate or lessen competition.[28] As long as the conduct is profitable apart from its exclusionary effect, it would pass this version of the no-economic-sense test, regardless of whether any other conduct would have been more profitable or the extent of any harm to competition.

Both the profit-sacrifice and no-economic-sense tests seek to establish objective standards by which to identify conduct that is likely to damage the competitive process, as opposed to merely aggressive competition. By combining the usual test for profit sacrifice with the no-economic-sense test, other jurisdictions have been able to develop an approach to predatory pricing that ensures that only profit sacrifice that is undertaken exclusively to eliminate competitors is prohibited. However, although the no-economic-sense test addresses some of the criticisms of the profit-sacrifice test, it is not completely free of criticism.[29]

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25 Patterson "The Sacrifice of Profits in Non-Price Predation" 2003 18 *Antitrust* 37.

26 O'Donoghue and Padilla *Law and Economics of Article 102 TFEU* 230.

27 Werden 2006 *Antitrust Law Journal* 420–422.

28 See *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko LLP* (2004) 540 US 398.

29 See O'Donoghue and Padilla *Law and Economics of Article 102 TFEU* 230.

## 4 3 The equally-efficient-competitor test

Another practical approach, which was proposed by Posner, is to ask whether the conduct would exclude an equally efficient competitor or, stated differently, a competitor that is as efficient as the dominant firm.[30] Posner's general standard for deciding exclusionary claims under US antitrust law proposes that the complainant must first prove that the respondent has monopoly power, and secondly that the challenged practice is likely in the circumstances to exclude from the respondent's market an equally (or more) efficient competitor.[31] The respondent can rebut by proving that although it is a monopolist and the challenged practice exclusionary, the practice is, on balance, efficient.[32] Although under the Competition Act the burden would be different, the test addresses some of the concerns with open-ended balancing by requiring that the complainant shows that the conduct in question is likely in the circumstances to exclude from the respondent's market an equally or more efficient competitor.[33] This test is based on the underlying principle that "a firm should not be penalized for having lower costs than its rivals and pricing accordingly".[34]

The test has found acceptance in the US and the EU in predatory pricing cases (as well as in other pricing cases such as margin squeeze and certain types of bundling), particularly in discussions of how to identify a price as predatory. Posner's own examples in his proposal concern pricing practices. His view is that it would be absurd to require a firm to hold a price umbrella over less efficient entrants.[35] Practices that will exclude only less efficient firms, such as the monopolist's dropping his price nearer to but not below its cost, should not be actionable, because efficiency should be encouraged.[36] Under this standard of identifying exclusionary conduct, low-cost firms should not hold their prices above their costs simply to allow a competitor to become established in the market.

There is, however, criticism of the equally-efficient-competitor test. First, less efficient competitors would in theory be able to increase consumer welfare if the increased competition that their presence in the market creates outweighs their relative inefficiency.[37] This is especially so in markets where competition is just starting to emerge and where it might be inappropriate to compare the efficiency of new competitors with that of the dominant firm.[38] In

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30 Posner *Antitrust Law* 2ed (2001) 194–195.

31 *Ibid*.

32 *Ibid*.

33 *Ibid*.

34 Hovenkamp "Exclusion and the Sherman Act" 2005 72 *The University of Chicago Law Review* 147 154.

35 Posner *Antitrust Law* 196.

36 *Ibid*.

37 O'Donoghue and Padilla *Law and Economics of Article 102 TFEU* 232; Armstrong and Vickers "Price Discrimination, Competition and Regulation" 1993 41(4) *Journal of Industrial Economics* 334; Gavil "Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance" 2004 72 *Antitrust Law Journal* 3 64; Salop 2006 *Antitrust Law Journal* 311 341; See also Edlin "Stopping Above Cost-Predatory Pricing" 2002 111 *Yale Law Journal* 941.

38 Gavil 2004 *Antitrust Law Journal* 61; Hovenkamp 2005 *The University of Chicago Law Review* 154; Salop 2006 *Antitrust Law Journal* 328.

the EU, this has led to an acceptance that the duty to protect firms from predation is not limited to protecting equally efficient firms, but also, in exceptional circumstances, less efficient firms.[39] Another criticism of the test arises in cases where economies of scope and scale characterise the market, and competitors only compete for a limited contestable portion of that market.[40] The European Commission seeks to overcome this obstacle by putting aside the advantages that the dominant firm derives from being an unavoidable competitor for a portion of the market and, instead, only focuses on equal efficiency for that portion of the market that is contestable.[41]

It is important that economies of scale exist and that legitimate competition on the merits not be prohibited.[42] The protection of equally efficient firms only does not appear to be an immutable rule that must be applied in all investigations into potentially abusive pricing conduct.[43] In terms of the definition of an "exclusionary act", there is no textual basis for mandating the protection of equally efficient competitors only. The definition speaks merely of "a firm" being actually or potentially impeded or prevented from entering into, *participating in*, or expanding within a market. Therefore, a firm (and not only an equally efficient firm) should not be unlawfully impeded or prevented from having an opportunity to sustain themselves in the market.

Further, in many industries the variable costs of large-scale production are cheaper than those associated with small-scale production. Here, new entrants are easily driven out of the market before they have had the opportunity to expand and reach their potential as an equally efficient competitor.[44] In markets that are already dominated by one or a few firms, new entry by firms is desirable, as is allowing them to grow into large-scale producers.[45] In this context, the aims of the Act include giving small- and medium-sized enterprises an equitable opportunity to participate in the economy.

## 4 4 The consumer-welfare test

Given the objective of identifying conduct that causes harm to the competitive process,[46] the consumer-welfare test focuses on the "overall impact on consumers" or net effects on consumer welfare.[47] The idea is to identify exclusionary conduct of a dominant firm that has, or is likely to have,

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39 O'Donoghue and Padilla *Law and Economics of Article 102 TFEU* 232.

40 *Ibid*.

41 European Commission Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] *OJ* C45/02 par 39–44; O'Donoghue and Padilla *Law and Economics of Article 102 TFEU* 233.

42 *Competition Commission of South Africa v Media 24 (Pty) Limited supra* par 111.

43 *Ibid*.

44 Bishop and Walker *The Economics of EC Competition Law: Concepts, Application and Measurement* 3ed (2010) 306.

45 *Ibid*.

46 S 2 of the Competition Act.

47 Salop 2006 *Antitrust Law Journal* 330.

a material, adverse effect on consumer welfare.[48] In particular, the test asks whether particular conduct reduces competition without creating a sufficient improvement in performance to fully offset these potential adverse effects on prices and thereby prevent consumer harm. At a fundamental level, the test entails quantifying and weighing the pro-competitive and anti-competitive effects of the challenged conduct.[49] The test makes unlawful all conduct by which a dominant firm acquires or maintains market power where the conduct causes net harm to consumers. This is the type of competitive-effects analysis contemplated in the merger provisions[50] and has the advantage of focusing the identification of exclusionary conduct on the impact on consumers, a key concern of the Act.[51]

The test does, however, present a number of difficulties. It is unclear whether predatory pricing (as an exclusionary abuse under section 8) requires as a necessary element a demonstration of direct impact on consumer welfare. However, even if it is a necessary element, it is argued that this test will not be easily administrable. In particular, for courts and competition authorities to assess the full effects of alleged unlawful exclusionary conduct on welfare will require an arduous assessment of complex economic evaluations and ultimately be counter-productive. These problems include limitations on both the ability of economists to measure accurately the net consumer welfare effects of particular conduct and the ability of judges to evaluate this evidence.[52]

While the test as a general balancing exercise presents some flexibility, the complexity of administering this test also means that firms and their advisors would find it difficult to determine at the outset whether specific conduct would constitute predatory pricing, especially under section 8(*c*). This will have a potentially chilling effect on pro-competitive conduct and reduce consumer welfare. A further consequence of a standard under which every action of a dominant firm must be scrutinised for net consumer-welfare effects threatens to chill a dominant firm's incentives to engage in pro-competitive conduct out of fear of investigation, litigation, or even mistaken liability – again, potentially harming consumer welfare.

## 5 STRATEGIC ECONOMIC THEORIES OF PREDATORY PRICING

Traditionally, predation claims arise in the context of aggressive pricing. A large firm is alleged to have cut prices below cost to drive out its smaller rivals intending later to raise prices and exploit consumers. Heading 5.1 discusses the criticism of the traditional theory of predation. While most antitrust literature on predation has focused on static cost-based tests of whether price is below some relevant measure of cost, the economic literature has developed a range of theories of predation that seek to show that the dynamics of predatory behaviour and its motivations could be a

48 Salop 2006 *Antitrust Law Journal* 330; Gavil 2004 *Antitrust Law Journal* 61.
49 Salop 2006 *Antitrust Law Journal* 330.
50 S 12A of the Competition Act.
51 S 2 of the Competition Act.
52 Werden 2006 *Antitrust Law Journal* 431-432; Elhauge 2003 *Stanford Law Review* 317.

rational strategy in certain factual settings. Heading 5.2 briefly reviews some of those theories.[53] Predation can also take place using means other than price. Claims for non-pricing conduct may found a claim for predatory behaviour under section 8(*c*). Accordingly, heading 5.3 discusses some of the main strategies concerning non-price predatory conduct.

## 5 1 Criticisms of the traditional theory of predation

In his 1958 article, McGee analysed the 1911 *Standard Oil* decision,[54] a case long held up as the classic example of predation. McGee was sceptical of predation. He claimed that the Standard Oil Company achieved its dominant position through "voluntary" merger and acquisition, buying out refining competitors at or above market prices. He found little indication in the trial record that predation had occurred.

McGee argued that a predatory strategy by a large firm would lead to large losses. In particular, due to their large market shares, the substantial revenues lost by a dominant firm when engaging in predatory pricing would be unlikely to be worthwhile. Also, recoupment of losses is unlikely as the gains from higher prices, if any, are likely to be short-lived because higher prices provide a strong incentive for entry (or re-entry). Predation might not lead to exit because investors might be willing to provide loans under the expectation that the prey's losses are only temporary. Cheaper alternatives might also be available, since predation must be more profitable than alternative strategies, such as merging with the prey. This theory suggested that predatory pricing is irrational and unlikely to be observed. The question thus remained, is predation feasible at all?[55]

## 5 2 Modern theories of predation

Game theoretical models of predation represent a departure from the static framework of perfect information. New theories rely on a dynamic world of imperfect and asymmetric information in which predatory pricing can be a profit-maximising strategy. Firms act strategically to modify competitors' expectations of profitability. Under this analysis, the predator seeks to influence the expectations of an existing competitor, a potential competitor, and even the prey's creditors, to convince the competitor that continued competition or future entry into the market would be unprofitable.

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[53] Headings 5.1 and 5.2 rely heavily on the research done by McGee ("Predatory Price Cutting: The Standard Oil Case" 1958 1 *Journal of Law and Economics* 137), Koller II ("The Myth of Predatory Pricing: An Empirical Study" 1971 4 *Antitrust Law & Economics Review* 105), Bork (*The Antitrust Paradox: A Policy at War With Itself* (1978)), Easterbrook "Predatory Strategies and Counterstrategies" 1981 48 *University of Chicago Law Review* 263), and Bolton, Brodley and Riordan ("Predatory Pricing: Strategic Theory and Legal Policy" 2000 88 *Geo Law Journal* 223).

[54] *Standard Oil Co. of New Jersey v. United States* (1911) 221 U.S. 1.

[55] It must be stated that in a re-examination of the *Standard Oil* case, the case on which McGee had primarily relied in rejecting the logic of predation, it was found that Standard had in fact used predatory tactics, although not necessarily predatory pricing, against its rivals, but in a far subtler way than McGee had imagined. In this regard, see Granitz and Klein "Monopolization by 'Raising Rivals' Costs': The Standard Oil Case" 1996 39 *The Journal of Law and Economics* 1.

Developing the strategic approach to predatory pricing, economists have formulated several coherent theories. These theories, which include financial market predation and various signalling strategies, demonstrate that predatory pricing is a rational, profit-maximising strategy. While the formal economic proof of the theories is complex, their intuitions are simply described below.

### *5 2 1 Financial market predation*

Under this theory, the prey is dependent upon outside funding to survive predatory conditions and the predator is fully aware of that. The predatory strategy involves the predator reducing its prices below cost in order to reduce the profitability of its competitors. The competitors' investors view this decrease in profitability as a sign of limited prospects in this market and decide to decrease or withdraw financial support. The model relies on capital market imperfections. Due to the asymmetry of information between the firms and capital markets, investors are unable to distinguish between predatory pricing and poor performance by managers of the preyed-upon firm. Thus, contrary to McGee's view**,** the prey may not be able to obtain capital readily under predatory conditions and may be forced to exit.

### *5 2 2 Signalling theories of predation*

Signalling models of predation rely on imperfect and asymmetric information between predator and its competitors (prey or future entrants). To the extent that the predator is better informed than its competitors about its own costs and market conditions, its actions can influence its competitors' expectations regarding future profits therefore leading to exit (or discouraging entry). The informed predator sells at low price to mislead its competitor into believing that market conditions are unfavourable. Recoupment of losses is likely to materialise, thus making predatory pricing profitable. Signalling theories include reputation effect, test-market and signal-jamming, and cost signalling.

### *(i) Reputation models of predation*

Reputation effects may arise in circumstances where the predator sells in multiple markets or within one market in consecutive time periods. The predatory strategy involves the dominant firm establishing a reputation for predatory pricing based on some perceived advantage. The potential for predatory behaviour relies on information being imperfect. The predator takes advantage of its competitors' uncertainty and prices aggressively to make them believe it is a strong competitor. The predator's reputation for aggressive pricing behaviour might deter entry or encourage exit not only in the market where predation takes place but potentially in other markets where the predator operates. As long as the predator's conduct is observed, this reputation effect can extend within the market across periods, across product markets and across geographic markets.

### *(ii) Cost-signalling models of predation*

Under this theory, the predator increases its volume and reduces prices below cost. The predator signals to its competitors that it is a low-cost, rather than high-cost, supplier even though it may have no cost advantage. The competitors are not certain about the predator's true cost structure and will choose to exit the market or not enter the market if they believe the dominant firm is a low-cost supplier.

### *(iii) Demand-signalling models of predation*

Under this theory, the prey is attempting to ascertain demand for its product, either a new product or its product in a new geographic market. Two predatory strategies may be relevant. First, the dominant firm responds by offering secret discounts, thus leading the entrant to believe that demand is low ("test-market predation") and/or, secondly, the dominant firm openly reduces its price below cost to prevent the prey from identifying true market conditions ("signal-jamming predation"). By purporting a situation of weak demand, the predator's actions may deter entry and/or expansion.

## *5 2 3 Predation for mergers*

Similar to other signalling models, the dominant firm acts strategically in order to eliminate its competitors. However, its goal is not to induce exit but rather to improve the terms that the prey will accept in a takeover. The predatory strategy involves the dominant firm choosing to price aggressively to modify the beliefs about future profits by competitors, who, faced with perceived unfavourable conditions, might agree to sell out at low prices.

# 5 3 Alternative theories of predation

## *5 3 1 Predatory capacity expansion*

Predation may also occur through excess capacity.[56] In a predation analysis, the relevant period in which a firm's conduct is undertaken may crucially affect whether a firm's behaviour may be viewed as having a legitimate business purpose. Thus, a longer-term approach is particularly important for the investment decisions of firms.

Consider the following situation: in period $T_1$, the incumbent has a capacity of 100 units. In period $T_2$, the entrant appears on the horizon and the incumbent realises that the entrant plans to enter the market against the incumbent in period $T_4$. Therefore, in period $T_3$ the incumbent increases its production by another 100 units to a total capacity of 200 units. Nonetheless, in period $T_4$ the entrant enters. There is now excess capacity in the market.

[56] Williamson "Predatory Pricing: A Strategic and Welfare Analysis" 1977 87 *Yale Law Journal* 284; Bishop and Walker *The Economics of EC Competition Law* 319; Joskow and Klevorick "A Framework for Analyzing Predatory Pricing Policy" 1979 89(2) *The Yale Law Journal* 213.

The extra capacity is unavoidably sunk and price falls to variable cost, which is significantly below average total cost. The additional investment in $T_3$ was clearly unprofitable. This sort of scenario poses difficult questions. Although on an average variable cost standard, the pricing by the incumbent in $T_4$ is not predatory, the capacity expansion by the incumbent in $T_3$ might be deemed a predatory output expansion to the extent that, viewed from that point in time, when the cost of capacity was not yet committed, the incremental revenue was not expected to cover incremental cost.

A slight variation of the excess capacity argument is to say[57] that excess capacity lowers the marginal cost of increasing output and so lowers the cost of responding to entry aggressively by increasing output. By lowering this cost, it makes a predatory increase in output post-entry cheaper and thus more likely. Observing the excess capacity, the potential entrant concludes that entry would be met by a very aggressive response and so does not enter. Excess capacity coupled with a reputation for predation may be a very effective form of entry deterrence under this strategy.

### *5 3 2 Scheduling, advertising, brand proliferation and predatory product announcements*

Predatory scheduling involves scheduling transport services to arrive just before the competitor's service so as to reduce the competitor's demand, which leads to no consumer benefit even in the short run.[58] Alternatively, other mechanisms relate to scheduling free services or increased services so that an entrant cannot profitably run a service.

In a predatory advertising strategy, the predator increases advertising spend above the profit-maximising level in order to make new entry harder.

Entry deterrence can also take the form of predatory product variety or brand proliferation.[59] This strategy involves introducing so many brands that a new entrant would find it very difficult to find a profitable niche, especially when coupled with intense advertising or a reputation for not repositioning brands in response to entry, such that there is no "product space" left for other firms to introduce new brands.

Predatory product announcements can occur in markets characterised by continuous innovation.[60] In these types of market, customers are concerned that if they buy a product it will soon be superseded by a superior product. Incumbents fearing entry from a new product are often known to pre-announce a new improved version of their product (so-called "vapourware") to encourage customers to wait. This deters customers from buying from the potential entrant even if the new product from the incumbent turns out to be delayed.

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57 Bishop and Walker *The Economics of EC Competition Law* 319.

58 See *Chester City Council v Arriva* [2007] EWHC 1373 (Ch) and the UK OFT Decision No CA98/01/2008, *Abuse of a dominant position by Cardiff Bus* (Case CE/5281/04), 18 November 2008.

59 Bishop and Walker *The Economics of EC Competition Law* 319.

60 See Bishop and Walker *The Economics of EC Competition Law* 320–322 in connection with predatory behaviour in high-tech industries.

## 6 CONCLUSION

If the dominance threshold is met, the abuse analysis should be carried out in a way that integrates the findings of the market power analysis. Allegations of predatory pricing illustrate the point. To the uninitiated consumer, predatory pricing can seem like normal low-cost pricing forming part of normal competition. For the competitors in the market, a number of commercial justifications exist for why they price below their incremental costs, which mostly have no material adverse effects, especially for consumers. However, predatory pricing is an exclusionary abuse that indirectly causes loss to consumer welfare. Without independent evidence of market power, there would be no justifiable reason for competition policy scrutiny of such pricing. When there is independent evidence showing market power amounting to dominance, then further scrutiny makes sense.

The Act's definition of an exclusionary act as a formulation of the meaning of abuse is hard to follow. So too are the formulations under EU competition law. Although the definitions of an "exclusionary act" and an "abuse" are different in detail, both are intended to discriminate between conduct that is anti-competitive and that which is pro-competitive. The main focus of an unlawful exclusionary act is on harm to competition (or the competitive process), as opposed to harm to competitors, and thereby harm to consumers. Mere harm to competitors, without harm to the competitive process is not enough to constitute an unlawful exclusionary act. However, the definition does not present the underlying principles by reference to which conduct that distorts and harms competition can be distinguished from normal competition on the merits. Therefore, the more important consideration should be the weighing of the effects of the act under section 8(*c*) or (*d*), whichever is appropriate, in order to determine whether the conduct in question is pro-competitive or anti-competitive, and then to consider what consequences flow from that act if it is shown to be "exclusionary".

Competitive and exclusionary conduct can look alike, and the same conduct can have both beneficial and exclusionary effects. This makes it hard to distinguish conduct that should be deemed unlawful from conduct that should not. The two main standards used to identify exclusionary conduct in the context of predatory pricing are the profit-sacrifice test and the equally-efficient-competitor test. The no-economic-sense test, as a variant of the profit-sacrifice test, and the consumer-welfare test have also been developed for these purposes.

In the context of the profit-sacrifice test, for example, the inquiry will be whether the strategy of lowering price in the short run was profitable compared to a feasible, less exclusionary strategy that could have been considered by the firm at the time. In this format as a test for section 8 liability, the test raises serious concerns. While for certain types of pricing abuse, like predatory pricing, it may serve as a useful indicator, the test cannot on its own be used to identify unlawful exclusionary conduct and thereby distinguish it from competition that has a legitimate business purpose. Similarly, it is suggested that the no-economic-sense test by itself is not sufficient to constitute a necessary condition for liability in all section 8

cases. However, combining the profit-sacrifice test with the no-economic-sense test may sometimes be useful in identifying certain exclusionary conduct, especially in the context of predatory pricing. The equally-efficient-competitor test revolves around the determination of whether an equally efficient competitor could have made a profit by charging the same price. A firm would thus be able to pass the equally-efficient-competitor test but fail the profit-sacrifice test. Given the open-ended nature of the consumer-welfare test and the inherent uncertainty for businesses in predicting its outcome, it is doubtful that it should be the general test for analysing conduct under section 8. Although consumer welfare should remain the goal of enforcement efforts, that objective is likely to be better served by a standard that takes better account of administrative costs and the benefits of dynamic competition for economic growth.

Ultimately, it is suggested that there is no single test that should be used to define anti-competitive conduct for purposes of identifying exclusionary conduct and hence for a finding of liability under section 8. Although many of the proposed tests have virtues, they also have flaws. This suggests that none currently works well in all situations. Thus, different types of conduct warrant different tests, depending upon, among other things: the scope of harm implicated by the practice; the relative costs of false positives, false negatives and enforcement; the ease of application; and other administrability concerns. An important goal for any test should be to identify conduct that harms competition while enabling firms effectively to evaluate the legality of their conduct before it is undertaken. In applying legal standards, courts should determine whether the conduct at issue warrants employing a conduct-specific test.

Until fairly recently, economic theories were unable to show by way of rigorous explanation how below-cost pricing could be rational business behaviour for a firm with market power. The courts fell back on known economic theory – static analysis in a world of perfect information, which the theory as well as empirical studies appeared to support. However, once the issues of asymmetric information and uncertainty are coherently reinserted into the simplest of economic models that assume these issues away, there appears to be ample scope for rational, and hence credible, threats of below-cost pricing. Strategic theories of modern economics can now explain when predation can be rational and have cast new light on the traditional theories of predatory pricing. Similarly, there has also been an increase in the identification and development of credible non-pricing strategies of predation.

# A DISCUSSION ON THE ISSUE OF COSTS IN RELATION TO DERIVATIVE PROCEEDINGS IN SECTION 165 OF THE COMPANIES ACT 71 OF 2008*

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**SUMMARY**

A historical practical obstacle to the institution of derivative proceedings has been the burden of costs. The burden of costs was identified as problematic as long ago as 1970 in the Van Wyk De Vries Commission of Inquiry into Companies and has the potential to continue to disincentivise derivative proceedings in light of the provisions of section 165 of the Companies Act 71 of 2008. Comparable provisions in the United Kingdom Companies Act 2006 are discussed to identify whether any improvements can be made with respect to the issue of costs in instituting derivative proceedings under section 165.

## 1 INTRODUCTION

The issue of costs and liability for costs involved in the derivative action was always a major concern. In 1970, the Van Wyk De Vries Commission of Inquiry into the Companies Act found that probably the biggest impediment to a derivative action was the risk that the plaintiff shareholder would have to bear the costs of the litigation.[1] The issue of costs continues to be a disincentive for prospective applicants in instituting derivative proceedings under the Companies Act 71 of 2008. Section 165 does not alleviate the burden on applicants regarding costs of the derivative proceedings and therefore applicants rarely institute derivative proceedings owing to the risk of being held personally liable for a costs order or several costs orders. This article discusses the issue of costs and its implication on the institution of derivative proceedings.

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* This article is based on sections of the author's PhD thesis.

1 Van Wyk de Vries *Commission of Enquiry into the Companies Act: Main Report* (RP 45 of 1970) (1970) par 42.12; see also "Company Law for the 21st Century: Guidelines for Corporate Law Reform" GN 1183 in *GG* 26493 of 2004-06-23 par 2.2.2.

A comparative approach has been adopted in this article. The United Kingdom (UK) has been chosen as a comparator because, historically, the framework of South African company law has its foundations in law that existed in Victorian England in the middle of the nineteenth century.[2] Both the Companies Act 46 of 1926 and the Companies Act 61 of 1973 (1973 Act) were still largely based on the framework and general principles of the English law.[3] The main objective of the article is to compare the relevant provisions in the UK Companies Act of 2006 with the comparable provisions in the Companies Act 71 of 2008 (2008 Act), which may thus be useful in providing solutions, guidelines and warnings that can be used to supplement lacunae or defects in the South African legislation.

Section 5(2) of the 2008 Act provides that, *to the extent appropriate*, a court interpreting or applying the Act may consider foreign company law. Section 5(2) states further that the Act must be interpreted and applied in a manner that gives effect to section 7, which sets out the purposes of the Act.[4]

The provisions in the 2008 Act also importantly adopt principles and values that are enshrined in the Constitution of South Africa.[5] It would not be possible to undertake any analysis of the provisions of the 2008 Act without referring to the Constitution, which is the supreme law of the land. The Bill of Rights, as provided for in Chapter 2 of the Constitution, constitutes a cornerstone of democracy in South Africa. It not only enshrines the rights of all people in the country and affirms the democratic values of human dignity, equality and freedom but also regulates the relationship between economic citizens and thus may have fundamental implications for company law.[6]

It is with these principles in mind that a comparison of the relevant sections of the 2008 Act and the UK Companies Act 2006 have been undertaken.

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2 Tong *Review of Company Law in South Africa: Should South Africa Follow the British Example in Corporate Governance Matters This Time?* (unpublished LLM dissertation, University of Natal Durban) 2003.

3 *Ibid*. See General Notice 1183 in *GG* 26493 of 2004-06-23 www.info.gov.za/notices/2004/26493/ (accessed 2020-11-27); Cassim and Cassim "The Reform of Corporate Law in South Africa" 2005 16(10) *The International Company and Commercial Law Review* 411–418.

4 See *Count Gotthard SA Pilati v Witfontein Game Farm (Pty) Ltd* [2013] 2 All SA 190 (GNP) 15.4; *Zoneska Investments (Pty) Ltd t/a Bonatla Properties (Pty) Ltd v Midnight Storm Investments 386 Ltd* (9831/2011, 7811/2012) [2012] ZAWCHC 163; [2012] 4 All SA 590 (WCC) (28 August 2012).

5 Constitution of the Republic of South Africa, 1996.

6 See *S v Makwanyane* 1995 (3) SA 391 (CC) 35–36; *Amdocs SA Joint Enterprise (Pty) Ltd v Kwezi Technologies (Pty) Ltd* 2014 (5) SA 532 (GJ).

## 2 THE ISSUE OF COSTS IN SECTION 266 OF THE COMPANIES ACT 61 1973

Arguably the greatest disincentive for minority shareholders in bringing statutory derivative actions in South Africa has been the cost of the action.[7] Under section 266 of the 1973 Act, there were risks involved for the shareholder who initiated the statutory derivative action although the shareholder did not become personally involved in the litigation as a result of the appointment of a provisional *curator ad litem,* and because the action was eventually brought in the name of the company.[8] The Van Wyk de Vries Commission stated that the issue of costs, including the fees charged by the provisional and ultimate *curator ad litem*, should be left to the discretion of the court.[9] In addition, it was the view of the Commission that the issue of costs would "without any doubt" discourage frivolous or vexatious actions by minority shareholders.[10]

Section 268 of the 1973 Act provided as follows:

> "The Court may, if it appears that there is reason to believe that the applicant in respect of an application under section 266(2) will be unable to pay the costs of the respondent company if successful in its opposition, require sufficient security to be given for those costs and costs of the provisional curator ad litem before a provisional order is made."

Only when the court appointed the *curator ad litem* and when the *curator ad litem* initiated the proceedings on behalf of the company was the action referred to as a statutory derivative action.[11] Prior to this, the risk of a costs order was borne by the shareholder who initiated the proceedings. The court could ensure that the initiating shareholder appreciated the potential consequences of making frivolous or vexatious claims by exercising its discretion under section 268 of the 1973 Act.[12] The shareholder who initiated the proceedings could be required to provide sufficient security for the costs of the application and costs of the provisional *curator ad litem* before a provisional order was made. The court would require such security if there was reason to believe that the applicant in respect of an application under section 266(2) was unable to pay the costs of the respondent company.[13] Consequently, there was potentially a considerable financial risk and burden placed on the initiating shareholder owing to security needing to be provided.

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7 Du Plessis "The South African Statutory Derivative Action: Background, Comparisons and Application" in Hugo and Kelly-Louw (eds) *Essays on the Law of Banking, Companies and Suretyship* (2017) 266.

8 *Ibid.*

9 Du Plessis in Hugo and Kelly-Louw *Essays on the Law of Banking, Companies and Suretyship* 266; see also Van Wyk de Vries *Commission of Enquiry into the Companies Act* par 42.16.

10 Van Wyk de Vries *Commission of Enquiry into the Companies Act* par 42.17.

11 Du Plessis in Hugo and Kelly-Louw *Essays on the Law of Banking, Companies and Suretyship* 267.

12 *Ibid.*

13 Hurter *Aspekte Van Statutere Minderheidsbeskerming in die Suid-Afrikaanse Maatskappyereg* (unpublished LLD thesis, University of South Africa) 1996 320.

This was probably the most significant reason that section 266 of the 1973 Act was used very infrequently.[14]

In summary, if the court refused to allow the action to continue, the unsuccessful party, in the absence of circumstances that justified a different order, would have been liable to pay the costs, including the costs of the initial application and all costs incurred by the provisional *curator ad litem*. If, however, the court confirmed the appointment of the *curator ad litem*, it meant that the company was liable for the costs of the proceedings if unsuccessful, which included all the costs incurred by the provisional *curator ad litem* and the ultimate *curator ad litem*.[15]

## 3 THE ISSUE OF COSTS IN SECTION 165 OF THE COMPANIES ACT 71 OF 2008

Section 165 of the Companies Act 71 of 2008 (2008 Act) provides that if a court grants leave to a person to sue on behalf of the company, the court is empowered to make an order regarding who would be liable for the remuneration and expenses of the person appointed as the investigator (this is the person who has been appointed to investigate the demand that has been served upon the company to commence or continue legal proceedings or to take related steps to protect the legal interests of the company). There is no similar provision on determining the liability for costs in section 165 where a committee or investigator instead of the person who is appointed to investigate. There is a lack of clarity in the 2008 Act as to whom the person appointed refers to. The "person appointed" may refer to the person appointed by the company to investigate the demand, or it could be interpreted to refer to the person who has been granted leave by the court to institute the derivative action. The section provides that a party or any of the parties may be liable to the proceedings or application, and the company may be liable. If the order makes two or more persons liable, it may also determine the nature and extent of the liability of each of those persons. The court may also vary the order as it sees fit.[16] It is submitted that the section does not provide clarity on who exactly will be liable for expenses in the proceedings. The Act may be referring to the person appointed by the company to investigate the demand, or it could refer to the person who is granted leave by the court to conduct the action under section 165.[17] It is submitted that further clarity should have been given by the legislature in this regard.

In *Lewis Group Limited v Woollam*,[18] the court confirmed that proceedings brought or intervened in with leave of the court must not be discontinued,

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14 *Ibid.*

15 *Brown v Nanco (Pty) Ltd* 1977 (3) SA 761 (W).

16 S 165(9) of the 2008 Act.

17 S 165(4) of the 2008 Act; Cassim "Cost Order, Obstacles and Barriers to the Derivative Action under Section 165 of the Companies Act 71 of 2008 (Part 1)" 2014 26 *South African Mercantile Law Journal* 1.

18 *Lewis Group Ltd v Woollam* (1) [2017] 1 All SA 192 (WCC).

compromised or settled without leave of the court.[19] This is a positive aspect of section 165 as it allows the court control over any settlements made in the derivative proceedings. The court is empowered to consider the interests of the company thereby ensuring fairness in the settlements reached. This also prevents parties from engaging or agreeing settlements unlawfully in their own interests and is a safeguard against directors and shareholders who wish to exercise undue influence on a person who wishes to discontinue the proceedings or reach an unacceptable compromise or settlement. The subsection also enables the court to determine whether the application was frivolous or vexatious and enables the applicant to decide whether to abandon the action because of the possibility of a large costs order.[20] Section 165 provides further that the court at any time may make any orders it considers appropriate about the costs of certain persons in relation to the proceedings – namely, the person who applied for, or was granted leave; the company; or any other party to the proceedings or application.[21]

Although this provision gives a court a wide discretion, it fails to move the burden and risk of the costs issue from the applicant to the company, especially in instances where the applicant may lose the action. The possibility of being burdened with a costs order continues to be of serious concern to an applicant under section 165 and the section does not completely eradicate the risk to the applicant in derivative proceedings.[22] According to Cassim, the new derivative proceedings under section 165 do not do enough to alleviate the burden of costs on the applicants.[23]

The applicant shareholder under section 165 institutes action, not in a personal capacity (as under section 163) but in the interests of the company. Therefore, the recovery of any financial gain or benefit is made to the company and not directly to the applicant, notwithstanding that all the shareholders may benefit from an increase in value of the company's shares.[24] However, this creates the possibility that a few shareholders may seek to benefit from a successful action without themselves carrying the risk of costs. Cassim refers to this situation as the "free rider" effect where only a few shareholders would risk their time, effort and finances in instituting a derivative action while those shareholders who decide not to take any action (the so-called free riders) will benefit from the outcome of the derivative action.[25]

The increase in value of shares, however, does not deal with the legal costs and expenses that have been incurred by the applicant shareholder. In cases where the applicant has succeeded in the action, the applicant shareholder may still only be able to recover a portion of the expenses in terms of the "loser pays" principle that exists in South African civil procedure.

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19 S 165(15) of the 2008 Act.

20 Cassim 2014 *South African Mercantile Law Journal* 1; Du Plessis in Hugo and Kelly-Louw *Essays on the Law of Banking, Companies and Suretyship* 274.

21 S 165(10) of the 2008 Act.

22 Cassim 2014 *South African Mercantile Law Journal* 1.

23 *Ibid.*

24 Cassim 2014 *South African Mercantile Law Journal* 12.

25 *Ibid.*

The applicant institutes the derivative claim on behalf of the company. Therefore, it is the company that is entitled to the award and not the applicant. In instances where the court awards costs on a party-and-party scale, the successful applicant would only be entitled to recover the costs incurred in the course of instituting the derivative claim and would not be reimbursed for costs that have been incurred over and above party costs.[26] It is submitted that if applicants have to bear the costs of a derivative claim while at the same time not being able to benefit directly from a successful action, applicants may not be willing to institute derivative claims. Shareholders may choose to sell their shares and exit the company rather than run the risk of expensive litigation.[27] Section 266 of the 1973 Act gave the courts a discretion to order the applicants to provide security for the application and *curator ad litem*. This provision served as an obstacle to the derivative action claims because of the significant financial burden it placed on applicants when required to provide security for costs. The applicant would be required to provide security for costs if the court was of the view that the applicant would not be able to satisfy the costs of the respondent company. The eventual amount could potentially include the costs in bringing the derivative action, the costs of appointing a provisional *curator ad litem*, the costs of the report prepared by the *curator ad litem* and the costs of the investigation to be conducted by the *curator ad litem*.[28]

Section 165(11) also grants the court a discretion to determine whether the applicant shareholder should provide security for costs. This provision creates further obstacles to the applicant shareholder as the amount required to cover the security may prove to be out of reach of the shareholder. This provision has the potential to disincentivise an application especially where litigation proceedings could continue for a sustained period for which the applicant shareholder would not be able to commit financial resources.[29] The security-for-costs provision is largely seen to be designed to protect the financial resources of the company, and to curb collusive settlements as well as frivolous and vexatious actions. It is submitted that there is a greater risk that applicants will be deterred from instituting a legitimate derivative claim because of a lack of financial support or indemnity for costs than that a frivolous or vexatious claim will be made. It is submitted that the current situation regarding indemnity for costs undermines good corporate governance as the protection of the interests of the company against wrongdoing is in doubt. Cassim opines that there is no true rationale for a security-for-costs provision as section 165(15) is already in the Act to prevent collusive settlements.[30]

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[26] *Ibid*. See Whincop "The Role of the Shareholder in Corporate Governance: A Theoretical Approach" 2001 25 *Melbourne University Law Review* 418 422–424. Party-and-party costs in this context refers to only those costs that were necessarily incurred in the course of instituting or defending the derivative claim.

[27] Cassim 2014 *South African Mercantile Law Journal* 13.

[28] Hargovan "Under Judicial and Legislative Attack: The Rule in *Foss V Harbottle*" 1996 113 *South African Law Journal* 631 650; see also Schreiner "The Shareholder's Derivative Action: A Comparative Study of Procedure" 1979 96 *South African Law Journal* 242–245.

[29] Cassim 2014 *South African Mercantile Law Journal* 1.

[30] *Ibid.*

The other possible reason for the provision dealing with security for costs is to protect the interests of the company as well as the directors should the action fail. But, according to Cassim, shareholders should not be put in a position where their personal wealth is used as a ground to disqualify them from instituting action; furthermore, there are other provisions in the Act designed to protect the company and directors such as those provisions found in section 78 of the Act.[31] Section 78 provides that a company is permitted to indemnify a director against expenses in a derivative action or provide a director with finances in order to defend proceedings in a derivative action. If judgment is given against a director in cases where the director has committed willful misconduct or an intentional breach of trust,[32] then the costs incurred will be repaid to the company.[33] However, in cases where a director is found to be negligent, then the legal costs and liability is ratifiable by the company.[34] The practical consequences of these provisions leave much to be desired. In instances where directors have acted negligently towards the company, they in effect bear no direct ill effects. They will not be held liable for payment or any reimbursement to the company of the costs involved in the defence of these actions. These provisions therefore have the effect of indemnifying the directors for their negligent actions. It is therefore submitted that a distinction must be drawn between directors' liability for negligence to third parties and liability for negligence to the company itself. This is a view supported by Cassim.[35] Section 78 of the Act permits a company to acquire insurance to protect directors and indemnify them against liability or expenses. It is important to ensure here again that these provisions and the insurance provided therein, which in most instances may be paid by the company on behalf of the director, should not be used as a mechanism for a director to subvert his or her liability for negligence and the costs involved in defence of a claim. This surely must not have been the intention of the legislature. Further clarity is needed as to when these provisions may be used to prevent rendering them superfluous.[36]

Section 165 is silent as to whether the court has a discretion to permit recovery to current and former shareholders. It is submitted that currently there is the possibility that shareholders who were present at the time of the wrongful acts but have subsequently left the company will not be able to recover any expenses incurred when they were shareholders in the company. The failure of the Act to clarify this position leaves open the possibility of new shareholders being unjustifiably enriched, while former shareholders are denied the right to recover any financial portion they have expended while still shareholders.[37]

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31 *Ibid.*

32 In terms of s 424 of the 1973 Act or in terms of s 77(3)(*a*)–(*c*) of the 2008 Act, or, consists of a fine in terms of s 78(3) of the 2008 Act.

33 S 78(4)–(6) read with s 78(8) of the 2008 Act.

34 S 78(4)–(6) of the 2008 Act.

35 Cassim "Cost Order, Obstacles and Barriers to the Derivative Action Under Section 165 of the Companies Act 71 of 2008 (Part 2)" 2014 26 *South African Mercantile Law Journal* 239.

36 Cassim 2014 *South African Mercantile Law Journal* 241.

37 Cassim 2014 *South African Mercantile Law Journal* 22.

Cassim opines that direct payment of a pro rata portion of the proceeds in a successful action to current shareholders may be necessary in order to prevent abuse in cases where the true defendants were majority shareholders or controllers of the company.[38] This would in effect, it is submitted, deter current shareholders from continuing or repeating the wrongdoing or from using the proceeds of the derivative action for their own purposes, thereby denying individual shareholders of the company any (direct or indirect) benefit of the recovery.[39]

A further anomaly in the 2008 Act regarding the liability for costs and expenditure in derivative proceedings pertains to section 165(9)(*a*) of the Act. In terms of the section, if the court grants leave to an applicant under section 165, the court must also make an order stating who is liable for the remuneration and expenses of "the person appointed". The section lacks clarity as it fails to indicate who is being referred to as the "person". The section leaves open whether the "person" is the person appointed by the court under section 165(4)(*a*) or whether it is referring to the person who made the demand under section 165(2). It is submitted that, if the section refers to the latter, then it should be the company that meets the applicant's expenses. If the court were to grant an order that the applicant would be liable for the expenses under section 165(9)(*a*), it would only increase the already heavy burden placed on applicants. Further clarity is needed in this respect.

## 4 THE UNITED KINGDOM COMPANIES ACT 2006

The courts were empowered under the common-law derivative action to indemnify a shareholder when an application is made to pursue a derivative action. Rule 19.9 E of the Civil Procedure Rules now regulates the power of the court to award costs. In terms of the rule, a court may order the company to indemnify the applicant shareholder against any costs incurred in relation to the permission or the derivative action or both.[40]

The financial implications of the derivative action are probably the most influential factor for an applicant shareholder when deciding whether or not to initiate a derivative action. In the UK, the issue of costs is of greater concern because the losing litigant may be held liable for the costs of the opposing party, and this is also the case regarding derivative actions.[41]

There have been differing views in the case law under common law and statute regarding the issue of costs. The courts have expressed the view that at common law an applicant shareholder who is able to persuade a

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[38] Cassim 2014 *South African Mercantile Law Journal* 22; *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134; Cassim 2014 *South African Mercantile Law Journal* 231.

[39] Boyle *Minority Shareholders' Remedies* (2002) 85; Cassim 2014 *South African Mercantile Law Journal* 22.

[40] Keay "Assessing and Rethinking the Statutory Scheme for Derivative Actions Under the Companies Act 2006" 2016 16 *Journal of Corporate Law Studies* 24.

[41] Reed "Derivative Claims: The Application for Permission to Continue" 2000 21 *Company Law* 156–158; Tang "Shareholder Remedies: Demise of the Derivative Claim?" 2015 1 *UCL Journal of Law and Jurisprudence* 183.

court at the *ex parte* preliminary stage that the proceedings were justified should be indemnified for costs.[42]

In *Wallersteiner v Moir (No. 2)*,[43] Lord Denning MR stated:

> "The minority shareholder, being an agent acting on behalf of the company, is entitled to be indemnified by the company against all costs and expenses reasonably incurred by him in the course of the agency ... Seeing that, if the action succeeds the whole benefit will go to the company, it is only just that the minority shareholder should be indemnified against the costs he incurs on its behalf."[44]

The court indicated that the applicant shareholder should be indemnified for costs even if the claim is unsuccessful provided the applicant acted in good faith and on reasonable grounds.[45] The rationale behind the court's order is that a company should indemnify a plaintiff in a derivative claim because the plaintiff is acting on behalf of the company and the company will directly benefit from a successful suit.[46]

In *Smith v Croft*,[47] the court held that the applicant shareholder, when applying for costs orders, must demonstrate that the award for costs is genuinely needed, and indicated that it may be appropriate to leave a proportion of the costs to the claimants as an incentive for the applicant to proceed with the derivative claim.

Lewison J in *Lesini v Westrip Holding Ltd*[48] rejected the view of the court in *Smith v Croft*. The court held that indemnity costs orders are not limited to impecunious claimants.[49] It is submitted that this was the correct approach by the court. An indemnity for a costs order that is awarded to the applicant should not be determined by the financial status of the applicant. The financial position of the applicant is irrelevant. The applicant initiates the action on behalf of the company for the wrongful actions perpetrated against it. The reward is then paid to the company. The applicant should then be reimbursed for the expenses involved in a successful action or for expenses in a successful claim where the losing party has to pay the costs of the litigation.

In *Carlisle & Cumbria United Independent Supporters' Society Ltd v CUFC Holdings Ltd*,[50] Arden LJ stated:

> "As the action was a derivative action on behalf of the club, the trust [the applicant] had an expectation of receiving its proper costs from the companies

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42 Keay 2016 *Journal of Corporate Law Studies* 24; *Wallersteiner v Moir (No. 2)* [1975] QB 371 391.

43 *Supra*.

44 *Wallersteiner v Moir (No. 2) supra* 391; see also *Wilton UK Ltd v Shuttleworth* [2018] EWHC 911 (Ch) 91

45 *Wallersteiner v Moir (No. 2) supra* 403–404; Boyle *Minority Shareholders' Remedies* 36–37; Li *A Comparative Study of Shareholders' Derivative Action* (2007) 74.

46 Zhang *The Derivative Action and Good Corporate Governance in China* 204.

47 (1988) Ch. 114 580–581.

48 [2009] EWHC 2526 (Ch); [2010] BCC 420 125.

49 See also *Jaybird Group Limited v Wood* [1986] BCLC 319, 327.

50 [2010] EWCA Civ 463; [2011] BCC 855.

on an indemnity basis if the action had gone forward."

This view was supported by the court in *Stainer v Lee*,[51] where the court held that a shareholder who obtains the permission of the court to proceed "should normally be indemnified as to his reasonable costs by the company. In *Foyster v Foyster Holdings Pty Ltd*[52] Barret J stated that applicant shareholders should be indemnified against costs in legitimate cases as the applicant shareholders have initiated the derivative action to protect the interests of the company when others within the company have failed to do so.[53]

The Commission indicated that the possibility of a costs indemnity order is a significant incentive to use the derivative action.[54] But, according to Reisberg, the granting of costs or an indemnity against costs is not really an incentive. An incentive in the context of a derivative action assumes that the applicant shareholder will obtain some benefit or advantage that the applicant did not already have by initiating a derivative action.[55] However, it is submitted that an award of an indemnity against costs does not provide the applicant with anything that the applicant did not already have, and neither has the applicant lost anything. But, in certain instances the applicant shareholder may suffer financially as the costs order may not reimburse the applicant for the finances expended in the hiring and briefing of attorneys in preparation for derivative litigation.[56] The applicant would remain liable for these legal costs irrespective of the outcome of the case.

Owing to the lack of clear guidelines regarding indemnity for costs, applicant shareholders have no certainty regarding whether a court will come to their aid in providing an indemnity for costs. The court has a wide discretion regarding an indemnity for costs but this provides little comfort for an applicant who requires reimbursement for instituting action on the company's behalf.[57] It is evident from the case law that the courts are inclined to make an award to indemnify an applicant against costs but these costs orders are limited.[58] In *Kiani v Cooper*,[59] the court limited the indemnity for costs order in favour of the applicant but not in respect of an adverse costs order. Proudman J indicated that the applicant should assume part of

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51 [2010] EWHC 1539 (Ch), [2011] 1 BCLC 537 56.

52 *Foyster v Foyster Holdings Pty Ltd* [2003] NSWSC 135 13.

53 See Keay 2016 *Journal of Corporate Law Studies* 25.

54 See Law Commission "Shareholder Remedies Consultation" (1996) http://lawcom.gov.uk/_project/shareholder-remedies/ (accessed 2019-03-05) par 18.1.

55 Reisberg "Funding Derivative Actions: A Re-Examination of Costs and Fees as Incentives to Commence Litigation" 2004 4 *Journal of Corporate Law Studies* 355; Hargovan 1996 *South African Law Journal* 648; Keay 2016 *Journal of Corporate Law Studies* 26.

56 Keay 2016 *Journal of Corporate Law Studies* 26; Hannigan and Prentice *Hannigan and Prentice: The Companies Act 2006 – A Commentary* (2009) par 4.86.

57 Zhang *The Derivative Action and Good Corporate Governance in China* 204.

58 Keay 2016 *Journal of Corporate Law Studies* 26; Ramsay and Saunders "Litigation by Shareholders and Directors: An Empirical Study of the Statutory Derivative Action" 2006 6 *Journal of Corporate Law Studies* 432; see also *Stainer v Lee supra* where Roth J ordered an indemnity to a limit of £40 000; *Kiani v Cooper* [2010] EWHC 577 (Ch); [2010] BCC 463 49.

59 *Supra*.

the risk in keeping with the decision in *Smith v Croft*, which indicated that only a portion of the costs should be indemnified to act as incentive to the applicant to continue to pursue the claim. In *Stainer v Lee*, Roth J ordered an indemnity to a limit of £40 000 but allowed for the possibility of an applicant applying for an extension of an indemnity for costs. The rationale of the court was that the applicant's costs could become excessively more and disproportionate to the amount eventually awarded to the company, which was uncertain at that point in the proceedings.[60] Furthermore, the approach by the court in *Stainer v Lee* allows the court to reassess the claim for indemnity for costs at every stage of the proceedings; at the same time, it ensures that there is a balance between a credible derivative claim and placing an undue burden on the personal financial status of the applicant.[61] The approach in *Stainer v Lee* provides relief to the applicant by postulating a type of interim funding that may be extended based on the ongoing degree of success of the applicant's case, which may be assessed at different stages of the proceedings.[62]

In *Wishart Castlecroft Securities Ltd*,[63] the court expressed a degree of wariness in writing a blank cheque to an applicant. The court therefore indicated that it would be appropriate to decide whether an award for costs should be granted during the permission-for-leave proceedings rather than the substantive hearing.[64] It is submitted that this view does have benefits for the applicant in that it provides a certain degree of clarity and certainty before the applicant decides to pursue the matter further – in which case the costs could increase substantially.

There is a lack of legislation and legal rules providing for indemnity for costs for shareholders. Keay submits that, as a result, there is a possibility that a company could be unjustly enriched, as it will be the recipient of the benefit from the shareholder's efforts in instances where a derivative claim is successful, and especially if the court does not make an order for the company to reimburse the shareholder.[65] Furthermore, it is submitted that the lack of legislation and guidelines on an indemnity for the costs borne by shareholders serves as a disincentive to prospective applicants in instituting derivative claims.[66] This results in the actions of wrongdoers going unpunished.

Although courts need to be wary of opening the floodgates to claims for costs by applicants in derivative proceedings, it must be kept in mind that

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60 *Stainer v Lee supra* 56.

61 Tang 2015 *UCL Journal of Law and Jurisprudence* 204.

62 Kaplan and Elwood "The Derivative Action: A Shareholder's Bleak House?" 2003 36 *University of British Columbia Law Review* 478.

63 (2009) CSIH 65, 2010 SC.

64 *Wishart v Castlecroft Securities Ltd supra* 49 and 62; Tang 2015 *UCL Journal of Law and Jurisprudence* 204.

65 Keay 2016 *Journal of Corporate Law Studies* 28; Wilson "Attorney Fees and the Decision to Commence Litigation: Analysis, Comparison and an Application to the Shareholders' Derivative Action" 1985 5 *Windsor Yearbook of Access to Justice* 177 and referred to in Ramsay "Corporate Governance, Shareholder Litigation and Prospects for a Statutory Derivative Action" 1992 15 *University of New South Wales Law Journal* 149 164.

66 Reisberg *Derivative Actions and Corporate Governance* (2007) 222.

courts will only make an award for costs once the derivative action has been subject to judicial scrutiny.[67] This takes into account the fact that UK legal rules provide for costs budgets to be provided by the litigants at what is known as a case-management hearing before the trial. This ensures greater control and analysis before any costs order is made.[68]

Tang submits that a balancing exercise must be adopted by the courts to ensure that the courts are not too generous or expansive in making awards indemnifying an applicant shareholder, and at the same are not too rigid and restrictive in rejecting claims for costs.[69] It is submitted in this article that this balancing exercise or dual consideration is not necessary, especially in instances where a successful applicant has acted in good faith to protect the interests of the company. It is submitted that an applicant in these cases should be indemnified for costs incurred and should not be restricted or inhibited from doing so.

It is submitted that if the courts are serious about protecting the interests of companies and ensuring good corporate governance then they need to be readier to award an indemnity for costs to shareholders who have successfully obtained permission to continue a derivative action.

## 4 1 Contingency fee agreements

A contingency fee agreement between attorney and client may serve as a mechanism to provide prospective applicant shareholders with an incentive to institute derivative proceedings.[70] In terms of the agreement, if a client wins the case, the attorney will be able to charge the normal fee and an additional fee that does not exceed the normal fee by 100 per cent. However, if the client loses the case, the client is not liable for the attorney's fee.[71] A contingency fee agreement has been used as a strong incentive to encourage derivative actions in the United States of America (US).[72] In the UK, contingency fee agreements were historically regarded as being contrary to public policy but were introduced into English law by section 58 of the Legal Services Act 1990[73] and have been used in criminal and family law cases. The application of contingency fee agreements in derivative proceedings in the UK remains uncertain as there has not been any case law embracing the concept in derivative proceedings. In *Wallersteiner v Moir*

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67 Li *A Comparative Study of Shareholders' Derivative Action* 74; Davies, Worthington, Micheler and Gower *and Davies: Principles of Modern Company Law* 8ed (2008) 455.

68 See Part 3 of the Civil Procedure Rules 1998 (SI 1998/3132), and the Court of Appeal's judgment in the *Griffiths v Solutia (UK) Ltd* [2001] EWCA Civ 736; Keay 2016 *Journal of Corporate Law Studies* 29.

69 Tang 2015 *UCL Journal of Law and Jurisprudence* 203.

70 Li *A Comparative Study of Shareholders' Derivative Action* 75.

71 As per article 4 of the Conditional Fee Agreements Order 2000; see generally Andrews "Conditional Fee Agreements: The Courts and Parliament in Unison" 1998 57 *Cambridge Law Journal* 429; Boyle *Minority Shareholders' Remedies* 83.

72 Hirt *The Enforcement of Directors' Duties in Britain and Germany: A Comparative Study with Particular Reference to Large Companies* (2004) 133; Li *A Comparative Study of Shareholders' Derivative Action* 75.

73 Substituted by s 27(1) of the Access to Justice Act 1999.

*(No. 2)*,[74] Lord Denning agreed in principle with conditional fee agreements being used in derivative proceedings. However, the majority of the Appeal Court held that the court did not have either the power or good reason to sanction the agreement. Authors have questioned the application of contingency fee agreements in the context of derivative proceedings. According to Boyle, it would be nonsensical to permit contingency fee agreements in derivative actions as any benefit that is awarded by the court in a successful claim must be paid to the company and not the applicant shareholder.[75] The shareholder therefore receives no right to the benefit of any award made. It is submitted that a contingency fee agreement serves as an incentive not to the applicant shareholder but to the applicant's attorneys, who, like the company, are the true benefactors of the contingency fee agreement in a successful action. For a contingency fee agreement to serve as a true incentive to applicants, an amendment to existing legislation or to the 2006 Act is necessary to provide for some benefit to the applicant when entering into such agreements, perhaps providing applicants with a pro rata share of the successful action which may then be used to satisfy their legal costs.

The possibility of being burdened with a costs order continues to be of serious concern to an applicant under section 165 of the 2008 Act and it is submitted that section 165(10) does little to alleviate the burden on an applicant who runs the risk of being held liable for the costs of the action. There has been no mention in case law or in statutes to date of the application of contingency fee agreements[76] in respect of derivative claims and neither has there been any consideration as to whether the applicant could be awarded a pro rata share in successful derivative proceedings.

## 4 2 Permission required before settlement or discontinuation of an action

Once it has granted permission for the derivative action to continue, a court in the UK may order, under rule 19.9 F of the Civil Procedure Rules, that the claim constituted by the derivative action cannot be discontinued, settled or compromised without its permission. The power to make such an order is in the sole discretion of the court. Under section 165(15) of the 2008 Act, derivative proceedings brought or intervened in with leave of the court "must not be discontinued, compromised or settled without leave of the court".[77] It is submitted that the South African approach is the more suitable one, because not only does section 165 give the court control over any settlements made in the derivative proceedings, but the section makes it compulsory for the court to grant permission for any discontinuance of the

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74 *Supra.*

75 Boyle *Minority Shareholders' Remedies* 83; Li *A Comparative Study of Shareholders' Derivative Action* 76.

76 There is no mention in either the Contingency Fees Act 66 of 1997 or the Companies Act 71 of 2008 regarding contingency fees in derivative claims.

77 See Cassim 2014 *South African Mercantile Law Journal* 21; see also Du Plessis in Hugo and Kelly-Louw *Essays on the Law of Banking, Companies and Suretyship* 274; *Lewis Group Ltd v Woollam supra*.

proceedings. The court is empowered to consider the interests of the company and thereby ensure fairness in the settlements or compromises reached.

## 5 CONCLUSION AND RECOMMENDATIONS

It is submitted that the issue of costs continues to be a disincentive for prospective applicants in the institution of derivative proceedings under the 2008 Act. Section 165 does not alleviate the burden on applicants regarding costs of the derivative proceedings and therefore applicants rarely institute derivative proceedings owing to the risk of being held personally liable for a costs order or several costs orders. Section 165(10) allows a court, at any time, to make any order it considers appropriate about costs in the proceedings. It is submitted that this is insufficient, as it does not provide the applicant with any relief or indemnity for costs, especially as courts in South Africa adopt the "loser pays" principle in civil proceedings, which also applies in derivative proceedings. The applicants in derivative proceedings institute the derivative action on behalf of the company. Any award made by the court in a successful action is paid to the company. The practical effect of this is that applicants run the risk of being held liable for their own litigation costs as well the costs of the defendant if they lose a derivative action, and this may be exacerbated in instances where the applicant chooses to take the decision of the court *a quo* on appeal. In this instance, the legal costs incurred may increase substantially. Even in instances where the court awards costs to the successful applicant, an award on the party-and-party scale may prove unreasonable in derivative proceedings owing to the nature of derivative actions. Any order by the court regarding costs in this instance will relate only to the costs and disbursements incurred by the applicant in instituting the derivative action and will not cover the additional costs over and above the party-and-party costs.

It has been argued that potential liability for costs is necessary to prevent opening the floodgates to frivolous and vexatious derivative claims.[78] However, it is submitted that liability for costs has a far more serious effect of discouraging derivative applications altogether, some of which are worthy in attempting to protect the interests of the company. It is submitted that one way to incentivise derivative applications by applicant shareholders would be to allow applicants to receive a pro rata share of an award, together with the company, in a successful derivative action. If prospective applicants are aware of the possibility of receiving a financial award in a successful derivative claim, this may not only encourage worthy derivative applications but also prevent frivolous and vexatious ones. However, granting successful applicants a pro rata share may contradict the derivative principle – in that the action was instituted on behalf of the company and the company is the only person truly entitled to any award. Therefore, a degree of flexibility would be required of the courts if the applicant is to be granted a pro rata share in the award. There also exists the option of the court making the company liable for a pro rata share of the litigation costs of the proceedings.

[78] Reisberg *Derivative Actions and Corporate Governance* 222.

Again, this would require a degree of flexibility by the court. However, the problem would remain that the applicant shareholder may still be liable to the shareholder's own attorneys for legal costs as the company would only be liable for a pro rata share of the defendant's costs.

It is submitted that the court must use its discretion when making an award for costs to prevent a situation where free riders who choose not to institute derivative proceedings are able to benefit from a successful action instituted by only a few shareholders. It is submitted that these free riders should be excluded from any award or indemnity for costs order.

The court is empowered under section 165(11) to use its discretion to determine whether the applicant shareholder should provide security for costs. It is submitted that this provision provides further obstacles to applicants as the amount of the security may prove beyond the applicant's means, especially in instances having the potential for lengthy litigation and instances where the applicant takes decisions by the court *a quo* on appeal. It is submitted that to expect an applicant to commit large amounts of money to derivative litigation for any sustained period is unfair and impractical, irrespective of the personal financial status of the applicant.[79] The derivative litigation is instituted on behalf of the company and the applicant should not be forced to commit personal financial resources, especially in a situation where the applicant will not receive any remuneration from a successful derivative claim. It is submitted that the section further disincentivises applicants' derivative claims; not only is there a lack of provision for indemnity for costs but there is also the potential of having to pay security for costs.

The 2006 Act in the UK also fails to provide clarity regarding indemnity for costs to applicants instituting a derivative claim. The risk of being held liable for the costs of the defendant in a losing derivative claim and the liability for the applicant's own legal costs continues to be a deterrent to derivative proceedings in the UK. However, the court in *Wallersteiner v Moir (No. 2)*[80] did indicate that there might be some relief for applicant shareholders. The court indicated that, at common law, an applicant shareholder who can persuade a court at the *ex parte* preliminary stage that the proceedings are justified should be indemnified for costs.[81]

It is submitted that although this decision was expressed in relation to the common law, it may serve as a useful guide in the interpretation of section 165(10) with regard to the indemnity for costs for applicants under the section. In essence, as long as an applicant is able to show at the demand stage that the proceedings were justified, a court would be able to indemnify

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79 Cassim 2014 *South African Mercantile Law Journal* 1.

80 *Supra*.

81 *Wallersteiner v Moir supra* 391: "The minority shareholder, being an agent acting on behalf of the company, is entitled to be indemnified by the company against all costs and expenses reasonably incurred by him in the course of the agency ... Seeing that, if the action succeeds the whole benefit will go to the company, it is only just that the minority shareholder should be indemnified against the costs he incurs on its behalf"; see also *Wilton UK Ltd v Shuttleworth supra* 91; Keay 2016 *Journal of Corporate Law Studies* 24; Cassim *The New Derivative Action Under the Companies Act* (2016) 17.

the applicant against costs. However, the UK courts themselves have been reluctant to apply the judgment in *Wallersteiner v Moir (No. 2)* in other cases and have opted for a more restrictive approach in relation to indemnity for costs. For example, in *Smith v Croft,*[82] the court took into account the personal financial position of the applicant shareholder. It concluded that the applicant shareholder, in applying for costs orders, must demonstrate that the award for costs is genuinely needed and that it may be appropriate to leave a proportion of the costs to the claimants as an incentive for the applicant to proceed with the derivative claim.[83] In essence, according to the court, wealthy applicants should not be entitled to an indemnity for costs. It is submitted that this is the incorrect approach. Applicants in a derivative claim institute action on behalf of the company and thus their personal financial status should not be a part of the equation. To pretend otherwise is to undermine the rationale behind derivative proceedings.[84] The conflicting approach to indemnity for costs has left applicants in a precarious position regarding costs and has also led to costly and lengthy mini-trials.[85]

The courts in the UK have not utilised contingency fee agreements to alleviate the financial burden on applicants.[86] There is no UK or South African legislation that provides for contingency fee agreements in the context of a derivative action. It is further submitted that for contingency fee agreements to be an incentive to applicants in derivative proceedings would require an alteration of the principle underpinning contingency fee agreements. Currently, if the contingency fee agreement were to apply in derivative actions it would be the company who would benefit as any award made by the court would have to be awarded to the company.[87] The applicant shareholder is not the plaintiff and thus receives no benefit from such an agreement. It is submitted that currently any contingency fee agreement in the context of derivative proceedings serves only to incentivise the applicant's attorneys who would benefit and not the actual applicant.

The courts in the UK have been inclined to assert a degree of flexibility in certain instances and have provided an indemnity for costs for a limited amount only.[88] This approach may serve as a guide to South African courts to allow for a portion of the applicants' costs to be indemnified in derivative proceedings without the court simply writing a blank cheque to applicants.[89] It is submitted that receiving an indemnity for a costs order for a limited amount may serve as an incentive to institute derivative proceedings to

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82 *Supra*.

83 *Smith v Croft supra* 580–581.

84 Cassim *The New Derivative Action Under the Companies Act* 17.

85 Sykes "The Continuing Paradox: A Critique of Minority Shareholder and Derivative Claims Under the Companies Act 2006" 2010 29 *Civil Justice Quarterly* 226.

86 In *Wallersteiner v Moir (No. 2) supra*. Lord Denning agreed in principle with conditional fee agreements being used in derivative proceedings however, the majority of the Appeal Court held that the court did not have neither the power nor good reason to sanction the agreement.

87 Boyle *Minority Shareholders' Remedies* 83; Li *A Comparative Study of Shareholders' Derivative Action* 76.

88 *Kiani v Cooper supra; Stainer v Lee supra.*

89 *Wishart v Castlecroft Securities Ltd supra.*

protect the interests of the company, especially in the absence of any amendment to existing legislation in regard to an indemnity for costs.

In terms of section 266 of the 1973 Act, although the initiating shareholder did not become personally involved in the litigation as a result of the appointment of a provisional *curator ad litem,* and because the derivative proceedings were eventually brought in the name of the company, there still remained a risk of costs for the initiating shareholder that ultimately resulted in the infrequent use of the statutory derivative action.[90] The Van Wyk de Vries Commission expressly recommended that costs (including those costs relating to the fees charged by the provisional and ultimate *curator ad litem*) should be left to the discretion of the court.[91] Section 268 of the 1973 Act provided as follows:

> "The Court may, if it appears that there is reason to believe that the applicant in respect of an application under section 266(2) will be unable to pay the costs of the respondent company if successful in its opposition, require sufficient security to be given for those costs and costs of the provisional *curator ad litem* before a provisional order is made."

Under the section, if the court was satisfied that all the requirements under section 266(3)(*a*) and (*b*) were satisfied, then the court would appoint a provisional *curator ad litem* who had to report back to the court on the return day.[92] On the return day, the court could do one of two things: (a) discharge the provisional order; or (b) confirm the appointment of the *curator ad litem* for the company and issue directions as to the institution of proceedings in the name of the company and the conduct of such proceedings on behalf of the company by the *curator ad litem*.[93]

Only once the court had confirmed the appointment of the curator and issued directions as to the institution of proceedings in the name and on behalf of the company, could the action be referred to as a statutory derivative action.[94] Up to this point, the initiating shareholder would have been liable for the risk of costs, and the court in terms of section 268 could ensure that the initiating shareholder understands the consequences of instituting frivolous or vexatious claims. In doing so, the court was empowered to require the instituting shareholder to furnish security of costs if the court believed that the applicant would not be able to pay the costs of the respondent company. This amount could also include the costs associated with bringing the application (to appoint a provisional *curator ad litem* and the costs associated with the envisaged report to the court on the "return day") and the estimated costs of the provisional *curator ad litem* doing the initial investigation into the alleged wrongs of, or breaches by, the wrongdoers. Considering the above, it is not difficult to imagine the huge financial burden on an applicant shareholder who is required to provide security for costs, and why potential derivative claims might be abandoned

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90 Du Plessis in Hugo and Kelly-Louw *Essays on the Law of Banking, Companies and Suretyship* 266.

91 Van Wyk de Vries *Commission of Enquiry into the Companies Act* par 42.16.

92 S 266(3) of the 1973 Act.

93 S 266(4) of the 1973 Act.

94 S 266(*c*) of the 1973 Act.

on this basis.

It is clear from the above discussion, that the position regarding costs under the 2008 and 1973 Acts is inadequate and places too heavy a burden on applicants seeking to institute derivative proceedings, in effect amounting to a disincentive to institute proceedings. The position in the UK is somewhat unclear. The inconsistent approach by the courts regarding whether applicants would be indemnified for costs creates a very unstable environment and ultimately may result in extra costs and time being expended in trying to satisfy a court that the derivative proceedings are warranted.

It is submitted that to alleviate the burden on applicants and to provide for a shareholder-friendly approach that ensures equity between company and applicant, section 165(10) of the 2008 Act should be amended to provide an indemnity for a costs order that favours applicants who wish to institute derivative proceedings. This would ensure that applicants are incentivised to institute derivative proceedings and that wrongdoing would not go unpunished simply because of the hurdle of costs. The court should be allowed a discretion in deciding whether to grant the costs in full or in part.

The amended section 165(10) should read as follows:

> "The court shall, on the application of the person to whom leave was granted under terms of subsection (2) to bring or intervene in the proceedings, order that the whole or part of the reasonable costs of bringing or intervening in the proceedings, including any costs relating to any settlement, compromise, or discontinuance approved in terms of subsection (15), must be met by the company. Such costs shall be paid by the company irrespective of the result of the application even if those costs are awarded against that applicant, unless the court considers that it would be unjust or inequitable for the company to bear those costs."

It is further recommended that section 165(11) be amended to read as follows:

> "An order under this section (subsection (10)) must include security for costs."

Considering the proposed amendments above, it is submitted that section 165(9)(*a*) be amended to provide further clarity in respect of the identity of the "person appointed" under the section. It is submitted that the section be amended to indicate that the "person appointed" refers to the person appointed by the court under section 165(4)(*a*). If the person appointed refers to the person appointed by the court under section 165(4)(*a*), it would make sense for the company to be liable for the expenses in relation to that appointment. This is especially so when taking into account that the person appointed under section 165(4)(*a*) is appointed to investigate the merits of the demand, the facts that gave rise to the demand, the probable costs that would be incurred if the company pursued any such cause of action or continued any such proceedings, and whether it appears to be in the best interests of the company to pursue any such cause of action or continue any such proceedings. The scope of such an appointment only seeks to benefit the company. Therefore, it is submitted that the company should be liable for

the expenses associated with that appointment. Furthermore, if the person under section 165(9)(*a*) were to refer to the applicant under subsection 2 this would only have the effect of potentially increasing the burden on an applicant and thereby discourage derivative claims.

It is therefore recommended that section 165(9)(*a*) be amended to read as follows:

> "(9) If a court grants leave to a person under this section-
> (*a*) the court must also make an order stating that the company is liable for the remuneration and expenses of the person appointed in terms of subsection (4)(*a*)."

Section 165(15) provides that derivative proceedings brought or intervened in with leave of the court "must not be discontinued, compromised or settled without leave of the court".[95] The UK Rule 19.9 F of the Civil Procedure Rules provides that once a court has granted permission for the derivative proceedings to continue, then the claim constituted by that derivative action cannot be discontinued, settled or compromised without the court's permission. It is submitted that the position in South Africa is preferable as the power to grant permission for the derivative proceedings to be discontinued, settled or compromised is left within the sole discretion of the court. Furthermore, it is submitted that the South African approach is sounder because not only does section 165 give the court control over any settlements made in the derivative proceedings, but the section makes it compulsory for the court to grant permission for any discontinuance of the proceedings. In doing so, the court is obliged to weigh up the interests of the company and relevant persons, thereby ensuring fairness in the settlements or compromises reached.

[95] See Cassim *The New Derivative Action Under the Companies Act* (2016) 21; see also Du Plessis in Hugo and Kelly-Louw *Essays on the Law of Banking, Companies and Suretyship* 274; *Lewis Group Ltd v Woollam supra*.

# ARE TRUSTEES OF THE ESTATES OF OWNERS OF SECTIONAL TITLE UNITS NOT FULLY COVERED BY SECTION 89 OF THE INSOLVENCY ACT?

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**SUMMARY**

This article highlights differential treatment of trustees when they make application for the clearance certificates, they need to register a transfer of immovable property. It illustrates that trustees of the estates of insolvent owners of sectional titles scheme units who apply for clearance certificates from bodies corporate do not enjoy the benefits provided by section 89 of the Insolvency Act. In comparison, such protection is provided to trustees when the estate is that of an insolvent owner of a property indebted to a municipality. The article argues that the Supreme Court of Appeal (SCA) in various judgments has incorrectly interpreted the law by not fully subjecting bodies corporate to section 89 of the Insolvency Act. The article argues that the time limits regarding protection from payment of charges, fees and levies applicable to trustees in relation to municipalities should be equally applicable to bodies corporate. The article recommends that the legislature must step in and clarify its intention by amending the provisions in the Sectional Titles Act that make provision for bodies corporate to issue clearance certificates.

## 1 INTRODUCTION

Sectional title denotes separate ownership of individual sections, commonly referred to as units, within a complex or development.[1] Ownership within a sectional titles scheme comprises individual ownership of a particular unit, joint ownership of certain parts of the complex or development, and membership of the body corporate.[2] In terms of section 2(*c*) of the Sectional Titles Act[3] (STA), the owners of different units within a sectional titles scheme own the complex or development, subject to a sectional title in undivided shares. In order to ensure that sectional titles are managed and administered efficiently, the legislature promulgated the Sectional Titles Schemes Management Act[4] (STSMA). In terms of the Preamble to the STSMA, the Act provides for the establishment of bodies corporate that are legislatively entrusted with the management and regulation of the complex or development subject to the sectional title and the units contained therein. Owners of all the individual units within the sectional title are members of these bodies corporate;[5] individual membership ceases when an owner ceases to be the owner of any of the units.[6] This enables bodies corporate to have perpetual succession because membership changes as ownership within the sectional title units changes.[7] Once constituted, a body corporate is a juristic person that can sue or be sued in its name regarding any contract that it has entered into, any damage to the common property, matters relating to the land or building for which owners are jointly liable, conduct or omission relating to its duties, and claims against the developer.[8]

In terms of section 7 of the STSMA, the powers and functions of the body corporate must be performed and exercised by the trustees of the body corporate. Both the trustees and the owners of units within a sectional titles scheme have duties that they need to perform in order for it to run efficiently. Probably the most important are the trustees' duty to collect levies, which are the lifeblood of sectional titles schemes, and the owners' duty to make payment. Unfortunately, some unit owners are often unable to honour their obligations to make the required periodic payments, resulting in substantial levy arrears. At times, defaulting owners run into financial difficulties to the extent that they do not have enough money or movable property to make payment, making debt collection procedures futile. It often transpires that the only substantial property in which defaulting owners have a financial interest

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1 In terms of s 2(*a*) of the Sectional Titles Act 95 of 1986, "[a] building or buildings comprised in a scheme and the land on which such building or buildings is or are situated, may be divided into sections and common property in accordance with the provisions of this Act." See also Bartlett "Pro's and Con's of Sectional Title Ownership" (19 June 2012) https://www.phinc.co.za/NewsResources/NewsArticle.aspx?ArticleID=291 (accessed 2020-02-20).

2 See s 36(1) and (2) of the STA. See also Booysen "A Critical Analysis of the Financial and Social Obligations Imposed on Sectional Owners in Sectional Title Schemes, as Well as Their Enforcement' (LLD Thesis, Stellenbosch University) 2014 1.

3 95 of 1986.

4 8 of 2011.

5 S 2(1) of the STSMA.

6 S 2(2) of the STSMA.

7 S 2(7) of the STSMA.

8 S 2(7)(*a*)–(*e*) of the STSMA.

are the units they own within the sectional titles scheme. Under these circumstances, the most suitable method of recovering payment "may be" to use insolvency law remedies to recover arrear levies, which would make the body corporate the defaulting owner's creditor.

In this article, we evaluate whether there is justification for treating trustees of the estates of insolvent members of bodies corporate differently from those who are liquidating properties of owners indebted to municipalities. The authors assess the differences between the statutory preference for payment of debts to municipalities, provided by section 118 of the Local Government: Municipal Systems Act[9] (LGMSA), and the provisions of section 15(B)(3)(*a*)(i)(aa) of the STA regarding debt collection by bodies corporate during insolvency proceedings. In particular, with reference to some of the decisions of the SCA, we evaluate whether these sections are differently subjected to section 89(1) of the Insolvency Act, and if so, the impact of such differentiation. The purpose of this article is to highlight that the manner in which the law is currently applied seems to provide some relief to trustees of estates where owners of properties owe certain charges and fees to municipalities when their estates are sequestrated (by barring them from paying historical debts), whereas the same advantage is not offered to trustees who are dealing with the insolvent estates of owners of section titles scheme units. It is argued that this amounts to unfair discrimination and is legally unsound.

This article is structured as follows: under heading 2, the duties of bodies corporate and owners within sectional titles schemes are discussed. Circumstances that can lead bodies corporate to decide to sequestrate the estates of some of their members are explored. Heading 3 discusses the general special preferences provided by legislation to municipalities and bodies corporate to assist them to collect what is owed to them when properties are sold. Here, the importance of the common-law principle of *concursus creditorum* is underscored. Heading 4 examines the differential statutory treatment of municipalities and bodies corporate in light of section 89 of the Insolvency Act when they collect amounts that are due to them during insolvency proceedings. Throughout the article, recommendations for law reform are made.

## 2 PARTIES' FUNCTIONS AND DUTIES

Sectional titles were introduced primarily to facilitate the provision of urgently needed residential accommodation within commuting distance from urban centres.[10] Communal living in the form of sectional title ownership creates dependency between owners of different units and has proved attractive to many middle-class people. Factors such as perceived affordability, safety, lifestyle benefits, and shared costs of maintenance and upkeep of the complex are often cited as reasons people prefer to purchase property subject to sectional title. It is worth noting that in communal living, unit owners' autonomy in relation to the use of their property can be limited and

9 32 of 2000.

