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THE RELEVANCE AND IMPACT OF SOUTH AFRICAN LABOUR LAW IN THE MINING SECTOR: A FOURTH INDUSTRIAL REVOLUTION PERSPECTIVE

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SUMMARY

The mining sector is one of the contributors to the South African economy and improving productivity is important if it is to remain competitive in the global marketplace. Thus, the technologies that will be created by the Fourth Industrial Revolution (4IR) are important to the mining sector. However, if this leads to mining companies being less reliant on labour, then these changes will have a negative impact on the jobs of mineworkers.

This article looks at the legal framework that governs the mining sector in South Africa in the context of 4IR. The Labour Relations Act (LRA) provides for collective bargaining and strike action, but collective bargaining in the South African mining sector is failing and has not produced the desired result. Strike action has become more common and strikes are often violent and unprotected. Secondly, occupational health and safety risks are present in the mines despite protective legislation – namely, the Mine Health and Safety Act (MHSA). Workers experience harsh working conditions underground. Lastly, workers' skills need to be developed if they are to retain their jobs in 4IR. In terms of legislation, workers should receive training if such training is available for their sector. Consideration urgently needs to be given to the impact on and relevance of 4IR to the labour legal framework in the mining sector. Furthermore, changes to the law in readiness for 4IR and its impact on the workforce in the mines should be considered.

1 INTRODUCTION

Work is an important part of a person's life because generally it helps meet a person's needs and enables a decent life.[1] However, it may also be dangerous, especially for employees in the mining sector.[2] The Fourth Industrial Revolution (4IR) is the latest phase in technological change taking place around us that has an impact on the workplace, including in the mining sector.[3] Technological advance impacts on productivity in a positive way;[4] machines perform at a constant quality and work continuously.[5] Thus, industries that employ workers to perform repetitive tasks choose automation over a human labour force.[6] Automation reduces costs and provides a more pleasant work environment by providing safer working conditions.[7] The mining sector is a significant contributor to the South African economy;[8] it employs 436 000 individuals.[9] Many of the workers are from poverty-stricken communities.[10] Automation may result in further job losses in the mining sector,[11] meaning that labour regulation in the mining sector in South Africa needs reconsideration. Legislation plays an important part in shaping labour relations, especially with regard to occupational health and safety, collective bargaining and strike action, and skills development.[12] Workers need to participate in collective bargaining related to work-related matters that are impacted by 4IR. However, the current collective bargaining system is inefficient.[13] Additionally, there is a need for preventive

1 International Labour Organisation (ILO) *Global Commission on the Future of Work: Work for a Brighter Future* (2019) 18.

2 Masia and Pienaar "Unravelling Safety Compliance in the Mining Industry: Examining the Role of Work Stress, Job Insecurity, Satisfaction and Commitment as Antecedents" 2011 37 *SA Journal of Industrial Psychology* 1 7.

3 Sibanye-Stillwater mine plans to be the first fully automated mine in South Africa. Braham "Wits, Sibanye-Stillwater Join Hands to Take Mining Digital" 2018 *The Journal of the Southern African Institute of Mining and Metallurgy* i vii.

4 Le Roux "Automation and Employment: The Case of South Africa" 2018 10 *African Journal of Science, Technology, Innovation and Development* 507 508.

5 Carbonero, Ernst and Weber "Robots Worldwide: The Impact of Automation on Employment and Trade" 2018 *International Labour Office, October 2018 Working Paper 36* 1 2.

6 Carbonero *et al* 2018 *International Labour Office, October 2018 Working Paper 36* 2.

7 For example, in the mining industry it could lead to workers no longer going underground. See Lynas and Horberry "Human Factor Issues With Automated Mining Equipment" 2011 11 *The Ergonomics Open Journal* 74 78.

8 Antin "The South African Mining Sector: An Industry at a Crossroads" 2013 *Economy Report South Africa* 1 1; Gumede "The Socio-Economic Effects and/or Modernising of Hard Rock Mines in South Africa" 2018 21 *South African Journal of Economic and Management Sciences* 1 1; Masia and Pienaar 2011 *SA Journal of Industrial Psychology* 7; and Tshoose "Placing the Right to Occupational Health and Safety Within the Human Rights Framework: Trends and Challenges for South Africa" 2014 47 *CILSA* 276 284.

9 Stats SA *Quarterly Labour Force Survey: Quarter 1* (2020) 3.

10 Mashaba "Mining Companies Rake in Huge Profits While Communities Live in Poverty" https://www.iol.co.za/the-star/news/mining-companies-rake-in-huge-profits-while-communities-live-in-poverty-18853390 (accessed 2019-12-18).

11 ILO *Global Commission on the Future of Work* 10.

12 Heald *Why Is Collective Bargaining Failing in South Africa?: A Reflection on How to Restore Social Dialogue in South Africa* (2016) 40; Mine Health and Safety Act 29 of 1996; and Skills Development Act 97 of 1998.

13 Heald *Why Is Collective Bargaining Failing in South Africa?* 32.

occupational health and safety measures to be in place; workplaces could be safer in 4IR, but workers are unfamiliar with the machinery, and this could pose a risk.[14] Lastly, workers' skills need to be developed on a continuing basis because of the evolving nature of 4IR. Moreover, automation will increase the need for certain skills and decrease the need for others.[15] For these reasons, there is a question as to the relevance and impact of 4IR on the labour law framework in the mining sector of South Africa. This article considers this question in detail.

2 COLLECTIVE BARGAINING AND STRIKE ACTION

2 1 Current legal framework for collective bargaining and strike action in the mines

The Constitution of the Republic of South Africa, 1996 (the Constitution) states that everyone has the right to fair labour practices.[16] The Constitution also provides for the right to strike.[17] The Labour Relations Act (LRA)[18] was enacted to give effect to the above constitutional provisions.[19]

2 1 1 Collective bargaining

The LRA aims to promote orderly collective bargaining.[20] Collective bargaining is the primary mechanism that employees and trade unions use to settle conflict about employment-related matters.[21] However, there is poor communication between the role players, and employees do not receive proper feedback on the problems that they are facing.[22] Employees feel that collective bargaining should meet their "human needs, alleviate poverty, ensure fair labour practices, and thereby contribute to a better life".[23] However, these expectations are high and unrealistic and the failure to meet them leads to insecurity and mistrust.[24]

The LRA suggests that collective bargaining is a voluntary process undertaken by parties.[25] However, the system of voluntarism has failed.[26]

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14 Baloyi "The Fourth Industrial Revolution Is a Serious Concern to Trade Unions and Humanity" https://www.voices360.com/community-development/the-forth-industrial-revolution-is-aserious-concern-to-trade-unions-and-humanity-17051399 (accessed 2019-07-16).

15 Le Roux 2018 *African Journal of Science, Technology, Innovation and Development* 509.

16 S 23 (1) of the Constitution. This includes the right to form and join a trade union and to participate in trade union activities.

17 S 23(2)(*c*) of the Constitution.

18 66 of 1996.

19 s 23(6) of the Constitution and s 1(*a*) of 66 of 1996.

20 s 1(*d*) of 66 of 1996.

21 Van Niekerk, Smit, Christianson, McGregor, and Van Eck *Law@Work* 3ed (2015) 388.

22 Twala "The Marikana Massacre: A Historical Overview of the Labour Unrest in the Mining Sector in South Africa" 2012 1 *Southern African Peace and Security Studies* 61 63.

23 Heald *Why Is Collective Bargaining Failing in South Africa?* 13.

24 Heald *Why Is Collective Bargaining Failing in South Africa?* 12 and 13.

25 *South African National Defence Union v Minister of Defence* (2007) 28 *ILJ* 1909 (CC) 41.

There are multiple reasons why it has failed: employers stay the process, threaten to collapse it, or exploit the conditions of workers; employers use tactics to affect the effectiveness of the bargaining council agreement; and a large number of workers are left out of the agreements.[27]

The LRA contains organisational rights that are important because they "strengthen[…] and support[…] trade unions, and in doing so promote[…] the institution of collective bargaining".[28] Organisational rights can be regulated in terms of a collective agreement.[29] According to Theron, Godfrey and Fergus, the "[l]imited organisational rights dispensation provided by the LRA has not achieved the right balance between labour relations stability and workplace democracy".[30] This leads to minority unions not having as much workplace coverage as a majority union, which creates problems, such as union rivalry and violence.[31]

Section 23(1)(*d*) of the LRA gives effect to the principle of majoritarianism in terms of which employees who are not members of a registered trade union can be bound to a collective agreement if a majority of the employees in the workplace are members of the trade union.[32] The goal of this provision is to ensure that collective bargaining is orderly and productive.[33]

Collective agreements are the end result in successful collective bargaining. In the *AMCU v Royal Bafokeng* case, it is stated that, "[t]he voluntary nature of our labour relations system is held together by collective agreements".[34] In order for an agreement to be valid, it must be in writing.[35] It binds the parties to the collective agreement, "members of every other party to the collective agreement", as well as the members of the trade union and members of the employers' organisation who "are party to the collective agreement" if it deals with terms and conditions of employment or the conduct of employers towards employees or *vice versa*.[36] It can bind non-members of the trade union if they were identified in the agreement,[37] if "the agreement expressly binds the employees"[38] and if the trade union has the majority of employees as members.[39]

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26 Coleman "Towards New Collective Bargaining, Wage and Social Protection Strategies in South Africa: Learning from the Brazilian Experience" 2013 *Global Labour University Working Paper* 1 76.

27 *Ibid*.

28 Van Niekerk *et al Law@Work* 65.

29 S 20 of 66 of 1996.

30 Theron, Godfrey and Fergus "Organisational and Collective Bargaining Rights Through the Lens of Marikana" 2015 *ILJ* 849 849.

31 As was seen in Marikana on 16 August 2012; see Theron *et al* 2015 *ILJ* 866.

32 S 23(1)(*d*) of 66 of 1996.

33 *Association of Mineworkers and Construction Union (AMCU) v Royal Bafokeng Platinum Limited* 2018 *ZALCJHB* 208 (LAC) 19; *Association of Mineworkers and Construction Union (AMCU) v Chamber of Mines of South Africa* 2017 6 *BCLR* 700 (CC) 44.

34 *AMCU v Royal Bafokeng supra* 26.

35 *Diamond v Daimler Chrysler SA (Pty) Ltd* 2006 27 *ILJ* 2595 (LC) par 26.

36 S 23(1) of 66 of 1996.

37 S 23(1)(*d*)(i) of 66 of 1996.

38 S 23(1)(*d*)(ii) of 66 of 1996.

39 S 23(1)(*d*)(iii) of 66 of 1996.

Minority unions do not always agree with the provisions set out in a collective agreement. This situation creates union rivalry and leads to problems in the collective bargaining process. Additionally, all employees are not afforded a fair say in changes brought about by a collective agreement. Many court cases have challenged the principle of majoritarianism, especially where minority unions and non-members are not consulted.[40]

South Africa's collective bargaining has been called "bad faith bargaining" by some authors; trade unions propose extreme demands and refuse to compromise.[41] This unwillingness to compromise increases the chances of a lengthy strike.[42] Trade unions have been ineffective in dealing with workplace issues.[43] Additionally, all parties' fears and concerns are not fully represented during the process.[44] Collective bargaining in South Africa does not work because it is being used to solve problems it was not designed to address[45] – for example, service delivery problems. Lastly, collective bargaining does not look at the root cause of the problems, such as the highly volatile political situation in South Africa.[46]

2 1 2 Strike action

Central to the concept of collective bargaining is the right to strike,[47] which is used to maintain a balance between labour and capital.[48] However, violence becomes an element in the strike if an employer hires replacement labour and attempts to continue operations while the workers are striking.[49] This right is not absolute and is limited in terms of the Constitution.[50] Additionally, it is limited procedurally and substantively by provisions in the LRA.[51] In South Africa, strikes go on for long periods.[52] Strikes no longer need majority

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40 *Lanxess Chrome Mining (Pty) Ltd v National Union of Mine Workers* 2018 *ZALCJHB* 410 (LC); *Transnet SOC Ltd* 2018 *ZALCJHB* 131 (LC); *AMCU v Royal Bafokeng supra* 208 and *AMCU v Chamber of Mines supra* 44. In *AMCU v Royal Bafokeng supra* the minority union, Association of Mineworkers and Construction Union, challenged the constitutionality of s 23(1)(*d*) of the LRA. The court held that the principle was constitutional and leads to orderly collective bargaining. It held further that minority unions do not need to be consulted. See *AMCU v Royal Bafokeng supra* par 11 and 19.

41 Botha and Lephoto "An Employer's Recourse to Lock-Out and Replacement Labour: An Evaluation of Recent Case Law" 2017 20 *PELJ* 1 23.

42 Botha and Lephoto 2017 *PELJ* 23.

43 Twala 2012 *Southern African Peace and Security Studies* 63.

44 Heald *Why Is Collective Bargaining Failing in South Africa?* 13.

45 *Ibid*.

46 Heald *Why Is Collective Bargaining Failing in South Africa?* 42.

47 S 23 of the Constitution and s 1 of the LRA.

48 Van Niekerk *et al Law@Work* 415 and Botha "Responsible Unionism During Collective Bargaining and Industrial Action: Are We Ready Yet?" 2015 48 *De Jure* 328 332.

49 Botha and Lephoto 2017 *PELJ* 24 and s 76 of 66 of 1996.

50 Van Niekerk *et al Law@Work* 415.

51 *Ibid*.

52 The longest recorded strike occurred in Lonmin, Implats and Amplats in 2014. See Heald *Why Is Collective Bargaining Failing in South Africa?* 46; Rycroft "Strikes and the Amendments to the LRA" 2015 *ILJ* 1 3; Theron *et al* 2015 *ILJ* 866.

support in order to be successful.[53] Lengthy strikes impact employees' wages since they are not paid during the strike.[54]

There has been an increase in violent strike action[55] to such an extent that the occurrence has been normalised.[56] Violent acts are aimed at both people and property.[57] Strike action is counterproductive and costly for employers because of the "damage to property, the expense of hiring private security firms, and the costs involved in litigation".[58] The current rise in violent strikes places the employer under a form of economic duress because employers are forced to give in to the demands of the workers.[59] Ngcukaitobi is of the view that recent strike action is political and economic in nature and is transformed into a labour-related issue.[60] It has been stated that strike action is fuelled by "service delivery protests, vigilante action, xenophobic violence, Zama mining operations, taxi violence and other forms of community-based conflict in South Africa".[61] The current rise in unprotected strikes in South Africa is an indication that the collective bargaining system is not working effectively.[62]

2 2 Impact and relevance of the Fourth Industrial Revolution on collective bargaining and strike action in the mines

The current way collective bargaining is conducted in South Africa will be challenged by 4IR.[63] There is a greater need for an effective collective bargaining system to be in place during the transition into 4IR.[64] Collective

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53 As is evident from the Lonmin strike in 2014 where a minority group of employees went on a strike that had an adverse effect on the mine. See Rycroft 2015 *ILJ* 2.

54 Du Plessis "Unions Should Think Twice About Strikes Before Committing Members to Hardship" https://www.miningmx.com/opinion/metal-heads/36615-unions-should-think-twice-aboutstrikes-before-committing-members-to-hardship/ (accessed 2019-08-27). The recent strike at Sibanye-Stillwater that lasted a few days short of five months left striking workers with a loss of income of R56 400 per worker. See Malope "How Amcu's Joseph Mathunjwa 'Won' a Lost War" https://city-press.news24.com/Business/how-amcus-joseph-mathunjwa-won-a-lost-war20190421 (27-08-2019).

55 Benjamin "Beyond Dispute Resolution: The Evolving Role of the Commission for Conciliation, Mediation & Arbitration" 2014 *ILJ* 10 as cited in Botha 2015 *De Jure* 344.

56 Botha 2015 *De Jure* 344. A survey conducted in 2013 by the Congress of South African Trade Unions showed that 60 per cent of workers felt that violence needed to be used in a strike. See Chinguno "Marikana: Fragmentation, Precariousness, Strike Violence and Solidarity" 40 2013 *Review of African Political Economy* 639 639.

57 Rycroft 2015 *ILJ* 3.

58 Botha 2015 *De Jure* 344.

59 Botha and Germishuys "The Promotion of Orderly Collective Bargaining and Effective Dispute Resolution, The Dynamic Labour Market and the Powers of the Labour Court (2)" 2017 *THRHR* 531 531.

60 Ngcukaitobi "Strike Law, Structural Violence and Inequality in the Platinum Hills of Marikana" 2013 *ILJ* 836 840.

61 Heald *Why Is Collective Bargaining Failing in South Africa?* 53.

62 Botha 2015 *De Jure* 342.

63 Heald *Why Is Collective Bargaining Failing in South Africa?* 29.

64 A study done in Spain showed that collective bargaining should be used to "ensure a fair transition towards a new world of work". It should improve flexibility and promote

bargaining should be involved in employment creation as it offers a means for all role players to discuss ways to find solutions to problems associated with 4IR.[65] It is proposed that the collective bargaining system become a compulsory system in terms of which there is a duty to bargain, especially in circumstances where 4IR negatively affects employees. The concept of "collective" in the bargaining process may no longer be relevant as a result of the focus on the individual and this can create a demand for individual bargaining that will require new legislation.

In general, collective agreements should focus on 4IR and entertain proposals as to future actions in expectation of the changes taking place in the workplace.[66] The approach to negotiation needs to be revisited and feelings of trust and respect need to be incorporated to satisfy human needs.[67]

Social dialogue should include academia as well as the general public.[68] Academic theoretical understanding can provide solutions to problems, as it should provide an impartial assessment of the issues. The general public may gain an understanding of workers' feelings and the impact of 4IR on the community. There is a need to include workers directly in social dialogue[69] through workplace fora. This will give "workers greater ownership to policies and solutions implemented; and it leads to more socially robust and innovative results".[70]

Collective bargaining and negotiations increasingly use multimedia platforms,[71] a trend that can obviate mass meetings.[72] This development can make the process easier as it is electronic and can enable communication between multiple parties in different locations – for example, via Skype.[73] Emotion plays less of a role in negotiations and the negotiator has an accurate record of the negotiation.[74] It saves costs on hiring and travelling to a venue for negotiating.[75] It makes it possible to conduct ballots relating to mandates and representivity via SMS and email, which is more reliable and accurate[76] than paper ballots. The increasing use of multimedia can involve a larger audience.[77] Trade unions may be able to influence action at more than one mine and even across borders.[78]

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employment creation (International Labour Office *Synthesis Report of the National Dialogues on the Future of Work* (2017) 62).

65 International Labour Office *Synthesis Report* 62.

66 International Labour Office *Synthesis Report* 63.

67 Heald *Why Is Collective Bargaining Failing in South Africa?* 118.

68 International Labour Organisation *A Reflection on the Future of Work and Society* (2017) 9.

69 International Labour Organisation *A Reflection on the Future of Work and Society* 14.

70 *Ibid*.

71 Heald *Why Is Collective Bargaining Failing in South Africa?* 40.

72 Heald *Why Is Collective Bargaining Failing in South Africa?* 31.

73 *Ibid*.

74 *Ibid*.

75 *Ibid*.

76 *Ibid*.

77 *Ibid*.

78 International Labour Organisation *Global Commission on the Future of Work* 42; Heald *Why Is Collective Bargaining Failing in South Africa?* 31.

The role of trade unions could diminish because there will be fewer employees working in the sector, and not as many permanent employees or employees on the premises. The role of the trade union will have to be revised and might need legislative protection to provide for compulsory representation. For trade unions to be relevant in 4IR, they will need to anticipate and adapt to change in relation to the economy and the labour market.[79] Self-maintaining technology and materials are being created that will replace labour and lead to fewer people in the workplace and fewer members of a trade union, resulting in their disappearance.[80] It will be difficult for trade unions to represent individual employees as 4IR brings about a change from "collective" to "individual" in the workplace.[81] It is suggested that an electronic applications platform will enable effective participation by a trade union but will make the need for collective bargaining practice superfluous.[82]

A mining company should hold lengthy discussions with all key role players on potential health and safety hazards that may result from a new system being considered.[83] Collective bargaining can have a positive impact on health and safety issues if negotiations are carried out according to the provisions of the LRA and for the right reasons.[84] A mining company should embark on applying a decision once all views are taken into account.[85]

Strike action has a potential to increase owing to a lack of communication and could lead to job losses in the mining sector, as employers are able to dismiss employees based on operational requirements. Employers will opt for automation rather than use replacement labour as they do currently.

3 OCCUPATIONAL HEALTH AND SAFETY

Occupational health and safety is especially critical in the mining sector owing to the harsh conditions that mineworkers face underground and on the surface.[86] The Department of Labour has stated it is a sector with a high risk of workplace fatalities.[87] However, the number of fatalities dropped in 2019 to 35 from 81 in 2018.[88]

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79 Brown "Robots, New Technology, and Industry 4.0 in Changing Workplaces: Impacts on Labor and Employment Laws" 2018 25 *American University Business Law Review* 349 362.

80 Heald *Why Is Collective Bargaining Failing in South Africa?* 40.

81 Heald *Why Is Collective Bargaining Failing in South Africa?* 43.

82 Heald *Why Is Collective Bargaining Failing in South Africa?* 43.

83 Badri, Boudreau-Trudel and Souissi "Occupational Health and Safety in the Industry 4.0 Era: A Cause for Major Concern?" 2018 109 *Safety Science* 403 406; Chia, Ming Lim, Sng and Hwang "Need for a New Workplace Safety and Health (WSH) Strategy for the Fourth Industrial Revolution" 2019 62 *American Journal of Industrial Medicine* 275 277.

84 Chia *et al* 2019 *American Journal of Industrial Medicine* 278.

85 Badri *et al* 2018 *Safety Science* 406.

86 Sieberhagen, Rothmann and Pienaar "Employee Health and Wellness in South Africa: The Role of Legislation and Management Standards" 2009 7 *SA Journal of Human Resource Management* 18 18.

87 *Ibid*.

88 Kotze "35: SA on Track for Lowest Number of Fatalities in History" https://miningreview.com /southern-africa/35-sa-on-track-for-lowest-number-of-fatalities-in-recorded-history/ (accessed 2019-12-18).

Because of the danger, more stringent regulation is required to help the health and safety record of mineworkers.[89] Mineworkers contract numerous diseases while working, including tuberculosis (TB), human immunodeficiency virus (HIV), acquired immunodeficiency syndrome (AIDS)[90] and pulmonary silicosis.[91] The effect of these diseases does not appear immediately but takes a number of months or years to show.[92]

3 1 Current legal framework for occupational health and safety in the mines

Everyone has a right to an environment that is not harmful to his or her health or well-being.[93] Occupational health and safety in the mines is covered by the Mine Health and Safety Act (MHSA).[94] Compensation for occupational diseases and injuries is provided for in the Compensation for Occupational Injuries and Diseases Act (COIDA)[95] and the Occupational Diseases in Mines and Works Act (ODMWA);[96] ODMWA applies exclusively to the mining sector.

3 1 1 Mine Health and Safety Act 29 of 1996

The MHSA was enacted to protect the health and safety of mineworkers.[97] According to the purpose of MHSA "[t]he [MHSA] is a statute specifically promulgated to provide for the protection of the health and safety of employees and other persons at mines".[98]

The employer is responsible for ensuring that the mines are safe.[99] The mine must be designed, constructed, equipped and in a condition to operate safely and the employer must enable a healthy working environment.[100] The employer must provide for health and safety equipment and health and safety facilities that are serviceable and hygienic.[101]

The conditions faced by mineworkers, specifically women, do not appear to meet the standards that are mentioned in the MHSA. Tshoose states, "99.8% of female workers are exposed to unhygienic conditions and lack of

89 29 of 1996.

90 Hermanus "Occupational Health and Safety in Mining: Status, New Developments, and Concerns" 2007 107 *The Journal of Southern African Institute of Mining and Metallurgy* 531 535.

91 Donoghue "Occupational Health Hazards in Mining: An Overview" 2004 54 *Occupational Medicine* 283 284.

92 Nelson "Occupational Respiratory Diseases in the South African Mining Sector" 2013 *Global Health Action* 89 90.

93 S 24(*a*) of the Constitution.

94 29 of 1996.

95 130 of 1993.

96 78 of 1973.

97 S 1(*a*) of 29 of 1996.

98 29 of 1996.

99 S 2 of 29 of 1996.

100 S 2(1)(*a*)(i) of 29 of 1996.

101 S 6(1)(*a*) and (*b*) of 29 of 1996.

access to adequate sanitary facilities while working underground".[102] Women are unhappy with the type and style of the personal protective equipment that is available.[103]

Employers must compile an annual health and safety report and it must include statistics on health and safety.[104] Employers evidently disclose all health and safety risks that are present on the mines. For instance, Implats Platinum disclosed that carbon dioxide and sulphur dioxide levels were exceeded on the mines.[105] The penalty for breaching occupational health and safety law in South Africa is set at a low level.[106] The mining industry does not fully comply with all health and safety requirements.[107] The failure to enforce the provisions of the MHSA may be linked to inspectorate authorities not having sufficient knowledge of how to deal with situations where the occupational health and safety legislation is violated.[108] (Legislation contains provisions on non-compliance with occupational health and safety law, which include fines and imprisonment.)[109]

In terms of the MHSA, if the worker subjectively believes that the work is dangerous, he or she has the right to refuse the work.[110] This is the only mechanism workers have to exercise control over their occupational health and safety.[111] According to Hermanus, workers are unaware of how to inform their managers about risks they face.[112]

Risk management is important according to the MHSA.[113] In practice, there is no consistency in the approach taken by employers.[114] When risk management is dealt with, there appears to be a lack of training, which leads to a lack of improvement in occupational health and safety.[115]

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102 Zungu "Occupational Health and Safety Challenges Reported by Women in Selected South African Gold and Platinum Mines" 2012 *Occupational Health Southern Africa* 6–13 as cited in Tshoose 2014 *CILSA* 284.

103 Zungu 2012 *Occupational Health Southern Africa* 6–13 as cited in Tshoose 2014 *CILSA* 284.

104 S 2(1)(*c*) of 29 of 1996.

105 Howard "Half-Hearted Regulation: Corporate Social Responsibility in the Mining Industry" 2014 131 *SALJ* 11 24.

106 Loewenson "Globalization and Occupational Health: A Perspective From Southern Africa" 2001 79(9) *Bulletin of the World Health Organization* 865–866 as cited in Tshoose 2014 *CILSA* 285.

107 Murray, Davies and Rees "Occupational Lung Disease in the South African Mining Industry: Research and Policy Implementation" 2011 32 *Journal of Public Health Policy* 65 71.

108 Tshoose 2014 *CILSA* 289.

109 S 55A of 29 of 1996.

110 S 23(1)(*a*) of 29 of 1996.

111 Coulson, Stewart and Saeed "South African Mineworkers' Perspectives on the Right to Refuse Dangerous Work and the Constraints to Workers Self-Regulation" 2019 119 *Journal of Southern African Institute of Mining and Metallurgy* 21 28.

112 Hermanus 2007 *The Journal of Southern African Institute of Mining and Metallurgy* 536.

113 *Ibid*.