10 Van der Merwe "Many Faces of Sectional Title: A Comparative Survey of the Inadequate Legal Treatment of Non-Residential Sectional Title Schemes" 2016 *TSAR* 428.

requires consideration of other unit owners.[11] To ensure harmonious communal living, sectional title units are arranged so as to ensure preservation of the physical integrity and appearance of the common property, given that individual units are physically interdependent, and residents are seldom completely homogenous.[12]

The governance of sectional titles schemes is entrusted to the bodies corporate, which are responsible for the running and administration of the common property through appointed trustees. Among others, bodies corporate are required to establish a fund for administrative expenses relating to the repair and maintenance of the common property.[13] Section 3(1)(*c*) of the STSMA empowers bodies corporate to require owners to make contributions necessary to defray the costs of rates and taxes, insurance and maintenance of these schemes, and electricity and water. These levies are in proportion to the quotas of owners' respective sections. All owners of properties that are subject to sectional title have an obligation to make contributions in the form of regular payment of levies in order to ensure the successful management of the complex or development. Failure to make such payments unfairly prejudices other unit owners within a complex or development because the financial burden regarding the management of the property is not evenly distributed.

It is also important for sectional title owners to participate in meetings relating to their schemes and to elect competent trustees who will manage their schemes efficiently. In order to effectively administer and manage these schemes, bodies corporate must "[d]o all things reasonably necessary for the enforcement of the rules and for the management and administration of the common property",[14] including instituting civil action to recover arrear levies. Non-payment of sectional title levies negatively affects the proper administration and management of sectional title schemes. This results in bodies corporate experiencing shortfalls in their expected income, thereby preventing them from collecting sufficient funds to meet their financial obligations.[15]

Should bodies corporate not receive levies due by defaulting owners, the entire scheme will experience financial difficulties, thus placing a heavy burden on those owners whose payments are up to date. If defaulting owners have the means to pay or sufficient movable property that can be sold to satisfy their arrear levies, it may be worthwhile for bodies corporate to

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11 See Boyce and Van der Merwe "The Rationale for the Imposition of Non-Financial Obligation on Apartment Owners in a Sectional Title Scheme" 2015 *Stell LR* 168 and Van der Merwe "The Adoption of the Institution of Apartment Ownership to Civilian Property Law Structures in the Mixed Jurisdiction of South Africa, Sri Lanka and Louisiana" 2008 19 *Stell LR* 311.

12 Van der Merwe and Erasmus "The Enforcement of the Obligation of Sectional Owner in a Sectional Title Scheme" 1999 *THRHR* 260.

13 S 2 of the STA.

14 S 4(*i*) of the STSMA.

15 Maree ("Demanding Your Interest: A New Era for Sectional Titles" 2017 (Mar) *De Rebus* 26) correctly argues that the "[f]inancial pressures experienced by the debtor could similarly be endured by his co-owners who nevertheless pay their levies regularly".

approach the Community Scheme Ombud for assistance.[16] In terms of section 39(1)(*e*) of the Community Schemes Ombud Service Act,[17] the body corporate may make an application to the Community Schemes Ombud Service for an order directing the defaulting owner to make payment of a contribution or any other amount due in terms of the registered rules of the sectional titles scheme.[18] It is not mandatory to refer payment disputes to the Community Schemes Ombud Service. Bodies corporate may also use civil proceedings to recover arrear levies against defaulting owners by issuing summonses in courts of law.[19] It was confirmed in *Body Corporate of Via Quinta v Van der Westhuizen N.O.,* that the "[b]ody corporate has a discretion to either enforce payment of levies or contributions through the Ombud, or in terms of its common law right in any court of law against a defaulting owner for the recovery of arrear levies".[20] The effectiveness of using either the Ombud or courts depends on whether defaulting owners, after these processes have been concluded, will be able to pay arrear levies. If not, the most likely method of securing such payment "might" be to use the insolvency law remedy of sequestration. Decided cases seem to suggest that bodies corporate are more likely to institute sequestration and liquidation proceedings than municipalities; hence, the authors chose to deal only with bodies corporate in this section. However, this does not mean that municipalities, if there is a need to, cannot institute such proceedings.

## 3 STATUTORY PREFERENCE FOR PAYMENT

### 3 1 *Concursus creditorum*

If it is clear that the only asset of value that the defaulting owner owns is the unit within the sectional titles scheme, it might be worthwhile for the body corporate to apply for the sequestration of the owner's estate in order to recover arrear levies.[21] In this regard, the body corporate must institute sequestration proceedings against the defaulting owner in the form of

16 In terms of s 39(1)(*e*) of the Community Schemes Ombud Act 9 of 2011, an applicant can bring an application for an order for the payment or re-payment of a contribution or any other amount.

17 9 of 2011.

18 In terms of Reg 19(1) of the Regulations on the Community Schemes Ombud Service, GN R1233 in *GG* 40335 of 2016-10-7, "[a]n application referred to in section 38(1) of the Act must be made by submission of an application by physical delivery or electronically, in accordance with the practice directive issued by the chief Ombud"'.

19 S 38(*d*) of the Community Schemes Ombud Service Act clearly provides that "[a]ny person may make an application if such person is a party to or affected materially by a dispute". See also s 42 of this Act, which stipulates that "[a]n Ombud must reject an application by written notice to the applicant if the Ombud is satisfied that the dispute should be dealt with in a court of law or other tribunal of competent jurisdiction".

20 (A196/2017) [2017] ZAFSHC 215 par 15.

21 See *Estate Logie v Priest* AD 312 319, where it was held: "It appears to me that it is perfectly legitimate for a creditor to take insolvency proceedings against a debtor for the purpose of obtaining payment of his debt. In truth that is the motive by which persons, as a rule are actuated in claiming sequestration orders. They are not influenced by altruistic considerations or regards for the benefit of other creditors, who are able to look after themselves. What they want is payment of their debt, or as much of it as they can get."

compulsory sequestration. Section 9(1) of the Insolvency Act[22] empowers any person who is owed an amount of R100.00 or more to apply for the sequestration of any person who is either insolvent or has conducted themselves in a manner that indicates that they may be insolvent.[23] In terms of section 12 of the Insolvency Act, in order to succeed with this application, the body corporate must satisfy the court that the defaulting owner is in arrears with levies in an amount of R100.00 or more, that the defaulting owner has either committed an act of insolvency or is actually insolvent, and that there is reason to believe that the sequestration of the defaulting owner's estate will be to the advantage of the collective body of creditors.[24] If these requirements are met, the provisional order that had been granted against the defaulting unit owner will be confirmed.

In South Africa, bodies corporate have attempted to use insolvency procedures hoping for the outcome that they would normally get when claiming payment of arrear levies through normal civil proceedings. For instance, in *Body Corporate of Empire Gardens v Sithole,*[25] the body corporate argued that it did not have an obligation to illustrate that there was a pecuniary benefit because it enjoyed certain preferences over other creditors.[26] The body corporate urged the SCA "[t]o deviate from the trite principle of *concursus creditorum* and conclude that it is not necessary for bodies corporate to prove actual or prospective pecuniary benefit to the general body of creditors".[27] The essence of this argument was that when bodies corporate act as sequestrating creditors, they are not required to comply fully with section 12(1) of the Insolvency Act, in that they should not have to satisfy the court that sequestration of defaulting owners will be to the advantage of the entire body of creditors. The body corporate took the approach that it would normally take when issuing a summons in a civil court – namely, that the order that the court will grant against the defaulting member will be to its sole advantage without regard to other creditors. In dismissing the body corporate's argument, the SCA held:

> "The purpose and effect of the sequestration order is to 'bring about a convergence of the claims in an insolvent estate to ensure that it is wound up in an orderly fashion and that the creditors are treated equally'. It cannot fittingly be described as a mechanism to be utilized by a creditor to claim a debt due by the debtor to one single creditor. Once a sequestration order is

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22 24 of 1936.

23 See s 8 of the Insolvency Act 24 of 1936. For a detailed discussion of acts of insolvency see Bertelsmann, Calitz, Evans, Harris and Louw *Mars: The Law of Insolvency in South Africa* 10ed (2019) 88–110.

24 See *Body Corporate of Calswald Crest v Mbatha* (94948/2015) [2019] ZAGPPHC 39 par 16. See also *Braithwaite v Gilbert* 1984 4 SA 171 (N) 718, where it was held that "[t]he onus of satisfying the Court on these three points is on the creditor and there is no onus on the debtor to disprove any of them. Furthermore, the degree of proof required when application is made for a final order of sequestration is higher than that for the grant of a provisional sequestration order".

25 2017 (4) SA 161 (SCA).

26 *Body Corporate of Empire Gardens v Sithole* 2017 (4) SA 161 (SCA) par 6. In support of this contention, the court quoted *Collett v Priest* 1931 AD 290 299; *Investec Bank Ltd v Mutemeri* 2010 (1) SA 265 (GSJ) 274–275 and Meskin *Insolvency Law and its Operation in Winding Up* (2016) 2–1 par 2.1.

27 *Body Corporate of Empire Gardens v Sithole supra* par 11.

> made, a concursus creditorum comes into being. This means that the rights of the creditors as a group are preferred to the rights of the individual creditor."[28]

The court was emphasising that, under insolvency law, the court should not be blinded by the identity or nature of a creditor. The court when exercising its discretion to grant a sequestration order should be geared towards evaluating whether all the debtor's creditors would derive some financial advantage.[29] The SCA further held that the principle of *concursus creditorum* "[m]eans that there should be a reasonable prospect of some pecuniary benefit to the general body of creditors as a whole". The SCA made it clear that the challenges that confront bodies corporate in relation to collecting levies are not novel, and do not warrant the immunity that is sought, as this would amount to courts usurping the function of the legislature.[30] Thus, when bodies corporate decide to initiate sequestration proceedings against their defaulting members, they must fully comply with both the common-law and statutory requirements provided for in section 12(1) of the Insolvency Act. It clarified that bodies corporate who are creditors of their defaulting members are not exempted from the common-law principle of *concursus creditorum* in insolvency proceedings, in that they do not hold a special position and must be part of the general body of creditors whose claims must be dealt with in accordance with insolvency-law ranking of creditors. Thus, the idea is to serve the full body of all creditors, and not the creditor that brought the application for sequestration forward or that has a claim tied in with some sentimental values relating to the nature of the work in which such creditor is engaged.

## 3 2 General statutory preference for payment

In order to understand the position of bodies corporate when they have instituted sequestration proceedings against their members, it is important to start by assessing whether they enjoy the same position as municipalities in relation to the statutory hypothecs that enable municipalities to insist on payment of certain charges and fees before properties within their jurisdiction can be transferred to new owners. Section 118 of the LGMSA plays a fundamental role in first assisting municipalities to collect all debts that are due to them when defaulting owners seek to transfer their properties.[31] Secondly, it appears to be conferring some form of priority

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[28] *Body Corporate of Empire Gardens v Sithole supra* par 9.

[29] See Marumoagae and Mokgoetsi "The Need to Clarify the Sheriff's Duties When Executing Writs of Execution That Could Indicate the Debtor's Insolvency" 2019 31 *SA Merc LJ* 302.

[30] *Body Corporate of Empire Gardens v Sithole supra* par 12.

[31] See *Johannesburg Municipality v Cohen's Trustees* 1909 TS 811 817, where Innes JA, commenting on the LGMSA's predecessor held that "[n]ow reading that section in connection with other provisions of the statute, the intention seems to have been to give to the local authority a right to veto the transfer of property until its claims in respect of rates should be satisfied. The result, of course, was to create, in effect, a very real and extensive preference over the proceeds of rateable property realised in insolvency; and to compel payment of the burden thus imposed before a sale of such property could be carried through, even in cases where insolvency had not supervened". See also *Rabie NO v Rand Townships Registrar* 1926 TPD 286, where it was held that "[b]ut is it clear from the fact that the privilege of preventing transfer is given to municipal councils that this right constitutes a claim ranking in priority to other debts? These words ordinarily convey the idea of a right in

during insolvency proceedings that enable municipalities to be paid what is owed to them before transfers can be effected. This payment is made before secured creditors are paid in respect of properties that trustees wish to transfer to new owners. Since the promulgation of the LGMSA, South African courts have attempted to clarify what section 118 entails in relation to the right of municipalities. In terms of section 118(1)(*b*) of the LGMSA, a registrar of deeds is not allowed to register a transfer of property before a prescribed certificate issued by the municipality that has jurisdiction over the area where the property is situated has been provided.[32] This certificate must certify that the seller has paid all "[m]unicipal service fees,[33] surcharges on fees, property rates and other municipal taxes, levies and duties during the two years preceding the date of application for the certificate".[34] In order for municipalities to issue clearance certificates, only portions of debts owed in respect of properties that are sought to be transferred for a period of two years before applications for clearance certificates are payable to municipalities.[35] This provision effectively restricts transfers of properties until municipalities have been paid all debts that arose in the two years before the date on which they are required to issue clearance certificates.[36] These are various debts that were accumulated and became payable at different times within the preceding two years before the municipality concerned was requested to issue a clearance certificate.[37]

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the person holding such claim to have the property sold which is subject to the claim and to be paid first out of the proceeds, or a right, when the property is sold in execution by another creditor, to be so paid and not merely a right to resist any dealing with the property unless the claim is paid".

32 See *Sheriff, Johannesburg North v Yellow Dot Property Investments* 2016 (5) SA 107 (GJ) par 17, where it was stated that "[i]n terms of s 118 of the Municipal Systems Act, the Registrar of Deeds may not register the transfer of the property except on production of the rates clearance certificate confirming that all amounts due to the municipality in respect of the above services for the two years preceding the application had been paid". See also *Tshwane City v Mitchell* 2016 (3) SA 231 (SCA) par 3 and *City of Johannesburg v Even Grand 6* CC 2009 (2) SA 111 (SCA) par 14, where it was held that "[s]ection 118(1) of the Systems Act gives the appellant the right to veto the transfer of property until such time as the rates and other amounts due in respect of the period of two years preceding the date of application for the certificate have been fully paid". See further *Nelson Mandela Bay Municipality v Amber Mountain Investments 3 (Pty) Ltd* 2017 (4) SA 272 (SCA) par 26, where it was held that "[t]he clear intention of the legislature was to limit the period in s 118(1) to two years preceding the date of application for the certificate".

33 In *Geyser v Msunduzi Municipality* 2003 (5) SA 18 (N) 34, it was held that "[i]t is clear from the language employed in s 118 of the Act that the words 'municipal service fees' include the charges for electricity and water supplied by first respondent to the occupier of a property". The Constitutional Court, in *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City; Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng, (Kwazulu-Natal law Society and Msunduzi Municipality as amici curiae)* 2005 (1) SA 530 (CC) par 54, held that the section "118(1) certificate must also cover the consumption charges due in connection with the property by an occupier who holds over unlawfully after the termination of a lease or some other legal relationship that rendered occupation lawful at the time it began. Here again, the relationship between the consumption charge and the property as well as the owner are sufficiently strong for the owner to bear the risk".

34 S 118(1)(*b*) of the LGMSA.

35 *Tshwane City v Uniqon Wonings (Pty) Ltd* 2016 (2) SA 247 (SCA).

36 *Jordaan v Tshwane Metropolitan Municipality* 2017 (6) SA 287 (CC) par 55.

37 *BOE Bank Ltd v City of Tshwane Metropolitan Municipality* 2005 (4) SA 336 (SCA) par 10.

In terms of section 118(3) of the LGMSA, an amount of the fees and charges stated in section 118(2) of this Act enjoy "[p]reference over any mortgage bond registered against the property".[38] This provision neither uses the phrase "all amounts" nor prescribes any time limits in which amounts stated herein ought to have been due. This provision "[d]oes not refer to a category or class of debts but to the aggregate of different debts secured by a single charge or hypothec".[39] In *BOE Bank Ltd v City of Tshwane Metropolitan Municipality*,[40] it was authoritatively held that section 118(3) of the LGMSA is not subject to the time limit that is prescribed in section 118(1) of this Act.[41] The SCA held that "[f]or purposes of s 118(3) it therefore does not matter when the component parts of the secured debt became due. The amounts of all debts arising from the stipulated causes are added up to become one composite amount secured by a single hypothec which ranks above all mortgage bonds over the property".[42] Section 118(3) of the LGMSA can be relied upon by municipalities to insist on payment of charges and fees that became due before the period stipulated in section 118(1) of this Act. It was held in *City of Johannesburg v Kaplan NO,*[43] that section 118(3) of the LGMSA creates security for payment in favour of municipalities of the prescribed municipal debts in respect of which municipalities enjoy preference over secured creditors on the proceeds of the properties sought to be transferred. The SCA held that municipalities have an obligation to issue clearance certificates once all amounts that are due in relation to properties in question during the two years immediately before the application for such certificates were made.[44]

It is evident that section 118(3) of the LGMSA in particular creates "[a] statutory hypothec over the property and, significantly, [one] that is in preference to any mortgage bond".[45] Heher JA, in *City of Johannesburg v Kaplan NO,*[46] remarked that there is a tendency in South Africa for the creation of statutory quasi-liens and statutory charges or preferences. The question then is, does the "statutory hypothec" that has been created in favour of municipalities in relation to payment of outstanding municipal charges also extend to bodies corporate regarding outstanding levies when their members have sold their properties and wish to transfer ownership to new owners? The answer to this question appears to be in section 15B(3)(*a*)(i)(*aa*) of the STA. This section provides:

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38 See *City of Tshwane Metropolitan Municipality v Mathabathe* 2013 (4) SA 319 (SCA) par 10, where the court held that the effect of s 118(3) of the LGMSA "[i]s to create in favour of a municipality a security for the payment of the prescribed municipal debts so that a municipality enjoys preference over a registered mortgage bond on the proceeds of the property".

39 *BOE Bank Ltd v City of Tshwane Metropolitan Municipality supra* par 10.

40 *Supra.*

41 *Ibid*.

42 *BOE Bank Ltd v City of Tshwane Metropolitan Municipality supra* par 11, where the court further held that "[c]onversely, if the Legislature really intended to render s 118(3) subject to the same two-year time limit contemplated in s 118(1), it could have done so in a number of ways".

43 2006 (5) SA 10 (SCA) par 16.

44 *City of Cape Town v Real People Housing (Pty) Ltd* 2010 (5) SA 196 (SCA) par 13 and 14.

45 *Hoofar Investments (Pty) Ltd v Moodley* 2009 (6) SA 556 (KZP) par 15.

46 *Supra* par 20.

> "The registrar shall not register a transfer of a unit or of an undivided share therein, unless there is produced to him a conveyancer's certificate confirming that as at date of registration if a body corporate is deemed to be established in terms of section 2(1) of the Sectional Titles Schemes Management Act, that body corporate has certified that all moneys due to the body corporate by the transferor in respect of the said unit have been paid, or that provision has been made to the satisfaction of the body corporate for the payment thereof."

Section 118(1) of the LGMSA states that "[a] registrar of deeds may not register" the transfer of property unless the conditions in that provision have been complied with. It is trite that the use of the word "may" denotes the discretion of the person with authority to perform a particular function. It is interesting to note that unlike this provision, section 15B(3)(*a*)(i)(*aa*) of the STA provides that "[t]he registrar shall not register" the transfer of property unless a conveyancer's certificate confirming that the body corporate has been paid what the member who wishes to register transfer of property owes to the body corporate. The usage of the phrase "shall not" appears to indicate that the Registrar of Deeds in terms of 15B(3)(*a*)(i)(*aa*) of the STA does not have a discretion to decide to register the transfer of property if there are amounts owing to the body corporate, irrespective of when such amounts were due. Unlike section 118(1) of the LGMSA, the legislature in section 15B(3)(*a*)(i)(*aa*) of the STA did not provide a time period within which debts owed to the body corporate must have fallen due in order for the body corporate to decline to issue the conveyancer's certificate.

While it is clear from section 15B(3)(*a*)(i)(*aa*) of the STA that there is some form of statutory preference if a property is to be sold, the position of bodies corporate is nonetheless not entirely clear in the event of the insolvency of their members, when properties in question are subjected to the rights of mortgage bondholders. In an attempt to clear the confusion, Brand J in *Nel NO v Body Corporate of the Seaways Building,*[47] held that the preference (if any) that is accorded by section 15B(3)(*a*)(i)(*aa*) of the STA to bodies corporate in respect of arrear levies during sequestration proceedings can be said to be created by section 89(1) of the Insolvency Act as part of the costs of realisation. In the following section, the authors evaluate whether the position of municipalities and bodies corporate is the same where they are requested to provide clearance certificates when they are owed charges, fees and levies.

## 4 SEQUESTRATION OF DEFAULTING OWNERS

The issuing of clearance certificates becomes more complex when municipalities are faced with applications relating to properties that are not only subject to security, but also involve the estates of owners who are either sequestrated or liquidated. While section 118(3) of the LGMSA is an independent and self-contained remedy,[48] it is nonetheless subject to section 118(2) of the LGMSA in insolvency proceedings, which provides that "[i]n case of the transfer of property by a trustee of an insolvent estate, the

[47] 1995 (1) SA 130 (C) 136.

[48] *Steve Tshwete Local Municipality v Fedbond Participation Mortgage Bond Managers (Pty) Ltd* 2013 (3) SA 611 (SCA) par 12.

provisions of this section are subject to section 89 of the Insolvency Act". This entails that once a sequestration or liquidation order has been granted by the court and all creditors have convened a meeting to elect a trustee who will be appointed by the Master of the High Court, where it is clear that the municipality has a claim in terms of the fees and charges listed in both subsections (1) and (3) of section 118 of the LGMSA, the trustee must deal with the municipality's claim in terms of section 89 of the Insolvency Act.

In relation to claims for clearance certificates that are made by trustees and liquidators, section 89 of the Insolvency Act is, to a large extent, aimed at diluting the strong position that section 118(1) and (3) of the LGMSA provide to municipalities. In terms of section 89(4) of the Insolvency Act:

> "Notwithstanding, the provisions of any law which prohibits the transfer of any immovable property unless any tax defined in subsection (5) due thereon has been paid, that law shall not debar the trustee of an insolvent estate from transferring any immovable property in that estate for the purpose of liquidating the estate, if he has paid the tax which may have been due on that property in respect of the periods mentioned in subsection (1) and no preference shall be accorded to any claim for such a tax in respect of any other period."

This provision makes it absolutely clear that section 89 of the Insolvency Act overrides provisions restricting transfer of immovable properties because of outstanding monies that are due to the State, provincial administration, municipality or a body established by statute (such as a body corporate) that is mandated to collect periodic payments incidental to the ownership of immovable properties.[49] Most importantly, section 89(1) of the Insolvency Act provides a time period that is different from that provided in section 118(1) of the LGMSA with regard to the date from which the amount owed to the State, municipality, provincial administration and bodies corporate must be calculated in order to allow the trustee to receive the necessary clearance from these authorities in order to transfer property. Section 89(1) of the Insolvency Act provides two periods within which the amounts due to these authorities must be calculated. The first period is a period of two years or less from the date on which the court grants a sequestration order. The second period is calculated from the date of the sequestration order to the date of transfer of the property. In other words, for the purposes of receiving clearance documents confirming required payments, the trustee is only obliged to pay arrear charges, fees and "levies" owed to the identified authorities if these became due in the two years before the date of sequestration or after sequestration but before the date of transfer. These authorities are legislatively prohibited from asking for any payment that became due in respect of the property subject to sequestration or liquidation proceedings outside this period. Once the trustee has made the necessary payment, these authorities are legislatively obliged to issue the necessary documents to enable the trustee to transfer the property.

The two periods provided for in section 118(1) of the LGMSA or any other period provided for in any other legislation will not be affected by section 89(4) of the Insolvency Act as long as it is within the period starting two years preceding the date of sequestration order and ending on the date of

[49] S 89(5) of the Insolvency Act.

transfer of property. In *City of Johannesburg v Kaplan NO,*[50] the SCA held that "[w]hen … the embargo provision in any other law is effectively longer than that in s 89(1), then, by reason of the provisions of s 89(4), the period in s 89(1) will override the period in the other law". In insolvency proceedings, the preference enjoyed by authorities such as municipalities and "bodies corporate"[51] over secured creditors and payment of amounts owing to them is restricted to the period identified in section 89(4) of the Insolvency Act. These authorities, which have a legislative mandate to collect charges, fees and levies in respect of immovable properties, are legislatively prevented from frustrating trustees and liquidators by declining to provide the necessary clearance certificates that would enable transfers of immovable properties by demanding payment of historical debts over such properties that were not due as provided for in section 89(4) of the Insolvency Act.

It is interesting to note that while section 118(1) of the LGMSA provides that municipalities have preference over charges and fees that were due within a period of two years before the date of the application of the clearance certificates, nonetheless, section 15B(3)(*a*)(i)(*aa*) of the STA does not prescribe any time period. Unlike section 118(2) of the LGMSA, section 15B(3)(*a*)(i)(*aa*) of the STA does not make any reference to the insolvency of owners of units within sectional titles schemes and how bodies corporate should deal with them when their estates are either sequestrated or liquidated. Nonetheless, the SCA, in *Nel NO v Body Corporate of the Seaways Building,*[52] held that "[a]s a matter of language, and particularly also in the light of the legislative history of the provision, the conclusion is ineluctable that the Legislature intended the provision to apply whether or not the transferor was insolvent".

Even though the SCA appears to be of the view that section 15B(3)(*a*)(i)(*aa*) of the STA also covers insolvency proceedings, it is not entirely clear to what extent this provision is subject to section 89 of the Insolvency Act. Unlike section 118(2) of the LGMSA, section 15B(3) of the STA does not have a provision that expressly subjects this provision to section 89 of the Insolvency Act. The drafting difference between these two sections opens up an unfortunate debate relating to the extent to which section 15B(3)(*a*)(i)(*aa*) of the STA is subject to the time frames that are meant to assist trustees and liquidators of estates of insolvent owners of units within sectional titles.

In an important judgment, *Barnard NO v Regspersoon van Aminie,*[53] (unfortunately written in Afrikaans from the authors' perspective), it appears from the editor's summary that the SCA in this judgment held that "contributions" due by unit owners cannot be regarded as taxes as provided for in section 89(5) of the Insolvency Act. Thus, the time period prescribed in

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50 *Supra* par 24.

51 As is shown below, the SCA appears to be of the view that this provision does not include bodies corporate.

52 1996 (1) SA 131 (SCA) par 11.

53 2001 (3) SA 973 (SCA). Given that this judgment is written in Afrikaans (in which the authors are not proficient), the authors relied exclusively on the editor's summary. The editor used the word "contributions" and in the context of the discussion, this appears to mean "levies".

section 89(1) of the Insolvency Act is not applicable to assist trustees and liquidators of estates of owners of units within sectional titles schemes. This effectively means that bodies corporate are placed in a better position than municipalities and can require payment of all the outstanding levies irrespective of when they were due when trustees and liquidators request clearance certificates.[54] It appears as if this is also how Bertelsmann *et al* understood this case. These authors' state:

> "In the past it was uncertain as to whether or not the contributions payable to a body corporate could be regarded as 'tax' for the purposes of s 89(1), (4) and (5) or whether these contributions formed part of the costs of realisation as provided for in s 89(1) of the Insolvency Act. In *Barnard NO v Regspersoon van Aminie*, the Supreme Court of Appeal brought an end to the uncertainty and found that arrear contributions were not taxes for the purposes of s 89(1), (4) and (5) of the Insolvency Act, because they were not paid to the State or a government institution, and therefore the two-year limitation contained in those subsections could not be applied to the arrear contributions." [55]

It is submitted that if indeed this is what the court said in Afrikaans in this judgment, it cannot be doubted from the reading of section 89 in its entirety that what the court is said to have said is clearly incorrect.[56] In fact, to the extent that the court expressed itself in these terms, this is a clear misrepresentation of section 89(5) of the Insolvency Act in particular. This provision does not restrict the institutions to which payment should be made only to the State and a governmental institution, as the court is alleged to have said. A proper reading of section 89 indicates that the institutions identified in section 89(5) of the Insolvency Act are: 1) the State; 2) a provincial administration; and 3) a body established by or under the authority of any law in discharge of a liability to make such periodic payments, if that liability is incidental to ownership of that property. The reach of section 89(5) of the Insolvency Act is broader than what the SCA is alleged to have stated in *Barnard NO v Regspersoon van Aminie.* First, it is beyond contention that this provision covers municipalities, which are not expressly referred to in the provision. Secondly, it is difficult to understand how bodies corporate can be excluded from the ambit of this provision given that they are established in terms of the STA and operate in terms of the STSMA; these are national laws as provided for in this provision.

Assuming that by the word "contribution" the SCA meant levies, it is submitted that the SCA erred in concluding that contributions do not constitute part of the word "tax" for the purposes of section 89 of the Insolvency Act. If indeed the reasoning of the court was limited to the view that contributions cannot be regarded as "tax" for the purposes of section 89(5) (because institutions that should be able to demand arrear "tax" in terms of this provision are the State or a governmental institution, which bodies corporate are not), this represents a total misreading of the provision. This conclusion also amounts to a clear disregard of the definition of the word "tax" in section 89(5) of the Insolvency Act, which provides that it means, in relation to immovable property, "[a]ny amount payable periodically

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54 Bertelsmann *et al Mars: The Law of Insolvency* 549.

55 *Ibid*.

56 The authors use the language of reporting because they could not directly read and comment on what the court said due to their lack of proficiency in Afrikaans.

in respect of that property to the State or for the benefit of a provincial administration or to a body established by or under the authority of any law." It is common cause in practice that, just like municipalities, bodies corporate are expected to collect monthly levies from their members in order to properly administer sectional titles. Monthly payments are indeed periodic payments and meet the definition of the word "tax".

There was no need for the SCA to take a technically complex view of what the word "tax" entails. The word "tax" is generally understood as involuntary and compulsory fees that must be paid to a recognised authority, non-payment of which attracts a particular sanction. In fact, this can be defined as "a sum of money demanded by government for its support or for specific facilities or service, levied upon incomes, property, sales etc".[57] While the word "tax" is generally understood in terms of state revenue collection, nonetheless, the State in terms of section 89(5) of the Insolvency Act expressly includes, in the definition of this word, institutions such as bodies corporate because they are also legislatively empowered to collect periodic amounts from owners of units of the sectional titles scheme that they are operating. For these reasons, it is submitted that the conclusion of the SCA in *Barnard NO v Regspersoon van Aminie*, insofar as it excluded bodies corporate from the ambit of section 89(5) of the Insolvency Act, should be rejected. One can hope that when either the SCA or the Constitutional Court is called upon to adjudicate a dispute dealing with the status of bodies corporate in relation to this provision, they will properly interpret the law by recognising bodies corporate as being fully included within the ambit of section 89 of the Insolvency Act.

It appears that the SCA decision in *Barnard NO v Regspersoon van Aminie* has received academic endorsement. According to Bertalsmann *et al*, the effect of section 15B(3)(*a*)(i)(*aa*) of the STA is that "[w]here a sectional title unit owner is insolvent, the body corporate may refuse to issue a clearance certificate unless all the outstanding levies and other moneys due to the body corporate have also been paid in full".[58] It is submitted that a proper reading of section 89(5) of the Insolvency Act does not support this conclusion. In fact, bodies corporate are indeed subject to the entire section 89 of the Insolvency Act and the time period that is prescribed for payment of taxes. As such, there is no justification for trustees of the estates of owners of units within sectional titles being burdened with payment of historical debts before they can be provided with clearance certificates, whereas trustees and liquidators of the estates of property owners who owe municipalities are protected against such.

It is submitted that if it is accepted that bodies corporate enjoy preference over arrear levies when their members are sequestrated and that such levies can be claimed as part of costs of realisation as provided for in section 89(1), then it cannot be that they are excluded from the time period provided for in section 89(4) of the Insolvency Act, which also covers periodic arrear charges and fees that are payable to municipalities. The SCA in *Body Corporate of Empire Gardens v Sithole,*[59] without engaging the conundrum

[57] Dictionary.com https://www.dictionary.com/browse/tax (accessed 2020-02-25).
[58] Bertelsmann *et al Mars: The Law of Insolvency* 549.
[59] *Supra*.

of whether contributions collected by bodies corporate fell to be interpreted as taxes (for the purposes of trustees who require clearance certificates to transfer properties out of sequestrated estates), stated that "[i]n terms of section 89(1) of the Insolvency Act, outstanding levies due to the body corporate are treated as being part of the cost of realisation".

Section 15B(3)(*a*)(i)(*aa*) of the STA cannot be interpreted as providing bodies corporate with a stronger right than that enjoyed by municipalities when property owners' estates are either sequestrated or liquidated. It is respectfully further submitted that the SCA erred in *Nel NO v Body Corporate of the Seaways Building*,[60] when it held that "[t]he protection granted to a body corporate would be considerably more extensive than that accorded, for instance, to municipalities for rates"; and further that "[t]he body corporate will have a *de facto* preference for an unlimited period, subject only to the law of prescription. And the type of debt due by a transferor which is protected by the contested provision would be wider than that owing to a municipality for rates".[61] The SCA did not provide jurisprudential reasoning as to why this provision should be read as providing more protection than that provided by section 118 of the LGMSA or even a sound justification as to why this could be said to be the legislature's intention.

The authors are of the view that the position outlined by SCA in *Nel NO v Body Corporate of the Seaways Building* and *Barnard NO v Regspersoon van Aminie* cannot be sustained in a constitutional democracy. The SCA's conclusion and reasoning in these two cases leads to unjustifiable differential treatment of trustees (and by extension, of two types of property owner) on the basis of which kind of legislative "authority" is owed charges, fees and levies. Trustees who are seeking to transfer the immovable property of insolvent owners indebted to municipalities are only liable to pay arrear charges and fees from a period starting two years before the date of a sequestration or liquidation order. This means that the insolvent estates of sequestrated owners will not be subject to the payment of historical debt before municipalities can issue clearance certificates that are outside the boundary set by section 89(1) and (4) of the Insolvency Act.

However, the position is different for trustees who are liquidating estates of insolvent members of bodies corporate. These trustees do not enjoy the benefit of a restriction on payment obligations as provided for by section 89(1) and (4) of the Insolvency Act. This means that the estates of insolvent members of bodies corporate are effectively obliged to settle all debts due to the bodies corporate – that is, including historical debts beyond two years before the date of sequestration order provided by section 89(1) and (4) of the Insolvency Act. To date, neither the SCA nor any of the divisions of the High Court have evaluated the real impact of the law as it is currently applied. It is submitted that this is an infringement of section 9 of the Constitution of the Republic of South Africa, 1996 (Constitution) and cannot be justified under section 36 of this Constitution.

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60 *Supra* par 140.

61 *Ibid*.

The differentiation identified in this provision is not one of the grounds of discrimination listed in section 9(3) of the Constitution.[62] To challenge this differentiation, any trustee of an insolvent estate of an owner in a sectional titles scheme (the owner) will shoulder the burden of establishing unfairness because this situation amounts to a differentiation on an analogous ground. Unfairness will be tested in line with the test of unfair discrimination established by the Constitutional Court in *Harksen v Lane NO*.[63] In terms of this test, a court starts by assessing whether the manner in which the law differentiates the position of trustees of insolvent estates (in relation to arrear charges, fees and levies), depending on whether they are requesting clearance certificates from municipalities or bodies corporate, amounts to discrimination. We are of the view that this amounts to discrimination because the law provides differently depending on whether the trustees of insolvent estates seeking to transfer property of insolvent owners are dealing with municipalities or with bodies corporate. The benefits accorded by section 89(4) of the Insolvency Act are only applicable to trustees who request clearance certificates from municipalities.

Once a court has identified any discrimination, it has to determine whether there is a rational connection between the discrimination and a legitimate governmental objective.[64] It is submitted that there is no rational connection between this discrimination and any governmental purpose. In fact, it is doubtful that the legislature intended that there should be this disparity. We are therefore of the view that this amounts to unfair discrimination and that it is thus unconstitutional. In light of confusion created by the SCA, we are of the view that the legislature must step in and clarify its intention. First, we recommend that the legislature clarify whether it intended to provide different payment periods for trustees dealing with municipalities as opposed to those dealing with bodies corporate. If so, then they should provide some form of rational justification for such differential treatment. If not, they should ensure that trustees, irrespective of whether they are dealing with a municipality or a body corporate, are treated the same when they seek to transfer ownership of properties in the estates that they are liquidating in terms of section 89(1) of the Insolvency Act.

Secondly, we recommend the amendment of section 15B(3) of the STA through the insertion of section 15B(3)(*a*)(i)(*cc*) which should read: "in the case of a transfer of property by a trustee of an insolvent estate, the provisions of this section are subject to section 89 of the Insolvency Act", which is in line with section 118(2) of the LGMSA. This will erase any doubt about the extent to which 15B(3)(*a*)(i) is subject to the Insolvency Act. It cannot be denied, as was stated by the SCA in *Steve Tshwete Local Municipality* v *Fedbond Participation Mortgage Bond Managers (Pty) Ltd,*[65] that the words of section 89(4) of the Insolvency Act (where the legislature expressly provides that the trustee shall not be prevented by any law that prohibits transfer of property before payment is made to relevant authorities

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62 See *Prinsloo v Van der Linde* 1997(4) SA 1 (CC) par 28–31 for an approach that courts employ in determining discrimination that is not based on any of the listed grounds.

63 1998 (1) SA 300 (CC) par 53.

64 Smith "Equality Constitutional Adjudication in South Africa" 2014 14 *AHRLJ* 609 616.

65 *Supra.*

like municipalities and bodies corporate) "[l]end themselves to the interpretation that the object of s 89 was to provide a remedy to a trustee by limiting the impediment created by embargo provisions".[66] The authors' recommendation is intended to extend the same privilege to trustees and liquidators of property of unit owners within sectional titles schemes.

## 5 CONCLUSION

It is commonly accepted that, in insolvency proceedings, the status of the creditor is of paramount importance. In this article, the conundrum faced by trustees of insolvent estates of owners of properties that are subject to sectional title is highlighted. In relation to acquiring clearance certificates, the authors have demonstrated that trustees dealing with bodies corporate are treated differently from trustees who are dealing with municipalities. The latter trustees enjoy the protection provided by section 89 of the Insolvency Act, which protection has been denied by the SCA to trustees who are dealing with bodies corporate when seeking to transfer properties of insolvent owners within a sectional titles scheme. We have argued that the legislature should intervene by making its intention clear as to whether it envisaged this disparity, or whether it intended the same treatment of trustees of insolvent estates irrespective of whether they are dealing with municipalities or bodies corporate.

[66] *Steve Tshwete Local Municipality* v *Fedbond Participation Mortgage Bond Managers (Pty) Ltd supra* par 18.

# COMMISSIONS OF INQUIRY AS A RESPONSE TO CRISIS: THE ROLE OF THE JALI COMMISSION IN CREATING PUBLIC AWARENESS OF CORRUPTION (PART 2)

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**SUMMARY**

When the government of a liberal constitutional democracy is confronted by some or other existential crisis that threatens a major institution of state or the very foundations of the democracy itself, it will often appoint a high-level judicial commission of inquiry as part of its response to the crisis. South Africa is no exception to this tendency, as is evidenced in recent years by the appointment of no fewer than four such commissions in response to a series of crises related to ongoing corruption within state institutions – commonly referred to by ordinary South Africans as "state capture". This has raised questions as to the alleged benefits of such commissions when viewed in relation to their considerable costs. This article seeks to contribute to this general debate by focusing on one of the purported benefits of such commissions that may be somewhat under appreciated. This is the creation of public awareness, during the life of the commission itself, about the nature and extent of the particular grave threat that confronts the society in question. It is contended that, mediated by a free and vibrant press, the public narrative that emerges during the operation of a commission of inquiry may serve to make a liberal democratic society more resilient in the face of threats to that society's continued existence. This article seeks to support this contention by focusing on an important precursor to the more recent commissions of inquiry on corruption in South Africa – that is, the Jali Commission of Inquiry into corruption within the South African penal system, which sat in the early years of the new millennium. By analysing the many articles and reports that appeared in a range of South African newspapers during the initial hearings of the Jali Commission, this article documents the emergence of an important public narrative on corruption within South Africa's prisons, and reflects upon the ultimate significance. This article is divided into two parts: the first part deals with the initial hearings of the Jali

Commission in KwaZulu-Natal, and the second part with subsequent hearings in the Free State.

## 1 INTRODUCTION

At the time this article is being written – just over a quarter of a century since the end of the apartheid era – South Africans are seeking to come to terms with the fact that a number of key institutions of state, together with the economy of the entire country, have been brought to the brink of collapse by widespread and ongoing corruption during the post-liberation period. As was pointed out in the introduction to Part 1 of this article, a common response by governments of liberal constitutional democracies, when facing "existential" crises of this sort, is the appointment of one or more public judicial commission of inquiry. South Africa has followed this practice: four high-profile judicial commissions of inquiry were appointed by President Cyril Ramaphosa, shortly after he assumed power in 2018, to investigate various aspects of corruption in the country. This has led to questions as to whether the alleged benefits of such commissions of inquiry are worth their considerable costs.[1]

This article seeks to contribute to this debate by focusing on one potential benefit of such commissions, which, although obvious, may be somewhat under appreciated. This is the benefit of public awareness about the nature and extent of the particular threat being investigated that is created during the life of a commission of inquiry. This is distinct from other potential benefits related to the official report that is published at the end of each commission of inquiry. In order to illustrate the manner in which such public awareness is created, as well as its potential role in protecting constitutional democracy, this article is focused on the considerable publicity generated in the South African press on the initial hearings of one of the first important public judicial commissions of inquiry into corruption during the post-apartheid era – namely, the Jali Commission of Inquiry into corruption within the South African penal system, which sat between 2000 and 2005. Whereas Part 1 of this article examined the many reports and articles that appeared in a range of national newspapers about the hearings of the Commission held in 2002 in KwaZulu-Natal, Part 2 focuses on the hearings that were held in the Free State later in the same year. This both confirms and adds nuance to the themes that emerged in Part 1, as well as adding a further chapter to what has been referred to in Part 1 as the "living history" of corruption within the South African penal system.

## 2 COMMISSIONS OF INQUIRY AND THE PRESS IN SOUTH AFRICA – A BRIEF HISTORICAL NOTE

Part 1 of this article provided an overview of certain of the more common arguments put forward by scholars for and against the appointment of public

[1] See the introduction to Part 1 of this article in 2020 41(4) *Obiter* 902–906.

commissions of inquiry in response to a national crisis. In particular, it discussed the important role of such commissions – in conjunction with a free press – in informing and educating the public about the nature and extent of the threat being faced. These arguments need not be repeated in detail here. At this point, it is worth noting, however, that press reporting on the hearings of the Jali Commission of Inquiry did not mark the first time that the South African press played an important role in revealing the threat posed by widespread corruption to the country in general and the penal system in particular.

South Africa's free press has clearly played a vital role in revealing the nature and extent of corrupt activities that have afflicted various institutions within the country over many years. There is strong historical evidence indicating that the South African media in general, and the press in particular, have made good use of the proceedings and processes surrounding commissions and committees of inquiry, including their published reports, in order to publicise facts about the country's prison system that would otherwise not have become known to the broader South African public. Far from serving to bury controversial matters within a set of legal rules, regulations and procedures, the appointment of such inquiries often gave those in the South African media – the "liberal" press in particular – the gap they needed to forcefully and regularly remind their viewers and readers of what was really happening in the prisons.

The above was true even during the apartheid period. Just one example drawn from this period is the extensive press coverage given to the shocking overcrowding that existed in South African prisons in the early 1980s. This coverage was thanks to a public commission of inquiry into the structure and functioning of South Africa's courts, known as the Hoexter Commission.[2] At this particularly repressive time, the South African media were faced with legislative provisions that severely limited what they could publish about conditions in the country's prisons.[3] However, because Judge Hoexter ruled that evidence before his commission had to be given in public, the press was able to "lift the veil" on the appalling conditions in the country's massively overcrowded prisons and lambast the apartheid regime.[4] This was significant in the context of the wider ideological battle that was taking place within the apartheid regime at the time, as expressed here:

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2 The Hoexter Commission of Enquiry was appointed on 29 November 1980.

3 S 44(1)(*f*) of the Prisons Act 8 of 1959 stated as follows: "Any person who publishes or causes to be published in any manner whatsoever any false information concerning the behaviour or experience in prison of any prisoner or ex-prisoner or concerning the administration of any prison, knowing the same to be false, or without taking reasonable steps to verify such information (the onus of proving that reasonable steps were taken to verify such information being upon the accused) shall be guilty of an offence and liable on conviction to a fine not exceeding two thousand rand or, in default of payment, to imprisonment for a period of not exceeding two years or to such imprisonment without the option of a fine or to both such fine and such imprisonment."

4 See, in general, Peté "Holding Up a Mirror to Apartheid South Africa: Public Discourse on the Issue of Overcrowding in South African Prisons 1980 to 1984 – Part One" 2014 35(3) *Obiter* 485–505.

> "[D]espite the legislative restrictions which were in place during the early 1980s preventing open reporting about conditions in South African prisons, a close examination of the public discourse during this period reveals a rich series of debates on the issue of chronic overcrowding. Of particular interest is the fact that these debates were inextricably linked to debates on the viability of the apartheid system itself, in particular the measures of social control which had been put in place by the apartheid regime. It is submitted that these debates acted as a mirror to ordinary South Africans, particularly white middle class South Africans who were the beneficiaries of the apartheid system, revealing to them the moral bankruptcy of the system, as well as the fact that it was impractical and untenable in the medium to long term."[5]

Another example of how the South African media made "good use" of public inquiries into prison conditions during the apartheid period was the release of the report of the "Van Dam Committee", which investigated conditions at the notorious Barberton prison complex in late 1983 and early 1984. As in the case of the Hoexter Commission discussed above, the South African "liberal press" had a field day with the damning findings of this particular committee of inquiry, and were able to reveal something of the sickening abuse and mismanagement that afflicted the apartheid penal system.[6] Once again, the revelations served at a wider ideological level as yet another chink in the armour of the apartheid system.

Further examples of the general point made above could no doubt be given, but this article must now return to its specific focus on the Jali Commission and, in particular, the hearings held in the Free State.

## 3 PUBLIC DISCOURSE SURROUNDING THE HEARINGS OF THE JALI COMMISSION IN THE FREE STATE

This section of the article traces the public discourse surrounding the revelations contained in evidence given before the Jali Commission of Inquiry during its hearings in the Free State. It also traces details of a public furore surrounding the airing of a video on national television, showing prisoners and warders at Bloemfontein's Grootvlei Prison engaged in a range of corrupt activities. Although the details of the corruption in the Free State differ from those in KwaZulu-Natal, it is clear that the shock and anger felt by the South African public at the time of the revelations remained the same. It is also clear that the virus of corruption had infected large sections of the South African penal system at this time.

### 3 1 Seeing is believing: video evidence of corruption at Bloemfontein's Grootvlei Prison

It is especially useful to examine corruption at Bloemfontein's Grootvlei Prison through the lens of the South African public media – since the usual

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5 Peté 2014 *Obiter* 485–505.

6 For a detailed analysis, see Peté "Apartheid's Alcatraz: The Barberton Prison Complex During the Early 1980s – Part Two" 2015 *PER* 305–330.

media frenzy that accompanied the hearings of the Commission was stoked by a "media event" that had been initiated by the prisoners themselves. This "media event" was the airing of a video that had been filmed in secret inside the prison in question, by four inmates. These inmates (Gayton McKenzie, 28, Moosa Mia, 30, Petrus Sekutoane, 52, and Samuel Grobbelaar, 43) became known as the "Grootvlei Four". When the video was aired in June 2002 on national television in the programme *Special Assignment*, South Africans exploded in outrage at what the video revealed of the widespread corruption inside Grootvlei.

The airing of the video gave rise to a wave of reports in all major South African newspapers. When the story broke in the national press, the "Grootvlei Four" told the *Sunday Times* that they had paid R146 000 to make the video, which had taken five months to film.[7] Five mini-cameras and microphones were set up in a cell, the kitchen, two tuckshops and the prison petrol station. The camera in the cell was hidden in a box of tea in order to evade detection in the event of a search by prison officials. McKenzie, who approached two friends for the money to hire the necessary equipment, masterminded the operation. Mia and Sekutoane helped to entrap certain corrupt warders, while Grobbelaar was responsible for smuggling the equipment into the prison, and for editing the video. The scenes were edited together by taping from one video machine to another.

The head of the prison was only informed about the sting operation after the four managed to film Mia (serving 30 years for two murders) buying a pistol and a bullet from a warder for R6 000. Once the video was complete, one copy was handed to the head of the Grootvlei Prison, Tatolo "Champ" Setlai, and another to lawyer, Nico Naude, for safekeeping. According to the four prisoners, their motives for filming the video were to: help break the criminal rings that operated in the prisons; force reform of the prison system; show the public how their taxes were being misspent; and secure a two-year reduction in their sentences, which they believed was given to all prisoners who exposed corruption. McKenzie told the *Sunday Times* that he was fed up with corrupt warders using prisoners as their "slaves" for everything from polishing their shoes to performing sex acts, and said:

> "You get paedophile prison warders who have sex with juvenile prisoners. I call it consensual rape. The Roman Catholic Church has now admitted that some priests molest boys but the Department of Correctional Services is afraid to come out in the open."[8]

Sekutoane, who was shown on the video sodomising a 21-year-old prisoner, told the *Sunday Times* that he had only done so in order to trap the warder. The young man who was sodomised was allegedly paid R10 and some tobacco for his services, while the warder was paid R20 for arranging for Sekutoane to have sex with the young man. Sekutoane admitted that he had paid juvenile prisoners for sex many times, but claimed that he had stopped

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7 (2002-06-23) *Sunday Times* 7. Although Grobbelaar later told *Rapport* that the filming had taken place between 15 March 2002 and 14 May 2002 – see (2002-06-23) *Rapport* 4.

8 (2002-06-23) *Sunday Times* 7.

doing so some time previously. He stated that he had not wanted to be seen on television having sex with a man:

> "I felt very bad about doing it because I've got a daughter who's going to see it."[9]

Grobbelaar told the *Sunday Times* that two attempts had been made to kill him after the video was shown on television. First, he was hit on the back of the head with a sock filled with steel and was knocked unconscious. The attack was allegedly carried out by another prisoner who had been hired by one of the warders incriminated in the video. While in hospital, a second attempt was allegedly made on his life. He claimed that one of the corrupt warders had provided a prisoner with poison with which to poison him (Grobbelaar) but that the attempt had been foiled when the prisoner with the poison had been intercepted before he could carry out the plan. Grobbelaar stated:

> "We've encouraged so many prisoners to come out with the evidence. I've even spoken to some 14-year-olds who have been molested. I'd rather die in [this] prison than be moved."[10]

In addition to the scenes referred to above – of warders selling a stolen pistol to Mia and a warder bringing a juvenile prisoner to Sekutoane for sex – the video also contained other incriminating scenes, including warders buying frozen chickens that had been stolen from the prison kitchen; warders selling mandrax and dagga to prisoners; and warders fraternising and drinking brandy and Coke with prisoners.[11] It was no wonder that the video was described in the press as "explosive".[12]

The South African press had a field day with the revelations – as well as the apparent failure of the Department of Correctional Services to deal promptly and decisively with the corrupt warders. Under the banner headline "Caught red-handed, still at large", *The Star* posed the following question in bold and enlarged type on its page one:

> "Prison warders gave a loaded gun to hardened criminals so that they could use it to escape. They produced young boys for adult prisoners to have sex with. They traded in hard drugs with the prisoners. They were caught on camera committing these serious crimes. Their punishment? Suspension. We want to know: WHY HAVEN'T THEY BEEN ARRESTED."[13]

The page one article went on to claim that the office of the National Commissioner of Police, Jackie Selebi, was unable to explain why the police had not arrested the 22 warders shown in the video. A spokesperson for the Commissioner, Senior Superintendent Selby Bokaba, was quoted as saying:

> "We are of the view that no one has laid a complaint or a charge, as we cannot act on a TV programme. If anyone comes forward to lay a charge, we

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9 *Ibid*.
10 (2002-06-23) *Sunday Times* 7.
11 (2002-06-20) *Star* 1; (2002-06-20) *Cape Times* 1.
12 (2002-06-20) *Cape Times* 1.
13 (2002-06-20) *Star* 1.

> will act. Correctional Services has suspended the warders and we must also wait for the Jali commission to conclude its investigations."[14]

Statements such as that quoted above served to fuel the disappointment and anger felt by many South Africans at this time. The fact that the Department of Correctional Services had failed to take more decisive action in the wake of the exposé was met with outrage in the press. The responses of several national newspapers are worth quoting at some length, since their opinions provide a clear indication of the shock and disillusionment that resulted from the events at Grootvlei. The following are extracts from editorials dated 20 June 2002, in *Business Day, The Citizen, The Pretoria News*, and *The Herald* respectively:

> "Sadly, instead of offering kudos to Setlai and the four prisoners who literally risked their lives to expose the unsavoury goings-on at the prison, the authorities have seemingly chosen to discourage whistle-blowing and to threaten Setlai with suspension for sanctioning the operation. Worse still, none of the implicated warders have been suspended. It beggars belief. And there are reports that one of the prisoners who recorded the video was severely assaulted and poisoned in an attempt to kill him."[15]

> "Even if South Africans aren't surprised by the corruption at Grootvlei prison, the expose on *Special Assignment* is a shocking indictment of the Department of Correctional Services. If confirmation were needed, the country now knows that life behind bars can be quite comfortable for murderers and their ilk. They have access to firearms, drugs, alcohol and sex, with the active connivance of jail warders. What a splendid advertisement to promote the outlaw life. The nation can see crime does indeed pay, for some. Just as disturbing as the goings on was the attitude of the department. It was wrong that so many warders with known dubious records were allowed to continue their duties before being caught on camera. But it is absolutely scandalous that they're still on duty now, and the department displays virtually no interest in bringing them to book ... [W]hat we need is firm, decisive action. Kick out the rotten staff immediately, and tighten up. If the wavering Mti is not up to the job he too must go."[16]

> "Sex, drugs, booze and rock 'n roll – it's all been happening in Bloemfontein's Grootvlei Prison. Yet, National Correctional Services Commissioner Linda Mti appears to have missed the point completely. Reacting to the hair-raising video filmed in the prison showing warders selling prisoners alcohol, drugs, facilitating sexual services and even making available a loaded firearm, Mti's stupefying response was that his department was 'not in the business of making videos' and did not support the making of it. Good gracious! Does Mti believe that such goings-on in our jails – it is hardly likely Grootvlei is an isolated case – are better kept under wraps? … Whatever action is necessary must be taken where needed to root out this cancer in our jails."[17]

> "There can now be no doubt about why SA prison gates are about as secure as a well-oiled revolving door. An expose on corruption at Bloemfontein's Grootvlei prison, flighted by SATV's Special Assignment this week, revealed breathtaking corruption showing warders to be no more than messengers for inmates who have money for booze, drugs, sex and even a firearm. A video showing this has been in the hands of prison authorities for some time, but not

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14 *Ibid*.

15 (2002-06-20) *Business Day* 15.

16 (2002-06-20) *Citizen* 16.

17 (2002-06-20) *Pretoria News* 11.

> one of the warders involved has been suspended. It can only be speculated that their roaring trade in vice, drugs and whatever else, continues to flourish … When prisoners get worried about the level of corruption, it is time government sat up and took note. In case it doesn't know, it has egg on its face."[18]

Seemingly bowing to public pressure, the Minister of Correctional Services, Ben Skosana, responded to reports that the head of the Grootvlei Prison, Tatolo Setlai, was to be suspended for allowing the filming of the video in his prison, by stating that he was opposed to any such suspension. He pointed out that, although procedures and regulations may have been abrogated, it would not be wise to suspend Setlai – because he had been a "facilitator for the greater good". He added that he would not encourage exposure of this sort, since it was not "helpful" to publicise information of this type without "putting it into perspective". The Minister also announced that the warders who appeared in the video would be suspended, and that the four prisoners who had filmed the video would be transferred to other prisons to ensure their safety.[19]

Civil society groups also began commenting in the press on the corruption at Grootvlei. For example, on 21 June 2002, the leader of the Southern Africa Methodist Church, Bishop Mvume Dandala, issued a statement in which he expressed his outrage at the criminal activities taking place in the prison:

> "We are appalled that it took an illegal action to uncover the shocking malpractice of corruption, gangsterism and violence that is allegedly being freely perpetrated at the Grootvlei Prison. We unequivocally condemn the illegal activities highlighted in the video taken by inmates, desperate to bring justice to the system. Having to resort to this action also reveals an alarming lack of channels for complaints."[20]

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18 (2002-06-20) *Herald* 4. Editorials expressing grave concern over the events at Grootvlei continued to be published in South African newspapers for some days following the initial flood of reports. For example, in its editorial of 22 June 2002, the *Natal Witness* commented on the Grootvlei Prison video as follows: "While the evidence being put before the Jali Commission of murder and mayhem in the KwaZulu-Natal prisons services has been shocking enough, the video footage of goings-on in Bloemfontein's Grootvlei prison has provided positively astounding confirmation of what many outsiders have long suspected – that the country's prisons are dens of unparalleled iniquity … It goes beyond the levels of incompetence and corruption that have in recent years come to be regarded as normal in much of the public service. The public has been confronted with the terrifying reality that what goes on inside the prisons is the complete antithesis of what 'correctional service' is supposed to mean. It is all the more alarming, and all the more reprehensible, because these prison officers have been entrusted by society with the task of protecting the community by curbing crime. The individual offenders must now feel the full force of the law … no doubt the reasons why things have come to this pass are many and complex, but poor management is certainly among them and there must be appropriate action at this level too. In fact, ministerial intervention is obviously overdue. The minister has reportedly commended the Grootvlei head for letting the video cameras into the prison, and rightly so. It is most unsatisfactory that this should be so, but (as with the filming of corruption in the post office a while back) it seems that only the public outrage sparked by graphic televised images has the force to galvanise officialdom into action" ((2002-06-22) *Natal Witness* 6).

19 (2002-06-20) *Cape Argus* 2.

20 (2002-06-22) *Saturday Star* 2. Another body that issued a public statement around this time was the Law Society of South Africa. On 23 June 2002, the Law Society called for the immediate arrest and suspension of all the warders implicated in the video. A spokesman

## 3 2 The Commission hears evidence on corruption at Grootvlei Prison

At the same time that the story of the Grootvlei video was raging in the nation's press, the Jali Commission was hearing evidence about the events depicted in the video. It was reported that warder A Tlakudi, who was shown on the Grootvlei video buying chicken and drinking brandy, told the Commission that he had bought the chicken to give to an inmate, Wilson Mohodi, who had not eaten all day, and had merely tasted the brandy to determine whether it was alcohol or tea. On 19 June 2002, Wilson Mohodi gave evidence before the Commission and claimed that Tlakudi had threatened that "a gun would be used" if he did not corroborate Tlakudi's story.[21] Moosa Mia also gave evidence before the Commission on 19 June 2002. He stated that he would sell chickens stolen by a warder, with 70 per cent of the proceeds going to the warder and 30 per cent retained by him. He also stated that six warders often bought brandy from him and that they had accounts with him that were settled on the 16th of each month, which was the day after they were paid. He told the Commission that a single tot sold for R15.[22]

Three days later, further explosive evidence, which was widely reported in the press, was presented to the Commission. Tatolo Setlai, the head of Grootvlei, told the Commission that the Commissioner for Correctional Services in the Free State, Willem Damons, had asked him to destroy the Grootvlei Prison tape. After he (Setlai) had refused to destroy the tape, Damons allegedly asked him to hand the tape to the National Intelligence Agency. Setlai had also refused to do this, since he suspected that the National Intelligence Agency would destroy the tape. Setlai told the Commission that he had received a letter linking his possible suspension to the video tape. Setlai was reported as having stated *inter alia*, as follows:

> "During the apartheid era, if a prisoner was found with two grams of dagga it was like a terrorist action, it never happened. In those days prisoners made means themselves, but nowadays members are deeply involved in such activities. They [i.e. prison officials] take democracy as a laissez faire government. They think they can do as they wish and some of them, when they take prisoners rations, they say they are eating their taxes. It is as if some black members don't fear black management as much as they feared white management."[23]

On the same day that Setlai was giving his evidence to the Commission, the "Grootvlei Four" launched an application in the Free State Provincial Division of the High Court in Bloemfontein to prevent their transfer to the Mangaung

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for the Law Society, Vincent Saldanha, stated that there was enough evidence on the videotape, coupled with the affidavits, to ensure that immediate action was taken: "The police should consult with the National Director of Public Prosecutions and if they cannot (take action) hand it over to the Scorpions to investigate" ((2002-06-24) *Diamond Fields Advertiser* 2).

21 (2002-06-20) *Cape Times* 1.

22 *Ibid*.

23 (2002-06-22) *Saturday Weekend Argus* 5; see also (2002-06-23) *Sunday Tribune* 13.

prison.[24] The reason they gave for their application was that they feared their lives would be in danger in that prison.

Two days after the above events, an article in the *Sunday Tribune* asked a number of provocative questions of the role of Tatolo Setlai in the sting operation. In the first place, why did Setlai allegedly retain an illegally obtained firearm in his possession for just over a month without informing the police? Secondly, why did he not involve the police in setting a trap for the warders? Thirdly, was it legal and/or moral for Setlai to allow warders and prisoners to commit crimes in order to prove that corruption was rife in Grootvlei Prison? The writer of the article made this final point, as follows:

> "Did the head of the prison allow drugs to be peddled inside his institution so that can (sic) prove a point? The prisoner who was filmed sodomising a youngster said he arranged the filming himself. Which begs the question, did the head of prison know and allow a juvenile prisoner to be taken from his section to a prison cell where he would be sodomised by an older inmate so that it can (sic) be proved that corruption happens?"[25]

Although Setlai's role was questioned by some, he seemed to have considerable support within the South African press. For example, on 23 June 2002, the *Sowetan Sunday World* editorialised, *inter alia*, as follows:

> "One can understand the desperation of the prison head in colluding with prisoners to rid himself of corrupt officials. Commissioner Linda Mti's threatened action against Tatolo Setlai, Grootvlei Prison's chief, is reprehensible but not surprising. It is similar to Henry Blazer's treatment when he blew the whistle on deputy speaker Baleka Mbete-Kgositsile's instant driver's licence. He was hung out to dry. This is the typical knee-jerk reaction of bureaucrats who think they are impervious to public censure. We applaud the cabinet ministers' quick action on the matter. Ben Skosana, correctional services minister, has placed the prisoners under his protection and Penuell Maduna, justice minister, has pledged his support for Setlai."[26]

The *City Press* also voiced its support for Setlai, and called on the authorities not to suspend him:

> "The suspension of Setlai, as suggested this week by Mti, would amount to punishing a whistle-blower while simultaneously protecting those who want to cover up corruption in the South African civil service, which is already rotten with corrupt elements … We … believe the suspension of Setlai would be a heavy blow for honesty and a betrayal of the many anti-corruption campaigners in this country. Mti must be stopped!"[27]

With public pressure building, a team of correctional services directors was dispatched to Bloemfontein on 22 June 2002 to lay departmental as well as criminal charges against all the prison officials at Grootvlei who were involved in the corruption scandal.[28] In the face of all the negative media attention, Linda Mti began to engage in "damage control", claiming that his

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24 (2002-06-23) *Rapport* 4 ; (2002-06-23) *Sowetan Sunday World* 2.
25 (2002-06-23) *Sunday Tribune* 13.
26 (2002-06-23) *Sowetan Sunday World* 17.
27 (2002-06-23) *City Press* 18.
28 (2002-06-23) *City Press* 9.

alleged call for Tatolo Setlai to be suspended had been quoted out of context. He defended his actions, as follows:

> "First and foremost I commend and hail all efforts that anybody makes to expose prison corruption, whether it's committed by the warders or by the prisoners. But it is important not to be overzealous and compromise themselves and the law in the process of exposing the culprits. There are rules and regulations that cannot be ignored under any circumstances. We are a security entity and the rule of law is primary. Otherwise we will end up being a law unto ourselves … How is it possible that hardcore criminals who are serving 102 years among themselves can produce such high-quality video material over three months without outside help? Overcrowded as our prisons are, officials are expected to uphold the rule of law at all times. That is why there is a thorough investigation on how this happened."[29]

The following day it was reported that Tatolo Setlai had received death threats as a result of his role in exposing corruption within Grootvlei Prison. Setlai believed he was being victimised by officials in the department. *Inter alia*, he stated:

> "I do not regret helping those prisoners … It is strange now that instead of the content being the subject of discussion, I am being questioned."[30]

The *Sowetan* made the following telling comment on the infighting that was taking place between Setlai and his colleagues:

> "Though Setlai has received high-level backing from the minister for his role in blowing the whistle, some of his colleagues in Correctional Services have not only questioned his motives for exposing the corruption, but are also baying for his blood … The death threats on Setlai and other whistleblowers are likely to reopen the debate about the adequacy of the legal protection granted to those who expose corruption in the country."[31]

The press continued to report on the high drama being played out at the hearings of the Jali Commission. On 25 June 2002, the "Grootvlei four" appeared before the Commission and claimed they had been roughed up and abused by the prison task force.[32] One of them, Gayton McKenzie, told the Commission that he had often been sent, by warder KJ Mvubu, to buy meat that had been stolen from the prison kitchen. He told the Commission that since Mvubu had started working in the prison he had eaten more meat than any person who had been in prison for years. He also told the Commission that prisoners drank brandy in front of Mvubu without any action being taken. Moosa Mia (another of the "Grootvlei four") told the Commission that he regularly paid "toll fees" to warder Ranketse Sephaka for the warder to take him to other parts of the prison. The video showed Sephaka taking Mia to a cell so that he could buy dagga from Mr Petrus Sekutoane. Mia had paid R10 to Sephaka for taking him to the cell. At Mia's request, Sephaka carried the dagga for Mia by inserting it in the front of his

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29 (2002-06-23) *City Press* 9. The article in *City Press* noted that Grootvlei Prison had been designed to accommodate 800 prisoners – but was forced to accommodate 1800 prisoners at the time the video was made.

30 (2002-06-24) *Sowetan* 1.

31 *Ibid*.

32 (2002-06-26) *Star* 2.

pants. Mia also told the Commission that Sephaka had sold mandrax to him over a period of eight months. In return, Mia had regularly given Sephaka free meat. Mia further told the Commission that warder Tsietsi Mokhitli regularly borrowed money from him. He had lent amounts of R20 to R600 to Sephaka on approximately 12 occasions this year.[33]

Evidence that at least some concrete action had been taken against the warders suspected of corruption at the Grootvlei Prison emerged on 25 June 2002, when it was reported that 22 warders had been suspended and refused entry to the jail until investigations had been completed. Despite this, press reports indicated that the matter was still not being treated as seriously or urgently as was required. Of concern was that the Free State Police continued to claim they had no grounds on which to arrest any of the suspended warders.[34] Of further concern was that the delay on the part of the Department of Correctional Services in suspending the warders could have negatively affected the investigation into their alleged corrupt activities. The *Sowetan* complained as follows:

> "We must … register our concern that it had taken almost a week before the warders were barred from returning to duty … We can only speculate on the impact this evident lack of urgency might have had on investigations. After all, prison authorities had argued the suspensions were necessary to ensure that no one interfered with the probe into allegations of corruption."[35]

The *Sowetan* also expressed its concern that none of the warders had, as yet, been charged:

> "Police have yet to arrest anyone in connection with the allegations. Suggestions by police that evidence at hand was insufficient to warrant any arrest is nothing but a cop-out."[36]

## 3 3 Public outrage over the Grootvlei Prison video continues to grow

On 26 June 2002, it was reported that Tatolo Setlai, the head of Grootvlei Prison who had played a role in revealing the extensive corruption within the prison, had been informed that he was to be transferred to another post against his will. He told *Volksblad* that he was informed by his area head that he was being transferred to the provincial head office of correctional services in the Free State. He said that he was waiting for a letter confirming this, and that it would break his heart to be transferred.[37] The Department of Correctional Services denied that it intended to transfer Setlai, stating that

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33 (2002-06-26) *Volksblad* 2.

34 (2002-06-25) *Sowetan* 3. It took another four days before any criminal charges were laid against the warders. On 29 June 2002, it was reported that 16 criminal charges had been laid against certain Grootvlei prison warders after a special police investigation unit had studied the video made by the "Grootvlei four". See (2002-06-29) *Volksblad* 1.

35 (2002-06-26) *Sowetan* 12.

36 *Ibid*.

37 (2002-06-26) *Volksblad* 2.

there had been a misunderstanding.[38] The ongoing uncertainty surrounding Setlai resulted in the press becoming even more suspicious of the motives of the different role players in the affair. For example, the *Sowetan* stated:

> "The contradictory statements from authorities about the position of the corruption-busting head of Grootvlei Prison in Bloemfontein, Tatolo Setlai, are unfortunate and leave a rather sour aftertaste. In fact, viewed from the embattled whistleblower's perspective, these statements could well be interpreted as intimidating instead of reassuring and supportive … In view of the Government's commitment to cleanse society of anti-social behaviour as well as its attempts to rid the public service of image-imploding corruption, nothing short of a clear and unequivocal support for whistleblowers will instill confidence in authority. The Government needs to move quickly to clear the doubts."[39]

Another example of the extent to which suspicions had been aroused is to be found in an editorial published in the Afrikaans press on the same day as the extract quoted above appeared in the *Sowetan*. *Volksblad* characterised the corruption in the Grootvlei Prison as "net die oortjies van die seekoei" (literally "just the ears of the hippopotamus" – i.e. just the tip of the iceberg). It railed against the possible transfer of Setlai, characterising it as a gross injustice ("skreiende onreg").[40]

By this point, public concern surrounding this matter had reached such significant levels that it required attention from the highest reaches of government. On 26 June 2002, the Cabinet issued a statement *inter alia* welcoming the fact that the corruption at Grootvlei Prison had been exposed. Although the government did not necessarily agree with the manner in which the information had been obtained, the Cabinet stated that it was critically important that the evidence be placed before the Jali Commission.[41]

On the same day that the Cabinet issued its statement, it was reported that – at the request of the Democratic Alliance – a snap debate was being held in the National Assembly on the situation in prisons, with specific reference to the Grootvlei Prison.[42] During the debate, Mrs Pauline Cupido of the Democratic Alliance asked the Minister of Correctional Services, Mr Ben Skosana, to consider installing security cameras in all prisons. Skosana stated that the possibility of establishing an anti-corruption unit for the Department of Correctional Services was being investigated. Members of the Scorpions would possibly form part of this unit. The chairperson of the portfolio committee on correctional services, Mr Ntshiki Mashimby of the African National Congress, asked why the head of the Grootvlei Prison kept a revolver, which had been illegally sold to a prisoner, in his possession for longer than a month.[43] The National Commissioner of Correctional Services, Linda Mti, appeared before the portfolio committee and admitted that the

38 (2002-06-27) *Beeld* 14; (2002-06-27) *Citizen* 5.
39 (2002-06-27) *Sowetan* 20.
40 (2002-06-27) *Volksblad* 10.
41 (2002-06-27) *Beeld* 14.
42 (2002-06-26) *Volksblad* 2;(2002-06-26) *Cape Times* 5.
43 (2002-06-27) *Burger* 10.

Department of Correctional Services was "beleaguered by the corrupt and criminal activities of a component of staff".[44] He told the committee that:

> "[t]he legal mandate of DCS remains unachievable while there are staff members in our prisons whose criminal behaviour keeps the wounds of corruption, substance abuse, sexual violence and crime in our prisons festering."[45]

The drama in Parliament was mirrored by even more drama at the hearings of the Jali Commission of Inquiry. On the same day that the corruption at Grootvlei was being discussed in Parliament, it was reported that the head of the Grootvlei Emergency Support Unit, Mr Rassie Erasmus, was to be prosecuted departmentally, criminally and civilly – following allegations he had made racist comments about members of the Jali Commission. It was alleged that he had called one of the Commissioners, Esther Steyn, a "teef tussen n klomp kaffers" (a bitch among a group of kaffirs). It was further alleged that he had called Mr Samuel Grobbelaar (one of the "Grootvlei four") a "kafferboetie" (roughly translated as "a kaffir lover"). Judge Thabane Jali ordered that a special investigative unit of the Scorpions should investigate a charge of defamation against Erasmus.[46]

On the same day as the dramatic events described above were being played out, Petrus Sekotoane (one of the "Grootvlei four") gave evidence before the Jali Commission. He told the Commission that not only did warder Ranketse Sephaka sell dagga and mandrax to prisoners, but he also sometimes allowed them into his home within the prison precinct to buy dagga. Sometimes Sephaka's wife sold dagga to prisoners when her husband was not at home. Moosa Mia (another of the "Grootvlei four") told the Commission that warder Johnny Thoabala regularly joined him when he went to buy dagga from, or deliver it to, other prisoners. In doing this, Mia could avoid paying "tollgate fees" of R2 to R5 to other warders manning internal prison gates. Mia also told the Commission that he had drunk brandy with warder TJ Leseba. Warder Mike Ramalefane allegedly ate chicken stolen from the prison kitchen and drank brandy with prisoners. Prisoner William Smith told the Commission that he used to earn approximately R450 a month by selling mandrax for warder Leon Visagie.[47] Smith told the Commission:

> "I sold a packet of dagga inside the prison for R50; R40 of which went to Visagie. The mandrax tablets went for R20 each."[48]

The following day, 27 June 2002, the long-awaited showdown between Free State Provincial Commissioner for Correctional Services, Willem Damons, and head of the Grootvlei Prison, Tatolo Setlai, took place before the Jali Commission. According to the *Sowetan*:

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44 (2002-06-26) *Cape Times* 5.
45 *Ibid*.
46 (2002-06-26) *Volksblad* 2.
47 (2002-06-27) *Star* 2; see also (2002-06-27) *Volksblad* 2.
48 (2002-06-27) *Sowetan* 2.

> "Setlai maintained that his senior, Free State Correctional Services commissioner Willem Damons, had repeatedly insisted that the damning videotape – allegedly showing corruption in the prison – be destroyed. The beleaguered prison chief was forced to face down Damons before the commission, repeating his assertions that Damons wanted him out of the Department of Correctional Services and had accused him of being a drug dealer ... In a dramatic development in proceedings, Damons vehemently denied telling Setlai that he would be transferred to the Correctional Services' provincial office after the videotape was made public."[49]

According to further press reports, Damons also denied that he had ordered Setlai to destroy the videotape. Setlai, on the other hand, maintained that not only Damons, but also Grootvlei's deputy head, Mrs Moira Dooling, wanted the videotape to be destroyed. According to Setlai, Damons was worried about the videotape and wanted it burned. It was dangerous for Setlai's future and would damage the image of the department and the government, and would scare off investors. According to Setlai, Damons also requested him to influence the prisoners not to cooperate with the Jali Commission. He told the Commission that Damons had that week decided that he (Setlai) was prohibited from setting foot in Grootvlei from 1 July 2002.[50] Damons undertook not to investigate, suspend or transfer Setlai – although he told the Commission that he believed that Setlai had contravened practices of good governance. He told the Commission that a national investigation unit was at Grootvlei, at his request, to investigate Setlai's part in the video.[51] According to a report in the *Saturday Star*, Advocate Vas Soni accused Damons several times of lying to the Commission and of giving contradictory evidence. According to this report:

> "He (Soni) said he would submit to the commission by the end of the day that Damons had been telling one lie after another. 'You lead us into every avenue except the main road. I am lost in your answers', Soni said. He also warned the provincial commissioner that he could lose his job and face charges of defeating the ends of justice if it were found that he had lied to the commission."[52]

The drama continued the following day, 28 June 2002, when prisoner Marius Engelbrecht told the Commission that members of the "26" prison gang had put out a "number 1" (i.e., had issued a sentence of death against) on the "Grootvlei four". According to Engelbrecht, who was a "major" in the "26" gang, the four would not be safe in any prison in South Africa, since corrupt warders would be used to get to them:

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49 (2002-06-28) *Sowetan* 3.

50 (2002-06-28) *Volksblad* 1.

51 (2002-06-29) *Volksblad* 1; (2002-06-29) *Saturday Star* 2.

52 (2002-06-29) *Saturday Star* 2. See also (2002-06-30) *City Press* 9. One newspaper columnist, William Saunderson-Meyer, commented bluntly on the affair as follows: "Correctional Services Commissioner Willem Damons wanted him [Setlai] to destroy the embarrassing video, Police Commissioner Jackie Selebi incorrectly claimed that the miscreants would not be arrested and prosecuted and the initial response of the correctional services ministry was the threat of a disciplinary inquiry against Setlai to establish whether he had followed 'internal procedures'. What a star-studded cast of morons." (2002-06-29) *Independent on Saturday* 8.