114 Hermanus 2007 *The Journal of Southern African Institute of Mining and Metallurgy* 537.

115 Hermanus 2007 *The Journal of Southern African Institute of Mining and Metallurgy* 531.

3 1 2 Occupational Diseases in Mines and Works Act 78 of 1973

ODMWA provides for the payment of compensation for diseases that were contracted by an employee while working in a mine.[116] A Mines and Works Compensation Fund has been established.[117] If a person dies after a fixed date, then the amount due to him or her is payable to dependants whom the commissioner designates.[118] The amount payable includes the value of food or quarters provided by the owner, overtime pay or special remuneration that was performed for ordinary work. However, it excludes the following payments: intermittent overtime, non-recurrent occasional services, cost to cover special expenses, and *ex gratia* payments.[119] Compensation is calculated in terms of an employee's past remuneration and does not take inflation into account.[120] It does not take into account all the costs involved in being injured or contracting a disease.[121] For instance, an employee cannot claim for pain, suffering and loss of the amenities of life when he or she claims damages.[122] Future loss of earnings is also not taken into account when compensation is awarded. Thus, "workers and their dependants are systematically impoverished".[123]

There is a dispute over compensation provided in terms of ODMWA. ODMWA provides for lump sum payments to an employee or his or dependants[124] but periodic payments would be more beneficial because lump sum payments tend to cover the current obligations of the employee or the dependants. There has not been an implementation of government policy to improve compensation for miners and bring it into line with compensation given to workers not from the mining sector.[125]

A further difficulty ODMWA poses is that it makes little provision for an employee's reintegration[126] – for instance, it places the responsibility on government to provide occupational health services.[127] Where an employee is temporarily disabled, the LRA provides that an employer must defer a dismissal.[128] ODMWA does not promote preventive measures even though they are cost effective.[129]

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116 Aim of ODMWA.
117 S 61(1) of 78 of 1973.
118 S 80(4) of 78 of 1973 read with subsection (3), which provides that this amount should be at least R34 458.
119 S 80A(1) of 78 of 1973.
120 Olivier, Smit and Kalula *Social Security: A Legal Analysis* (2003) 485.
121 Olivier *et al Social Security* 485.
122 Olivier *et al Social Security* 480.
123 *Ibid*.
124 S 81 of 78 of 1973.
125 Murray *et al* 2011 *Journal of Public Health Policy* 70.
126 Olivier *et al Social Security* 493.
127 Olivier *et al Social Security* 493 fn 300.
128 Olivier *et al Social Security* 491.
129 Olivier *et al Social Security* 493.

Occupational diseases become evident only after a while.[130] This factor is problematic for migrant workers on the mines in South Africa because they may return to their home country before showing signs of disease.[131] Migrant employees do not have a mechanism at home to claim compensation from either ODMWA or COIDA.[132] In addition, "[t]he functioning of the compensation system in rural areas is insufficient".[133]

In 2016, the High Court passed judgment in a class action that was instituted by 68 mineworkers against various mining companies.[134] The mineworkers had contracted silicosis and TB while working in the mines[135] and the action included all workers who worked in a gold mine after 12 March 1965.[136] In 2019, the High Court made the settlement agreement an order of court.[137] The settlement amounts to R5 billion, to be paid to a trust and paid out to past and current mineworkers or their dependants if they contracted silicosis and TB as a result of working in the gold mines.[138] This is a landmark case, and will compensate workers and their dependants who do not claim under ODMWA.

3 1 3 Compensation for Occupational Injuries and Diseases Act 130 of 1993

COIDA is relevant to the mining sector despite it having its own piece of legislation, as is evident from section 25 of COIDA.[139] The provisions apply to casual and to full-time employees.[140] COIDA provides for the establishment of a compensation fund.[141]

COIDA provides an extensive list of diseases that are considered as compensatable. However, if an employee contracts a disease not listed in COIDA, then the employee needs to prove that the disease was contracted in the workplace and that it arose in the course of his or her employment.[142] It may be difficult for an employee to prove that a disease arose in the workplace because not many employees have access to medical facilities or a specialist to undergo the necessary tests to prove their allegation.[143] All of

130 Olivier *et al Social Security* 477.

131 *Ibid*.

132 *Ibid*.

133 Olivier *et al Social Security* 474.

134 *Nkala v Harmony Gold Mining Company Limited* 2016 7 *BCLR* 881 (GJ).

135 *Nkala v Harmony Gold Mining Company Limited supra* par 6.

136 *Nkala v Harmony Gold Mining Company Limited supra* par 40 (i) and 41.

137 *Ex Parte Nkala and Others* 2019 *ZAGPJHC* 260 par 127.

138 *Ex Parte Nkala and Others supra* 23.

139 S 25 of 130 of 1993 provides: "If an employee meets with an accident (b) while he is engaged in or about his employer's mine, works or premises in organized first aid, ambulance or rescue work, fire-fighting or any other emergency service; (c) … such accident shall, for the purposes of this Act, be deemed to have arisen out of and in the course of his employment."

140 S 1(xix) of 130 of 1993.

141 S 15(1) of 130 of 1993. "Compensation" is defined in s 1 of 130 of 1993 as "compensation in terms of this Act and, where applicable, medical aid or payment of the cost of such medical aid; (xl)".

142 S 65(1)(*b*) of 130 of 1993.

143 Olivier *et al Social Security* 466.

the above leads to employees not reporting diseases that are not mentioned in COIDA.[144]

An employee's compensation is calculated with reference to his or her earnings.[145] An employee cannot claim for pain, suffering and loss of the amenities of life or the future loss of earnings.[146] The employee's past earnings are considered and the calculation does not take inflation into account.[147] As stated earlier, this leads to a situation where "workers and their dependants are systematically impoverished".[148] As stated, many occupational diseases become evident only after a while and this can be problematic for migrant workers because disease may become evident only on their return to their home country.[149] They cannot claim compensation under COIDA while they are outside South Africa.[150] In rural areas, workers also face a problem because there is no compensation system. Family members and the community have to take care of the person.

COIDA fails to provide employees with an opportunity to be reintegrated into the workplace once they suffer from an injury or a disease.[151] COIDA does not promote preventive measures even though they are cost effective.[152]

3 2 Impact and relevance of the Fourth Industrial Revolution on occupational health and safety in mines

The occupational health and safety of workers in 4IR, specifically when new machinery is introduced, is an important issue.[153] There have been attempts to make the introduction of new machinery compliant with general occupational health and safety.[154] However, as the process is more complex with 4IR, this can be difficult because it can lead to greater occupational health and safety hazards.[155] The risks cannot be predicted in the same manner as before.[156] It is suggested that new models of risk analysis need to

144 *Ibid*.
145 S 67(1) of 130 of 1993.
146 Olivier *et al Social Security* 480.
147 Olivier *et al Social Security* 485.
148 Olivier *et al Social Security* 480.
149 Olivier *et al Social Security* 477.
150 *Ibid*.
151 Olivier *et al Social Security* 492.
152 Olivier *et al Social Security* 493.
153 Badri *et al* 2018 *Safety Science* 405.
154 *Ibid*.
155 Podgórski, Majchrzycka, Dąbrowska, Gralewicz and Okrasa "Towards a Conceptual Framework of OHS Risk Management in Smart Working Environments Based on Smart PPE, Ambient Intelligence and the Internet of Things Technologies" 2017 *International Journal of Occupational Safety and Ergonomics* 1 20 as cited in Badri *et al* 2018 *Safety Science* 405.
156 Fernández and Pérez "Analysis and Modeling of New and Emerging Occupational Risks in the Context of Advanced Manufacturing Processes" 2015 *Procedia Engineering* 1150 1159 as cited in Badri *et al* 2018 *Safety Science* 405.

be created to enable monitoring of all occupational health and safety hazards.[157]

Jones states that a new regulatory framework for occupational health and safety in 4IR will not come in time, as was the case in previous revolutions.[158] Current legislation will be relevant and valid for the coming years because the laws are adaptable.[159] It is suggested that standards should be looked at first, because if standards are not changed, it will have an adverse effect on occupational health and safety management.[160] This will ensure that the new system complies with a standard and is safe to be placed in a mine.[161] These standards need to be flexible and agile to be able to adapt to any further changes.[162] It will be advisable for mining companies to have an in-house framework for occupational health and safety to ensure that risks can be detected timeously.[163] It is suggested that relying only on occupational health and safety legislation in the workplace will not be effective.[164]

There is a need to embrace common values, such as "stewardship, common good, and human dignity among all stakeholders to ensure continued occupational safety and health".[165] Key role players can develop these common values.[166]

As previously stated, risk management is an important component of the MHSA and will be highly important in 4IR.[167] Mining companies have to be aware and able to prepare themselves for these risks. It will be important to have a system where data can be gathered from different places and be accessible to all involved in the mining sector – for example, on a database available via the Internet.[168]

Occupational health and safety management should be a focus area because it will lead to the effectiveness and efficiency of regulation.[169] Workers should be involved in occupational health and safety

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157 Badri *et al* 2018 *Safety Science* 405.

158 Jones "With the IEC/ISO 17305 Safety Standard Delay, What's Next? Rockwell Automation" http://www.rockwellautomation.com/en_NA/news/the-journal/detail.page?pagetitle=With-the-IEC%2FISO-17305-Safety-Standard-Delay%2CWhat%E2%80%99s-Next%3F&content_type=magazine&docid=4b89588d842bf4d13ed1e631a1c9c26d (accessed 2017-07-18) as cited in Badri *et al* 2018 *Safety Science* 407.

159 Badri *et al* 2018 *Safety Science* 407.

160 *Ibid*.

161 *Ibid*.

162 Badri *et al* 2018 *Safety Science* 408.

163 Badri *et al* 2018 *Safety Science* 407.

164 Chia *et al* 2019 *American Journal of Industrial Medicine* 278.

165 World Economic Forum *Values and the Fourth Industrial Revolution: Connecting the Dots Between Value, Values, Profit, and Purpose* (14 November 2016) http://www3.weforum.org/docs/WEF_Values_and_the_Fourth_Industrial_Revolution_WHITEPAPER.pdf (accessed 2018-10-11) as cited in Chia *et al* 2019 *American Journal of Industrial Medicine* 279.

166 Chia *et al* 2019 *American Journal of Industrial Medicine* 2017.

167 Badri *et al* 2018 *Safety Science* 408.

168 *Ibid*.

169 Bluff, Gunningham and Johnstone *OHS Regulation for a Changing World of Work* (2004) 43.

management[170] as their participation can make occupational health and safety management run effectively and efficiently.[171]

The world of work is changing and with it the way employer-employee relationships are carried out. "Full-time employment" might be an obsolete concept in the future as a result of an increase in the employment of independent as well as part-time workers.[172] These changes can potentially exclude a large number of employees from the ambit of occupational health and safety legislation.[173] Independent workers do not fall under the definition of "employee" in compensation legislation.[174] Subcontractors and workers who are outsourced are under pressure owing to competition, which can lead to health and safety issues in the workplace.[175]

The impact of 4IR may be devastating for the mental health of workers because of the complexity of this revolution as well as the fear of being retrenched.[176] The increasing complexity of 4IR can lead to workers experiencing psychosocial afflictions[177] such as depression and anxiety. There is a trend towards a greater number of people suffering from psychosocial problems such as the syndrome of "burn-out"[178] and musculo-skeletal disorders.[179] These issues are not recognised in legislation, especially occupational health and safety legislation.[180] Employers need to develop better ways of dealing with mental health issues that are present in the workplace.[181]

Safety in the mines is jeopardised by skills shortages and aggravated by the high level of unemployment, leading to an increase in the number of illegal miners who contribute to worsening statistics by entering unsafe mine shafts. These acts have repercussions for the whole industry.

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170 Bluff *et al OHS Regulation for a Changing World of Work* 45.

171 Gustaven "Improving the Work Environment: A Choice of Strategy" 1980 *International Labour Review* 271–286 as cited in Bluff *et al OHS Regulation for a Changing World of Work* 49.

172 Chia *et al* 2019 *American Journal of Industrial Medicine* 278. This scenario will arise in the case of machinery that does not need human intervention to work but needs a human to programme and maintain it from time to time (Lynas and Horberry 2011 *The Ergonomics Open Journal* 74).

173 Chia *et al* 2019 *American Journal of Industrial Medicine* 278.

174 S 1(xix) of 130 of 1993.

175 Bluff *et al OHS Regulation for a Changing World of Work* 3.

176 Sirvio, Ek, Jokelainen, Koiranen, Järvikoski and Taanila "Precariousness and Discontinuous Work History in Association with Health" 2012 *Scandinavian Journal of Public Health* 360–367 as cited in Chia *et al* 2019 *American Journal of Industrial Medicine* 276.

177 Leka and Jain "Health Impact of Psychosocial Hazards at Work: An Overview" 2010 *World Health Organization, Geneva* 136 as cited in Badri *et al* 2018 *Safety Science* 407.

178 Bluff *et al OHS Regulation for A Changing World of Work* 48.

179 Bluff *et al OHS Regulation for A Changing World of Work* 2. It is found "that an injury serious enough to lead to at least a week off of work almost triples the combined risk of suicide and overdose death among women and increases the risk by 50 per cent among men" (author unknown "BU Finds Workplace Injuries Contribute to Rise in Suicide, Overdose Deaths" https://www.eurekalert.org/pub_releases/2019-07/buso-bfw072219.php (accessed 2019-08-26)).

180 Badri *et al* 2018 *Safety Science* 407.

181 Rinker "Employers Step Up Efforts to Help Workers Address Mental Health" https://abcnews.go.com/Health/employers-step-efforts-workers-address-mental-health/story?id=64483957 (accessed 2019-08-26).