> "They will die in prison, violently at the hands of gang members. There is no safe place in any prison in South Africa for such a prisoner. The saying is that you can run but you cannot hide … Their number is up. There is no discussion. This is the end. No escape. One way in, one way out."[53]

With the storm surrounding events at Grootvlei raging in the press, the political and administrative leadership of the Department of Correctional Services went into full "damage limitation" mode. On the same day that Engelbrecht was presenting the dramatic evidence detailed in the previous paragraph to the Jali Commission, the Minister of Correctional Services, Mr Ben Skosana, and the National Commissioner of Correctional Services, Mr Linda Mti, were holding a workshop against corruption at Grootvlei Prison.[54] Emotions ran high and Mti broke down emotionally and began to cry as he was about to address provincial managers and warders at the workshop. He stated that the anger and heartache of what he had seen on the video was just too much for him. Skosana announced that a campaign was to be launched against all acts and forms of corruption. The reasons for corruption would be established, and strategies would be developed to restrict the spread of corruption.[55] The Premier of the Free State, Ms Winkie Direko, also addressed the workshop. Speaking to a crowded hall in the prison, she stated that the Free State, South Africa and Africa had been let down by corrupt warders at the prison. These warders had broken the trust placed in them by the national commissioner, Mr Linda Mti, the minister, Mr Ben Skosana, the president, Mr Thabo Mbeki, and the people of South Africa. A furious Ben Skosana stated that South Africans had been knocked off their feet by waves of anger and disbelief after watching the Grootvlei video. The country was in a state of shock, and the damage done to the department would take a very long time to repair. He said that he was not surprised to see the national commissioner overcome by his emotions. He said that it had been a long hard two weeks since the screening of the video, and he then placed his hand on Mti's shoulder.[56]

## 3 4 The saga continues to smoulder throughout July 2002

Not everyone was convinced by the display of contrition and emotion described above. On 1 July 2002, columnist Mathatha Tsedu of *The Star* commented somewhat pessimistically on how he saw the saga surrounding Setlai playing itself out:

> "In the nature of how the system operates, Setlai is bound to lose; he is bucking the system, and the system never forgets or forgives. If, right now, with the national spotlight on him and his prison, we are able to witness the kind of harassment he is undergoing, what will happen when the TV lights move away and we all forget about him? It is disappointing that Mti has come across as not too keen to take action against the warders who were caught breaking the law. He has tried to say he was just pointing out that the

53 (2002-06-29) *Citizen* 6; see also (2002-06-29) *Volksblad* 1–2.
54 (2002-06-28) *Volksblad* 1.
55 (2002-06-29) *Volksblad* 1.
56 (2002-06-29) *Volksblad* 2.

> evidence might yet be proved to be useless. That is a legitimate concern, but I personally would like to see him defending Setlai against Damons. I would like to see him call Damons in and ask tough questions about the need to destroy the tape, unless this was Mti's instruction. There is a stink coming out of the Free State prison which needs to be allowed to air, and Correctional Services is currently on a path to stem the revelations … One can only hope that Skosana will continue to provide sound leadership on this matter and that we are not going to wake up one day and find Setlai gone and the warders back on duty."[57]

A week later, on 7 July 2002, a special report in the *Sunday Tribune* entitled "Just how deep is the rot?" provided South Africans with a broad overview of what had been going wrong within the penal system as a whole. The report set out the views of Advocate Vas Soni on the reasons for the endemic corruption within many South African prisons. According to the report, Soni believed that the political tensions and battle for power between the old white power structure and new officials appointed after 1994 had contributed greatly to the rot. "Operation Quiet Storm" resulted in prison management being undermined, with POPCRU officials concentrating more on gaining power than on running the prisons. According to Soni:

> "The old guard, mostly the whites, sat back and watched the rot fester and the system crumble ... What we saw at Grootvlei happens at all the prisons we have been to. Warders turn a blind eye to criminality. There is a sense of shamelessness among them … When we saw what was on the video tape it was a case of *déjà vu*. It confirmed what we already knew … There is nepotism in recruitment. It's like a family business for many. At New Prison in Pietermaritzburg, for instance, a warder had eight relatives working under him. He had the audacity to say that they were the best candidates from more than 2 000 applicants."[58]

Two days after the publication of the special report referred to in the previous paragraph, the Setlai saga once again attracted attention in the press. The pessimistic assessment of Setlai's future by newspaper columnist Mathatha Tsedu, in his column of 1 July 2002 – discussed above – appeared to be depressingly accurate, when, on 9 July 2002, it was reported that Setlai had been "temporarily" transferred from his post as the head of Grootvlei Prison to the post of chairman of the prison's parole board. This was despite the assurance of Provincial Commissioner Willem Damons to the Jali Commission that Setlai would not be transferred or moved. According to the *Sowetan*:

> "The transfer has been widely viewed as part of an attempted cover-up after Setlai allowed four long-term prisoners to record alleged acts of corruption by up to 22 Grootvlei warders and inmates on videotape."[59]

Setlai submitted a complaint to the Jali Commission to the effect that he had been victimised because of his struggle against corruption.[60] The South African Police Union issued a statement to the effect that moving Setlai out

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57 (2002-07-01) *Star* 8.
58 (2002-07-07) *Sunday Tribune* 4.
59 (2002-07-09) *Sowetan* 3.
60 (2002-07-09) *Beeld* 2.

of his post sent a message that whistleblowers were not protected within the Department of Correctional Services. The Union called on the Minister of Correctional Services, Mr Ben Skosana, and the Jali Commission, to come to Setlai's rescue.[61] The fact that Setlai was being deliberately targeted seemed to be borne out by evidence presented to the Jali Commission a few days later, on 14 July 2002, by Grootvlei prisoner Kenneth Kunene. Kunene alleged that a group of warders belonging to POPCRU had formulated a plot to get rid of Setlai. In terms of the plan, unlawful items like dagga would be planted in the cupboards of Setlai's monitors – to show him in a bad light. Setlai would be worked out of the system. It was reported that Setlai was reconsidering his charge of victimisation against the Department of Correctional Services, after being removed from his post as head of the Grootvlei prison.[62]

In addition to the Setlai saga, the South African press continued to give wide coverage to other shocking revelations made by witnesses who appeared before the Jali Commission. On 14 July 2002, one of the "Grootvlei Four", Gayton McKenzie, told the Commission that Grootvlei warder FV Mostert ran a shebeen in the prison, from which the warder earned more than R9 000 per month. Up to 20 bottles of brandy were sold to prisoners per week at a price of R200 or R300 per bottle. McKenzie alleged that liquor was smuggled into the prison hidden in sand or cement – or in paint tins. McKenzie told the Commission that pornographic films were so freely available in the prison that one did not even have to pay to watch them. He told the Commission that he had seen all the newest pornographic films on the market. Evidence was led before the Commission to the effect that warder Frans Molejane, who had been caught with 23 bags of dagga in the Virginia prison, had been reassigned to Grootvlei Prison by Damons. It was alleged that Molejane sold food, brandy, dagga and ecstasy in the prison.[63] McKenzie told the Commission that the "Grootvlei Four" had been so badly victimised as a result of the video, that at one point they had decided to cease cooperating with the Commission.[64] Two days later, on 16 July 2002, McKenzie told the Commission that the four had been dismissed from their positions as monitors without reason, and were locked in their cells for 23 hours per day. He said that their cells were searched daily and that they had been forced to live on bread and cooldrink for the past 10 days, since they were afraid to eat meat from the prison kitchen. He alleged that an attempt had been made to poison Samuel Grobbelaar, one of the "Grootvlei Four", with "Two Steps".[65]

The Setlai saga returned to the news on 17 July 2002, when the acting head of the Grootvlei Prison, Langa Bikane, gave evidence before the Jali Commission. He admitted that Setlai's transfer to the parole board was unfair. Bikane had signed both the letter informing Setlai of his suspension in May, as well as the letter informing him of his transfer to the parole board in

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61 (2002-07-10) *Volksblad* 1.
62 (2002-07-16) *Volksblad* 1.
63 *Ibid*.
64 (2002-07-16) *Volksblad* 1; see also (2002-07-16) *Citizen* 7.
65 (2002-07-17) *Volksblad* 2.

July. Bikane told the Commission that he did not want to suspend Setlai in May, but had to sign the letter informing Setlai of his suspension, as Provincial Commissioner Damons and his advisory team had decided to suspend Setlai. He had also had no choice but to sign the letter from the task team in July informing Setlai that he was being transferred from his position as head of the Grootvlei Prison to the Parole Board in Bloemfontein.[66] The following day it was reported that Setlai intended to launch an urgent application in the Free State High Court to be allowed to remain in his position as head of the Grootvlei Prison.[67]

On 19 July 2002, heart-rending evidence was presented to the Jali Commission by a 20-year-old juvenile inmate of Grootvlei Prison. He alleged that he had been sodomised 11 times in the prison by a warder and other prisoners. The juvenile alleged that on his second day in Grootvlei Prison, a prisoner sodomised him for the first time. Within his first week in the prison, a further two prisoners sodomised him. He sought help from a warder, Sam Mohanoe, who proceeded to sodomise him as well. He alleged that he was sodomised seven times by the warder in the warder's office and in a storeroom. The juvenile was eventually detained in a single cell for his own safety, but was allegedly "put on auction" and "sold" by a warder to another prisoner for sex. After this, he twice tried to commit suicide. Advocate Vas Soni stated that it was "a sad day for the prison system in South Africa" and he apologised to the prisoner "on behalf of all decent human beings".[68]

A few days later, on 23 July 2002, one of the Grootvlei four, Petrus Sekutoane, told the Commission that one of the warders regularly left a 25-litre tin full of dagga in his cell overnight. Sekutoane would then sell the dagga to other inmates. The cost of a tin of dagga was R1 000, and this was sold to inmates for R2 500. Sekutoane alleged that profits from the sale of dagga had been deposited into his bank account by the warder who had supplied him with the drugs.[69] On the same day, further heart-rending evidence was presented to the Commission about the frequent occurrence of prison rape. Grootvlei prisoner Wilson Mohodi told the Jali Commission that a Grootvlei warder known as "Daddy" sodomised young male prisoners in his office on a daily basis. Mohodi told the Commission that the warder, a certain Sam Mohanoe, had been sodomising juveniles since 1985. Mohanoe was facing criminal charges for allegedly sodomising a 20-year-old prisoner eight times. According to Mohodi, he and Mohanoe sometimes took turns to sodomise juveniles in Mohanoe's office. Mohodi also told the Commission that he sometimes supplied Mohanoe with a young man in return for cannabis. Mohanoe would reward the juveniles with cannabis, Vaseline and toiletries in a plastic bag. Sometimes Mohodi paid a warder R20 to bring a juvenile to his cell for the weekend. Mohanoe's legal representative denied that his client had sodomised juvenile prisoners.[70] In further evidence, a 20-year-old Grootvlei prisoner testified before the Commission that he was

66 (2002-07-18) *Citizen* 7; (2002-07-18) *Volksblad* 2; (2002-07-18) *Afrikaner* 3.
67 (2002-07-18) *Volksblad* 2; (2002-07-18) *Afrikaner* 3.
68 (2002-07-21) *Sunday Independent* 5; (2002-07-20) *Beeld* 4.
69 (2002-07-24) *Volksblad* 2.
70 (2002-07-23) *Volksblad* 1.

promised All Star running shoes and food by an older prisoner – in return for sex. He testified that he had been repeatedly sodomised by warders and older prisoners.[71]

Finally, to end off this overview of the public discourse surrounding events at Grootvlei Prison in 2002, a brief comment on the fate of Tatolo Setlai is made. On 24 July 2002, it was reported that Setlai had been transferred back into his post as head of the Grootvlei Prison, presumably as a result of legal pressure he had brought to bear.[72] Unfortunately, this was not to last. On 16 January 2003, Setlai appeared in the regional court on charges of corruption. He claimed that he was framed and that the charges were a "payback" by officials of the department, for what he had told the Jali Commission.

It is clear from the above that any ordinary South African who bothered to read the newspapers during June and July 2002 would have been under no illusions as to the seriousness of the problems confronting the Department of Correctional Services in relation to corruption. Any illusions as to the supremacy of human rights in the post-apartheid period was likely to have been dashed. In concluding this sub-section, it is worth noting that the disturbing picture painted in the press was confirmed in the final report of the Commission.[73] This report reflected a government department on the brink of collapse, riddled with corruption and beset by criminality and other forms of malpractice.[74]

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71 (2003-07-24) *Star* 3; (2002-07-24) *Volksblad* 2.

72 (2002-07-24) *Volksblad* 1; (2003-07-24) *Star* 3.

73 The Jali Commission furnished its Final Report to the President in December 2005.

74 The Final Report had been preceded by a series of Interim Reports, which the Commission explained were necessary because the Department of Correctional Services was "experiencing a total breakdown in the disciplinary system, which required recommendations for immediate intervention" (Jali Commission Report Vol 1 16). The Commission noted that the interim reports dealt with "illegal drug dealing, medical aid fraud, favouritism in appointments, extortion, unlawful financial transactions with prisoners, fraudulent matric certificates, unlawful visits, theft, fraud, assault of prisoners, irregular appointments, irregular transfers and parole transgressions amongst other things" (Jali Commission Report Vol 1 16). It went on to deliver the following damning indictment of the institutional culture within the Department: "The most noticeable feature of the institutional culture the Commission observed was that corruption and maladministration were rife in most of the Management Areas investigated. There is a large group of employees within such Management Areas who featured in almost all the incidents of corruption and maladministration and who are predominantly driven by greed and the need to make easy money. This became apparent in the nature of the corruption that is endemic within the Department ... The investigations also revealed that many employees consciously and systematically disregard Departmental rules and regulations. The failure or refusal to comply with rules and regulations of the Department became apparent in the manner in which these employees consciously and deliberately flouted regulations relating to security, searching of members, searching of visitors, visitation rights, procurement of goods for the prisoners, the relationship between prisoners and warders, recruitment and appointments, promotions, merit awards, transfer, parole, disclosure of private work, treatment of prisoners, use of State assets and others. This appeared to be done with impunity in that there was little evidence of disciplinary action being taken against the transgressors" (Jali Commission Report Vol 1 17).

## 4 CONCLUSION

The Jali Commission of Inquiry appears only to have been moderately successful in bringing about direct improvements to the South African penal system over the medium to long term. In assessing the condition of South Africa's prisons in 2016, a decade after the conclusion of the Commission, Lukas Muntingh states:

> "Ten years after the Jali Commission released its report, the DCS remains beset by the same problems as those the commission was established to address: overcrowding, corruption, impunity, rights violations and services that do not reach sufficient numbers of prisoners and leave much to be desired with regard to impact. All indications are that there have been significant improvements in the DCS, especially regarding corruption and maladministration, but that there is plenty that remains unacceptably dysfunctional."[75]

Although the investigation conducted by the Jali Commission of Inquiry did not result in the resolution of all the many problems that were identified within the penal system, it is clear that the overall value of the Commission cannot be judged on this fact alone. This article has focused on the impact of extensive newspaper reporting during the hearings of the Commission on the public at large – in particular on public perceptions regarding issues of corruption. Muntingh's observation that there were "significant improvements in the DCS, especially regarding corruption and maladministration" is clearly significant in this regard.[76] Speculating about the value of changing public perceptions on issues such as corruption is bound to be somewhat imprecise. Nevertheless, it is submitted that public perceptions are extremely important when it comes to defeating deeply rooted and complex social ills. Furthermore, it is submitted that there is sense to be made in relation to the manner in which public perceptions are constructed and shaped. Furthermore, as discussed below, it is contended that such perceptions may serve to render a society based upon principles of liberal constitutional democracy more resilient in the face of major challenges, such as widespread corruption.

As far as public perceptions are concerned, it is submitted that in the aftermath of South Africa's first democratic election at the start of the post-apartheid era, an overwhelming majority of citizens dreamed of a future characterised by tolerance and respect for the basic human rights of each of the country's inhabitants.[77] It is difficult to say precisely when these dreams began to fade, as corruption took hold in different areas of public life.[78] It is clear, however, that extensive media reporting on the hearings of the Jali Commission of Inquiry – traced in this article – constitute an important early

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75 Muntingh *Ten Years After the Jali Commission: Assessing the State of South Africa's Prisons* 2016 58 *SACQ* 42.

76 *Ibid*.

77 South Africa's first democratic election was held on 27 April 1994.

78 Of course, rampant corruption in South Africa pre-dates 1994. Corruption was a defining feature of the apartheid system. See, for e.g., Van Vuuren *Apartheid, Guns and Money* (2017). See also Van Vuuren *Apartheid Grand Corruption: Assessing the Scale of Crimes of Profit in South Africa From 1976 to 1994* (2006).

milestone along the road that South Africans have travelled towards increasing disillusionment with the state of corruption within important institutions of state. Although the Jali Commission failed to root out corruption completely within the South African penal system, or (at a more general level) to prevent the major corruption scandals that were to characterise the presidency of Jacob Zuma, it is submitted that this commission cannot be written off as a waste of taxpayers' money. It may be argued, perhaps, that the present outrage of South Africans at the manner in which corruption has brought the country to its knees – together with a determination among many finally to confront and defeat this scourge – was first "primed" by the narrative that emerged from the hearings of the Jali Commission.

The Jali Commission was able to place a fairly discrete set of corrupt practices under a judicial microscope, with sufficient resources to conduct a thorough and open analysis in a legally rigorous manner. The public narrative that emerged from the hearings of the Commission, provided the public with a wealth of minute and often banal detail as to the manner in which corruption was able to establish a foothold and flourish in South Africa's "post-liberation setting". It became clear that, in an environment characterised by political turbulence and economic flux, avenues for corruption that may otherwise have been closed, were opened up and exploited by ruthless individuals. The manner in which corruption was able to "hollow out" an institution from the inside, despite the existence of legal and constitutional safeguards, was revealed for all to see. In the extensive reporting on the hearings of the Commission, the South African public was able to experience something of the "smell and feel" of the corruption that had started to take hold of certain institutions of state during the early years of the post-apartheid period. It is the contention of this article that the "up close and personal" understanding of the mechanics and corrosive effects of corruption provided by the Jali Commission – albeit in relation to a single institution of state – may be regarded as an important building block of current public perceptions on the general issue of corruption.

Returning, finally, to the precarious time at which these words are being written, it is the contention of this article that South Africa's very survival as a liberal constitutional democracy depends upon the determination of the public at large to root out corruption. It is submitted that Cathleen Powell's observation (referred to in the introduction to Part 1 of this article), that commissions of inquiry may serve to ensure public "buy-in for important processes of change and renewal", is absolutely correct.[79] So too is her

[79] Powell "South Africa's Commissions of Inquiry: What Good Can They Do?" The Conversation" (8 November 2018) https://theconversation.com/south-africas-commissions-of-inquiry-what-good-can-they-do-106558 (accessed 2021-05-06). Powell's rejection of the common misconception that the appointment of a commission of inquiry automatically leads to a reduction in public concern about the issue being investigated, receives solid support from Raanan Sulitzeanu-Kenan. Sulitzeanu-Kenan refutes the "common claim" that "the appointment of an inquiry acts to reduce the level of public interest in the affair [which led to such appointment]", stating that "despite the prevalence of this claim, no empirical support was found for any mitigating effect of inquiry appointment on media salience in recent

observation that the "most important work of the Zondo and Nugent Commissions might be done before their formal function – the submission of their reports – is completed."[80] While clearly not a panacea, the proceedings of a public commission of inquiry within a liberal constitutional democracy – when properly handled and working in tandem with a free and vibrant press – may serve to educate and inform the public, creating an important bulwark against corrupt forces that seek to subvert that democracy. This is particularly the case in times of existential crisis, such as the present threat posed by corruption and "state capture" to South Africa's constitutional democracy. Such commissions of inquiry are worth every cent of their cost.

studies." See Sulitzeanu-Kenan "Reflection in the Shadow of Blame: When Do Politicians Appoint Commissions of Inquiry?" 2010 40(3) *BJPS* 617.

[80] Powell https://theconversation.com/south-africas-commissions-of-inquiry-what-good-can-they-do-106558.

# COMBATING HARASSMENT UNDER THE PROTECTION FROM HARASSMENT ACT 17 OF 2011 IN SOUTH AFRICA: DOES IT PUNISH VICTIMS AND PROTECT PERPETRATORS?

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**SUMMARY**

The Protection from Harassment Act 17 of 2011 (the Act) seeks to protect victims of harassment. Despite this legislative development, the effectiveness of the Act has not been widely explored. This article fills this cavity. It argues that the broadly drafted definition of harassment, together with other concomitant shortcomings in the Act, makes it prone to abuse by unscrupulous litigants, thereby militating against its regulatory efficiency goals. The article further maintains that the Act is constructed in an unbalanced manner as it protects the rights of complainants, but unintentionally is open to abuse, allowing, unfathomably, an alleged victim of harassment to become the harasser. The article analyses the regulatory aptness of the Act in an age marked by an exponential increase in cyber-related harassment and makes a case for enhancing the regulatory approach of the Act to offer an effective means of protecting victims of harassment in a rapidly evolving society.

## 1 INTRODUCTION

Harassment has become an endemic, perennial problem confronting contemporary societies with the media being awash with individuals subjected to it on the basis of social stratifications such as gender, race,

ethnicity, nationality, religion, political affiliation and sexuality.[1] Despite its prevalence, harassment sustains criminal liability because it possesses a direct affront to human dignity and privacy, among other fundamental human rights.[2] In an attempt to combat this crime, the South African legislature has enacted the Protection from Harassment Act[3] (the Act) to protect individual fundamental human rights – *inter alia*, the right to equality, privacy, dignity and freedom, as well as security of person.[4] To achieve this significant goal, the Act, aims specifically, among other things, to "afford victims of harassment an effective remedy against such behaviour".[5] Conceptually, legislation and policy drafted to inhibit the conduct of harassment by safeguarding fundamental rights, as the Act asserts it does, is necessary in a constitutional democracy.[6] However, such legislation should be drafted to provide maximum protection to victims of harassment in a technological world, while minimising the frivolous abuse by unscrupulous litigants using an interpretation of the Act that creates unjust legal remedies. Equally, such maximum protection can only be achieved when the Act addresses not only traditional forms of harassment but also non-traditional forms of cyber-related abuse that can occur through digital technology and other platforms.[7]

This article commences by unravelling the definitional scope and elements of harassment[8] as provided for in the Act, taking into account the purpose of

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1 Arndt "Street Harassment: The Need for Criminal Remedies" 2018 29 *Hastings Women's Law Journal* 81.

2 Chik "Harassment Through the Digital Medium A Cross-Jurisdictional Comparative Analysis on the Law on Cyberstalking" 2008 3 *Journal of International Commercial Law and Technology* 24; Volokh "One-To-One Speech vs One-to-Many Speech, Criminal Harassment Laws, and 'Cyberstalking'" 2013 107 *Northwestern University Law Review* 760; Chemaly "Why We Need to Take Street Harassment Seriously" (28 September 2015) https://www.washingtonpost.com/news/parenting/wp/2015/09/28/why-we-need-to-take-street-harassment-seriously/?utm_term=.a745e8c8e594 (accessed 2020-03-25).

3 17 of 2011.

4 S 9 of the Constitution of the Republic of South Africa, 1996 provides: "(1) everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair." The right to human dignity is provided in terms of section 10. It states that "everyone has inherent dignity and the right to have their dignity respected and protected." See The Constitution of South Africa, 1996. https://www.gov.za/documents/constitution-republic-south-africa-1996 (accessed 2020-03-26).

5 Preamble to the Act.

6 Landman and Ndou "The Protection from Harassment Act and its Implications for the Workplace" 2013 22 *Contemporary Labour Law* 82.

7 Smit "Cyberbullying in South African and American Schools: A Legal Comparative Study" 2015 35 *South African Journal of Education* 2.

8 In terms of s 1(1) of the Act "harassment" occurs when "directly or indirectly engaging in conduct that the respondent knows or ought to know–

(a) causes harm or inspires the reasonable belief that harm may be caused to the complainant or a related person by unreasonably–

the Act[9] and other relevant tools provided for juridical interpretation. By exploring the aforementioned, the objective is to determine whether the definition of harassment in the Act contributes to the achievement of the Act's purpose in the context of an evolving society. It is argued, in their current form, that the legal remedies in the Act allow for potential abuse. It is argued further that in securing and protecting the aforementioned rights, the potential for abuse has unintentionally been created, resulting in an undesirable situation whereby an alleged victim of harassment may become a "harasser" through the Act. The article then turns to examine whether the Act is adequate in a technology-based world. Finally, the article tenders a discussion on possible legislative reforms for the effective safeguarding of the rights of victims of harassment.

## 2 THE ACT IN BRIEF: CONTEXTUAL AND HISTORICAL BACKGROUND

Prior to 2011, the preventative measures in place to deal with harassment had many shortcomings and were not effectively beneficial to financially vulnerable complainants who had to endure, among other things, judicial bureaucracy before they could obtain a court order to protect their rights.[10] The legal process was cumbersome, time-consuming and costly for complainants.

The Act seeks to ensure that complainants' rights are adequately protected.[11] The Act consolidates the rights of the complainant by affording victims of harassment a legal remedy against such behaviour and introducing measures that enable the relevant organs of state to give full effect to the provisions of the Act.[12]

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(i) following, watching, pursuing or accosting of the complainant or a related person, or loitering outside of or near the building or place where the complainant or a related person resides, works, carries on business, studies or happens to be;

(ii) engaging in verbal, electronic or any other communication aimed at the complainant or a related person, by any means, whether or not conversation ensues; or

(iii) sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant or a related person or leaving them where they will be found by, given to, or brought to the attention of, the complainant or a related person; or

(b) amounts to sexual harassment of the complainant or a related person.

9 The Preamble to the Act lays out the purpose of the Act panoramically: "Since the Bill of Rights in the Constitution of the Republic of South Africa, 1996, enshrines the rights of all people in the Republic of South Africa, including the right to equality, the right to privacy, the right to dignity, the right to freedom and security of the person, which incorporates the right to be free from all forms of violence from either public or private sources, and the rights of children to have their best interests considered to be of paramount importance; and in order to–

(a) afford victims of harassment an effective remedy against such behaviour; and

(b) introduce measures which seek to enable the relevant organs of state to give full effect to the provisions of this Act."

10 It is noteworthy that the Domestic Violence Act 116 of 1998 also defines domestic violence in s 1(viii) to include the following: (e) intimidation; (f) harassment; and (g) stalking.

11 See Preamble to the Act.

12 See Preamble to the Act.

Aside from the above, the adoption of the Act was necessitated by the growing and complex problems relating to defining harassment within the South African context and the need to introduce criminal and civil remedies to prevent or reduce violence in different forms of interpersonal relationship.[13] Internationally, many countries have taken legislative action against harassment, recognising that such conduct is a public problem that merits attention.[14] Harassment may have negative effects upon an individual such as causing behavioural, psychological and social problems. Specific risks to the victims of harassment may include loss of personal safety, loss of a job, sleeplessness, and a change in work or social habits.[15] These effects are far-reaching with the potential to drain both criminal justice resources and the healthcare system.[16]

## 3 THE DEFINITION AND CLASSIFICATION OF HARASSMENT

Conceptually, harassment exists primarily in two major arenas – namely, either physical or cyber-related harassment. Classification is based on the nature of the perpetrator's conduct and the space in which the conduct occurs.[17] This binary delineation is implicitly alluded to in the Act and is significant for the purpose of effectively combating all types of harassment.[18] In terms of the Act, physical harassment occurs when a person watches, pursues or accosts a complainant or related person, or loiters outside of or near a building or place where the complainant or related person resides, works, carries on business, studies or happens to be. Physical harassment also includes engaging in verbal conduct aimed at the complainant or related person, by any means, whether or not conversation ensues.[19] It includes the sending, delivering or causing delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to a complainant or related person or leaving them where they will be found by, given to or brought to the attention of, a complainant or related person.[20] The Act also recognises that physical harassment can take another dimension when the conduct of the harasser amounts to sexual harassment.[21] Such conduct may cause mental,

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13 South African Law Reform Commission "Discussion Paper on Stalking" (undated) https://www.justice.gov.za/salrc/dpapers/dp108.pdf (accessed 2020-03-29).

14 Pende "Bullying and Sexual Harassment in the Legal Profession" (1 May 2019) https://www.unodc.org/res/ji/resdb/data/2019/us_too_bullying_and_sexual_harassment_in_the_legal_profession_html/iba_us_too.pdf (accessed 2020-03-29).

15 Earle "An International Perspective on Sexual Harassment Law" 2017 12 *Law and Inequality: A Journal of Theory and Practice* 57–58.

16 Salter and Bryden "I Can See You: Harassment and Stalking on the Internet" 2009 18 *Information and Communications Technology Law* 102.

17 Sissing and Prinsloo "Contextualising the Phenomenon of Cyber Stalking and Protection from Harassment in South Africa" 2013 15 *Acta Criminologica: African Journal of Criminology and Victimology* 15.

18 S 1(1) of the Act.

19 Pathe "Stalking by Law: Damaging Victims and Rewarding Offenders" 2004 *Journal of Law and Medicine* 103.

20 S 1(1) of the Act.

21 A succinct case-law definition of sexual harassment was provided in *J v M Ltd* (1989) 10 ILJ 755 (IC) – that is, conduct that troubles another continually in the sexual sphere. This definition was further endorsed in *Reddy v University of Natal* (1998) 19 ILJ 49 (LAC).

psychological, physical or economic harm.[22] The Act clearly recognises the cyber aspect of harassment by indicating that harassment may occur through the medium of email or any other digital technology. Cassim[23] observes that because cyber-related harassment occurs through digital platforms that connect many people it has become a common and more aggressive type of harassment with devastating effects on an individual's personhood.[24]

## 4 THE ACT'S LEGAL APPROACH AND TEST OF HARASSMENT

The overarching purpose of the Act is to allow for the issuing of protection orders against harassment in order to afford victims of harassment an effective remedy against such behaviour.[25] The Act provides victims of harassment with a speedy and effective remedy in the form of a "protection order" or interdict whereas, previously, interdicts were only available through costly High Court litigation or from the domestic violence court in terms of the Domestic Violence Act,[26] (DVA), which required the additional criteria of a domestic relationship to be applicable. The DVA together with the Act recognise that harassment may be experienced by the complainant in a number of ways.[27]

The court in *Mnyandu v Padayachi*[28] had to determine whether the conduct of the appellant (Mnyandu) constituted harassment in terms of section 1(1) of the Act. The applicant (Padayachi) alleged that his colleague had circulated an email that was defamatory, slanderous, libellous, dishonest, deceitful and malicious.[29] He contended that by circulating the email, the appellant impaired his dignity, defamed him, adversely affected his well-being and undermined his opportunity for promotion and financial benefit at his place of employment.[30] The applicant could have used the common law to institute a claim for defamation or requested the employer to take disciplinary action against the appellant. Instead, the applicant elected to use the Act to found his claim. The applicant contended that the email circulated constituted harassment.[31]

The case was first heard in the magistrates' court, where it was held that the email sent by the appellant was sufficient to constitute harassment in terms of section 1(1) of the Act.[32] The magistrates' court issued a final

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22 Chicktay "Sexual Harassment and Employer Liability: A Critical Analysis of the South African Legal Position" 2010 54 *Journal of African Law* 283.

23 Cassim "Formulating Adequate Legislation to Address Cyber-Bullying: Has the Law Kept Pace with Advancing Technology?" 2018 26 *South African Computer Journal* 4.

24 Cassim 2018 *South African Computer Journal* 4 par 1.

25 See s 9 of the Constitution, and Preamble to the Act.

26 116 of 1998.

27 Laas and Boezaart "The Legislative Framework Regarding Bullying in South African Schools" 2014 17 *Potchefstroom Electronic Law Journal* 373.

28 2017 (1) SA 151 (KZP).

29 *Mnyandu v Padayachi supra* par 6.5.

30 *Mnyandu v Padayachi supra* par 6.6.

31 *Mnyandu v Padayachi supra* par 7.

32 *Mnyandu v Padayachi supra* par 26.

protection order against the appellant. The magistrates' court held that the Act applies to the workplace. Consequently, employers and employees can invoke the provisions of the Act when subjected to harassment in the workplace.[33] The appellant appealed to the High Court. The High Court maintained that the onus is on the applicant to prove on a balance of probabilities that the appellant knew, or ought to have known, that by sending the email, she was engaging in conduct that would cause harm to the applicant or inspire the reasonable belief that harm would be caused to him, be it mental, psychological, physical or economic, and that her conduct was unreasonable in the circumstances.[34] The High Court noted that there is a scarcity of South African jurisprudence dealing with the Act and, in particular, with the interpretation of the word "harassment" as contained in the Act. The paucity and scarcity of jurisprudence on the Act militates against its application and interpretation.[35]

In order to compensate for the lack of jurisprudence, the High Court relied upon foreign jurisprudence sourced from the United Kingdom, Australia and Hong Kong.[36] According to the Australian Queensland Criminal Code, there are certain elements required for conduct to constitute unlawful stalking (harassment).[37] In particular, section 359B of the Queensland Criminal Code provides protection against intentionally directed conduct of a respondent whose objective is to harass an applicant provided it occurs on more than one occasion (protracted). Such conduct may consist in the act of sending one or more emails. It is the physical act of communication and not the contents of the communication that appears to be contemplated in subsections (*b*) and (*c*) of section 359B.[38] Therefore, under the Queensland Criminal Code, the sending of one email (which is not a protracted act) may be considered to not constitute harassment as the conduct has not occurred on more than one occasion.[39]

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33 *Mnyandu v Padayachi supra* par 27.

34 *Mnyandu v Padayachi supra* par 6.2.

35 *Mnyandu v Padayachi supra* par 6.3.

36 The indication that there is a lack of South African jurisprudence on the Act was also alluded to in par 1.34 of the South African Law Commission "Stalking Report of 2008" (undated) https://www.justice.gov.za/Salrc/reports/r_pr130_stalking.pdf (accessed 2020-03-07).

37 Kift "Stalking in Queensland: From the Nineties to Y2K" 1999 11 *Bond Law Review* 105.

38 State of Queensland "Criminal Code Act 1899" (26 February 2020) https://www.legislation.qld.gov.au/view/pdf/inforce/current/act-1899-009 (accessed 2020-03-05).

39 S 359B of the Queensland Criminal Code, titled "What is unlawful stalking", states: "Unlawful stalking is conduct–

(a) intentionally directed at a person (the stalked person); and

(b) engaged in on any 1 occasion if the conduct is protracted or on more than 1 occasion; and

(c) consisting of 1 or more acts of the following, or a similar, type–

(i) following, loitering near, watching or approaching a person;

(ii) contacting a person in any way, including, for example, by telephone, mail, fax, email or through the use of any technology;

(iii) loitering near, watching, approaching or entering a place where a person lives, works or visits;

(iv) leaving offensive material where it will be found by, given to or brought to the attention of, a person;

Under the auspices of the same Australian Queensland Criminal Code, for harassment to occur, the contents of the communication must be such that it causes detriment to the stalked person.[40] Section 359A of the Queensland Criminal Code provides definitions for key words and phrases. It defines detriment in terms of the consequences of the stalking behaviour, which include: (a) apprehension of fear or violence to, or against the property of, the stalked person or another person; and (b) serious mental, psychological or emotional harm.[41] The victim must therefore establish that the

(v) giving offensive material to a person, directly or indirectly;
(vi) an intimidating, harassing or threatening act against a person, whether or not involving violence or a threat of violence;
(vii) an act of violence, or a threat of violence, against, or against property of, anyone, including the defendant; and

(d) that–
(i) would cause the stalked person apprehension or fear, reasonably arising in all the circumstances, of violence to, or against property of, the stalked person or another person; or
(ii) causes detriment, reasonably arising in all the circumstances, to the stalked person or another person."

[40] S 359A of the Queensland Criminal Code provides "definitions for ch 33A": "In this chapter–
*circumstances* means the following circumstances–
(a) the alleged stalker's circumstances;
(b) the circumstances of the stalked person known, foreseen or reasonably foreseeable by the alleged stalker;
(c) the circumstances surrounding the unlawful stalking;
(d) any other relevant circumstances.
*property*, of a person, means–
(a) property in which the person has an interest, whether or not the defendant also has an interest in the property; or [Note under the Acts Interpretation Act 1954, schedule 1 – *interest*, in relation to land or other property, means–
(a) a legal or equitable estate in the land or other property; or
(b) a right, power or privilege over, or in relation to, the land or other property.]
(b) property that is otherwise–
(i) used and enjoyed by the person; or
(ii) available for the person's use or enjoyment; or
(iii) in the person's care or custody; or
(iv) at the premises at which the person is residing.
*stalked person* see s 359B.
*unlawful stalking* see s 359B.
*violence*–
(a) does not include any force or impact within the limits of what is acceptable as incidental to social interaction or to life in the community; and
(b) against a person includes an act depriving a person of liberty; and
(c) against property includes an act of damaging, destroying, removing, using or interfering with the property.

[41] S 359A of the Queensland Criminal Code provides "definitions for ch 33A": "In this chapter–: *detriment* includes the following–
(a) apprehension or fear of violence to, or against property of, the stalked person or another person;
(b) serious mental, psychological or emotional harm;
(c) prevention or hindrance from doing an act a person is lawfully entitled to do;
(d) compulsion to do an act a person is lawfully entitled to abstain from doing.
*Examples of paragraph (c)* – a person no longer walks outside the person's place ofresidence or employment. A person significantly changes the route or form of transport the person would ordinarily use to travel to work or other places.
*Example of paragraph (d)* – a person sells a property the person would not otherwise sell.

communication caused him fear of physical violence to person or property, or serious mental, psychological or emotional harm. Finally, an objective test is employed to determine whether or not the conduct indeed caused harm. In other words, harm must reasonably arise from the relevant circumstances.[42]

Similarly, the South Australian Criminal Law Consolidation (Stalking) Amendment Act 7 of 1994 prescribes that the conduct complained of should occur on at least two separate occasions and reasonably arouse the victim's apprehension or fear.[43] In the same vein, the Law Reform Commission of Hong Kong in its groundbreaking Report on Stalking opines that, for a finding of stalking to be made, a stalker must pursue a course of conduct that amounts to harassment of another; the harassment should be serious enough to cause that person alarm or distress; and a reasonable person would have to think that the course of conduct amounted to harassment of the other.[44] This submission resonates with section 1(2) of the South African Act, which provides that the person whose course of conduct is in question ought to know that it amounts to harassment of another if a reasonable person in possession of the same information would understand (or foresee) that the course of conduct amounted to harassment of the other.[45]

In *Dowson v Chief Constable of Northumbria Police*,[46] the court provided a summary of what must be proved in law for a claim of harassment to succeed: (a) there must be conduct which occurs on at least two occasions; (b) which is targeted at the Claimant; (c) which is calculated in an objective sense to cause alarm or distress; (d) which is objectively judged to be oppressive and unacceptable; (e) what is oppressive and unacceptable may depend on the social or working context in which the conduct occurs; (f) a line is to be drawn between conduct that is unattractive and unreasonable, and conduct that has been described in various ways as tormenting the victim.[47]

Emphatically, the legal test as to whether a person is guilty of harassment is objective in nature.[48] This means it entails an assessment of the conduct by a reasonable person, a total departure from the elements of many criminal offences, which require a degree of intent before an offence is committed.[49] Such a divergence is justified as many harassers claim that

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42 Purcell, Pathé and Mullen "Stalking: Defining and Prosecuting a New Category of Offending" 2004 30 *International Journal of Law and Psychiatry* 167.

43 This test was clearly laid out in *R v Smith* (2013) 2 All ER 804 par 25 Court of Appeal, Australia; *Thomas v News Group Newspapers Ltd* (2002) EMLR 78 Supreme Court of Appeal, Australia; and *R v Curtis* (2010) 3 All ER 849 par 29 Court of Appeal, Australia.

44 The Law Reform Commission of Hong Kong Report "Stalking" (undated) http://www.worldlii.org/hk/other/hklrc/reports/2000/3/stalk-Chapter-6.html (accessed 2020-03-27).

45 S 1(1) of the Act.

46 (2010) All ER (D) 191 par 142 (2006) 4 All ER 395 England and Wales High Court, England. This case centered on whether allegations made against the Chief Constable of police by his colleagues amounted to harassment under the Protection from Harassment Act 1997.

47 *Dowson v Chief Constable of Northumbria Police* (2010) All ER (D) 192 par 143.

48 Middlemiss "Let the Stalker Beware? Analysis of the Law of Stalking in Scotland" 2014 78 *Journal of Criminal Law* 407.

49 Middlemiss 2014 *Journal of Criminal Law* 407 par 1.

they have no intention of harassing their victims. In another UK case, *Majrowski v Guy's and St Thomas's NHS Trust*,[50] the court held that the purpose of the Protection from Harassment Act[51] is to protect victims of harassment, whatever form the harassment, wherever it occurs and whatever its motivation.[52] The court reasoned that the Act seeks to provide protection against stalkers, racial abusers, disruptive neighbours, bullying at work and so forth. Similarly, elements required to constitute harassment in terms of the UK anti-harassment laws dictate that the prohibited conduct must occur more than once and a reasonable person in the position of the offender must foresee and understand that the course of conduct amounted to harassment.[53]

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[50] (2006) 4 All ER 395 House of Lords of the United Kingdom.

[51] Protection from Harassment Act of 1997.

[52] Notably in United Kingdom, the Protection from Harassment Act 1997 provides:

"S 1: Prohibition of harassment

(1) A person must not pursue a course of conduct–
   (a) which amounts to harassment of another, and
   (b) which he knows or ought to know amounts to harassment of the other.

(2) For the purposes of this section, the person whose course of conduct is in question ought to know that it amounts to harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other.

(3) Ss (1) does not apply to a course of conduct if the person who pursued it shows–
   (a) that it was pursued for the purpose of preventing or detecting crime,
   (b) that it was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or
   (c) that in the particular circumstances the pursuit of the course of conduct was reasonable.

S 2: Offence of harassment:

(1) A person who pursues a course of conduct in breach of section 1 is guilty of an offence.

…

S 4: Putting people in fear of violence

(1) A person whose course of conduct causes another to fear, on at least two occasions, that violence will be used against him is guilty of an offence if he knows or ought to know that his course of conduct will cause the other so to fear on each of those occasions.

(2) For the purposes of this section, the person whose course of conduct is in question ought to know that it will cause another to fear that violence will be used against him on any occasion if a reasonable person in possession of the same information would think the course of conduct would cause the other so to fear on that occasion.

…

S 7: Interpretation of this group of sections

(1) This section applies for the interpretation of sections 1 to 5.

(2) References to harassing a person include alarming the person or causing the person distress."

[53] *R v Smith supra* par 24. The court stated that "[i]n construing section 1 of the 1997 Act it is right to have regard to the type of mischief at which it was aimed. It is also right to have regard to what the ordinary person would understand by harassment. It does not follow that because references to harassing a person include alarming a person or causing a person distress (s 7(2)), any course of conduct which causes alarm or distress amounts to harassment…. So to reason would be illogical and would produce perverse results…. the definition of the word "harass" in the Concise Oxford Dictionary … [means] to 'torment by subjecting to constant interference or intimidation'…. Essentially, it involves persistent conduct of a seriously oppressive nature, either physically or mentally, targeted at an individual or resulting in fear or distress." In *R v Curtis supra*, the court held that the impugned conduct must be unacceptable to a degree which would sustain criminal liability

Based on the aforementioned jurisprudence, the High Court in *Myandu v Padayachi* overturned the decision of the magistrates' court and ruled in favour of the appellant.[54] The High Court found that although the Act was applicable in the workplace, the appellant did not harass the applicant.[55] The High Court held that although the conduct of the appellant in sending the email may have been unreasonable, because she allowed her emotions to cloud her perception, it was not objectively oppressive nor had the gravity to constitute harassment in terms of the Act.[56] The High Court held that while the applicant alleged that his prospects of promotion, his dignity and reputation within his company and community were compromised as a consequence of the email, there was no evidence to this effect.[57] Therefore, the High Court was unable to find that the facts of this matter sustained a finding that the conduct of the appellant constituted harassment as contemplated by the Act, and the appeal succeeded.[58]

It is apparent from the aforementioned cases that the offence of harassment is not merely constituted by a course of conduct that is oppressive and unreasonable; the consequences or effect of the conduct ought not merely to cause a degree of alarm, but must cause serious fear, alarm and distress. The legal test is always an objective one: the conduct must be calculated in an objective sense to cause alarm or distress, and be objectively judged as oppressive and unacceptable.[59] As Chik[60] opines, an objective test is subjective in nature, applied to particular facts and circumstances. In other words, a person ought to know (or foresee) that his course of conduct amounts to harassment of another if a reasonable person in possession of the same information would know (or foresee) that the course of conduct would result in the prohibited types of effect on the other.

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and must also be oppressive. The court agreed with the following analysis in *Thomas v News Group Newspapers Ltd supra* par 29–30: "Section 7 of the 1997 Act does not purport to provide a comprehensive definition of harassment. There are many actions that foreseeably alarm or cause a person distress that could not possibly be described as harassment. It seems … that section 7 is dealing with that element of the offence which is constituted by the effect of the conduct rather than with the types of conduct that produce that effect. The Act does not attempt to define the type of conduct that is capable of constituting harassment. 'Harassment' is, however, a word which has a meaning which is generally understood. It describes conduct targeted at an individual which is calculated to produce the consequences described in section 7 and which is oppressive and unreasonable. The practice of stalking is a prime example of such conduct." See *SATAWU obo Dlamini / Transnet Freight Rail, a Division of Transnet Ltd* [2009] JOL 24429 (TOKISO).

54 *Mnyandu v Padayachi supra* par 73.

55 In *SATAWU obo Dlamini / Transnet Freight Rail, a Division of Transnet* Ltd *supra*, the arbitrator held that "harassment is a form of unfair discrimination, and that although harassment is generally understood to denote repeated conduct a single extremely serious slur on the grounds of race could constitute harassment. He held further that although the test for establishing discrimination is objective, the Constitution requires that the primary focus be on the effect on the complainant of the action complained of, and that the proper test for assessing whether the conduct constituted harassment is by reference to the reasonable victim".

56 *Mnyandu v Padayachi supra* par 71.

57 *Mnyandu v Padayachi supra* par 70.

58 *Mnyandu v Padayachi supra* par 73.

59 The objective test is instrumental because it ensures that irrational stalkers or stalkers who are mentally ill fall within the ambit of regulation and that their conduct is subject to legal "remedies".

60 Chik 2008 *Journal of International Commercial Law and Technology* 33.

The effect on the victim is objectively determined, and actual proof of resulting harm is immaterial.[61]

In terms of the Act and South African case law, one event is sufficient to constitute harassment, provided harm can be proven by the complainant. A course or pattern of events does not have to be proved in order for harassment to have occurred.

## 5 FACTORS CONSIDERED BY A COURT WHEN GRANTING A PROTECTION ORDER

In terms of the Act, a court, in deciding whether the conduct of a respondent is unreasonable, must in addition to any other factor take into account whether the conduct, in the circumstances in question, was engaged in for the purposes of detecting or preventing an offence; to reveal a threat to public safety or the environment; to reveal that an undue advantage is being or was given to a person in a competitive bidding process; or to comply with a legal duty.[62] Anyone, including a child, who is subjected to unwanted attention, may apply for a protection order at the magistrates' court nearest to where either the complainant or the harasser resides or is employed, or to where the harassment is occurring.[63]

It is not necessary for the complainant to engage the assistance of an attorney in order to launch this application. The complainant simply completes the relevant application form, obtainable at the court or online, and provides the details of the harassment and the reasons the protection sought is necessary.[64] The court must consider such an application after submission as soon as reasonably possible.[65] If the court is satisfied that there is *prima facie* evidence that (a) the respondent (harasser) is engaging or has engaged in harassment; (b) harm is being or may be suffered by the complainant or a related person as a result of that conduct if a protection order is not issued immediately; and (c) the protection to be accorded by the interim protection order is likely not to be achieved if prior notice of the application is given to the respondent, the court must, notwithstanding the fact that the respondent has not been provided with notice of the proceedings, issue an interim protection order against the respondent.[66]

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61 Chik 2008 *Journal of International Commercial Law and Technology* 32 par 1.

62 Landman and Ndou 2013 *Contemporary Labour Law* 24.

63 S 2 of the Act.

64 Soekoe "Protection From Harassment Act Simplified" (11 April 2013) http://www.wlce.co.za/index.php/2013-04-30-11-57-18/2013-04-30-12-22-01/240-the-protection-from-harassment-act-simplified (accessed 2014-04-16).

65 You can obtain a protection order against any person who perpetrates harassment even if the perpetrator is a child who is old enough to appreciate the consequences of his or her actions and who knew or ought to have known that the conduct was harmful. You do not have to be in any form of a domestic relationship with the perpetrator in order to apply for a protection order. Children over the age of 14 are legally regarded as being mature enough to understand the difference between right and wrong and can be criminally charged if they commit a criminal act such as breaching a protection order. A court may be reluctant to grant an order against a child under the age of 14 as a child under the age of 14 might not necessarily understand the difference between right and wrong.

66 S 3 of the Act.

After the issuing of an interim order, there will be an opportunity at a later stage for the respondent to defend him- or herself before a final order is granted. Such an order is granted on the balance of probabilities that the respondent has engaged or is engaging in harassment. Such an order, including an interim protection order, may prohibit the respondent from certain conduct[67] and may impose any additional conditions on the respondent deemed reasonably necessary to protect and provide for the safety or well-being of the complainant.[68] Whenever a court issues a protection order, including an interim protection order, the court must make an order authorising the issuing of a warrant for the arrest of the respondent and suspending the execution of that warrant subject to compliance with any prohibition, condition, obligation or order imposed. This means that the harasser may be "automatically" arrested without further proceedings for failure to adhere to the requirements of such an order and may face imprisonment for up to five years.[69]

If an interim order is not sought, or if the court decides not to issue such an order, the court must direct that the application for a court order be served on the respondent and that the respondent be given notice of the fact that he or she must show cause, on a date stated in the notice, as to why the order should not be granted.[70] All the defences the respondent may raise as justification for his or her conduct require the respondent to have a specific purpose. Some guidance on what constitutes purpose may be derived from the UK S case in *Hayes (FC) v Willoughby*.[71] The defence of Willoughby, the alleged harasser, was that he was engaged in the prevention or detection of crime; a recognised defence in terms of section 1(3) of the equivalent Act in the United Kingdom. The trial judge found that Willoughby's campaign of correspondence with the various public authorities concerning a Mr Hayes amounted to harassment. However, the trial judge found that Willoughby's conduct was gratuitous, for apart from some modest financial claims against Mr Hayes, almost all of which were resolved at an early stage of his campaign, he had no personal interest in establishing his allegations against Mr Hayes.[72] The majority of the UK Supreme Court noted that their decision on the standard by which a person's purpose is to be assessed was divided between an objective[73] and a subjective test.[74] The majority of the court declined to accept either a stark objective or an equally stark subjective test,

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67 An interim protection order, may prohibit the respondent from:
(a) engaging in or attempting to engage in harassment;
(b) enlisting the help of another person to engage in harassment; or
(c) committing any other act as specified in the protection order.

68 An "additional condition" may well be an order that the harasser may not be within a specific radius of the complainant. See s 9 and 10 of the Act.

69 S 11 of the Act.

70 Landman and Ndou 2013 22 *Contemporary Labour Law* 81–82.

71 (2013) UKSC 17 UK Supreme Court.

72 *Hayes (FC) v Wiloughby supra* par 3.

73 *KD v Chief Constable of Hampshire* (2005) EWHC 2550 (QB) 144 England and Wales High Court, United Kingdom. Also mentioned in *Hayes (FC) v Wiloughby* (2013) UKSC 17 par 10.

74 *EDO MBM Technology Ltd v Axworthy* (2005) EWHC 2490 (QB) par 28–29 Queen's Bench, United Kingdom. Also mentioned in *Hayes (FC) v Wiloughby* (2013) UKSC 17 par 1, 10 and 26.

but opted for a test that is well known in our constitutional dispensation, being the test of rationality.[75]

Therefore, essentially the purpose of the Act is to enforce and protect the complainant's rights enshrined in the Constitution, specifically the right to freedom and security of the person (section 12),[76] the right to dignity (section 10), and the right to equality (section 9). However, we find that the aforementioned rights are in competition with those of the respondent – namely, freedom of movement and residence (section 3), privacy (section 14),[77] and freedom of expression in terms of section 16.[78]. Hence, the complainant's alleged infringed rights will need to be balanced with those of the respondent by using the limitation of rights clause in the Constitution in order to deploy a remedy that does justice between the parties.[79]

## 6 DOES THE DEFINITION OF HARASSMENT CONTRIBUTE TO THE ACT ACHIEVING ITS PURPOSE?

Before the Act, protection orders were only available to people experiencing physical, sexual, emotional, verbal, psychological, economic and other forms of abuse from a person with whom they had a domestic relationship in terms of the DVA.[80] This meant that applicants could only obtain a protection order

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75 *Hayes (FC) v Wiloughby* (2013) UKSC 17 par 14.

76 In terms of s 12 of the Constitution:, "(1) Everyone has the right to freedom and security of the person, which includes the right (a) not to be deprived of freedom arbitrarily or without just cause; (b) not to be detained without trial; (c) to be free from all forms of violence from either public or private sources; (d) not to be tortured in any way; and (e) not to be treated or punished in a cruel, inhuman or degrading way. (2) Everyone has the right to bodily and psychological integrity, which includes the right– (a) to make decisions concerning reproduction; (b) to security in and control over their body; and (c) not to be subjected to medical or scientific experiments without their informed consent."

77 S 14 of the Constitution states: "Everyone has the right to privacy, which includes the right not to have– (a) their person or home searched; (b) their property searched; (c) their possessions seized; or (d) the privacy of their communications infringed."

78 According to the Constitution, freedom of expression is guaranteed in terms of s 16(1), which provides that "everyone has the right to freedom of expression, which includes– (a) freedom of the press and other media; (b) freedom to receive or impart information or ideas; (c) freedom of artistic creativity; and (d) academic freedom and freedom of scientific research. (2) The right in ss (1) does not extend to (a) propaganda for war; (b) incitement of imminent violence; or (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."

79 S 36 of the South African Constitution provides the limitation clause. It maintains: "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including– (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

80 The procedure to follow in obtaining a domestic protection order in terms of the Domestic Violence Act 116 of 1998 is as follows. The application can be made at any magistrates' court having jurisdiction over the area:

(a) where the complainant resides (temporarily or permanently) or works;

(b) where the respondent resides or works; or

against someone to whom they were married or engaged, or with whom they were in a romantic, intimate or sexual relationship; their parent, child or family member, or someone with whom they were living. By contrast, a person wishing to obtain a protection order under the Protection from Harassment Act (the Act) is not required to prove the existence of a domestic relationship, which was often a hurdle to obtaining protection, such as in instances of abuse between an educator and a learner.

The Act does not prohibit a person from applying for a protection order under the DVA if he or she falls into the category of being in a domestic relationship. Hence, in certain instances, a complainant may have recourse under both the Act and the DVA. The Act only requires the complainant to make a *prima facie* case that he or she has been harassed by the respondent. The court will then grant an interim protection order and an arrest warrant will be issued but will be suspended. It is therefore a relatively simple remedy to obtain.[81] If the complainant does not have, or is not in the process of applying for a protection order against harassment or stalking as provided for in the DVA, the court may not refuse to issue a protection order, or to impose any condition or make any order, which it is competent to impose or make in terms of the Act merely on the grounds that other legal remedies are available to the complainant.[82]

(c) where the act or acts of domestic violence took place.

The complainant is required to complete a prescribed form setting out the nature of the domestic violence against which he or she requires protection as well as the nature of the domestic relationship between him or herself and the respondent. Supporting documentation such as witness reports, medical evidence and statements from persons having knowledge of the domestic violence should, where possible, be attached to the application. Given the nature of abuse and the fact that it generally takes place behind closed doors in the absence of outsider presence, the absence of supporting documentation will not disqualify the complainant in obtaining the necessary protection order. The application for the protection order can be made on behalf of the complainant by a third party including among others a social worker, counsellor, health service provider, or a relative. Where the application is made by a third party, the complainant's written consent must be handed to the court. No consent is required where the complainant is a minor, mentally disabled, or unable to provide the requisite consent. A minor may approach the court for an order without the consent of his or her parent or guardian. Once the application has been completed, the clerk of the court will submit the application papers to the relevant magistrate who will, in the event that he or she is satisfied that the respondent is committing or has committed the acts of domestic violence and that the complainant will suffer hardship if an order is not immediately granted, grant an interim protection order against the respondent. Where the court is not satisfied, for whatever reason, the court will notify the complainant and the respondent to attend court on an allotted date for further decision. An interim protection order is of a temporary nature only and a date will be set by the magistrate and recorded on the interim protection order for return where the respondent will be provided an opportunity to show the court why a final order should not be made in the complainant's favour. The clerk of the court will arrange for a copy of the application papers together with a copy of the interim protection order to be served by the sheriff, or a member of the South African Police Services on the respondent. Service by the police is normally only required where there is a likelihood of resistance to service. On the return date, the court will consider the respondent's evidence. Where the court is satisfied on a balance of probability that the respondent has committed or is committing an act of domestic violence, it will issue a final order against the respondent. This order will remain in force until such time as it is set aside by another court.

81 Landman and Ndou 2013 22 *Contemporary Labour Law* 90.

82 Landman and Ndou 2013 22 *Contemporary Labour Law* 83–84.

If the person who is engaged in conduct that constitutes harassment is doing so electronically[83] over the Internet or by email (otherwise known as e-comm) and as a result they retain their anonymity, the Act allows the court to request details of the person from the electronic communications service provider or may order an investigation by the police to obtain the details of the alleged harasser.[84] The Act defines an "electronic communication service provider" with reference to the Regulation of Interception of Communication and Provision of Communication-Related Information Act[85] (RICPCI), where it is defined as any:

> "(a) person who provides an electronic communication service under and in accordance with an electronic communication service licence issued to such person under Chapter 3 of the Electronic Communications Act,[86] and includes any person who provides – (i) a local access communication service, public pay-telephone service, value-added network service or private electronic communication network as defined in the Electronic Communications Act; or (ii) any other electronic communication service licensed or deemed to be licensed or exempted from being licensed as such in terms of the Electronic Communications Act; and (b) Internet service provider."[87]

If the court is satisfied that a protection order should be issued where the identity of the electronic harasser is unknown, the court may issue a direction ordering a service provider to furnish the court with the harasser's information.[88] The interception of such information provided must comply with section 6 of the RICPCI.[89]

As the interim order has to be served after being granted, mobile operators and Internet service providers (ISPs) can be asked to locate relevant parties. Electronic service providers can be forced to hand over the name, surname, identity number and address of the person to whom the IP address, email or cellular phone number belongs, and ISPs that fail to hand over information can be fined R10 000, while their staff could be imprisoned for six months.[90]

The Act assumes that in all cases ISPs would be able to provide details of the identity of an individual online. However, there are cases where South African ISPs would be unable to assist if the online activity took place outside of South Africa. In those instances, law enforcement officials would be required to make inquiries with international companies, such as Google or Facebook. There are so many tools of obfuscation available that a determined perpetrator will be able to circumvent the law unless the service providers, as well as law enforcers themselves, are as well-versed in these tools as the perpetrators.

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83 Harassment via phone, SMS, email and social media is so widespread; it has developed into a layer of emotional abuse that simmers just below the surface of our nation's psyche.

84 Bick "SA's New Harassment Act Explained" (22 April 2013) http://www.women24.com/CareersAndMoney/Legal/SAs-new-Harassment-Act-explained-20130422T (accessed 2014-06-16).

85 70 of 2002.

86 36 of 2005.

87 S 1 of the Act. Landman and Ndou 2013 22 *Contemporary Labour Law* 82–83.

88 Landman and Ndou 2013 22 *Contemporary Labour Law* 83.

89 *Ibid*.

90 S 18(4)(*b*) of the Act.

The service provider must provide the information or respond that it does not have the required information within five ordinary court days. However, before providing the information, the service provider must, at least 48 hours before it does so, inform the respondent of the information that is to be provided to the court. Failure to provide the information to the court as required is a criminal offence in terms of the Act.[91]

The Act provides a victim with remedies that were previously not at their disposal owing either to the cost required or the requirements to be met. Thus, the Act has produced an environment conducive to easily obtaining a protection order and warrant of arrest, albeit suspended, so as to protect the fundamental rights of the complainant and thus achieve the purpose of the Act. However, the ease of obtaining a protection order in terms of the Act has indirectly and possibly inadvertently simultaneously produced an environment wherein an alleged respondent's rights may far too easily be infringed, curtailed and/or limited, sometimes without even adherence to the *audi alteram partem* principle in circumstances where an *ex parte* interim protection order is granted.

## 7 POTENTIAL ABUSE OF AVAILABLE REMEDIES

The Act, although a welcome piece of legislation, poses several practical problems that include, but are not limited to, the possible abuse of the Act by unscrupulous litigants, and the circumvention of the Act by cyberbullies. Just as the DVA is susceptible to abuse in divorce cases, the Act is also open to abuse. The Act differs from the DVA in at least two ways: first, the Act does not require a domestic relationship for it to be used; such a criterion often formed a deterrent to those litigants who merely wished to use the DVA for self-seeking or vengeful purposes. Secondly, the definition of harassment indicates that there is no need for a pattern of behaviour to be shown or proved to access the remedies in the Act. Essentially, behaviour in the form of a single text message or comment may comply with the definition of harassment in the Act.[92]

Furthermore, section 2(4) of the Act[93] goes beyond sections 14 and 15 of the Children's Act[94] by reducing the common-law limitations on a child's capacity to litigate and to have access to a court of law.[95] Therefore, it becomes possible for school children to become litigants; schoolyard disputes are now easily brought to the arena of the harassment court. It is envisaged that this will occur in that the source of harassment by way of electronic media or online communication is most commonly used by the younger generation. The Act and its remedies become that much more susceptible to abuse as it is now available to minors without the assistance

91 S 18(4)(*a*) of the Act.

92 Refer to s 1 of the Act.

93 See s 2(4) of the Act, which states: "Notwithstanding the provisions of any other law, any child, or person on behalf of a child, may apply to the court for a protection order without the assistance of a parent, guardian or any other person."

94 38 of 2005.

95 Chik 2008 *Journal of International Commercial Law and Technology* 26.

or consent of their parents who would normally provide reasoning and judgment before approaching the court for relief.

As easy as it is to perpetrate abuse under the cloak of anonymity through cyberbullying, it is likewise easy to fabricate abuse in order to incite police action against a supposed perpetrator. In a worst-case scenario, the application of the Act could result in the abuse of the right to privacy, which it is designed to protect.

Section 18 of the Act provides for certain criminal offences including the contravention of any prohibition, condition, obligation or order imposed by the court by means of a protection order, including an interim order; and the making of a false statement in a material respect in an affidavit stating that the respondent has contravened the prohibition, condition, obligation or order imposed by the court by means of a protection order, including an interim order.[96] Therefore, the Act does provide recourse for a person who is wrongly arrested on a warrant of arrest issued based on a protection order. However, there does not seem to be any offence created or remedy provided for a respondent who finds him- or herself continually at court on fabricated allegations.

It appears that the Act, while providing ease of use for a complainant has failed to consider the possibility of an unscrupulous complainant using the Act for vengeful self-seeking reasons. This may result in a complainant continually calling a respondent to court to oppose applications for protection orders, thereby causing the alleged harasser to be in fact harassed. The Act's remedy is for the respondent to prove that the complainant has made a false statement in an affidavit referred to in section 11(4)(*a*) of the Act; the complainant would then be guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding five years.[97] The Act further provides that the court may only make an order as to costs against any party if it is satisfied that the party in question has acted frivolously, vexatiously or unreasonably. The aforementioned remedies may be irrelevant to a respondent who seeks to prevent a complainant from continually harassing him or her by launching vexatious, frivolous or unreasonable applications to which he or she is compelled to answer in an endeavour to prevent an order being granted to his or her detriment.

It appears that such a respondent's remedy lies in section 2(1)(*b*) of the Vexatious Proceedings Act,[98] which states as follows:

> "If, on an application made by any person against whom legal proceedings have been instituted by any other person or who has reason to believe that the institution of legal proceedings against him is contemplated by any other person, the court is satisfied that the said person has persistently and without any reasonable ground instituted legal proceedings [own emphasis added] in any court or in any inferior court, whether against the same person or against different persons, the court may, after hearing that person or giving him an opportunity of being heard, order that no legal proceedings shall be instituted

96 Landman and Ndou 2013 22 *Contemporary Labour Law* 84.

97 S 18 of the Act. Any proceedings under subsection (1) shall be deemed to be civil proceedings within the meaning of s 3 (*c*) of the Appellate Division Further Jurisdiction Act 1 of 1911.

98 3 of 1956.

> by him against any person in any court or any inferior court without the leave of the court, or any judge thereof, or that inferior court, as the case may be, and such leave shall not be granted unless the court or judge or the inferior court, as the case may be, is satisfied that the proceedings are not an abuse of the process of the court and that there is *prima facie* ground for the proceedings."

An order in terms of section 2(1)(*a*) or (*b*) of the Vexatious Proceedings Act may be issued for an indefinite period or for such period as the court may determine, and the court may at any time, on good cause shown, rescind or vary any order issued.[99] Any person against whom an order has been made under section 2(1) who institutes any legal proceedings against any person in any court or any inferior court without the leave of that court or a judge thereof or that inferior court (in other words without first obtaining the necessary *probalis causa* certificate), shall be guilty of contempt of court and be liable upon conviction to a fine not exceeding one hundred pounds or to imprisonment for a period not exceeding six months.[100]

The remedy available for "harassed" respondents in terms of the Vexatious Proceedings Act is a remedy to be implemented in the High Court, which once again exposes the respondent to the costs occasioned by such remedy whereas the complainant has the ease and advantage of using the tools available at his or her disposal in the magistrates' court. Unfortunately, the magistrates' court has no inherent jurisdiction at common law to prevent the future institution of vexatious proceedings and hence, besides the remedies provided in the Act as enunciated above, the court has no other power to prevent the abuse of the Act. A respondent who finds him or herself in such a position will be compelled, if aware, to use the Vexatious Proceedings Act as this Act's purpose is to protect individuals against the institution of future vexatious proceedings.

In terms of our common law, a respondent who finds him or herself the victim of vexatious harassment proceedings may apply to court for the complainant's claim to be struck out on the basis that the claim is vexatious, frivolous and improper;[101] in terms of *Reichel v Magrath*,[102] every court has inherent rights to prevent an abuse of its process in the form of frivolous or vexatious litigation. The respondent may simultaneously apply for the existing proceedings to be stayed pending the outcome of his or her High Court application in terms of the Vexatious Proceedings Act.

## 8 THE WAY FORWARD: OPTIONS FOR REFORM

Although it can be strongly argued that the Act is innovative legislation that tackles the problem of harassment, it still needs to align with the demands of an ever-changing technological world.[103] In particular, there is a need to deal with the contradictions that emanate from the defragmented cyber-legislation

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99 S 2(1)(*c*) of the Vexatious Proceedings Act.

100 *Absa Bank Ltd v Dlamini* 2008 (2) SA 262 par 32.

101 *Cohen v Cohen* 2003 (1) SA 103.

102 14 AC 665.

103 Bandel "Legislating Against Cyber Crime in Southern African Development Community: Balancing International Standards with Country-Specific Specificities" 2018 12 *International Journal of Cyber Criminology* 10.

framework applicable to harassment.[104] The Act must be harmonised with other cyber-related legislation in an attempt to minimise the risk of double regulation and obfuscation.[105]

Further, the Act must take into account and include new and innovative methods of harassment in cyberspace – such as the use of automatic non-human agents or third-party action through the use of computer software, impersonation and instigation of third parties.[106] To further achieve regulatory equilibrium in the protection of rights, a gradation model for remedies and punishment should be adopted. The test of rationality, which is based on the subjective facts and circumstances of each case, should be cautiously applied in order adequately to balance a number of individual rights. Additionally, public policy exceptions should be made in respect of legitimate functions such as police investigations and debt collection not amounting to harassment or intimidation.[107]

## 9 CONCLUSION

This article has demonstrated that the Act has been enacted to give effect to the protection of individual fundamental rights, including but not limited to, the right to equality, privacy, dignity and freedom and security of the person.[108] In order for the Act to achieve this purpose, it aims to afford victims of harassment an effective remedy against such behaviour.[109] The Act is therefore necessary in a constitutional democracy. However, the Act should have been drafted to provide maximum protection to deserving victims of human rights violations while still minimising the potential for abuse by unscrupulous litigants by way of an interpretation of the Act that creates unjust legal remedies. This article has further shown that although the Act sought to provide maximum protection to victims, it was not drafted to minimise the potential for abuse by unscrupulous litigants.

This article has explored the definition of harassment[110] as provided for in the Act, taking into account the purpose of the Act.[111] The definition of harassment is couched widely in a manner that contributes to the

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104 Clough *Principles of Cybercrimes* (2015) 4.

105 Lohse "The Meaning of Harmonisation in the Context of European Union Law: a Process in Need of Definition" in Andernas and Andersen (eds) Theory and Practice of Harmonisation (2011) 282.

106 Vasilescu "Illegal Interception of Computer Data Transmission in the Regulation of the New Romanian Criminal Code" 2015 16 *Journal of Law and Administrative Sciences* 230.

107 Deepa and Ghatak "Mitigating Cyber Sexual Harassment: An Insight from India" 2018 1 *Asian Themes in Social Sciences Research* 40.

108 S 9(1) (equality) and s 10 (human dignity) of the Constitution, 1996.

109 Preamble to the Act.

110 S 1(1) of the Act.

111 The Preamble to the Act provides the purpose of Act 17 of 2011 as follows: "Since the Bill of Rights in the Constitution of the Republic of South Africa, 1996, enshrines the rights of all people in the Republic of South Africa, including the right to equality, the right to privacy, the right to dignity, the right to freedom and security of the person, which incorporates the right to be free from all forms of violence from either public or private sources, and the rights of children to have their best interests considered to be of paramount importance; and in order to (a) afford victims of harassment an effective remedy against such behaviour; and (b) introduce measures which seek to enable the relevant organs of state to give full effect to the provisions of this Act."

achievement of the purpose of the Act, but simultaneously, as a consequence of the wideness of the definition, the Act finds itself vulnerable to abuse. This situation occurs when the complainant's rights to equality or human dignity[112] are favoured over the rights of the respondent – that is, their rights to privacy or freedom of expression.

The Act provides for a speedy and effective remedy for those who have legitimately experienced harassment, which qualities likewise open the Act to abuse: first, unlike under the DVA, a complainant is not required to prove any type of relationship to the respondent, let alone a domestic relationship, which criterion was often a deterring factor for unscrupulous litigants. Secondly, the complainant is not required to prove a pattern of behaviour or even repetitive behaviour by a respondent; owing to the wide definition of harassment,[113] a single act of harassment may be enough and easy to conjure. Thirdly, the complainant may be a minor without the assistance of his or her parent or guardian, thereby increasing the litigation between school children who are now encouraged to take their schoolyard disputes to court. Fourthly, Internet or cyber-bullying is included in the definition of harassment and the Act allows for the disclosure of information pertaining to an alleged respondent, thereby encouraging an unscrupulous litigant to conjure cyber-bullying evidence in order to obtain details pertaining to the respondent from the service provider as provided for in the Act and thereby infringing the respondent's right to privacy.[114]

While a complainant can easily obtain a remedy, those respondents who have not engaged in harassing behaviour may conversely find themselves at the mercy of an automatic warrant of arrest obtained by an unscrupulous and vengeful complainant, sometimes even without application of the *audi alteram partem* principle. The magistrates' court does not have inherent jurisdiction to prevent frivolous or vexatious proceedings against a respondent. The Act has done little to protect a respondent from a vexatious complainant and has only provided two remedies – namely, proving that a false statement has been made by the complainant, and secondly requesting a costs order against the complainant.[115] Both remedies appear to offer little solace to a respondent who is at the mercy of an unyielding litigant. In these instances, the respondent may be well advised to incur the costs associated with a High Court application and use the Vexatious Proceedings Act to approach the High Court for an appropriate order. Therefore, although the Act is necessary, it has not sought to protect all parties involved and has left a *lacuna* that can be exploited by vengeful and unscrupulous litigants.

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112 S 9 and 10 of the Constitution of the Republic of South Africa, 1996.

113 S 1(1) of the Act.

114 Salter and Bryden "I Can See You: Harassment and Stalking on the Internet" 2009 18 *Information and Communications Technology Law* 102; Sissing and Prinsloo "Contextualising the Phenomenon of Cyber Stalking and Protection from Harassment in South Africa" 2013 15 *Acta Criminologica: African Journal of Criminology and Victimology* 15.

115 See heading 7 above.

# BURN VICTIMS AND SKIN DONATIONS: A LEGAL PERSPECTIVE

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**SUMMARY**

This article highlights the need for skin donations to treat burn wounds. South Africa has an exceptionally high number of burn wound victims per annum. The ideal way to treat burn wounds is to transplant skin from another part of the patient's body to the affected areas (autografts). Unfortunately, this is not always possible or feasible and in those cases skin from cadavers (allografts) should be used, but this can only be done if the deceased has indicated a wish during his or her lifetime that tissue be donated for transplantation use after death. If the deceased has not indicated his or her wish to be a tissue donor, family members could be asked to consent to a donation. The article looks at the legal requirements in South Africa for a valid skin donation as well as the requirements should skin be imported owing to a lack of enough tissue donors in the country. This position is contrasted to the position in the United Kingdom with a view to establishing whether South Africa can learn from another jurisdiction concerning the procurement of skin for transplantation. The possible reasons that people do not donate skin are also touched upon.

> "[O]ne of the hardest things about getting sick, really sick, is that you are separated from the people you love. Even when families are dedicated to the patient, illness separates the well from the sick. The sick suffer alone, they undergo procedures and surgeries alone, and in the end, they die alone. Transplant is different. Transplant is all about having someone else join you in your illness. It may be in the form of an organ from a recently deceased donor, a selfless gift given by someone who has never met you, or a kidney or liver from a relative, friend or acquaintance. In every case, someone is saying in effect, let me join you in your recovery, your suffering, your fear of the

unknown, your desire to become healthy, to get your life back. Let me bear some of your risk with you."[1]

## 1 INTRODUCTION

According to the World Health Organisation (WHO), nearly 180 000 people die annually from burn wounds, making this a global public health problem, with the highest number of deaths being in Africa and South-East Asia.[2] Non-fatal burns are a leading cause of morbidity, including prolonged hospitalisation, disfigurement and, in some cases, even disability that results in social rejection.[3] In South Africa, nearly 1.6 million people suffer from burn wounds annually, with approximately 268 severe cases being reported every month.[4] An estimated R364 million is spent annually for care of burns from kerosene (paraffin) cook stove incidents.[5] The socio-economic effects of these incidents include loss of income and prolonged care, as well as the emotional trauma associated with burn wounds.

Between April 2014 and March 2015, 3 206 burn patients were treated by a burn care unit at one private hospital group in South Africa. Of these, 1 859 were male burn victims, suggesting that many of these injuries are work-related.[6] Children are also hugely vulnerable as the South Africa has a rate of 2.8 burn-related deaths per 100 000 children, which is more than five times higher than other middle-income countries, which average 0.5 burn-related deaths per 100 000 children.[7] Infants and small children have a larger skin surface area because of their larger head circumference and shorter legs in proportion to their body size, causing increased evaporative losses and decreased body temperature compared to adults. Infants also have a thinner dermis causing deeper burn wounds.[8] According to Martinez, death from burn wounds occurs mainly because there are no effective, affordable and synthetic treatment options available.[9] The best solution for

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1 Mezrich *How Death Becomes Life* (2019) 19–20. The sick in this instance could be the burn victim and the donation of skin could be the joining in recovery.

2 Anon "Burns" 6 March 2018 https://www.who.int/news-room/fact-sheets/detail/burns (accessed 2019-02-26).

3 *Ibid*.

4 Ngobeni "Shortage of Skin for Burn Victims" 2018 *Rekord Centurion* https://rekordcenturion.co.za/151245/shortage-of-skin-for-burn-victims/ (accessed 2019-03-01). See also Allorto, Wall and Clarke "Quantifying Capacity for Burn Care in South Africa" 2018 *Burns Open* 188–192 for burn wound statistics per province in SA.

5 Anon https://www.who.int/news-room/fact-sheets/detail/burns. See also Rode, Berg and Rodgers "Burn Care in South Africa" 2011 24(1) *Annals of Burns and Fire Disasters* 7–8.

6 Nicholson, Swinney, Wilson and Saville "Netcare Burn Statistics 2014/2015: An Eye-Opener" http://www.netcare.co.za/News-Hub/Articles/ArticleId/248/netcare-burns-stistics-20 (accessed 2019-02-26).

7 Wesson, Bachani, Mtambeka, Millar, Hyder and Van As "Pediatric Burn Injuries in South Africa: A 15-Year Analysis of Hospital Data" 2013 44 *Injury: International Journal of the Care of the Injured* 1477–1482. See also Burn Care Trust https://www.burncare.co.za/ (accessed 2019-02-26).