4 SKILLS SHORTAGES AND SKILLS DEVELOPMENT

Unemployment and skills shortages are major issues in South Africa; currently the official unemployment rate is 30,8 per cent.[182] Automation will make many kinds of work obsolete. However, it will also lead to new jobs being created.[183]

4 1 Current legal framework for skills development in the mines

4 1 1 Skills Development Act 97 of 1998 and Skills Development Levies Act 9 of 1999

In South Africa, the Skills Development Act (SDA) regulates skills development in the workplace.[184] Skills development in South Africa is funded in terms of the provisions of the Skills Development Levies Act (SDLA).[185] The purpose of the SDA is to develop skills and improve the quality of the working life of employees.[186] It aims to promote self-employment and to increase investment in education and training.[187] It promotes the use of the workplace as an active learning environment and aims to improve the employability of those that were previously disadvantaged by way of introducing training and education schemes.[188]

A Sectoral Education and Training Authority (SETA) plays an important role in the workplace because it uses hands-on methods to promote and develop skills development. The Minister of Higher Education and Training may establish a SETA for any national economic sector for a specific time by way of notice in the *Government Gazette*.[189]

The SDA covers learnerships. A learnership must include a structured learning component and a structured work experience component in order for it to be established by a SETA;[190] it needs to be registered with the Director-General and it needs to lead to a qualification registered by the South African Qualifications Authority.[191]

The SDA provides for skills programmes that are funded by SETAs.[192] A programme may be funded by a SETA or by the Director-General.[193] To

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182 Stats SA "Quarterly Labour Force Survey (QLFS): Q3:2020" http://www.statssa.gov.za/?p=13765 (accessed 2020-12-10).

183 ILO *Global Commission on the Future of Work* 18.

184 S 2 of 97 of 1998.

185 Preamble of 9 of 1999.

186 S 2(1)(*a*)(i) of 97 of 1998.

187 S 2(1)(*a*)(iii) and (*b*) of 97 of 1998.

188 S 2(1)(*c*)–(*f*) of 97 of 1998.

189 S 9(1)(*a*) of 97 of 1998.

190 S 16(*a*) and (*b*) of 97 of 1998.

191 S 16(*c*) and (*d*) of 97 of 1998.

192 S 20(3) of 97 of 1998. A "skills programme" as defined in s 20(1) of 97 of 1998 means a programme that: "(a) is occupationally based; (b) when completed, will constitute a credit

qualify for funding, it must be developed according to "(i) the sector skills development plan of the SETA; or (ii) the national skills development strategy" and funds must be available.[194]

The government has focused on skills shortages but this issue is still a major concern.[195] There have been numerous changes to the educational system but they fail to reach the desired end – namely, the development of necessary skills.[196] The government has tried to settle the issue through an education budget that funds the development of necessary skills, but despite its efforts, there are structural issues that hinder its progress, such as not having the correct resources and facilities.[197]

4 1 2 Mineral and Petroleum Resources Development Act 28 of 2002

The aim of the Mineral and Petroleum Resources Development Act (MPRDA) is to provide access to, and sustain the development of, the mineral and petroleum resources of South Africa and all other related matters.[198]

All mineral rights vest in the State and the State can grant such rights to a person provided that certain requirements are met.[199] An application for a mining right must be lodged with the Minister of Minerals and Energy.[200] An application for a mining right must have a social and labour plan attached.[201]

The regulations of the MPRDA make provision for social and labour plans with which the holder of a mining right must comply.[202] The objectives of the social and labour plan are to promote employment and advance social and economic welfare, "contribute to the transformation of the mining industry"

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towards a qualification registered in terms of the National Qualifications Framework contemplated in Chapter 2 of the NQF Act; (c) uses training providers referred to in section 17(1)(*c*); and (d) complies with any requirements that may be prescribed." See also s 20(3)(*a*) of 97 pf 1998.

193 S 20(3)(*a*) of 97 of 1998.

194 Ss 20(3)(*b*) and (*c*) of 97 of 1998.

195 Rasool and Botha "The Nature, Extent and Effect of Skills Shortages on Skills Migration in South Africa" 2011 9 *SA Journal of Human Resource Management* 1 1.

196 *Ibid*.

197 Rasool and Botha 2011 *SA Journal of Human Resource Management* 3. Harmony Gold Mine provided 96 per cent of its workers with training in 2015. The training and development programmes included "skills development, adult education and training, a bridging school, learnerships, bursaries, graduate development, talent management and supervisory and leadership development". AngloGold Ashanti is also involved in skills development, which it offers its workers as well as the community where the mine is situated. It offers bursaries, learnerships, internships, work exposure, vacation programmes and graduate training. The bursaries are targeted at mining specialists (Melass "In Training" https://www.miningdecisions.com/sustainability/in-training/ (accessed 2019-10-03)).

198 Preamble of 28 of 2002.

199 Centre for Applied Legal Studies (CALS): The Social Labour Plan Series 2016 *Phase 1: System Design Trends Analysis Report* 14.

200 S 22(1) and (1)(*a*) of 28 of 2002.

201 Regulation 42(1)(a) of 28 of 2002 and Department of Mineral Resources *Guidelines for the Submission of a Social and Labour Plan* (2010) 4.

202 S 25(2)(*f*) of 28 of 2002.

and "ensure that holders of mining rights contribute towards the socio-economic development of the areas in which they are operating".[203]

Mining companies have "to develop and implement comprehensive Human Resources Development Programmes", among other plans.[204] The human resource development programme's primary objective "is to ensure development of requisite skills in respect of learnerships, bursaries (of core and critical skills), artisans, ABET training and other training initiatives reflective of demographics".[205] The skills that need to be provided to mineworkers are not limited to skills needed to work on the mines but also skills that can be used once the mine has closed.[206] The skills development plan needs to comply with skills development legislation.[207]

This ensures that the mining company includes the sustainability of the community in its plan for the duration of the mine's operation.[208] The plan is drafted in consultation with the mining community.[209] An annual report showing compliance with the social and labour plan must be submitted to the Director-General by the holder of the mining right[210] and to the regional manager or designated agency.[211] The social and labour plan is binding on the mining company that holds the mining right, and if there is non-compliance, the mining right can be suspended.[212]

Leon is of the view that social and labour plans are unworkable and do not provide guidance on how to reach the outcomes mentioned in the social and labour plan.[213] The lack of guidance on these issues can make it difficult for mining companies to comply and leads to the plan not being carried out fully. The plan is viewed as a mere means to get a mining licence and is not completed to benefit the mining community.[214]

Many social and labour plans are vague on how a community can hold a mining company accountable for what is provided in the social and labour plan.[215] Some community members wish to engage with the other role players but lack the expertise to engage in the discussions owing to the technical nature of mining.[216] Language is also a barrier in these communities because not all members speak fluent English.[217] Mining

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203 Regulation 41 of 28 of 2002.

204 Department of Mineral Resources *Guidelines for a Social and Labour Plan* 4.

205 Department of Mineral Resources *Guidelines for a Social and Labour Plan* 8.

206 Rogerson "Mining Enterprise, Regulatory Frameworks and Local Economic Development in South Africa" 2011 5 *African Journal of Business Management* 13373 13375.

207 Department of Mineral Resources *Guidelines for a Social and Labour Plan* 8.

208 Regulation 41 of 28 of 2002.

209 Meyersfeld "Empty Promises and the Myth of Mining: Does Mining Lead to Pro-Poor Development?" 2017 2 *Business and Human Rights Journal* 31 39.

210 Department of Mineral Resources *Guidelines for a Social and Labour Plan* 6.

211 Rogerson 2011 *African Journal of Business Management* 13375.

212 S 93 of 28 of 2002.

213 Leon "Marikana, Mangaung and the Future of the South African Mining Industry" 2013 *Journal of Energy and Mineral Resources Law* 171 186.

214 Leon 2013 *Journal of Energy and Mineral Resources Law* 186.

215 Lamola *A Critical Analysis of the Enforceability of Social and Labour Plans in the South African Mining Industry* (master's dissertation, University of Pretoria) 2017 36.

216 Howard 2014 *SALJ* 20.

217 *Ibid*.

companies face certain consequences if they do not comply with their social and labour plans – for instance, a mining company's licence may be withdrawn or revoked by the Minister of Mineral Resources.[218] However, this sanction is rarely invoked. Moreover, without guidelines on the level or target that needs to be fulfilled, only a complete failure to comply is regarded as non-compliance.[219]

4 2 The impact and relevance of the Fourth Industrial Revolution on skills shortages and skills development in the mines

In South Africa, research has begun on 4IR and its impact on the workforce,[220] but there are no processes in place to "ensure employment creation in the digital age".[221] According to Heald, "[n]ew skills, trades, jobs, professions and careers will need to be designed from scratch".[222] It will be necessary to ensure that income earned from flexible employment is predictable so as to create employment security.[223]

A lack of skills leads to productivity problems,[224] which will be more apparent in 4IR where new skills will be necessary to perform certain tasks; without the availability of these skills, the mines will not be able to run efficiently. Jobs that are repetitive and are predictable will be carried out by robots.[225] Technical skills could become redundant in the mining sector because most tasks require such skills.[226] The World Economic Forum identifies the skills challenges as "skills mismatches and skills redundancy".[227]

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218 Lamola *A Critical Analysis* 40.

219 Lamola *A Critical Analysis* 41.

220 Campbell "Fourth Industrial Revolution Centre Launched in South Africa" https://www.engineeringnews.co.za/article/fourth-industrial-revolution-centre-launched-insouth-africa-2019-04-16/rep_id:4136 (accessed 2019-07-15); Gavaza "Fourth Industrial Revolution Summit Opens in Midrand" https://www.businesslive.co.za/bd/national/2019-07-05-fourth-industrial-revolution-summitopens-in-midrand/ (accessed 2019-07-15); Author unknown "President Cyril Ramaphosa Highlights the Fourth Industrial Revolution in SA" https://albertonrecord.co.za/217169/president-cyril-ramaphosa-highlights-fourth-industrialrevolution-sa/ (accessed 2019-07-15); Shapshak "South Africa Prepares for 4IR and 'More Entrepreneurial' Govt" https://www.forbes.com/sites/tobyshapshak/2019/07/12/south-africa-prepares-for-4ir-andmore-entrepreneurial-govt/#6f01746c38cd (accessed 2019-07-15).

221 Heald *Why Is Collective Bargaining Failing in South Africa?* 42.

222 Heald *Why Is Collective Bargaining Failing in South Africa?* 35.

223 *Ibid*.

224 Badri *et al* 2018 *Safety Science* 407.

225 Khoosal "Don't Panic, it's Just the Fourth Industrial Reshuffling" https://www.businesslive.co.za/bd/opinion/2019-05-29-dont-panic-its-just-the-fourthindustrial-reshuffling/ (accessed 2019-08-27).

226 World Skills Conference 2019 *Mission Talent–Mass Uniqueness: A Global Challenge for One Billion Workers* (2019) 22.

227 World Skills Conference 2019 *Mission Talent– Mass Uniqueness: A Global Challenge for One Billion Workers* 18. A skills mismatch occurs if the present skill does not meet the skills needed. In South Africa, highly qualified individuals do jobs that require a lower qualification. Skills redundancy is when a person has skills that are no longer required – for

Role players should predict what skills will be needed and develop programmes specifically to cover the development of such skills.[228] It is necessary to implement teaching, learning and training in the latest technologies in order to equip the current and future workforce.[229] The retraining of existing workers is necessary if unemployment levels are to be decreased.

The training has to be aimed at developing a combination of conventional task-associated expertise with computer skills.[230] Trade unions can play a role in negotiating on the retraining of the current workforce.[231] It is important that mineworkers have the skills needed to operate the new machinery; otherwise, there could be a negative impact on the safety of the mine and workers. If the transformation is not well managed, it has the potential to widen the skills gap.[232]

New skills are difficult to acquire for an ageing population and even more difficult for a workforce that lacks the necessary schooling to enlist in programmes to learn new skills;[233] the mining sector consists mainly of unskilled or semi-skilled workers who have not finished school.

Job losses are a major challenge that is worsened by the current unemployment rate.[234] Job loss is likely to affect low-skilled workers, mostly from previously disadvantaged groups.[235] The mining sector expects "to see a reduction in their workforce due to automation".[236]

Research has shown that highly skilled and high-value employees are undergoing re-skilling and up-skilling,[237] although it is the jobs of the low-skilled that are threatened by automation. Also, the up-skilling of low-skilled workers will lead to lifelong learning becoming a reality.[238]

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instance, carrying out repetitive tasks (World Skills Conference 2019 *Mission Talent–Mass Uniqueness: A Global Challenge for One Billion Workers* 18 and 19).

228 Manda and Dhaou "Responding to the challenges and opportunities in the 4th Industrial revolution in developing countries" 2019 *Association for Computing Machinery* 246.

229 Ncube "The Fight of Labour Unions for Relevance" https://www.news24.com/MyNews24/the-fight-of-labour-unions-for-relevance-20190208 (accessed 2019-07-16).

230 Lorenz, Rüßmann, Strack, Lasse, Bolle "Man and Machine in Industry 4.0: How Will Technology Transform the Industrial Workforce Through 2025?" 2015 *The Boston Consulting Group* 22 and European Commission "Factories of the Future: Multi-Annual Roadmap for the Contractual PPP under Horizon 2020" *European Factories of the Future Research Association (EFFRA)* 136 as cited in Badri *et al* 2018 *Safety Science* 407.

231 Ncube https://www.news24.com/MyNews24/the-fight-of-labour-unions-for-relevance-20190208.

232 World Economic Forum *The Future of Jobs Report* (2018) 17.

233 Lorenz *et al* 2015 *The Boston Consulting Group* 22 and European Commission *European Factories of the Future Research Association (EFFRA)* 136 as cited in Badri *et al* 2018 *Safety Science* 407.

234 Manda and Dhaou 2019 *Association for Computing Machinery* 247.

235 Manda and Dhaou 2019 *Association for Computing Machinery* 450.

236 World Economic Forum *The Future of Jobs Report* 17.

237 Bain and Company *Labor 2030: The Collision of Demographics, Automation and Inequality* (2018); McKinsey & Company *Skill Shift: Automation and the Future of the Workforce* Discussion Paper, McKinsey Global Institute (2018); Barclays *Robots at the Gate: Humans and Technology at Work* (2018) as cited in World Economic Forum *The Future of Jobs Report* 14.

238 World Economic Forum *The Future of Jobs Report* 14.

A highly skilled workforce is necessary for a country to be successful in 4IR,[239] which presents a problem for South Africa. Statistics South Africa estimates that 30 per cent of workers in South Africa are unskilled, 46 per cent are semi-skilled and only 24 per cent are skilled.[240] This situation needs to change; skilling and re-skilling needs to be made a priority.[241] High levels of unemployment and skills shortages lead to illegal mining, which is unsafe for the miners.

Even in the event that automation affects only specific tasks, many workers do not have the right skills to adapt to new technologies, thus negatively affecting wages as well as job quality.[242] The workforce needs to be agile and equipped with futureproof skills.[243]

The World Economic Forum holds the view that humans will not be replaced but will be augmented by machines.[244] In this process, automation enhances and complements human strength, enabling a worker to reach full potential and gain a competitive advantage and free workers from routine and repetitive tasks.[245]

Government, trade unions and companies need to cooperate in deciding on job creation.[246] Businesses will need to partner with other role players in order to manage the "large-scale retraining and upskilling challenges ahead".[247] Government is to incentivise lifelong learning by "ensuring shared standards for retraining".[248] They need urgently to "address the problem of the future of employment".[249] Trade unions play a role in the development of the social and labour plan in voicing the concerns of their members and by monitoring the plan to ensure that obligations are met.[250]

Social and labour plans can help with saving jobs and the up-skilling of workers. Currently, these plans focus on job losses related to mine closures but can be expanded to incorporate job losses as a result of automation and operational requirements. Non-compliance with the social and labour plan should result in stricter sanctions to ensure promises are kept and that the social and labour plan is not drawn up merely for the sake of getting a

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239 Manda and Dhaou 2019 *Association for Computing Machinery* 249.

240 Stats SA *Quarterly Labour Force Survey* 2018 as cited in Manda and Dhaou 2019 *Association for Computing Machinery* 249.

241 Manda and Dhaou 2019 *Association for Computing Machinery* 249.

242 World Economic Forum *The Future of Jobs Report* 12.

243 Shook and Knickrehm "Harnessing Revolution: Creating the Future Workforce" 2017 *Accenture Strategy* as cited in World Economic Forum *The Future of Jobs Report* 7 and 12.

244 World Economic Forum *The Future of Jobs Report* 10.

245 World Economic Forum *The Future of Jobs Report* 10.

246 Smith "Govt Must Work With Business, Unions to Create Jobs – Gareth Ackerman" https://www.fin24.com/Companies/Retail/govt-must-work-with-business-unions-to-createjobs-gareth-ackerman-20190331 (accessed 2019-08-27).

247 World Economic Forum *The Future of Jobs Report* 14.

248 McKinsey & Company *Skill Shift: Automation and the Future of the Workforce* as cited in World Economic Forum *The Future of Jobs Report* 14.

249 Heald *Why Is Collective Bargaining Failing in South Africa?* 56.

250 CALS "Social and Labour Plan Mining Community Toolkit" https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/environment/resources/SLP%20Community%20Toolkit%202%20March%202017.pdf (accessed 2019-08-11) 11.

mining right but benefits workers whose jobs are threatened by automation. Job losses in 4IR will put a strain on the Unemployment Insurance Fund as large-scale pay-outs will create problems in the system. Youth unemployment needs to be addressed if political unrest and violence are to be avoided.[251] The situation will be aggravated if there is little effort to re-skill and retrain employees, and so it is necessary to invest in such programmes and it is vital that they run the whole life span of employment.[252] Businesses and employees need to play an active role in retraining and re-skilling and employees must be involved in a lifelong learning plan.[253]

5 CONCLUSION AND RECOMMENDATIONS

5 1 Recommendations

5 1 1 Collective bargaining and strike action

It is recommended that a good collective bargaining system be in place to consider the views and opinions of all. Collective bargaining should be compulsory in situations where an employer considers automating their business.

The LRA and other laws should be developed to cater for individual bargaining as there is a change from full-time to part-time employment.

More role players, such as academics, should be included in social dialogue[254] as they could offer an unbiased opinion in finding solutions to problems that are not apparent to those directly involved. Worker participation should be encouraged, especially in situations dealing with technological change that directly affects them.

Multimedia platforms and the Internet are a means of assisting collective bargaining and negotiations as well as organising labour.[255] It allows the collective bargaining process to take place anywhere and leads to an easing of communication barriers during negotiation.

With the possibility of trade unions being obsolete in the future, their role needs to be revisited and perhaps afforded greater protection in terms of legislation.

Strike actions might increase, and workers might be retrenched based on operational requirements. In this regard, workers may need greater protection from retrenchment. Legislation needs to be enacted that would make it difficult for employers to replace employees who take part in a protected strike from being replaced by automation. The definition of the term "strike" needs to be reconsidered and be extended to the circumstances of employees who work from home and to temporary employees. It can be achieved by extending the definition of "employee" as

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[251] Heald *Why Is Collective Bargaining Failing in South Africa?* 13.

[252] *Ibid*.

[253] Heald *Why Is Collective Bargaining Failing in South Africa?* 129.

[254] ILO *A Reflection on the Future of Work and Society* 9.

[255] Heald *Why Is Collective Bargaining Failing in South Africa?* 40.

well as "strike" to accommodate workers who do not fall under the traditional definitions covered in the LRA.

5 1 2 Occupational health and safety

It is recommended that new models of risk analysis be created to monitor and prevent occupational health and safety risks.[256] Consideration needs to given to new management standards that are flexible and agile.[257] Workers should be included in occupational health and safety management.[258] Mining companies should have an in-house framework for occupational health and safety[259] to detect risks on time. A common value system should guide health and safety issues.[260]

A system, preferably online, should provide information on health and safety risks and make it possible for mine owners to obtain information from other mines.[261] Temporary workers need to be included in the ambit of occupational health and safety legislation and they need to be made aware that they are covered by the legislation.

Mental health issues will be common in the workplace and need to be addressed in legislation.[262] Employers will need to develop ways to deal with mental health issues. It will be necessary to consider the matter of responsibility in the case of technological malfunction in order to control the burden on compensation funds. There should be a fund that compensates employees if they are injured operating new machinery. Lastly, a universal labour guarantee needs to be enacted to ensure the workplace is safe and healthy[263] as workers may be jeopardised if pressed to reach a certain target by methods perhaps not in compliance with regulations.

5 1 3 Skills development

A process needs to be in place that assists in employment creation in 4IR.[264] Temporary employees' income should be made more predictable.[265] Wages should not be negatively impacted by 4IR. Key role players need to consider what skills will be needed and develop programmes that supply those skills.[266] Existing workers need to be retrained and re-skilled if they are to keep their jobs. The SDLA will need to be revisited and new guidelines on

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256 Badri *et al* 2018 *Safety Science* 405.

257 Badri *et al* 2018 *Safety Science* 408.

258 Bluff *et al OHS Regulation for a Changing World of Work* 45 and 49.

259 Badri *et al* 2018 *Safety Science* 407.

260 World Economic Forum *Values and the Fourth Industrial Revolution* http://www3.weforum.org/docs/WEF_Values_and_the_Fourth_Industrial_Revolution_WHITEPAPER.pdf (accessed 2018-10-11) as cited in Chia *et al* 2019 *American Journal of Industrial Medicine* 278.

261 Badri *et al* 2018 *Safety Science* 408.

262 Leka and Jain 2010 *World Health Organization* 136 as cited in Badri *et al* 2018 *Safety Science* 407.

263 ILO *Global Commission on the Future of Work* 38.

264 Heald *Why Is Collective Bargaining Failing in South Africa?* 42.

265 Heald *Why Is Collective Bargaining Failing in South Africa?* 35.

266 Manda and Dhaou 2019 *Association for Computing Machinery* 246.

funding for training provided. Trade unions can negotiate the retraining of all workers. Job losses on the mines should be mitigated by specifically directed training programmes but should not be restricted to mine-related skills. This can be done in terms of a social and labour plan.

There should be investment in developing highly skilled workers and the programmes should take a long view by equipping workers with skills that are flexible and agile. Education systems should provide training, easing the burden on employers and offering a focused structure.

Key role players need to be involved in job creation and in deciding how the goal is to be achieved.[267] Businesses and employers need to be involved in the retraining and re-skilling of employees[268] and employment programmes should be implemented by government.[269]

Government needs a financing mechanism that pays workers when they undergo training. Alternatively, workers could be entitled to a certain number of training rights.[270] Workers need support during the transition to 4IR and there should be investment in institutions, policies and strategies that provide support.[271]

Older workers should have a choice as to whether they wish to be economically active or not and working conditions should be favourable for their continuing to work.[272] SETAs can identify the specific skills needed in the mining sector and implement the relevant skills-development plans.

A new fund should be established to pay for the training and re-skilling of workers, and employers that plan on automating should contribute to it. The fund should be provided for in separate legislation and contain detailed provisions on its funding and what type of training and learning it will finance, thus lessening the burden on SETAs. The training and learning financed by the fund should be aimed at skills needed in 4IR.

Lastly, the Department of Labour should offer services to vulnerable workers; automation has the potential to make most mineworkers vulnerable and in need of the assistance envisaged in terms of the Employment Services Act 4 of 2014.[273] This Act should be used to benefit all workers who lose their jobs and specific programmes for mineworkers should be developed.

5 2 Conclusion

South African labour legislation covers numerous aspects that impact labour relations and the workforce. It makes sufficient provision for collective

[267] Smith https://www.fin24.com/Companies/Retail/govt-must-work-with-business-unions-to-createjobs-gareth-ackerman-20190331.

[268] Heald *Why Is Collective Bargaining Failing in South Africa?* 129.

[269] ILO *Global Commission on the Future of Work* 32.

[270] ILO *Global Commission on the Future of Work* 31.

[271] ILO *Global Commission on the Future of Work* 32.

[272] ILO *Global Commission on the Future of Work* 33.

[273] The aims of the Employment Services Act (ESA) include providing for public employment services; finding ways to promote employment of young work seekers and vulnerable persons; and helping people retain their employment in distressed companies.

bargaining and strikes, occupational health and safety and skills development. However, the laws are not implemented in a way that gives full effect to the purposes of such legislation. Role players lack the knowledge and expertise needed to carry out the law. The arrival of 4IR will bring many changes to the world of work that need to be taken into consideration in examining the current legislative framework. This study has found that 4IR will impact the labour laws in the mining sector and that changes will need to be made in order to protect workers.

The reality of 4IR will have an impact on the future world of work, which can either be positive or negative depending on whether the role players are proactive in finding solutions to the problems that the mining sector labour force faces. For that reason, it is important to consider seriously the findings of this analysis and its recommendations.

PREDATORY PRICING: SINGLE-FIRM DOMINANCE, EXCLUSIONARY ABUSE AND PREDATORY PRICES (PART 3)

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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 the Competition Amendment Act 18 of 2018. In light of these developments, this three-part series of articles evaluate the law relating to the economic concept of predatory pricing under the Competition Act. In this context, the crucial elements of dominance and abuse are also discussed. The first in this series of three articles critically evaluated the law on the determination of single-firm dominance under section 7 of the Competition Act. The second article discussed the basic forms of abuse, the meaning of abuse, tests that have been developed to identify exclusionary conduct, the criticism of the traditional theory of predatory pricing, the main strategic economic theories of predatory pricing and non-pricing theories of predation. This article focuses on the law of predatory prices under section 8(1)(*c*) and 8(1)(*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 which gives effect to the purposes set out in section 2. In light hereof and where appropriate, the South African position is mainly compared with the position in the European Union and the United States.

1 INTRODUCTION

The broad idea behind predatory pricing is that a dominant firm sets prices for goods or services at such a low level that it deliberately incurs losses or foregoes profits relative to alternative commercial behaviour not involving predatory behaviour. The effect is to exclude or foreclose, or be likely to exclude or foreclose, one or more of the firm's actual or potential competitors. In turn, this allows the firm to strengthen or maintain its market power, thereby causing consumer harm. From an enforcement perspective, an assessment of a predatory pricing case requires a balancing act between over-enforcing the prohibition, which entails the possibility of higher prices for goods and services, and under-enforcing it to the benefit of large firms aiming to strengthen or maintain their market power in the market.

The first two articles in this three-part series focused on the legal analysis of dominance and abuse, respectively. In light of the series of *Media24* cases,[1] the subsequent commencement of the Competition Amendment Act 18 of 2018 (Amendment Act), modern economics and competition law experience in the United States (US) and the European Union (EU), the main aim of this article is to discuss the legal elements of the economic concept of below-cost predatory pricing under the Competition Act 89 of 1998 (the Act).[2] Discussion under heading 2 concerns the aims and purposes of the Act relative to predatory pricing. Heading 3 discusses the legislative difference in predatory pricing cases falling under section 8(1)(*d*)(iv) or 8(1)(*c*). Heading 4 sets out general and specific issues that are usually considered in the identification of a theory of harm based on predatory pricing. Heading 5 discusses the main cost benchmarks used to determine whether a dominant firm has engaged in predatory pricing under section 8(1)(*d*)(iv) or 8(1)(*c*). Heading 6 discusses whether a predatory intention translates into feasibility of excluding competition. Heading 7 provides a conclusion.