8 Moss "Treatment of Burn Patient in Primary Care" 2010 23(11) *Advances in Skin & Wound Care* 517–524.

9 Dr Roux Martinez, head of the only specialized pediatric burn unit in Africa, as quoted in Ngobeni "Shortage of Skin for Burn Victims" 2018 *Rekord Centurion*

this problem is cadaveric human skin. The statistics of children dying from burn wounds reflect numbers that are staggering and are a good indication of the number of burn injuries suffered by children in the country. Every citizen could make a difference to these statistics by deciding in favour of skin donation after their own death or the death of a loved one.[10]

A burn wound is the destruction of skin that meets flames, hot fluids, electricity or radiation. The severity of the burn injury is determined by the amount of surface area of the skin that is damaged and the depth of the tissue that is involved.[11] Excessive skin injuries do not have the capacity for healing on their own and require surgery. When possible and available, skin is taken from unburnt parts of the patient's own body and transplanted onto the injured parts. This is known as an autograft. Often there is no unburnt skin available for transplantation and the need then arises for donated skin. The process of transplanting donated skin from a donor onto a burn victim is known as an allograft.

The biggest problem with treating burn wounds is the unavailability of donor skin. Donor skin from cadavers "is recognized as the gold standard for temporary cover following early excision when insufficient autograft is available".[12] Skin protects the body against physical or biological trauma. When donor skin is used to cover burn wounds, it is a temporary measure and it helps with the heat and fluid loss as well as protecting the burn victim against infections and immense pain.[13] Because donated skin functions as a temporary measure, there is no need for tissue typing. As alluded to by specialists in the field, "the cadaveric skin promotes epithelialisation, suppresses infection, prepares the wound bed for definitive closure, provides a dermal template for epithelial grafts and prevents desiccation of tissue".[14] Before 2016, South Africa did not have an official skin donation programme.[15] Specialists used skin procured on their orders from dead donors but there was no official policy regulating the procurement of skin or the transplantation thereof. If no human skin was available, the skin of pigs was used as an alternative. This is called xenotransplantation and is not the

https://rekordcenturion.co.za/151245/shortage-of-skin-for-burn-victims/ (accessed 2019-03-01).

10 Ngobeni 2018 *Rekord Centurion*.

11 Burn Care Trust "A National Skin Bank for South Africa" https://www.burncare.co.za/national-skin-bank-south-africa/ (accessed 2019-02-26).

12 *Ibid*.

13 Most burn wounds are painful because the sensory nerve endings in the skin remain intact but become exposed because of the loss of the epidermis. See Moss 2010 *Advances in Skin & Wound Care* 517–524.

14 Rhode, Rogers, Adams, Kleintjes, Whitelock-Jones, Muganza and Allorto "The Dilemma of Treating Major Burns in South Africa" 2013 *SAMJ* 2.

15 The first allograft skin bank was established at Bewerwick, Holland, in 1952. A skin bank was also introduced in India in 2000. See Gore "Cadaver Skin Donation and Skin Bank" 2017 *Indian Journal of Burns* 3–5. See also Rhode *et al* 2013 *SAMJ* 1–4, in which the following is stated: "To serve the greater population of burn victims, every effort should be made to establish a skin bank for universal use, rather than channeling scarce financial resources into procedures that have a very limited role in SA."

ideal situation and raises many legal and ethical questions as cross-species infections could manifest.[16]

The purpose of this article is to provide an overview of how human skin donations are regulated in South Africa. The article commences with the legal and regulatory framework relating to skin donations in South Africa. This is followed by a brief comparative discussion on the legal position in the United Kingdom (England and Wales). In order to provide further context to this discussion, the article then posits the possible reasons for the lack of donated skin. The article concludes by considering the legality of importing cadaver skin as a possible solution for the shortage of donated skin. The focus is only on allografts, as the only option to treat more severe burn wound cases is to use donated cadaver skin.

## 2 THE LAW AND SKIN DONATIONS IN SOUTH AFRICA

### 2 1 The Constitution of the Republic of South Africa

Section 2 of the Constitution of the Republic of South Africa, 1996 (the Constitution) states: "The Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled." Section 27(1) of the Constitution stipulates that everyone has the right to have access to health care services. Although this sounds plausible, it should be noted that the above-mentioned right to access health care is internally limited by section 27(2), which stipulates that the State must take reasonable legislative and other measures within its available resources to achieve the progressive realisation of this right.[17]

The constitutional validity of the statutory framework guiding organ and tissue donations has not been tested by South African courts. It is often misconstrued that the case of *Soobramoney v Minister of Health (KwaZulu-Natal)*[18] might have an influence in this field but the legal issues in this case were specifically about the provision of haemodialysis as an emergency health care measure. The legal measures guiding the transplant process have not been evaluated. It could therefore be accepted that the donation of organs and tissue, as well as subsequent transplantation thereof, is constitutionally acceptable by virtue of the fact that no part of the National Health Act[19] (NHA) or accompanying regulations has been declared unconstitutional.

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16 See Slabbert "Xenotransplantation" 2015 36(3) *Obiter* 725–737.

17 For a constitutional perspective on organ and tissue donations and transplantation, see Venter "A Selection of Constitutional Perspectives on Human Kidney Sales" (unpublished LLM dissertation, University of South Africa) 2012; Labuschagne "An Analysis of Organ Transplantation in South Africa With Specific Reference to Organ Procurement" (unpublished LLM dissertation, University of Pretoria) 2013.

18 1997 (1) SA 765 (CC).

19 61 of 2003.

## 2 2 The National Health Act 61 of 2003

The NHA repealed the Human Tissue Act 65 of 1983.[20] Chapter 8 of the NHA regulates deceased and living tissue donation as well as subsequent transplantation.[21] As indicated earlier, the focus of this article is only on the use of human skin from deceased donors (cadavers). Section 1 of the Act defines tissue as "human tissue and includes flesh, bone, a gland, an organ, *skin* (author's own emphasis), bone marrow or body fluid, but excludes blood or a gamete". Skin is thus regarded as tissue according to the NHA.

Section 62 of the NHA mandates how a person should indicate their decision to become an organ or tissue donor after their death. According to section 62(1)(*a*) of the NHA, a person who is competent to make a will (16 years or older) may in a will,[22] or a document signed by him or her and at least two competent witnesses (14 years or older);[23] or in an oral statement made in the presence of at least two competent witnesses,[24] donate his or her body or any specified tissue (skin) thereof to be used after his or her death. This section, however, raises numerous practical difficulties, which are discussed below.

First, section 62(1)(*a*)(i) specifies that a living competent person may dispose of his or her tissue in a will. However, after the death of a person, a will has to be validated by the Master of the High Court.[25] This process could take several days or even months. Ideally, skin should be procured within six hours after death, but this is merely a guideline for best practice, as sometimes skin is procured a few days after death.[26] Thus, to record a wish that you want to be a skin donor after your death in a will seems futile, except if it is regarded as guidance to family members, who have knowledge of the contents of the will, and who will have to make a decision concerning a skin donation.[27]

Secondly, section 62(1)(*a*)(ii) relates to the fact that a person can donate their tissue by signing a document in the presence of two competent witnesses, this section could be interpreted in various ways. Before discussing these different ways, it is interesting to note that this section of the Act is only supposed to be applicable to deceased donation. Yet, this is

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20 In 2012, Chapter 8 of the NHA came into effect, and repealed the Human Tissue Act 65 of 1983; see Proc 11 in *GG* 35081 of 2012-02-27.

21 See also Slabbert "The Law as an Obstacle in Solid Organ Donations and Transplantations" 2018 *THRHR* 70.

22 S 62(1)(*a*)(i) of the NHA.

23 S 62(1)(*a*)(ii) of the NHA.

24 S 62(10)(*a*)(iii) of the NHA.

25 For another perspective, see Slabbert "Burial or Cremation: Who Decides?" 2016 *De Jure* 230–241, at 232–235, where the deceased's wishes in a will is discussed.

26 Skin Donation "Facts" http://www.skindonation.in/facts.html (accessed 2019-02-26). The harvesting process takes about 30–45 minutes. A battery-operated instrument is used and only the uppermost layer is shaved off. There is no bleeding and bandages are put over the parts where skin was taken. There is no disfigurement of the body.

27 South Africa follows a system of opting-in, meaning individuals or their family members must consent to a tissue donation. If there is no explicit consent, no tissue will be taken for transplantation purposes. Donations are done altruistically.

also the process used for living tissue (bone) donations. Within the clinical environment, a transplant coordinator will ask a person whether they are willing to act as a living bone donor by providing them with the option to donate the femoral head when removed from their body during hip-replacement surgery. In this case, the donor's consent is recorded when the donor signs a donor consent form in the presence of two witnesses.[28]

When this process is followed in the case of a deceased donor, such a signed document could be compared to a living will,[29] which has no legal status in South Africa.[30] The document thus only serves as a directive to the family of the deceased when they are asked to consent to the tissue (skin) donation from the deceased.[31] If it is assumed that this part of the Act refers to the registration process of becoming a tissue donor while alive, it seems irrelevant as registration on the Organ Donor Foundation's (ODF) website[32] can be done online without following the same formalities. The online registration does not require the presence of two witnesses – neither their details nor signatures are captured. It is in any event best practice in the clinical environment for a transplant coordinator always to ask the family of the deceased for consent to a donation. For this to occur, the hospital has to refer the death to a transplant coordinator.[33] No coordinator will act and accept a donation by virtue of an indication that the deceased made a choice to be a tissue donor while still alive – for example, by having a written signed document, a sticker on his or her driver's licence, or wearing a bracelet stating "tissue donor".

Thirdly, the stipulation in the Act that tissue can be donated in an oral statement in the presence of competent witnesses also raises practical concerns. For example, who will attest to such a statement? Who will do research to verify the validity of such a statement or where will the witnesses be found when one takes into consideration the time constraints associated with donations? Furthermore, this approach has not been followed in hospitals that perform transplantations. The relevance of this section might only be found if the family of the deceased consents to the donation based

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28 S 55 of the NHA addresses the removal of tissue from a living person. This must be done with the written consent of the donor, granted in the prescribed manner, and in accordance with prescribed conditions. Neither the Act nor the Regulations clarify what these conditions are.

29 A living will is a declaration or an advance directive that represents a person's wishes. It is not a will in the testamentary sense of the word. There is in South Africa, at present, no law regarding the validity or enforceability of a living will; see South African Medical Association "Living Wills and Advance Directive" www.samedical.org>guidelines-with-regard-to-living-wills-2012.pdf (accessed 2020-01-25).

30 See *Clarke v Hurst* 1992 (4) SA 630 (D). "There is in South Africa at present no law regarding the validity or enforceability of living wills": see South African Medical Association SAMA www.samedical.org>guidelines-with-regard-to-living-will-2012.pdf (accessed 2019-06-15).)

31 "A regular will is always respected, even if the next of kin do not like it"; see Van Diest, Lopes and Niesing "Cadaveric Tissue Donation: A Pathologist's Perspective" 2003 *J Med Ethics* 135–136.

32 Organ Donor Foundation www.odf.org.za.

33 There is no routine referral system in SA. See Slabbert and Venter "Routine Referrals: A Possible Solution for Transplantation Shortages" 2017 *South African Journal of Bioethics & Law* 15–19.

on the fact that the deceased made it known (orally) that he or she wanted to be a donor after death. It therefore seems that section 62(1) in the NHA serves no real purpose with regard to enhancing skin donations.

Within this context, it should be borne in mind that the legal and regulatory framework does not function in isolation but is implemented within a clinical environment. In this setting, the transplant coordinator is tasked with the responsibility of seeking consent from a relative of the deceased for a tissue (skin) donation. In this case, the relevant relative can in fact veto the decision that the deceased made while still alive.[34] Family members may be influenced by a variety of factors, such as not knowing the deceased's wishes or fear of bodily disfigurement.[35] Veatch feels strongly that family members should respect the wishes of the deceased if they are known. He asserts "the body is still the mortal remains of an individual and his or her wishes deserve respect".[36] He refers to the deontological theory of "duty", which, in the context of tissue donation, means we owe a duty to the dead, regardless of the consequences. In other words, the deceased's wishes should be honoured regardless of the family's own view on tissue (skin) donation. There must be respect for the autonomy of the deceased exercised before death to make a choice to donate human tissue (skin) or not. To this end, Veatch states, "the ethical principle of respect for autonomy is one of the most profound and widely affirmed deontological duties".[37] He concludes by saying that, in practice, the deceased's own wishes must prevail. Any indication that the deceased wanted to donate tissue (skin) should be enough to authorise tissue procurement even if the family objects. He argues that the procurement organisation[38] has a moral duty – not just a right – to follow the deceased's wishes.[39] If his argument could be followed in South African hospitals where donor referrals are made, it would make a huge difference to the number of tissue donations and would be more in line with respect for personal choices.

Section 62(2) of the NHA states: "[in] the absence of a donation under subsection (1)(*a*)", the family of the deceased, in a specific order,[40] should be asked for consent for a donation. The Act is thus clear that the family should only be asked *in the absence of* a will, a signed document or an oral statement made by the deceased. Yet, as indicated above, good practice is *always* to ask the family for consent. If family members do not give consent or if there is a disagreement between them, the donation will not happen.[41] If

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34 Cay "Contemporary Issues in Law and Ethics: Exploring the Family Veto for Organ Donation" 2019 *Journal of Perioperative Practice* 1–7. See also Isdale and Savulescu "Families Shouldn't Be Allowed to Veto Organ Donation" (2016) http://bit.ly/2vO9DuD (accessed 2017-06-15).

35 Cay 2019 *Journal of Perioperative Practice* 1.

36 Veatch *Transplantation Ethics* (2000) 146.

37 Veatch *Transplantation Ethics* 147.

38 South Africa does not have a procurement agency functioning nationwide.

39 Veatch *Transplantation Ethics* 148.

40 The order in which persons should be asked for consent, according to s 62(2) of the NHA, is: spouse, partner, major child, parent, guardian, major brother or major sister.

41 See also Van Diest, Lopes and Niesing "Cadaveric Tissue Donation: A Pathologist's Perspective" 2003 *J Med Ethics* 135.

consent for a skin donation is given in writing by the family of the deceased, the procurement of the skin takes place. It is usually done by a retrieval officer from an authorised tissue bank.[42]

According to section 54 of the NHA, the Minister of Health may designate an institution as an authorised institution, which may acquire and supply tissue (skin). Such an institution may receive payment in respect of the acquisition and supply of the tissue. However, the amounts may not exceed an amount that is reasonably required to cover the costs involved with the acquisition or supply of the tissue.[43] A tissue bank must therefore ideally be a non-profit company in terms of the Companies Act.[44] To sell or trade in human tissue is an offence;[45] if convicted, a person could be given a fine or imprisonment for a period not exceeding five years, or both a fine and such imprisonment.[46] Section 61(5)(*a*) of the NHA also states clearly that a person who charges a fee for human tissue shall be guilty of an offence and the same punishment as above is prescribed.

Skin is not an organ according to the NHA and it is not necessary to procure skin while the blood flow continues, albeit artificially as, for example, in the case of a brain-dead donor donating solid organs. Therefore, skin can be procured in a mortuary or a funeral home. Section 67 of the NHA prescribes that a medical practitioner in charge of a mortuary may, in writing and in the prescribed manner, authorise an authorised institution (tissue bank) to remove any specified tissue from a body before burial, on condition that permission has been given by the family for a donation to take place. At post-mortem examinations, donated tissue that is not relevant to the outcome of the post mortem may also be provided to an authorised institution at its request.[47]

Section 68 of the NHA authorises the Minister to make regulations in terms of the Act. This has been done and it is important to note that these regulations are as important as the Act itself, as they contain further detail regarding specific matters in Chapter 8. Only those parts of the regulations applicable (or possibly applicable) to skin donations and transplantation are highlighted in the parts to follow. Different sets of regulations are discussed and this underscores the difficulty in legislative interpretation.

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42 In terms of the Regulations Relating to Tissue Banks (GN R182 in GG 35099 of 2012-03-02), a tissue bank is "an organisation, institution or person that provides or engages in one or more services including cells and/or tissue from living or deceased individuals for transplantation purposes and is registered in terms of regulation 3 of these regulations".

43 S 60 of the NHA.

44 71 of 2008. A tissue bank could also be part of a tertiary institution, e.g., the Centre for Tissue Engineering at the Tshwane University of Technology.

45 S 60(4)(*b*) of the NHA.

46 S 60(5) of the NHA.

47 S 67(4) of the NHA.

## 2 3 Regulations

### *2 3 1 Regulations Regarding the General Control of Human Bodies, Tissue, Blood, Blood Products and Gametes*[48]

The first regulation that is relevant in the Regulations Regarding the General Control of Human Bodies, Tissue, Blood, Blood Products and Gametes (General Control Regulations) concerning skin donations is regulation 8(1). This section stipulates that a retrieval officer has a period of 24 hours after the death of a person of whom tissue (skin) has been donated to remove the tissue so donated. As mentioned earlier, it is ideal to remove donated skin within 6 hours of death. Unfortunately, especially in cases of an unnatural death, it is not always possible to remove skin within the 24-hour period. Skin can sometimes be removed even 5 days after death. It takes approximately 30 to 45 minutes for a retrieval officer to retrieve skin with a battery-operated instrument. Skin is taken from the back of the legs, the thighs, the back of the arms and the back of the deceased. There are eight layers of skin, but only the uppermost layer is harvested. There is no bleeding, no mutilation takes place and there is no disfigurement. Bandages are placed over the parts where skin has been removed. The process described above is followed to uphold the dignity of the donor.

Regulation 9 addresses the establishment of death. Death according to the NHA is brain death. According to regulation 9, the death of a person should be established by at least two medical practitioners, one of whom shall have been practising as a medical practitioner for at least five years after the date on which he or she was registered as a medical practitioner. This is also relevant to the procurement of solid organs for transplantation. The regulation also indicates that in instances involving the removal of eye tissue, a person from whom the tissue is removed shall be deemed dead upon the issuing of a certificate of death in terms of the relevant law. Unlike with corneas, skin is not mentioned specifically in regulation 9. It is suggested that the regulations should be amended to include specific reference to skin, as skin can also be procured from a deceased who has been removed from a ventilator.

It appears that regulation 14(3) of the General Control Regulations should be read with section 62 of the NHA as it determines that if a person who has died has in their will or in a document donated tissue of their body, a medical practitioner may act upon a will or document that on the face of it appears to be legally valid. As indicated under the discussion of the NHA, despite this section, the practice in hospitals is always to ask the family for a donation and not to act on documents indicating the wish of the deceased.[49]

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[48] The Regulations Regarding the General Control of Human Bodies, Tissue, Blood, Blood Products and Gametes were published in the Government Gazette GN R180 in *GG* 35099 of 2012-03-02.

[49] See Slabbert and Molusi "The Possible Effect of the Protection of Personal Information Act 4 of 2013 on Organ and Tissue Donations" 2017 *Obiter* 632–640.

### *2 3 2 Regulations Relating to Tissue Banks*[50]

The Regulations Relating to Tissue Banks (Tissue Bank Regulations) start by stipulating limitations on the use of human tissue. They state explicitly, among other things, that no one may remove, acquire, process or store human tissue (skin) unless he or she is authorised with the Department of Health.[51] The Tissue Bank Regulations prescribe the procedure – namely, "an application for authorisation of a tissue bank shall be made to the Director General".[52] Regulation 5 prescribes the organisational structure of a tissue bank. It may be freestanding (a non-profit company) or be part of an institution.[53] All activities relating to tissue (skin) procurement and distribution for transplantation must comply with the Guiding Principles of the WHO and the Declaration of Istanbul.[54] Every tissue bank should also have a medical director to advise and oversee the processes.[55] Regulation 5(7) is problematic. It states that only a "competent person" may be involved with, among other things, the retrieval of tissue (skin) from cadavers. A "competent person" is defined in regulation 1 as "a medical practitioner and registered as such in terms of the Health Professions Act, 1974". Current practising tissue retrieval officers are not registered medical practitioners as required by the Regulations. Therefore, it is submitted that the drafters of the Regulations have made an error in this regard as it is not common practice, nor is it necessary, to have the competencies of a medical practitioner to successfully procure human tissue (skin) for transplantation purposes.

Regulation 6 prescribes the record management systems a tissue bank needs to maintain. The whole donation process from the donor to the ultimate recipient of the skin should be easily traceable. The following documentation should be available at the tissue bank: the consent form, the donor suitability assessment, an explanation of the retrieval processes, the quarantine and infectious disease testing documents and reports, as well as the processes done in the laboratories to preserve the donated tissue (skin), and the final labelling, storage and distribution records.[56] There must also be a system in place to notify the Director General about serious adverse events that may influence the safety and quality of the skin.[57] Regulation 6(5) determines that all information at a tissue bank pertaining to donors and recipients is confidential.[58] Regulation 8 prescribes that a tissue bank shall be inspected every year for compliance. Unfortunately, this is not always

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50 GN R182 in *GG* 35099 of 2012-03-02.

51 Reg 2(1) of the Tissue Bank Regulations.

52 Reg 3(1) of the Tissue Bank Regulations.

53 The Centre for Tissue Engineering is a part of the Tshwane University of Technology (SA).

54 Reg 5(2) of the Tissue Bank Regulations. See also the website of the WHO at www.who.org and the Declaration of Istanbul at www.declarationofistanbul.org. South Africa is a signatory of the Declaration and a member state of the WHO and is therefore bound by the prescriptions of both concerning organ and tissue donations.

55 Reg 5(4) of the Tissue Bank Regulations.

56 Reg 6(1) of the Tissue Bank Regulations. See also reg 14.

57 Reg 6(1)(*d*) and (*e*) of the Tissue Bank Regulations.

58 See also reg 15 of the Tissue Bank Regulations. See also Slabbert and Molusi 2017 *Obiter* 632–640.

complied with by the Department of Health. Regulation 21 makes it an offence to contravene or fail to comply with any provision of the Regulations. A person found guilty is liable to a fine not exceeding R40 000 and/or imprisonment for a period not exceeding two years.

If the Tissue Bank Regulations are applied to skin donations, the following is clear. Only a retrieval officer from an authorised tissue bank may remove skin from a deceased's body. The officer must then transport the donated skin to the tissue bank. After skin has been procured from a cadaver, blood tests and other medical tests are done to determine whether there are any infectious agents present that may cause transplantation-transmitted diseases. Cadavers excluded from skin donation include where HIV, hepatitis B and C, sexually transmitted infections, active skin cancers or septicaemia is present.[59] If the potential donor does not have the above conditions, the procured skin is preserved, stored, labelled and packed according to approved standard operating procedures.[60] Skin is preserved in an 85 per cent glycerol solution and is stored at between 4 and 8 degrees Celsius. The skin is then distributed in specified holders for transplantation to burn units.

In this part of the article under heading 2, the NHA and its various regulations (insofar as both relate to skin donations) have been discussed and certain shortcomings have been indicated. In general, there is enough guidance to regulate the donation of skin even though not always ideal and sometimes ambiguous. In the following section, the legal and regulatory environment relating to skin donations in the United Kingdom (England and Wales) is briefly discussed. By providing a brief overview of how skin donation, transplantation and banking is regulated in the UK, the following section aims to determine whether any improvements should be made to the South African framework.

## 3 THE LAW AND SKIN DONATIONS IN THE UNITED KINGDOM

The importance of tissue donation can often seem trivial when compared to organ donation. Historically, the latter has gained more attention from politicians, legislators, clinicians and the general public, even though tissue donation and banking were the forerunner in this environment. The first tissue bank in the United Kingdom (UK) was established in Leeds in 1956.[61] In less than a decade, by 1965, it had outgrown its facility and the Yorkshire Regional Tissue Bank was established to provide skin, bone and heart valves.[62] This was later followed by the establishment of a further two tissue

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59 See Skin Donation "Facts" (undated) http://www.skindonation.in/facts.html (accessed 2019-02-06).

60 Compliant with ISO 31000:2009 (revised by ISO 31000:2018), which provides principles and generic guidelines on risk management.

61 Phillips and Pedraza "The Use of the Ionization Technique for Tissue Sterilization: The International Atomic Energy Agency (IAEA) Experience" 2013 *Cell Tissue Bank* 341–348.

62 Guam, Reynolds, Jones, Clarkson, Gillan and Kaye "Tissue and Corneal Donation and Transplantation in the UK" 2012 *British Journal of Anaesthesia* i43–47, i43.

banks in London and Cambridge.[63] Eventually a decision was made by the National Blood Service[64] to centralise tissue banking services (apart from eye banking) throughout the UK, and in 2005 a multi-tissue bank was established in Liverpool, which currently provides a national comprehensive tissue service to the National Health Service (NHS).[65] Even though, the Liverpool centre coordinates most donations of deceased tissue, it is not the sole supplier, as other private and public establishments are also involved in the supply of tissue.[66]

From a clinical point of view, great strides were being made to establish and develop tissue donation and banking. However, this was not the case in the legislative and regulatory environment. The process of tissue donation was, fortunately, prescribed by the Human Tissue Act 1961 (which also governed the organ donation process) but, up until 1993, there was no guidance pertaining to the regulation of tissue banks.[67] In other words, there was no consensus on how to approach donor selection, retrieval, storage, distribution or tracking of allografts.[68] Consequently, the American Association of Tissue Bank's guidelines were followed until the British Association of Tissue Banking developed the first set of UK tissue banking standards.[69]

Today, tissue donation, transplantation and banking are regulated by a vast collection of legislative and regulatory sources. These are discussed below. It should be noted that this section only focuses on the framework followed in England and Wales.[70]

## 3 1 Overview of the legal and regulatory framework

Tissue donation is often described as life-enhancing as opposed to life-saving. Even so, its significance is clearly reflected in the fact that 7 453 tissue products were issued during 2019/2020.[71] The donation,

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63 NHS Blood and Transplant "History of Tissue Banking" https://www.nhsbt.nhs.uk/tissue-and-eye-services/about-us/history-of-tissue-banking/ (accessed 2020-12-16).

64 Currently, the National Blood Service forms a part of the NHS Blood and Transplant (NHSBT).

65 NHSBT https://www.nhsbt.nhs.uk/tissue-and-eye-services/about-us/history-of-tissue-banking/ (accessed 2020-12-16).

66 Nuffield Council on Bioethics "Human Bodies: Donation for Medicine and Research" (2011) https://www.nuffieldbioethics.org/publications/human-bodies-donation-for-medicine-and-research (accessed 2020-12-16).

67 NHS Blood and Transplant "Regulatory Compliance" https://www.nhsbt.nhs.uk/tissue-and-eye-services/safety-and-quality/regulatory-compliance/ (accessed 2020-12-17).

68 Freelander, Boyce, Ghosh, Ralston and MacNeil "Skin Banking in the UK: The Need for Proper Organisation" 1998 *Burns* 19–24 19.

69 *Ibid*.

70 The legislative and regulatory framework regarding organ and tissue donation and transplantation is a devolved issue within the UK.

71 NHSBT Annual Report and Accounts 2019/2020 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/924960/30204_022nd_Annual_Report_and_Accounts_2019-2020_Accessible.pdf (accessed 2020-12-12). The statistics are based on skin, heart valves and tendons. Unfortunately, statistics that focus solely on skin products were not available.

transplantation and banking of tissue is governed by a broad array of legal sources, including primary and secondary legislation, common law as well as guidance provided by statutory and non-statutory bodies. The discussion that follows distinguishes between the sources regulating 1) the donation and transplantation of tissue, and 2) tissue establishments.

### *3 1 1 The donation and transplantation of tissue*

The term "consent" has become inseparable from the practice of organ and tissue donation, in that the Human Tissue Act 2004 (HT Act) regards it as the fundamental principle that underpins the lawful storage, use and removal of human tissue. The HT Act specifically refers to securing "appropriate consent". When the Act is read alongside the Organ Donation (Deemed Consent) Act 2019 (in England) and the Human Transplantation (Wales) Act 2013 (in Wales), "appropriate consent" is to be understood as "deemed consent" in certain circumstances.[72] In other words, if an individual is over 18, he or she will be considered as a potential organ and tissue donor after death, unless he or she makes a decision not to be a donor or has nominated a representative to make a decision on his or her behalf.[73] Neither the HT Act nor the Acts relating to the deemed consent system mandate how an individual should record a decision regarding tissue donation.[74] Thus, a potential donor can record their wish on the Organ Donor Registry, tell a friend or family member (nominated representative) or record their decision in writing. In essence, the information should lead a reasonable person to conclude that the potential donor would have consented to the donation.[75] The consent process above relates to the potential donor whereas the consent process followed by the health care professionals within the clinical context is further discussed below under heading 3.2. It is important also to highlight in this section that the Human Tissue (Permitted Material: Exceptions) (England) Regulations 2020 stipulate that certain tissue may only be procured if expressed consent (as opposed to deemed consent) was obtained.[76] Skin is not regarded as an excluded material, but it is worth noting that express consent is required for skin donation that forms part of a novel or rare transplant – for example, with skin that forms part of the face.[77] The HT Act makes provision for a number of offences, but most relevant to this discussion is that it is an offence to

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72 Apart from the primary legislation above, other legal instruments should also be consulted when dealing with skin donation and transplantation. These include, but are not limited to, the Mental Capacity Act 2005, Human Rights Act 1998 and Equality Act 2010, as well as the relevant Human Tissue Authority Codes of Practice.

73 S 3 of the HT Act; s 1 of the Organ Donation (Deemed Consent) Act 2019; s 4 of the Human Transplantation (Wales) Act 2013. (Note, the Welsh legislation makes use of the term "express consent".)

74 Human Tissue Authority *Code F: Donation of Solid Organs and Tissue for Transplantation (Part Two: Deceased Organ and Tissue Donation)* (2020) 54.

75 HTA *Code F (Part Two)* 48.

76 Reg 2 of the Human Tissue (Permitted Material: Exceptions) (England) Regulations 2020.

77 See reg 2(*a*)–(*x*) of the Human Tissue (Permitted Material: Exceptions) (England) Regulations 2020 for the complete list of excluded materials.

remove tissue without consent,[78] and to store or use tissue for anything other than a qualifying purpose.[79]

Under the HT Act, the Human Tissue Authority (HTA) was established to act as the regulator for human tissue and organs.[80] The HTA's role as a statutory body is to provide codes of practice and standards that prescribe both procurement and transplantation activities.[81] These codes aim to provide guidance to health professionals carrying out transplant activities.[82] In other words, the codes serve as an extremely helpful resource that all individuals involved with donation and transplantation activities can consult for assistance in navigating more easily the legislative and regulatory framework. Additionally, the HTA's active role is to ensure that all tissue establishments comply with the necessary quality and safety standards. This role is discussed below.

### *3 1 2 Tissue establishments*

Unlike in the early 1990s, the tissue banking process is now governed by legislation. The European Tissues and Cells Directive, consisting of the European Union (EU) Directive on Tissues and Cells[83] and its associated Commission Directives[84] were transposed into UK law by means of the Human Tissue (Quality and Safety for Human Application) Regulations 2007. It should be noted that these regulations, following Brexit, have been amended and should be read alongside the Human Tissue (Quality and Safety for Human Application) (Amendment) (EU Exit) Regulations 2019/481 and the Human Tissue (Quality and Safety for Human Application) (Amendment) (EU Exit) Regulations 2020. The EU Exit Regulations were drafted to ensure that, upon leaving the EU, the UK would maintain current safety and quality standards for blood, organs, tissue and cells.[85]

In addition to the HT Act's relevant sections on consent discussed above, these regulations set out to regulate activities concerning the intended use of human tissue and cells in or on a human recipient.[86] The purpose of these regulations is to ensure high standards of quality and safety when transplanting human tissue, as well as to establish a unified approach to tissue banking throughout the European Community.[87] The frameworks above are applicable to "tissue establishments", which includes tissue banks

78 S 5 of the HT Act.

79 S 8 of the HT Act.

80 S 13 of the HT Act.

81 See HTA Codes of Practice https://www.hta.gov.uk/guidance-professionals/codes-practice (accessed on 2021-01-16): *Code A: Guiding Principles and the Fundamental Principles of Consent* (2020); *Code F (Part Two)*.

82 HTA *Code F (Part Two)* 43.

83 Directive 2004/23/EC of the European Parliament and of the Council (31 March 2004).

84 Commission Directives 2006/17/EC (8 February 2006) and 2006/86/EC (24 October 2006).

85 Human Tissue (Quality and Safety for Human Application) (Amendment) EU Exit Regulations 2020 Explanatory Notes.

86 Human Tissue (Quality and Safety for Human Application) Regulations 2007 Explanatory Notes.

87 *Ibid*.

as well as other units that store skin for autografts. Typically, these are burns and plastic surgery units within a hospital. In accordance with the Regulations, skin is regarded as tissue as "tissue" includes "all constituent parts of the human body formed by cells, but does not include (a) gametes, (b) embryos outside of the human body, or (c) organs or parts of organs if it is their function to be used for the same purpose as the entire organ in the human body".[88]

As seen above, the HTA also has a part to play in this process. In accordance with the Regulations, its role as "designated competent authority" is to license the establishments that procure, process, store, distribute, import or export tissues for human application.[89] The HT Act empowers the HTA to issue all tissue establishments with the necessary directions[90] and codes of practice[91] to ensure that the establishments are complying with the expected standards. Additionally, the HTA has the power to inspect or search the tissue establishments.[92]

Due to the limited scope of this article, only the key regulations and their relevance to tissue establishments are briefly noted. In the first instance, an appropriate HTA licence is required by any establishment that *stores* or *imports* skin for human application.[93] An establishment that holds an HTA licence may then enter into a third party agreement with another establishment, which will then be allowed to procure, test, process, export or distribute skin on their behalf.[94] In order to obtain a licence, an establishment is required to comply with requirements relating to i) staff and facilities; ii) quality management procedures; iii) reporting; and iv) records.[95] Notably, the main point of interest under the licensing agreement is the requirement to appoint a "designated individual" (DI) who plays a key role in ensuring that the quality and safety requirements of the Regulations are implemented.[96] The DI must hold the required qualifications as prescribed by the Regulations,[97] and fulfil the statutory duties as set out by regulation 12. These duties include that the DI should ensure that suitable practices are used when undertaking licensed activities; that others working under the licence are suitable and that all other conditions of the licence are complied

88 Reg 5 of the Human Tissue (Quality and Safety for Human Application) Regulations.

89 Reg 3 of the Human Tissue (Quality and Safety for Human Application) Regulations.

90 See HTA *Guide to Quality and Safety Assurance for Human Tissues and Cells for Patient Treatment* (2021) http://docplayer.net/11257872-Human-tissue-authority-guide-to-quality-and-safety-assurance-for-human-tissues/ (accessed on 2021-01-15).

91 See HTA *Code A* and HTA *Code F (Part Two)*.

92 Part 5 of the Human Tissue (Quality and Safety for Human Application) Regulations.

93 Reg 7(1) of the Human Tissue (Quality and Safety for Human Application) Regulations.

94 Reg 6 of the Human Tissue (Quality and Safety for Human Application) Regulations.

95 Reg 11 of the Human Tissue (Quality and Safety for Human Application) Regulations.

96 *Ibid*.

97 Reg 11(3) of the Human Tissue (Quality and Safety for Human Application) Regulations. The DI is required to be a suitable person to fulfil their statutory duties and furthermore must have either a diploma, certificate or other formal qualification in the field of medical or biological sciences or be suitably qualified based on academic qualification and practical experience.

with, such as the requirements relating to information and confidentiality.[98] An additional noteworthy focal point of the Regulations is the requirement relating to the register and the reporting obligations that are placed both on the HTA and the tissue establishments. According to regulation 19, all serious adverse events and reactions affecting donors or recipients in human application treatment must be reported to the HTA.[99] This information alongside a register of the licensed establishments and the activities they are allowed to carry out must be publicly accessible.[100] Lastly, as it relates to the discussion under heading 5 below, a brief mention should be made to the fact that the Regulations (read in conjunction with the HTA directions)[101] allow for the import and export of tissue and cells.[102]

## 3 2 Tissue donation pathway

Given that the effectiveness of tissue donation and transplantation laws relies largely on how they operate and are implemented within the clinical environment, it is necessary also to provide an outline of the clinical pathway of tissue donation in England and Wales. As most of the technicalities involved in the tissue donation and transplantation process are discussed elsewhere in this article, this section briefly explains only the five main stages followed.

Before the process is outlined, it should be noted that specialist nurses (SN)[103] play a key role in the tissue donation pathway.[104] The process below focuses solely on tissue donation. However, it should be noted that during the organ donation process, consent can also be requested simultaneously to procure tissue. The process is initiated by the identification and referral of the potential donor.[105] This action is usually triggered by the clinical staff at a relevant hospital, after they have spoken to the family about the option of tissue donation and explained that a referral will be made. The referral will most likely be made to the National Referral Centre (NRC) in Liverpool and should be made as soon as possible after verification of death. Interestingly, in 2020, the Gloucestershire Hospitals NHS Foundation Trust decided to pioneer a tissue donation initiative in England where two SN in tissue donation were appointed within the hospitals to streamline the donation

98 Reg 12 and 13 of the Human Tissue (Quality and Safety for Human Application) Regulations.

99 Reg 19(1) of the Human Tissue (Quality and Safety for Human Application) Regulations.

100 Reg 18 and 19(2) of the Human Tissue (Quality and Safety for Human Application) Regulations.

101 HTA *Guide to Quality and Safety Assurance for Human Tissues and Cells for Patient Treatment* https://www.hta.gov.uk/sites/default/files/HTA%20Guide%20to%20Quality%20and%20Safety%20Assurance%20for%20Human%20Tissues%20and%20Cells%20for%20Patients%20Treatment_1.pdf.

102 Reg 15 of the Human Tissue (Quality and Safety for Human Application) Regulations.

103 For purposes of this article a SN includes a specialist nurse involved in organ donation (SNOD), a specialist nurse involved in tissue donation (SNTD) and a specialist requester.

104 HTA *Code F (Part Two*) 47.

105 Guam *et al British Journal of Anaesthesia* i43–47, i44.

pathway.[106] Ordinarily, the team of SN at the NRC receive the donor referral and subsequently contact the potential donor family to discuss donation options.[107] The SN complete the consent and donor screening process in accordance with the legislative and regulatory framework discussed above.[108] The next stage is to retrieve the tissue. The retrieval takes place in a mortuary in liaison with the NRC and the mortuary team.[109] The potential donor should usually be in the mortuary within six hours of confirmation of circulatory death for optimal tissue retrieval.[110] In essence, the donor is prepared as if they were undergoing a surgical procedure and is also reconstructed afterwards to an appearance that is reflective of their pre-donation state.[111] By following this approach, the donor is treated in a way that upholds and respects their dignity.[112] After procuring the skin, it is transported to the tissue bank, where it is processed immediately to conserve the structure of the tissue.[113] The final stage of the process is to use the skin for transplantation purposes. Here, the skin product is most often ordered from the NRC via hospitals across the UK, and is ultimately transplanted to the recipient.[114]

After careful consideration of the legislative and regulatory framework, as well as the clinical pathway regarding tissue donation in England and Wales, this article concludes that the South African legislature could draw two initiatives from the UK's approach to tissue donation, transplantation and banking. First, South Africa could benefit from establishing a regulatory body like the HTA. This body would not only improve the acute tissue shortage in the country but might also have a positive impact on both deceased and living organ donation rates. Secondly, and related to the first initiative, is the drafting and subsequent dissemination of professional guidance regarding tissue donation and transplantation. The professional guidance would assist those working in the field to navigate the ambiguous NHA and its accompanying regulations. In addition, accessible professional guidance would ensure a consistent approach by all individuals practising in this area. It is, however, acknowledged that the South African environment faces certain hinderances since donation and transplantation services are not centralised by a single body (like the NHS) rooted within a public health care

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106 NHS Gloucestershire Hospital Foundation Trust "Gloucestershire Hospitals Pioneer New Organ Donation Approach" https://www.gloshospitals.nhs.uk/about-us/news-media/press-releases-statements/gloucestershire-hospitals-pioneer-new-organ-donation-approach/ (accessed 2021-01-18).

107 NHSBT "Tissue and Eye Services" https://www.nhsbt.nhs.uk/tissue-and-eye-services/about-us/ (accessed 2021-01-18).

108 *Ibid*.

109 Guam *et al* 2012 *British Journal of Anaesthesia* i43–47, i45.

110 Joint United Kingdom Blood Transfusion and Tissue Transplantation Services Professional Advisory Committee "Guidelines for the Blood Transfusion Services in the United Kingdom" (2013) https://www.transfusionguidelines.org/red-book/ (accessed 2021-01-18).

111 Guam *et a*l 2012 *British Journal of Anaesthesia* i43–47, i45.

112 NHSBT "Get the Facts About Organ Donation" https://www.organdonation.nhs.uk/helping-you-to-decide/about-organ-donation/get-the-facts/ (accessed 2021-01-18).

113 Guam *et al* 2012 *British Journal of Anaesthesia* 108 (S1) i43–47, i45.

114 Clinton "Staring Down Death to Save Lives: The Grisly Work of Human Tissue Banks" (2014) *https://www.express.co.uk/life-style/health/505460/Life-inside-the-Liverpool-NHS-human-tissue-bank* (accessed 2021-01-17).

sector. Thus, it should be borne in mind that any improvements to the South African framework should take cognisance of the private/public health care sector divide.

Apart from legislative and regulatory shortcomings, there are also other factors that influence the availability of skin. The following section analyses the possible reasons for the shortage of donated skin in South Africa.

## 4 POSSIBLE REASONS FOR DONATED SKIN SHORTAGES

### 4 1 The will of the deceased or the family

As discussed above, family members can veto a decision that the deceased expressed while still alive.[115] If the next of kin being asked for a donation are not aware of the deceased's wishes, they usually do not consent to the donation. If they know that the deceased wanted to donate, the decision to consent is simplified as it is then based on the family members' motivation to fulfil the wishes of the deceased. More public awareness regarding donations is thus essential.[116] Some authors like Emson have different views and are of the opinion that the right of control over the cadaver should be vested in the State as representative of those who may benefit from a donation.[117] Among other arguments, he reasons that the cadaver has changed from an object without intrinsic value destined only for disposal, and has now become a vital resource.[118] He argues the following:

> "The concept of the right of a person to determine before death, the disposal of their body after death, made sense only when there was no continuing use for that body; it makes neither practical nor moral sense now, when the body for which the dead person no longer has any use, is quite literally a vital resource, a potential source of life for others … If this argument is correct, then it is even more morally unacceptable for the relatives of the deceased to deny utilisation of the cadaver as a source of transplantable organs [tissue] … The need of the potential recipient, the benefit which may accrue to him or her, to me trumps and surpasses all other considerations."[119]

His argument is based on the fact that "opting in", where people voluntarily donate their organs, has failed and he therefore feels strongly that the relatives should not have a right over the deceased. He further argues that to ask for their consent to procure organs or tissue from the deceased is

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115 See Beauchamp and Childress 2009 *Principles of Biomedical Ethics* 359: "In practice … few individuals sign donor cards, the cards are rarely available at the time of death, and procurement teams routinely seek authorization from the family, even if the decedent left a valid donor card. The family has become the primary donor (i.e., the decision maker about donation) rather than the individual."

116 See also Slabbert and Venter "Autonomy in Organ Donations v Family Consent: A South African Legislative Context" 2019 *De Jure Law Journal* 458–467.

117 Emson "It Is Immoral to Require Consent for Cadaver Organ Donation" 2003 *J Med Ethics* 125–127.

118 Emson 2003 *J Med Ethics* 126.

119 *Ibid*.

unacceptable, as the good of others (the recipients) should be the predominant concern.[120]

Harris echoes these views when he says:

> "The benefits from cadaver transplants are so great, and the harm done in going against the wishes of those who object so comparatively small, that we should remove altogether the habit of seeking the consent of either the deceased or relatives [and therefore] provide for the automatic or mandatory availability of donor organs [tissue]."[121]

## 4 2 Not enough donors

The NHA and its regulations have been discussed above. South Africa follows a procurement system called "opting in*"*. This means a tissue (skin) donor must indicate while he or she is still alive an intention to donate skin after death. If there is no indication that is what the deceased wanted, the family will be asked for consent, as explained above. In other words, the donations are altruistic, and consent needs to be given, either by the deceased him- or herself, while living, or the next of kin after death. Other countries such as the UK (England and Wales), France, Spain and Belgium follow a system of "opting out". In such a system, every citizen is an organ or tissue donor unless the individual records in writing his or her objection to a donation before death. To change to such a system in South Africa might not be viable as "[t]he poor and uneducated may be disadvantaged as only the more informed groups would exercise autonomy, since only they would be aware of their right to opt-out".[122] An opt-out system also creates a reverse burden of proof that might not withstand constitutional muster.[123] Spain, a country that has seen a continuous increase in deceased donors for over 20 years has had a system of opting out since 1979 but despite having this system, relatives are still always asked for consent before a donation takes place. It thus seems that it is not the system of opting out that has increased the number of donors in Spain; it is rather having an organisational approach that strongly relies on routine referrals for the process of deceased donations.[124] Noyes *et al* came to a similar conclusion in their short-term impact study of introducing a soft opt-out organ donation system in Wales.[125] Their study concluded that the change to an opt-out system did not

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120 Emson 2003 *J Med Ethics* 127. See also Savulescu "Death, Us and Our Bodies: Personal Reflections" 2003 *J Med Ethics* 127–130; Harris "Organ Procurement: Dead Interests, Living Needs" 2003 *J Med Ethics* 130–139.

121 Harris 2003 *J Med Ethics* 130.

122 Taylor *Stakes and Kidneys: Why Markets in Human Body Parts Are Morally Imperative* (2005) 8. See also Etheredge, Penn and Watermeyer "Opt-In or Opt-Out to Increase Organ Donation in South Africa? Appraising Proposed Strategies Using an Empirical Ethics Analysis" 2018 *Developing World Bioethics* 119–125.

123 See Slabbert "This Is My Kidney, I Should Be Able to Do With It What I Want: Towards A Legal Framework for Organ Transplants in South Africa" 2012 (31) *Medicine and Law* 617–640.

124 See Slabbert and Venter "Routine Referrals: A Possible Solution for Transplantation Shortages" 2017 *SAJBL* 15–19.

125 Noyes, McLaughlin, Morgan, Walton, Curtis, Madden, Roberts and Stephens *"*Short-Term Impact of Introducing a Soft Opt-Out Organ Donation System in Wales: Before and After Study" 2019 9 *British Medical Journal* doi:10.1136/ bmjopen-2018-025159.

necessarily have an immediate impact on the organ donation rates but that it should rather be regarded as "the first step of a longer journey".[126] It is worthwhile to note here that Kent is of the opinion that a lack of potential donors might not be the sole factor contributing to the shortage of donor tissue but that health professionals' attitudes and lack of awareness also has an impact.[127]

## 4 3 No procurement agency

South Africa's legislation on donations is, as indicated above, only a chapter within an Act.[128] Although the regulations were drafted with the aim of expanding on the Act, there is in certain instances a lack of clarity, as highlighted above. Most other countries where tissue donations take place have separate specific pieces of legislation addressing only donations and transplantation. In some instances, these distinct legislative frameworks create procurement organisations to assist with the procurement of donated organs or tissue. In the United States of America, the National Organ Transplant Act of 1984 created the United Network for Organ Sharing (UNOS)[129] and the Organ Procurement and Transplant Network (OPTN).[130] Both these organisations are involved in the procurement and distribution of donated organs or tissue. In the UK, the HT Act 2004, created the HTA, which acts as the regulator for human tissue and organs.[131] As a statutory body, and as discussed above, the HTA provides codes of practice and standards that prescribe both procurement and transplantation activities to which all licensed hospitals are required to adhere.[132] Unlike UNOS, the HTA is not directly involved with the allocation of tissue and organs. This role is fulfilled by the National Health Service Blood and Transplant (NHSBT), a special health authority tasked with ensuring that a fair, transparent and equitable approach to patient selection and organ allocation is followed.[133] Spain has a National Transplant Organisation (NTO) as part of Spain's health ministry.[134] South Africa does not have a procurement agency, nor is the process of donation or transplantation nationally controlled. There is not even a national waiting list for patients in need of an organ or tissue. There is also not a national list of organ or tissue donors except for the list of registrations that is maintained and held by the ODF. This registry comprises only the names of people who have indicated their willingness to be an organ or tissue donor after death, but it has no legally binding powers.

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126 *Ibid*.

127 Kent "Tissue Donation and the Attitudes of Health Care Professionals" in *Organ and Tissue Donation: An Evidence Base for Practice* (2007) 102–122, 103.

128 Ch 8 of the NHA.

129 United Network for Organ Sharing (UNOS) https://unos.org.

130 Organ Procurement and Transplant Network (OPTN) https://optn.transplant.hrsa.gov.

131 Human Tissue Authority (HTA) www.hta.gov.uk.

132 S 13 of the HT Act.

133 NHSBT "Introduction to Patient Selection and Organ Allocation Policies" POL 200/4.1/2017.

134 Deutsches Referenzzentrum für Ethik in den Biowissenschaften "The Spanish Transplantation System" http://www.drze.de/in-focus/organ-transplantation/modules/das-spanische-transplantationswesen.

## 4 4 Lack of education (fear of mutilation)

Tissue donations generally occur less often than solid organ donations. A possible reason might be a lack of public understanding regarding the difference between organ and tissue donation. Some people think that if they sign an organ donor card it does not include the use of tissue after death.[135] Siminoff *et al* also indicate that the process around tissue donations differs from the donation of solid organs. The donation of solid organs is time sensitive and therefore a transplant coordinator would approach the family of a brain-dead patient in person to ask for a donation. Tissue can be procured after death in a mortuary or at a funeral parlour and therefore the family could be asked telephonically for a donation. This has been a problem for some families as they do not understand the process of tissue procurement after their deceased loved one has been moved from the hospital. Some are even suspicious that tissue could easily be sold for commercial gain whereas organs can only be used for transplantation in a patient who needs an organ and the process takes place in hospital.[136]

Sque *et al* report that family members have declined tissue donations because of a fear of the body being disfigured.[137] Family members also feel the deceased has suffered enough and that they (the family) must protect the dead body and must not relinquish their guardianship of the body.[138] The aim of Sque *et al*'s research was specifically to find out why families declined a donation after death, but apart from the obvious comments made by the family members, they discovered there were underlying issues such as a perceived violation of a body, a perceived desecration of the dead body, a feeling that the perfect aesthetic image of the deceased would be destroyed and a perceived view that the deceased would be exposed to prolonged suffering as it was impossible for family members to detach themselves from the person they once loved and admired.[139]

Although no formal studies on why people do not want to donate skin after death in South Africa has been done, it could be accepted that families would have the same issues as highlighted above. This once again shows a lack of awareness and knowledge on skin donations. Tissue banks should therefore focus more on campaigns to inform the public how skin donations are done and emphasise that the body will not be mutilated – an open casket funeral is still possible as the skin is taken from the back or the legs and arms of the deceased and only the top layer is removed; the body is thus not skinless or mutilated.

It is clear that there is not yet enough information on tissue donations in South Africa. This could be seen as a contributing factor to the overarching problem with donation shortages. People are asked for a donation at a very

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135 Siminoff, Traino and Gordon "Determinants of Family Consent to Tissue Donation" 2010 69(4) *J Trauma* 956–963.

136 Siminoff *et al* 2010 *J Trauma* 963.

137 Sque, Long, Payne and Allordyce "Why Relatives Do Not Donate Organs for Transplants: 'Sacrifice' or 'Gift of Life'?" 2007 61(2) *Journal of Advanced Nursing* 134–144.

138 Sque *et al* 2007 *Journal of Advanced Nursing* 138.

139 Sque *et al* 2007 *Journal of Advanced Nursing* 140.

vulnerable time. They are grieving the loss of a family member. This combined with ignorance concerning skin donations or how skin is procured from a dead body is a recipe for failure. South Africa desperately needs skin for all the burn victims but unless there is better education of the population at large, there will always remain a shortage of donated skin despite the high level of deaths in South African hospitals. The possibility of importing skin should thus also be investigated.

## 5 IMPORTATION OF CADAVER SKIN

Section 68(1)(*g*) of the NHA gives authority to the Minister to make regulations regarding the importation of tissue. In March 2012, this was done through the promulgation of the Regulations Relating to the Import and Export of Human Tissue, Blood, Blood Products, Cultured Cells, Stem Cells, Embryos, Foetal Tissue, Zygotes and Gametes (Import Regulations).[140] According to regulation 2, no person may import tissue without a permit. A person who wishes to import tissue (skin) must apply in writing to the Director-General (DG) on a prescribed form attached to the regulations. Once the application is received, the DG issues a permit to the person authorising him or her to import tissue (skin), subject to conditions as the DG may determine and record on the permit. In the case of tissue for therapeutic use (for example, skin for burn wounds), an import permit may only be issued if the application is accompanied by information in respect of the health status of the donor, particularly regarding transmissible diseases and the results of tests performed in that regard.[141] The DG may refuse to issue an import permit if the relevant information has not been provided. In such a case, the DG must give reasons in writing for the refusal.[142] The person who applied for the import permit must keep record of each importation and such record must be submitted to the DG before the end of February each year, for the preceding calendar year.[143] Each consignment of tissue (skin) imported into the Republic must be accompanied by a certificate from the supplier, stating that the biological substance (skin) has been exported in terms of applicable laws and regulations of the country from which the substance originates.[144]

A register must be kept by an authorised institution (tissue bank) that has imported skin in terms of the Regulations.[145] A copy of the register must be provided to the DG at intervals not exceeding six months and the register itself must be kept for a minimum period of five years after the last entry in such register.[146]

It thus seems possible for a registered tissue bank to import skin, should it be regarded as a viable option for the skin shortages locally.

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140 Reg R181 of *GG* 35099 of 2012-03-02.
141 Reg 4(3) of the Import Regulations.
142 Reg 4(5) of the Import Regulations.
143 Reg 4(8) of the Import Regulations.
144 Reg 4(10)(*b*) of the Import Regulations.
145 Reg 7 of the Import Regulations.
146 Reg 7(3) of the Import Regulations.

## 6 CONCLUSION

In general, skin and organ or tissue donations do not affect people daily and therefore few really care about it, or so it seems. However, if a family member is in dire need of a kidney or a liver to save their life, or a child has been severely burned, suddenly relatives and friends become aware of organ or tissue donations. This should change. There should be more awareness campaigns on the need for skin specifically. Information should highlight that nearly every deceased person can donate skin without the body being mutilated. This will give hope to the many burn victims suffering from indescribable pain and suffering.

The article started with a quote, and we would like to end with a quote from an unknown author in the same book as at the beginning:

> "Don't think of organ [skin] donation as giving up part of yourself to keep a total stranger alive. It's really a total stranger giving up almost all of themselves to keep part of you alive."[147]

[147] Mezrich *How Death Becomes Life* 269.

# METHODS TO USE WHEN TEACHING LEGAL ETHICS IN SOUTH AFRICA

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**SUMMARY**

Teaching legal ethics must be more than just compliance with the requirements of the legal profession but also an opportunity for every law faculty or law school to make a contribution to the development of a culture of ethics. Whether legal ethics are taught in a stand-alone module or integrated in any other module, the lecturer has to determine the goals and objectives of the module and how to achieve them and also how to assess whether the set goals and objectives have been achieved. In designing a module on legal ethics, the lecturer's own style and personality will influence the module's structure, style and technique. The lecturer therefore needs to choose the teaching method that suits him or her. Teaching methods identified include case studies, problems, Socratic instruction, discussions, group discussions, video and film presentations, co-curricular activities, lectures, the use of social media and the Internet, clinical participation, role play and simulations, law clinics, written assignments, one-minute essays, games, and moot courts. Most of these methods are not exclusive; in teaching, one most often uses a combination of the different methodologies. This article focuses mainly on the methods to be used (the "how" question) when teaching legal ethics. The objectives (the "what and why" questions) and structural aspects (the "where" questions) are also dealt with briefly. The "how" question is important because how we approach teaching needs to reflect the changing student body, the increase in student numbers and the changing learning style of our students. In answering the "how" question, various methodologies are discussed as possible ways to teach legal ethics in a South African context.

## 1 INTRODUCTION[1]

In a joint press statement by the South African Law Deans Association, the Law Society of South Africa and the General Council of the Bar, it is stated that "legal practice and ethics could be viewed as capstone courses" in the final year of study.[2] The statement envisages that ethics could "be taught contextually and expose students to the values of social responsiveness in legal practice".[3] It also stated that "[t]he profession is currently undergoing an ethical crisis, and these fundamentals must be inculcated into prospective and candidate attorneys right from law school throughout their vocational and continuing professional development."[4] It is now eight years later and the teaching of legal ethics remains of utmost importance.[5] There is still a dire need for the introduction of a legal ethics module in the South African LLB (a four-year undergraduate law degree). As most South African law schools (faculties) have been revisiting their LLB programmes as part of the South African national recurriculation project, a unique opportunity was available for law schools to ensure the inclusion of legal ethics in their LLB programmes.

In the LLB Qualification Standard, ethics and integrity are described as an applied competence for LLB students:

> "The graduate has knowledge of relevant ethical considerations in law and is able to conduct her/himself ethically and with integrity in her/his relations within the university and beyond, with clients, the courts, other lawyers and members of the public."[6]

Teaching legal ethics should therefore be more than just compliance with the requirements of the legal profession but must also be seen as an opportunity by every law faculty or law school to make a contribution to the development of a culture of ethics. Through teaching legal ethics lecturers can assist students to

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1 A first contribution on teaching legal ethics to South African law students was published as Snyman-Van Deventer and Swanepoel "Teaching the Theory and Skills of Legal Ethics to South African LLB Students" 2017 *Obiter* 127. This article develops the more practical aspects of teaching legal ethics with specific focus on the nine methods of teaching identified and very briefly discussed in the first article, as well as two more methods identified to assist in teaching legal ethics.

2 The South African Law Deans Association, the Law Society of South Africa and the General Council of the Bar "Joint Press Statement: Legal Education in crisis? Law Deans and the Legal Profession Set to Discuss Refinement of LLB degree" 30 January 2013. Issued by Barbara Whittle Communication Manager, Law Society of South Africa.

3 *Ibid*.

4 *Ibid*.

5 Van Zyl and Visser "Legal Ethics, Rules of Conduct and the Moral Compass: Considerations From a Law Student's Perspective" 2016 19 *Potchefstroom Electronic Law Journal* 1 13–15; Robertson and Kruuse "Legal Ethics in South Africa: Possibilities, Challenges and Opportunities" 2016 32(2) *South African Journal on Human Rights* 344 345–348; Kruuse "Substantive Second-Level Reasoning and Experiental Learning in Legal Ethics" 2012 2 S*tellenbosch Law Review* 280 280–284.

6 Council on Higher Education *Higher Eduation Qualifications Sub-Framework: Qualification Standard for the Bachelors of Laws (LLB)* (May 2015) 1–17 15.

find their inner ethical compass and help them make decisions accordingly. Van Zyl and Visser emphasise that a moral compass is also needed to guide the practitioner.[7] Menkel-Meadow and Sander suggest that students should be equipped with a sense of individual responsibility and self-regulation and they must be able to ask moral and professional questions, and develop a sense of concern for the welfare and interest of the public.[8]

The first step in a process to include the teaching of legal ethics in the LLB programme is to determine the content of such a module and to decide if the teaching of legal ethics is the teaching of rules of conduct and professional responsibility only or whether it is more than just that.[9] Green declares that students must be equipped as lawyers with knowledge of legal ethics and the profession's values, and be able to use this knowledge to identify and solve ethical problems or dilemmas.[10] In re-curriculation, faculties in South African law schools must determine the specific aspects and knowledge of legal ethics to be taught either in the legal ethics module or integrated with the curriculum.[11]

The second step is to determine whether legal ethics should be taught (i) in only one module, or (ii) in a core module but also be included in other substantive modules; or (iii) throughout the entire curriculum without any specific module dedicated to legal ethics. In the (re)curriculum process, South African law schools must decide between these options. Even when choosing to teach legal ethics in a stand-alone module, legal ethics may still also be taught in other modules. Taking into account the lack of resources and teaching staff, it may be a short-term solution to include aspects of legal ethics across the curriculum.

The third step is to determine how to teach legal ethics. The lecturer needs to determine the specific methods of teaching that will best suit not only his or her own style, but that will also contribute to optimising the learning of the students.

This article focuses mainly on the methods to be used (the "how" question) when teaching legal ethics. The objectives (the "what and why" questions) and structural aspects (the "where" questions) will be dealt with very briefly.[12] The "how" question is important because how we approach teaching needs to reflect the changing student body, the increase in student numbers and the changing learning style of our students. In answering the "how" question, twelve

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7 Van Zyl and Visser 2016 *PELJ* 9.

8 Menkel-Meadow and Sander "Infusion Method at UCLA: Teaching Ethics Pervasively" 1995 58 *Law and Contemporary Problems* 129 130.

9 Snyman-Van Deventer and Swanepoel 2017 *Obiter* 127 140.

10 Green "Less is More: Teaching Legal Ethics in Context" 1998 *William and Mary Law Review* 367. Also see Menkel-Meadow and Sander "The 'Infusion' Method at UCLA: Teaching Ethics Pervasively" 1995 58 *Law and Contemporary Problems* 129 130; Snyman-Van Deventer and Swanepoel 2017 *Obiter* 140.

11 Green 1998 *William and Mary Law Review* 367.

12 For a discussion on the objectives and structural aspects, see Snyman-Van Deventer and Swanepoel 2017 *Obiter* 127–147.

methodologies[13] from the American experience and two additional methods, namely the one-minute essay and moot courts, are discussed as possible ways to teach legal ethics in a South African context. The teaching methods[14] identified are case studies,[15] problems,[16] Socratic instruction,[17] discussions,[18] group discussions, video and film presentations,[19] co-curricular activities,[20] lectures,[21] the use of social media and the Internet, clinical participation, role play and simulations, law clinics, written assignments, one-minute essays, games, and moot courts. As Kruuse said of her article published in 2012, it is hoped that this article too "will give readers food for thought, not only about the way in which law is taught at their various faculties and law schools, but also take the subject of legal ethics more seriously".[22]

## 2 ANSWERS TO THE WHAT, WHERE, AND HOW QUESTIONS

### 2 1 What?

Whether legal ethics are taught in a stand-alone module or in any other module, the onus is on the lecturer to determine: (i) all the goals and objectives of the module; (ii) how to achieve the goals and objectives; and (iii) how to assess whether the set goals and objectives have been achieved.[23] In designing a module on legal ethics, the lecturer must give attention to structure, style, technique and substance to ensure that the identified outcomes, goals and objectives are met.[24] According to Terrel, more emphasis should be placed on

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13 Burns (in "Teaching Legal Ethics" 1993 4(1) *Legal Education Review* 141 151–154) identified seven methods, namely case studies, problems, Socratic instruction, discussions, video and film presentations, co-curricular activities and lectures. Those seven as well as the use of social media and role play are briefly discussed in Snyman-Van Deventer and Swanepoel 2017 *Obiter* 143–146.

14 Burns 1993 *Legal Education Review* 151–154; Snyman-Van Deventer and Swanepoel 2017 *Obiter* 143–146.

15 Burns 1993 *Legal Education Review* 151.

16 Burns 1993 *Legal Education Review* 152.

17 *Ibid*.

18 Burns 1993 *Legal Education Review* 153.

19 *Ibid*.

20 Burns 1993 *Legal Education Review* 154.

21 *Ibid*.

22 Kruuse 2012 S*tellenbosch Law Review* 280 280.

23 Burnham "Teaching Legal Ethics in Contracts" 1991 *Journal of Legal Education* 107; Henriss-Anderssen "Teaching Legal Ethics to First Year Law Students" 2002 13(1) *Legal Education Review* 49; Snyman-Van Deventer and Swanepoel 2017 *Obiter* 139.

24 Terrell "Ethics With an Attitude: Comments on New Directions for Keck Philanthropy" 1995 58 *Law and Contemporary Problems* 355 355.

the outcomes and the lecturer should rather focus on what he or she teaches than how he or she teaches it.[25]

Aaronson identifies the four overlapping domains of good lawyering as role conceptualisation, problem-solving, decision-making and practical judgment.[26] In designing and also teaching a legal ethics module, we can contribute to the development of all four of these domains. Brest states that law students will need to solve problems, make decisions and plan throughout their careers[27] and a good lawyer must be able to "assist clients in articulating their problems, defining their interest, ordering their objectives, and generating, assessing, and implementing alternative solutions".[28] To enable a student to achieve all that, a student needs multifaceted skills and therefore our teaching needs to contribute to the development of all of these skils.[29]

According to Green, lecturers should ensure that they equip their students as best they can to become lawyers with (i) ethical knowledge and professional values; (ii) the skill to recognise ethical problems as they arise in practice; and (iii) the ability to solve these ethical dilemmas.[30] Tzannes indicates that the objectives of teaching legal ethics are (i) to teach the rules of professional conduct, (ii) to instil doctrines of ethical practice, and (iii) to enable students to identify their various responsibilities when making an ethical decision.[31]

In light of all these imperatives, we must ask the question: why do we want to include a module on legal ethics in our curriculum, and what do we want to teach in such a module?[32]

The teaching of legal ethics may be described as teaching students to understand:

(i) the legal profession, its structures, roles and responsibilities;[33]
(ii) the lawyer's role and responsibility when providing professional service;[34]
(iii) the disciplinary rules of the legal profession;[35]

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25 *Ibid*.

26 Aaronson "Thinking Like a Fox: Four Overlapping Domains of Good Lawyering" 2002 9 *Clinical Law Review* 1 2.

27 Brest "The Responsibility of Law Schools: Educating Lawyers as Counsellors and Problem Solvers" 1995 58 *Law and Contemporary Problems* 5 9.

28 *Ibid*.

29 *Ibid*.

30 Green 1998 *William and Mary Law Review* 367. Also see Menkel-Meadow and Sander 1995 *Law and Contemporary Problems* 130.

31 Tzannes "Legal Ethics Teaching and Practice: Are There Missing Elements?" 1997 1 *TM Cooley Journal of Practical and Clinical Law* 59 66; Snyman-Van Deventer and Swanepoel 2017 *Obiter* 141.

32 Snyman-Van Deventer and Swanepoel 2017 *Obiter* 140.

33 Burns 1993 *Legal Education Review* 141; Morgan "Use of the Problem Method for Teaching Legal Ethics" 1998 39 *William and Mary Law Review* 409 409; Menkel-Meadow and Sander 1995 *Law and Contemporary Problems* 130.

34 Burns 1993 *Legal Education Review* 141 141.

35 *Ibid*.

(iv) the student's own values, moralities and attitudes, individual responsibility and self-regulation;[36]

(v) the student's own decision-making in answering individual questions on the profession and own responsibities and questions on how to commit to the legal profession;[37]

(vi) questions on morals and the legal profession;[38]

(vi) the legitimacy of requiring a lawyer to do something in conflict with his or her own personal values;[39] and

(vii) the necessity to develop a sense of concern for the public interest and welfare.[40]

In view of the above, the content of a legal ethics module should include more than rote learning. It should include a focus on the development of an understanding of the general theory of ethics as well as the specific legal ethics or responsibilities and ethics of lawyers as governed by the rules of the law societies, the general bar and the Legal Practice Council, and especially the *Code of Conduct for All Legal Practitioners, Candidate Legal Practitioners and Juristic Entities*.[41] This should enable students not only to make ethically responsible decisions when practising law, but also in their personal lives. Students should understand theoretical approaches to legal ethics, the purpose, objectives and functions of legal ethics and the rules and principles of legal ethics. A module on legal ethics should further deal with specific practice issues such as admission requirements and the fit-and-proper requirement; codes of conduct; observing the law; professional negligence and professional misconduct; accepted professional practices; prescription of matters; the attorney/client relationship; the best interest of clients; the interest of justice; a legal practitioner's duties to the court; touting and marketing of legal services; honesty and integrity; trust money and financial management; fees and billing; charging for legal services; and the regulatory requirements applicable to attorneys and advocates. It must be emphasised that even though these practice-specific issues will most often form the core of a module on legal ethics, other ethical issues (as already mentioned) should not be seen as less important, but as contributing to the development of a holistic view and sense of legal ethics.

Beca states:

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[36] Burns 1993 *Legal Education Review* 141; Menkel-Meadow and Sander 1995 *Law and Contemporary Problems* 130.

[37] Burns 1993 *Legal Education Review* 141.

[38] Menkel-Meadow and Sander 1995 *Law and Contemporary Problems* 130.

[39] Burns 1993 *Legal Education Review* 141.

[40] Menkel-Meadow and Sander 1995 *Law and Contemporary Problems* 130.

[41] Legal Practice Council Notice 198 of 2019.

> "If we want students to be prepared to solve ethical dilemmas, then it is crucial to teach them how to do it. Hence, we need to give them the tools to make a serious discernment and therefore, offer them a method of using those tools."[42]

It is thus clear that we have to determine our goal with teaching legal ethics, as well as the content of the legal ethics module in the South African context, before we can determine the method to teach legal ethics.[43] Kruuse states that the task is rather "to attempt to build students' own capacities for reflective judgment".[44]

## 2 2 Where?

Not only is it necessary to determine the goals and objectives of teaching legal ethics before it is decided which teaching method to use, but (as mentioned above) it must also be decided whether to teach legal ethics (i) in one stand-alone[45] module only; (ii) in a core module and then also include it in other substantive modules; or (iii) throughout the entire curriculum in all substantive modules where applicable or possible, with no specific module dedicated to legal ethics (the so-called pervasive method[46] or mixed method). In the single/stand-alone module method, legal ethics are taught in one core module, which will include codes of conduct, professional rules and responsibilities, and also the philosophical and ethical issues that give rise to such codes or rules.[47] If it is decided that legal ethics should be taught in a single module, it is still possible to include aspects thereof in other modules as applicable. Solberg is adamant that legal ethics cannot be taught in one module only and emphasises that it should be included in most modules.[48] Joy is also of the opinion that it is better to include legal ethics in all modules to ensure that students learn that ethical problems, questions and issues are part of all areas of the practice of law.[49] Beca states that a legal ethics course (module) "should be also linked to

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42 Beca "Teaching Legal Ethics to Law Students: Why, What, How and Who Might Teach?" 2016 3 *Asian Journal of Legal Education* 85 88.

43 Snyman-Van Deventer and Swanepoel 2017 *Obiter* 141.

44 Kruuse 2012 S*tellenbosch Law Review* 280 282.

45 Burns 1993 *Legal Education Review* 151.

46 The pervasive method is the systematic teaching of legal ethics in substantive modules as relevant issues arise and demonstrating that legal ethics are part and parcel of all areas of the law (Burns 1993 *Legal Education Review* 145). Also see Solberg "Reforming the Legal Ethics Curriculum: A Comment on Edward Rubin's 'What's Wrong With Langdell's Method and What to Do About It'" 2009 62 *Vanderbilt LR En Banc*15–16; Henriss-Anderssen 2002 *Legal Education Review* 53; Menkel-Meadow and Sander 1995 *Law and Contemporary Problems* 129–138; Egan, Parsi and Ramirez "Comparing Ethics Education in Medicine and Law: Combining the Best of Both Worlds" 2004 13 *Annals of Health Law* 303 307–308; Link "The Pervasive Method of Teaching Ethics" 1989 39 *Journal of Legal Education* 485 485–489.

47 Burns 1993 *Legal Education Review* 151.

48 Solberg 2009 *Vanderbilt LR* 13; Robertson "Providing Ethics Learning Opportunities Throughout the Curriculum" 2009 12 *Legal Ethics* 59–76; Joy "Teaching Ethics in the Criminal Law Course" 2004 48 *Saint Louis University LJ* 1241.

49 Joy 2004 *Saint Louis University LJ* 1240–1241; Pierce "Legal Ethics Must Be at the Heart of the Law School Curriculum" 2002 26 *Journal of the Legal Profession* 159 161.

other courses, in order to help students build a thinking structure and some content essential to understand ethical issues".[50]

Cramton and Martin criticise the pervasive method and state that it "is usually a pretence rather than a reality".[51] Most lecturers do not devote substantial time in their modules to legal ethics and may even feel uncomfortable dealing with it.[52] Bundy agrees that lecturers "in mainstream courses would not make a sufficient commitment of classroom time and personal energy to ethics instruction".[53] He states:

> "[T]he pervasive approach suffers from two crippling drawbacks. First, by giving the pieces of legal ethics home everywhere, it effectively deprives its core concepts a home anywhere. Without a required course with significant content, there is no place in which students and instructors confront, in any probing or systematic way the critical ethical concepts, institutional and political understandings, and regulatory alternatives that underlie all areas of professional ethics and regulations."[54]

Cramton and Martin therefore recommend a required course (compulsory module) supported by the inclusion of ethics in specific other modules as agreed by faculty and monitored to ensure effectiveness.[55] Kelly agrees that the pervasive method is enhanced by also teaching legal ethics in a basic module.[56] This is supported by Snyman-Van Deventer and Swanepoel and they propose that in the South African context a core module is crucial; students should be taught the skills and processes to identify and solve ethical questions or problems in a core module, but added to this, lecturers should integrate legal ethics in all other core modules.[57] For example, in a module such as company law, the lecturer can use the topic of fiduciary duties of directors for a discussion on ethics, and can use case law such as *Gihwala v Grancy Property Ltd*.[58]

However, the success of teaching legal ethics using either the pervasive or the mixed method is dependent on the support of all faculty lecturers and their willingness to incorporate legal ethics into their modules.[59]

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50 Beca 2016 *Asian Journal of Legal Education* 93.

51 Cramton and Martin "Information Technology and Legal Ethics: Expanding the Teaching and Understanding of Legal Ethics Through the Creation of a New Generation of Reference Materials" 1995 *Law and Contemporary Problems* 337 338.

52 *Ibid*.

53 Bundy "Ethics Education in the First Year: An Experiment" 1995 *Law and Contemporary Problems* 21.

54 Bundy 1995 *Law and Contemporary Problems* 33.

55 Cramton and Martin 1995 *Law and Contemporary Problems* 338.

56 Kelly "Notes on the Teaching of Ethics in Law School" 1980 *Journal of the Legal Profession* 27.

57 Snyman-Van Deventer and Swanepoel 2017 *Obiter* 141.

58 2017 (2) SA 337 (SCA).

59 See Solberg 2009 *Vanderbilt LR* 15–16; Henriss-Anderssen 2002 *Legal Education Review* 53; Menkel-Meadow and Sander 1995 *Law and Contemporary Problems* 129–138; Egan, Parsi and Ramirez 2004 *Annals of Health Law* 303 307–308; Link 1989 *Journal of Legal Education* 485 485–489.

## 2 3 How?

Only after the faculty has decided on the where and the what of teaching legal ethics can a lecturer decide on the specific teaching method to be used. As stated by Terrel, "one's goal can often determine one's methods".[60] The teaching method used should not only provide students with knowledge and practical wisdom, but also contribute to the development of practical reasoning skills.[61] Burns explores seven methodologies[62] for teaching legal ethics – namely, case studies,[63] problems,[64] Socratic instruction,[65] discussions,[66] group work, video and film presentations,[67] co-curricular (or voluntary) activities[68] and lectures.[69] Other methods include the use of social media, such as Facebook, Twitter and Instagram, as well as role play and simulations, law clinics,[70] written assignments, one-minute essays, games and moot courts. Most of these methods are not exclusive and teaching most often uses a combination of the different methodologies; for example, a video presentation is often followed by a lecture that may also include the Socratic method as well as a class discussion and written assignments. Cramton and Martin submit that students learn in different ways and at different times and therefore a variety of teaching methods should be used.[71] An integrated approach to teaching legal ethics ensures that students: (i) gain the theoretical and factual knowledge they need; (ii) gain practical wisdom and insight from others, including other students; (iii) learn to understand the links between an ethical dilemma, real life, the law and the implications of it all; (iv) grasp the holistic interplay between ethics and law; and (v) develop necessary practical reasoning skills.

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60 Terrell 1995 *Law and Contemporary Problems* 355 355.

61 Jacobowitz and Rogers "Mindful Ethics: A Pedagogical and Practical Approach to Teaching Legal Ethics, Developing Professional Identity, and Encouraging Civility" 2014 4 *St Mary's Journal on Legal Malpractice & Ethics* 198 211.

62 Burns 1993 *Legal Education Review* 151–154. These are also briefly discussed in Snyman-Van Deventer and Swanepoel 2017 *Obiter* 143–146.

63 Burns 1993 *Legal Education Review* 151; Snyman-Van Deventer and Swanepoel 2017 *Obiter* 143–144

64 Burns 1993 *Legal Education Review* 152; Snyman-Van Deventer and Swanepoel 2017 *Obiter* 127 144.

65 Burns 1993 *Legal Education Review* 152; Snyman-Van Deventer and Swanepoel 2017 *Obiter* 144–145.

66 *Ibid*.

67 *Ibid*.

68 Burns 1993 *Legal Education Review* 154; Snyman-Van Deventer and Swanepoel 2017 *Obiter* 145.

69 Burns 1993 *Legal Education Review* 152; Snyman-Van Deventer and Swanepoel 2017 *Obiter* 145–146.

70 For purposes for this article, clinical teaching will not be included as it is not a method to use in a lecture/class.

71 Cramton and Martin 1995 *Law and Contemporary Problems* 337 338; Kruuse 2012 S*tellenbosch Law Review* 280 280: "[S]tudents have a range of different learning styles."

Beca emphasises that from an active-participation paradigm, students must be at the centre of any legal ethics course and activities should be developed based on learning rather than teaching.[72] Students must develop their own legal reasoning, while acquiring the knowledge they will need in future.[73] Nicolson advocates interactive teaching methods and he states that it is "more likely to inspire and help students develop their own moral stance and moral reasoning".[74]

### *2 3 1 Case studies or case discussions*[75]

Blackburn and Niedzwiedz explain that case discussion involves analysis of court opinions most often based on prescribed case law.[76] Students are encouraged to ask questions, but it works best in smaller classes.[77] Case discussions in class require that students read the judgment before class and form an understanding of the judgment and, it is hoped, also an own opinion. In class, the students then need to identify the rules of law applicable to the case and analyse its component parts. Through this process, students learn the fundamentals of legal reasoning and the doctrinal rules relevant to the specific case under discussion.[78] Chang remarks that through reading case law "students learn to identify the same or similar issues in factually different cases, helping them to attain an understanding of judicial thinking".[79] Chang also explains that there is not necessarily a single correct way of analysing case law and that the process rather than the outcome is important.[80] Case discussions, rather than a lecture, assist students to perform case analysis and to think critically about the judgment rather than just passively listening to a lecture.[81]

Cramton and Martin use the term "case study" to describe an actual or hypothetical situation featuring important issues of professional ethics in a practice setting that is relevant to the law school course for which it is designed. The case is supported by text, rules, and excerpts that provide what the regular course materials do not – a thorough treatment of the law and ethics of lawyering relevant to the case. The students are placed in the lawyer's position

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72 Beca 2016 *Asian Journal of Legal Education* 89.

73 *Ibid.*

74 Nicolson "Teaching Legal Ethics: What, How and Why" 2010 1 *Education and Law Review* 1 10.

75 Althougn there is a certain focus in the USA on the use of case books, most lecturers in South Africa prefer to select the case law they prescribe in accordance with their own opinion of the value of specific judgments.

76 Blackburn and Niedzwiedz "Do Teaching Methods Matter? A Field Study of an Integrative Teaching Technique" 1981 *American Business Law Journal* 525 525.

77 *Ibid*.

78 Chang "The Teaching of Law in the United States: Studies on the Case and Socratic Methods in Comparison With Traditional Taiwanese Pedagogy" 2009 4 *National Taiwan University Law Review* 1 13.

79 Chang 2009 *National Taiwan University Law Review* 5.

80 Chang 2009 *National Taiwan University Law Review* 13.

81 *Ibid*.

of considering the alternative courses of action available, which forces an evaluation of the consequences of the possible paths.[82]

Brest explains that the case-study method teaches students problem-solving skills through the following question: "Given this set of facts and these precedents, what are the rights and liabilities of the parties?"[83] The answer to this question provides the foundation needed by the lawyer to advise his/her client about the legal consequences of his/her course of action.[84] A case study illustrates how a particular situation is dealt with through the analysis of actual cases of misconduct. Students learn from these real-life legal ethical problems how to apply the relevant law, codes of conduct or professional rules.[85] However, Brest criticises the case-study method, because it is limited by the specific facts of particular appellate cases prescribed and thus provides only static situations with those specific facts whereas lawyers are faced by changing situations in everyday practice.[86] Burns agrees that when using the case-study method, students do not develop skills to recognise or identify ethical dilemmas as they arise.[87] He describes case studies as a useful secondary source that provide the student with insight into the disciplinary processes as well as the sanctions to be imposed for a breach of codes of conduct or professional rules.[88] However, the case-study method can be expanded by inclusion of "what if" scenarios. The lecturer can use the original case study and then add further questions based on an additional "what if" scenario.

Chang agrees with Brest that the case-study method limits the students to a specific set of facts and does not provide for the complexity of the legal process.[89] He offers a further critique of the case-study method,[90] namely: (i) problems exist with case books;[91] (ii) the case-study method encourages students to view law in an incomplete conception;[92] (iii) the case-study method omits the fact-finding and the legal process;[93] and (iv) the case-study method fails to teach lawyering.[94]

However, Chang also lists a number of arguments in support of the case-study method[95] – namely: (i) interest in learning increases; (ii) students are

82 Cramton and Martin 1995 *Law and Contemporary Problems* 340.
83 Brest 1995 *Law and Contemporary Problems* 5 7.
84 *Ibid*.
85 Burns 1993 *Legal Education Review* 151.
86 Brest 1995 *Law and Contemporary Problems* 7.
87 Burns 1993 *Legal Education Review* 152.
88 *Ibid*.
89 Chang 2009 *National Taiwan University Law Review* 18.
90 Chang 2009 *National Taiwan University Law Review* 16–19.
91 Chang 2009 *National Taiwan University Law Review* 16–17.
92 Chang 2009 *National Taiwan University Law Review* 17.
93 Chang 2009 *National Taiwan University Law Review* 17–18.
94 Chang 2009 *National Taiwan University Law Review* 18–19.
95 Chang 2009 *National Taiwan University Law Review* 13–16.

taught how to read cases;[96] (iii) students are taught how to think like lawyers;[97] (iv) the law is learnt through a series of precedents; (v) students develop an understanding of the legal process; (vi) it cultivates moral imagination;[98] and (vii) it develops mental toughness.[99] In using the case-study method or case discussions when teaching legal ethics, all the arguments in support of the case-study method can be viewed as positive results of using this method. It especially contributes to students realising that they need to consider different opinions and perspectives. They learn how rules and doctrines are applied, but also that after analysis of the law and the circumstances, judges may exercise discretion in reaching a decision.[100] Students learn to recognise the important facts, and to identify the court's decision and reasoning.[101] It gives students the opportunity to examine the extent to which a judge not only follows the law and also precedents, but also why and how a judge avoids precedents.[102] In discussing a specific judgment, the lecturer can guide students to the relevant and important facts and circumstances that lead to or cause an ethical dilemma and also to the applicable law, whether rules or legislation. Students must then identify the decision of the court and its reasoning. But students should also be allowed to explore critically different views on the decision and form their own opinion, and they should even be allowed to propose their own solutions to the specific ethical problem. Parks notes that the case-study method involves more than just listening as in a lecture but requires participation; the method enables students to learn from the experience and insights of other students and the lecturer.[103]

For example, in using the facts and judgment of *Jiba v General Council of the Bar of South Africa,*[104] the focus can be placed on the relationship between a legal practitioner and the court. Students can discuss the facts and identify specific complaints against the appellant. Students can also be asked to identify and evaluate the appropriate sanctions and the order made by the court. Students could then use this judgment as a basis for compiling a list of conduct that indicates that a person is not a fit and proper person to practise as a legal practitioner.

Cramton and Martin believe that the use of case studies makes it possible to incorporate legal ethics in most modules.[105] It is important to emphasise the role of the lecturer in the case-study method. The lecturer must play an active part in

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96 Chang 2009 *National Taiwan University Law Review* 13.
97 Chang 2009 *National Taiwan University Law Review* 14.
98 Chang 2009 *National Taiwan University Law Review* 15.
99 Chang 2009 *National Taiwan University Law Review* 16.
100 Chang 2009 *National Taiwan University Law Review* 15.
101 Chang 2009 *National Taiwan University Law Review* 14.
102 Chang 2009 *National Taiwan University Law Review* 15.
103 Parks "Appropriate Methods for the Teaching of Legal Skills in Practical Training Courses" 1990 8(2) *Journal of Professional Legal Education* 161 170.
104 2019 (1) SA 130 (SCA) 130.
105 Cramton and Martin 1995 *Law and Contemporary Problems* 341.

analysing the ethical problems in the case law and ensure that students develop insight into what is emphasised or ignored in order to shape their perception of what constitutes an ethical lawyer.[106] According to Joy, the lecturer can use case law effectively if he/she guides the students through the judgment and also uses additional material, specific assignments, and requires students to take part in class or smaller group discussions.[107] Journal articles dealing with case discussions provide additional material that the lecturer can use in the case-study method.[108]

It should be noted that the use of judgments should not be limited to case studies or case discussions, but can also be used in the other teaching methods.

### *2 3 2 Problems*[109]

Brest prefers transactional case studies to case studies of (for example) appellate decisions.[110] However, in analysing his transactional case studies, they prove to be just a variation on the problem method. The starting point of the problem method is a factual situation – in other words, the problem that the student needs to solve.[111] The problem thus is the stimulus and reason for learning. Students should view legal ethics as part of their everyday life, but especially as part of what they will deal with as legal practitioners. Students must therefore be able to see themselves in the role of the attorney or advocate making ethics decisions. This is best achieved by using the problem method as it places the student hypothetically in the role of the lawyer.[112] Morgan explains that the problem method, like the case-study method, gives legal issues a human face.[113]

When using the problem method, the lecturer gives the students a specific hypothetical problem that a lawyer may face in practice – for example, a lawyer receives incriminating documents from his client that also indicate certain crimes that will be committed in the near future. Questions pertaining to the problem can be asked by the lecturer, such as: what must you as the lawyer do with the

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106 Joy 2004 *Saint Louis University Law Journal* 1243.

107 Joy 2004 *Saint Louis University Law Journal* 1245.

108 In this regard, a very useful article is Van Eck "Ethical and Professional Duties in the Use of Recycled Legal Instruments: A Trio of Cases" 2020 2 *Journal of South African Law* 354–368 where she discusses three judgments, namely *Cele v The South African Social Security Agency* 2008 (7) BCLR 734 (D); *Sibiya v Director-General: Home Affairs* 2009 (3) All SA 68 (KNP); *Tekalign v Minister of Home Affairs* 2018 (3) All SA 291 (ECP).

109 For a detailed discussion of the use of the problem method, see Morgan 1998 *William and Mary Law Review* 409-419.

110 Brest 1995 *Law and Contemporary Problems* 5 7.

111 Martin "Teaching Legal Problem Solving: A Problem-Based Learning Approach Combined With a Computerised Generic Problem" 2004 14 *Legal Education Review* 77 78.

112 Morgan 1998 *William and Mary Law Review* 417; Tzannes 1997 *TM Cooley Journal of Practical and Clinical Law* 62.

113 Morgan 1998 *William and Mary Law Review* 417.

documents; should you give it back to your client; and/or should you inform the authorities? Students can discuss the problems and related questions in class, or individual assignments can also be given and students must then hand in their own written answer to the problem. In determining the solution to ethical problems or questions, students need to identify the issues by using their knowledge of ethical and moral standards and the applicable laws, case law, codes of conduct or professional rules.[114]

The problem method requires students to identify the issues from the facts and thus necessitates that they engage with the facts more intensely. With the problem method, students themselves must determine the ethical issues and find a solution.[115] The problem method requires students to think about the law and ethics while applying cases, statutes, codes and other legal material to solve the hypothetical problem.[116] Morgan states that using problems helps students learn how to integrate the requirements of the law and their conscience.[117] Through using the problem method, students develop decision-making skills and problem-solving skills.[118] In solving the problem, students need to go through the various stages of problem-solving and, in the process, they also acquire substantive contextualised knowledge.[119]

The problem method can be linked to case studies, as a lecturer may use a set of facts from a judgment and pose it as the problem for the class to solve. Again it is important to emphasise that all the teaching methods can and should be used in support of the teaching and learning experience of the students and one method does not exclude the use of other methods.

### *2 3 3 Socratic method*

Bateman states that the goal of the Socratic method is to develop higher thinking skills, problem-solving skills, reflective thinking and logical reasoning.[120] He concludes that these skills "enable the student to draw reasonable inferences, recognize assumptions, think deductively, interpret various points of view, and evaluate arguments".[121] These skills also serve the student well in solving an ethical problem. Tzannes describes the Socratic method as a process of hypothesis elimination, finding better hypotheses by steadily identifying and eliminating those that lead to contradictions.[122] Through the asking of questions and using the students' answers in guiding the conversation, the lecturer can

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114 Burns 1993 *Legal Education Review* 152; Morgan 1998 *William and Mary Law Review* 409.

115 Burns 1993 *Legal Education Review* 152.

116 Morgan 1998 *William and Mary Law Review* 414.

117 Morgan 1998 *William and Mary Law Review* 417.

118 Martin 2004 *Legal Education Review* 79.

119 *Ibid*.

120 Bateman "Toward Diversity in Teaching Methods in Law Schools: Five Suggestions From the Back Row" 1997 17 *Quinnipiac Law Review* 397 401.

121 Bateman 1997 *Quinnipiac Law Review* 402.

122 Tzannes 1997 *TM Cooley Journal of Practical and Clinical Law* 63.

place emphasis on specific ethics issues. The lecturer can, for example, use prescribed material to ask questions on: the sources of ethical duties; the "fit and proper" requirement; touting; the balance between the best interest of clients and the administration of justice and the duty to the court; the standard of conduct expected of legal practitioners, specifically honesty and integrity;[123] accepting clashing briefs;[124] failing to prepare properly and fully to represent a client;[125] and failure to act in the best interest of a client.[126] In the conversation and the specific questions asked, the lecturer can focus on decided cases, ethical problems and even hypothetical problems. Through the conversation, the students come to understand the nuances of the ethical problem and are able to formulate an ethical stance on the issue under discussion.[127] However, it is necessary that the lecturer ensures that all students feel safe and secure to enable them to freely engage in the conversation.[128] Bateman suggests that the lecturer should take care to call on students by name to answer questions rather than ask for volunteers.[129] This is to ensure that students stay alert and prepare to participate.[130] In using a hypothetical problem or a real case, the lecturer can lead students through the ethical issues at hand by asking specific questions to develop a sense of ethical problems and the way to resolve them.

The Socratic method can also be used with case studies or the problem method. The Socratic method enables the lecturer "to guide the student toward an articulation of ideas expressed in the case".[131] The lecturer can ask questions on the case law prescribed or the problem posed in such a way as to contribute to the enhancement of the specific ideas or outcomes the lecturer identified as important. It enables the lecturer to focus on a specific ethical problem or question and to assist the students in finding solutions to ethical problems. For example, using *Jiba v General Council of the Bar of South Africa,*[132] the lecturer can start with the seven specific complaints[133] against the appellant and guide students through the majority and minority judgments and the different interpretations of the judges pertaining to the issue of misconduct by the parties involved. The lecturer can ask questions on whether students perceive the parties to be unreliable, dishonest, incompetent or unsuitable. The high standard of integrity expected of legal practitioners and the determination of whether a person is fit and proper can also be discussed.

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123 Most of these aspects are dealt with in Van Eck 2020 *Journal of South African Law* 354–368.

124 *General Council of the Bar of South Africa v Matthys* 2002 (5) SA 1 (E).

125 *Ibid*.

126 *Ibid*.

127 Tzannes 1997 *TM Cooley Journal of Practical and Clinical Law* 63.

128 Burns 1993 *Legal Education Review* 152.

129 Bateman 1997 *Quinnipiac Law Review* 414. From own experience and that of colleagues, we have concluded that owing to cultural differences and other perceptions of students in a South African context, the lecturer should rather ask the whole class or call on several students.

130 Bateman 1997 *Quinnipiac Law Review* 414.

131 Chang 2009 *National Taiwan University Law Review* 5 and see also 27.

132 *Supra*.

133 *Jiba v General Council of the Bar of South Africa supra* 136–137.

### *2 3 4 Discussions*

Lecturers can use discussions with almost all other teaching methods. It is an integral part of the case discussion in the case-study method, but discussions need not focus on case law only. The discussion can focus on different ethical dilemmas that do not necessarily originate in case law. Ideally, discussions should be used in smaller groups where students can engage personally with ethical and moral dilemmas. Students also learn the value of discussion in problem-solving.[134] The lecturer plays an important role as facilitator of the discussion and should take care to lead the discussion in such a way as to ensure that students indeed engage with the issues and are able to identify the problems and through the discussion find their own solution to the ethical dilemma. The class discussion should encourage students to participate and to prepare for class. Discussions would encourage the student to engage with the prescribed material before class, but also during class when participating in the discussion or even when only listening to the discussion. Through discussions, students are also exposed to other points of view and intrepretations; by sharing views, students gain better perspectives on the ethical and moral dilemma under discussion. The class discussion can also focus on prescribed material other than case law. In this regard, as an example, the article of Van Eck[135] can be used to focus on different issues for discussion in class, such as criteria for a fit and proper person;[136] ethical and professional duties;[137] fees and billing[138] and overreaching fees;[139] misleading the court;[140] the duty to inform the court;[141] commissioner of oaths and the process of attestation;[142] and touting.[143]

### *2 3 5 Group work*

Group work can be closely linked to discussions. While group work may include other forms of collaboration, such as group assignments, group work is an important tool to use to ensure individual participation in activities, especially discussions.[144] It may be easier for some students to participate in a smaller group discussion than in a bigger class discussion. Beca explains that students should be asked to work in permanent groups where they can engage in discussions on difficult issues raised in class. In smaller groups, students can

134 Burns 1993 *Legal Education Review* 153.
135 Van Eck 2020 *Journal of South African Law* 354–368.
136 Van Eck 2020 *Journal of South African Law* 358–359.
137 Van Eck 2020 *Journal of South African Law* 359–360.
138 Van Eck 2020 *Journal of South African Law* 360–362.
139 Van Eck 2020 *Journal of South African Law* 364–366.
140 Van Eck 2020 *Journal of South African Law* 362.
141 Van Eck 2020 *Journal of South African Law* 363–364.
142 Van Eck 2020 *Journal of South African Law* 362–363.
143 Van Eck 2020 *Journal of South African Law* 361–362.
144 The article of Van Eck (and all the issues identified there) again serves as an example of a source of discussion topics as well as case discussions.

cooperate and try to understand others' point of view while also putting forward their own points of view, moral position and ethical reasoning.[145] Group work can also be used with other methods and is ideal to use for reflection after video and film presentations or simulations. Group work, whether in the form of written or group discussions, can focus on a specific issue – for example, the concept of a "fit and proper person to practise as a legal practitioner" – and then each group can deal with a specific judgment. In feedback to the whole class, each group gives feedback on their judgment and the class can then list specific requirements or practices that will determine whether or not a person is fit and proper.[146]

### *2 3 6 Video and film presentations*

Tzannes explains that films and videos can raise ethical issues and problems to engage students both emotionally and intellectually.[147] They also stimulate interest and attention. Students tend to understand concepts better through images. However, it is quite often difficult to find suitable material and it may be expensive.[148] Platforms such as YouTube may offer suitable clips. When using film and television in class, it should always include a reflection on the conduct of the fictional character and the situation. This should also lead students to question and reflect on their own values.[149] It is necessary to ensure that the ethical issue is identified and that students are guided through their prescribed material to assist them in formulating a solution to the problem posed in the video or film presentation. The reflection on the video or film presentation can take various forms and can, for example, include a class discussion, a written assignment or a lecture on the issues identified in the video or film.

### *2 3 7 Voluntary (co-curricular) learning activities*

Voluntary learning opportunities are extra opportunities students can use to enhance their studies. They are not part of the compulsory lectures and do not form part of the formal curriculum. Co-curricular activities are thus voluntary learning opportunities and should serve to reinforce legal ethical issues already raised.[150] Different activities can be used – for example, guest lectures on ethical issues by judges, lawyers (practising attorneys and advocates), lawyers in the financial services industry and in the insurance industry or even from the banking sector; panel discussions with invited guests such as judges and/or

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145 Beca 2016 *Asian Journal of Legal Education* 89.

146 *Jiba v General Council of the Bar of South Africa supra*; *Jasat v Natal Law Society* 2000 (3) SA 44 (SCA); *General Council of the Bar of South Africa v Matthys supra*; *Society of Advocates of Natal v Merret* 1997 (4) SA 374 (N).

147 Tzannes 1997 *TM Cooley Journal of Practical and Clinical Law* 63.

148 Burns 1993 *Legal Education Review* 154.

149 Rhode "Legal Ethics: Prime Time and Real Time" 2012 1 *Berkeley Journal of Entertainment and Sports Law* 113 113.

150 Burns 1993 *Legal Education Review* 154.

practitioners; study groups or tutor groups;[151] moot courts;[152] and the use of social media.[153] Through guest lecturers, students are afforded the opportunity to interact with professionals and to hear about "real-life" experiences relating to ethical dilemmas.

### *2 3 8 Lectures*

Lectures are cost-effective and require less input than, for example, the development of a video. However, a very specific input is still required from the lecturer to determine the knowledge students are expected to gain from a lecture; and input from the student is also required as they should prepare before class and study the prescribed material.[154] The lecturer must also decide on the content and may include case law and other materials. Tzannes observes that lectures do not require active student involvement, but can still be used to teach primary information.[155] Burns mentions that criticism against the lecture method includes that it is more suitable for teaching black-letter ethics law[156] and does not assist in developing analytical abilities.[157] Using formal lectures, legal ethics can be included in other modules and Joy advises that an ethical problem can be raised during a lecture, such as by asking, in a criminal law lecture, "Could you defend this guilty client?".[158] Although lectures are not ideal from a paradigm of active participation, lecturers can use them to explain ideas, principles and rules – for example, by applying the theory or factual information to concrete situations. In other words, the lecturer can explain the theoretical aspects with examples.[159] A lecture can start with a reference to case law or an article[160] and link this to the primary information that will be taught in the specific lecture.

### *2 3 9 Social media, electronic media and the Internet*

Students actively use social media and are used to immediate answers, communication and information. They use various social media platforms to communicate and to get information. They are used to fast responses on their postings and are equally quick to respond to those of others. They most

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151 Burns 1993 *Legal Education Review* 154.

152 Moot courts are discussed below as a separate method of teaching and learning.

153 Hemingway "Keeping It Real: Using Facebook Posts to Teach Professional Responsibility and Professionalism" 2013 43 *New Mexico Law Review* 43 56.

154 See Beca 2016 *Asian Journal of Legal Education* 90.

155 Tzannes 1997 *TM Cooley Journal of Practical and Clinical Law* 59 62.

156 The focus will be on theory, principles from legislation, regulations and codes, case law, textbooks and not skills.

157 Burns 1993 *Legal Education Review* 154.

158 Joy 2004 *Saint Louis University Law Journal* 1239–1248.

159 See Beca 2016 *Asian Journal of Legal Education* 90.

160 Van Eck 2020 *Journal of South African Law* 354; Slabbert "The Requirement of Being a 'Fit and Proper' Person for the Legal Profession" 2011 *Potchefstroom Electronic Law Journal* 209.

probably use the Internet on a daily basis and are familiar with different social media platforms such as Facebook, Instagram, Twitter, Snapchat and WhatsApp, as well as Internet pages, blogs and search engines. The lecturer can thus use students' facility with social media and the Internet as a learning tool to capture their attention and awareness[161] and include social media in the module.

At the University of the Free State, Blackboard is used and is an ideal platform to facilitate both formal discussions, as set and moderated by the lecturer, and informal dicussions or chats between the students. A lecturer can use Blackboard or any of the social media platforms to teach legal ethics through both the problem and discussion methods by communicating an ethical problem and ensuring student participation in the on-line discussion of the problem.[162]

The advantages of using technology are explained by Anthon, Hemingway and Smith.[163] They contend that most students are familiar with Facebook (and now also Instagram, Snapchat and others) and may even use them more than email.[164] Just like in the USA, South African law students also get law-school-related information via Facebook pages of both the law school and student organisations.[165] A lecturer can use a Facebook group to send different types of messages to the whole class. The post can be a simple message; a message with a file or a link to specific Internet sites; or even videos and photos.[166] The messages can, for example, be a follow-up on a class discussion[167] or a lecturer can use posts to illustrate ethical dilemmas.[168] Students can reply to the posts and a Facebook group can also facilitate a group/class discussion.[169] Students can also ask questions or post relevant information on the group;[170] to encourage participation, students may also contribute anonymously.

Snyman-Van Deventer and Swanepoel comment:

> "Posts on social media can place emphasis on specific ethical issues to enhance or add to aspects dealt with in, for example, a lecture. Alternatively, social media can be used in a more focused way to deal with specific aspects or issues." [171]

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161 Snyman-Van Deventer and Swanepoel 2017 *Obiter* 146.

162 *Ibid*.

163 Anthon, Hemingway and Smith "A Technological Trifecta: Using Videos, Playlists, and Facebook in Law School Classes to Reach Today's Students" 2014 *Rutgers Computer & Technology Law Journal* 1 1–16.

164 Anthon, Hemingway and Smith 2014 *Rutgers Computer & Technology Law Journal* 7.

165 *Ibid*.

166 Anthon, Hemingway and Smith 2014 *Rutgers Computer & Technology Law Journal* 8.

167 *Ibid*.

168 Hemingway 2013 *New Mexico Law Review* 43–45.

169 Anthon, Hemingway and Smith 2014 *Rutgers Computer & Technology Law Journal* 9.

170 *Ibid*.

171 Snyman-Van Deventer and Swanepoel 2017 *Obiter* 146.

### *2 3 10 Role-play, mock trials and simulations*[172]

Role-play, mock trials and simulations do share certain qualities with clinical learning.[173] Teaching legal ethics through simulations involves role-play in a simulated practice setting where students play the role of the client, the lawyer, or even the judge or members of disciplinary boards,[174] as well as witnesses and clients.[175] Nicolson explains that role-play and simulations will contribute to the development of moral sensitivity and judgement, because it is more likely to engage the interest and emotions of students and their experience will thus be more personal, immediate and realistic.[176] It is an especially useful teaching tool if students are encouraged to see issues from the other side.[177] Burns states that format, organisation, personnel, material and manner of class presentation are very important in the planning of a successful legal ethics teaching programme.[178] He warns that using the simulation method requires a higher level of planning and administration than, for example, the case-study method.[179] Bundy emphasises that role-play as a teaching method places extraordinary demands on the time and energy of lecturers.[180] It is important to note that, just as in the case with video and film presentations, students should be given the opportunity to reflect on the simulation and on how to solve the ethical dilemma or address the ethical issue raised.[181]

### *2 3 11 Written assignments*

Written assignments can be used to develop not only writing and research skills but also how to deal with specific topics in legal ethics. Legal-writing exercises can be used to expose students to ethics.[182] As written assignments can take many forms and vary in length and structure, it is possible to use assignments to focus specifically on legal ethics and to cover different topics on legal ethics. Students may be asked to write essays, opinions, briefs or memoranda. For example, students could write an essay on the difference between ethics and

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172 For a discussion of the use of role play and simulation at a USA law school, see Bundy 1995 *Law and Contemporary Problems* 19, as well as Kruuse 2012 *Stellenbosch Law Review* 280 289–295.

173 Tzannes 1997 *TM Cooley Journal of Practical and Clinical Law* 63–64.

174 *Ibid*.

175 Burns "Teaching the Basic Ethics Class Through Simulation: The Northwestern Program in Advocacy and Professionalism" 1995 58 *Law and Contemporary Problems* 37 41.

176 Nicolson 2010 *Education and Law Review* 10.

177 *Ibid*.

178 Burns 1995 *Law and Contemporary Problems* 39.

179 Burns 1995 *Law and Contemporary Problems* 40.

180 Bundy 1995 *Law and Contemporary Problems* 19 27.

181 See Beca 2016 *Asian Journal of Legal Education* 90.

182 Weresh "Fostering a Respect for Our Students, Our Specialty, and the Legal Profession: Introducing Ethics and Professionalism into the Legal Writing Curriculum" 2005 21 *Touro Law Review* 427 440.

morality. The brief could, for example, be on a judgment involving ethical issues that is on appeal. Students could also write opinions for a client – for example, on the behaviour of an attorney who had supposedly mishandled trust funds causing the client to suffer damages. Students could also write a brief on the guidelines provided by courts on the high standard of integrity expected of legal practitioners and the determination of a person as fit and proper to practise as a legal practitioner. Linked to this, students could also write on the professional and ethical duties involved in providing services as a legal practitioner. A written assignment could, for example, be given to students to comment on the role of the legal practitioner in ensuring the right to a fair trial and to prevent substantial injustice with reference to *Mackay v Legal Aid Board*.[183] Bateman observes that concrete feedback on written assignments is crucial.[184] He also recommends that written assignments be viewed as teaching tools rather than as assessment or grading tools.[185]

### *2 3 12 One- (or five-) minute essays*

The one-minute essay is based on a focused question that can be answered within a minute (or a few minutes) and the answer is based on the student's knowledge or opinion.[186] Although the one-minute essay is mostly used to ascertain the students' understanding of the lecture and particularly what they do not understand,[187] it can be used to focus the attention of the students on specific ethical issues. The one-minute essay can also be used to ascertain students' understanding of case law and the ethical issues in judgments.

The one-minute essay can be adapted to ensure classroom participation. The one-minute essay ensures participation of all students, even the less vocal ones. It also provides students with the opportunity to offer their own opinions on the question asked. The lecturer can build on this and move to key concepts and principles and more difficult questions. Through the questions posed in the one-minute essays, the lecturer can focus the students' attention on the important aspects of the lecture and guide them to their study material.

### *2 3 13 Games*

Bateman declares that "introducing games into the classroom can increase student cooperation, motivation, and may improve doctrinal learning".[188] Through adapting popular television gameshows for the classroom, students will

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183 Bateman 1997 *Quinnipiac Law Review* 416.

184 *Mackay v Legal Aid Board* 2003 (1) SA 271 (SE).

185 *Mackay v Legal Aid Board supra* 418.

186 On Course "One-Minute Paper" https://oncourseworkshop.com/self-awareness/one-minute-paper/ (accessed 2021-02-04).

187 Holtzman "Adapting the One-Minute Paper for Active Learning" 2007 *Academic Exchange Quarterly* https://wsac.wa.gov/sites/default/files/2014.ptw.%285%29.pdf (accessed 2020-02-25).

188 Holtzman 2007 *Academic Exchange Quarterly* 419.

understand the rules of the game and participate more freely. However, the game should never trivialise the ethical issues. It is best suited to teach principles and rules. There are different games that can be used to teach the theory and principles. For example, a lecturer can use a beach ball to ensure that students participate in class discussions. Asking a question on an ethical issue, the lecturer throws the ball into the class and the student who catches the ball is required to answer the question, and in that way the discussion starts. A game like "Who Wants to Be a Millionaire?" can be used to review case law. Other games such as "30 seconds" can also be used to teach theory and principles. Another method to ensure that students read the prescribed case law and to deal with legal ethical issues dealt with in the case law, is to put typed paragraphs from judgments into balloons. This method can also be used to facilitate discussion using specific quotations from case law – for example, "The importance of legal practitioners being scrupulously honest in their dealings with the court has been stressed time and again in this country";[189] "The attorney's profession is an honourable profession, which demands complete honesty and integrity from its members";[190] "A client is entitled to taxation of his or her attorney's account".[191] The balloons are tossed around by the students until they burst, leaving the student with the burst balloon to identify the relevant judgment and discuss the ethical issue identified in the paragraphs.

### *2 3 14 Moot courts*

Although moot courts are mostly a co-curricular learning activity, they can be incorporated in a specific module to teach legal ethics. It is necessary for a school or faculty to decide whether to do a smaller moot in a specific module, or to facilitate a moot court on legal ethics as a co-curricular activity. A moot court is explained as follows:

> "A moot court competition simulates a court hearing (usually an appeal against a final decision), in which participants analyse a problem, research the relevant law, prepare written submissions, and present oral argument. Moot problems are typically set in areas of law that are unsettled or that have been subject to recent developments. They usually involve two grounds of appeal, argued by each side."[192]

Ethical problems can be used to design a set of facts for a moot court. Through the use of moot courts, students are not only challenged to solve the ethical problem on behalf of their client, but also develop their advocacy skills. In a moot, students must submit written submissions or memoranda, and then must present their client's case in an oral presentation before the judge. The students

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189 *Jiba v General Council of the Bar of South Africa supra* 149.

190 *Summerley v Law Society, Northern Provinces* 2006 (5) SA 613 (SCA).

191 *Blakes Maphanga Inc v Outsurance Co Ltd* 2010 (4) SA 232 (SCA) 240.

192 University of Oxford: Faculty of Law "Mooting: What Is It and Why Take Part?" https://www.law.ox.ac.uk/current-students/mooting-oxford/mooting-what-it-and-why-take-part (accessed 2020-03-02).

develop their legal research and writing skills and learn to work in a team. The moot court stimulates critical thinking and forces students to engage with the subject matter, materials and the legal ethics issue. It also encourages preparation and participation. Using moot courts requires a huge input from the lecturer and should be a project of school or faculty rather than being used in a module on legal ethics where it is the responsibility of a single lecturer. The number of skills developed through an ethics moot justifies the school or faculty in taking responsibility for moot courts on legal ethics. Law schools or faculties with a vibrant and active moot court culture may be able to introduce a moot on ethics in addition to other moot court activities. But even if a law school is not actively involved in moot courts or moot competitions, a moot on legal ethics will add to the more practical experience of students.

The purpose of setting out all the various methods of teaching ethics has not been clearly explained or summed up.

## 3 CONCLUSION

The "how" question should be answered by the lecturer teaching legal ethics and it is not necessary to choose just one teaching method, especially when most methods cannot be used in isolation. It is clear that, in teaching legal ethics, it is preferable for a combination of the methodologies as described above to be used; this will contribute to better teaching and learning within any legal ethics module or other modules that may include the teaching of legal ethics. Exposure to legal ethics in various ways contributes not only to the development of the ability to identify legal ethical problems, and of the skills to solve such problems, but also to the understanding that ethics form part of the working environment of every lawyer; furthermore, it forms part of everyday life. Students will also develop an understanding that everybody has a responsibility for his or her own ethical behaviour and the decisions made on a daily basis.

Snyman and Swanepoel have concluded:

> "In designing a legal ethics module for the South African LLB student, ethics must be seen as more than just legal rules or obligations. It is not only about proper behaviour, but also about responsibility, integrity, honesty and trustworthiness, inspired and guided by personal values, religion, philosophy as well as professional rules of conduct and codes of ethics. For the South African LLB student, a stand-alone module on legal ethics is indeed crucial. This should however be followed by the inclusion or enforcement of legal ethics in other modules also."[193]

Brest states it best:

> "Indeed, in the end, no law school curriculum can substitute for good mentoring in a lawyer's early years of practice and for the experience of grappling with actual problems day to day. But law schools can provide a strong foundation for the

[193] Snyman-Van Deventer and Swanepoel 2017 *Obiter* 147.

> ongoing, reflective self-education that is integral to any successful professional career."[194]

By including a core module on legal ethics and also focusing on ethical issues in other modules, we can contribute to the development of an ethical culture in law students as prospective lawyers. The content of the module of legal ethics and the method of teaching legal ethics should contribute to an understanding of the duties and responsibilities of a lawyer and guide the student in developing his/her own moral compass. In answering the what, where and how questions, we can plan, structure and develop a module on legal ethics that will enable students to develop the necessary skills of problem-solving, decision-making and practical judgment in line with the duties and responsibilities of an ethical lawyer.

[194] Brest 1995 *Law and Contemporary Problems* 5 7.

# AN ANALYSIS OF ASPECTS OF THE PROPOSED REFORM OF THE FINANCIAL CONSUMER COMPLAINT RESOLUTION MECHANISMS IN THE SOUTH AFRICAN BANKING SECTOR

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**SUMMARY**

One objective of the revised South African market conduct regulatory framework for the financial sector is to introduce an effective dispute resolution framework. The Financial Sector Regulation Act, and the Act to follow the Draft Conduct of Financial Institutions Bill, potentially address some of the deficiencies associated with the old dispute resolution framework. This article makes a distinction between the old and new regulatory provisions concerning internal dispute resolution and external dispute resolution structures in the banking sector. This research highlights the changes involved in the new regulatory framework and identifies which aspects of the amended regulatory framework aim to address a particular issue associated with the old dispute resolution framework. It is not argued whether this legislation will achieve the fair treatment and protection of financial customers in the banking sector, as only time will tell. However, it is acknowledged that the new structure will improve consistency and efficacy in this dispute resolution structure.

## 1 INTRODUCTION

A financial customer must be able to lodge a complaint concerning a bank with an effective complaint resolution forum. This article makes a distinction between the old and new regulatory provisions concerning the framework for internal and external dispute resolution in the banking sector. Alternative dispute resolution (ADR) mechanisms, typically ombud schemes, serve as the external complaint resolution forum operational in the banking sector.

One of the objectives of the revised South African market conduct regulatory framework for the financial sector is to introduce effective dispute

resolution processes.[1] This article makes a novel contribution in identifying how the provisions of the Financial Sector Regulation Act (FSR Act)[2] and the Draft Conduct of Financial Institutions Bill (COFI Bill)[3] could correct certain issues associated with the previous dispute resolution framework. The new provisions introduced by the FSR Act that impact on the operation of ombud schemes in the financial sector are discussed under heading 4 below. These provisions relate mostly to the new ombud scheme oversight bodies, namely, the Ombud Council (OC) and the Financial Services Tribunal (FST). The COFI Bill aims to improve the internal complaint procedures of financial institutions. Accordingly, under heading 5 below, this contribution examines the broad framework of, and aspects concerning, internal dispute resolution mentioned in the COFI Bill, and to some degree, the FSR Act. The exclusive focus of this article is on the traditional banking sector, which sector forms part of the financial sector.

## 2 A SYNOPSIS OF THE REGULATORY INSTRUMENTS DETERMINING THE DISPUTE RESOLUTION FRAMEWORK

The legislation determining the structure of the dispute resolution framework includes: (1) the National Credit Act (NCA),[4] regarding credit agreement disputes; (2) the Financial Advisory and Intermediaries Services Act (FAIS Act),[5] which, among other matters, regulates the conduct of the Ombud for Financial Services Providers (FAIS Ombud), and prescribes how financial institutions should resolve consumer complaints to which the FAIS Act applies; and (3) the Financial Services Ombud Schemes (FSOS) Act (repealed),[6] which provided the operational framework predominantly for voluntary ombud schemes, but also in some respects for statutory ombud schemes.

Schedule 4 of the FSR Act repealed the FSOS Act with effect from 31 May 2021. Moreover, Schedule 4 also amends sections of the FAIS Act with most amendments being effective from 1 April 2018, excluding those provisions directly related to complaint resolution by the Ombud and the introduction of the Ombud Council, which will be effective from 1 April 2022. Chapter 14 of the FSR Act concerns the regulation of ombud schemes and comes into operation to coincide with the repeal of the whole of the FSOS

1 National Treasury "Explanatory Policy Paper Accompanying the Conduct of Financial Institutions Bill" (2018) http://pmg-assets.s3-website-eu-west-1.amazonaws.com/181211CoFI_Bill_policy_paper.pdf (accessed 2020-04-22) 8.

2 9 of 2017 (FSR Act).

3 The first draft of the COFI Bill was published for comment during 2018. See https://pmg.org.za/call-for-comment/784/ (accessed 2020-05-22). The second draft of the COFI Bill was published in September 2020. See http://www.treasury.gov.za/legislation/GovernmentNotices/43741_29-09_NatTreasury.pdf (accessed 2021-05-13).

4 34 of 2005 (NCA).

5 37 of 2002 (FAIS Act).

6 37 of 2004 (FSOS Act). The whole Act was repealed with effect from 31 May 2021.

Act and parts of the FAIS Act. Moreover, the COFI Bill[7] advises how financial institutions (including banks) should treat their clients, in line with the "Treating Customers Fairly" principles.[8] Chapter 7 of the COFI Bill prescribes specific requirements for the complaint management process of financial institutions, and the aim is to introduce uniformity into how financial institutions deal with complaints.

Examples of other regulatory instruments include codes of conduct, and the most prevalent are mentioned. First, the Code of Good Banking Practice (Banking Code) is a voluntary code of conduct. The current status of the Banking Code is regarded as "universally and uniformly observed within the banking industry".[9] Du Toit makes this comment after considering that most banks apply the Banking Code in their client dealings. The second most prevalent code, a statutory code of conduct, is the General Code of Conduct for Authorised Financial Services Providers and Representatives (Financial Services Providers Code).[10] In particular, Part XI, deals with complaint resolution by a financial services provider, where a provider could include a bank.[11]

## 3 EXISTING EXTERNAL DISPUTE RESOLUTION MECHANISMS

### 3 1 Introduction

There are two broad categories of ombud scheme operating in the financial sector.[12] The first category, the statutory ombud scheme, derives its mandate from specific legislation, and/or a related instrument as discussed

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7 National Treasury http://pmg-assets.s3-website-eu-west1.amazonaws.com/181211CoFI_Bill_policy_paper.pdf.

8 FSB "Treating Customers Fairly: Complaints Management Discussion Document" (October 2014) https://www.fsca.co.za/Regulatory%20Frameworks/Documents%20for%20Consultation/TCF%20Complaints%20Management%20Discussion%20Document.pdf (accessed 2018-04.28) 1.

9 Du Toit "Reflections on the South African Code of Banking Practice" 2014 *TSAR* 570. See a general discussion of the Banking Code in Uzokwe and Van Heerden "Consumer Protection in the Banking Industry: A Comparison of the South African and Nigerian Codes of Banking Practice" 2018 81 *THRHR* 631–649.

10 A copy is available from https://faisombud.co.za/wp-content/uploads/2018/06/General-Code-of-Conduct-for-Authorised-Financial-Services-Providers-and-Representatives.pdf (accessed: 2020-05-07).

11 See Van Zyl "Codes of Conduct for the Financial Services Industry" 2006 17 *Stell LR* 333–347 for a general discussion of the voluntary codes that exist in the financial services industry. For another example of an industry code, see the Association for Savings and Investment in South Africa "Treating Customers Fairly (TCF): Best Practice Guidelines for ASISA Members" (2011) https://www.asisa.org.za/wp-content/uploads/2017/05/tcf-best-practices-guideline-for-asisa-members-nov-2011.pdf (accessed 2020-05-04).

12 There is potentially a third category, referred to as the "back-stop" ombud, which takes on the role where a matter does not directly fall in the jurisdiction of any ombud. See National Treasury "A Known and Trusted Ombud System for All" (September 2017) http://www.treasury.gov.za/twinpeaks/Final%20Twin%20Peaks%20Policy%20Doc_A%20known%20and%20trusted%20ombuds%20system%20for%20all_September2017.pdf (accessed 2019-02-05) 6.

above.[13] Examples of statutory ombud schemes in the financial sector include: (1) the FAIS Ombud regulated by the provisions of the FAIS Act and the Rules on Proceedings of the Office of the Ombud for Financial Services Providers (FAIS Ombud Rules),[14] and the Financial Services Providers Code;[15] (2) the Pension Funds Adjudicator regulated by the Pension Funds Act;[16] and (3) the Registrar of the Council for Medical Aid Schemes, regulated by the Medical Schemes Act.[17]

The second category, the voluntary ombud scheme, derives its mandate from either: (1) the codes of conduct regulating different industries; and/or (2) the terms of reference for the respective ombud scheme, drafted considering the provisions of the now-repealed FSOS Act,[18] and agreed to contractually among members.[19] Examples of voluntary ombud schemes in the financial sector include the Ombudsman for Long-Term Insurance, the Ombudsman for Short-Term Insurance, the Johannesburg Stock Exchange Ombud and the Ombudsman for Banking Services (OBS).

The National Credit Regulator (NCR)[20] and the National Consumer Tribunal (NCT) are the primary dispute resolution forums for disputes concerning credit agreements in the banking sector.[21] According to section 134 of the NCA, a consumer may also approach an ombud with jurisdiction,[22] a consumer court or an ADR agent concerning a dispute related to a credit agreement.[23] Consequently, the consumer can also refer a dispute relating to a credit agreement to the OBS, depending on whether the OBS mandate allows the OBS to adjudicate on the matter. The remainder of the discussion is limited to the primary ombud schemes operating in the traditional banking sector, namely, the OBS and the FAIS Ombud.

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13 S 1 of the FSR Act defines a statutory ombud as either the Pension Funds Adjudicator, the FAIS Ombud or another ombud declared by a financial sector law as a statutory ombud scheme.

14 Issued by the Financial Services Board. See GN 81 of 2003 in *GG* 25299 of 2003-08-08.

15 See https://faisombud.co.za/about-us/mandate/ (accessed 2020-04-28).

16 24 of 1956.

17 131 of 1998.

18 Woker "Evaluating the Role of the National Consumer Commission in Ensuring That Consumers Have Access to Redress" 2017 29 *SA Merc LJ* 4.

19 National Treasury http://www.treasury.gov.za/twinpeaks/Final%20Twin%20Peaks%20Policy%20Doc_A%20known%20and%20trusted%20ombuds%20system%20for%20all_September2017.pdf 6.

20 Regulation 50 of the National Credit Regulations sets out the process for initiating a complaint to the NCR. The NCR is an example of a sector regulator that handles consumer complaints.

21 The jurisdiction of the Tribunal on credit matters is contained in s 26(1) of the NCA. The National Credit Amendment Act 19 of 2014 extended the Tribunal's mandate on credit-related disputes and the Tribunal also entertains applications on reckless credit.

22 The definition of "ombud with jurisdiction" in the NCA was amended to include reference to the definition contained in the FSR Act (according to Schedule 4 of the FSR Act).

23 The discussion concerning the NCR and NCT is not taken further, apart from acknowledging that this is the structure prescribed by the NCA for the resolution of disputes concerning credit agreements subject to the NCA.

## 3 2 The primary ombud schemes in the banking sector

The OBS, established in terms of section 11 of the FSOS Act, is an "industry ombud scheme" in terms of section 1 the FSR Act. In turn, the FAIS Ombud, a statutory ombud under the FSR Act, was established in terms of section 20 of the FAIS Act. The OBS must consider the following documents and/or principles when adjudicating a complaint: (1) the OBS Terms of Reference and operational procedures;[24] (2) the provisions of the Banking Code; (3) relevant case law and legislation; (4) best practice internationally; and (5) the principles of equity or fairness.[25] In contrast, the mandate of the FAIS Ombud comes from the FAIS Act and the Rules promulgated in terms of this Act.[26]

The OBS only entertains complaints concerning a bank that is a member of the Banking Association of South Africa (BASA) where the claim amount is R2 million or less, which threshold is higher than that of the FAIS Ombud where the monetary value of a claim may not exceed R800 000.[27] In contrast, the FAIS Ombud can hear complaints against all financial services providers where: (1) the provider contravened the provisions of the FAIS Act and the customer suffered or is likely to have suffered financial prejudice or damage; (2) the provider acted wilfully or negligently when providing a financial service and the customer suffered or is likely to have suffered a financial prejudice or damage as a result; or (3) the provider treated the customer unfairly.[28]

The OBS will not entertain a claim that has prescribed or where the complaint originates from a company with a business turnover of R10 million or more. Moreover, the OBS does not assist with complaints related to the following: (1) a bank's decision concerning lending or credit, interest rates or bank charges grounded in sound commercial reasoning, unless maladministration is clearly evident;[29] (2) a matter that can be more appropriately handled by a court of law or another dispute forum; or (3) a matter under litigation.[30] Additionally, the OBS cannot consider a complaint or dispute that would fall within the exclusive jurisdiction of any statutory ombud.[31] In respect of both the OBS and the FAIS Ombud, the complainant

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[24] Ombudsman for Banking Services "Terms of Reference" (February 2018) https://www.obssa.co.za/wp-content/uploads/2018/02/Terms-of-Reference-Final-February-2018.pdf (accessed 2020-04-03).

[25] See https://www.obssa.co.za/about/wherewecanhelp/ (accessed 2020-04-03).

[26] FAIS Ombud "Circular 2 of 2018: Financial Services Ombud Scheme Act 37 of 2004 – FSOS Act" (October 2018) https://faisombud.co.za/wp-content/uploads/2018/10/Circular-2_2018-1.pdf.

[27] See https://faisombud.co.za/about-us/mandate/ (accessed 2020-04-28).

[28] *Ibid.*

[29] This is an example of the consequences of banks being able to determine the jurisdiction of this ombud scheme. See National Treasury http://www.treasury.gov.za/twinpeaks/Final%20Twin%20Peaks%20Policy%20Doc_A%20known%20and%20trusted%20ombuds%20system%20for%20all_September2017.pdf 10.

[30] *Ibid*.

[31] OBS Terms of Reference par 3.2(c)(i).

must attempt to resolve the dispute with the financial institution before approaching an ombud scheme.

The OBS may make a recommendation or determination of compensation to the maximum of R2 million, which can include amounts for "distress and inconvenience" not exceeding R50 000.[32] The OBS recommendation can be made an order of court, but the determination does not automatically carry the same weight as a court order, unlike a FAIS Ombud determination.[33] Also, the OBS may publish the name of those banks that do not comply with a recommendation.[34]

The number of complaints received during a reporting period for both the FAIS Ombud and the OBS remains low when contrasted against the number of South African financial customers.[35] The FAIS Ombud received 9 323 complaints during the 2018/2019 financial year, settling 1 209 in favour of the complainant.[36] The OBS figures for the 2019 reporting period are more detailed. The OBS received: 326 walk-ins, 4 709 referrals for adjudication, and 26 257 calls in the call centre.[37] From these complaints, the OBS opened 6 333 cases.[38]

Indeed, private sector initiatives may be more efficient compared to a statutory arrangement, but proper research is required before amending the existing structure.[39] Different models of how to change the current structure of ombud schemes in the financial sector have been recommended.[40] However, the final determination on the new structure remains uncertain. Until a proposal is accepted, the existing ombud schemes remain operational.

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32 OBS Terms of Reference paras 1.3(a) and 3.2(a)(ii)

33 See https://faisombud.co.za/about-us/mandate/ (accessed 2020-04-28).

34 Uzokwe and Van Heerden 2018 *THRHR* 638. See also OBS "2018 Annual Report" (May 2019) https://www.obssa.co.za/wp-content/uploads/2019/05/J25144_OBSSA_Annual_Report_2018_FA_Spreads.pdf (accessed 2020-05-08) 15.

35 The number of clients per bank according to the Consumer Satisfaction Survey of 2019 include: 11.4 million for Capitec, 8.2 million for FirstRand Ltd, 8.1 million for Standard Bank Ltd, and 7.9 million for Nedbank Ltd. See https://businesstech.co.za/news/banking/339319/battle-of-the-banks-south-africas-big-5-banks-compared/ (accessed 2020-05-11).

36 FAIS Ombud Annual Report 2018/2019 at 19 available from https://faisombud.co.za/wp-content/uploads/2019/12/FAIS_Ombud_Annual_Report_2018-2019.pdf (accessed 2020-05-07). The 2019/2020 annual report was not available at time of publication.

37 OBS https://www.obssa.co.za/wp-content/uploads/2020/05/J26691_OBSSA_Annual-Report_FA-Spreads.pdf 19.

38 *Ibid.*

39 Melville "Has Ombudsmania Reached South Africa? The Burgeoning Role of Ombudsment in Commercial Dispute Resolution" 2010 22 *SA Merc LJ* 65.

40 National Treasury http://www.treasury.gov.za/twinpeaks/Final%20Twin%20Peaks%20Policy%20Doc_A%20known%20and%20trusted%20ombuds%20system%20for%20all_September2017.pdf 27–36.

### 3 3 Oversight and funding of ombud schemes until sections of the FSR Act become operational

The FSOS Council was responsible for the oversight of statutory and voluntary ombud schemes. However, the FAIS Ombud also reported to the Financial Services Board (FSB) concerning its overall functioning, and the FSB could also set rules concerning complaints and investigations procedures, which the FAIS Ombud would have to implement.[41]

In terms of section 8 of the FSOS Act, the FSOS Council was responsible for considering, and then granting or refusing, an application for the registration of an ombud scheme. In addition, the FSOS Council had to ensure sufficient coordination and co-operation between activities of the voluntary and statutory ombud schemes. Likewise, the FSOS Council was obligated to "develop and promote best practices" for a recommended complaint resolution procedure after consulting with a specific ombud, keeping in mind that these standards specifically apply to that ombud. It is entirely possible that the requirements and standards between ombud schemes could be different. Then, while performing its functions, the Council had to "ensure that the independence and impartiality of an ombud" were not affected.[42] The FSOS Council had a consumer education responsibility, albeit phrased in a general manner, as the Council could issue guidelines to inform consumers of the jurisdiction and submission procedures of the different ombud schemes.[43]

Government (more specifically the FSB, as it then was) funded the operation of a statutory ombud.[44] In contrast, voluntary ombud schemes are funded through subscription levies on members.[45] It is a possible impediment to the independence of a voluntary ombud scheme that those members who fund the operation of the ombud scheme are the same members complained about.

## 4 ASPECTS OF THE FSR ACT APPLICABLE TO THE REGULATION OF CONSUMER DISPUTES

### 4 1 Introduction to the FSR Act and the regulation of dispute resolution

The FSR Act is the first piece of legislation introduced to give effect to the Twin Peaks model of regulation for the South African financial sector.[46] The

41 The FSB was replaced by the Financial Sector Conduct Authority (FSCA) in terms of the FSR Act.

42 S 8(1)(*e*) of the FSOS Act.

43 S 8(2)(*a*) of the FSOS Act.

44 The FSCA is now responsible to fund the FAIS Ombud.

45 National Treasury http://www.treasury.gov.za/twinpeaks/Final%20Twin%20Peaks%20Policy%20Doc_A%20known%20and%20trusted%20ombuds%20system%20for%20all_September2017.pdf 6.

46 Uzokwe and Van Heerden 2018 *THRHR* note 13.

second piece of legislation will be the Act enacted after the COFI Bill. The "Treating Customers Fairly" (TCF) principles forms an integral part of the above Twin Peaks model.[47] According to TCF Outcome 6, customers should not face unreasonable post-sale barriers imposed by financial institutions when they change products or switch between providers, or when these customers want to submit a claim or lay a complaint against a financial institution. Linked to this TCF outcome, is the FSR Act objective to ensure the fair treatment and protection of financial customers.[48] It is submitted that providing a consumer with the opportunity to resolve a complaint against a financial institution fairly and effectively contributes to the fair treatment and protection of financial consumers. However, the "fair treatment and protection of financial consumers" is achieved when the fundamental principles of access, effectiveness, independence, transparency and fairness are fulfilled.[49] Thus, to determine whether consumers are protected and treated fairly, content must be given to these principles to measure whether financial institutions (internal complaints resolution) and ombud schemes (external complaint resolution) resolve complaints in line with these fundamental principles. Also, both financial institutions and ombud schemes should comply with the same fundamental principles. Still, there may be a deviation between the extent to which the institution or scheme complies with a fundamental principle, in line with the principle-based approach,[50] and such deviation must be considered when the regulatory authority determines whether a financial institution is compliant.

The internal dispute resolution mechanisms of financial institutions, as discussed in 5 3 below, are to be regulated by the Financial Sector Conduct Authority (FSCA).[51] The external dispute resolution mechanisms will mostly be regulated by the OC and the FST under the new regulatory framework.[52]

## 4 2 The Ombud Council

The OC, replacing the FSOS Council, is established as a juristic person, and a national public entity for the purposes of the Public Finance Management Act[53] according to section 175 of the FSR Act. The OC is to function as a

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47 FSB https://www.fsca.co.za/Regulatory%20Frameworks/Documents%20for%20Consultation/TCF%20Complaints%20Management%20Discussion%20Document.pdf 1.

48 S 7(1)(*c*) of the FSR Act.

49 These fundamental principles form part of the objective of the OC in terms of s 176 of the FSR Act.

50 Principle-based regulation means that the focus of a financial institution would be to achieve a specific outcome, but to a lesser extent, apply rule-based measures as well. See National Treasury http://pmg-assets.s3-website-eu-west1.amazonaws.com/181211CoFI_Bill_policy_paper.pdf 11.

51 The FSR Act established two new regulators, namely the Prudential Authority (PA) responsible for prudential regulation, and the FSCA responsible for market conduct regulation.

52 GenN 169 in *GG* 41549 of 2018-03-29, as amended by GN 1019 in *GG* 41947 of 2018-09-28, as amended by GenN 142 in *GG* 42314 of 2019-03-18, as corrected by GN 657 in *GG* 42454 of 2019-05-10 and amended by GN 1130 in *GG* 42677 of 2019-08-30 and by GenN 356 in *GG* 43131 of 2020-03-24.

53 1 of 1999.

full-time statutory body, different from the FSOS Council, the latter having been managed by part-time staff. According to section 176 of the FSR Act, it is the objective of the OC to ensure that consumers have access and can use complaint processes that are "affordable, effective, independent and fair".

Section 177 sets out the functions of the OC, which, if achieved, will enable the OC to meet the above objective. First, the OC must recognise industry ombud schemes as schemes to which the FSR Act applies. The OC must then promote cooperation and coordination between different ombud schemes in the financial sector. In addition, the OC aims to protect the impartiality and independence of ombud schemes. Moreover, the OC must promote the public's awareness of ombud schemes. Then, as access is also an important principle, the OC must implement measures to provide consumers with access to the appropriate ombud schemes. The idea is for the OC to establish and operate centres that will direct financial consumers to the correct ombud scheme to hear complaints.[54] Furthermore, the OC is responsible for publicising information concerning ombud schemes, which includes informing consumers of the kind of complaints different schemes may entertain. Moreover, when there is an overlap in the jurisdiction of the different ombud schemes, the OC must resolve the overlap issue and decide which scheme should hear a complaint. Furthermore, the OC has a general monitoring function, monitoring whether ombud schemes comply with financial sector laws. The concluding function is that the OC should support financial inclusion in the financial sector.

The OC may issue two types of regulatory instrument to fulfil its functions and objective. The first type are the OC rules, which have a preventative purpose. In terms of section 201(1), the purpose of the OC rules is to achieve the OC's objective. Thus, the general purpose behind the OC rules is to ensure that consumers have access to affordable, effective, independent and fair ADR processes. Practically, ombud schemes will need to adopt the provisions of the OC rules as part of their terms of reference. The OC can also issue directives that require an ombud or ombud scheme to take steps to avoid contravening a financial sector law insofar as it relates to ombud schemes.[55] According to section 204, the OC may commence proceedings against an ombud scheme in the High Court to ensure that the scheme complies with financial sector law. A contravention arguably also includes a contravention of the OC rules. Furthermore, according to section 206 of the FSR Act, the OC can impose administrative penalties on an ombud scheme, the ombud or the governing body of an ombud.

It appears as if the OC is to be the link between the ombud schemes and the financial sector regulators, as well as the direct link to the Minister. The OC must inform the financial sector regulators which conduct of financial institutions is giving rise to complaints.[56] Where there appears to be a trend,

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54 See s 209 of the FSR Act, and the Financial Sector Conduct Authority "Twin Peaks Newsletter Issue 4: Establishing New Entities" https://www.fsca.co.za/TPNL/4/fsb4/regulations.html (accessed 2020-03-27).

55 S 202(1) of the FSR Act.

56 S 184(*d*) and (*e*) of the FSR Act.

a relevant regulator will be able to implement measures to regulate the general conduct of financial institutions.

Section 214 of the FSR Act requires the OC to approve an ombud scheme's initial governing rules and/or any subsequent amendments thereto (for example, in the case of the existing OBS and the FAIS Ombud). The criterion for approval is that the ombud scheme rules must assist the ombud scheme to achieve the FSR Act objectives. Furthermore, according to section 215, where a financial institution is a member of an industry ombud scheme, the scheme rules are automatically incorporated into the bank-client contract concluded between the financial institution and the customer.

Section 217(1) requires ombud schemes to report annually to the OC concerning their operations. The voluntary ombud schemes and statutory ombud schemes must report to the same body (the OC), creating a standard reporting format applicable to all ombud schemes. Moreover, the OC is in a position to provide coordinated feedback on the ombud schemes to other financial sector regulators. Moreover, the FSCA may at any time request, either the OC, the statutory ombud scheme or a recognised industry ombud scheme to deliver a report either on the operation of the ombud scheme or regarding trends and implications of those trends of conduct of financial institutions. It is submitted that the value of the report to the FSCA is in the the identification of systematic complaints with a view to enhancing the control of the financial industry. The need for standardisation of the collection of data has been mentioned as a potential issue of concern in the financial sector.[57] Thus, a previously raised issue, the lack of feedback to regulators, may be resolved.[58]

## 4 3 Financial Services Tribunal

The FST, established under section 219 of the FSR Act, for the judicial review of decisions of the financial sector regulators and the OC. According to section 219 of the FSR Act, the FST's function is to reconsider decisions (and omissions to take decisions) by a financial sector regulator, an authorised financial services provider (e.g., a bank), a statutory ombud (not a voluntary ombud scheme) and a market infrastructure. The decisions referred to in section 219 are defined in section 218. First, the Tribunal may reconsider a decision relating to a financial sector law, taken by either a financial sector regulator or the OC. The Tribunal may also review a decision taken by a statutory ombud (not a voluntary ombud) concerning a specific consumer complaint. This means that the OC is able to review the decision of a voluntary ombud scheme, but the FST may still review that OC decision. Then, the FST can directly investigate a decision made by either (1) an authorised financial services provider under the FAIS Act or (2) a decision

[57] Van Zyl 2006 17 *Stell LR* 339–340.

[58] FinMark Trust "Landscape for Consumer Recourse in South Africa's Financial Services Sector" (2007) http://www.finmark.org.za/documents/R_consumerrecourse.pdf (accessed 2020-04-21) 26.

contemplated under section 105 of the Financial Markets Act[59] made by a market infrastructure. The "decision" referred to in section 218 also includes certain omissions. The first type of omission relates to the period within which a provider must take a decision. It is an omission if the decision-maker has not made a decision either within the period prescribed or specified in a financial sector law,[60] or, where there is no prescribed period, within a reasonable period.[61] It is also an omission to avoid taking action, either within a specified period or, alternatively, within a reasonable period after making the decision. An FST order has the same force and effect as a civil judgment – that is, it is enforceable as if a court delivered the decision.[62]

## 4 4 Influence of the FSR Act on the issues related to the previous regulatory structure

The National Treasury policy document, "A Known and Trusted Ombud System for All", illustrates some issues associated with the current framework, which issues I mention and add to below.[63] The first issue, the lack of consistency in the standards and/or requirements concerning dispute resolution processes, is resolved for the most part. The OC rules apply, and ombud schemes must incorporate the rules as part of their terms of reference. Previously, the FSOS Council prepared the standards for each ombud scheme; thus, the standard was arguably particular to an ombud scheme. Moreover, one body, namely the OC, will now be responsible for confirming whether an ombud scheme complies with financial sector laws. The OC must identify the best-practice standards to be implemented as part of the ombud scheme structure. Then, the OC needs to decide how to balance implementing standardised rules while also adopting a principle-based approach. Put in simple terms, the OC must decide to what extent each ombud has the option to deviate in its application of the prescribed fundamental principles mentioned above, which principles are included in the OC rules.

Another identified issue is the lack of clear and standardised guidelines against which to measure the performance of ombud schemes.[64] This inconsistency will be resolved when the OC rules prescribe the standards and requirements that all ombud schemes should adopt. However, the content of the fundamental principles, the foundation of the OC rules – namely, ensuring consumers have access to affordable, effective, independent and fair ADR processes – must be explained. An ombud scheme must comprehend the content of a fundamental principle to

59 19 of 2012.

60 S 218(*f*) of the FSR Act.

61 S 218(*g*) of the FSR Act.

62 S 236(2) of the FSR Act.

63 National Treasury http://www.treasury.gov.za/twinpeaks/Final%20Twin%20Peaks%20Policy%20Doc_A%20known%20and%20trusted%20ombuds%20system%20for%20all_September2017.pdf 8–15.

64 National Treasury http://www.treasury.gov.za/twinpeaks/Final%20Twin%20Peaks%20Policy%20Doc_A%20known%20and%20trusted%20ombuds%20system%20for%20all_September2017.pdf 15.

determine whether it complies with the principle or not, and also to what extent the ombud may incorporate the principle in a manner that is uniquely suitable to its specific mandate.

The overlap in the jurisdiction of the OBS and FAIS Ombud remains an issue. Nevertheless, one of the OC's functions to issue standards that would reduce the overlap and then also decide which ombud scheme should have exclusive jurisdiction over a particular matter when there is an overlap. Practically, this issue will only be resolved when the OC operates as a single-entry point for consumer complaints. Nevertheless, if the OC delays deciding which ombud scheme has jurisdiction, this will result in a consumer experiencing the ombud scheme structure as ineffective.

An issue with the previous system is the lack of an effective referral process where a complaint goes to the incorrect ombud scheme.[65] The OC rules should include a standard process applicable to all ombud schemes for complaint referrals. Also, one function of the OC is to improve the coordination between ombud schemes, which it is hoped will lead to creating a referral platform. Otherwise, the lack of an effective referral process compromises the confidence in the entire ombud scheme system when it is the customer's perception that the complaint takes too long to resolve, and even more so when a consumer is sent from pillar to post.

Another issue with the outgoing system is that each ombud scheme has used different standards for reporting, causing inconsistency in the level of transparency between schemes. The reporting method needs to be consistent between all ombud schemes. Also, the reporting duty should cause a sector regulator to detect systemic consumer abuse. It is not enough to have an annual reporting duty.

The previous structure creates no direct and binding duty, either on the FSOS Council or an ombud scheme to educate consumers. Two functions of the OC may resolve this issue – namely, improving the public awareness of ombud schemes and publicising information concerning ombud schemes. Arguably, the OC, by including an educational obligation in the OC rules, could delegate fulfilment of this function to ombud schemes. The FSCA will also have an education duty, which could include education on ombud schemes. This duty may be delegated to financial institutions through the FSCA conduct standards.

## 5 INTERNAL COMPLAINT RESOLUTION MECHANISMS

The discussion concerning internal complaint resolution mechanisms includes: (1) whether the existing regulatory instruments prescribe standards and/or requirements for an internal dispute resolution framework; (2) the extent to which the proposed regulatory framework will amend internal complaint resolution mechanisms; and (3) whether the measures forming

[65] National Treasury http://www.treasury.gov.za/twinpeaks/Final%20Twin%20Peaks%20Policy%20Doc_A%20known%20and%20trusted%20ombuds%20system%20for%20all_September2017.pdf 11.

part of the proposed regulatory framework resolve the issues associated with the existing regulatory framework.

## 5 1 Standards and/or requirements under the existing framework

Complaint forums operating in the banking sector require consumers first to attempt to resolve a dispute directly with their bank.[66] The assumption is that all banks prepare a written Customer Management Framework (CMF). Before the promulgation of the FSR Act, industry codes influenced the requirements for a CMF. The Banking Code prescribes, among other things, general standards that banks must incorporate as part of the internal dispute resolution process. Nevertheless, key principles forming the foundation for the Banking Code – namely, fairness, transparency, accountability and reliability – apply equally to the part of the Code concerning consumer complaints. Part 10 of the Banking Code provides an introductory discussion of the expectation from a bank during an internal dispute resolution process. The general standards provide that call centre staff will assist with queries and provide time frames for when a bank must take a specific action. A bank must acknowledge receipt of a complaint within three business days, inform the customer of the status of the investigation of a complaint within 14 days, and also at this time give an estimated time by which it will resolve a complaint. The Banking Code prescribes no time limit to resolve a complaint. The second segment of part 10 informs a customer of the customer's right to approach the OBS when the bank fails to resolve a complaint.[67]

The Financial Services Providers Code provisions concerning the internal complaint resolution system and procedures are more detailed than those of the Banking Code. According to the Financial Services Providers Code, the internal complaint resolution relies on the following principles: (1) the provider must have a comprehensive complaints policy emphasising the provider's commitment to the complaint process, and also explaining the system and procedures associated with complaint resolution; (2) the internal complaint resolution system and procedures must be transparent and visible; (3) clients must have access at any time of the day to the facilities to lodge a complaint;[68] and (4) there must be fairness in the resolution of the complaint.[69] Moreover, paragraph 19 of the Code imposes specific obligations on the provider when it comes to internal complaint resolution. First, the details of the internal complaint resolution system and procedures and any amendments thereto should be in writing. In addition, the details and contact particulars of the FAIS Ombud must be communicated to clients. Moreover, the customer must submit a written complaint accompanied by all the relevant information and copies of relevant documents. Then, the provider must "promptly" acknowledge receipt of a

66 See the mandate of the FAIS Ombud https://faisombud.co.za/about-us/mandate/ (accessed 2020-04-28).

67 See the Banking Code 35–36.

68 FAIS Code par 17(*c*) and 19(1)(*ii*).

69 FAIS Code par 17.

complaint in writing, but there is no clear guideline on what constitutes "promptly". With regard to the outcome of the complaint, the client must be informed within six weeks where the provider is unable to resolve a complaint according to the FAIS Ombud Rules. Also, where the outcome is not favourable to the client, the provider must provide written reasons for the complaint outcome while also indicating that the client may pursue the matter further with the FAIS Ombud within six months.

## 5 2 Standards and/or requirements under the proposed framework

The FSR Act imposed additional standards and endowed the relevant regulator with authority to issue additional standards, which, among other things, will inform how banks must manage the internal dispute resolution process. The FSCA will be responsible for evaluating the internal dispute resolution mechanisms of financial institutions. It is one of the objectives of the FSCA to protect financial customers, first by promoting the fair treatment of financial customers by financial institutions, and also through educating financial customers on issues concerning financial literacy.[70] This function would arguably also include ensuring the protection of financial customers that results from access to effective internal and external complaint mechanisms. According to section 106 of the FSR Act, the FSCA may issue conduct standards for financial institutions to achieve specific objectives.[71] In terms of section 106(3)(*c*)(iii), the FSCA may issue a conduct standard aimed to achieve fair treatment of financial customers. Accordingly, an FSCA conduct standard may prescribe requirements for the internal complaint resolutions mechanisms of banks as a financial institution. Additionally, the FSCA can request ombud schemes to report on aspects of complaint resolution. The purpose of this reporting duty is arguably to identify systemic infringement of consumer rights so that the FSCA may implement an industry-wide intervention to issue standards concerning the internal complaint mechanisms.

The COFI Bill will prescribe how financial institutions (including banks) should treat their clients, in line with the TCF principles. More specifically, TCF principle 6, which provides that a customer should "not face unreasonable post-sale barriers imposed by firms to change product, switch providers, submit a claim or make a complaint", applies to the resolution of consumer complaints.[72] The COFI Bill intends to follow a principle-based approach and will establish binding principles that must be adhered to by the role players in the financial sector.[73] Chapter 7, consisting of sections 32 to 35, relates to dealing with the post-sale barriers faced by financial

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70 S 57(*b*) of the FSR Act.

71 S 67 of the COFI Bill relates to conduct standards the FSCA may issue. Any reference to a section of the COFI Bill refers to the section in the second draft of the Bill.

72 FSB https://www.fsca.co.za/Regulatory%20Frameworks/Documents%20for%20Consultation/TCF%20Complaints%20Management%20Discussion%20Document.pdf 1.

73 National Treasury http://pmg-assets.s3-website-eu-west1.amazonaws.com/181211CoFI_Bill_policy_paper.pdf 14.

customers, and the obligations of financial institutions in this regard. A Chapter 7 purpose concerns the fair treatment of financial customers after they conclude a contract for "a financial product, financial instrument or financial service". Accordingly, complaint resolution mechanisms contribute to whether or not there is fair treatment of financial customers. Section 33 relates directly to complaints management. In terms of section 33(1)(*d*), a financial institution must not impose post-sale barriers that will prevent a financial customer from lodging a complaint. Section 33(2)(*c*) involves providing financial customers "with efficient and effective complaints management" where a complaint may be resolved "in a fair and expeditious manner". Then, section 33(2)(*d*) requires that a financial institution monitor complaints. Moreover, a financial customer should be advised about, and have access to not only an effective internal complaint mechanism but also an external dispute resolution mechanism according to section 33(2)(*f*).

## 5 3 Influence of the FSR Act and the COFI Bill on the issues related to the previous regulatory structure

The Banking Code and the Financial Services Providers Code impose those obligations that are placed on banks to develop and then implement internal complaint mechanisms. Nevertheless, there is no direct statutory obligation on a bank to establish an internal complaint mechanism that complies with specific standards. The FSR Act provides the FSCA with authority to issue conduct standards to achieve the fair treatment of financial customers, and more specifically, standards concerning complaint resolution.[74] Therefore, all banks (as financial institutions) would have to follow the provisions of these conduct standards. Accordingly, in July 2020, the FSCA issued Conduct Standard 3 of 2020 (Banks), referred to as the Conduct Standard for Banks. Section 8 of the Conduct Standard for Banks is very prescriptive on the requirements that must be included as part of a bank's complaints management framework.[75]

The Banking Code does not place a direct obligation on a bank to educate clients on the availability of an internal complaint resolution mechanism. The Code merely states that a bank should inform a client how to lodge a complaint and where to go if unsatisfied with the outcome. The FAIS Code refers to transparency and visibility as essential principles that should form part of an internal complaint resolution mechanism. Implementation of these fundamental principles requires that a financial services provider must have full knowledge of internal complaint resolution procedures, which implies an obligation to educate a consumer. Section 33(2)(*f*) of the COFI Bill imposes a statutory educational obligation on a financial institution, where the institution should not only provide access to an effective internal complaint mechanism but also inform customers on the availability of this forum. Accordingly, the obligation to provide education that an internal complaint mechanism is available to a financial customer will become a statutory

[74] S 106(3)(*c*)(iii) of the FSR Act.
[75] A detailed analysis of the Conduct Standard for Banks forms part of future research.

obligation. However, the extent of this duty is left open to interpretation. It may end up being a "tick-box exercise" where the financial institutions comply with the letter of the provision without considering the purpose behind the obligation.

At present, none of the codes includes an obligation that a bank should keep records of complaints it has received. Moreover, banks have no obligation to report to a regulator concerning the implementation and outcome of their internal complaint mechanisms. Section 55 of the COFI Bill places a general obligation on a financial institution to implement a framework to retain data and records, which general provision would also apply to complaints it has received. However, this section is too general to impose a specific duty on a financial institution concerning the complaints a financial institution receives.

## 6 CONCLUDING REMARKS

This contribution highlights the changes from the old to the new regulatory framework and identifies which aspects of the amended regulatory framework should address a specific issue associated with the outgoing dispute resolution framework. It is not argued whether this legislation will achieve the fair treatment and protection of financial customers in the banking sector, as only time will tell. However, it is acknowledged that the revised structure will improve the consistency and efficacy of the dispute resolution structure in the banking sector, especially with the introduction of one regulatory authority, the OC, for statutory and voluntary ombud schemes. To introduce a principle-based approach will allow the appropriate level of flexibility, but still promote consistency between the ombud schemes and also among banks. However, it will not help if these fundamental principles become a "catch-all" phrase. Therefore, there should be a clear interpretation of what these principles entail, and content analysis should form part of future research.

All indications are that the previous structure will remain, albeit that a single body, the OC, will carry the oversight function. It does appear that much of whether the new external dispute resolution structure will be effective is going to depend on how well the OC rules are drafted. Also, the FSR Act provides the FSCA with authority to prepare conduct standards concerning complaint resolution. These conduct standards should result in a consistent approach among financial institutions when dealing with customer complaints. However, as with the OC rules, whether the internal complaint mechanism of banks functions effectively will depend on how well these conduct standards are drafted. At least, the legally binding nature of the OC rules and FSCA conduct standards will be stronger than an industry code.

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

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**SUMMARY**

The article discusses and compares the dissolution of a marriage as well as the legal consequences thereof in Islamic law, South African law and English law. This is done in order to demonstrate that despite similarities, there are vast differences between the three legal systems. This impacts on how Muslim personal law (MPL) can be recognised and regulated in South Africa and in England and Wales as constitutional democracies. South Africa, England and Wales share a commitment to human rights and have adopted various approaches in respect of accommodating the application of Islamic law. Internal pluralism also exists within the Muslim communities in South Africa, England and Wales as the majority of Muslims in these countries have to varying degrees developed diverse strategies to ensure compliance with Islamic law, as well as with South African and English law. Notwithstanding the accommodation of MPL in terms of South African and English law, the differences between these legal systems have resulted in decisions that, while providing relief to the lived realities of Muslims, are in fact contrary to the teachings and principles of Islam and therefore problematic for Muslims.

## 1 INTRODUCTION

The definition of the term "marriage" in all three legal systems clearly illustrates that a marriage should ideally only be terminated at the death of either spouse.[1] Although Islamic, South African law and English law discourage divorce and encourage reconciliation between spouses, all three legal systems also recognise that, under certain circumstances, it may become impossible to continue with the marriage and that divorce is the only

[1] All three legal systems advocate the view that when a marriage is concluded, the spouses enter into a life-long relationship.

alternative.[2] This is particularly so where cordial relations between the spouses become distinctly impossible. The parties should embark upon the termination of a marriage through divorce only as a measure of last resort. The reality in modern-day society is that divorce, like marriage, has become firmly entrenched in the familial and social lives of people.[3]

As a result, a comprehensive set of rules and principles regulating the dissolution of a marriage has been developed by the Islamic, South African and English legal systems so as to minimise the harmful effects that the dissolution of a marriage can have on the family, especially where there are children born of the marriage. The primary aim of rules and principles regulating the termination of a marriage is to promote social stability by reducing hostility between the spouses. It is also to ensure that equity prevails in respect of the economic consequences of the divorce. In addition to the economic consequences that require regulation, most of the personal consequences of a marriage end when the marriage is terminated. A discussion of the rules and principles regulating the dissolution of a marriage in the three legal systems follows.