2 AIMS AND PURPOSES OF THE ACT

The Act recognises that competition between firms is highly desirable. Generally, competition encourages efficiency, innovation, improved product choice and lower prices.[3] Price competition between firms encourages consumers to switch from their competitors' goods or services to other firms' goods or services. This is regarded as normal competition or competition on the merits. However, the Act also recognises that there is a boundary line when these exceptionally low prices become harmful to competition and

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1 *Competition Commission of South Africa v Media 24 (Pty) Limited* [2019] ZACC 26 (*Media24 (CC)*; *Media 24 Proprietary Limited v Competition Commission of South Africa* 146/CAC/Sep16 (*Media24 (CAC)*) and *Competition Commission of South Africa v Media 24Limited* CT 013938/CR154Oct11 (*Media24 (CT)*).

2 The article intentionally avoids technical criticisms and debates of complex aspects of predatory pricing, such as how the effect of an alleged predatory price should be determined, what defences the respondent should be allowed to raise, and how the onus of proof should be allocated. Above-cost predatory pricing also falls beyond the ambit of this article.

3 S 2 of 89 of 1998.

thus, in the long run, to consumers. This type of below-cost pricing will have the effect of excluding competitors from the market, which increases the likelihood of firms becoming dominant, industry concentration and ultimately the formation of monopolies, which harms consumer welfare.

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. The prohibitions of predatory pricing under section 8(1)(*c*) and (*d*)(iv) are example of legal instruments used in the *ex post* regulation of predatory pricing as an exclusionary abuse. *Ex post* regulation in this context is not an easy task. Approaches to evaluating whether predation has occurred are often criticised as being over-inclusive, in that they implicate innocent firms in predation, or as being under-inclusive, in that they fail to identify firms that are genuinely engaging in predation to the detriment of competition.[4] Thus, any approach taken to prevent predatory pricing needs to find a balance between over- and under-enforcement, while simultaneously fulfilling the purposes of the Act.

Section 2 of the Act envisages this desired balance. While competitive prices and product choices are important, so is the protection of small and medium-sized businesses. Therefore, any approach to prohibiting predatory pricing must avoid over-inclusion as this will harm the ability of firms to set competitive prices, while simultaneously not being under-inclusive as this makes it easy for dominant firms to force small and medium-sized competitors to exit the market.

3 PREDATORY PRICING UNDER SECTION 8

Section 8(1)(*d*)(iv) of the Act sets out a specific prohibition against predatory pricing. In particular, the Amendment Act made changes to section 8(1)(*d*)(iv) by providing that it is prohibited for a dominant firm to sell goods or services at predatory prices. "Predatory prices" means prices for goods or services[5] below the firm's average avoidable cost or average variable cost. Section 8(1)(*d*)(iv) makes it clear that there are two tests that may be applied in order to determine the existence of predatory pricing – namely, a cost benchmark of average avoidable cost and of average variable cost. Interestingly, before the commencement of the Amendment Act, marginal cost and average variable cost were the relevant cost standards. Shortly before the Act became law, a further influential approach was developed by William Baumol[6] – namely, the cost benchmark of average avoidable cost. It is probably for this reason that section 8(1)(*d*)(iv) used marginal cost and average variable cost as benchmarks but did not include average avoidable

4 Mackenzie "Are South Africa's Predatory Pricing Rules Suitable?" (September 2014) http://www.compcom.co.za/wp-content/uploads/2014/09/Neil-Mackenzie-Predatory-Pricing-in-SA.pdf (accessed 2015-03-22) 3, 5 and 6.

5 S 1 of 89 of 1998 provides that "goods or services", when used with respect to particular goods or services, includes any other goods or services that are reasonably capable of being substituted for them, considering ordinary commercial practice and geographical, technical and temporal constraints.

6 Baumol "Predation and the Logic of Average Variable Cost Test" 1996 39 *Journal of Law and Economics* 49.

cost in the provision at that time.[7] A dominant firm contravenes this section if it charges a price that is below its average avoidable cost or average variable cost, and which has an anti-competitive effect, and if such anti-competitive effect is not outweighed by technological, efficiency or other pro-competitive gains.

Section 8(1)(*c*), on the other hand, prohibits unjustified exclusionary acts not listed in section 8(1)(*d*)(iv) that have an overall anti-competitive effect.[8] In *Nationwide Airlines (Pty) Ltd v South African Airways (Pty) Ltd*,[9] the Competition Tribunal said in its interpretation of section 8(1)(*d*)(iv) that its approach is first to limit the scope of the subsection by critically construing any evidence when considering a complaint of predation under that section. Then, unless it is shown unequivocally that the respondent is pricing below the prescribed cost levels, it would not make a finding under section 8(1)(*d*)(iv) but consider the complaint in terms of section 8(1)(*c*).

Section 8(1)(*c*) is, therefore, a more expansive catch-all provision in respect of other acts or forms of exclusionary conduct not covered by section 8(1)(*d*). In *Competition Commission of South Africa v Senwes Limited*,[10] the Constitutional Court held that an exclusionary act must fall outside the scope of section 8(1)(*d*) for it to be prohibited by section 8(1)(*c*). It follows that a complaint of predatory pricing brought in terms of section 8(1)(*c*) may not be found on the cost benchmarks prescribed in section 8(1)(*d*)(iv). This also means that other non-pricing forms of predation are captured by section 8(1)(*c*), as opposed to section 8(1)(*d*).

4 IDENTIFYING THE THEORY OF HARM

4 1 General factors relevant to finding an exclusionary abuse

In general, the following considerations are relevant when assessing whether a credible theory of harm applies to the conduct of a dominant firm:[11]

(a) the nature and structural features of the market in which the alleged abuse takes place;

(b) the extent to which actual or potential competitors are exposed to the possibility of exclusionary conduct in that market;

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7 *Media 24 (CC) supra* par 33.

8 *Competition Commission of South Africa v Senwes Limited* CCT 61/11 [2012] ZACC 6 par 27–28.

9 92/IR/OctOO 10.

10 *Supra* par 28.

11 Bellamy and Child *European Union Law of Competition* 8ed (2018) 895–896; European Commission Communication – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] *OJ* C45/7 (The Guidance Paper) par 20; Case C-413/14 P *Intel Corporation Inc. v European Commission* EU:C:2017:632 par 136 and see *Intel Corporation Inc. v European Commission* EU:C:2016:788 par 122–172 of Advocate General Wahl's opinion, which includes detailed discussion of factors relevant in considering an allegation of abuse.

(c) how far the dominant firm's degree of market power has already weakened competition in the market;
(d) the extent to which the conduct in issue further weakens competition with the dominant firm in the relevant market or strengthens the position of that firm in a connected market;
(e) the direct and indirect effect of the conduct on end-consumers, including, where appropriate, a counterfactual analysis to illustrate the likely impact of the conduct at issue;
(f) how far the conduct reflects a transitory response to a competitive threat as against a systematic attempt (to exclude or discipline competitors) that threatens to impose a long-term impediment to effective competition;
(g) the extent to which a dominant firm can be seen to be "leveraging" its market power in order to place competing firms at a significant disadvantage in parts of the market (or related markets) that are in principle contestable; and
(h) whether the exclusionary effect of the conduct in issue is proportionate to any legitimate commercial interest or, perhaps, public policy objective that may be identified as an "objective justification".

4 2 Specific issues relevant in identifying predatory pricing

A predation case typically involves some combination of the following specific issues:[12]

(a) whether the alleged predator set prices below some relevant measure of cost where these cost tests divide into those where the cost threshold is some type of marginal cost, and those that use some type of average cost that also includes fixed costs/overheads;
(b) whether the alleged predator deviated from short-run profit maximisation while the prey was still in the market, which should include a consideration of the extent to which the alleged predator is treating its customers and competitors less favourably than its own subsidiaries or related companies;
(c) whether there is a realistic possibility that the predator will be able to recoup the cost of predation where the cost of predation can be thought of as actual losses sustained, on a marginal or average cost basis or the "opportunity cost" losses, or profit-sacrifice, compared to the profit that would be achieved under an alternative short-run profit maximisation strategy;
(d) the proportion of customers who are offered lower prices or, stated differently, the proportion of the market that is likely to be foreclosed;
(e) whether there is evidence of predatory intent or whether the dominant firm's conduct constitutes a legitimate and proportionate response to competing firms; and

[12] See *Media24 (CC) supra*; *Media24 (CAC) supra*; *Media24 (CT) supra*; *Nationwide Airlines v South African Airways (Pty) Ltd* [2001] ZACT 1.

(f) whether the alleged victim of the predatory conduct is as efficient as the alleged predator and, if not, whether the predatory strategy would still have been successful if the prey had been as efficient as the alleged predator.

5 COST-BASED TESTS FOR PREDATION

Cost-based tests are the most commonly used indicators in predatory pricing cases to discriminate between competitive price-cutting and unreasonably low prices that are predatory. Since the basic premise is that firms act to maximise profit, these economic cost tests seek to identify the various costs incurred by a firm in producing goods or services and which ultimately determine total revenue. Pricing below a particular cost standard indicates that a firm is not recovering all of the costs incurred in producing a product. The intuition underpinning cost benchmarks could be thought of as a method for identifying pricing at a level that has no legitimate business purpose. In this context, these standards are useful in establishing whether predation has taken place, because they point to a profit sacrifice on the part of the dominant firm.

5 1 The principal cost measures under the Act

There are five cost standards relevant to the determination of predatory pricing under section 8(1)(*d*)(iv) or section 8(1)(*c*) of the Act. They are at the core of the European case law based on *AKZO Chemie BV v Commission of the European Communities*[13] and the US approach deriving from the Areeda-Turner test.[14] These are: (i) marginal cost; (ii) average variable cost; (iii) average avoidable cost; (iv) long-run average incremental cost; and (v) average total cost. As stated, the second and third are the standards applicable to complaints brought under section 8(1)(*d*)(iv), while the remaining three remain relevant to complaints brought under section 8(1)(*c*).

5 1 1 Marginal cost

Marginal cost is the cost of producing one additional unit of output. Marginal cost is a function of variable costs only, since fixed costs, by definition, do not vary according to output. The marginal cost of a unit of output and the average cost of all units of output can differ.

5 1 2 Average variable cost

According to section 1 of the Act, "average variable cost" means the "sum of all the costs that vary with an identified quantity of a particular product, divided by the total produced quantity of that product". Examples of variable costs include fuel, electricity, transport, distribution and raw materials.

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13 [1991] ECR I-03359.

14 Areeda and Turner "Predatory Pricing and Related Practices Under Section 2 of the Sherman Act" 1975 88 *Harvard Law Review* 697.

5 1 3 Average avoidable cost

In terms of section 1 of the Act, "average avoidable cost" means the "sum of all costs, including variable costs and product-specific fixed costs, that could have been avoided if the firm ceased producing an identified amount of additional output, divided by the quantity of the additional output". Unlike long-run average incremental cost, this cost measure omits all fixed costs that were already sunk before the time of the predation. Consequently, average avoidable cost will generally be lower than long-run average incremental cost. In sum, average avoidable cost consists of the firm's average variable cost plus fixed costs that would be avoided if the firm ceased production.

5 1 4 Long-run average incremental cost

Long-run average incremental cost refers to the fixed costs and variable costs a firm incurs when it starts supplying a new product, averaged out over the units of output supplied. It includes all costs that are "incremental" to the production of a particular product. All costs that can be attributed to the relevant product, including any sunk costs of entry, are included under this cost measure, but it excludes all joint or common costs. Therefore, long-run average incremental cost consists of the firm's average avoidable cost plus the sunk costs incurred on entering the market.

This cost measure is often used in the context of regulated network industries, which have high barriers to entry but low operating costs, as it allows firms to average out the high sunk costs that they must recover with the low operating costs.

5 1 5 Average total cost

Average total cost consists of a combination of variable costs and fixed costs of production, which remain constant irrespective of changes in output, averaged out over the number of units produced. General examples include depreciation, interest and property taxes. Average total cost, therefore, includes long-run average incremental costs plus an allocation of joint and common costs.

5 2 The relevant time horizon

To a large extent, what is variable and what is fixed depends on the time horizon.[15] Equally, within fixed costs, the time horizon may affect whether a given cost component is viewed as sunk.[16] The longer the time horizon, the more cost components can be altered and are as such to be regarded as

[15] See further O'Donoghue and Padilla *Law and Economics of Article 102 TFEU* 2ed (2013) 295.

[16] O'Donoghue *et al Law and Economics of Article 102 TFEU* 294.

variable and avoidable.[17] In the very short-term, most costs are fixed or sunk.[18]

The implications of using a particular cost measure therefore depend on the time horizon over which they are assessed. Equally, the extent to which predation cases hinge on cost definitions ultimately depends on the relevant time horizon. This raises the question of what the correct time period is over which predation should be assessed. Although there is no widespread agreement on the relevant time period, most commentators agree that the correct period for assessing which costs are variable is the period over which the alleged predatory price(s) prevailed or could reasonably be expected to prevail.[19] It can be seen that the longer the time horizon over which the profitability of the investment is assessed the more likely it is that predation will be identified.

5 3 The principal cost-based tests for predatory pricing

There is no single cost-based test used by all competition authorities and, as described below, frequently competition authorities have used more than one measure. The most commonly cited approaches are discussed below.