## 2 DISSOLUTION OF A MARRIAGE BY DEATH

### 2 1 Islamic law

In terms of Islamic law, the dissolution of a marriage can be effected by the death of one of the spouses to the marriage. The matrimonial property regime of marriages concluded in terms of Islamic rites is one of complete separation of estates.[4] According to authentic narrations from Islamic jurists,[5] a person is only allowed to receive benefits and wealth that was earned through lawful means; if the parties are married in terms of a shared matrimonial property system, for example, one becomes entitled to receive benefits to which he or she is not Islamically entitled.[6] Although there is also no sharing of assets at the termination of the marriage by death, both husband and wife can inherit from each other upon the death of the other spouse.[7] Although Islam encourages parties to draw up a will, there is no real freedom of testation.[8] This means that a testator cannot, for example,

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2 Sabiq *Fiqh Us-Sunnah* (1989) 51; Esposito *Islam the Straight Path* (1991) 78 83. Barratt, Domingo, Amien, Denson, Mahler-Coetzee, Olivier, Osman, Schoeman and Singh *Law of Persons and the Family* (2017) 332; Herring *Family Law* (2011) 105–107.

3 Barratt *et al Law of Persons and the Family* 332; Gibson *Dissolving Wedlock* (1994).

4 Rautenbach and Bekker *Introduction to Legal Pluralism* (2014) 368; Ibn Katheer *Tafseer al-Quran al-Adheem* vol 1 (2003) 93; *Quran* ch 4, verse 33. The matrimonial property system in terms of Islamic law is similar to the South African standard antenuptial contract where the accrual system is excluded.

5 Ibn Katheer *Tafseer al-Quran al-Adheem* vol 1 (2003) 93.

6 The *Ulama* in South Africa are unanimous that the only matrimonial property regime that is *Shari'ah* compliant is the standard antenuptial contract where there is no sharing of assets and liabilities during the subsistence of the marriage. This may prove to be problematic as the wife may be left destitute where all or most of the assets accrued during the subsistence of the marriage are registered in the husband's name.

7 Doi *Women in Shari'ah* (1989) 166.

8 Alkhuli *The Light of Islam* (1981) 97.

disinherit one child or his wife, for that matter, as one of the principles of the Islamic law of inheritance is that the wife, the children born of the marriage and the parents of the husband or wife inherit in all cases, although not in equal shares.[9] Islam limits the power of testamentary disposition to one-third of the testator's estate, as the remaining two-thirds must be distributed among the heirs.[10] The rules of inheritance are, however, subject to the condition that, before the heirs inherit, all the deceased's debts, including funeral expenses, must first be settled and effect must be given to bequests and legacies.[11]

Maintenance (*nafaqah*) during the subsistence of the marriage is primarily the husband's duty, regardless of the private means of the wife.[12] The wife is under no obligation to contribute financially towards the running of the household, and where she does, she may claim such amounts from her husband.[13] When a marriage is terminated by the death of the husband, insofar as the maintenance of the surviving spouse is concerned, the surviving widow is allowed to be maintained from the estate of her deceased husband for a period of four months and ten days – namely, her period of *iddah* (mourning)[14] after the death of her husband. Thereafter, the rules of inheritance come into effect.[15]

## 2 2 South African law

The dissolution of a civil marriage[16] can occur through the death of one or both of the spouses. As soon as the marriage is terminated, the personal consequences of the marriage end – that is, the *consortium omnis vitae* and spousal maintenance duty come to an end.[17] The manner in which the matrimonial property is divided upon the death of one or both of the spouses depends on the matrimonial property system that regulates their marriage.

### *2 2 1 Marriages in community of property*

Where the parties were married in community of property prior to death, the marriage, as well as the community of property between the spouses, ends and each spouse is entitled to half of the joint spousal estate.[18] The Administration of Estates Act[19] regulates the winding up of the joint estate. In

9 *Ibid*.

10 Doi *Women in Shari'ah* 165. Examples of heirs are the wife, the children and the deceased's parents.

11 Alkhuli *The Light of Islam* 96.

12 Siddiqi *The Family Laws of Islam* 107.

13 Siddiqi *The Family Laws of Islam* 108.

14 *Iddah* is defined as a compulsory period of waiting or mourning, which a widow or divorcee is obliged to observe in terms of Islamic Law. In the case of a widow, the prescribed *iddah* is four months and ten days, and for the divorcee, the prescribed *iddah* is three months.

15 Ibn Katheer *Tafseer al-Qur'anal-Adheem* vol 1 218.

16 This includes civil unions concluded in terms of the Civil Union Act 17 of 2006.

17 The surviving spouse of the deceased can claim maintenance from the deceased spouse's estate in terms of the Maintenance of Surviving Spouses Act 27 of 1990.

18 Voet 23.2.90; Grotius 2.11.13; Van Leeuwen 4.23.11.

19 66 of 1965.

terms of the Act, control of the joint estate is transferred to the executor for winding up before the surviving spouse receives his or her half-share of the joint estate.[20] The executor has to pay all debts owed by the joint estate and exact payment for all debts that are owed to the joint estate.[21] Only once the executor has discharged these duties is half the net balance of the joint estate delivered to the surviving spouse – by virtue of the matrimonial property system that regulated the marriage, not the laws of inheritance.[22] The deceased spouse's net half of the joint estate is devolved among his or her heirs. As soon as the executor assumes control over the joint estate, the surviving spouse is only permitted to deal with the assets in the joint estate for specified purposes,[23] unless he or she has the consent of the Master of the High Court to do otherwise.[24]

### *2 2 2 Marriages out of community of property excluding accrual*

An antenuptial contract is not terminated by the death of one or both spouses, but rather by the fulfilment of all the conditions of the antenuptial contract. The executor deals only with the estate of the deceased spouse.

If the surviving spouse has any claim against the deceased estate, he or she must lodge a claim against the deceased estate with the executor.[25] This can include a claim for household necessaries in terms of section 23 of the Matrimonial Property Act,[26] where one spouse contributed more than his or her *pro rata* share to household necessaries. In cases where the parties were married out of community of property without accrual before 1 November 1984, an automatic right of recourse exists where one spouse contributed more than his or her *pro rata* share. Spouses who entered into a marriage after the coming into operation of the Matrimonial Property Act, no longer enjoy this automatic right of recourse. Spouses can, if they so wish, agree to a right of recourse in terms of their antenuptial contract.[27]

### *2 2 3 Marriage out of community of property with accrual*

Where spouses are married in terms of the accrual system, the calculation of the accrual occurs when the marriage is terminated. A claim will be lodged against the deceased's estate where the accrual of the surviving spouse is less than that of the deceased.[28] In contrast, where the deceased estate shows a smaller accrual, it is the duty of the executor to lodge a claim against the surviving spouse for the payment of the accrual.

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20 Barratt et al *Law of Persons and the Family* 327.

21 *Ibid.*

22 *Estate Sayle v Commissioner of Inland Revenue* 1945 AD 388.

23 For example, funeral expenses and reasonable maintenance may be claimed from the joint estate.

24 Heaton and Kruger *South African Family Law* (2015) 116; Barratt *et al Law of Persons and the Family* 327.

25 *Barnard v Van der Merwe* 2012 (3) SA 304 (GNP).

26 88 of 1984.

27 S 23(1) and (4) of the Matrimonial Property Act 88 of 1984.

28 Heaton and Kruger *South African Family Law* 116.

### *2 2 4 Claims of the surviving spouse*

In addition to the above consequences, where a marriage is dissolved through death, claims based on inheritance and maintenance also arise. Where the deceased has left a valid will, effect must be given to claims based on inheritance. Where the deceased died without a valid will, the rules of intestate succession, as set out in the Intestate Succession Act,[29] will apply.

In terms of section 2(1) of the Maintenance of Surviving Spouses Act,[30] a surviving spouse can also institute a claim against the deceased's estate for his or her reasonable maintenance needs until his or her death or remarriage, to the extent that she cannot provide for these needs from her own means and earnings. To determine what "reasonable maintenance needs" are, the court takes the following factors into consideration – namely, the amount available in the deceased estate for distribution to heirs and legatees,[31] the surviving spouse's existing and expected means, earning capacity, financial needs and obligations,[32] the duration of the marriage,[33] the surviving spouse's standard of living during the marriage,[34] the surviving spouse's age at the time of the deceased's death,[35] and any other relevant factors. The amount claimed by the surviving spouse will, therefore, be reduced or denied if there are insufficient funds in the deceased's estate,[36] or in situations where the surviving spouse is in a position to provide maintenance for him- or herself. The deceased's children also have a claim against the estate for their reasonable maintenance needs.[37] The claim of the surviving spouse and the dependent children of the deceased has the same order of preference. In terms of section 2(3)(*b*), where the claims of the surviving spouse and the dependent children compete with one another, and the amount available in the deceased's estate is insufficient to meet the claims in full, these claims will be reduced proportionally.

Surviving spouses who are married in terms of the Recognition of Customary Marriages Act[38] or the Civil Union Act,[39] as well as surviving spouses married according to Muslim rites,[40] qualify as "survivors" in terms of the Maintenance of Surviving Spouses Act. This does not apply to the surviving partner of a life partnership as the law does not impose a duty of support between unmarried persons.[41]

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29 81 of 1987.
30 27 of 1990.
31 S 3(*a*) of the Maintenance of Surviving Spouses Act 27 of 1990.
32 S 3(*b*) of the Maintenance of Surviving Spouses Act 27 of 1990.
33 S 3(*b*) of the Maintenance of Surviving Spouses Act 27 of 1990.
34 S 3(*c*) of the Maintenance of Surviving Spouses Act 27 of 1990.
35 *Ibid*.
36 *Oshry v Feldman* 2010 (6) SA 19 (SCA).
37 S 2(3)(*a*) of the Maintenance of Surviving Spouses Act 27 of 1990.
38 120 of 1998.
39 17 of 2006.
40 *Daniels v Campbell NO* 2004 (5) SA 331 (CC) and *Hassam v Jacobs NO* [2008] 4 All SA 350 (C).
41 *Volks NO v Robinson* 2005 (5) BCLR 446 (CC).

It must, however, be noted that the relief provided to a surviving Muslim spouse in terms of the Maintenance of Surviving Spouses Act is contrary to the principles of Islamic law as the wife is only entitled to maintenance from her deceased husband's estate during the *iddah* period. Thereafter, she becomes the responsibility of her guardian.

## 2 3 The law of England and Wales

A marriage is terminated by the death of one or both spouses.[42] At the death of a spouse, the surviving spouse automatically acquires a right to inherit assets from the estate where the deceased spouse died intestate.[43] The surviving spouse furthermore acquires an automatic right to apply for financial provision from the deceased spouse's estate where the provision made for the surviving spouse is insufficient.[44] The surviving spouse also has an action against third parties whose wrongful act caused the death of the deceased spouse.[45]

## 2 4 Comparison

In Islamic law, since the marriage involves complete separation of assets, the spouses cannot lay claim to each other's estates where the marriage is terminated by the death of one of the spouses. The spouses can, however, inherit from each other. In contrast, in terms of South African law, the division of the marital property depends exclusively on the matrimonial property system regulating the spouses' marriage. In English law, the surviving spouse automatically acquires a right to inherit from the estate of the deceased spouse unless the latter executes a valid will that excludes the surviving spouse. The surviving spouse is also entitled to lodge a claim for maintenance against the deceased spouse's estate.

The Islamic law of inheritance does not recognise freedom of testation; a husband cannot disinherit his wife while the marriage is still in existence. Both South African and English law allow the spouses freedom of testation. In terms of South African law, in particular, where the parties are married in community of property or subject to accrual, for example, one spouse can still prevent the other from inheriting his or her half-portion of the estate, or his or her portion of the accrual.

A further significant difference between Islamic law and the other two legal systems is that, at the termination of a marriage by death, both South African and English law permit the parties to enter into another marriage immediately. In contrast, Islamic law requires the woman to observe a period of mourning. This rule does not apply to the man where the parties were married in terms of Islamic rites, as he is allowed to enter into a marriage immediately upon the death of his wife.

Furthermore, in terms of Islamic law, after the death of her husband, the

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42 Herring *Family Law* 135.

43 Probert *Family and Succession Law in England and Wales* (2013) 85.

44 *Ibid*.

45 S 1(3) of the Fatal Accidents Act 1976.

widow once again becomes the responsibility of her guardian, who is under an obligation to maintain her. The surviving spouse is only allowed to be maintained from the estate of her deceased husband for a period of four months and ten days after the demise of her husband.[46] South African law makes provision for the widow of the deceased to claim for maintenance in terms of the Maintenance of the Surviving Spouses Act.[47] As mentioned previously, a surviving spouse married according to Muslim rites[48] qualifies as a "survivor" in terms of the Maintenance of Surviving Spouses Act, allowing the surviving spouse to lodge a claim for maintenance against the deceased spouse's estate. Although this claim is allowed in terms of South African law, it conflicts with the teachings and principles of Islamic law in terms of which the surviving wife becomes the responsibility of her guardian and is not allowed to lodge a claim against her deceased husband's estate. Similarly, English law also makes provision for the surviving spouse to lodge a claim for maintenance against the deceased spouse's estate.

## 3 DISSOLUTION OF A MARRIAGE BY DIVORCE

### 3 1 Islamic law

Where the marital relationship has broken down and the parties can no longer live together in peace and harmony, Islam recognises that termination of the marriage is inevitable.[49] There is no value in keeping a marriage together when the union has been rendered meaningless and has no future owing to the breakdown of the marital relationship.[50] The marriage will subsist only for as long as the spouses have love and respect for each other.[51] Leaving matters unresolved where the marital relationship has broken down and where the spouses can no longer live together is regarded as un-Islamic and unethical on the part of spouses.[52]

Islam, therefore, recognises the necessity of divorce. While divorce is allowed in instances of absolute necessity, it is clear that Islam does not regard it as desirable.[53] As Islam implores spouses to try their utmost to keep their marriage intact, the act of divorce should, therefore, be considered only as a last resort, after all attempts at reconciliation have failed.

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46 Ibn Katheer *Tafseer al-Qur'anal-Adheem* 218.

47 S 7(2) of the Maintenance of Surviving Spouses Act 27 of 1990.

48 *Daniels v Campbell NO supra* and *Hassam v Jacobs NO supra*.

49 Ur-Rahman *Muhammad: Encyclopedia of Seerah* vol 2 (1989) 58; Moosa *Unveiling the Mind* (2004) 117.

50 Keene *Believers in One God* (1983) 168.

51 Ayoup *Fiqh of Muslim Family* (undated) 182.

52 *Quran* ch 4, verse 129.

53 Ayoup *Fiqh of Muslim Family* 185; *Quran* ch 4, verse 19.

### *3 1 1 Definition of divorce*

The literal meaning of the word *talaq* is to "set free".[54] In terms of Islamic law, *talaq* is defined as "the dissolution of a valid marriage contract forthwith or at a later date by the husband, his agent, or his wife duly authorised by him to do so, using the word *talaq,* a derivative or a synonym thereof".[55] From the definition, certain deductions can be made. First, the right of *talaq* as a method of terminating the marriage is generally exclusively reserved for the husband;[56] furthermore, the right of *talaq* is entirely at the discretion of the husband.[57] Where the husband is guilty of misconduct,[58] and the wife wishes to terminate the marriage as a result thereof, she is required to apply to the relevant Muslim authority[59] for the annulment (*faskh*) of the marriage.[60] Secondly, the husband may appoint or delegate someone to pronounce the divorce on his behalf.[61] Thirdly, *Shari'ah* does not prescribe any formalities in respect of the manner in which the divorce must be pronounced.[62] For example, no witnesses are required to be present at the time that the *talaq* is pronounced, nor is the presence or the consent of the wife required for the *talaq*.[63]

### *3 1 2 Pre-divorce procedure*

Before a divorce is issued, all attempts must be undertaken to reconcile the parties.[64]

In the interests of fairness and justice, the *Quran* advocates the appointment of an arbiter from the family of each spouse.[65] The role of the two appointed arbiters is to assist the spouses in the reconciliation process by probing into the real cause of the disharmony between the spouses, and to assist the spouses to find a solution to the dispute.[66] According to the *Shafi'i* school of Islamic jurisprudence, the arbiters are not authorised to pass any final decree, but are permitted to make recommendations for reconciliation between the spouses.[67] These recommendations may either be accepted or rejected by the spouses.[68] However, if the spouses authorise the arbiters to effect a divorce, or to take any other measure, they will be

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54 Doi *Shari'ah: The Islamic Law* (1984) 168.
55 Nasir *The Status of Women Under Islamic Law* (2009) 120.
56 Ba'-kathah *Tuh-fatul Ikhwaan* (1987) 164; Doi *Women in the Shari'ah* 84.
57 Rautenbach and Bekker *Introduction to Legal Pluralism* 374.
58 For example, failing to maintain the wife or cruelty on the part of the husband towards the wife. See Moodley "The Islamic Laws of Divorce, Polygamy and Succession" 2001 42(2) *Codicillus* 9; Rautenbach and Bekker *Introduction to Legal Pluralism* 379.
59 The *Ulama* or one of the Judicial Councils will suffice as a relevant Muslim authority.
60 Ba'-kathah *Tuh-fatul Ikhwaan* 165.
61 Sabiq *Fiqh Us-Sunnah* 128.
62 Ahmad *The Muslim Law of Divorce* (1984) 28–30; Moosa *Unveiling the Mind* 118.
63 Sabiq *Fiqh Us-Sunnah* 128.
64 *Quran* ch 4, verse 35.
65 Alkhuli *The Light of Islam* 84.
66 *Ibid*.
67 Siddiqi *The Family Laws of Islam* (1984) 217.
68 *Ibid*.

deemed to be bound by their decision.[69] Only if all attempts at reconciliation have failed, may a divorce be sought.[70] Reconciliation between the two spouses is encouraged as far as possible.[71]

### *3 1 3 Grounds for divorce*

Divorce is permitted when married life is a source of misery and unhappiness for the spouses to the marriage.[72] Besides the breakdown of the marital relationship, a divorce may also be sought if the husband is impotent or sterile, or the wife is chronically ill.[73] The spouses are allowed to part ways where, as far as temperament is concerned, they are incompatible to such an extent that they cannot live together in marital agreement.[74] The wife is also allowed to seek a divorce if the husband is serving a sentence of life imprisonment, or is absent and his whereabouts are unknown, or where the husband is unable to bear the financial responsibility of maintaining his wife.[75] A further ground for divorce is the misconduct of either the husband or the wife[76] – for example, if either the wife or the husband commits adultery. In this instance, an action for divorce can be instituted.

### *3 1 4 Forms of divorce*

There are various verses of the *Quran* indicating that a divorce may be effected orally or in writing, in the presence of two competent witnesses.[77]

#### (i) Orally

Divorce may be effected orally in explicit terms (*seerah*). Where the word "*talaq*" is used explicitly, the marriage is terminated, whether or not the husband had the necessary intention to terminate the marriage.[78] Examples of explicit terms would be "I *talaq* you" or "I divorce you".

Alternatively, *kinaayah* (ambiguous terms) may be used. This is where the husband uses other terms beside the word "*talaq"* to convey his intention to terminate the marriage. When terms other than the word "*talaq*" are used, it is important to establish the intention of the husband – that is, whether or not he intended to end the marriage. Examples of ambiguous terms would be "I hereby set you free", "Begin your *iddah*" or "You are no more my wife from this moment forward".

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69 *Ibid*.
70 Alkhuli *The Light of Islam* 84.
71 *Quran* ch 4, verse 130.
72 Alkhuli *The Light of Islam* 82.
73 Alkhuli *The Light of Islam* 84.
74 Siddiqi *The Family Laws of Islam* 218.
75 *Ibid.*
76 *Ibid.*
77 For example, *Quran* ch 65, verse 2.
78 Ba'-kathah *Tuh-fatul Ikhwaan* 164.

### (ii) Writing

A marriage is similarly terminated if the *talaq* is written down.[79] The wording must be clear and unambiguous and must convey the meaning that the marriage is being terminated.[80] A dispute may arise as to the authenticity of the author of the divorce later. In this case, it must be proved that the husband is the person who wrote the letter with the intention of terminating the marriage.[81]

Whether the divorce is effected orally or in writing, the words uttered or written must convey the intention that the marriage is being dissolved.[82] Therefore, where the divorce is issued under duress, or when the husband becomes mentally ill, the marriage is not dissolved and the divorce does not become effective.[83] However, where the husband utters the word "*talaq"* in jest or playfully to his wife, the marriage will be deemed to be dissolved.[84] This is the case, despite the fact that there was no intention on the part of the husband to terminate the marriage.[85]

The four schools of Islamic jurisprudence agree that the divorce of an unconscious person who is in that condition for a reason other than intoxication is null and void.[86] They are also unanimous that the uttering of the word *talaq* while asleep does not result in the termination of a marriage.[87]

Islam prohibits the intake of any intoxicating substances such as drugs and alcohol.[88] In the event that the husband voluntarily or willingly ingests an intoxicating substance that affects his powers of reasoning, and he pronounces a *talaq* while in this condition, the marriage is terminated.[89] However, if the husband's power of reasoning is affected through non-sinful means – for example, through sickness or mental illness and he pronounces a *talaq* while so afflicted – the *talaq* will not be valid.[90]

## *3 1 5 Restrictions on divorce*

Because Islam discourages divorce, certain restrictions have been placed on the spouse's right to seek a divorce. Alkhuli sets out the restrictions on divorce as follows:[91]

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79 Ba'-kathah *Tuh-fatul Ikhwaan* 165.
80 Sabiq *Fiqh Us-Sunnah* 124.
81 Ba'-kathah *Tuh-fatul Ikhwaan* 165.
82 Sabiq *Fiqh Us-Sunnah* 125.
83 *Ibid*.
84 Ba'-kathah *Tuh-fatul Ikhwaan* 166.
85 *Ibid*.
86 Ayoup *Fiqh of Muslim Family* 192.
87 *Ibid*.
88 *Quran* ch 5, verses 90–91.
89 Ba'-kathah *Tuh-fatul Ikhwaan* 166; Ayoup *Fiqh of Muslim Family* 192.
90 *Ibid*.
91 Alkhuli *The Light of Islam* 85.

(i) The husband is not allowed to divorce his wife during the period she is menstruating. The reason for this restriction is that sexual intercourse is prohibited during this period, and the abstinence of sexual relations may cause cold relations between the husband and wife. This restriction on divorce therefore seeks to ensure that the husband is not merely seeking divorce because he is deprived of sexual intercourse.

(ii) Before a divorce can take place, the spouses must submit themselves to mediation. It is only upon the failure of such reconciliation attempts by two judges that the spouses would be allowed to proceed with a divorce.

(iii) Where a divorce is instituted, a waiting period (*iddah*) of three months (that is, three menstrual cycles) after the divorce must be observed by the wife. In the case of a pregnant woman, the waiting period is extended until the birth of the child. During the *iddah* period, the woman is prohibited from entering into marriage with a third party but can remarry her first husband. The compulsory waiting period provides both parties with an opportunity to reconsider the divorce and to remarry each other if they wish to do so.

(iv) The husband is prohibited from evicting the wife from the marital home once the divorce takes place. The wife may remain in the marital home for the duration of the *iddah* period.

(v) Both spouses are encouraged to remarry each other during and after the waiting period unless an irrevocable divorce has taken place. See (vii) below for the position of remarriage where the divorce is irrevocable.

(vi) In the case of a revocable divorce, the spouses are presented with two opportunities to remarry each other, after the first and second divorce has been issued.

(vii) Where a third divorce is issued, the divorce is irrevocable, and the wife is prohibited from remarrying her first husband, unless she has entered into a marriage with a third party and this marriage is terminated either through death or divorce.

### *3 1 6 Number of talaq*

Islamic law only permits a man to divorce his wife in three separate and distinct periods, usually three-monthly courses.[92] During these periods, the parties may try to reconcile, but if this proves to be unsuccessful, the divorce becomes effective after the lapse of the third period.[93] In other words, in Islam, the husband possesses the power of three *talaq*, which need not all be given in order for the marriage to be terminated.[94] For example, if the husband pronounces one *talaq,* and the wife completes her three-month period of *iddah* as required, the marriage is deemed to be terminated. However, if the parties wish to remarry each other after the *iddah* period they may do so, but the husband now only has two *talaq*. If the husband

92 Siddiqi *The Family Laws of Islam* 219.
93 Doi *Shari'ah: The Islamic Law* 173.
94 Ba'-kathah *Tuh-fatul Ikhwaan* 167.

thereafter issues her with another two *talaq,*[95] he has used up all his rights of *talaq*. If he now wishes to remarry his ex-wife, he would only be allowed to do so once she has entered into a marriage with a third party, consummation has occurred, and the subsequent marriage has been properly terminated.[96]

### *3 1 7 Types of talaq*

A divorce initiated by the husband can be effected in one of two ways – namely, the *talaq al-sunna* or the *talaq al-bid'a.*[97]

#### (i) *Talaq al-sunna*

This method of divorce is recommended by Islamic law, and is in accordance with the *Quran* and the traditions of Prophet Mohammed (PBUH).[98] In terms of this method of divorce, the husband must pronounce only one *talaq* or repudiation, during a period when the wife is in a state of purity.[99] The underlying purpose for these conditions is to prevent the permanent termination of the marriage.[100] These conditions also allow the husband to revoke the *talaq* or repudiation when better sense prevails, especially when the repudiation has been issued in a hasty and rash manner without proper consideration being given.[101] During this period of separation, after the announcement of a *talaq*, the marriage continues to subsist between the parties.[102] Where the parties reconcile during the wife's *iddah* period, there is no need for a new marriage contract to be concluded.[103] However, if the husband has issued one or even two *talaq*, and he abstains from sexual intercourse with his wife, and no reconciliation tales place during the period of *iddah*, a complete cessation of the marital rights and duties between the spouses takes place.[104] Should the spouses then wish to reconcile, a new contract of marriage would be required and the parties need to agree upon a new dower.[105] Where the husband has issued one *talaq* and the parties decide not to reconcile after the expiry of the period of *iddah*, the wife is allowed to enter into a marriage with a third party, without him having to issue the other two *talaqs*.[106]

A distinction should be drawn between revocable and irrevocable divorces.[107] The method of divorce described above is an example of a revocable divorce (*raj'i*). A *talaq al-raji* becomes effective only at the end of the waiting period (*iddah*) that starts after the first or second "divorce" is

95 Hallaq *The Origins and Evolution of Islamic Law* (2005) 23.
96 Ba'-kathah *Tuh-fatul Ikhwaan* 167.
97 Ba'-kathah *Tuh-fatul Ikhwaan* 168.
98 Ayoup *Fiqh of Muslim Family* 186.
99 The husband cannot issue a divorce while the wife is menstruating.
100 Siddiqi *The Family Laws of Islam* 223.
101 Doi *Shari'ah: The Islamic Law* 175.
102 Doi *Shari'ah: The Islamic Law* 175; Siddiqi *The Family Laws of Islam* 223.
103 Doi *Shari'ah: The Islamic Law* 176.
104 Ibn Qudaamah *Al-Mugni* (2013) 98.
105 Doi *Shari'ah: The Islamic Law* 176.
106 Ibn Qudaamah *Al-Mugni* 98.
107 Doi *Shari'ah: The Islamic Law* 177; Ba-kathah *Tuh-fatul Ikhwaan* 169.

pronounced.[108] During the waiting period, the woman remains the legal wife of the husband, and the husband is under an obligation to support his wife financially.[109] While the parties are still in a position to reconcile and resume their marital relationship, a divorce with the possibility of reconciliation is allowed only twice.[110] Thereafter, the parties must make a final decision to either dissolve the marriage permanently, or continue with the marriage.[111]

An irrevocable divorce (*ba'in*) is a divorce where the husband has made all three pronouncements.[112] In this instance, the marriage is dissolved with immediate effect.[113] When the husband pronounces the third *talaq*, it becomes a *talaq al-ba'in*, severing the marital rights and duties between the spouses.[114] This means that the parties cannot enter into a marriage unless the former wife marries a third person and the latter voluntarily divorces her.[115]

### (ii) *Talaq al-bid'a*

This second method to effect a divorce is not in accordance with the rules laid down by prophetic tradition, and is known as *talaq al-bid'a* or the innovated divorce.[116] This method of divorce is not recommended, as the divorce becomes irrevocable as soon as it is pronounced.[117] In terms of this method of divorce, the husband issues or conveys all three of the divorces in writing or orally in one sitting.[118] Where the husband exercises his right of repudiation on three successive occasions as stated in the example, the divorce becomes irrevocable.[119] Once the divorce becomes irrevocable, the parties are absolutely forbidden to remarry each other, as an irrevocable divorce severs the marital ties forever, unless the wife marries a third party and divorces the latter.[120] After the termination of the marriage with the third party, the wife is allowed to remarry her first husband.

### (iii) *Khula*

*Khula* can be defined as the termination of a marriage by the husband uttering the words "*talaq"* or "*khula",* and whereby he accepts compensation for freeing his wife from the marriage.[121] The spouses can agree on any

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108 *Ibid*.
109 Doi *Shari'ah: The Islamic Law* 176; Al-Fawzaan *Al-Mulakhkhas Al-Fiqhi* vol 2 (2001) 317.
110 *Ibid*.
111 *Quran* ch 2, verse 229.
112 Sabiq *Fiqh Us-Sunnah* 149.
113 *Ibid*.
114 Doi *Shari'ah: The Islamic Law* 178.
115 Sabiq *Fiqh Us-Sunnah* 145 178 and 363; *Quran* ch 2, verse 230.
116 This divorce is commonly known as the "three-in-one", "triple" or instant divorce.
117 Doi *Shari'ah: The Islamic Law* 179.
118 Siddiqi *The Family Laws of Islam* 224.
119 Cachalia *Future of Muslim Family Law in South Africa* (1991) 69.
120 Bulbulia "Women's Rights and Marital Status: Are We Moving Closer to Islamic Law?" 1983 *De Rebus* 431 432.
121 Ba'-kathah *Tuh-fatul Ikhwaan* 171; Siddiqi *The Family Laws of Islam* 230; Al-Misri and Keller *Reliance of the Traveller: A Classic Manual of Islamic Sacred Law* (2008) 562.

amount of compensation, but it must be a fixed amount and it must have economic value.[122] However, the amount of compensation paid by the wife must not exceed that which she received as dower.[123] Furthermore, the parties have to agree on all the aspects of the contract in respect of the *khula*. The wife can use this method of divorce where she has suffered cruelty and abuse at the hands of her husband or where the husband has deserted her.[124]

In addition to the reasons cited above, the wife can also apply for a *khula* where she has an aversion to the physical appearance of her husband.[125]

The effect of a *khula* is that the divorce is rendered irrevocable and should therefore be resorted to only in extreme circumstances.[126] The fact that a marriage dissolved by *khula* renders the divorce irrevocable means that the husband forfeits his right to reconcile with his wife.[127] However, the parties can still remarry each other if they mutually agree to do so.[128] The general rule in respect of *khula* is that all the conditions and restrictions applicable to *talaq* apply similarly to *khula*.[129]

### (iv) Divorce by mutual agreement (*mubara'ah*)

In certain circumstances, the wife might not be in a financial position to pay the husband compensation, as required when the marriage is terminated by *khula*.[130] The spouses to the marriage can, however, still dissolve the marriage if they mutually agree to do so.[131] Where the husband makes an offer for a mutually agreed divorce, he may not withdraw his offer before the wife has given him an answer.[132] Should the wife accept the offer for a mutually agreed divorce, the divorce is effective immediately.[133] In contrast, if the wife makes the initial offer of a mutually agreed divorce, she is entitled to withdraw the offer at any time before acceptance by the husband.[134]

### (v) Judicial divorce (*tafriq*)

Islam makes provision for the pronouncement of a divorce by judicial intervention.[135] This is where an Islamic court arbitrates the marital dispute

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122 Ba'-kathah *Tuh-fatul Ikhwaan* 171.
123 Doi *Women in Shari'ah* 96.
124 Doi *Women in Shari'ah* 96. See also the discussion of Faskh below.
125 Siddiqi *The Family Laws of Islam* 232.
126 Doi *Women in Shari'ah* 98.
127 Doi *Shari'ah: The Islamic Law* 194.
128 Doi *Women in Shari'ah* 98.
129 Siddiqi *The Family Laws of Islam* 232.
130 Schacht *An Introduction to Islamic Law* (1964) 164; Fyzee *Outlines of Mohammadan Law* (1974) 155.
131 Doi *Women in Islam* 97.
132 Esposito and DeLong-Bas *Women in Muslim Family Law* (2001) 32; Rautenbach and Bekker *Introduction to Legal Pluralism* 379.
133 Fyzee *Outlines of Mohammadan Law* 155.
134 Rautenbach and Bekker *Introduction to Legal Pluralism* 379.
135 Doi *Shariah: The Islamic Law* 170–172; Sabiq *Fiqh Us-Sunnah* 51.

and pronounces a divorce.[136] This is a method of divorce by judicial separation.[137] Either the husband or the wife can institute an action for judicial separation. The two methods for judicial divorce are known as *li'an* and *faskh.*

(1) *Li'an*

False accusations of adultery and fornication, especially against chaste persons, are strictly prohibited in terms of *Shari'ah*.[138] It is therefore incumbent upon the person who accuses another of such immoral misconduct to produce four witnesses who are able to provide eye-witness accounts of the misconduct in question.[139] Where the husband levels such accusations[140] and has no witnesses to attest to his accusations, and the wife furthermore denies his accusations, *li'an* will ensue.[141] In other words, *li'an* or mutual imprecation brings about separation between the husband and wife when one of the spouses utters four oaths and one curse upon themselves.[142] The oaths are uttered to show the person's own truthfulness.[143]

Where the husband, for example, accuses his wife of committing adultery, the spouses have to appear before a *Qadi* (judge), and the husband has to repeat under oath four times that his accusation bears the truth.[144] On the fifth time, the husband invokes the curse of Allah if his accusation is false.[145] The wife in turn has to repeat under oath four times that the husband's accusation is false.[146] She is also required to invoke the curse of Allah.[147] Where both spouses have taken these oaths, the *Qadi* will issue an order that the parties be separated and the marriage is thereby annulled.[148] The parties are barred from ever remarrying each other.[149]

However, if the husband refuses to take these oaths after making these accusations against his wife, he will be punished.[150] Similarly, punishment will be meted out to the husband if he chooses to withdraw during the course of taking the oaths.[151] Where the wife refuses to take the required oath, and the husband has already taken the oaths, she invites upon herself the punishment for adultery. *Li'an* differs vastly from the situation where the

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136 Rautenbach and Bekker *Introduction to Legal Pluralism* 379. In South Africa, there are no Islamic courts, and the parties in this case would approach the local *Ulama* or Judicial Council for a pronouncement of divorce.

137 Nasir *The Status of Women Under Islamic Law* 134.

138 Alkhuli *The Light of Islam* 106.

139 Ba'-kathah *Tuh-fatul Ikhwaan* 172.

140 For example, the husband can accuse the wife of adultery, or he can deny that he is the father of the child, or alternatively he can deny that she is pregnant by him.

141 Doi S*hari'ah: The Islamic Law* 188.

142 Ba'-kathah *Tuh-fatul Ikhwaan* 172.

143 *Quran* ch 24, verse 6.

144 Ba'-kathah *Tuh-fatul Ikhwaan* 173.

145 *Ibid*.

146 Doi *Shari'ah: The Islamic Law* 189.

147 *Ibid*.

148 Ba'-kathah *Tuh-fatul Ikhwaan* 174.

149 Ba'-kathah *Tuh-fatul Ikhwaan* 175.

150 The punishment meted out to the husband is 80 lashes.

151 Ba'-kathah *Tuh-fatul Ikhwaan* 175.

marriage is terminated through divorce, because even where the divorce is irrevocable, the spouses may remarry each other after the wife has entered into a marriage with a third party, and such marriage is dissolved at a later stage.[152] Where the marriage is dissolved by *li'an*, the spouses are prohibited from marrying each other forever.

(2) *Faskh*

The literal meaning of the term *faskh* is "to annul a deed" or to "rescind a bargain".[153] The definition of *faskh* as it pertains to a marriage is the annulment or abrogation of the contract of marriage by the *Qadi* at the instigation of the wife.[154] *Faskh* is the only method by which a wife can obtain a divorce without the husband's consent and participation.[155] The marriage will be annulled if the *Qadi* is satisfied that the wife is prejudiced by the marriage.[156]

Where the wife wishes to apply for a *faskh*, this may be done on one of the following grounds: injury/discord; failure to maintain; defect on the part of the husband; husband's absence *sine causa* or imprisonment; and cruelty or incompatibility.[157]

## (vi) Other grounds for terminating a marriage

(1) Apostasy: The marriage is automatically and immediately annulled where the husband turns apostate and renounces Islam.[158]

(2) *Elaa*: This is the temporary separation between husband and wife, where the husband in anger takes an oath that he will refrain from having sexual intercourse with his wife for a period of four months.[159] The marriage would be dissolved when the husband does not resume sexual relations with his wife at the end of the four-month period.[160]

Once the four-month period has lapsed, the wife has the right to demand that her husband resume sexual relations with her, or else he must *talaq* her.[161] Furthermore, once the four-month period has lapsed, the spouses are required to remarry each other if they wish to continue to live together as husband and wife.[162] Where the husband, however, has sexual intercourse with his wife before the expiry of the four-month period, the marriage remains intact, but the husband has to give compensation for breaching the oath.[163]

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152 Ayoup *Fiqh of Muslim Family* 320.
153 Doi *Shari'ah: The Islamic Law* 171.
154 Doi *Women in the Shari'ah* 90.
155 Nasir *The Islamic Law of Personal Status* (2002) 120–133.
156 Doi *Women in the Shari'ah* 90.
157 Moodley 2001 *Codicillus* 8 9.
158 Siddiqi *The Family Laws of Islam* 237; *Quran* ch 60, verse 10.
159 Siddiqi *The Family Laws of Islam* 238; Ba'-kathah *Tuh-fatul Ikhwaan* 170.
160 *Quran* ch 2, verses 226–227.
161 Ba'-kathah *Tuh-fatul Ikhwaan* 171.
162 Sidiqi *The Family Laws of Islam* 238.
163 Ba'-kathah *Tuh-fatul Ikhwaan* 170.

## *3 1 8 Iddah*

In terms of Islamic law, *iddah* can be defined as a compulsory period of waiting imposed on a woman after the death of her husband or on her divorce. During this time, the wife is prohibited from remarriage.[164] The reasons given by *Shari'ah* for the compulsory period of waiting are fourfold – namely, it provides the spouses with an opportunity to reconsider whether the divorce should be revoked or made final; it allows the parties to determine whether or not the wife is pregnant by her husband so that there may be no confusion as to the paternity of the child; it provides the widow with a mourning period where the marriage is dissolved through the death of the husband[165] and lastly, it provides the wife with *nafaqah* for a definite period after the marriage ends.[166]

### (i) Different kinds of *iddah*

The various kinds of *iddah* can be listed as: the *iddah* of women who menstruate; the *iddah* of a *mustahaadhah*;[167] the *iddah* of women who have passed the age of menstruation; the *iddah* of the widow; and the *iddah* of a pregnant woman.[168]

### (ii) The rights of the woman in *iddah*

During the period of *iddah,* the wife is prohibited from remarriage.[169] She is entitled to remain in the marital home for the duration of the *iddah,* whether the marriage has been terminated by *talaq,* annulment or death of the husband.[170] The husband cannot evict her from the marital home.[171] Similarly, no one is allowed to evict the wife from the marital home in the event of the death of her husband.[172] Where the deceased husband died without providing the widow with a place to live, the duty to provide suitable lodgings for her falls on the heirs of the deceased.[173]

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164 Doi *Shari'ah: The Islamic Law* 198; *Quran* ch 2, verse 228.

165 Sabiq *Fiqh us-Sunnah: Doctrine of Sunnah of the Holy Prophet* (1989) 198 208.

166 Siddiqi *The Family Laws of Islam* 220–221. It must be noted that the *iddah* period for the divorcée is three months or three menstrual cycles. The *iddah* period for the widow is four months and ten days.

167 *Mustahaadhah* refers to a woman who experiences menstruation that continues for longer than the normal period of menstruation, or to a person who experiences irregular cycles of menstruation.

168 The rules pertaining to the different kinds of *iddah* are discussed in Ba'-kathah *Tuh-fatul Ikhwaan* 174–177; Siddiqi *The Family Laws of Islam* 220; Sabiq *Fiqh Us-sunnah* 201; Al-Misri *et al Reliance of a Traveller: A Classic Manual of Islamic Sacred Law* 571.

169 Doi *Shari'ah: The Islamic Law* 203.

170 *Ibid*.

171 Ba'-kathah *Tuh-fatul Ikhwaan* 177; Al-Misri *et al Reliance of a Traveller: A Classic Manual of Islamic Sacred Law* 569.

172 *Ibid*.

173 *Ibid*.

A woman in a state of *iddah* is not allowed to leave her house to attend social functions, visit family and friends or for recreation.[174] The only time such a woman can leave her home is for necessity – for example, to purchase food or to go to work.[175]

## 3 2 South African law

As a result of the enactment of the Divorce Act,[176] the law relating to divorce was changed to a no-fault divorce system, as far as the grounds for divorce were concerned.[177] Although divorce is no longer fault-based, the misconduct of the parties is still a factor that is taken into consideration with regard to the patrimonial consequences of divorce.[178]

### *3 2 1 Definition of divorce*

The Divorce Act does not provide a definition of the term "divorce" but merely refers to the term "divorce action" as being "action by which an application is made for a decree of divorce or other relief in connection with the divorce".[179] The ordinary meaning of divorce as defined by the Oxford Dictionary as the "legal ending of a marriage".[180] The Divorce Act is gender neutral and either the husband or the wife can institute an action for divorce on one of the grounds of divorce as stipulated in the Divorce Act.

### *3 2 2 Pre-divorce procedure*

Although the spouses are encouraged to institute an action for divorce as a last resort, the Divorce Act, unlike *Shari'ah*, does not prescribe any pre-divorce procedure. In other words, while the spouses can be encouraged to embark on mediation with a view to reconciliation, there is no legal duty on them to do so. The judiciary has, however, emphasised that mediation should be preferred over litigation in family disputes.[181]

### *3 2 3 Grounds for divorce*

Previously, the four recognised grounds for divorce were adultery, malicious desertion, incurable mental illness lasting seven years, and lastly, imprisonment for at least five years after having been declared an habitual criminal.[182] The Divorce Act replaced these grounds of divorce and

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174 Ayoup *Fiqh of Muslim Family* 331–332.
175 Ba'-kathah *Tuh-fatul Ikhwaan* 177–178.
176 70 of 1979.
177 Barratt *et al Law of Persons and the Family* 334.
178 Heaton and Kruger *South African Family Law* 130.
179 S 1 of the Divorce Act 70 of 1979.
180 Hawkins, Delahunty and McDonald *Oxford Mini School Dictionary* (2002) 191.
181 *MB v NB* 2010 (3) SA 220 (GSI); *FS v JJ* 2011 (3) SA 126 (SCA).
182 Adultery and malicious desertion are common-law grounds of divorce. In 1935, the Divorce Laws Amendment Act 32 of 1935 introduced incurable mental illness and imprisonment of the defendant spouse after being declared an habitual criminal as grounds of divorce.

introduced irretrievable breakdown of the marriage[183] and mental illness, as well as continuous unconsciousness,[184] as grounds of divorce. The widening and relaxing of the grounds of divorce have resulted in South Africa being described as one of the easiest countries in the world in which to obtain a divorce, as a divorce is essentially available on demand.[185]

Section 3 of the Divorce Act provides for the following no-fault grounds of divorce: irretrievable breakdown of the marriage; mental illness; and continuous unconsciousness.

## (i) Irretrievable breakdown of the marriage

When a spouse cites that the marriage has broken down irretrievably as the ground upon which the divorce is sought, the spouse has to prove the following:[186]

(1) the marriage relationship has disintegrated to the point where it is no longer a normal marriage relationship; and

(2) there is no reasonable prospect of the restoration of a normal marriage relationship between the spouses in the future.

In other words, the *consortium omnis vitae* between the spouses must have been either destroyed or violated.[187] In order to determine whether this has indeed occurred, the court employs a subjective and an objective approach.[188] A combination of the subjective and objective approach dictates that the court will consider whether the marriage has broken down irretrievably from the point of view of the spouses concerned, taking into account the fact that the plaintiff is suing for divorce while also taking into account its own interpretation of the facts and circumstances of the marriage, by paying attention to the history and present state of the marriage.[189] Where both spouses indicate that they no longer wish to be married to each other, the courts will conclude that the marriage has broken down irretrievably.[190] This is the position even where one of the spouses does not want to get divorced and wants to save the marriage.[191] Where the other spouse is determined to end the marriage, the court will conclude that the marriage has broken down irretrievably.[192]

Section 4(2) provides certain guidelines to assist the court in its determination as to whether the marriage has broken down irretrievably.[193]

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183 S 4(1) of the Divorce Act 70 of 1979.

184 S 5(1) and (2) of the Divorce Act 70 of 1979.

185 Hawkey "Africans Catch the Divorce Bug" (2009-11-29) *Sunday Times Live*.

186 S 4(1) of the Divorce Act 70 of 1979.

187 *Schwartz v Schwartz* 1984 (4) SA 467 (A); *Naidoo v Naidoo* 1985 (1) SA 366 (T).

188 *Schwartz v Schwartz supra*; *Naidoo v Naidoo supra*; *Swart v Swart* 1980 (4) SA 364 (O).

189 *Ibid*.

190 *Singh v Singh* 1983 (1) SA 781 (C) 786D.

191 Barratt *et al Law of Persons and the Family* 337.

192 *Ibid*.

193 For example, the parties have not lived together as husband and wife for a period of one year, or the defendant has committed adultery, and the plaintiff finds it irreconcilable to continue with the marriage.

### (ii) Mental illness or continuous unconsciousness

The special grounds for divorce in section 5(1) and (2) of the Divorce Act are very detailed, narrow and precise, and require the evidence of medical experts to be cited as grounds for divorce. The reason for these stringent requirements is that a spouse who is mentally ill, or in a state of continuous unconsciousness, is particularly vulnerable.[194]

A question that arises is whether a spouse instituting divorce proceedings must cite the grounds set out in section 4, or those in section 5, where the defendant spouse is for example, mentally ill. From court decisions,[195] it is clear that where the defendant spouse is, for example, mentally ill, the plaintiff can decide whether to institute a divorce in terms of section 4 or section 5. By citing irretrievable breakdown of the marriage as the ground for divorce, the plaintiff can escape the stringent requirements set out in terms of section 5.

## *3 2 4 Forms of divorce*

From the definition of the term "divorce", it can be deduced that a civil marriage can only be dissolved by instituting a divorce action in a court of law. The spouses, therefore, cannot of their own accord, either orally or in writing, terminate their marriage without involving the courts.

## *3 2 5 Restrictions on divorce*

As the use of the word "may" in sections 3, 4 and 5 of the Divorce Act implies that a court can refuse to grant a divorce, even if one of the grounds of divorce has been proved, the question arises as to whether a court has a discretion to grant or refuse a divorce.[196] If the court is of the opinion that there is a reasonable prospect that the *consortium omnis vitae* between the spouses can be restored so that the spouses can resume a normal marriage relationship, the court will not have the power to grant a divorce, as irretrievable breakdown is a requirement for divorce in terms of section 4 of the Divorce Act.[197] In this respect, section 4(3) makes provision for the court to postpone divorce proceedings if it appears to the court that there is a reasonable possibility that the spouses may become reconciled through marriage counselling or further reflection. In contrast, if the court is satisfied that the marriage has broken down irretrievably, and there is no reasonable prospect of restoring a normal marriage relationship between the spouses, the court is obliged to grant the divorce.[198]

Furthermore, in terms of section 6 of the Divorce Act, the court can also refuse to, and in fact cannot, grant a decree of divorce until the court is

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194 S 5(3) and (4) of the Divorce Act 70 of 1979. Where a divorce is sought on the grounds of s 5(1) or (2), an application for the forfeiture order cannot be made.

195 *Smit v Smit* 1982 (4) SA 34 (O); *Ott v Raubenheimer NO* 1985 (2) SA 851 (O); *Dickson v Dickson* 1981 (3) SA 856 (W).

196 *Schwartz v Schwartz supra* 474.

197 *Ibid*.

198 *Ibid*.

satisfied that the provisions with regard to the welfare of any minor children are satisfactory or are the best that can be effected in the circumstances.

Section 5A regulates the position where the parties have concluded a religious marriage in addition to a civil marriage. Section 5A provides that a court can refuse to grant a divorce until a spouse who has the power to procure a religious divorce takes the necessary steps to do so. Although section 5A was originally inserted to provide relief for Jewish wives, section 5A is not limited to the Jewish faith and can be used by anyone practising other religions in appropriate circumstances, including adherents of Islam.[199]

## 3 3 The law of England and Wales

Initially, when the dissolution of a marriage by divorce was introduced in 1857, adultery was the only ground for divorce.[200] This position prevailed until 1937 when three additional grounds of divorce were added – namely, cruelty, desertion and incurable insanity.[201] In 1969, the Divorce Reform Act provided that irretrievable breakdown of the marriage was the sole ground for divorce.[202] The law regulating divorce law has been consolidated in the Matrimonial Causes Act 1973.[203]

### *3 3 1 Definition of divorce*

A divorce brings an end to a legal relationship that exists between married spouses; when a decree of absolute of divorce is granted, this terminates the legal rights and obligations that the parties owe each other during the subsistence of the marriage.[204]

### *3 3 2 Pre-divorce procedure*

Section 6(1) of the Matrimonial Causes Act 1973 provides that if a petitioner consults a solicitor with regard to the institution of divorce action, the solicitor is required to certify whether the possibility of reconciliation has been discussed, and furthermore, whether the names and addresses of organisations or people that can assist the spouses have been provided. The aim of section 6(1) is to ensure that the solicitor reflects carefully on whether the parties ought to consider reconciliation.[205]

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199 *Amar v Amar* 1999 (3) SA 604 (W).

200 Divorce and Matrimonial Causes Act 1857.

201 Matrimonial Causes Act 1937.

202 Burton *Family Law* 77.

203 Douglas *An Introduction to Family Law* (2004) 177.

204 All decrees of divorce are, in the first instance, decrees *nisi* that do not legally terminate the marriage. However, a decree *nisi* may be made absolute, on the application of a party in whose favour it was granted, six weeks after the decree was pronounced. The party against whom the decree was granted may also make an application after three months for it to be made absolute. The time period between the decree *nisi* and the decree absolute is often used to negotiate the financial settlements and other consequences that flow from the dissolution of a marriage (Herring *Family Law* 110).

205 Herring *Family Law* 118.

### *3 3 3 Grounds for divorce*

As indicated above, the Divorce Reform Act 1969 provides that the sole ground for divorce is that the marriage between the spouses must have broken down irretrievably. To establish whether the marriage has broken down irretrievably, one of five facts has to be proved – namely adultery, unreasonable behaviour, desertion, living apart for two years with the respondent's consent, or living apart for five years.[206]

#### (i) Adultery

The definition ascribed to "adultery" is the voluntary sexual intercourse between a married person and a person of the opposite sex, whether married or not, who is not the married person's spouse.[207] The marriage is deemed to have broken down irretrievably where one spouse has committed adultery and the other spouse finds it intolerable to live with the guilty spouse.[208] The spouse applying for the divorce (petitioner) cannot rely on his or her own adultery.[209] In terms of section 1(2)(*a*) of the Matrimonial Causes Act 1973, the petitioner is required to prove that the other spouse (respondent) had committed adultery, and is required to demonstrate that the petitioner finds it intolerable to live with the respondent. The courts have, however, held that, despite the presence of two elements – namely, adultery and the fact that the innocent spouse finds it intolerable to live with the guilty spouse – the latter element does not necessarily have to be linked to the first.[210] The fact that one spouse finds it intolerable to live with the guilty spouse is not necessarily attributed to adultery.[211]

The spouses are barred from instituting an action for divorce on the ground of adultery where the spouses have continued to live together for six months or more (whether continuously or in an aggregate of shorter periods) after the discovery of the adultery.[212] It is the discovery of the adultery, and not the date of its commission, that is used to calculate the six months, and it is therefore still possible to institute an action for divorce on the ground of an adultery that occurred many years ago, provided discovery thereof is within the time period prescribed in section 2(1).[213]

#### (ii) Unreasonable behaviour

Section 1(2)(*b*)[214] provides that an irretrievable breakdown of the marriage can be inferred where one spouse behaves in such a manner that the other

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206 Probert *Family and Succession Law in England and Wales* 106.

207 Burton *Family Law* 79.

208 S 1(2)(*a*) of the Matrimonial Causes Act 1973.

209 Herring *Family Law* 111.

210 *Cleary v Cleary and Hutton* [1974] 1 W.L.R. 73; *Carr v Carr* [1974] 1 WLR 1534; [1974] 1 All ER 1193, CA.

211 *Goodrich v Goodrich* [1971] 1 WLR 1142; [1971] 2 All ER 1340.

212 S 2(1) of the Matrimonial Causes Act 1973; Cretney, Mason and Bailey-Harris *Principles of Family Law* (2003) 281.

213 Burton *Family Law* 83.

214 Matrimonial Causes Act 1973.

spouse can no longer reasonably be expected to live with the guilty spouse. The courts use objective and subjective tests to establish whether this is indeed the case.[215] The central question that the courts are required to ask is whether any right-thinking person would come to the conclusion that one spouse behaved in such a manner that the other spouse cannot reasonably be expected to live with the guilty spouse, regard being had to all the circumstances and the character and personalities of the spouses.[216] The modern approach to establishing what constitutes unreasonable behaviour is primarily concerned with assessing any conduct that is not trivial in nature, and considering the conduct objectively to establish the effect it has on the spouse petitioning for the divorce.[217] Examples of behaviour that have been found to be sufficient for the petitioner to succeed with the application for divorce are violence;[218] insensitivity, lack of communication or excessive unsociability;[219] bullying or constant criticism;[220] financial irresponsibility or excessive financial restriction;[221] emotional[222] or sexual dissatisfaction,[223] boredom and growing apart.[224]

## (iii) Desertion

Where one spouse has deserted the other spouse for a continuous period of two years immediately prior to the institution of an action for divorce, it can be inferred that the marriage has broken down irretrievably.[225] Despite the explicit reference to a continuous period of two years in section 1(2)(*c*), section 2(5) qualifies this by providing that periods of cohabitation totalling less than six months will not be taken into account towards the two-year period stipulated in section 1(2)(*c*).

Desertion comprises both a physical and mental dimension, as there must be both physical separation and the intention to desert.[226] This requirement is deemed to be met even though the spouses continue to live in the same house, as long as they have established separate households.[227]

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215 *Livingstone-Stallard v Livingstone-Stallard* [1974] Fam. 47, which was adopted by the Court of Appeal in *O'Neill v O'Neill* [1975] 1 W.L.R. 118.

216 *Buffery v Buffery* [1980] 2 FLR 365; *Livingstone-Stallard v Livingstone-Stallard supra* 54; *O'Neill v O'Neill supra*.

217 *Birch v Birch* [1992] 1 FLR 564.

218 *Bergin v Bergin* [1983] 1 All ER 905.

219 *Bannister v Bannister* [1980] 10 Fam Law 240, CA.

220 *Livingstone-Stallard v Livingstone-Stallard supra*.

221 *Cartr-Fea v Carter-Fea* [1987] Fam Law 131.

222 *Pheasant v Pheasant* [1972] 2 WLR 353.

223 *Dowden v Dowden* [1977] 8 Fam Law 106.

224 *Morgan v Morgan* [1973] 117 SJ 223.

225 S 1(2)(*c*) of the Matrimonial Causes Act 1973; Cretney *et al Principles of Family Law* 288.

226 *Le Brocq v Le Brocq* [1964] W.L.R.1085.

227 *Ibid*.

### (iv) Living apart for two years plus the respondent's consent

In an attempt to reduce the animosity and bitterness that usually arise between spouses who are divorcing, there was a move away from fault-based divorce law with the introduction of this ground for divorce.[228] To meet the requirements set out in this ground for divorce, either one of the spouses must leave the marital home or, where the spouses continue to live in the same house, they must have established separate households.[229] The requisite "continuous" period of separation can be made up of shorter periods, provided the interludes of cohabitation do not exceed six months.[230]

Insofar as the consent requirement is concerned, only consent to the divorce and not to the separation is required.[231]

### (v) Living apart for five years

In terms of this ground for divorce, the spouses are required to live apart for a continuous period of five years immediately preceding the institution of the application for divorce. This was an innovation when divorce law was reformed in 1969, as for the first time a divorce was allowed against the wishes of the innocent spouse.[232]

#### *3 3 4 Restrictions on divorce*

In order to encourage newly married spouses to give their marriage a chance, the law provides that they may not petition for a divorce during the first year of marriage.[233] This is an absolute bar to which there are no exceptions.[234]

## 3 4 Comparison

Notwithstanding the fact that Islamic, South African and English law value the institution of marriage and attach importance thereto, all three legal systems acknowledge the necessity of terminating the marriage in certain circumstances. This is especially so as none of the three legal systems expects spouses to remain in a marriage where the marriage relationship is acrimonious and unhappy.

Besides this similarity, there are also fundamental differences between the laws relating to divorce in these three legal systems.

In terms of Islamic law, the right to divorce is the exclusive right of the

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228 S 1(2)(*d*) of the Matrimonial Causes Act 1973.

229 *Mouncer v Mouncer* [1972] 1 W.L.R. 321.

230 S 2(5) of the Matrimonial Causes Act 1973; Cretney *et al Principles of Family Law* 289–290.

231 *Santos v Santos* [1972] Fam Law 247.

232 S 1(2)(e) of the Matrimonial Causes Act 1973.

233 S 3(1) of the Matrimonial Causes Act 1973 inserted by s 1 of the Matrimonial and Family Proceedings Act 1984.

234 *Butler v Butler* [1990] Fam Law 21.

husband. Where a wife wants to terminate the marriage, special grounds have to be present in order for her to do so. A husband is also allowed to unilaterally issue a divorce without intervention from any religious authority. Where a wife wants to terminate the marriage, she has to approach the relevant religious authority in order to do so. Islamic law, therefore, differentiates between the dissolution of a marriage instituted by a husband and one instituted by a wife. On the other hand, where South African and English divorce law are concerned, both husband and wife have the same right to institute an action of divorce, based on the same grounds and the same rules.

Before parties can terminate their marriage, Islamic law makes it incumbent on the spouses to appoint two arbiters, one from the family of each spouse, in order to assist the spouses to reconcile. Although, in terms of English law, a solicitor is required to certify whether the possibility of reconciliation has been discussed, there is no legal duty on the parties to submit themselves to mediation. The same applies regarding the requirement that the solicitor give the spouses the names and addresses of organisations or people that can assist the spouses should they wish to reconcile. Parties married in terms of South African civil law cannot be compelled to mediate or arbitrate their dispute before instituting an action for divorce, although it is strongly encouraged.

Insofar as the grounds for divorce are concerned, there are vast differences between Islamic and South African law. In particular, in Islam, adultery is regarded as a ground for divorce. Islamic law also allows a spouse to institute an action for divorce where one spouse is chronically ill, impotent, sterile, serving life imprisonment, or is absent and his or her whereabouts are unknown. In contrast, when South African law shifted to no-fault divorce, adultery was relegated to a mere factor to be taken into consideration to determine whether or not the marriage has broken down irretrievably. In other words, adultery is no longer a ground for divorce. South African divorce law recognises the irretrievable breakdown of the marriage as well as mental illness and continuous unconsciousness as grounds for divorce. English law, on the other hand, only recognises one ground for divorce – namely, the irretrievable breakdown of the marriage. The fact that one spouse has committed adultery can be used to establish that the marriage has broken down irretrievably.

A fundamental difference between the legal systems is that, in terms of Islamic law, the husband is allowed to terminate the marriage in writing or orally, without court intervention. In contrast, where spouses are married in terms of South African or English law, an action for divorce must be instituted in a court of law. A divorce can, therefore, only be granted where a court legally terminates the marriage.

Despite the fact that in all three legal systems there are certain restrictions in place before a decree of divorce is granted, the restrictions encountered in Islamic law differ vastly from those found in South African and English law.

A divorce initiated in terms of Islamic law becomes effective immediately – that is, the moment it is pronounced. This does, however, not mean that the divorce is finalised at this stage. The marriage may still remain valid. If the parties reconcile before the end of the three-month *iddah* period, there is no

need for them to remarry, as the marriage remains intact. In contrast, when a civil court issues a decree of divorce, the divorce is finalised for all intents and purposes. In South African and English law, once an order of divorce is pronounced, the marriage is terminated, and should the parties wish to reconcile, they will have to conclude another marriage.

Lastly, for spouses married in terms of South African law, there is no period of *iddah* for the wife, irrespective of whether the marriage is terminated by death or divorce as is the case in Islamic law. In South African law, the parties can remarry as soon as the divorce is finalised.

These differences again highlight the dilemma of Muslims in South Africa, England and Wales as the law of divorce in terms of Islamic law differs vastly from that of South African and English law.

## 4 ECONOMIC CONSEQUENCES OF DIVORCE

### 4 1 Islamic law

The dissolution of a marriage has far-reaching economic implications for the spouses of a marriage. In respect of the dissolution of a marriage in terms of Islamic law, the following consequences warrant discussion – namely, the division of the matrimonial property, maintenance, the position of the dower and inheritance.

#### *4 1 1 Division of the matrimonial property*

The spouses retain sole rights of ownership and control over their individual property as a marriage concluded in terms of Islamic law is a non-sharing system unless the parties have entered into a marriage contract.[235] Where a marriage contract has been entered into prior to the conclusion of the marriage, the matrimonial property will be divided according to the terms of the marriage contract.[236]

#### *4 1 2 Maintenance (nafaqah) after the dissolution of the marriage*

The husband is obliged to maintain his wife during the subsistence of the marriage.[237] Subject to certain conditions, this duty continues, even in the event of the marriage being dissolved by divorce.[238]

Where the divorce is revocable, the husband is still obliged to maintain the wife and provide her with accommodation, food, drink and clothing for the

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[235] Alkhuli *The Light of Islam* 72; *Quran* ch 5, verse 1. There is uncertainty whether the parties will use the marriage contract to enter into a matrimonial property regime that is contrary to the dictates of Islamic law.

[236] Alkhuli *The Light of Islam* 72. The prospective spouses have the right to negotiate conditions that will apply to marriage provided these conditions are not contrary to the meaning of marriage. For example, the parties cannot agree to live separately.

[237] Doi *Shari'ah: The Islamic Law* 204; Ayoup *Fiqh of Muslim Family* 351.

[238] Doi *Women in Shari'ah* 108; Siddiqi *The Family Laws of Islam* 109; *Quran* ch 65, verse 6.

period of three months after the divorce – the *iddah* or waiting period.[239] The rationale is that the woman is still a wife as long as the *iddah* continues and she is, therefore, entitled to the same maintenance as another wife.[240] Where the divorce is irrevocable, the wife is not entitled to maintenance.[241] After the three-month *iddah* period has lapsed, the husband ceases to be responsible for the maintenance of his former wife, as they are regarded as strangers.[242] It should be noted, however, that the wife may in certain instances not be entitled to maintenance during the *iddah* period.[243]

Where the wife is pregnant at the time of divorce, the husband has to maintain her for the entire duration of the pregnancy, as well as during the time that she is breastfeeding the child.[244] The husband is therefore under an obligation to maintain his pregnant wife during the course of the pregnancy and, after the delivery of the baby, he is further obliged to pay his wife for breastfeeding the baby.[245] However, after the delivery of the baby, he is not obliged to maintain his ex-wife.[246]

In Islamic law, the responsibility of the maintenance of the divorced woman reverts to her relatives: her son, or father, or other relations.[247] As far as the former wife is concerned, as soon as the *iddah* period has expired, she no longer has a claim for maintenance against her former husband, although she can claim for child-minding services.[248]

At the time of divorce, the wife is entitled also to any unpaid maintenance due to her that accumulated during the course of the marriage, as this is a debt against the husband's estate that does not prescribe.[249] The father, besides maintaining his children, is also responsible for the cost of childcare.[250] Where the children are in the custody of the mother, their father is under an obligation to remunerate her for the childcare services that she renders by taking care of their children.[251] The father or former husband must provide housing for her and the children born of the marriage.[252]

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239 *Quran* ch 65, verse 6; Qasmi *The Complete System of Divorce* (2002) 217.

240 Al-Fawzaan *Al-Mulakhkhas al-Fiqhi* 317.

241 *Ibid*.

242 Qasmi *The Complete System of Divorce* 223; Moosa and Karbanee "An Exploration of Mata'a Maintenance in Anticipation of the Recognition of Muslim Marriages in South Africa: (Re-)Opening a Veritable Pandora's Box" 2004 2 *Law, Democracy and Development* 269 with reference to the *Quran* ch 2, verse 223 and ch 65, verse 1 and 6.

243 Nasir *The Status of Women Under Islamic Law* 143.

244 Vahed *Islamic Law (Shari'ah): An Introduction to the Principles of Islamic Law* (2005) 32 with reference to *Quran* ch 65, verse 6. The breastfeeding may last for up to two years (Sakr *Family Values in Islam* (undated) 48); *Quran Al-Talaaq* 65:6.

245 *Al-Mawsoo'ah al-Fiqhiyyah* vol 17 (1983) 311.

246 *Ibid*.

247 Vahed *Islamic Law* 32; Qasmi *The Complete System of Divorce* 228; Sallie *Maintenance and Child-Care According to Islamic Law* (2001)105.

248 Doi *Shari'ah: The Islamic Law* 206; Denson and Carnelley "The Awarding of Post-Divorce Maintenance to a Muslim Ex-Wife and Children in the South African Courts: The Interaction between Divine and Secular Law" 2009 30(3) *Obiter* 679 686.

249 Sallie *Maintenance and Child-Care According to Islamic Law* 43.

250 *Ibid*.

251 *Ibid*.

252 *Ibid*.

Furthermore, he has to provide the food and all other necessaries to ensure that his children are not left destitute and impoverished.[253]

### *4 1 3 Position of dower on divorce*

When a marriage has been concluded without stipulating the dower and the spouses terminate the marriage before consummation takes place, there is no liability on the husband to make any payment of dower.[254] However, the *Quran* recommends that the husband pay something to the wife according to his means and ability, as some harm has been done to her reputation due to the divorce.[255]

Where the amount of dower is stipulated and agreed upon before the marriage is concluded, and the divorce takes place before consummation of the marriage, the husband has to pay the wife half of the fixed amount.[256]

A woman who seeks to terminate her marriage by *khula* also has to pay back the whole or at least a portion of the dower she received from her husband. Where the marriage is dissolved after consummation has taken place, and the amount fixed as dower has not been paid by the husband, the wife is entitled to the full amount of dower.[257]

### *4 1 4 Inheritance*

The termination of the marriage by divorce has certain legal implications on inheritance. Islam limits the power of testamentary disposition to one-third of the testator's estate, as the remaining two-thirds must be distributed among the heirs.[258] Insofar as the spouses are concerned, they may inherit from each other if the divorce is revocable.[259] In this instance, if either spouse dies during the period of *iddah*, the surviving spouse is entitled to inherit from the deceased.[260] Where the divorce is revocable, the wife inherits a fourth of the deceased husband's estate, where the latter died without any offspring.[261] Where the deceased husband dies leaving children, the wife inherits only an eighth of his estate.[262] Where the husband dies leaving no children, but more than one widow, the surviving widows' collective share is one quarter.[263] Where the deceased leaves children and more than one widow, their collective share is one-eighth.[264] These rules are, however, subject to the condition that before the heirs inherit, all the deceased's debt,

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253 Sallie *Maintenance and Child-Care According to Islamic Law* 44.
254 Doi *Women in Shari'ah* 159.
255 Ur-Rahman *Muhammad: Encyclopedia of Seerah* (1989) 67; *Quran* ch 2, verse 236.
256 Quran ch 2, verse 237. See also Doi *Women in Shari'ah* 159.
257 Doi *Women in Shari'ah* 158.
258 Doi *Women in Shari'ah* 165.
259 Ahmad *The Muslim Law in Divorce* (1984) 82.
260 *Ibid*.
261 Alkhuli *The Light of Islam* 99.
262 Alkhuli *The Light of Islam* 99. In other words, if the marriage was polygynous, then the eighth share of the estate is divided equally among all the wives.
263 *Ibid*.
264 *Ibid*.

which includes funeral expenses, must first be settled and effect must be given to bequests and legacies.[265] In the event of an irrevocable divorce, the spouses are not allowed to inherit from each other.[266]

### *4 1 5 Pension-sharing*

As the spouses maintain completely separate estates during the subsistence of the marriage, they are not entitled to share each other's pension at divorce.

## 4 2 South African law

The most important economic consequences of divorce – namely, division of the spouses' marital property, maintenance matters between the spouses, the interests of the children born of the marriage[267] and costs issues – are regulated by sections 6 to 10 of the Divorce Act.[268] Section 7(1) of the Divorce Act regulates the situation where the divorcing spouses enter into a settlement agreement that stipulates how the spouses' assets are to be divided, and for the payment of spousal maintenance. In terms of section 7(1), the court can make this settlement agreement an order of court. The settlement agreement in the majority of cases relates to matters concerning the division of the spouses' assets, the payment of spousal maintenance, and matters concerning access and contact with any minor children born of the marriage, but it can include any provision, provided that the provision is not illegal or *contra bonos mores*.[269]

Section 7(1) furthermore grants the court a discretion as to whether to incorporate the spouse's settlement agreement into the divorce order. As divorce proceedings are very costly and time consuming, it is often in the spouses' interest to enter into a settlement agreement. Where the court granting the divorce incorporates all or parts of the settlement agreement into the divorce order, it becomes an order of the court.[270] In other words, failure to comply with the provisions of the deed of settlement will result in the immediate attachment of property in execution of the settlement agreement, as well as the possibility of imprisonment for contempt of court on the part of the guilty party.[271]

Where the court elects not to make the spouses' settlement agreement an order of the court, it can nevertheless still have legal consequences as it is a binding contract and can be enforced in the same way as any other contract.[272]

In the event of the spouses not being able to reach an agreement, the

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265 Alkhuli *The Light of Islam* 96.

266 Esposito *Women in the Muslim Family* (2001) 35.

267 A discussion on the law of parent and child falls outside the ambit of research undertaken for purposes of this article.

268 70 of 1979.

269 *Middleton v Middleton* 2010 (1) SA 179 (D).

270 *Swadif (Pty) Ltd v Dyke* 1978 (1) SA 928 (A); *PL v YL* 2013 (6) SA (ECG).

271 *Ibid*.

272 Barratt *et al Law of Persons and the Family* 345.

terms of their divorce will be decided in court.[273]

### *4 2 1 Division of the matrimonial property*

South African divorce law is no longer based on fault or blameworthiness of a spouse as far as the grounds for divorce are concerned. However, certain consequences of divorce are influenced by who is to blame for the breakdown of the marriage, and this can cause the court to depart from the ordinary rules of division when making an order for the division of the spouses' assets.[274] In other words, the effect of divorce on the division of the spouses' property depends on the matrimonial property system applicable to the marriage, and on whether the court has ordered a forfeiture of benefits in terms of section 9 of the Divorce Act or an order for spousal maintenance. Where the marriage is out of community of property and was concluded before 1984, the division of the spouses' assets can further be influenced by a redistribution order.[275] In applications for both a forfeiture of patrimonial benefits and redistribution orders, the conduct of the spouses is taken into account.[276]

#### (i) Forfeiture of patrimonial benefits

Section 9 of the Divorce Act makes provision for the forfeiture of patrimonial benefits. The court, when granting an order for divorce can, depending on the circumstances of the particular case, deviate from the ordinary rules in respect of the division of the marital property and order a complete or partial forfeiture of benefits.[277] In other words, in terms of a forfeiture order, the erring spouse can be deprived of some or all of the patrimonial benefits that he or she would ordinarily be entitled to by virtue of the matrimonial property regime that regulates the marriage.[278] The underlying idea of section 9(1) is that a person should not be allowed to benefit financially from a marriage that has broken down irretrievably because he or she erred.[279] Where the court grants a forfeiture order, the innocent spouse is entitled to retain such forfeited assets.[280] The erring spouse does not forfeit the assets he or she brought into the marriage; he or she merely loses the claim he or she has to the assets of the other spouse.[281]

Where the marriage is in community of property and an order for total forfeiture has been made, the erring spouse will receive only those assets that he or she brought into the joint estate, and will not be able to claim the assets the other spouse brought into the marriage as a result of the other spouse's effort.[282] Where the marriage is regulated by the accrual system,

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273 *Ibid*.
274 Barratt *et al Family Law and the Family* 345.
275 Heaton and Kruger *South African Family Law* 129.
276 *Ibid*.
277 S 9(1) of the Divorce Act 70 of 1979.
278 Barratt *et al Law of Persons and the Family* 346.
279 Barratt *et al Law of Persons and the Family* 348.
280 *Rousalis v Rousalis* 1980 (3) SA 446 (C).
281 *Ibid*.
282 *Smith v Smith* 1937 WLD 126.

the right to share in the accrual of the other spouse's estate is forfeited.[283] The court can also order the forfeiture of assets that a spouse would be entitled to in terms of an antenuptial contract.[284]

An order for forfeiture of patrimonial benefits will be granted if the court is satisfied that the erring spouse against whom the order is sought will be "unduly benefited" if the court does not make a forfeiture order against him or her.[285] In determining whether to grant the order, the court must take into account the duration of the marriage, the circumstances that led to the breakdown of the marriage and any substantial misconduct on the part of either spouse.[286] Not all these factors need be present or viewed cumulatively.[287] The point of departure is to consider whether the spouse against whom the forfeiture order is sought would in fact be benefited.[288] This is a purely factual issue.[289] Once this has been established, the court must determine, having regard to the three above-mentioned factors, whether that spouse will be unduly benefited in relation to the other spouse if the forfeiture order is not granted.[290] It must be borne in mind that the court is limited to those factors stated in the wording of section 9(1). This position was confirmed in *Botha v Botha,*[291] where it was held that, in considering whether to grant a forfeiture order, the court could not take any factors into account that fell outside those listed in section 9(1).[292]

As far as substantial misconduct is concerned, this is but one factor that the court takes into account, and the court can grant a forfeiture order even if there is no substantial misconduct or fault on the part of the spouse against whom the order is sought.[293]

A forfeiture order cannot be used to circumvent the normal consequences arising from the matrimonial property system that the parties chose to regulate their marriage.[294]

### (ii) Redistribution of patrimonial assets

Prior to the enactment of the Matrimonial Property Act in 1984,[295] if a woman did not want to be subject to her husband's marital power, the parties concluded a marriage out of community of property. The standard antenuptial contract more often than not resulted in very unfortunate consequences for the wife, who found herself in the situation where she was a housewife and mother for most of her married life, and was therefore

283 Heaton and Kruger *South African Family Law* 136.
284 *Watt v Watt* 1984 (2) SA 455 (W).
285 S 9(1) of the Divorce Act 70 of 1979.
286 S 9(1) of the Divorce Act 70 of 1979.
287 *Wijker v Wijker* 1993 (4) SA 720 (A) 729E.
288 *Wijker v Wijker supra* 727D.
289 *Ibid*.
290 *Wijker v Wijker supra* 729E.
291 2006 (4) SA 144 (SCA).
292 *Botha v Botha supra* par 8.
293 Barratt *et al Law of Persons and the Family* 349.
294 Heaton and Kruger *South African Family Law* 135. See also *Wijker v Wijker supra*.
295 88 of 1984.

unable to amass an estate of her own.[296] At the dissolution of the marriage she would not be able to share in the assets that her husband had accumulated during the subsistence of the marriage, and inevitably she would leave the marriage only with what she brought into the marriage.[297] The introduction of the accrual system in 1984 brought relief to spouses who entered into a marriage after 1 November 1984. As the Act was not retrospective, the relief did not extend to marriages contracted out of community of property before 1 November 1984.[298] The legislature therefore inserted subsections (3) to (6) into section 7 of the Divorce Act.[299] Subsections (3) to (6) seek to provide relief to spouses married subject to a complete separation of property prior to the enactment of the Matrimonial Property Act or the Marriage and Matrimonial Property Law Amendment Act.[300]

Section 7(3) bestows on the court the discretionary power to issue an order that the assets, or part of the assets, of one spouse be transferred to the other spouse in order for justice to prevail.[301] The court cannot make a redistribution order of its own accord, and the party seeking redistribution must apply for the order.[302]

In terms of section 7(3), only the following spouses may apply for a redistribution order: spouses who were married prior to the commencement of the Matrimonial Property Act with an antenuptial contract that excludes community of property, community of profit and loss, and the accrual, or who were married prior to the commencement of the Marriage and Matrimonial Property Law Amendment Act in terms of section 22(6) of the Black Administration Act.[303]

Section 7(4) sets out two further requirements that must be met in order for the court to exercise its discretion whether to grant an order for the redistribution of assets. In terms of section 7(4), the court can only grant a redistribution order if it is satisfied that it is equitable and just because the spouse who seeks a redistribution order has contributed directly or indirectly to the maintenance or increase of the other spouse's estate during the subsistence of the marriage. The contribution by the spouse to the maintenance or increase of the other spouse's estate need not have been in monetary form.[304] The contribution can be one of the following:[305]

(i) rendering services – for example, where the spouse works in the other spouse's business without compensation, or receives a very small

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296 For a comprehensive discussion of the disadvantages of the standard form antenuptial contract, see South African Law Commission *Report Pertaining to the Matrimonial Property Law* (RP 26/1982) 12.1.