5 3 1 Areeda-Turner test

Because of the difficulty of assessing the profit-maximising price level, Areeda and Turner argued for the use of marginal cost as the boundary line for determining predatory pricing, rather than the profit-maximising price level.[20] The Areeda-Turner test relies on marginal cost pricing to differentiate between competitive behaviour and anti-competitive predatory behaviour.[21] Accordingly, two pricing zones can be distinguished.[22] First, if a price is below marginal cost, there is a strong presumption of predatory and exclusionary behaviour since losses are made on each unit sold and the predator would make higher profits if it reduced output.[23] Secondly, if the price is equal to or above marginal cost, there is a presumption of legitimate behaviour, because profits are higher after the last sale compared to a situation of not making that sale at all.[24]

It is well known that the marginal cost of a firm may be difficult to measure. This empirical difficulty in implementing a "pure" Areeda-Turner test also results in an administrative impediment.[25] For this reason, Areeda

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17 *Ibid*.

18 *Ibid*.

19 See O'Donoghue *et al Law and Economics of Article 102 TFEU* 295 and the authorities cited at fn 9.

20 See Areeda and Turner 1975 *Harvard Law Review* 697 710–716.

21 Areeda and Turner 1975 *Harvard Law Review* 709.

22 *Ibid*.

23 Areeda and Turner 1975 *Harvard Law Review* 712; however, refer to heading 6 for an overview of possible defences.

24 Areeda and Turner 1975 *Harvard Law Review* 710–711.

25 Areeda and Turner 1975 *Harvard Law Review* 716.

and Turner suggested the use of average variable cost as a surrogate for marginal cost.[26] This is a good approximation – to the extent that marginal costs are roughly constant over the entire range of output, or if the firm in question produces near the point where average variable cost is at its minimum.[27] However, this approximation becomes difficult when the line between fixed and variable costs is blurred.

5 3 2 The AKZO test (and its refinement)

In *ECS/AKZO*,[28] the European Commission argued that, apart from the inherent difficulty of accurately establishing costs, a predation test based only on cost does not give sufficient weight to the strategic aspect of a dominant undertaking's price-cutting behaviour. In line with this argument, in its Sixteenth Report on Competition Policy published in 1987, the European Commission set out its policy towards predatory pricing practices.[29] Their view was that such practices must be considered to be part of an "abusive global strategy" aimed at eliminating other producers in an anti-competitive manner or at restricting their freedom of action. A firm's strategy has many dimensions and price is but one element among many. Consequently, a policy of deterring predatory pricing that does not take account of the context might cause certain firms to have recourse to different methods in order to achieve the same goals. In the *ECS/AKZO* decision, the European Commission applied this global approach to a strategy that sought to force the exit of a competitor.

On appeal, however, the European Court of Justice adopted a cost-based test approach,[30] which consisted of two rules. First, prices below average variable cost by means of which a dominant undertaking seeks to eliminate a competitor must be regarded as abusive. The Court of Justice reasoned that since each sale at a price below average variable cost would generate a loss (namely, the total amount of the fixed costs and at least part of the variable costs relating to the unit produced), a dominant undertaking has no interest in applying such prices unless to eliminate competitors so as to enable it subsequently to raise its prices by taking advantage of its position of market power. This rule has been somewhat refined in recent years to recognise the fact that rational business justifications can exist for prices below average variable cost.[31] Secondly, prices below average total costs, but above average variable costs, must be regarded as abusive if they are determined as part of a plan for eliminating a competitor. The Court of

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26 *Ibid*.

27 Areeda and Turner 1975 *Harvard Law Review* 717.

28 Case IV/30.698 *ECS/AKZO*, European Commission Decision of 14 December 1985, *OJ* L374/1 par 76–77.

29 Commission of the European Communities *Sixteenth Report on Competition Policy* 1987 par 336.

30 C-62/86 *AKZO Chemie BV v Commission of the European Communities* [1991] ECR I-03359 par 71–72.

31 Case C-202/07 *France Télécom SA v Commission of the European Communities* [2009] ECR I-02369 par 109–111; cf. Case C-209/10 *Post Danmark A/S v Konkurrencerådet* EU:C:2012:172 par 27 where the European Court of Justice said that prices below average variable costs must "in principle" be regarded as abusive.

Justice reasoned that such prices could drive from the market undertakings that are perhaps as efficient as the dominant undertaking but which, because of their smaller financial resources, are incapable of withstanding the competition waged against them. The extra element of intent is necessary, because reasons do exist, at least in the short-run, for a firm to price a product below average total cost, as opposed to pricing below average variable cost or average avoidable cost.

The Court of Justice adopted the average variable cost threshold of the Areeda-Turner test in its first rule but added another threshold at average total cost to address the scenario where the optimal profit-maximising or loss-minimising prices lie below average total cost and are as such not predatory. However, there are other situations where pricing between average variable cost and average total cost may be predatory – for instance, a profit sacrifice causing exit; the Court of Justice solved this problem in the grey zone between average variable cost and average total cost by looking at the intentions of the alleged predator. If there were evidence of exclusionary intent, then the presumption of legitimacy would cease to apply. In terms of this decision, a plan is usually shown first through direct evidence of intent arising from the dominant firm's documents, and second through indirect factors which, taken together, show an anti-competitive intention underlying the price-cutting.

5 3 3 The European Commission's Guidance Paper

In its Guidance Paper on enforcement priorities in applying Article 102, the European Commission proposes slightly different cost standards to the two *AKZO* rules. Rather than average variable cost, the European Commission uses average avoidable cost as the appropriate benchmark for assessing whether a firm is acting in a predatory manner.[32]

The implication is that if the revenues derived by a firm from a particular activity were less than the costs that the firm would save or avoid if it ceased that activity, then the firm would be better off ceasing the activity. So, if a firm is pricing below average avoidable cost, then it is making short-run losses relative to the alternative of not carrying out the activity at all.

In general, average avoidable costs will be above average variable costs because avoidable costs include fixed costs that are avoided by ceasing an activity. Avoidable costs differ from total costs in that they do not include common costs or costs that are fixed over the relevant time period. Thus, the European Commission will hold that a price below average avoidable cost should be considered as involving a sacrifice of short-run profits and is therefore predatory behaviour.[33]

The adoption of average avoidable costs as a benchmark has two immediate advantages over the use of average variable cost.[34] First, it avoids the problem of having to achieve a precise distinction between fixed and variable costs within the specific period. Secondly, it provides a more

[32] The Guidance Paper par 64.
[33] The Guidance Paper par 64–65.
[34] See Baumol 1996 *Journal of the Law and Economics* 49.

accurate measure of the avoidable losses than does average variable cost since it also includes the product-specific fixed costs that could be avoided by stopping the production of the product or service in question. As a result, it provides a clear reflection of whether it would be more profitable for the firm to terminate the production than to engage in predatory pricing.[35] However, average avoidable cost still encounters problems where predation has occurred over a long period of time, and it is difficult to determine which costs are avoidable and which are not.[36]

The European Commission's alternative to average total cost is long-run average incremental cost.[37] In many cases, long-run average incremental cost will be the same as average total cost. Where they will differ, however, is where a multi-product firm incurs some costs that are common to more than one product. Such costs are not incremental to any one product and so would not be included in long-run average incremental cost. Average total cost, however, typically includes an allocation of such common costs to each product. Where some costs are common across a number of products, there is no single economically correct way to allocate them and it would therefore not seem reasonable to find a firm guilty of predation on the basis that it is pricing below some essentially arbitrary measure of total product cost.

5 3 4 Section 8(1)(d)(iv)

The Amendment Act added the average avoidable cost measure as the legal test to help distinguish lawful price-cutting behaviour from anti-competitive below-cost pricing. This means that if a dominant firm fails to cover its average avoidable cost or average variable cost, the firm is incurring losses or foregoing profits and may be engaged in unlawful exclusionary conduct. The inclusion of average avoidable cost and average variable cost reflects the discussion above – that is, in most cases these costs will be the same. From an enforcement perspective, in cases where average variable cost and average avoidable cost are the same, the latter better reflects a possible profit sacrifice.

A dominant firm that charges predatory prices below average avoidable cost, but above average variable cost, will now face prosecution under section 8(1)(*d*)(iv) and not under section 8(1)(*c*), which was the case previously. However, the effect of the predatory pricing strategy will still have to be analysed before an adverse finding can be made. Depending on the situation, both cost measures present some practical difficulties, and the courts have to be practical and choose the test that is better suited to resolve the dispute.

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35 See The Guidance Paper par 64 fn 3, where the European Commission writes that in most cases the average variable cost and average avoidable cost will be the same, as often only variable costs can be avoided. However, in circumstances where they will differ, the latter better reflects possible sacrifice.

36 O'Donoghue *et al Law and Economics of Article 102 TFEU* 305.

37 The Guidance Paper par 67; see also O'Donoghue *et al Law and Economics of Article 102 TFEU* 307.

5 3 5 Media24, section 8(1)(c) and the role of intent

The Competition Commission investigated allegations of predatory pricing against Media24 in 2011 and then referred the complaint to the Competition Tribunal, alleging predatory pricing. The case presented by the Competition Commission was that Media24 had used Forum as a fighting brand. Forum was kept in the market with the sole purpose of charging prices that were lower than its competitors, who were then forced to exit the market. Once this task was completed, the fighting brand closed up shop. Media24 subsequently appealed to the Competition Appeal Court, and then the Competition Commission appealed to the Constitutional Court. The decisions of the Competition Tribunal,[38] Competition Appeal Court[39] and the Constitutional Court[40] primarily dealt with the question of whether pricing below average total cost could be predatory and, if so, under what circumstances, and they included a determination of the role of intent in the analysis.

(i) The Competition Tribunal decision

The case referred to the Competition Tribunal was based first on an alleged contravention of section 8(1)(*d*)(iv) of the Act, and in the alternative on a violation of section 8(1)(*c*). At that time, section 8(1)(*d*)(iv) still prohibited pricing below marginal cost or average variable cost. The Competition Tribunal found that Media24 had not priced its advertising below its average avoidable cost, and thus the Competition Commission failed to establish that Media24 had priced below the lower standards of average variable cost or marginal cost.[41] As a result, the Competition Tribunal made its determination using section 8(1)(*c*) and not section 8(1)(*d*)(iv).

The Competition Tribunal found that the Competition Commission had established that average total cost was an appropriate cost standard to use to evaluate predation in this case.[42] In particular, it held that Media24 had charged advertising prices for Forum below its average total cost, that it had intended to predate on GNN,[43] that Media24 had the ability to recoup what it had lost during this predation period and that GNN had not been excluded owing to its relative inefficiency. It found that Media24's actions had an anti-competitive effect and that there was no evidence of pro-competitive gain that outweighed this effect.[44] Consequently, the Competition Tribunal found that the Competition Commission had proved that Media24 had priced below

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38 *Media24 (CT) supra.*

39 *Media24 (CAC) supra.*

40 *Media24 (CC) supra.*

41 *Media24 (CT) supra* par 211.

42 *Media24 (CT) supra* par 221.

43 In *Media24 (CT) supra* par 222, the Competition Tribunal held that average total cost could be an appropriate costs standard for a finding under s 8(1)(*c*) when accompanied by additional evidence of predation. The Competition Tribunal evaluated the additional evidence under the following four headings: direct intention to predate, indirect intention to predate, recoupment, and the equally efficient competitor test.

44 *Media24 (CT) supra* par 621.

average total cost; this, coupled with "predatory intent", was a contravention of section 8(*c*).

(ii) The Competition Appeal Court decision

The Competition Appeal Court held that the test envisaged in section 8(1)(*c*) determines whether specific conduct amounts to an exclusionary act as defined in the Act, and that this is an objective test. The court held that subjective evidence of intent should not be examined in proving predatory pricing. Once such evidence was disregarded, average total cost was not an appropriate cost standard to use to illustrate that predatory pricing occurred. The Competition Appeal Court concluded:

> "There is no escaping the conclusion that predation must focus on the likely economic effect of pricing below a particular cost measure to determine whether the low prices are due to a lawful competitive response to rivals or to predation and unlawful behaviour rather than on the intention with which a pricing strategy is adopted."[45]

Having rejected using average total cost with intention as the suitable standard, the Competition Appeal Court stated that the only appropriate benchmark that had been relied upon by the Competition Commission in their pleadings was average avoidable cost. The Competition Appeal Court also rejected the Competition Commission's inclusion of hypothetical profits foregone by not pursuing an alternative business strategy.[46]

This does not mean that it is the only appropriate benchmark to apply to section 8(1)(*c*) in all cases, but rather that in this particular case it was the only appropriate test that remained. In light of its rejection of the average-total-cost-plus-intent test, the Competition Appeal Court did not have to consider the balance of the evidence concerning the intention of Media24. Accordingly, the appeal by Media24 was upheld as it could not be established that Media24 had violated section 8(1)(*d*)(iv) or 8(1)(*c*).

(iii) The Constitutional Court decision

Remarkably, the Constitutional Court decision was decided by 10 judges with four conflicting judgments, which resulted in no majority decision.

The first judgment consisted of three judges. Ultimately, the judgment would grant leave to appeal, uphold the appeal, and remit the matter to the Competition Appeal Court on the basis that the Competition Appeal Court's disregard of the evidence of predatory intent incorrectly limited the powers of the Competition Commission to prosecute matters. They reasoned that the competition authority should be able to use whichever cost benchmark was appropriate for the case at hand, including the average total cost standard when accompanied by sufficient additional evidence.

The second judgment consisted of four judges. Their judgment would dismiss the application for leave to appeal because the assessment of these

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45 *Media24 (CAC) supra* par 56.

46 *Media24 (CAC) supra* par 109.

expert economic issues is not appropriate to be determined by the Constitutional Court and gives rise to no constitutional question or a point of law in the public interest.