297 *Ibid*.

298 Skelton *et al Family Law in South Africa* 159.

299 Skelton *et al Family Law* 159; Heaton and Kruger *South African Family Law* 138.

300 3 of 1988.

301 Heaton and Kruger *South African Family Law* 138; Barratt *et al Law of Persons and the Family* 352; Skelton *et al Family Law* 159.

302 *Beaumont v Beaumont* 1987 (1) SA 967 (A).

303 38 of 1927.

304 *Katz v Katz* 1989 (3) SA 1 (A).

305 S 7(4) of the Divorce Act 70 of 1979.

salary;

(ii) saving expenses that would otherwise have been incurred – for example, by staying at home as mother and housewife; or

(iii) any other manner; in other words, any other kind of contribution would be taken into account.

The wording of section 7(4) allows the court a wide discretion to determine whether a contribution has been made by the spouse seeking a redistribution order, as the latter can request a transfer if he or she had made "any kind" of contribution towards the maintenance or increase of the other spouse's estate.[306] Section 7(4) goes a long way in recognising that the role played by women as homemakers, in allowing their husbands to further their careers, should not be undervalued[307] and must be afforded due weight.[308]

In addition to the requirements set out in section 7(3) and (4), the court is also required to take into account the factors listed in section 7(5). These factors are, namely, the existing means and financial obligations of the parties; any donation made by one of the parties to the other; any forfeiture order made in terms of section 9 (1) of the Divorce Act and lastly, any other factor which in the opinion of the court should be taken into account.

Although section 7(5) does not specifically list misconduct as one of the factors that the court can take into account, past court decisions have indicated that "any other factor" includes the misconduct of a spouse.[309] While the courts have acknowledged misconduct as a relevant factor, the courts have cautioned that a conservative approach must be adopted when considering misconduct. Furthermore, the conduct of a spouse must be considered only when there is conspicuous disparity between the conduct of the spouses, especially where there has been gross misconduct.[310]

Where a court reaches a decision to grant a redistribution order, it has to decide what proportion of the assets must be transferred to the spouse with fewer assets.[311] Previously, courts adopted the English law guideline that one-third of the spouses' combined assets should be transferred to the spouse who owns fewer assets.[312] This approach was, however, rejected in *Beaumont v Beaumont*.[313] The court held that its discretion should not be limited by guidelines but that it must rather consider all the factors listed in terms of the Divorce Act, and any other factor that the court deems necessary to take into account.[314] The court chose to start with a clean slate

306 Barratt *et al Law of Persons and the Family* 352.

307 *Beaumont v Beaumont supra*; *Katz v Katz supra*; *Kirkland v Kirkland* 2006 (6) SA 144 (C); *Badenhorst v Badenhorst* 2006 (2) SA 255 (SCA); *Buttner v Buttner* 2006 (3) SA (SCA).

308 *Bezuidenhout v Bezuidenhout* 2005 (2) SA 187 (SCA) par 29.

309 *Beaumont v Beaumont supra*; *Buttner v Buttner supra*.

310 *Beaumont v Beaumont supra* 994–995.

311 *Van Gysen v Van Gysen* 1986 (1) SA 56 (C); *MacGregor v MacGregor* 1986 (3) SA 644(C).

312 *Beaumont v Beaumont supra*; *MacGregor v MacGregor supra*.

313 *Supra*.

314 *Beaumont v Beaumont supra* 991F. See also *Childs v Childs* 2003 (2) SA 187 (SCA); *Bezuidenhout v Bezuidenhout supra*; *Buttner v Buttner supra*; *Kirkland v Kirkland supra*.

to determine the extent of the redistribution.[315]

Mention must be made of the fact that section 7(3) may fall foul of the rights guaranteed in the Constitution – in particular, the right to equality – as redistribution orders are available only to spouses who concluded a marriage before the commencement date of the Matrimonial Property Act.[316] In other words, spouses married out of community of property prior to 1984 enjoy the protection offered in terms of section 7(3), while a spouse married after 1984 will not enjoy this protection.[317] The decision in *Gumede v President of SA,*[318] which allows spouses married in terms of customary law to apply for a redistribution order, regardless of when they married, and of which matrimonial property system applied to their marriage, lends weight to the argument that granting redistribution orders for spouses married in terms customary law, while denying them to others, appears to violate section 9 of the Constitution.[319]

### *4 2 2 Spousal maintenance after divorce*

During the subsistence of a marriage, spouses have reciprocal *pro rata* duties to maintain each other. The general rule is that the reciprocal duty of support between spouses is terminated at the dissolution of the marriage, either by death or divorce. However, where the marriage is dissolved by divorce, the Divorce Act in section 7(1) makes provision for ongoing maintenance in terms of a settlement order concluded between the spouses.

Where the spouses cannot reach consensus, section 7(2) empowers the court to issue an order for the payment of maintenance by one spouse to the other. The maintenance order, granted in terms of section 7(2), must be granted simultaneously with the divorce order.[320] In other words, a spouse will not be allowed to claim spousal maintenance once the decree of divorce has been issued.[321] Prior to the Divorce Act, maintenance orders would remain in effect until the death or remarriage of the spouse in whose favour the order was granted. Cognisance was given to the fact that in the past women were not financially independent during subsistence of the marriage, and when the marriage was terminated by divorce, it was accepted that the husband would continue to support his former wife financially until she either remarried or until she died.[322] Societal changes have taken place over the years and more and more women have entered the workplace.[323] These changes are reflected in court decisions; on more than one occasion, courts have denied an application for maintenance where the spouse claiming maintenance was employed and was in a position to support him- or

315 *Beaumont v Beaumont supra* 998F–G.
316 Barratt *et al Law of Persons and the Family* 358.
317 *Ibid*.
318 2009 (3) SA 152 (CC).
319 Barratt *et al Law of Persons and the Family* 359; Heaton “Family Law” *Annual Survey of South African Law* (2009) 440 460-463.
320 S 8(1) of the Divorce Act 70 of 1979.
321 *Ibid*.
322 Heaton and Kruger *South African Family Law* 160.
323 Barratt *Law of Persons and the Family* 360.

herself.[324] Changes in social policy have dictated a move away from the principle that, once a marriage has been concluded, the spouse is entitled to lifelong financial support, even after the termination of the marriage.[325] Where circumstances allowed, the courts have leaned towards the "clean-break" model of maintenance, which breaks the mould of lifelong spousal maintenance after the termination of a marriage by divorce.[326] In its most extreme form, the "clean-break" principle advocates the complete termination of any economic relationship between the spouses upon divorce.[327] In other words, neither of the spouses will receive, nor be required to pay, maintenance to each other.

In terms of section 7(2), if the court in exercising its discretion decides to award a maintenance order, then such an order must be just. Having stated this, the court is bound to recognise that certain situations may arise where it will be in the interests of justice to grant a maintenance order after a divorce.[328] The courts have also recognised that a spouse applying for maintenance might not currently be employed, but if granted the opportunity, could be trained or retrained in order to secure employment in the future. In this instance, a court can grant a spouse rehabilitative maintenance.[329] When deciding whether to grant rehabilitative or permanent maintenance, the court considers the following factors pertaining to the spouse applying for maintenance: age, earning capacity, qualifications, length of absence from the labour market, duration of the marriage, minor children born of the marriage, financial ability of the spouse against whom a maintenance order is sought to support the other spouse, and the presence of fault.[330] In considering whether to grant spousal maintenance, the court is also under a constitutional obligation to promote equality between men and women.[331] In some instances, however, in order to achieve substantive equality, the court is required by necessity to treat husbands and wives differently.[332]

Section 7(2) provides a list of factors that the court must take into account in the exercise of its discretion in deciding whether it is just or fair to grant a maintenance order. The factors listed in section 7(2) are the following: the existing or prospective means of the parties; the earning capacity of the parties; the spouses' financial needs and obligations; the age of each spouse; the spouses' standard of living prior to the dissolution of the marriage by divorce; the duration of the marriage; the conduct of the spouses as far as it is relevant to the breakdown of the marriage; whether any redistribution order has been granted; any other factor that, in the court's discretion, should be taken into account.

None of the factors listed in section 7(2) are dominant and they are not

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[324] *Botha v Botha* 2009 (3) SA 89 (W); *Kooverjee v Kooverjee* 2006 (6) SA 127 (C).
[325] Barratt *et al Law of Persons and the Family* 360.
[326] *Ibid*.
[327] *Beaumont v Beaumont supra*.
[328] *Grasso v Grasso* 1987 (1) SA 48 (C).
[329] *Botha v Botha supra*; *Kroon v Kroon* 1986 (4) SA 616 (E).
[330] *Kroon v Kroon supra*; *Pommerel v Pommerel* 1990 (1) SA 998 (E).
[331] *Kooverjee v Kooverjee supra*.
[332] *Kooverjee v Kooverjee supra* par 11.2.6.

listed in order of importance.[333] Furthermore, only conduct that is relevant to the breakdown of the marriage is considered, and fault assumes greater relevance if there has been gross misconduct on the part of one of the spouses.[334] In the same manner that a redistribution order under section 7(3) is taken into account when a maintenance order in terms of section 7(2) is considered, a maintenance order can also be taken into account when the nature or extent of a redistribution order is to be determined.[335] Section 7(2) furthermore empowers a court to take "any other factor" into account in order to issue a maintenance order that is just. Factors that the courts have, for example, taken into account, are the best interests of the minor children born of the marriage,[336] the child-rearing responsibilities of the spouse claiming maintenance,[337] and the inflation rate.[338]

### *4 2 3 Inheritance*

Section 2B of the Wills Act[339] provides that if a testator dies within three months of the dissolution of his or her marriage,[340] any will executed prior to the dissolution of the marriage will be implemented as if his or her former spouse had died before the dissolution of the marriage and the former spouse will, therefore, not be entitled to inherit from the deceased testator's estate. This position prevails unless it is clear from the contents of the will that the testator intended his or her former spouse to inherit, notwithstanding the dissolution of the marriage. Therefore, if a testator does not want his or her former spouse to inherit, he or she must revoke the existing will. If a testator dies more than three months after the dissolution of his or her marriage and has not revoked an existing will that would have benefited his or her former spouse, the latter will inherit from the deceased testator's estate in terms of the will.[341]

### *4 2 4 Pension-sharing orders*

Section 7(7)(*a*) of the Divorce Act states that a spouse's pension interest is part of that spouse's assets at divorce for the purpose of determining the patrimonial benefits to which the spouses may be entitled.[342] Therefore, even where the divorce order does not expressly make mention of the spouse's pension interest, the value of the pension interest is automatically included for the purposes of determining the proprietary consequences of

333 *Swart v Swart supra*; *Grasso v Grasso supra*.
334 *Swart v Swart supra*.
335 Heaton and Kruger *South African Family Law* 141.
336 *Grasso v Grasso supra*.
337 *Kroon v Kroon supra*.
338 *Vedovato v Vedovato* 1980 (1) SA 772 (T).
339 7 of 1953.
340 S 2B applies irrespective of whether the marriage was dissolved by divorce or annulment.
341 Sonnekus in Heaton (ed) *Law of Divorce and Dissolution of Life Partnerships in South Africa* (2014) 49–50.
342 *Maharaj v Maharaj* [2002] 2 All SA 34 (D); 2002 (2) SA 648 (D).

the divorce.[343] In terms of section 7(8)(*a*) of the Divorce Act, the court granting the divorce is empowered to order the member's fund to pay the non-member spouse's portion directly to him or her when the member spouse becomes entitled to his or her pension.[344]

## 4 3 The law of England and Wales

At divorce, little regard is paid to strict ownership rights when deciding how property should be allocated as the proprietary consequences of divorce are not determined by the marital property regime applicable to or chosen by the spouses to the marriage. However, the parties are at liberty to enter into an agreement regulating how the division of assets should be divided in the event of a divorce.[345] The agreement can be concluded either before the parties enter into the marriage or after the spouses have separated.[346] The agreement does not have to be made an order of the court. Private agreements between the spouses can take the form of pre-nuptial agreements, post-nuptial agreements, separation agreements, consent orders and financial dispute resolutions.

In respect of pre-nuptial agreements, the decision in *Radmacher v Granatino*[347] confirmed the validity of pre-nuptial agreements, and that it was no longer regarded as being contrary to public policy.[348] In *Radmacher v Granatino*, the approach adopted by the court was that effect should be given to a pre-nuptial agreement that was concluded with the informed consent of the spouses, each spouse appreciating the full legal implications of the agreement, unless in the prevailing circumstances it would not be fair to hold the spouses to their agreement.[349] As to whether it would be fair to hold the spouses to their agreement, the court considered the factors that relate to the conclusion of the agreement, as well as those that relate to the subsequent relationship between the parties.[350] A pre-nuptial agreement is deemed to carry more weight if both spouses received independent legal advice before the conclusion of the agreement; if there was full disclosure of all assets by each spouse; and where there was no duress or undue pressure to conclude the agreement.[351] However, even where the pre-nuptial agreement was freely concluded with full disclosure, it will not automatically be upheld in a court of law.[352]

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343 *Fritz v Fundsatwork Umbrella Pension Fund* 2013 (4) SA 492 (ECP); *Macallister v Macallister* [2013] JOL 30404 (KZD); *Kotze v Kotze* [2013] JOL 30037 (WCC); *Motsetse v Motsetse* [2015] 2 All SA 495 (FB) and *Ndaba v Ndaba* [2017] 1 All SA 33 SCA.

344 See also s 37D(1)(*d*)(i) of the Pension Funds Act 24 of 1956.

345 Probert *Family and Succession Law in England and Wales* 192.

346 *Ibid*.

347 [2010] UKSC 42.

348 *Radmacher v Granatino* [2010] UKSC 42 par 52.

349 *Radmacher v Granatino supra* par 75.

350 *Ibid*.

351 *Kremen v Agrest (N0.11) (Financial Remedy: Non-disclosure: Post-Nuptial Agreement* [2012] EWHC 45 (Fam), par 74; *GS v L* [2011] EWHC 1759b (Fam), par 77; *B v S (Financial Remedy: Marital Property Regime* [2012] EWHC 265 (Fam), par 20.

352 *Radmacher v Granatino supra* par 77.

Furthermore, the court held in *Radmacher v Granatino* that there was no material distinction between pre-nuptial and post-nuptial agreements.[353] Post-nuptial agreements would therefore be enforceable between the spouses, even if they were not capable of binding the court.[354]

The existence of a separation agreement will be taken into consideration by a court in exercising its discretion to achieve an outcome that is just and fair as stipulated under section 25 of the Matrimonial Causes Act 1973. The pertinent questions that a court has to ask in this respect are:[355]

(i) How was the separation agreement made?
(ii) Did the parties attach importance to it?
(iii) Have the parties acted on the separation agreement?

Courts will more likely than not uphold a separation agreement entered into between the spouses unless there is very good reason to depart from its terms.[356]

Spouses who enter into a written settlement agreement in which they agree on the division of their assets can approach a court to make a consent order on the terms agreed.[357] The consent order constitutes an order of the court that makes it more difficult to challenge.[358] A court order will be overturned only if there is proof of some element that vitiates the basis of the order.[359]

In order to encourage parties to come to a settlement in respect of the division of their assets, financial dispute resolution was introduced in 2000. Financial dispute resolution consists of strong judicial case management as well as an "early neutral evaluation" by a judge as to what order would possibly be granted if the parties went to court.[360] The agreement reached by the spouses as a consequence of the financial dispute resolution is deemed to be a binding order of court.[361]

### *4 3 1 Division of matrimonial property*

The Matrimonial Causes Act gives the court extensive powers to issue a range of financial orders;[362] property adjustment orders;[363] pension-sharing orders;[364] and orders for the sale of any property belonging to the

353 *Radmacher v Granatino supra* par 60.
354 *Radmacher v Granatino supra* par 60. See also *MacLeod v MacLeod* [2008] UKPC 68.
355 *G v G (Financial Provision: Separation Agreement)* [2000] 2 F.L.R. 18 FD.
356 *Edgar v Edgar* [1980] 1 WLR 1410. For example, the presence of fraud, duress and undue influence.
357 S 33A of the Matrimonial Causes Act 1973.
358 *De Lasala v De Lasala* [1980] A.C. 546.
359 *Rose v Rose* [2002] EWCA Civ 208. For example, misrepresentation, mistake, or material non-disclosure.
360 *Rose v Rose* [2002] 1 F.L.R. 978.
361 *Ibid*.
362 S 23 of the Matrimonial Causes Act 1973 allows the court to make orders for secured or unsecured periodical payments or a lump-sum payment.
363 S 24 of the Matrimonial Causes Act 1973 allows a court to make orders for the transfer or settlement or property, or for the variation of an existing settlement.
364 S 24B of the Matrimonial Causes Act 1973.

spouses.[365] Section 25(2) provides the list of factors that the court takes into account to determine how the assets should be divided on divorce. The list of factors provided for in terms of section 25(2) is not exhaustive as the courts are also instructed in terms of section 25(1) to have regard to all the circumstances of the case. In practice, courts tend to focus on the needs of the spouses and the children born of the marriage, and therefore in a case involving spouses with modest assets, the primary caregiver have more often than not been given more than half of the estate.[366] In contrast, where divorcing spouses are wealthy, the spouse who has not personally generated the wealth, has been allocated significantly less than half of the assets.[367]

The decision of the House of Lords in *White v White*[368] heralded a change in the courts' approach insofar as the allocation of assets between divorcing spouses is concerned, as the court held that the primary objective in applying the Matrimonial Causes Act is to achieve a fair outcome between the spouses.[369] Lord Nicholls, who delivered the main judgment, emphasised that in order to achieve a fair outcome between divorcing spouses, there should be no discrimination between husband and wife and their respective roles, and furthermore, there should be no bias against the homemaker in favour of the spouse who has amassed assets.[370] The consequence of the decision in *White v White* has been that courts have been prepared to award wives a larger share of the assets where the divorcing parties are very wealthy.[371]

The key principles in respect of the allocation of assets of divorcing parties as formulated by case law are first that the focus of the courts will primarily be on meeting the needs of the children and their primary caregiver where resources of the spouses are insufficient to meet their needs.[372] Secondly, where divorcing spouses have more than sufficient resources to meet their needs, these resources may be shared depending on the source of the resources, the contributions of the spouses and all the circumstances of the case.[373]

### *4 3 2 Maintenance*

In respect of post-spousal maintenance, a court is also required to consider the desirability of a clean break between divorcing spouses insofar as the economic consequences of the divorce are concerned.[374] For example, a court must consider whether it would be appropriate to exercise its powers to ensure that the financial obligations of the divorcing spouses are terminated

365 S 24A of the Matrimonial Causes Act 1973.
366 *Scott v Scott* [1978] 1 W.L.R. 723.
367 *O'D v O'D* [1976] Fam. 83; *Page v Page* [1981] 2 F.L.R. 198; *Dart v Dart* [1996] 2 F.L.R. 286.
368 [2000] 2 F.L.R 981.
369 *Supra* 989.
370 *Ibid*.
371 *McFarlane v McFarlane* [2006] UKHL 24.
372 *B v B (Financial Provision: Welfare of Child and Conduct)* [2002] 1 F.L.R. 555.
373 *McFarlane v McFarlane supra* par 68.
374 *Ibid*.

as soon as possible after a decree of divorce.[375] The desirability of a clean break may also influence whether the provision is made by way of lump-sum or periodical payments, but it cannot affect the actual amount deemed appropriate.[376]

Where the court makes an order for periodical payments, the court is also required to consider whether it would be appropriate to specify the time period for which the order should last.[377] The court can furthermore direct that no application should be made in the future to increase the period of time.[378] Cognisance must be taken of the fact that periodical payments will automatically terminate where the recipient remarries.[379] Where the recipient merely cohabits with a third party, it is within the court's discretion whether or not the payments should cease.[380]

In terms of section 23(1)(*b*) of the Matrimonial Causes Act 1973, an order for secured periodical payments can also be made, and be effective even after the death of the payer.[381] Orders for secured periodical payments are generally made where the payer has a bad track record or he or she might leave the country to work elsewhere, and simultaneously take assets out of the jurisdiction of the court, and where the payer is particularly wealthy or impecunious and it is necessary to protect the position of the payee.[382]

### *4 3 3 Inheritance*

In terms of article 26 of the Inheritance Act 1962, the right of succession between spouses is cancelled by legal separation, divorce, and by the voiding of their marriage by judgment.

### *4 3 4 Pension-sharing orders*

The courts are also empowered to make two types of order in respect of a spouse's pension – namely, an order for attachment of the spouse's pension[383] or an order for pension-sharing. In terms of an attachment order, the court makes an order for that part of the pension to be paid directly to the ex-spouse when it falls due.[384] The disadvantages of this order are that the ex-spouse is required to wait until the pension becomes due, and it is also uncertain what the value of the pension will be when it is eventually paid.[385] The preferred order is an order for pension-sharing in terms of which the person's pension right is shared with the ex-spouse, who can either leave it

375 *H v H (Financial Provision)* [2009] EWHC 494 (Fam).
376 *Robin v Robin* [2010] EWCA Civ 1171.
377 S 25A(2) of the Matrimonial Causes Act 1973.
378 S 28(1A) of the Matrimonial Causes Act 1973.
379 S 28(1)(*a*) of the Matrimonial Causes Act 1973.
380 *Fleming v Fleming* [2003] EWCA Civ 1841 par 9; *Grey v Grey* [2009] EWCA Civ 1424.
381 Burton *Family Law* 160.
382 In *Agget v Agget* [1962] 1 WLR 183; [1962] 1 All ER 190; *Parker v Parker* [1972] 2 WLR 21; [1972] 1 All ER 410.
383 This order was originally introduced by s 166 of the Pension Act 1995, inserting s 25B–D into the Matrimonial Causes Act 1973.
384 Douglas *An Introduction to Family Law* 195.
385 *Ibid*.

in the pension scheme, or reinvest it elsewhere.[386] This enables the ex-spouse to receive the benefits of the pension as if he or she had accrued them independently of the circumstances of the other spouse.[387]

## 4 4 Comparison

There are stark differences between Islamic, South African and English law insofar as the economic consequences flowing from divorce are concerned. The matrimonial property regime of a marriage concluded in terms of Islamic rites is one of complete separation. Both spouses therefore leave the marriage on divorce with their separate assets. Unlike South African and English law, Islamic law does not make provision for the sharing of assets at the termination of the marriage on divorce. In particular, the claim for the forfeiture of patrimonial benefits and a redistribution order that is allowed in terms of South African divorce law is foreign to Islamic law. In South African law, the division of the marital assets is determined by the matrimonial property regime regulating the spouses' marriage. In contrast, in terms of English law, the division of matrimonial property at divorce is determined by the courts, unless the parties have entered into private agreements in respect of their estates.

It is also clear from the discussion above that the position in Islamic law with regard to the post-divorce maintenance differs from that in South African and English law in the following respects: first, the duty of maintenance in South African law is reciprocal during the marriage, and the duty rests on both husband and wife depending on their circumstances, while in Islam the duty falls only on the husband. Secondly, in South African law, the duty to maintain terminates at the date of divorce, unless there is an agreement between the parties to the contrary, or a court order to that effect. In Islam, maintenance of the wife terminates three months after the divorce. In other words, the husband's spousal duty of support does not extend beyond the *iddah* period, and after the *iddah* period, the husband ceases to be responsible for the maintenance of his ex-wife. There is no provision for the duty to continue, either by agreement or by court order. The exception to this rule is when the ex-wife is pregnant or where she is still breastfeeding.

Unlike South African and English law, in Islamic law, arrear maintenance is regarded as a debt against the husband that does not prescribe.

South African and English law do not require the husband to pay dower to his wife, and therefore there is no need for rules regulating the dower at the dissolution of a marriage as is the case in Islamic law.

In respect of Islamic law, the dissolution of a marriage by divorce does not necessarily terminate the rights of succession between the parties; in the case of a revocable divorce, the surviving spouse is entitled to inherit from the deceased if either spouse dies during the *iddah* period. In South African law, the rights of succession between spouses are terminated at divorce unless the provisions of section 2B of the Will Act are applicable. The rights

386 *Ibid*.
387 *Ibid.*

of succession between spouses are cancelled at the termination of a marriage in terms of English law.

While both South African and English law make provision for pension-sharing orders, there is no similar provision in Islamic law.

## 5 CONCLUSION

The purpose of this article is to highlight the fundamental differences with regard to the principles and rules governing the termination of a marriage, either by death of one or both spouses or by a divorce in Islamic, South African and English law. The aim has been to emphasise that Islamic law will never completely comply with international equality rights or with the South African Constitution. Furthermore, as Islamic law is regarded as divine law, it is highly improbable that major changes to Muslim Personal Law to bring it in line with the Constitution, in particular gender equality, will be acceptable to adherents of the Muslim faith.

While all three legal systems recognise the importance of marriage as the cornerstone of society and that the dissolution of a marriage through divorce should be embarked on as a last resort, all three legal systems have developed a comprehensive set of rules and principles regulating divorce. Each legal system, however, has its own provisions in respect of law relating to divorce. Underlying the various sets of rules of divorce are Islamic legal theories *vis-à-vis* human rights and gender legal theories. It is clear from the comparative analysis of divorce law that Islamic divorce law is irreconcilable with the Western human-rights approach adopted by South Africa and England and Wales in respect of divorce law. In particular, the right to equality and the right to freedom of religion is at the crux of the dilemma. Legal principles firmly established in Islamic law appear to be in direct conflict with gender equality and human rights. Where these rights prove to be irreconcilable, the question arises whether Islamic law should bow to the Constitution (which would essentially involve changing and adapting Islamic law to accommodate the Constitution) or whether the Constitution should be adapted to accommodate Islamic law. It must be borne in mind that, although Islamic divorce law may appear oppressive as far as the rights of women are concerned, the overall spirit of Islamic divorce law lays emphasis on both equity and decent behaviour between the parties.

The comparison between the three legal systems clearly demonstrates that, while there are some similar underlying principles, the rules and principles in Islamic law are clearly fundamentally different from those of South African law and English law. The attempts to give effect to the consequences of marriages concluded in terms of Muslim rites in both South African law and English law have led to a unique set of rules that are not always *Shari'ah* compliant and which will ultimately lead to the emergence of a distorted set of laws relating to Muslim family law. The result is that profound difficulties are experienced by Muslims who practise MPL and live in South Africa, England and Wales.

# A PLEA OF DOUBLE JEOPARDY BY ACCUSED EMPLOYERS: ARE THERE LIMITS?

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**SUMMARY**

The rule against double jeopardy entails that, generally, a person cannot be charged more than once for the same, or substantially the same, offence or misconduct in respect of which he or she has been convicted or acquitted. Under the Constitution of the Republic of South Africa, 1996, this rule is part of an accused's right to a fair trial. This article shows that every employer prosecuted for allegedly not complying with either employees' tax obligations in the Fourth Schedule of the Income Tax Act 58 of 1962, or for an offence at common law, is entitled to raise the procedural defence of double jeopardy. This article argues that the recent judgment in *Grayston Technology Investment (Pty) Ltd v S* is authority for the proposition that, in any such prosecution, an accused employer may invoke double jeopardy, even if the prior punishment or acquittal stems from non-criminal proceedings under the Tax Administration Act 28 of 2011 before the Tax Court or the Tax Board. A key hypothesis of this article is the argument that double jeopardy ought not to be applied as an inflexible procedural rule in every instance. This is because such an approach would lead to the undesirable result of undermining the Legislature's objective in catering for criminal and civil sanctions in respect of certain violations of fiscal legislation. No hard-and-fast rules can be laid down in advance as to when double jeopardy may be successfully invoked. Each case needs to be decided on its own facts. It is contended that when a court decides whether to uphold a double-jeopardy defence, it must strike an equitable balance between, on the one hand, the accused employer's fundamental right to a fair trial and, on the other, society's legitimate interest in ensuring that taxpayers comply with their tax obligations on pain of adequate punishment for non-compliance.

Are there limits to the plea of double jeopardy by accused employers?

> "To me at least, it is hard to see why the double jeopardy principle should apply when the state wants to chop off my toes, but not when it seeks to slit my nose, or brand my skin, or gouge my ears, or flay my back."[1]

## 1 INTRODUCTION

The South African Revenue Service (SARS) is established by section 2 of the South African Revenue Service Act[2] (SARSA) "as an organ of state

[1] Amar "Double Jeopardy Law Made Simple" 1997 106 *Yale Law Journal* 1807 1811.

within the public administration, but as an institution outside the public service". Its objective is "the efficient and effective collection of revenue".[3] In this context, revenue means "income derived from taxes, duties, levies, fees, charges, additional tax and any other moneys imposed in terms of legislation, including penalties and interest in connection with such moneys".[4] SARS is obliged to "secure the efficient and effective, and widest possible enforcement of",[5] *inter alia*, the Income Tax Act[6] (ITA). As an organ of state, SARS is bound by the Bill of Rights (the BoR) in terms of section 8(1) of the Constitution of the Republic of South Africa, 1996 (the Constitution) to respect taxpayers' fundamental rights.[7] The Tax Administration Act[8] (TAA) confers on SARS a formidable arsenal of powers that include, *inter alia*, an authority to impose penalties for non-compliance with a "tax Act" (as defined).[9] Broadly speaking, these are administrative non-compliance penalties[10] and understatement penalties.[11] A defaulting taxpayer may also be prosecuted for an offence under Chapter 17 of the TAA, or an offence at common law.[12]

## 2 PROBLEM STATEMENT AND OBJECTIVE OF THE ARTICLE

In accordance with section 5(1) of the ITA, the Fourth Schedule thereof creates a framework that regulates the collection of employees' tax, colloquially referred to as Pay As You Earn (PAYE), and matters related thereto. In terms of paragraph 2(1) of the Fourth Schedule, an "employer" (as defined)[13] who qualifies as a "resident" (as defined)[14] for income tax

2 34 of 1997.

3 S 3 of SARSA.

4 S 1 of SARSA.

5 S 4(1)(*a*) of SARSA.

6 58 of 1962.

7 Although the BoR does not expressly refer to taxpayers as a class of beneficiary, courts have recognised their entitlement to fundamental rights. See, for e.g., *Metcash Trading Ltd v Commissioner, South African Revenue Service* (CSARS) 2001 (1) SA 1109 (CC) (right of access to court in s 34); *First National Bank of SA Ltd t/a Wesbank v CSARS: First National Bank of SA Ltd v Minister of Finance* 2002 (4) SA 768 (CC) (right to property); and *Gaertner v Minister of Finance* 2014 (1) SA 442 (CC) (right to privacy).

8 28 of 2011.

9 The TAA (s 1) defines "tax Act" to mean "this Act or an Act, or portion of an Act, referred to in section 4 of the SARS Act, excluding Customs and Excise legislation".

10 See s 208 of the TAA for the definition of "administrative non-compliance penalty". S 209(*b*) provides that such penalties are to be "imposed impartially, consistently, and proportionately to the seriousness and duration of the non-compliance".

11 S 221 of the TAA defines "understatement" to mean "any prejudice to SARS or the *fiscus* as a result of—(a) failure to submit a return required under a tax Act or by the Commissioner; (b) an omission from a return; (c) an incorrect statement in a return; (d) if no return is required, the failure to pay the correct amount of 'tax'; or (e) an impermissible avoidance arrangement". SARS must show that a taxpayer committed the offending conduct and that it caused prejudice. See *Purlish Holdings (Pty) Ltd v CSARS* 81 SATC 204 par 20. Also, see *ITC 1934* 82 SATC 457 par 26–27, 32–36.

12 See, for e.g., *Director of Public Prosecutions, Western Cape v Parker* 2015 (4) SA 28 (SCA).

13 "Employer" is defined in par 1 of the Fourth Schedule of the ITA to mean "any person (excluding any person not acting as a principal, but including any person acting in a

purposes, irrespective of whether or not it is registered for PAYE under paragraph 15 of the Fourth Schedule, and

> "who pays or becomes liable to pay any amount by way of remuneration[15] to any employee[16] shall, unless the Commissioner has granted authority to the contrary,[17] deduct or[18] withhold from that amount, or, where that amount constitutes any lump sum contemplated in paragraph 2(1)(b) of the Second Schedule, deduct from the employee's benefit or minimum individual reserve as contemplated in that paragraph, by way of employees' tax an amount which shall be determined as provided in paragraph 9, 10 or 11 or section 95 of the Tax Administration Act, whichever is applicable, in respect of the liability for normal tax of that employee, … and shall, subject to the Employment Tax Incentive Act, 2013, pay the amount so deducted or withheld to the Commissioner within seven days after the end of the month during which the amount was deducted or withheld".

Accordingly, an employer is a "withholding agent"[19] of employees' tax and is obliged to pay it to SARS by the seventh day of each calendar month. This PAYE is remitted together with an EMP201 form on which an employer discloses all relevant information pertaining to the computation of the PAYE.[20] The legislature's use of the word "shall" when it imposed the duty on an employer to "deduct or withhold" PAYE emphasises the mandatory character of the obligation in question. Thus, compliance with paragraph 2(1) is compulsory.[21] The imperative nature of this duty is further bolstered by,

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fiduciary capacity or in his capacity as a trustee in an insolvent estate, an executor or an administrator of a benefit fund, pension fund, pension preservation fund, provident fund, provident preservation fund, retirement annuity fund or any other fund) who pays or is liable to pay to any person any amount by way of remuneration, and any person responsible for the payment of any amount by way of remuneration to any person under the provisions of any law or out of public funds (including the funds of any provincial council or any administration or undertaking of the State) or out of funds voted by Parliament or a provincial council".

14 See the definition of "resident" in s 1 of the ITA.

15 "Remuneration" is defined in par 1 of the Fourth Schedule as "any amount of income which is paid or is payable to any person by way of any salary, leave pay, wage, overtime pay, bonus, gratuity, commission, fee, emolument, pension, superannuation allowance, retiring allowance or stipend, whether in cash or otherwise and whether or not in respect of services rendered, including …". The definition of "remuneration" expressly excludes from its ambit, *inter alia*, certain pension monies, disability grants, and earnings of a qualifying independent contractor. For the distinction between the terms "paid" and "payable", see *Singh v CSARS* 2003 (4) SA 520 (SCA) par 52.

16 Although the definition of "employee" in par 1 of the Fourth Schedule does not expressly exclude a qualifying independent contractor from its ambit, it is excluded by necessary implication. This is so by reason that an employee is defined to mean a person earning "remuneration" (as defined).

17 The "authority" envisioned in par 2(1) of the Fourth Schedule is catered for in par 11 thereof.

18 In this context, "or" has a disjunctive effect. This is unlike the conjunctive word "and". See *Master Currency (Pty) Ltd v CSARS* 2014 (6) SA 66 (SCA) par 15. In the present context, "or" distinguishes "deduct" from "withhold". Therefore, it follows that these words bear separate meanings for purposes of par 2(1). For a useful summary of the principles of statutory interpretation, see *Chisuse v Director-General, Department of Home Affairs* 2020 (6) SA 14 (CC) par 46–58.

19 S 156 of the TAA defines "withholding agent" to mean "a person who must under a tax Act withhold an amount of tax and pay it to SARS". The ITA is encompassed by the term "tax Act" as defined in s 1 of the TAA.

20 See par 14(2) of the Fourth Schedule in the ITA.

21 See *Mohamed v Ally* 1999 (2) SA 42 (SCA) 48.

first, paragraph 3(1) effectively providing that PAYE is a first charge against remuneration; secondly, by paragraph 3(2) providing that the obligations in paragraph 2(1) of the Fourth Schedule

> "shall apply … notwithstanding the provisions of any law which provide that any such amount shall not be reduced or shall not be subject to attachment".

Accordingly, an employer's duty under paragraph 2(1) is absolute. The view expressed here is consistent with paragraph 3(1) stating that an employer's duty to withhold or deduct PAYE

> "shall not be reduced or extinguished by reason of the fact that the employer has a right or is otherwise than in terms of any law under an obligation to deduct or withhold any other amount from the employees' remuneration".[22]

Paragraph 6(1) of the Fourth Schedule of the ITA, read with section 213(1) of the TAA, provide that an employer who fails to comply with paragraph 2(1) referred to above is liable to pay a percentage-based penalty equal to ten per cent of the unpaid tax. If non-compliance is tantamount to an "understatement" or a "substantial understatement",[23] within the meanings of these terms in section 221 of the TAA, then, under section 222(1), an employer must pay an understatement penalty by reason of any "prejudice"[24] caused. A penalty is imposed by SARS issuing a penalty assessment under section 214 of the TAA.

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[22] However, in terms of par 2(1A), the duty to deduct or withhold PAYE does not apply to "any year of assessment of a company or trust solely by virtue of paragraph (c) of the definition of 'personal service provider' where the company or trust has in respect of such year of assessment provided that person with an affidavit or solemn declaration stating that the relevant paragraph does not apply and that person relied on that affidavit or declaration in good faith".

[23] "Understatement penalty" as defined means "a case where the prejudice to SARS or the *fiscus* exceeds the greater of five per cent of the amount of 'tax' properly chargeable or refundable under a tax Act for the relevant tax period, or R1 000 000".

[24] For a conceptualisation of prejudice in s 221 of the TAA, see *ITC 1934 supra* par 43–45. *In casu*, the court held that "prejudice" includes SARS performing an audit that leads to the uncovering of unlawful behaviour by a taxpayer. The correctness of this view is, it is submitted, questionable. In terms of s 3(1) of the TAA, SARS is responsible for the administration of tax Acts. Section 3(2)(*a*) to (*i*) prescribes the responsibilities that comprise "administration of a tax Act". It includes to "enforce SARS' powers and duties under a tax Act to ensure that an obligation imposed by or under a tax Act is complied with" (s 3(2)(*g*)). Under s 40 of the TAA, "SARS may select a person for inspection, verification or audit on the basis of any consideration relevant for the proper administration of a tax Act, including on a random or a risk assessment basis". Thus, conducting an audit is no more than SARS fulfilling its obligations to administer taxes efficiently and effectively. The performance of this function, coupled with the financial and human resources costs associated therewith, ought not to be "prejudice" within the meaning of this term in the context of the definition of understatement in s 221 of the TAA. In that context, prejudice entails acts or omissions by a taxpayer or representative taxpayer in violation of duties arising from a tax statute and which conduct adversely affects the interests of SARS, or the *fiscus*. Prejudice ought not to include actions by SARS in the execution of its statutory role which, of necessity, involves the incurrence of costs. For purposes of an understatement, a causal nexus must exist between, on the one hand, the offending conduct by a taxpayer and, on the other, the prejudice endured by SARS or the *fiscus*. See *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) par 50 (and the authorities cited there at fn 45).

The percentage-based penalty referred to in the preceding paragraph falls squarely within the definition of an "administrative non-compliance penalty" in section 208 of the TAA. Even though they may be compensatory in effect, such penalties and understatement penalties are "punishment"[25] that may be imposed for non-compliance with employees' tax obligations arising from the ITA. These are not criminal sanctions. Rather, they are purely administrative in nature. Apart from the imposition of these administrative penalties, the legislature also catered for the imposition of criminal sanctions for breaches of an employer's PAYE obligations.

To this end, paragraph 30(1) of the Fourth Schedule of the ITA is instructive. The relevant part thereof reads:

> "Any person who wilfully and without just cause– …
> *(b)* uses or applies any amount deducted or withheld by him by way of employees' tax for purposes other than the payment of such amount to the Commissioner; …
> shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 12 months."

In addition to administrative penalties and statutory criminal offences provided for by the ITA as read with the TAA, employers may also be prosecuted for common-law crimes (such as theft or fraud involving employees' tax collected but unpaid to SARS).[26]

The foregoing practical realities raise the critical question of law forming the subject of research in this article: can a taxpayer raise the defence of double jeopardy in response to a charge in respect of a common-law or statutory offence in circumstances where, as employer, it has already paid an administrative non-compliance or understatement penalty imposed by SARS under the TAA arising from the same or substantially identical facts that give rise to the criminal charge?

A case law survey reveals that, although some judicial *dicta* exist that grapple with this vexed issue, it has not as yet been dealt with in relation to the TAA, and nor has it been authoritatively decided by either the Supreme Court of Appeal (SCA) or the Constitutional Court (CC). There is also a dearth of published academic writings canvassing this important constitutional issue. Accordingly, this article carries the potential to make a meaningful contribution to the discourse pertaining to this subject.

## 3 ROADMAP OF THE DISCUSSION

The ensuing discussion is divided into two main parts. In the first part, the plea of *autrefois acquit* or *autrefois convict* will be discussed with reference to its origins and application in light of the common law, the Constitution and the Criminal Procedure Act[27] (CPA). This discussion aims to lay a firm foundation for the argument that South African employers and taxpayers

[25] *ITC 1934 supra* par 41; *Mr X v CSARS* TC (unreported) 2020 03 27 Case no 13720 par 29.
[26] See *Grayston Technology Investment (Pty) Ltd v S* 2016 (4) All SA 908 (GJ) par 95–101.
[27] 51 of 1977.

generally are entitled, as any other accused, to the equal benefit and protection of the defence embodied in the double-jeopardy rule. In the second part, with reference to relevant case law, the limits to the application of the double-jeopardy rule are discussed. In this part, the legal basis is laid for the central hypothesis of this article, namely that the rule against double jeopardy may be successfully invoked by an accused employer in circumstances where it had already paid an administrative penalty whose fairness was, despite appeal by the taxpayer, approved by the Tax Board or the Tax Court consequent on the same, or substantially the same, misconduct for which the taxpayer is charged criminally. Finally, the conclusion distils the thrust of the key submissions made in the ensuing discussion.

## 4 THE DOUBLE-JEOPARDY RULE AS APPLIED IN SOUTH AFRICA (SA)

### 4 1 Common-law origins and constitutional status

Double jeopardy is universally adopted in legal systems across the world, including at international law.[28] However, the rules governing double jeopardy vary from jurisdiction to jurisdiction. In general terms, the double-jeopardy rule provides that no one may be punished twice for the same offence.[29] Therefore, this rule prevents the re-prosecution of persons for the same matter.[30] As such, it promotes reasonableness and fairness. Although this rule is mainly applied in the field of criminal law, in SA, this procedural rule applies also in some civil contexts (such as at employee disciplinary hearings in labour law).[31]

Double jeopardy is grounded on the principle of finality engrained in the doctrine of *res judicata*. This doctrine is predicated on the need for avoiding un-ending litigation by re-opening or re-trying cases.[32] Accordingly, double jeopardy serves, on the one hand, to restrain the prosecutorial powers of the State with its significant financial and human resources and, on the other, to protect subjects from harassment through abuse of the criminal justice process.[33] In so doing, double jeopardy protects individuals against continual

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[28] For e.g., see article 14(7) of the International Convention on Civil and Political Rights, 1966 and article 4(1) of Protocol 7 to the European Convention on Human Rights, 1950. See *S v Basson* 2007 (1) SACR 566 (CC) par 252–253.

[29] *Lelaka v S* SCA (unreported) 2015-11-26 Case no 409/15 par 6.

[30] The "same offence" is not confined to an "identical offence". See *R v Constance* 1960 (4) SA 629 (A) 635B–636D.

[31] In *Mahlakoane v South African Revenue Service* 2018 (39) ILJ 1034 (LAC) par 27, the court held: "The principle of 'double jeopardy' has, as its heart, fairness and this rule or principle simply entails that an employee cannot, generally, be charged again with the same misconduct that he or she was either found guilty or not guilty of. However, there are instances where breaches of this rule or principle can be condoned. The paramount consideration, however, is fairness to both sides."

[32] See *Thwala v S* 2019 (1) BCLR 156 (CC) par 10.

[33] Jordaan "Appeal by the Prosecution and the Right of the Accused to be Protected Against Double Jeopardy: A Comparative Perspective" 1999 32 *Comparative and International Law Journal of Southern Africa* 1 2–3. Also, see *S v Basson* 2005 (1) SA 171 (CC) par 61, 66.

anxiety, embarrassment, ordeal and expense caused by repeated prosecutions at the insistence of the State and its officials.[34]

In SA, double jeopardy became part of the law via the common law. It stems from the English law maxim, *nemo debet bis vexari pro una et eadem causa* (no person shall be vexed twice for the same cause of action). This, in turn, is derived from the Roman law, *exceptio rei judicatae*.[35] As a result, historically in SA, an accused convicted, acquitted or discharged at a criminal trial has, generally, been regarded as being in legal jeopardy. Therefore, the State was precluded from later charging the accused with the same offence, or with what is, in effect, the same offence.[36] In this context, it is an accepted principle that an "offence embraces both the facts which constitute the crime and the legal characteristics which make it an offence".[37]

The common-law rule against double jeopardy acquired statutory recognition in section 106(1)(*c*) and (*d*) of the CPA.[38] Later, it acquired the imprimatur of the Constitution when it was entrenched in section 35(3)(*m*) of the BoR as a fundamental right of an accused. This subsection reads:

> "Every accused person has a right to a fair trial, which includes the right– … not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted."

Section 9(1) of the Constitution entrenches the right of all persons to equality. It reads: "Everyone is equal before the law and has the right to equal protection and benefit of the law." This provision is reinforced by section 9(2) of the Constitution, which reads: "Equality includes the full and equal enjoyment of all rights and freedoms." Although the Constitution does not expressly refer to taxpayers, the rights in the BoR apply to all natural and juristic persons *qua* taxpayers.[39] Also, SARS is an organ of state for constitutional purposes and, under s 8(1) of the Constitution, it is bound by the BoR. Accordingly, the fair-trial rights of every accused in a criminal court include the right entrenched in section 35(3)(*m*) of the Constitution.

Denying any accused the benefits stemming from s 35(3)(*m*) would create unequal treatment of persons. Such inequality in the criminal justice system would be antithetical to the values of equality, the achievement of equality, and the advancement of human rights and freedoms, all of which are

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34 *Green v US* 1957 355 US 184 187–188.

35 *S v Moodie* 1962 (1) SA 587 (A) 596C.

36 *S v Ndou* 1971 (1) SA 668 (A) 676C–E.

37 *Connelly v Director of Public Prosecutions (DPP)* 1964 (2) All ER 401 433G–H (quoted with approval in *Lelaka v S supra* par 6).

38 The relevant extract from s 106(1) reads: "When an accused pleads to a charge, he may plead … (*c*) that he has already been convicted of the offence with which he is charged; or (*d*) that he has already been acquitted of the offence with which he is charged." These provisions apply in conjunction with s 336 of the CPA. By virtue of this provision, when offending conduct may sustain a charge under the common law and statute, the prosecution can, unless a contrary indication appears from the particular statute, elect to charge an accused in terms of one of these sources of law, but not both. See *S v Mostert* 2010 (1) SACR 223 (SCA) par 18–19.

39 Moosa *The 1996 Constitution and the Tax Administration Act 28 of 2011: Balancing Efficient and Effective Tax Administration With Taxpayers' Rights* (doctoral thesis, University of the Western Cape) 2016 184–187.

democratic values entrenched in the Constitution.[40] Therefore, the plea of *autrefois convict* or *acquit* ought to be available to every accused when pleading to a charge of any nature, irrespective of whether the relevant offence stems from legislation or the common law.

## 4 2 Relevant considerations when double jeopardy is asserted

When pleading double jeopardy, an accused is "deemed to demand that the issues raised by the plea be tried".[41] To establish the facts supporting such a plea, the accused bears the burden to prove all relevant particulars of the prior case in which he or she was convicted or acquitted.[42] These particulars can be presented through oral evidence or by documentary proof (such as a certified copy of the prior judgment or a transcript of the prior proceeding), or by both forms of evidence. If a plea of *autrefois convict* or *acquit* is upheld, then the prosecution of the case where this plea is raised is barred, but then only as regards the offence(s) to which the plea relates.[43]

A plea of *autrefois convict* or *acquit* in a second prosecution only protects an accused if "he or she was in jeopardy of conviction in the first".[44] An accused may succeed with this plea provided that certain legal requirements are met.[45] First, the prior trial of the accused must have been by a competent court;[46] secondly, the substance of the present matter must be the same as, or substantially identical[47] to, that which was previously adjudicated; thirdly, the earlier judgment must be intended[48] to be final as concerns guilt or innocence of the accused on the merits, either in law or on the facts;[49] and fourthly, the earlier case must relate to a charge on which a

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40 Moosa *Taxpayers' Rights* 223–226.

41 S 108 of the CPA.

42 *R v Matengeni* 1969 (4) SA 392 (R) 393H–394C.

43 Lansdown, Hoal and Lansdown *South African Criminal Law and Procedure* vol 1 (1957) 366–367.

44 *S v Basson* 2007 (1) SACR 566 (CC) par 254.

45 For a discussion of the various legal requirements, see Lansdown *et al South African Criminal Law and Procedure* 367–368. Also, see *R v Manasewitz* 1933 AD 165 173–174.

46 Hiemstra *Suid-Afrikaanse Strafproses* 5ed (1993) 260. Also, see *S v Odendaal* 1995 (2) SACR 449 (T) 451.

47 The test for substantial identity is "whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first indictment" (*S v Ndou supra* 680F) or "an offence for which on the first charge there could be a conviction" (per Lord Morris in *Connelly v DPP supra* 433G–H).

48 To determine the existence of any such intention requires a proper interpretation of the court's judgment and order. For the applicable interpretive rules, see *Eke v Parsons* 2016 (3) SA 37 (CC) par 29–30; *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) par 18–22.

49 *Sayed v S* 2018 (1) SACR 185 (SCA) par 25. In *S v Basson* 2007 (1) SACR 566 (CC) par 254, it was held: "The requirement that the previous acquittal must have been on the merits, or to put it differently, that the accused must have been in jeopardy of conviction, means that, if the previous prosecution was vitiated by irregularity, then it cannot found a plea of *autrefois acquit* in a subsequent prosecution. That is because the accused was not acquitted on the merits and was never in jeopardy of conviction because the proceedings were vitiated by irregularity."

valid judgment could be entered in favour of, or against, the accused.[50] Accordingly, for purposes of the application of the rule against double jeopardy, it is irrelevant whether a criminal charge stems from the common law or a statutory provision creating an offence.

The rule against double jeopardy is not inflexible or absolute. Its operation is subject to certain exceptions, where appropriate. For example, in criminal law, double jeopardy is no bar to a prosecution on a heavier charge (such as murder or culpable homicide) after an accused was previously convicted or acquitted of a lighter offence stemming from the same conduct (such as assault). In this instance, the victim's death is a material "new fact"[51] that would justify deviation from the double-jeopardy rule engrained in section 35(3)(*m*) of the Constitution.

Similarly, in labour law, provided "it is, in all the circumstances, fair to do so",[52] an employee may be subjected to a second disciplinary hearing on the same issue for which he or she has been found guilty or acquitted. Consequently, in *MEC for Finance, KwaZulu-Natal v Dorkin NO*,[53] the appeal court held that, having regard to the gravity of the offences for which the employee was found guilty, "exceptional circumstances" existed that made it fair to permit the employer to subject its employee to a repeat hearing through proceedings in the Labour Court.

## 5 LIMITS TO DOUBLE JEOPARDY: DOES IT APPLY WHEN SARS IMPOSES ADMINISTRATIVE PENALTIES?

The discussion under heading 4 reveals that, to succeed with a plea of *autrefois acquit or convict*, an accused employer in a criminal trial must prove he was acquitted or convicted by a competent court of law for the same (or substantially the same) offence. This requirement was dealt with in *S v Odendaal*.[54] *In casu*, the accused was convicted in a lower court under certain Road Traffic Regulations of 1990 for having failed timeously to register and license a trailer. Prior to his prosecution, the accused paid the prescribed penalty ("boete") to the traffic authority in accordance with regulation 27(1). In terms of regulation 27(2), this payment did not absolve the accused, as owner, of criminal liability for failing to register and license the relevant trailer timeously. As a result, by law, he was prosecuted for his failure. At his trial arising from the same facts that led to the payment of a penalty, the accused pleaded that the rule against double jeopardy precluded the prosecution undertaken against him. This plea was dismissed, and the accused was convicted of the offence.

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50 If a superior court, on appeal, quashes an indictment on the basis that it was bad *ab initio*, then the accused cannot rely on double jeopardy in a later criminal trial because he or she was never legally in jeopardy. See *R v Manasewitz supra* 174.

51 *S v Ndou supra* 676C.

52 *BMW (South Africa) (Pty) Ltd v Van der Walt* 2000 (21) ILJ 113 (LAC) par 12.

53 2008 (6) BLLR 540 (LAC) par 14.

54 *Supra.*

This decision was confirmed on review by Southwood J. He held the penalty paid under regulation 27(1) was administrative in nature. It was not imposed by a court of law pursuant to a finding of guilt after a prosecution. Southwood J held that this was critical to a determination of whether the accused was protected by the rule against double jeopardy, which at all material times formed part of the suite of fair-trial rights accruing to the accused under the interim Constitution, 1993. Southwood J held that since payment of the penalty did not occur after a guilty verdict against the accused by a competent court of law, the rule against double jeopardy did not protect the accused against subsequent prosecution for the same conduct that led to the payment of the administrative penalty in the first place.

This decision is important in the context of tax administration. As explained above, an employer who defaults in his employees' tax obligations may suffer an administrative non-compliance penalty or understatement penalty imposed by SARS through a penalty assessment. Despite the penal nature of these impositions, based on the aforementioned *ratio decidendi* emerging from *S v Odendaal*, payment by an accused employer of an administrative penalty would not preclude a subsequent prosecution for a statutory crime or common-law offence arising from the same misconduct that led to the penalty being imposed against the taxpayer in the first place. In other words, at a criminal trial, the taxpayer would, in these circumstances, not have recourse to the fundamental right accorded by section 35(3)(*m*) of the Constitution. For the reasons that follow, it is submitted that this is not the legal *cum* constitutional position that ought to apply in criminal cases where an administrative penalty imposed by SARS was paid by a taxpayer after the penalty was, in whole or in part, upheld by the Tax Board or Tax Court.

An administrative non-compliance penalty and understatement penalty imposed by SARS is provisional only. In terms of sections 220 and 224 of the TAA, they are respectively subject to appeal to the Tax Board or Tax Court. Therefore, these statutory institutions are the ultimate arbiters of the fairness of a penalty imposed against a taxpayer.[55] While the Tax Board and Tax Court are not courts in the judicial hierarchy under section 166 of the Constitution, they are "specialist tribunals"[56] created by the TAA to perform an adjudicative role in tax disputes. A taxpayer who pays a penalty approved by the Tax Board or Tax Court does so in accordance with a decision by a competent administrative adjudicative authority that is properly established by law.

Accordingly, for purposes of the double-jeopardy rule, decisions of the Tax Board and Tax Court ought to carry the same weight as that of a competent court of law. If so, then a taxpayer ought to be entitled, as a matter of legal principle, to plead double jeopardy against a criminal charge in relation to a statutory or common-law offence arising from the same or

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[55] *CSARS v Hawker Air Services (Pty) Ltd; CSARS v Hawker Aviation Partnership* 2006 (4) SA 292 (SCA) par 14.

[56] *Metcash Trading Ltd v CSARS supra* par 32. While the Tax Board is an administrative tribunal, the Tax Court is more appropriately described as a "court of revision" (see *Africa Cash & Carry* v *CSARS* 2020 (2) SA 19 (SCA) par 52).

substantially the same facts that led to the imposition of an administrative penalty that has been paid by the taxpayer prior to the institution of the criminal case but only after it was approved by a duly constituted Tax Board or Tax Court, as the case may be. Authority for this proposition is found in the *obiter dictum* in *Grayston*.[57]

*In casu*, it was held that section 35(3)(*m*) of the Constitution "transcends the confines of purely criminal procedure" and provides "a constitutional safeguard against double jeopardy irrespective of whether the forum empowered to impose the sanction is a criminal court, a civil court or an administrative tribunal".[58] The court held that the doctrine of *res judicata*, which underpins double jeopardy, as well as the principles of justice and reasonableness underpinning the Constitution and the right to just administrative action in section 33 of the Constitution, give practical expression to the same legal sentiment, namely that "a person should be protected from being repeatedly brought to answer in respect of the same conduct",[59] regardless of the forum where such person is brought to answer for his conduct.

Support for the court's conclusion that double jeopardy ought to apply in cases where punishment in the form of a civil (administrative) penalty was authorised by a tribunal that is not a court of law was found in international and foreign law. This was possible owing to the interpretive directives in section 39(1)(*b*) and (*c*) of the Constitution. To this end, the court considered the decision in *Han v Commissioner of Customs & Excise and Similar Cases*.[60] This is an English case that concerned the imposition of civil penalties by the customs authority owing to the taxpayer evading payment of VAT for which there also existed a parallel scheme of statutory offences.

In *Han*, the court held that, in determining whether a person had been subjected to a "criminal charge", as that term is used in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, due regard must be given to the "substantive" rather than "formal" conception of the term "charge". To do so "impels the Court to look behind the appearances and examine the realities of the procedure in question in order to determine whether there has been a "charge" within the meaning of Article 6".[61] In this regard, three factors, to be considered cumulatively, were identified as relevant to whether double jeopardy applies to an accused person for purposes of Article 6 of the European Convention. These are: (i) the classification of the relevant proceedings in the applicable domestic law; (ii) the nature of the offence charged; and (iii) the nature and degree of severity of the penalty that the accused risked incurring if convicted.

For purposes of deciding the appeal in *Grayston*, it was unnecessary for the court, on the facts, to decide whether, in light of the prior imposition of civil penalties against the appellant taxpayers, double jeopardy precluded

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57 *Supra.*

58 *Grayston Technology Investment (Pty) Ltd v S supra* par 125.

59 *Grayston Technology Investment (Pty) Ltd v S supra* par 126.

60 2001 (4) All ER 687 (CA).

61 *Han v Commissioner of Customs & Excise supra* 703e.

the statutory charges for which they were convicted. This is so because, first, the appellants accepted that they could be convicted and sentenced on the criminal charges, despite the civil penalties. Therefore, they did not raise the plea of *autrefois convict*. Secondly, "the evidence before the court did not indicate what administrative penalties were imposed, nor could they be determined because the interest portion of the judgment debts was not disclosed".[62] Consequently, on the specific facts before the appellate court, double jeopardy did not apply. Therefore, the views expressed by the court on the question of the application of double jeopardy are *obiter*.

## 6 CONCLUSION

This article shows that the double-jeopardy rule is, under the Constitution, an integral part of the right of every accused person to a fair trial. Consequently, every delinquent employer who fails to comply with its employees' tax obligations is entitled to plead double jeopardy. For this defence to succeed, the relevant legal requirements must be met. This article demonstrates that there is now judicial authority for the proposition that an accused employer may successfully invoke double jeopardy even if the prior punishment or acquittal stems from non-criminal proceedings before a specialist tribunal (such as, the Tax Board or Tax Court). This approach is beneficial to employers and ought to be embraced as enlightened and consonant with the spirit of the BoR.

However, the operation of double jeopardy in circumstances where an accused employer has paid a civil penalty arising from the same or similar facts appears to conflict with the Legislature's intention to impose criminal and civil sanctions for certain violations of obligations arising under fiscal legislation. The application of double jeopardy in such circumstances may well undermine the deterrent effect sought to be achieved by the Legislature catering for civil and criminal sanctions. An equitable balance ought, therefore, to be struck between, on the one hand, the right of an accused employer to a fair trial and, on the other hand, society's interest in ensuring that every taxpayer pays a fair share of tax timeously. Consequently, there may be instances where an employer may justifiably be subjected to a civil penalty and criminal sanction for failing to pay employees' tax to SARS, whether timeously or at all. This was recognised in *Grayston*, where the court held that "[d]ouble jeopardy cannot arise every time two different tribunals consider holding the same person responsible for some act or omission".[63] However, no hard-and-fast rules can be laid down in advance as to the, presumably rare, circumstances where double jeopardy may not be successfully invoked. Each case must be decided on its own facts.

62 *Grayston Technology Investment (Pty) Ltd v S supra* par 124.
63 *Grayston Technology Investment (Pty) Ltd v S supra* par 128.

# THE CONSTITUTIONAL ROLE OF THE JUDICIARY IN CASES OF SEXUAL GBV: AN ANALYSIS OF *TSHABALALA v S; NTULI v S* 2020 (5) SA 1 (CC)

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**SUMMARY**

The Constitution of the Republic of South Africa is the supreme law, and it imposes obligations on all arms of the State, including the judiciary. In performing their functions and exercising their powers, all three arms of the State are obliged to fulfil the obligations imposed by the Constitution. In particular, all three arms of the State are bound by the provisions of the Bill of Rights. The Bill of Rights, provided for in the Constitution, is a cornerstone of democracy in the country. The Bill of Rights provides for fundamental human rights, which must be respected, protected, promoted and fulfilled by the State. Different legal systems recognised in the Republic also have to comply with the provisions of the Bill of Rights. In particular, section 39(2) of the Constitution provides that whenever legislation is interpreted and when the common law and customary law are being developed, the spirit, purport and objects of the Bill of Rights must be promoted. Therefore, even when a case before a court calls for the application of common law and all the principles applicable under common law, such application must comply with the provisions of the Constitution, including in cases of common-law rape. Gender-based violence has reached alarming rates in South Africa. The country is referred to as the "femicide nation" and the "rape capital of the world". With a Constitution that is supreme and entrenched, a Bill of Rights that provides for the protection and promotion of fundamental human rights, and obligations incurred in terms of international and African human-rights treaties, there are particular obligations placed on all three arms of the State, including the judiciary. All three arms of the State are obliged to comply with these provisions when addressing the scourge of gender-based violence in the country. This article conducts a critical analysis of the constitutional role of the judiciary in cases of sexual gender-based violence, with a focus on section 39(2) of the Constitution. The analysis is based primarily on the case of *Tshabalala v S; Ntuli v S* 2020 (5) SA 1 (CC).

## 1 INTRODUCTION

The Constitution of the Republic of South Africa, 1996 (the Constitution) is the supreme law of the Republic.[1] This means that all laws have to comply with or be drafted within the parameters of constitutional provisions.

[1] S 2 of the Constitution.

Furthermore, all laws recognised in the Republic also have to comply with the obligations imposed by the Constitution as it is the supreme law.[2] Lastly, all three arms of the State, including the judiciary, are obliged to fulfil the obligations imposed by the Constitution.[3]

The Bill of Rights makes provision for the protection and promotion of fundamental human rights, which are justiciable within South Africa's constitutional democracy.[4] Section 8(1) of the Constitution places a particular obligation on all three arms of the State by stating the following:

> "The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state."

This section means that whenever the three arms of the State perform their functions or exercise their powers, they are bound by the provisions of the Bill of Rights. Furthermore, reference to all law, as stated in this section, includes other laws recognised in the Republic – for example, common law and customary law, which are also subject to the provisions of the Bill of Rights.[5] This is in line with section 7(1) of the Constitution, which provides that the Bill of Rights is a cornerstone of democracy in South Africa, and affirms the democratic values of human dignity, equality and freedom.

Section 39(1) of the Constitution provides that whenever a court interprets the Bill of Rights, these democratic values must be promoted. There is, therefore, a further obligation on the courts to give effect to these values whenever they interpret the Bill of Rights. Even though values are not justiciable, they do provide an important framework within which the rights in the Constitution are to be interpreted and given effect to; more particularly, they provide guidance to the courts on how rights are to be interpreted and ultimately given effect to.

The courts are also obliged to consider international law when interpreting the Bill of Rights.[6] There are various United Nations (UN) and African human-rights instruments that provide the international and regional standard for the protection and promotion of rights in general, and women's rights in particular. For example, the UN Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) and the African Charter on Human and People's Rights (ACHPR) provide the standard for the

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2 S 2 of the Constitution; customary law and common law are recognised in South Africa as provided for in s 39(2) and (3) of the Constitution.

3 S 7(2) of the Constitution provides that the State must respect, protect, promote and fulfil the rights in the Bill of Rights; s 8(1) of the Constitution further provides that the Bill of Rights applies to all law, binds the legislature, the executive, the judiciary and all organs of state.

4 The Bill of Rights is provided for in Chapter 2 of the Constitution; the Bill of Rights provides for the following rights, among others: the rights to equality, human dignity, and freedom and security of the person. These are provided for in sections 9, 10 and 12 respectively.

5 Various sections of the Constitution refer to common law – for example, ss 8(3)(*a*), 39(2), and 39(3). The Constitution also makes mention of customary law in ss 39(2) and (3), and 211(1).

6 Being a State Party to various treaties (for example the United Nations Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), 1979 and the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol)), South Africa is obliged to fulfil the obligations it has incurred in terms of these treaties. See s 39(1)(*b*) of the Constitution; *Tshabalala v S; Ntuli v S supra* par 96.

protection and promotion of the right to equality of all women in a similar manner to that of section 9 of the Constitution.[7]

Of particular significance to this article is section 39(2) of the Constitution, which obliges the courts to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation and when developing the common law or customary law. Where the common law deviates from or fails to comply with the provisions of the Constitution, it needs to be developed in a manner that will promote the spirit, purport and objects of the Bill of Rights.

Section 165(2) of the Constitution further states that the courts are independent and are subject only to the Constitution and the law.[8] This would in effect also mean that the courts are subject to the common law where a matter requires or calls for the application of the common law. However, even when a matter does in fact call for the application of the common law, such application remains subject to particular constitutional provisions as stated in sections 2, 7(1), 8(1) and 39(1) and (2) of the Constitution. Therefore, even when a crime, such as common-law rape, is committed and such a matter must be considered according to the provisions of common law, the constitutional obligation placed on the courts to consider and determine the matter within constitutional parameters and provisions remains intact by virtue of sections 8(1), 39(1)(*a*) and (*b*), and section 39(2) of the Constitution.[9]

In essence, the courts are charged with the protection and promotion of the Constitution, and in particular the protection and promotion of the Bill of Rights, whenever they perform their functions or exercise their powers, even in instances where the common law finds application. Section 167(3)(*a*) states that the Constitutional Court is the highest court of the Republic; thus, this section places a particular and greater obligation on this court to fulfil the obligations imposed by the Constitution, and the Bill of Rights in particular, as it will set the standard and precedent for all other courts of the Republic.[10]

In recent years and more especially during the national lockdown period, gender-based violence has been on the rise in South Africa.[11] Incidents of gender-based violence have also become more violent.[12] Central to this

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7 It is important to mention that while these international and African human-rights instruments set the international and regional standard, the Constitutition does go further in its provisions when providing for the promotion and protection of the right to equality as stated in s 9 of the Constitution.

8 This is again in line with s 2 (supremacy clause) of the Constitution.

9 This is because common-law rape infringes rights that are recognised and protected in the Bill of Rights, for e.g., the rights to human dignity and freedom and security of the person, to name a few. These rights are provided for in ss 10 and 12 of the Constitution respectively.

10 Ss 168, 169, and 170 of the Constitution make reference to other courts that are recognised in the Republic. These are the Supreme Court of Appeal, the High Courts, and other courts, for e.g., the Labour Court and small claims courts, to name a few. Due to the Constitutional Court being the apex court in the country and the doctrine of judicial precedent, as founded on judicial hiearchy, there is a particular and greater obligation on the Constitutional Court to promote and protect the spirit, purport and objects of the Bill of Rights.

11 South Africa declared a national lockdown on 23 March 2020 in terms of the National Disaster Management Act due to the global Covid-19 pandemic.

12 To date, incidents of gender-based violence have become more violent where, for example, women's bodies are often discovered in horrifying conditions. The most recent incident is

article is section 39(2) of the Constitution, and in particular, the application of the common-law doctrine of common purpose to matters of common-law rape. Against this backdrop, the article analyses the case of *Tshabalala v S; Ntuli v S*,[13] in which the Constitutional Court had to develop the common law within the provisions and parameters of section 39(2) of the Constitution by determining whether the doctrine of common purpose is applicable in matters of common-law rape.

Prior to the decision of the court in this case, there was uncertainty in the law with regard to the application of the doctrine of common purpose to matters of common-law rape. This uncertainty resulted in conflicting application of the doctrine in matters of common-law rape.

As previously stated, all three arms of the State, which include the judiciary, have obligations to fulfil (in terms of the Constitution and international and African human-rights treaties) to protect and promote human rights, especially those of women. This article considers the role of the judiciary, through the determination, development and application of the law, in the fight against gender-based violence, its constitutional, international, and regional human-rights obligations in terms of ratified treaties and other legal instruments with regard to the protection and promotion of human rights, particularly for women.

The case of *Tshabalala v S; Ntuli v S* is introduced in the next section.

## 2 INTRODUCTION TO THE CASE: *TSHABALALA v S; NTULI v S*

Mathopo AJ, in his opening remarks, stated:

> "Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy, and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation. Women in this country are entitled to the protection of these rights."[14]

In the case of *Tshabalala v S*; *Ntuli v S*, the Constitutional Court had to determine whether or not the common-law doctrine of common purpose is applicable in matters of common-law rape. The doctrine of common purpose entails the following: if two or more people, having a common purpose to commit a crime, act together in order to achieve that purpose, the conduct of each of them in the execution of that purpose is imputed to the other.[15] Prior to the Constitutional Court's decision in this case, there was no clarity and certainty in our law as to the application of the doctrine in matters of common-law rape; the doctrine was applied in some cases and excluded in

that of Tshegofatso Pule whose body was discovered hanging from a tree while she was 8 months pregnant (News 24 "Man accused of Tshegofatso Pule's murder confesses to previous failed attempt" https://www.news24.com/news24/southafrica/news/ man-accused-of-tshegofatso-pules-murder-confesses-to-previous-failed-attempt-report-20200618 (accessed 2020-09-08)).

13 *Supra.*

14 *Tshabalala v S; Ntuli v S supra* opening remarks.

15 Snyman *Criminal law* 6ed (2014) 256.

others.[16] Rape has been on a steady rise over the last three years. In particular, sexual offences committed against women have been on a steady rise.[17]

## 2 1 Facts of the case

On 20 September 1998, a group of men went on the rampage in the township of Tembisa in Gauteng.[18] During this time, the men, including Tshabalala and Ntuli, forced their way into numerous homes which were located on nine separate plots in a community where marginalised and vulnerable people, mostly women and children, lived. Once forceful entry was gained, the men ransacked, looted and, in one case, stabbed one of the occupants.[19] On approaching some of the houses, they threw rocks and stones on the roofs, sowing confusion by masquerading as police. When their entry was refused, they broke down doors and assaulted the occupants they found inside.[20] Some of the males in the homes were also attacked and they were made to lie on the ground with blankets covering their heads. The violent acts included the rape of eight female occupants, some of whom were repeatedly raped, by several members of this group.[21] The youngest victim of these crimes was 14 years old and another victim was a woman who was visibly pregnant; this did not deter the group from committing these crimes.[22] It is important to note that while some of the men raped the female occupants, other members of the group were standing guard outside the homes in which these violent crimes were taking place. Essentially, they were posted to act as lookouts or guards for the other members of the group.

On 13 August 1999, this matter was brought before the High Court on a charge of common-law rape mainly based on the common-purpose doctrine.

## 2 2 Proceedings in the High Court

Mr Tshabalala and his other co-accused[23] were found guilty of eight counts of rape, seven of which were imposed on the basis of the application of the

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16 There are a number of court cases that reflect the uncertainty in our law around the application of the common-purpose doctrine to matters of common-law rape. A discussion of these cases will follow in a later section of this note.

17 Crime Stats South Africa "Crime Stats Simplified: https://www.crimestatssa.com/national.php (accessed 2020-02-14); South African Police Service "Crime Situation in Republic of South Africa Twelve (12) Months (April to March 2018_19)" https://www.saps.gov.za/services/april_to_march2018_19_presentation.pdf (accessed 2020-02-14).

18 *Tshabalala v S; Ntuli v S supra* par 5.

19 *Ibid.*

20 *Tshabalala v S; Ntuli v S supra* par 6.

21 *Ibid.*

22 *Ibid.*

23 For the purposes of this note, reference will only be made to Mr Tshabalala and Mr Ntuli who were the applicants in this case. As and when it is necessary, reference will be made to the other co-accused who were part of the group of men referred to above as the "other co-accused" or will be referred to by name specifically when necessary.

doctrine of common purpose.[24] Both Mr Tshabalala and Mr Ntuli were postively identified at different scenes where the crimes took place.

Mr Tshabalala was identified in household eight where an attempted rape took place and was further identified at an outside toilet.[25] Mr Ntuli was identified at two different locations where the crimes took place. In one of the households where Mr Ntuli was seen, the occupants were assaulted and one of the female occupants was raped by more than two men.[26]

The applicants contended that the common-law crime of rape is not an offence for which an individual can be convicted through the application of the doctrine of common purpose. This contention, however, was rejected by the High Court.[27] In deciding if the doctrine should indeed be applicable to the common-law crime of rape, the High Court evaluated the evidence and arrived at the conclusion that the group acted as a "cohesive whole".[28]

In support of this conclusion, the court held that the fact that blankets were placed over some of the occupants while the women and children were being raped, and that some members of the group were posted outside as lookouts, could only point to one conclusion, namely that the attacks were not spontaneous, but were planned. Therefore, a common purpose was formed before the attacks began and before the rapes were executed in order to further the common purpose.[29]

The reasoning of the court was based on the following: (a) both applicants were at the scene of the crimes with the group; (b) both applicants were identified by some of the witnesses at the scene and also at the identification parade; (c) both applicants must have known, or been aware of, the group's *modus operandi* to commit the crimes; and (d) both applicants did not disassociate themselves from the actions of the group.[30] Both accused were convicted and sentenced to effective life sentences.

They sought leave to appeal from the High Court, which was refused. Mr Tshabalala later also petitioned the Supreme Court of Appeal for leave to appeal, which was also refused. However, what incited both Mr Tshabalala and Mr Ntuli to appeal to the Constitutional Court was the decision of the Full Court with regard to a Mr Phetoe, who was a co-accused in the matter.

Mr Phetoe was granted leave to appeal both his conviction and sentence on 28 November 2012 to a Full Court of the High Court. The Full Court reasoned that due to the State's failure to prove beyond reasonable doubt that each member of the group did indeed rape the eight complainants, the convictions of rape based on the application of the doctrine of common purpose had to be set aside.[31] The Full Court held further that the doctrine cannot be applied to crimes that can only be committed through the use of

[24] *Tshabalala v S; Ntuli v S supra* par 8.
[25] *Ibid.*
[26] *Ibid.*
[27] *Tshabalala v S; Ntuli v S supra* par 9.
[28] *Tshabalala v S; Ntuli v S supra* par 10.
[29] *Ibid.*
[30] *Tshabalala v S; Ntuli v S supra* par 11.
[31] *Tshabalala v S; Ntuli v S supra* par 13.

one's own body, or part thereof, and not through the instrumentality of another person.[32]

Therefore, the Full Court overturned Mr Phetoe's common-law rape conviction, replacing it with one of being an accomplice, and sentenced him to one term of life imprisonment instead.[33] The Full Court arrived at this decision after it determined that Mr Phetoe did not dissociate himself from the group, including the rapes.

However, Mr Phetoe was dissatisfied with this finding and subsequently applied for, and was granted, special leave to appeal to the Supreme Court of Appeal.

In the section that follows is a discussion of the proceedings in the Supreme Court of Appeal with regard to Mr Phetoe's special leave to appeal.

## 2 3 Proceedings in the Supreme Court of Appeal

The Supreme Court of Appeal (SCA) held differently; it did not agree with the decision of the Full Court. The SCA held instead that to convict the appellant as an accomplice to the crime on the basis of his mere presence at the scene "would subvert the principles of participation and liability as an accomplice in our criminal law".[34] The SCA stated that there was no evidence to prove that Mr Phetoe was indeed present at the scene where the rapes, assaults, housebreakings, and robberies took place, other than at household three, and thus concluded that no common purpose with the other members of the group was established.[35] Further to this, the court stated that Mr Phetoe did not meet the requirements of an accomplice and to hold him accountable as such would amount to a subversion of the principles of participation and liability as an accomplice in our criminal law.[36]

It was on this basis that the SCA set aside the convictions and sentences of all counts of common-law rape but confirmed Mr Phetoe's conviction and sentence in respect of the robbery with aggravating circumstances.[37]

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32 *Ibid.*

33 In the minority judgment at par 9 of the case as it was heard in the Supreme Court of Appeal, it is recorded that Dama AJ held differently. Dama AJ held that there was no evidence presented by the State to prove that Mr Phetoe assisted the rest of the accused in any form at the time the rapes were committed, except for the fact that he was present at the scene. Dama AJ was of the opinion that Mr Phetoe should not be held liable.

34 *Tshabalala v S; Ntuli v S supra* par 15.

35 *Tshabalala v S; Ntuli v S supra* par 15*; Phetoe v S* 2018 (1) SCA par 10, 15, 16, 17, 20 and 21.

36 *Phetoe v S supra* par 15; in par 13 of the case, the court referred to the definition of an accomplice in Snyman *Criminal Law* 266 in the following manner: "a person is guilty of a crime as an accomplice if, although he does not satisfy all the requirements for liability contained in the definition of the crime and although the conduct required for a conviction is not imputed to him by virtue of the principles relating to common purpose, he unlawfully and intentionally engages in conduct whereby he furthers the commission of a crime by somebody else."

37 *Phetoe v S supra* par 20; the SCA did not engage, in this matter as it was on appeal, on the application of the doctrine of common purpose itself. It only applied itself to the appeal of the conviction and sentence of being an accomplice to the crimes of common-law rape.

The SCA overturned the findings of the High Court, which were based on the application of the doctrine of common purpose, and those of the Full Court that Mr Phetoe was an accomplice to the rapes.[38] Therefore, the SCA set aside the convictions and sentences relating to all the convictions on common-law rape. The decision of the SCA conformed to the minority judgment in the High Court.[39]

As a result of Mr Phetoe's successful appeal and decision by the SCA, both Mr Tshabalala and Mr Ntuli applied to the Constitutional Court in December 2018 for leave to appeal their convictions and sentences respectively.

## 2 4 Proceedings in the Constitutional Court

The Constitutional Court was charged with answering two main questions, namely: (a) whether an accused can be convicted of common-law rape based on the application of the doctrine of common purpose; and (b) whether the decision of the SCA in the case of Mr Phetoe was indeed correct, and if correct, whether there was anything to distinguish the convictions of Mr Tshabalala, which he put in dispute, from those from which his co-accused, Mr Phetoe, was absolved.[40]

## 2 5 The uncertainty around the application of the common-purpose doctrine to common-law rape

As previously stated, the Constitutional Court founded its jurisdiction in this case on the fact that there was uncertainty in our law with regard to the application of the doctrine of common purpose to common-law rape. What is key in the common-law doctrine, particularly in matters of rape, is the instrumentality principle. This principle requires that the person who is accused of rape be the one that actually penetrated the victim unlawfully through the use of his own genitalia.[41] This would therefore mean that in matters of group rape, where common purpose may be established, but before an individual in the group can be convicted and sentenced for common-law rape, it must be proved beyond reasonable doubt that this particular individual did in fact penetrate the victim without consent through the use of his own genitalia. It was, therefore, important that the court make a determination as to the application of the doctrine in matters of common-law rape. Before the court could decide if the doctrine should indeed apply, it considered: the facts of previous cases in which the application of the doctrine of common purpose in matters of common-law rape was considered; how the law was applied in those cases; and, if there was anything in those previous cases that could possibly be used in the present case to assist the court in arriving at a conclusion.

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38 *Tshabalala v S; Ntuli v S supra* par 16.
39 *Tshabalala v S; Ntuli v S supra* par 13
40 *Tshabalala v S; Ntuli v S supra* par 18.
41 *Tshabalala v S; Ntuli v S supra* par 2.

What follows is a brief discussion of select previous cases referred to by the Constitutional Court in the present case.

In *S v Moses*,[42] the appellant was a member of a group charged with a number of crimes, which included common-law rape. The court had to determine whether or not the doctrine should be applicable to common-law rape. The minority in this case determined that the doctrine should be applicable, as the facts called for its application.[43] Thus, the minority in this case did not consider the instrumentality principle to play a role or to be relevant in matters of common-law rape.

In *Kholosa v The State*,[44] the court had to decide an appeal that also included a charge of common-law rape. When deciding the issue of rape in this case, the court determined that the doctrine could not be applied to common-law rape. The court based its decision largely on the instrumentality principle.[45]

Lastly, in *S v Jaars,*[46] the court had to decide an appeal in which some of the rape convictions were based on the doctrine of common purpose. However, the court determined that the instrumentality principle is the determinative factor in matters of rape and therefore the convictions of the court *a quo* were set aside.[47]

These three cases illustrate the uncertainty that existed in our law insofar as the application of the doctrine of common purpose to common-law rape is concerned and the relevance of the instrumentality principle in common-law rape. It is this uncertainty that provided the need for the Constitutional Court to establish certainty and authority that could be used by other courts in similar cases.

## 3 ANALYSIS

In the present case of *Tshabalala v S; Ntuli v S*, the Constitutional Court noted that sexual violence committed against women is particularly prevalent and strips women of their rights to equality, human dignity and bodily integrity. Importantly, the court also acknowledged three aspects of gender-based violence: first, that the incidence of sexual violence in South Africa is high; secondly, that incidents of sexual violence in South Africa are gendered; and thirdly, that sexual gender-based violence infringes many of women's rights, including the right to equality.[48] The crime of rape strips

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42 (2010) JDR 0851 NCK; also referred to in par 23 of the facts of *Tshabalala v S; Ntuli v S supra.*

43 *Ibid;* the court likened the defintion of rape to that of robbery and held that the distinction is artificial and more perceived than real.

44 2012 JOL 29419 ECG*;* also referred to in par 24 of the facts of *Tshabalala v S; Ntuli v S supra.*

45 *Ibid*.

46 2018 JDR 1026 GJ; also referred to in par 25 of the facts of *Tshabalala v S; Ntuli v S supra.*

47 *Ibid.*

48 *Tshabalala v S; Ntuli v S supra* par 1.

women of rights that are protected in the Constitution, national legislation and international and regional treaties.[49]

Rape, by its very nature, has criminal, physical, emotional and social elements attached to it. Rape has very little to do with non-consensual penetration; the very nature of rape far exceeds its legal and social definitions and consequences.[50] Within its social context, rape has to do with the assertion of power that expresses itself violently in a sexual, degrading, and intrusive manner. The assertion of this power is often gendered as it is typically exerted by men at the expense of women.[51] Further to this, women who have experienced rape as victims and survivors do not experience rape as a sexual encounter but as a frightening, life-threatening attack and "as a moment of immense powerlessness and degradation".[52]

Within its legal context, rape infringes the rights to equality, human dignity, freedom and security of the person, and privacy. Rape is a crime that is often committed against women and the perpetrators of this crime violently take what they have no permission to take; they enter into a personal space they have no permission to enter.

In the present case, the Constitutional Court noted, in particular, the scourge of rape against women in the country, more specifically incidents of group rape.[53] The doctrine of common purpose is applicable in instances

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[49] Equality and human dignity are provided for, first, as values and, secondly as justiciable human rights within ss 1(*a*), 7(1), 9 and 10 of the Constitution respectively; s 12 of the Constitution provides for the right to freedom and security of the person as violence constitutes a grave invasion of personal security; s 12(1)(*c*), in particular, provides for the right to be free from all forms of violence from either public or private sources; s 12(2) further provides for the right to bodily and psychological integrity, which includes the right to security in and control over a person's body; s 14 of the Constitution also provides for the right to privacy. For the purpose of this article, focus is placed on this right generally. When a person invades someone's person or body without their permission, there is a violation of this right. Rape by its very nature constitutes an invasion of the right to privacy as consent or permission to access another person's body is lacking. However, this is not to reduce incidents of sexual gender-based violence to a lack of mere consent. What is clear is that the rights to equality, human dignity, privacy, and bodily integrity are all linked in matters of sexual gender-based violence. With regard to national legislation, the Domestic Violence Act 116 of 1998 provides for the issuing of protection orders in cases where domestic violence has taken place; Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 provides for offences such as rape. The United Nations (UN) instruments that provide for the protection of the human rights of women are: the Universal Declaration of Human Rights (UDHR), 1948; the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), 1979; and the Sustainable Development Goals (SDGs), 2015, specifically goal 5 and goal 5.2. South Africa ratified the UDHR on 7 November 1945 and CEDAW on 15 December 1995. At a regional level, the following instruments provide for the protection and promotion of the human rights of women: the African Charter on Human and People's Rights (ACHPR), 1981; and the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol), 2003. South Africa ratified the ACHPR in 1996; in the concurring judgment, Victor AJ also referred to the influence of international law in the present case in par 93, 94, 95.

[50] Statistics South Africa ("Quantitative Research Findings on Rape in South Africa" http://www.statssa.gov.za/publications/Rape/Rape.pdf (accessed 2020-05-06)) has recorded that rape has been defined in various ways, including legal, psychological, sociological and subjective definitions.

[51] *Tshabalala v S; Ntuli v S supra* par 44.

[52] *Tshabalala v S; Ntuli v S supra* par 70.

[53] *Tshabalala v S; Ntuli v S supra* par 31.

where there is a group of people acting together with a common purpose and therefore carry and share the same legal liability. Of importance to common-law rape, as previously stated, is the instrumentality principle. This principle requires the perpetrator to actually penetrate the victim, without their consent, through the use of their own genitalia. However, the court determined the instrumentality principle to be irrelevant and inapplicable to the doctrine of common purpose with regard to common-law rape, and thereby rendered the instrumentality principle a non-requirement in matters of group rape. The irrelevance of this principle was considered within the social and legal environment of the country – for example, the obligations imposed on the courts according to section 39(2) of the Constitution.

National legislation has to be interpreted in a manner that promotes the spirit, purport and objects of the Bill of Rights. In addition, the common law itself has to be developed in the same manner.[54] The court also considered the definition of rape as provided for in the Criminal Law (Sexual Offences and Related Matters) Amendment Act[55] (SORMA). SORMA expands the definition of rape to no longer include instrumentality as a requirement for a rape conviction.[56] The definition of rape now encapsulates more than just the insertion of male genital into female genitalia.[57] SORMA defines rape in the following manner:

> "Any person (A) who unlawfully and intentionally commits an act of sexual penetration with a complainant (B), without the consent of B, is guilty of the offence of rape."[58]

The above definition of rape, read in conjunction with the definition of sexual penetration[59] in SORMA, further expands the definition to include, for example, inanimate objects that are inserted into the genital organs or anus of a person without their consent.[60] This also extends the application of the doctrine of common purpose with regard to common-law rape.[61] Furthermore, section 55 of SORMA provides:

> "Any person who: (a) attempts; (b) conspires with any other person; or (c) aids, abets, induces, incites, instigates, instructs, commands, counsels or procures another person, to commit a sexual offence in terms of this Act, is guilty of an offence and may be liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable."

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54 *Tshabalala v S; Ntuli v S supra* par 98; s 39(2) of the Constitution oblies the courts to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation and when developing the common law.

55 32 of 2007.

56 In the concurring judgment by Victor AJ in par 80, it is stated that the instrumentality principle has no place in South Africa's modern society; see the Preamble to SORMA and *Tshabalala v S; Ntuli v S supra* par 97.

57 As previously defined under common law.

58 S 3 of SORMA.

59 S 1 of SORMA.

60 The definition of sexual penetration in SORMA reads: "'sexual penetration' includes any act which causes penetration to any extent whatsoever by– *(a)* the genital organs of one person into or beyond the genital organs, anus, or mouth of another person; *(b)* any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or *(c)* the genital organs of an animal, into or beyond the mouth of another person.

61 *Tshabalala v S; Ntuli v S supra* par 69 and 97.

According to the above section, the conduct of a person that falls within the requirements of subsections (*a*) to (*c*) may be subject to the same punishment as that of the actual perpetrator on conviction. As a result, even though the conduct of the actual perpetrator may not necessarily be imputed to another, if any one of the requirements listed in section 55 is met, such a person may be liable to the same punishment as the perpetrator who in fact committed the act of unlawful sexual penetration. From a legislative perspective, and with regard to the facts of *Tshabalala v S; Ntuli v S*, this is a step in the right direction towards combating gender-based violence, especially with regard to incidents of group rape. In instances of group rape, where not all members of a group have personally and unlawfully penetrated the victim themselves, but might have aided in the rape of the victim, a member of such a group may be liable to the same punishment as the perpertartor who committed the act of unlawful sexual penetration.

The inclusion of this section in the present Act, and the decision of the Constitutional Court in the present case, are examples of how both arms of the State (the legislature, and the judiciary in particular) have sought to fulfil their constitutional obligations in terms of section 8(1) of the Constitution. The court's reference to international and regional treaty obligations also illustrates how the national executive has further enabled the court to determine the relevance of the instrumentality principle in our society.[62]

The definition of rape, as stated in SORMA, clearly excludes the common-law requirement of instrumentality, which required the accused personally, through the use of his own genitalia, to penetrate a victim without the requisite consent. Furthermore, this definition of rape now develops the common law in line with the spirit, purport and objects of the Bill of Rights. SORMA, therefore, further elaborates and settles the legal parameters within which a person can be convicted of committing the crime of common-law rape.

This determination resulted in the extension and application of the doctrine of common purpose to common-law rape.[63] Therefore, the development of the common law by the Constitutional Court according to constitutional provisions has played a significant role in this ground-breaking judgment; the uncertainty in our law was finally settled at the highest judicial level.

In essence, this determination resulted in two members of the group – namely, Tshabalala and Ntuli, who were both positively identified at different scenes where the rapes were committed – being convicted of common-law rape *albeit* they did not penetrate the victim personally through the use of their genitalia. This determination by the Constitutional Court eradicated the uncertainty that hovered over the application of the doctrine of common purpose to common-law rape. The court also assumed an empathetic and sympathetic approach toward victims in reaching its decision; this is evident

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[62] S 231(1) of the Constitution provides that negotiating and signing of all international agreements is the responsibility of the national executive.

[63] *Tshabalala v S; Ntuli v S supra* par 97.

in the choice of words the court used throughout the case.[64] Though the court assumed this perhaps unusual approach, its decision was still within constitutional parameters and international law obligations.[65] In the concurring judgment, Victor AJ stated that the obligations imposed on the judiciary by the Constitution and international law provide the legal and logical basis to confirm the application of the doctrine of common purpose to the common-law crime of rape.[66] This judgment focused on two main points – namely, feminist legal theory and the use of international law in pronouncing on the development of common law.[67] Further to this, past rules that presented evidential obstacles to victims of sexual assault were also considered and it was within this context that the development of the common law and the instrumentality principle, as they relate to rules of evidence and procedure, were considered.[68] South Africa has ratified multiple international instruments, and thereby incurred obligations that have to be fulfilled.[69] These have been discussed previously – for example, the CEDAW and the Maputo Protocol.

It is also important to mention that the court used a stern and reprehensive tone and language as it detailed the facts of this case and when applying the law to the facts. This further illustrates the seriousness with which the court took its role in deciding this case.

Prior to the Constitutional Court reaching its decision in this case, there was no clarity and certainty in our law with regard to the application of the doctrine of common purpose to common-law rape and therefore, there was uncertainty as to when it should be applied. This uncertainty in our law had the further potential to create uncertainty in victims of rape with regard to the protection they would be afforded and entitled to in terms of the law, espcially when their cases are before the courts. Therefore, the findings by the Constitutional Court clarify first, the commitment of the judiciary to

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64 The Constitutional Court used words, phrases or sentences such as at par 68, "Who knows what the black woman thinks of rape? Who has asked her? Who *cares*?", and at par 70, "for many victims and survivors of rape, they "do not experience rape as a sexual encounter but as a frightening, life-threatening attack" and "as a moment of immense powerlessness and degradation".

65 The court referred to the Bill of Rights and the international law obligations South Africa has incurred as a State Party to various international treaties (par 99).

66 *Tshabalala v S; Ntuli v S supra* par 99.

67 *Tshabalala v S; Ntuli v S supra* par 79. Feminist legal theory was raised in par 81, 85, 91, and 92 of the case. This theory as argued in the present case focused on the dignity and privacy of women. Victor AJ also referenced other developments that have taken place in our legal system with regard to rape in par 80 – for e.g., the so-called marital rape exemption in which a husband could not be convicted for raping his wife; the medieval hue-and-cry rule that required the victim to make a loud outcry immediately after being raped; and the cautionary rule, which was a warning to judicial officers that the evidence of complainants, such as witnesses in cases of sexual assault, could not be safely relied upon without corroboration. These have all been abolished. Par 82 of the present case also refers to past adherence to evidential obstacles such as the prompt complaint rule, multiple witness consistency, and the identification of the first witness to whom the rape was reported, all of which underpinned gender bias against victims of sexual assault.

68 *Tshabalala v S; Ntuli v S supra* par 83. Par 86 of the case indicates that accepting the doctrine of common purpose is a step towards the start of the end of sexism in rape trials.

69 *Tshabalala v S; Ntuli v S supra* par 93. The Preamble to SORMA also refers to international legal instruments in terms of which South Africa has incurred obligations toward combatting and ultimately eradicating gender-based violence.

addressing the scourge of gender-based violence; secondly, it illustrates the commitment by the judiciary to fulfil its constitutional and international law obligations; and thirdly, the Constitutional Court has determined that the doctrine of common purpose is applicable in matters of common-law rape.[70] This also illustrates the significant role of the law in addressing gender-based violence.[71]

When interpreting and giving effect to the rights in the Bill of Rights, the courts are mandated to promote the values that underlie an open and democratic society based on human dignity, equality and freedom. In deciding this case, the Constitutional Court referred to other rights that are protected and promoted in the Bill of Rights – for example, the rights to freedom and security of the person and privacy. This further illustrates how the rights in the Bill of Rights are interdependent.

## 4 CONCLUSION

Violence against women, more specifically violence that manifests itself sexually, has been on a steady increase. It is important to mention that, by their nature, women are not vulnerable and weak human beings; they are resilient, strong, intelligent, capable and nurturing beings; it is the exertion of male power that is often gendered and sexually violent that makes women vulnerable and marginalises them in society. Violence that is tailor-made to target and single out women does result in women occupying a weakened and vulnerable position in their own society. This is because gender-based violence infringes the most basic human rights of women. Thus far, it is clear that laws, policies, year-long awareness campaigns and every mechanism that has been established to combat and ultimately eradicate gender-based violence are proving to be ineffective and insufficient.

Furthermore, the circumstances in which this violence takes place seem to worsen with every act of violence.[72] Insofar as the law is concerned with regard to the prevention, prohibition and elimination of gender-based violence, there is no lack, especially considering that South Africa makes appropriate provisions in the Constitution, which is supreme and entrenched; it has also ratified various international and regional treaties that seek to combat and eradicate gender-based violence.[73]

There are, in addition, various campaigns in place that seek to address and create awareness about gender-based violence, but even these have thus far proved to be ineffective. What is proving to be a particular challenge in combating and ultimately eradicating the scourge of rape are the values

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70 See *Tshabalala v S; Ntuli v S supra* par 87, where Victor AJ referred to a judgment in which Moseneke DCJ expanded on the doctrine of common purpose.

71 *Tshabalala v S; Ntuli v S supra* par 84. The criminal justice system imposes heavier sentences through the Criminal Law Amendment Act 105 of 1997 in respect of certain serious offences as provided in s 51.

72 *Tshabalala v S; Ntuli v S supra* par 61.

73 *Tshabalala v S; Ntuli v S supra* par 96. S 231(1) of the Constitution states that negotiating and signing all international agreements is the responsibility of the national executive. To this end, South Africa has ratified various international agreements as previously mentioned.

held by society about gender-based violence in general and gender-based sexual violence in particular. Therefore, the eradication of gender-based violence will need to be a committed social compact between society,[74] the government and civil society organisations.[75] Secondly, awareness campaigns also have to be tailor-made for specific communities. This is necessary in order to create a real understanding of what kind of behaviour causes or results in gender-based violence; why the protection and promotion of women's human rights is important; why it is important to identify and change harmful attitudes that have the potential to further perpetuate incidents of gender-based violence; and lastly, why it is important to reaffirm women's place in society.

The role and significance of societal values and attitudes were also noted by the Constitutional Court in this case.[76] Therefore, the Constitutional Court, through the determination, development and application of the common law is to be commended for acknowledging the role of the judiciary, first, in the protection and promotion of constitutional rights and values; secondly, in fulfilling its constitutional and international law obligations; and thirdly, in reaffirming the place of women in society by seeking to combat gender-based violence through the development of the common law in terms of the provisions of section 39(2) of the Constitution.

Every victory, especially at such a level, is a step in the right direction towards the ultimate elimination of gender-based violence and the realisation of constitutional rights for all, including especially women. This case illustrates how the Constitutional Court fulfilled its mandate; gave effect to its obligations in terms of the Constitution; also further reaffirmed the significance of the Bill of Rights within South Africa's constitutional democracy; and lastly, set a precedent for all other courts in the country. The court undertook a constitutional and human-rights based approach to criminal law.

[74] *Tshabalala v S; Ntuli v S supra* par 84.
[75] *Tshabalala v S; Ntuli v S supra* par 85.
[76] *Tshabalala v S; Ntuli v S supra* par 92.

# CASES / VONNISSE

## THE PRINCIPLE OF LEGALITY AND THE REQUIREMENTS OF LAWFULNESS AND PROCEDURAL RATIONALITY

## *Law Society of South Africa v President of the RSA* (2019 (3) SA 30 (CC))

### 1 Introduction

Apart from conferring a wide range of powers on the President, the Constitution also regulates the manner in which the President may exercise these powers. One of the ways in which the Constitution does this is by imposing an obligation on the President to exercise his or her powers in accordance with the principle of legality, which is an incident of the rule of law. A necessary consequence of this requirement is that a decision of the President may be reviewed and set aside on the grounds that it infringes the principle of legality.

From its relatively modest beginnings in *Fedsure Life Insurance v Greater Johannesburg Transitional Metropolitan Council* (1999 (1) SA 374 (CC)) – where the Constitutional Court held that the exercise of public power is only legitimate when it is lawful (par 56) – the principle of legality has expanded in leaps and bounds over the past 21 years; today, it encompasses several other grounds of review, including lawfulness, rationality, undue delay and vagueness (see Hoexter "Administrative Justice in Kenya: Learning from South Africa's Mistakes" 2018 62(1) *Journal of African Law* 105 123).

Of all of these broad grounds of review, substantive rationality has received the most attention from the courts and today encompasses several other grounds of review itself, such as procedural fairness (*Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC)) (*Albutt*), procedural rationality (*Democratic Alliance v President of the RSA* 2013 (1) SA 248 (CC)) (*Democratic Alliance*), relevant and irrelevant considerations (*Democratic Alliance*), non-jurisdictional mistake of fact (*Pepkor Retirement Fund v Financial Services Board* 2003 (6) SA 38 (SCA)), and, on occasion, the giving of reasons (*Judicial Service Commission v Cape Bar Council* 2013 (1) SA 170 (SCA)).

Unfortunately, the development of the principle of legality has not been all plain sailing, and the rationality jurisprudence of the Constitutional Court has given rise to complex and difficult questions. This is particularly the case

when it comes to procedural fairness and procedural rationality. It is not entirely clear what the difference between these two requirements is and in what circumstances the one should be applied rather than the other. The court attempted to address some of these questions in *Law Society of South Africa v President of the Republic of South Africa* (2019 (3) SA 30 (CC)) (*Law Society*). The purpose of this note is to discuss this case critically.

## 2 The facts

In this case, the Law Society of South Africa (LSSA) applied for an order declaring that former President Jacob Zuma's decision – taken together with the other members of the Summit of the Heads of State of the Southern African Development Community (SADC) – to suspend the operation of the SADC Tribunal (Tribunal), as well as his decision to deprive the Tribunal of its existing jurisdiction to hear individual complaints, was unlawful and irrational and, therefore, unconstitutional.

Former President Zuma's decisions to suspend the Tribunal and deprive it of its existing jurisdiction to hear individual complaints arose out of the Tribunal's judgment in *Mike Campbell (Pvt) Ltd v The Republic of Zimbabwe* ([2008] SADCT 2 (28 November 2008)). In this case, the applicant was dispossessed of his farm in terms of Amendment 17 of the Constitution of Zimbabwe (2005). Apart from vesting ownership of agricultural land required for resettlement and other purposes in the State, by operation of law, Amendment 17 also provided that no compensation would be paid for such land and that its acquisition could not be challenged in a court of law.

After he was dispossessed, the applicant and several other dispossessed landowners applied to the Tribunal for an order declaring that Zimbabwe had breached its obligations under the Treaty by enacting and implementing Article 17. The Tribunal granted the order. In arriving at this decision, it found that Article 17 not only denied the applicants access to the courts in Zimbabwe but also that it discriminated against them on the basis of race. It thus breached Article 4(c), which provides that SADC and its member states must act in accordance with the principles of "human rights, democracy and the rule of law", and Article 6(2), which provides that SADC and its member states shall not discriminate against any person on the grounds of, *inter alia*, race.

Despite the fact that Article 16(5) provides that decisions of the Tribunal are binding on member states, Zimbabwe refused to comply with the judgment. Zimbabwe's non-compliance was then referred to the Summit of the Heads of State for further action. Instead of living up to its responsibility to enforce the judgments of the Tribunal, the Summit turned on the Tribunal itself, first, by suspending its operations; and, secondly, by depriving it of its existing jurisdiction to hear individual cases. The first goal was achieved by simply refusing to reappoint or replace those members of the Tribunal whose terms of office had expired, and the second by drafting and adopting the 2014 Protocol to the SADC Treaty, which provided that the Tribunal's jurisdiction is limited to inter-state disputes.

Former President Zuma's decision to suspend the operation of the Tribunal and especially his decision to deprive it of its existing jurisdiction to

hear individual complaints was met with dismay by members of the legal fraternity in South Africa and, as pointed out above, the LSSA then applied for an order declaring that these decisions were unlawful and irrational and, therefore, unconstitutional. The President's decisions were unlawful, the LSSA argued, because they purported to amend the SADC Treaty without following the procedure set out in Article 36 of the Treaty for doing so. The President's decision was irrational because the process he followed to amend the SADC Treaty was not rationally related to the purpose for which the power to amend the SADC Treaty was given. The Constitutional Court agreed with the LSSA and set the President's decision aside.

## 3 The judgment

In arriving at its decision, the Constitutional Court dealt, first, with the argument that former President Zuma's decisions were unlawful and, secondly, that they were irrational. Each of these is discussed in turn.

### *3 1 Unlawfulness*

Insofar as the question of unlawfulness was concerned, the Constitutional Court began by pointing out that although the Constitution confers vast powers on the President, these powers are constrained by the principle of legality, which is an incident of the rule of law (par 46). The principle of legality provides, *inter alia*, that the President "may exercise no power and perform no function beyond that conferred on [him or her] by law" (par 47). In other words, the President may exercise only those powers that have lawfully been conferred upon him or her and he or she must exercise them in the manner prescribed (par 48).

Given that the Protocol that operationalised the Tribunal forms an integral part of the Treaty itself, the Constitutional Court held that the requirement that the President must exercise his or her powers in the manner prescribed means that the President can lawfully amend the jurisdiction of the Tribunal only in accordance with the procedure set out for amending the Treaty. This procedure provided that the Treaty may be lawfully amended by a decision supported by three-quarters of all the member states (Article 35(1)). It may not be amended simply by means of a protocol, which requires the support of only 10 member states, as the Summit of the Heads of State purported to do (par 49).

Apart from providing that the President must exercise his or her powers in the prescribed manner, the Constitutional Court held further that the requirement of lawfulness also provides that the President must exercise those powers in good faith and must not misconstrue them (par 46). Given that the purpose of the Treaty is to protect and promote the principles of democracy, human rights and the rule of law, it followed that the President could not exercise the power to amend the Treaty in a manner that infringed these goals (par 51). Unfortunately, the President's decision to amend the Treaty in a manner that effectively suspended the Tribunal and stripped it of its existing jurisdiction to hear individual complaints did precisely that. It deprived the Tribunal of its most critical function – namely, resolving

individual disputes relating to human rights, democracy and the rule of law and thus undermined these principles (par 55).

In light of these points, the Constitutional Court went on to find that the President had acted unlawfully by

> "following an impermissible or irregular procedure. Worse still, not only did he not have the power to not appoint or renew the terms of Members of the Tribunal but also lacked the authority to suspend its operations. This illegality of his conduct also stems from purporting to exercise powers he does not have. And it cannot be overemphasised that his conduct was also unlawful in that he failed to act in good faith and in pursuit of the object and purpose of the Treaty we have bound ourselves to." (par 56)

## *3 2 Irrationality*

Insofar as the issue of irrationality was concerned, the Constitutional Court began by confirming that besides imposing an obligation on the President to exercise only those powers that have lawfully been conferred on him or her, the principle of legality also imposes an obligation on the President to exercise those powers rationally. This requirement, however, applies not only to the decisions taken by the President but also to the process in terms of which such decisions are taken. In the case at hand, this meant that the decision to amend the Treaty as well as the process leading up to the amendment must be rationally related to the purpose for which the power to amend was exercised (par 51).

Although the principle of legality encompasses the requirement of procedural rationality, the Constitutional Court held that it was necessary to note that, in *Masetlha v President of the RSA* (2008 (1) SA 566 (CC)) (*Masetlha*), it was held that the principle does not encompass the requirement of procedural fairness. It was, therefore, essential to distinguish between these two requirements. Procedural fairness provides that a decision-maker must grant a person who is likely to be adversely affected by a decision a fair opportunity to present his or her views before any decision is made. Procedural rationality provides that there must be a rational relation not only between a decision and the purpose for which the power was given, but also between the process that was followed in making the decision and the purpose for which the power was given (par 63).

> "The proposition in *Masetlha* might be seen as being at variance with the principle of procedural irrationality laid down in both *Albutt* and *Democratic Alliance*. But it is not so. Procedural fairness has to do with affording a party likely to be disadvantaged by the outcome the opportunity to be properly represented and fairly heard before an adverse decision is rendered. Not so with procedural irrationality. The latter is about testing whether, or ensuring that, there is a rational connection between the exercise of power in relation to both process and the decision itself and the purpose sought to be achieved through the exercise of that power." (par 64)

The critical issue in this case, therefore, was not whether former President Zuma gave anybody a fair hearing or not. Instead, the critical issue was whether the process followed by former President Zuma before he decided effectively to suspend the Tribunal and deprive it of its existing jurisdiction to hear individual complaints was rationally connected to the purpose for which

the power to amend the Treaty had been given to him – namely, to uphold the principles on which the Treaty was based (democracy, human rights and the rule of law), and to protect the Tribunal as one of the institutions created by the Treaty (par 65) and thus secure the best interests of the citizens of SADC (par 69).

The Constitutional Court held that it was not. In arriving at this decision, the court found that the process followed by former President Zuma would be rationally connected to the purpose for which the power to amend the Treaty had been given to him, only if he followed the procedure for amending the Treaty set out in Article 36(1), which requires a decision supported by three-quarters of all the Member States of SADC. Given that former President Zuma had not followed this procedure, his decision was irrational and thus unconstitutional (par 70).

> "It is necessary to reiterate that the legitimate purpose for prescribing an amendment process that requires the support of three-quarters of Member States is designed to render it very difficult to fatally amend provisions that relate to the very essence of the Treaty, like the protection of human rights, access to the Tribunal and the rule of law. We emphasise that the purpose for regulating the power to amend so tightly is to secure the best interests of SADC citizens. An amendment like the downgrading of the status of the Tribunal is therefore required to be overwhelmingly supported. The procedure for the amendment through the Protocol that was followed is not only unavailable to the Member States, but also frustrates the purpose for giving them the power to amend the Treaty. It requires a lesser majority support to pass than the amendment procedure prescribed by the Treaty." (par 69)

## 4 Comment

While there is no doubt that the Constitutional Court came to the correct conclusion, its judgment gives rise to several interesting issues.

### *4 1 Unlawfulness*

As the summary set out above clearly indicates, the Constitutional Court based its decision on two critical grounds: first, that the President's decision was unlawful and, secondly, that it was irrational. Insofar as the first ground was concerned, the Constitutional Court found that the President's decision was unlawful, not because he lacked the authority to amend the jurisdiction of the SADC Tribunal, but rather because he did not do so in the manner prescribed by Article 35(1) of the Treaty.

This aspect of the requirement of lawfulness also forms a part of the common-law rules governing administrative action and has been codified in section 6(2)(*b*) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), which provides that "a court or tribunal has the power to judicially review an administrative action if a mandatory and material procedure or condition prescribed by an empowering provision was not complied with".

At common law, prescribed procedural requirements were referred to as procedural jurisdictional facts, and a distinction was drawn between mandatory procedural jurisdictional facts and discretionary procedural jurisdictional facts. This distinction was necessary because a failure to

comply strictly with mandatory procedural jurisdictional facts would usually result in invalidity, while a failure to comply strictly with discretionary procedural jurisdictional facts would not.

As Hoexter points out, mandatory procedures are usually denoted by the use of peremptory words in legislation such as "must" or "shall", while discretionary procedures are usually denoted by the use of a permissive word such as "may". Apart from peremptory words, she points out further that mandatory procedures are also denoted by "the use of negative words such as 'no person shall' and the presence of a sanction for non-compliance" (Hoexter *Administrative Law in South Africa* 2ed (2012) 292).

It is important to note, however, that the mere fact that a procedure is classified as mandatory does not mean that it must be strictly complied with. In some cases, sufficient compliance may be adequate. This is because the courts do not approach this issue in a legalistic manner. Instead, they ask whether the procedure followed by the administrator was sufficient to achieve the purpose of the provision in question. If it was, then the procedure of the administrator will be upheld as lawful (see Quinot, Corder, Maree, Murcott, Kidd, Webber, Bleazard and Budlender *Administrative Justice in South Africa: An Introduction* (2015) 137).

The vital role of the purpose of the statutory provision in determining whether an administrator has complied with a mandatory procedure was highlighted by the Constitutional Court in *Allpay Consolidated Investment Holdings* (*Pty*) *Ltd v Chief Executive Officer of the South African Social Security Agency* (2014 (1) SA 604 (CC)), where it held:

> "[A]ssessing the materiality of compliance with legal requirements in our administrative law is, fortunately, an exercise unencumbered by excessive formality. It was not always so. Formal distinctions were drawn between 'mandatory' or 'peremptory' provisions on the one hand and 'directory' ones on the other, the former needing strict compliance on pain of non-validity, and the latter only substantial compliance or even non-compliance. That strict mechanical approach has been discarded. Although several factors need to be considered in this kind of enquiry, the central element is to link the question of compliance to the purpose of the provision. In this Court O'Regan J succinctly put the question in *ACDP v Electoral Commission* as being 'whether what the Applicant did constituted compliance with the statutory provisions viewed in the light of their purpose'." (par 30)

Although the Constitutional Court did not classify the procedure for amending the SADC Treaty as mandatory or material, there is no doubt that it is. Apart from the fact that Article 35(1) of the Treaty uses the word "shall", the court has consistently held that the procedure for passing a Bill, including a Bill amending the Constitution or an Act, must be complied with strictly. This is because these manner-and-form procedures are designed to promote the fundamental democratic values such as deliberation, public participation, openness and transparency.

In *Executive Council of the Western Cape Legislature v President of the RSA* (1995 (4) SA 877 (CC) par 62), for example, Chaskalson P stated that the manner-and-form provisions of the interim Constitution were not merely directory. Instead, "they prescribed how laws were to be made and changed and were part of a scheme which guaranteed the participation of both houses in the exercise of the legislative authority vested in Parliament under

the Constitution, and also established the machinery for breaking deadlocks".

In *Doctors for Life International v Speaker of the National Assembly* (2006 (6) SA 416 (CC) par 208), the Constitutional Court held that "[i]t is trite that legislation must conform to the Constitution in terms both of its content and the manner in which it was adopted. Failure to comply with manner and form requirements in enacting legislation renders the legislation invalid". See also *Tongoane v National Minister for Agriculture and Land Affairs* (2010 (6) SA 214 (CC) par 97–109).

This aspect of the judgment in *Law Society* thus confirms that the requirement of unlawfulness encompasses both a lack of authority and a failure to follow a mandatory and material procedure. It also highlights (once again) that the grounds of review under the principle of legality overlap in many respects with the grounds of review under PAJA (see Brand and Murcott "Administrative Law" 2013 *Annual Survey of South African Law* 61 62).

Apart from finding that the President's decision to amend the jurisdiction of the SADC Tribunal was unlawful because he failed to follow the mandatory procedure prescribed by Article 35(1) of the Treaty, the Constitutional Court also found that the President's decision was unlawful because he acted in bad faith and misconstrued his powers. His decision was not aimed at protecting the Tribunal and, thus, the Treaty principles it was established to uphold, but rather at paralysing it (*Law Society* par 45).

Both grounds of review were recognised by the Constitutional Court in *President of the Republic of South Africa v South African Rugby Football Union* (1999 (4) SA 147 (CC) par 148), when it held that not only is the exercise of public power constrained by the principle of legality but the President must also act in good faith and not misconstrue his or her powers. These requirements are aimed at ensuring that the President exercises the powers conferred upon him or her in the public interest, rather than in his or her own interest (see Hoexter *Administrative Law* 308).

Although these grounds of review have formed part of the principle of legality for a long time, this is the first case in which the Constitutional Court has found that the President acted in bad faith and misconstrued his powers. (In *Democratic Alliance*, the SCA also found that the President had misconstrued his powers, but on appeal, the Constitutional Court held that it was not necessary to decide this question.) Apart from its historical significance, this aspect of the judgment highlights another dismal aspect of former President Zuma's lamentable presidency and confirms the crucial role the Constitutional Court has played in ameliorating at least some of his constitutionally delinquent decisions.

## *4 2 Rationality*

After the Constitutional Court came to the conclusion that the President's decision was unlawful, it was strictly speaking not necessary for the court to go on and also consider whether it was irrational. The finding that the President's decision was unlawful was sufficient to render it unconstitutional

and invalid. However, the fact that the court went on to consider the rationality requirement is to be welcomed.

This is because it allowed the court to address one of the more complex and challenging issues to which its legality jurisprudence has given rise – namely, whether the principle of legality encompasses the requirements of procedural fairness as a separate and self-standing ground of review and, if so, what the difference is between procedural fairness and procedural rationality.

Insofar as this issue is concerned, the Constitutional Court has adopted at least three different approaches. In *Masetlha,* a majority of the court held that legality does not encompass procedural fairness as a self-standing ground of review. In arriving at this decision, the majority held that it is inappropriate to subject executive action to the potentially onerous requirements of procedural fairness requirements for two reasons: first, executive action is expressly excluded from the purview of PAJA (par 76); and, secondly, procedural fairness is a "cardinal feature" of administrative action, not executive action (par 77).

In its subsequent judgment in *Albutt*, the Constitutional Court refined the strict approach it adopted in *Masetlha* and held that executive action might be subjected to the requirements of procedural fairness, and in particular the requirement to hear interested parties, when this was the only way in which the President could exercise the power that had been conferred upon him or her in a rational manner (par 72). It followed, therefore, that while the principle of legality did not encompass procedural fairness as a self-standing ground of review, it did encompass it as a part of rationality review in an appropriate case.

Finally, in *Minister of Defence and Military Veterans v Motau NO* (2014 (5) SA 69 (CC)), the Constitutional Court interpreted *Masetlha* very narrowly and held that it applied to the specific circumstances of that case – namely, the relationship between the President and the Head of the National Intelligence Agency, which was a matter of national security (par 81). Outside of these specific circumstances, the court stated in an *obiter dictum* that there was no reason for the requirements of procedural fairness not to apply to executive action as a self-standing ground of review (par 83).

At roughly the same time, the Constitutional Court also introduced the concept of procedural rationality when it held, in *Democratic Alliance*, that rationality applies not only to the decision itself but also to the process by which the decision is made. This is because rationality review "is an evaluation of the relationship between means and ends" and the means for achieving the purpose for which the power was conferred includes everything that is done to achieve the purpose:

> "Not only the decision employed to achieve the purpose, but also everything done in the process of taking that decision, constitute means towards the attainment of the purpose for which the power was conferred." (par 36)

Apart from introducing the concept of procedural rationality, the Constitutional Court also held that a failure to take into account relevant facts forms a part of the means to achieve the purpose for which the power

was conferred and that such a failure may colour the entire process with irrationality and thus render the final decision itself irrational. When it comes to deciding whether a failure to take into account relevant facts does colour the entire process with irrationality, a three-stage inquiry must be followed: first, have relevant factors been ignored?; secondly, if they are relevant, is the failure rationally related to the purpose for which the power was conferred?; and thirdly, if the failure is not rationally related to the purpose, does the failure colour the entire process with irrationality? (par 39).

After setting out these principles, the Constitutional Court applied them to the facts of the case. In this respect, it found that former President Zuma's decision to appoint Mr Menzi Simelane as the National Director of Public Prosecutions (NDPP) was procedurally irrational because he failed to take into account adverse findings made against Mr Simelane by the Ginwala Commission of Inquiry. These findings were relevant, the court held, because they suggested that Mr Simelane was not a fit and proper person to be appointed as the NDPP as required by section 9(1) of the National Prosecuting Authority Act 32 of 1998 and the President's failure to take them into account did colour the entire process with irrationality and thus rendered his final decision irrational.

As the summary set out above indicates, the Constitutional Court's jurisprudence is confusing and contradictory. In addition, it has introduced a new concept into South African constitutional law – namely, procedural rationality – but has failed to define this concept clearly or distinguish it from procedural fairness. In its judgment in *Law Society,* the court has attempted to address this last issue. In this respect, the following points may be extracted from its reasoning:

- First, procedural fairness and procedural rationality are separate aspects of the procedural dimension of the rationality requirement (par 64 and 65).
- Secondly, procedural fairness imposes an obligation on the President to afford a party the opportunity to make representations before the President takes a decision that may adversely affect that party (par 64 and 65).
- Thirdly, where an empowering provision expressly provides for a specific procedure, the President must follow that procedure before exercising the power in question. A decision to follow a different and especially less onerous procedure would not be rationally related to the purpose for which the power was granted (par 67–70).

While the Constitutional Court's attempt to distinguish between procedural fairness and procedural rationality is to be welcomed, the manner in which it did so gives rise to some concerns. One of these is the suggestion that procedural fairness and procedural rationality are separate aspects of the procedural dimension of rationality. Instead of seeing them as separate aspects, however, it appears, for two reasons, to be more correct to treat procedural fairness as one aspect of a broader requirement of procedural rationality.

First, this is the manner in which the Constitutional Court itself has described the relationship between procedural fairness and procedural

rationality in its earlier jurisprudence. Apart from relying on its judgment in *Albutt* as authority for the requirement of procedural rationality in *Democratic Alliance*, the court also described the duty to consult as an aspect of procedural rationality in *Electronic Media Network Ltd v eTV (Pty) Ltd* (2017 (9) BCLR 1108 (CC) par 66).

The same point was made more recently in *Democratic Alliance v Minister of International Relations and Cooperation* (2017 (3) SA 212 (GP) par 64–70) when the full bench held, *inter alia*, that the national executive's failure to consult with Parliament, as it was obliged to do, before delivering notice of South Africa's withdrawal from the Rome Statute of the International Criminal Court was procedurally irrational and thus invalid. In other words, the court held that the duty to consult is not separate from, but rather an aspect of, the requirement of procedural rationality.

Secondly, if procedural fairness and procedural rationality are separate aspects of the procedural dimension of rationality, then it appears that procedural rationality imposes only two obligations on the President: first, to take relevant factors into account (*Democratic Alliance*) and, secondly, to follow a material and mandatory procedure (*Law Society*). Given that these requirements are already encompassed by lawfulness, however, it seems that procedural rationality does not enjoy its own independent or separate content, or, at least that, thus far, the Constitutional Court has been unable to identify an independent and separate content for the requirement of procedural rationality. If this is correct, then it is difficult to understand what the purpose of procedural rationality is.

## 5 Conclusion

As pointed out in the introduction to this note, the decision to extend the requirement of rationality to include both procedural fairness and procedural rationality has given rise to complex and challenging questions. Although it was unnecessary to do so, the Constitutional Court sought to address some of these questions in *Law Society*. Unfortunately, it was not as successful as it could have been.

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# *YM v LB*
# (465/09) [2010] ZASCA 106 (17 September 2010)

*Scientific tests on a child to determine paternity should not be ordered where paternity has been shown on a balance of probabilities.*

## 1 Introduction

In this matter, which resulted in an enquiry by the Supreme Court of Appeal and ultimately a unanimous decision, the facts were the following: the appellant, Mrs Y M (M) appealed against an order that she and her minor daughter (Y) submit to DNA testing to determine whether Mr L B (B), the respondent, was the biological father of Y. The order was sought by B, who also claimed that, if the tests proved that he was indeed the father, he should be given full parenting rights. The North Gauteng High Court (Pretoria) (Murphy J sitting as court of first instance), ordered that M submit herself and Y to DNA tests within 30 days of the date of the order, and postponed the other relief *sine die*. The Supreme Court of Appeal granted leave to appeal. On appeal, B filed no heads of argument, and nor was there any appearance on his behalf.

## 2 Question of law

The appellant sought an order to overturn the judgment of the court *a quo*, which compelled the appellant (M) and her daughter (Y) to submit themselves to DNA tests against their will. Relevant questions include what possible effects the provisions of the Children's Act 38 of 2005 might have on this issue, and also what effect an order of this nature would have on criminal proceedings on a charge of arrears in maintenance, should the appeal be upheld.

## 3 The decision of the court

Murphy J, in the High Court considered (in considerable depth) the cases (often in conflict with one another) that have dealt with orders to submit to blood tests to determine paternity. These local cases, as well as cases abroad, dealing with orders to submit to scientific testing in order to determine paternity were also discussed at length by Didcott J in *Seetal v Pravitha* (1983 (3) SA 827 (A)). The judgment of Murphy J is reported. The judgment of the High Court refusing an application for leave to appeal is also, unusually, reported in the same volume at 479 (*LB v YD* 2009 (5) SA 463 (NGP)).

With reference to the facts, which were largely undisputed, the court ultimately upheld the appeal. Mention of certain additional facts is necessary: M and B commenced a sexual relationship in February 2006. They started living together in October of that year and became engaged in November. B told M at the end of the year that he would be going to work initially elsewhere in the country and, thereafter, abroad, for a short period of time the following year. During March 2007, M went to stay for what was thought to be the period of B's absence in the Northern Province, where her parents lived. However, B did not, in fact, go abroad. B frequently phoned M, and according to her version, he usually did so under the influence of alcohol. M became disillusioned with the relationship. Even before M moved to the Northern Province, B allegedly consumed alcohol in excess, and on many occasions returned home late at night and in an inebriated state.

At the end of March 2007, M discovered that she was pregnant. She was certain that B was the father, and alleged that B never disputed paternity, with the exception of one occasion when B denied paternity on the telephone, apparently under the influence of alcohol. M alleged that B retracted this denial the following morning and could not even remember raising the issue. In a letter sent some time later by B's attorney after the child's birth, B once again denied paternity. This was in contrast to B's conduct and his correspondence with M, which unequivocally showed the contrary. An important factor was that B paid an amount of money into M's bank account in each of April, May and July of 2007. It was submitted on behalf of the appellant that such actions were consistent with the belief on the part of B that he was the father. In the founding affidavit and in the court *a quo,* B expressly stated that he believed that he was Y's father and that he desired to develop a relationship with her.

M decided nonetheless to break off the engagement and she informed B accordingly when he visited her in April 2007. M and B agreed to remain in contact. M revived a relationship with a former boyfriend (Mr M) and the couple got engaged in June and married in July 2007. M informed B that after the birth of Y they would have to make arrangements regarding child support and access. In September 2007, M advised B telephonically that her due date was mid-November. Y was born on 8 November, and M phoned B on the day she was discharged from hospital. B said that he wanted to see Y. M indicated that she would contact B at a later stage, but, two days later, M received a letter from B's attorney in which B strongly denied paternity and tendered to pay the cost of blood and DNA tests to determine the issue.

M, although previously willing to allow B to be part of Y's life, responded via her attorney that B would not be afforded any parental rights, and he would also not be bound by any financial obligations towards Y. In a follow-up letter from B's attorney, B was now "100 per cent" certain that he was Y's father, but he nonetheless insisted that M and Y had to undergo blood tests. M bluntly refused, giving rise to B's application in the court *a quo* for an order to compel testing.

## 4 Legal implications

It is self-explanatory that in accordance with the so-called *Plascon Evans* principle, disputes of fact must be determined having regard to B's averments and denials unless these are untenable. According to this principle, when factual disputes arise, relief should be granted only if the facts stated by the respondent, together with the admitted facts in the applicant's affidavits, justify the order (*Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)).

*In casu*, these factual disputes were essentially immaterial; B never really denied paternity in his affidavits, but simply sought scientific confirmation. The Supreme Court of Appeal regarded the finding of the High Court that M might have been intimate with her husband, Mr M, at the time of Y's conception, unwarranted, given that the only evidence to support this finding was contained in hearsay. The Supreme Court of Appeal accordingly held that the High Court erred in ordering M and Y to undergo DNA testing. The issue of paternity *in casu,* according to the judgment of Lewis JA, was determinable on a balance of probabilities. B demanded scientific proof, which he was not entitled to. The Supreme Court of Appeal, however, accepted that there might be cases where there is a genuine uncertainty as to paternity, and where a DNA test should be ordered. As upper guardian of all children, the High Court has the inherent power, in its discretion, to order scientific tests if this is in the best interest of a child *(LB v YD supra* par 22). The author agrees with this approach. Section 37 of the Children's Act 38 of 2005 makes provision for the use of scientific tests to determine paternity. Where paternity is at issue in legal proceedings, and a litigant refuses to submit to testing, the court is obliged to warn her of the "effect which such refusal might have on [her] credibility". This was not such a case.

As a rule, the truth should be the primary value in the administration of justice and should always be pursued. Murphy J, correctly to the author's mind, stated that this is so because, if not for its own sake, then at least because "[i]t invariably is the best means of doing justice in most controversies". Where we come from and who we really are as human beings are questions that fall within the realm of the sacred for most individuals. By excluding reliable scientific evidence on a question of paternity, especially where same may be obtained expeditiously and where the costs thereof are tendered by an individual (B *in casu)*, this principle (pursuit of the truth) has been abandoned. It is of course also true that an order to compel paternity tests constitutes an infringement of an individual's privacy (s 14 of the Constitution of the Republic of South Africa, 1996). However, in the author's opinion this would be a relatively minor infringement in service of the truth. The author is not persuaded that such an order would harm the legitimacy of the administration of justice. In fact, to argue to the contrary, will do exactly that. Moreover, where it is alleged that an accused is in arrears of maintenance, the issue of paternity is a crucial element of the crime of contempt of court. The correct approach must be that, as a general matter, the discovery of the truth should prevail against the primacy of the rights to privacy and bodily integrity, especially if the truth can

be established through only minor infringement of such rights. Murphy J in the High Court came to the same conclusion (*LB v YD supra* par 23).

It will most often be in the best interests of a child to have any possible doubts about a child's paternity resolved beyond doubt by the best available evidence, which would obviously include blood or DNA tests. It is beyond cavil that, if it is in the best interests of the child, an individual's rights to privacy and bodily integrity might be infringed upon by the order of a court in the exercise of its inherent jurisdiction. From an analysis of the decision of the Supreme Court of Appeal (par 15 *in casu*), the inference is that such an order is exclusively within the purview of the High Court as upper guardian of all minors. The author does not agree with this inference, because it is trite that a maintenance court is also entitled to order a paternity test in an endeavour to determine maintenance obligations. This should also be the approach adopted, if not already the practice, in any criminal trial for contempt of court as a result of arrears in maintenance. Any other interpretation might create a stalemate whenever the defence is raised that paternity is disputed, and that the accused is therefore not liable to pay any amount of maintenance. Such a defence must be investigated by the presiding officer in a criminal trial ultimately to pronounce a verdict beyond reasonable doubt. An accused will receive the benefit of the doubt if the State is not able to prove the contrary. To argue that the discovery of the truth should as a general rule not prevail over such rights as privacy and bodily integrity – as the Supreme Court of Appeal *in casu* apparently did (par 16) – cannot stand in criminal proceedings. These rights, similar to other rights enshrined in the Constitution, may be limited where such limitation is reasonable and justifiable by applying the criteria in section 36(1) of the Constitution. It is submitted that criminal proceedings necessitate this approach.

Regarding paternity, two presumptions, which assisted the court tremendously, were embodied in the previous Children's Act 82 of 1987. This is not the situation anymore (*S v Ward* 1992 1 SA 271 (BGD) 275; *Park v De Necker* 1987 1 SA 1069 (N)). It has been argued that modern scientific tests are able to prove the identity of a person beyond a reasonable doubt, without the necessity of any corroborative evidence (Taitz and Bohm 1986 *SALJ* 662; Taitz and Singh 1995 *THRHR* 91). This argument was not, however, accepted by the court in *S v L* (1992 3 SA 713 (E)). In practice, prosecutors in criminal proceedings and maintenance enquiries are required to follow policy directives that enable them to request an order for paternity tests only if the dispute cannot be resolved by other means (*Policy Directives* Part 26 Maintenance Matters B4 (d); see also s 21(1)(*a*)–(*c*), (2)(*a*)–(*b*), and (3)(*a*)–(*b*) read with section 16 of the previous Maintenance Act 99 of 1998).

## 5 Conclusion

A principle that holds that the discovery of truth should always prevail over such constitutional rights can never be categorical. As Didcott J held in *Seetal v Pravitha* (*supra* 864G–865C), it is not always in an individual's interest to know the truth. Lewis JA *in casu* goes even further and finds that,

in each case in which a court faces a request for an order for a blood test or a DNA test, the court must consider the particular position of the child and make the determination for that child only. The duty of a court is to determine disputes in civil matters on a balance of probabilities. It is not a court's function to ascertain scientific proof of the truth. This, however, must always be restricted to civil matters, and even then exceptions to the rule must be tolerated for instance, as indicated in maintenance enquiries (*Salooje v Tsukudu* 1985 2 SA 889 (O)). (On the duty to maintain under the common law, see the discussion in Lesbury van Zyl *Handbook of South African Law of Maintenance* (2000) 89; *Moodly v Gramani* 1976 (1) SA 118 (N); *S v Sephiri* 1981 (2) SA 837 (B); *S v Bedi* 1971 (4) SA 501 (N); *Perumal v Naidoo* 1975 (3) SA 901 (N); *Mayer v Williams* 1981 (3) SA 348 (A)).

The author is mindful of the application of the rebuttable presumption (on a balance of probabilities) of the principle *pater est quem nuptiae demonstrant* (the father is indicated by the marriage). If the mother of the child was married at the time of conception or birth or during the intervening period, the presumption operates. This is exactly the situation *in casu*, and any further discussion in this regard confuses the issue even further.

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# OLD HABITS DIE HARD – THE SOUTH AFRICAN REVENUE SERVICE'S INABILITY TO COMPLY WITH ITS OWN LEGISLATION

## *Sip Project Managers (Pty) Ltd v C:SARS* Case number: 11521/2020 Gauteng Division, Pretoria (30 April 2020)

## 1 Introduction

The South African Revenue Service (SARS) has identified third-party appointment as an important weapon in its tax-collection arsenal (SARS *Tough New Penalties for Outstanding Income Tax Returns* (2009) 4). In terms of section 179(1) of the Tax Administration Act 28 of 2011 (TAA), SARS is permitted to issue a third-party appointment notice in terms whereof a third party becomes liable for the taxpayer's tax debt in instances where the third party holds (or will hold) money on behalf of or due to the taxpayer. Although the usefulness of the appointment of a third party from a collection perspective is apparent, it remains important to ensure that certain built-in measures are in place to ensure that SARS does not use this power in an overzealous manner and that taxpayers' rights are respected.

In 2015, subsection 179(5) of the TAA was inserted (through s 57 of the Tax Administration Laws Amendment Act 23 of 2015) to provide such a built-in measure. This subsection provides:

> "SARS may only issue the notice referred to in subsection (1) after delivery to the tax debtor of a final demand for payment which must be delivered at the latest 10 business days before the issue of the notice, which demand must set out the recovery steps that SARS may take if the tax debt is not paid and the available debt relief mechanisms under this Act, including, in respect of recovery steps that may be taken under this section–
>
> (*a*) if the tax debtor is a natural person, that the tax debtor may within five business days of receiving the demand apply to SARS for a reduction of the amount to be paid to SARS under subsection (1), based on the basic living expenses of the tax debtor and his or her dependants; and
>
> (*b*) if the tax debtor is not a natural person, that the tax debtor may within five business days of receiving the demand apply to SARS for a reduction of the amount to be paid to SARS under subsection (1), based on serious financial hardship."

This case note reflects on the case of *Sip Project Managers (Pty) Ltd v C: SARS* (Case number: 11521/2020 Gauteng Division, Pretoria (30 April 2020)), where section 179(5) of the TAA was considered. The *SIP Project Managers* case is important because it provides some perspective on this relatively new insertion in the TAA. In the first part of this case note, the facts

of the case and the judgment are provided. In the next part, the judgment is analysed by considering the consequences of SARS's failure to adhere to peremptory wording and by contemplating whether the tax debt must be "due and payable" before a notice in terms of section 179(5) of the TAA can be delivered. Thereafter, some conclusions are drawn.

## 2 Facts of the case and judgment

In terms of a tax assessment that was issued in June 2019, SARS owed SIP Project Managers (Pty) Ltd (the taxpayer) a refund of about R1.6 million. Subsequently, SARS requested additional information to verify the assessment. However, the taxpayer failed to provide the additional information and on 9 October 2019, SARS issued an additional assessment, which resulted in the taxpayer owing an amount of R1 233 231 to SARS (*SIP Project Managers supra* par 4). The notice of assessment indicated that the tax debt must be paid by 30 November 2019 (*SIP Project Managers supra* par 19; par 5 erroneously reflects the date of payment as 30 September 2019).

According to SARS, it had delivered three letters of demand to the taxpayer on 7 November 2019, 11 November 2019 and 22 January 2020 (*SIP Project Managers supra* par 8), without the desired result. SARS then proceeded with tax collection by way of a third-party notice, which was issued to Standard Bank on 3 February 2020. Standard Bank, acting in accordance with the third-party appointment notice, paid over R1 262 007 from the taxpayer's bank account at Standard Bank (*SIP Project Managers supra* par 6 and 15).

The taxpayer approached the court to have the third-party appointment notice set aside and to have SARS refund the money that Standard Bank had paid in terms of the third-party appointment notice (*SIP Project Managers supra* par 1). The taxpayer sought this recourse primarily on the basis that SARS did not comply with section 179(5) of the TAA.

The taxpayer averred that the letters of demand (a prerequisite in terms of section 179(5) of the TAA for issuing a third-party appointment notice) were not delivered to the taxpayer (*SIP Project Managers supra* par 14). Despite Mrs Tati, the official who authorised the third-party appointment, stating that the letters of demand "show on the SARS e-filer view", the taxpayer and its accountant were unable to view the letters on the taxpayer's e-filing profile (*SIP Project Managers supra* par 8) and provided a screenshot of the e-filing profile showing the lack of such a letter (*SIP Project Managers supra* par 16). Furthermore, the taxpayer and its accountant averred that the letters of demand were not sent to them in any other manner (*SIP Project Managers supra* par 9). In further support of their argument, Mrs Campbell, an employee at SARS's call centre, was also unable to find any letter of demand on the taxpayer's e-filing profile when the taxpayer's accountant phoned the call centre (*SIP Project Managers supra* par 10).

SARS chose to rely only on the letter dated 7 November 2019 (*SIP Project Managers supra* par 20; par 15 erroneously specifies the date as 7 September 2019). SARS chose not to rely on the letter dated 11 November

2019, because it did not comply with the requirements for a letter of demand as stipulated in section 179(5) of the TAA. Also, SARS did not rely on the letter dated 22 January 2020, because it was not issued at least 10 business days before the third-party appointment notice was submitted (*SIP Project Managers supra* par 15). As such, the court had to consider whether the letter of demand dated 7 November 2019 was delivered to the taxpayer and if not, the consequences thereof.

Considering section 179(5) of the TAA, the court remarked that the wording in this subsection is clearly peremptory and, as such, SARS should deliver a letter of demand before it can commence with recovery of taxes by way of a third-party appointment notice (*SIP Project Managers supra* par 22). Thus, it was important to establish whether there had been "delivery" of the section 179(5) notice dated 7 November. A notice is considered to be "delivered" when SARS correctly submits the letter to the taxpayer's electronic filing page (s 251(*d*)(iii) of the TAA read with s 255(1)(*a*) of the TAA and rule 3(2)(*b*)(ii) of the Rules for Electronic Communication prescribed under s 255(1) of the TAA). Because no acknowledgement of receipt is required (rule 3(3) of the Rules for Electronic Communication prescribed under section 255(1) of the TAA), SARS only had to prove that the notice was reflected on the taxpayer's e-filing profile (*SIP Project Managers supra* par 17).

Yet, SARS could not provide a consistent explanation of who sent the letter of demand. In SARS's answering affidavit, it was indicated that (i) the Debt Management Division sent the notice via e-filing (par 15 of the affidavit); (ii) Mrs Tati sent the notice (par 103 of the affidavit); and (iii) the letter was system-generated and sent automatically via the SARS system (par 107 of the affidavit). Moreover, neither the deponent of the SARS affidavit, Mrs Tati, nor any other SARS employee claimed that they had personal knowledge that the section 179(5) notice was indeed sent to the taxpayer on the e-filing profile (*SIP Project Managers supra* par 16). Also, SARS failed to provide any evidence that the notice reflected on the taxpayer's e-filing profile (*SIP Project Managers supra* par 16). Hence, the court held that the notice was not delivered to the taxpayer and, as such, SARS had not complied with section 179(5) of the TAA.

Nonetheless, the court stipulated that SARS's failure to comply with the section 179(5) requirement does not necessarily render the third-party appointment null and void. The court determined that, in such instances, a court has to consider whether "it was fatal that it [the requirement] had not been complied with" (*SIP Project Managers supra* par 24). To determine whether an omission is fatal, the purpose of the requirement must be established (par 24 quoting from *Maharaj v Rampersad* 1964 (4) SA 638 (A) 646C). In this respect, the court declared that section 179(5) of the TAA limits SARS's power to recover tax by way of a third-party appointment notice by requiring a notice advising the taxpayer of the outstanding tax debt, SARS's recovery powers, and the taxpayer's debt relief mechanisms (*SIP Project Managers supra* par 26). A failure to deliver a section 179(5) notice would clearly disregard the restriction that section 179(5) establishes on SARS's tax recovery power. Accordingly, the court held that the third-

party appointment notice was unlawful and thus null and void (*SIP Project Managers supra* par 23).

The court held that, even if the letter dated 7 November 2019 had been found to have been "delivered" to the taxpayer, the letter would have been unlawful, the reason being that at the date of this letter, namely 7 November 2019, the tax debt was not yet outstanding, because the date of payment on the assessment was 30 November. The court held that, in terms of the *contra fiscus* rule, "outstanding tax debt" must be interpreted against SARS and therefore, the letter would have been premature (*SIP Project Managers supra* par 21).

SARS argued that, in spite of the letter not being delivered and despite it being premature, the court should still not order SARS to repay the money it had received in terms of the unlawful third-party appointment notice. The basis for this argument was that, at the time the matter was heard by the court, namely 30 April 2020, there was indeed an outstanding tax debt, which was not suspended in terms of section 164 of the TAA. This means that if SARS were to repay the third-party notice money, it could simply use its recovery powers to collect the outstanding tax debt. Essentially, SARS argued that the repayment would be of no purpose (*SIP Project Managers supra* par 26) and relied on the matter of *Oceanic Trust v C:SARS* (unreported, case of 22556/09 (WCC) 13 June 2011), where the court held that it was neither just nor convenient to order repayment, because SARS could use set-off or could appoint a third party again in relation to the outstanding tax debt (*Oceanic Trust v C:SARS supra* par 89).

Notably, the court indicated that the *Oceanic Trust* matter was considered before there was a peremptory provision stipulating that a taxpayer must receive a final letter of demand in terms of section 179(5) of the TAA. If the court were to decide not to order a repayment in the current matter, despite there being no valid section 179(5) notice, it would mean that the insertion of section 179(5) served no purpose (*SIP Project Managers supra* par 26). As a result, SARS was ordered to pay back the money that it received from the third party, with interest from date of payment.

Consequently, SARS would need to start afresh with the collection procedure by issuing and *delivering* a section 179(5) notice to the taxpayer. Alternatively, SARS could use some of the other collection powers at its disposal.

## 3 Case analysis

### *3 1 Failure to adhere to peremptory wording, again*

From this judgment, it is clear that action by SARS, when it fails to act in accordance with the peremptory wording of section 179(5) of the TAA, will be null and void. The same approach to peremptory wording in the TAA is evident in the matter of *Nondabula v C: SARS* (2018 (3) SA 541 (ECM) (27 June 2017)), where it was held that SARS could not issue a third-party appointment notice in terms of section 179(1) of the TAA when it did not

furnish a notice of assessment that complies with the requirements stipulated in section 96 of the TAA (*Nondabula supra* par 21).

Significantly, the court in *Nondabula* (par 26) held:

> "The least that is expected of the first respondent is to comply with its own legislation and most importantly promote the values of our Constitution in the exercise of its public power."

From this *dictum* in *Nondabula*, it is clear that to declare SARS's conduct unlawful the court did not only rely on the peremptory wording of section 96 of the TAA, but also on the rule of law, which section 1(*c*) of the Constitution of the Republic of South Africa, 1996 (Constitution) lists as a founding value, and on section 195(1) of the Constitution, which sets out the values and principles governing public administration.

In relation to the rule of law, SARS may not act arbitrarily (Fritz *An Appraisal of Selected Tax-Enforcement Powers of the South African Revenue Service in the South African Constitutional Context* (doctoral thesis, University of Pretoria) 2017 38), meaning that fair procedure must be followed (Currie and De Waal *The Bill of Rights Handbook* (2013) 540–547). In *Nondabula*, the court held that SARS did not follow fair procedure because it failed to comply with requirements of the TAA (*Nondabula supra* par 25). Thus, SARS acted contrary to the rule of law.

In relation to section 195 of the Constitution, the court held that SARS did not comply with, among others, section 195(1)(*f*) of the Constitution (*Nondabula supra* par 25). This subsection provides that public administration, of which SARS forms part (s 195(2) of the Constitution), must be accountable. In *Nondabula,* the court stipulated that SARS has to comply with the provisions of the TAA to ensure accountability (*Nondabula supra* par 24).

As in *Nondabula,* SARS in the current matter did not follow fair procedure when it failed to deliver a letter of demand. Also, SARS did not act in an accountable manner as SARS did not comply with the TAA. Thus, comparing the matter under discussion, namely *SIP Project Managers*, with the court's approach in *Nondabula*, the question as to why the court did not also pronounce SARS's conduct in *SIP Project Managers* to be contrary to the Constitution arises.

Perhaps, it is because in *SIP Project Managers* the court indicated that the failure to "deliver" the notice was not SARS's fault (*SIP Project Managers supra* par 4). Yet, SARS, as part of public administration, is held (or should be held) to a higher standard than other debt collectors or creditors. This is evident from section 195(1) of the Constitution. As such, SARS should make sure that a letter is "delivered", because "[i]t is not enough to pro[ve] the existence of a final letter of demand; the letter should be delivered to the taxpayer" (*SIP Project Managers supra* par 17).

While it could be onerous on SARS to verify whether all section 179(5) notices, or any other required notices for that matter, display on the taxpayer's e-filing profile, a SARS system failure or glitch should not prejudice the taxpayer. Even if it is found to be unrealistic to expect SARS to

verify "delivery" of all documents, once it has come to SARS's attention that there was in fact no "delivery", as was the case when Mrs Campbell could not find a letter of demand on the taxpayer's profile, SARS should take steps to rectify its non-compliance.

In a similar vein, the court in *Siphayi v C: SARS* (unreported decision Gauteng Local Division, Johannesburg case no: 34975/2019) held that when SARS is satisfied that a notice has not been delivered to a taxpayer and the taxpayer would suffer material disadvantage as a result thereof, the notice must be withdrawn and delivered anew (*Siphayi v C: SARS supra* par 10–11).

However, in the matter under discussion, SARS did not even investigate the taxpayer's version pertaining to the non-delivery of the notice, let alone rectify the situation by repaying the money that was paid over by the third party. Instead, it allowed the matter to proceed to court, which meant that both parties had to incur legal expenses to have the matter resolved. Whereas SARS's legal expenses are paid with taxpayers' money, the taxpayer did not have the same good fortune. Fortunately, the taxpayer in *SIP Project Managers* had sufficient funds to obtain legal representation and to proceed with this matter to court. If the applicant had been a less affluent taxpayer, namely one who could not afford to incur legal expenses when R1 262 007 had been paid over to SARS by virtue of an unlawful third-party appointment, SARS's conduct would not have been brought to the fore.

## *3 2 "An outstanding tax debt"*

The court did not consider in detail the taxpayer's alternative argument pertaining to a tax debt that was not yet payable at the time the section 179(5) notice was issued, because the taxpayer's argument pertaining to the non-delivery was successful. Nonetheless, the question is still pertinent.

In its brief discussion of the "outstanding tax debt" aspect, the court indicated that, in accordance with the *contra fiscum* rule, the words "outstanding tax debt", as contained in section 179(1) of the TAA, must be interpreted against SARS. As such, the court held that the notice was premature and unlawful (*SIP Project Managers supra* par 21).

The court was correct to decide that outstanding tax as intended in section 179(1) of the TAA means that the tax debt must be due and payable at the time the third-party appointment notice is issued. Already in *Mpande Foodliner CC v the Commissioner* ((2000) 63 SATC 46 par 33), the court held that a third-party appointment can only be made "if an amount of tax, additional tax, penalty or interest is due and payable".

Even though *Mpande Foodliner* dealt with a third-party appointment in terms of section 47 of the Value Added Tax Act 89 of 1991, which was replaced by section 179 of the TAA, "a due and payable" tax debt remains a requirement. In terms of the TAA, the term "outstanding tax debt" refers to an amount of tax that is due and payable, but which has not been paid on or before the required day (the definition of "outstanding tax debt" and "tax debt" in s 1 of the TAA read with ss 162 and 169(1) of the TAA). In this regard, the required

day refers to the date indicated in the assessment as the date of payment. Consequently, in *SIP Project Managers,* the third-party notice could only have been issued after the date of payment, namely 30 November 2019.

Even so, the court's line of argument is misdirected. While it is important to consider at what stage a third-party notice may be issued, it is irrelevant for purposes of this case. Rather, the relevant question is whether the tax debt must be due and payable before a notice in terms of section 179(5) of the TAA may be issued and delivered.

An initial response may be that the section 179(5) notice may only be sent once the tax debt is due and payable and not before such time. Then again, there is nothing in section 179 of the TAA that explicitly prohibits the section 179(5) notice from being worded in future terms. On a simple reading of the provision, this means that SARS could perhaps draft the section 179(5) notice ahead of time, warning the taxpayer of the recovery steps that SARS has at its disposal if the taxpayer does not pay by the due date and the debt relief mechanisms that are provided for in the TAA. Consequently, the question of whether the tax debt must be due and payable before a section 179(5) notice can be delivered must be analysed further.

While it would be prudent to consider the purpose of the section 179(5) notice to ascertain whether an "impending" interpretation tallies therewith, neither the *Explanatory Memorandum to the Tax Administration Law Amendment Bill, 2015* nor the *Short Guide to the Tax Administration Act, 2011 (Act 28 of 2011)* (2018) provide insights as to its aim(s).

In the author's view, section 179(5) serves two purposes – namely, to inform and to demand. In relation to the first purpose, it first informs the taxpayer of the collection powers SARS has at its disposal, which include the third-party appointment. Secondly, the taxpayer is informed of the debt relief mechanisms available to the taxpayer, which include, among others, an instalment payment arrangement (s 167 of the TAA) and a compromise (s 200 of the TAA). In addition, section 179(5) provides that a taxpayer may, within five business days after receiving the section 179(5) notice, request a reduction of the amount that has to be paid to SARS in terms of a third-party notice. When considering the possibility of a reduction, SARS may consider the basic living expenses of the taxpayer and any dependants in instances where the taxpayer is a natural person, or the serious financial hardship the taxpayer will suffer in instances where the taxpayer is a person other than a natural person (s 179(5)(*a*) and (*b*) of the TAA).

This additional debt relief mechanism afforded to the taxpayer, acknowledges the financial impact tax collection has on taxpayers. A failure to inform a taxpayer of this additional opportunity, or a failure to ensure that the notice was indeed delivered to the taxpayer, deprives the taxpayer of this option. Moreover, the impact of appointing a third party and of the taxpayer's money being paid over to SARS, where the taxpayer was unaware of the possibility of requesting a reduction, stretches further than possibly affecting the taxpayer and any dependants. As highlighted in *Nondabula*, the ripple-effect must be considered. In *Nondabula,* the court took cognisance of the fact that the taxpayer was a businessman who employed a substantial number of people in a country where the unemployment rate is extremely

high (*Nondabula supra* par 25). Currently, the unemployment rate is at 29,1 per cent (Stats SA "Work & Labour Force: Key Statistics" http://www.statssa.gov.za/?page_id=737&id=1 (accessed 2020-05-26). From this discussion, it is clear that the purpose to "inform" is an important one. However, this is only one of the two purposes of section 179(5) of the TAA.

When considering the "demand" purpose, it is acknowledged that generally a letter of demand is used to place a debtor in *mora* where no specific date for performance is stipulated (Nagel (eds) *Business Law* 6ed (2019) 63). Only once a debtor is in *mora* can one proceed with legal action. In the same way, if the purpose of a section 179(5) notice was only to demand payment, this notice should have placed the taxpayer in *mora.* However, this would be unnecessary because the assessment already stipulates a date by which payment should be made, meaning that the taxpayer would naturally be in *mora ex re* if the taxpayer did not pay by the date stipulated in the assessment.

As such, it is envisioned that the "demand" purpose of section 179(5) of the TAA is not aimed at establishing *mora*, but rather at demanding payment one last time. This is evident from the wording of section 179(5) of the TAA, which refers to "final demand of payment". Again, this requirement recognises the impact a third-party appointment could have on a taxpayer, hence the requirement of an additional demand.

Allowing the "demand" to be made in relation to a tax debt, which is not yet due and payable, would be nonsensical. If the intent was that the notice should serve as a reminder, which SARS can furnish in anticipation of the possibility that a taxpayer would not pay its tax debt by the date of payment as indicated in the assessment, the section would not refer to "final" and "demand". Therefore, I opine that the words "final" and "demand" point, however indirectly, towards the time at which this notice should be delivered, in other words, to when the debt is due and payable.

Besides, as stated by the court (*SIP Project Managers supra* par 21), but in relation to the wrong subsection, the *contra fiscus* rule dictates that the court must follow the interpretation that is in the taxpayer's favour in instances where the relevant provision is ambiguous (*Glen Anil Development Corporation Limited v CIR* 1975 (4) SA 715 (A) 726–728). This would mean that the provision should be interpreted so that the notice can only be given when the tax is due and payable. Nonetheless, I suggest that the wording of section 179(5) be amended to create certainty. This can be done by explicitly indicating that the tax debt must be due and payable when the section 179(5) notice is delivered, similar to the wording used in section 179(1) of the TAA, or by stating that the taxpayer must be in default. The latter option would be similar to the wording used in section 129(1) of the National Credit Act 34 of 2005, which requires a specific notice informing a debtor of available options, before the creditor can proceed to issue a summons.

## 4 Conclusion

Section 179(5) of the TAA recognises the impact tax recovery can have on a taxpayer and dependants by requiring a final demand of payment and by providing an opportunity for the taxpayer to request a reduction based on the taxpayer's financial circumstances. In light of *Nondabula*, where the ripple-effect of tax collection was pointed out, section 179(5) serves an extremely important purpose – a purpose so important that SARS cannot simply brush over it. Meticulous compliance is essential.

Nonetheless, it is disappointing that the court in *SIP Project Managers* did not go as far as the court did in *Nondabula*, namely to declare SARS's conduct to be unconstitutional. Although the court declared the third-party appointment to be invalid and unlawful and ordered repayment, which orders achieved the result the taxpayer sought, it is imperative that SARS's conduct be framed in the correct context. Its conduct does not constitute a mere failure to comply with peremptory wording; it constitutes unconstitutional conduct. Perhaps, if SARS was an ordinary creditor, it would have been sufficient to pronounce its conduct as unlawful and invalid. However, SARS is not an ordinary creditor and must be held to the standard required from SARS in terms of the Constitution. A specific declaration of unconstitutional conduct would have shown that SARS's failure to comply with legislation will not be tolerated. Moreover, such a declaration would have sent a warning to SARS to engage with taxpayers. If a taxpayer avers that the section 179(5) notice was not delivered, SARS must investigate and, if it finds that the required procedure was not followed, withdraw any steps it took and repay money it received.

In the matter of *SIP Project Managers*, SARS blatantly neglected its constitutional duty and failed to take the appropriate steps to rectify the situation of its own accord. This matter should never have proceeded to court. If it were not for a taxpayer with sufficient funds to litigate, this injustice would never have been brought to the fore. A harsher judgment, condemning SARS's behaviour, could have seen the death of this old, bad habit of SARS, flaunting the provisions of its own legislation.

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