The third judgment comprised two judges and would grant leave to appeal, but for different reasons to the first judgment. However, they would dismiss the appeal because prohibiting pricing below average total cost would undermine the Act's objectives. They reasoned that unlike a complaint of prohibited predatory pricing pursued against a dominant firm under section 8(1)(*d*)(iv), the Competition Commission bears the onus under section 8(1)(*c*) to demonstrate that a dominant firm has engaged in an exclusionary act by implementing a predatory pricing strategy. The Competition Commission is, however, afforded significant scope under this catch-all section to advance an appropriate cost standard against which to measure a dominant firm's pricing practices. The court held that in the present matter, the Competition Commission had failed to advance such a test.

The fourth and final judgment of one judge concurred with the third judgment on leave to appeal and the first judgment on the merits.

Considering that the six judges under the first, third and fourth judgments granted leave to appeal, albeit for different reasons, leave to appeal was granted. However, since the six judges responsible for the second and third judgments did not uphold the appeal, again for differing reasons, the appeal was dismissed. This means that the Constitutional Court ultimately dismissed the appeal and that the Competition Appeal Court decision stands. Accordingly, when evaluating whether a firm's prices are below average total cost under section 8(1)(*c*), the role of predatory intent as an indicator to show a contravention is not considered. Equally, since the Amendment Act has amended section 8(1)(*d*)(iv) by prohibiting pricing below average avoidable cost and average variable cost, this means that the Competition Appeal Court and Constitutional Court decisions stand on the question of pricing below average total cost and the role of intent.

6 THE ROLE OF INTENT AND FEASIBILITY OF EXCLUSION

Predation analysis typically centres on the premise that pricing below a certain cost measure is an abuse. The firm appears to incur a loss on each unit sold and the sale therefore would seem to lack any obvious motive other than to drive out a competitor. However, it is widely accepted that there are many legitimate justifications for a firm to choose to price below average total cost, and now above average avoidable cost/average variable cost but below average total cost/long-run average incremental cost.[47] Some of the individual categories of commercial justification that have a reasonably clear meaning, depending on the circumstances, include introductory pricing and short-run promotions, "option value" systems (for example, "subsidised" printers), two-sided markets (for example, "subsidised" newspapers) and,

[47] O'Donoghue *et al Law and Economics of Article 102 TFEU* 343.

perhaps, mistake.[48] In dynamic industries, difficulties exist in distinguishing between investments in economies of scale, network effects, learning by doing, and investments in harming rivals (advantage-building versus advantage-denying).[49]

It might, therefore, be sensible to interpret a dominant firm's motive or predatory intention to be an issue relevant to assessing whether exclusion is feasible, as opposed to trying to second guess a firm's commercial thinking. In this assessment, relevant factors to consider would include whether scale, duration or the firm's low pricing behaviour is likely to have an impact on a competitor. Also, a credible theory of harm that shows that exclusion would be feasible should also show that the conditions are met for the strategic economic theories of predation – for instance, "financial predation" or "signalling theories of predation" – and should further include an analysis of the ease of entry and strength of non-foreclosed competitors.

7 CONCLUSION

Firms are thought to engage in predatory pricing exactly because they are not yet able to engage in setting prices above the competitive level. Predation is therefore a means to achieve a position of being able to raise prices by exercising market power. This typically involves sacrificing profits at an initial stage and then recouping the profit sacrifice and profits in excess of that sacrifice at a later stage. The key enforcement difficulty with predation is that it is easily confused with normal competition. A price reduction is not automatically predatory and, in fact, lowering prices can be a direct manifestation of intense competition. Accordingly, care must be applied in analysing predatory pricing cases so as to avoid a signal that prevents dominant firms from lowering their prices to the competitive level for fear of being charged with predatory pricing.

An important debate among lawyers and economists revolves around what the appropriate test is for predation. More precisely, what combination of factors combine to prove a coherent theory of harm based on predation. The legal jurisdictions of the US and EU and their systems of case law, as well as different decision makers within their regulatory agencies, have over time raised various combinations and permutations of requirements and have adopted variants within each condition as constituting proof of predation. Overall, the balance between competition law and economics on predation remains highly contradictory. However, it remains important to develop sound, clear, objective, effective, and administrable predatory pricing rules that enable firms to know in advance whether their price-cutting behaviour will result in liability under section 8(1)(*d*)(iv) or section 8(1)(*c*).

It is suggested that The Guidance Paper's average avoidable cost/long-run average incremental cost version of the Areeda-Turner test is better than the average variable cost/average total cost version. When the predatory increment can be determined, the average avoidable cost measure is the preferred measure in determining whether prices are predatory. Preferably,

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48 *Ibid*.

49 O'Donoghue *et al Law and Economics of Article 102 TFEU* 352–355.

only claims involving prices below average avoidable cost, or below a similarly appropriate cost measure, combined with a probability of recoupment, should be subject to potential liability. However, there appears to be no theoretically correct cost benchmark.

On a simple reading of section 8(1)(*d*)(iv), it can be argued that the cost benchmarks of average avoidable cost and average variable cost appears to be better suited for safe harbours than tests of abuse, meaning that below-cost pricing indicates that further investigation may be worthwhile. The benchmarks have importance though in identifying where the hurdle for finding abuse is set. However, ultimately, cost-based tests are form-based tests, and are good for providing safe harbours, but they cannot be used independently of a coherent, fact-based theory of harm to competition. This means that even where prices are below some measure of cost, it does not necessarily imply that this is harmful. The evidence should support that theory to a high-enough standard, especially given the risk that too much intervention means that beneficial price-cutting could be deterred. In the US, the recoupment requirement serves as a valuable screening device to identify implausible predatory-pricing claims.

Under section 8(1)(*c*), and specifically in relation to allegations of prices below average total cost, the courts have clarified that intent plays no role, as such. However, because of the difficulties inherent in all cost standards, it would not be wise for any court to tie itself too closely to any particular cost standard. The ultimate concern in cases such as these should be whether pricing below a cost standard could lead, or led, to the exclusion of a competitor, which exclusion had anti-competitive effects that are not outweighed by the gains listed in section 8(1)(*c*).[50] Therefore, consideration should also be given to the feasibility of excluding a competitor and evidence on how prices would increase above the level that otherwise would have prevailed through, for example, the possibility of recouping losses. A consideration of all these factors will help gauge the ultimate issue of what the mechanism for consumer harm is.

[50] *Media24 (CC) supra* par 96 and 71.

THE RULE OF LAW IN INDIAN ADMINISTRATIVE LAW VERSUS THE PRINCIPLE OF LEGALITY IN SOUTH AFRICAN ADMINISTRATIVE LAW: SOME OBSERVATIONS

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SUMMARY

The rule of law is expressly mentioned in the Constitution of the Republic of South Africa, 1996. The principle of legality has flourished in South African administrative law since its recognition and reception into our law in *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC). The Indian Constitution does not contain an equivalent expression of the rule of law. Notably, how persons and societies in India govern themselves is premised upon beliefs akin to the rule of law. Moreover, Indian administrative law has been strongly influenced by the theory of the rule of law as advocated by Dicey. Whilst Indian administrative law relies heavily upon the rule of law to judicially review conduct that is capricious, South African administrative law has come to rely on the incident of the rule of law, namely the principle of legality. This contribution inspects some of the reasons why the rule of law is heavily relied on in Indian administrative law – where it essentially mirrors the South African administrative law principle of legality. This contribution also suggests reasons as to why the principle of legality is so prevalent in South African administrative law as opposed to merely the rule of law as employed by the Indian courts in Indian administrative law.

1 INTRODUCTION

A founding value of the Constitution of the Republic of South Africa[1] (the Constitution) is that of a democratic system of government ensuring accountability, responsiveness, and openness.[2] The principle of legality is an incident of the rule of law and is often regarded as a "catch-all" mechanism, and in South African administrative law it serves as a useful means to hold

1 1996.
2 S 1(d).

accountable the exercise of all public (and private) power by increasing the scope of judicial review. The rule of law is another founding value of the Constitution.[3] The Constitutional Court in *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) recognised the significance of the legality principle as an implicit means of calibrating the validity of the exercise of public power, but subject to the following caveat:

> "[t]he principle of legality is *implied* within the terms of the interim Constitution. *Whether the principle of the rule of law has greater content than the principle of legality is not necessary for us to decide here*. We need merely hold that fundamental to the interim Constitution is a principle of legality."[4]

Section 1(*c*) of the Bill of Rights expressly recognises the supremacy of the Constitution and the rule of law. The effectiveness of the Bill of Rights is galvanised by virtue of its application to all law and it binds the legislature, the executive, the judiciary, and all organs of state.[5] To date, there has been no definitive judgment (as far as the author is aware) on whether the rule of law *indeed* has greater content than the principle of legality. However, numerous applications for judicial review of administrative action and non-administrative action often succeed on the basis that the exercise of power in question is contrary to the principle of legality. Sripati compellingly asserts that the historic links between South Africa and India are captured by Mahatma Gandhi who stated: "The freedom of India started in South Africa; and [India's] freedom will not be complete till South Africa is free".[6]

This contribution inspects the historical links between India and South Africa to establish a rationale to examine a specific aspect of administrative law between the two countries, namely the reliance on the rule of law in administrative law. A treatise would be required to comment on the full gamut of administrative law. Instead, this contribution aims to examine why the principle of legality is employed so effectively in South African administrative law as opposed to merely the rule of law as employed in Indian administrative law. In examining the above, reasons are proffered for this apparent anomaly.

2 THE NEXUS BETWEEN INDIA AND SOUTH AFRICA

The abolition of slavery on 28 August 1833 in the British Empire[7] was bittersweet. It meant emancipation for some but not for Indians. During the 1860s, large-scale shipments of Indians to British colonies to work on sugar plantations translated into some 1.2 million Indian labourers to South Africa;

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3 S 1(c).

4 *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) 57. Author's own emphasis.

5 S 8(1).

6 Sripati "Constitutionalism in India and South Africa: A Comparative Study from a Human Rights Perspective" 2007 16 *Tulane Journal of International and Comparative Law* 49 52. esp. the authorities cited at fn 1.

7 In terms of the Slavery Abolition Act, 1833.

particularly the sugar plantations in Natal.[8] This form of labour used by the British Empire in its sugarcane colonies proved vital to sustain the sugar industry in Britain. As observed by the pejorative remark of the Royal Commission of Labour in 1892, "importation of East Indian Coolies did much to rescue the sugar industry from bankruptcy".[9] The system of indentured labour would prove to last from 1860 to approximately 1914. This system was resisted by many Indians forced to work in appalling conditions, and Gandhi, in particular, advocated the philosophy of Satyagraha[10] as a means of resisting the racial discrimination that characterised such a system of forced labour.[11] At the end of the indentured (forced) labour in 1911, approximately 1,5 million Indians arrived in Natal. Statistics captured in 1996 revealed that approximately 2,6 per cent of the total population of approximately 40.5 million were descendants of the aforesaid indentured labourers as well as those Indians who had voluntarily travelled to South Africa to seek out a better life for themselves.[12]

South Africa and India are both diverse ethno-pluralistic secular[13] societies. In 2018, Pew Research Centre calculated that India, at that time, had a population of 1,4 billion people and home to 94 per cent of the world's Hindus with substantial Muslim, Christians, Sikhs, Buddhists, Jains, and "adherents of folk religions".[14] In 2015, statistics in South Africa[15] revealed that 86 per cent of the population regarded themselves as Christians; 5,4 per cent Ancestral Tribal, Animist, or other African religion; 5,2 per cent nothing

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8 Sen "Indentured Labour from India in the Age of the Empire" 2016 35 *Social Scientist* 35 38; Sturman "Indian Indentured Labour and the History of International Rights Regimes" 2014 5 *American Historical Review* 1439 1441.

9 Sen 2016 *Social Scientist* 43.

10 Civil disobedience. See Ramaswany "Gandi's Satyagraha in South Africa and the Tamils" 2010 39 *Economic and Political Weekly* 36 38; Czekalska and Klosowicz "Satyagraha and South Africa: Part 1: The Origins and the Relationship Between the Idea and the Place in Mahatma Gandhi's Writings" 2016 40 *Politeja* 31 34–36 esp. the authorities cited at fn 1, 6–7, 9 and 12.

11 Pachauri "The Indentured Labour System and the Roots of Indian Policy Toward South Africa" 1997 58 *Proceedings of the Indian History Congress* 732 733.

12 Prabhakara "India and South Africa: Cautionary and Salutary Lessons" 2003 38 *Economic and Political Weekly* 1839 1840. Significantly this figure has reduced to 1,5 million of the 58,78 million population figure as per mid-year population estimates conducted by the government in 2019, see "Mid-Year Population Estimates 2019" (2019) http://www.statssa.gov.za/publications/P0302/MYPE%202019%20 Presentation_final_for%20SG%2026_07%20static%20Pop_1.pdf (accessed 2020-09-09).

13 In the sense that a society is representative of people from diverse cultural, ethnic, racial, and religious backgrounds without the state supporting any particular religion, see Coertzen "Religion and the Common Good in a Pluralistic Society – Reformed Theological Perspectives" 2012 53 *Supplementum* 175 178; Botha "Human Dignity in Comparative Perspective" 2009 20 *Stell LR* 171 193–194, 204–210 and 214–215; Das Acevedo "Secularism in the Indian Context" 2013 38 *Law & Social Inquiry* 138 140ff; Chisti "Secularism in India: An Overview" 2004 65 *The Indian Journal of Political Science* 183 185–188. Significantly, in *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225, the constitutional bench of the Supreme Court of India emphasised the secularism aspect of the Indian Constitution.

14 Majumdar "Five Facts About Religion in India" (29 June 2018) https://www.pewresearch.org/fact-tank/2018/06/29/5-facts-about-religion-in-india/ (accessed 2020-09-09).

15 See "General House Survey" (2015) http://www.statssa.gov.za/publications/P0318/ P03182015.pdf (accessed 2020-09-09) 27–28.

in particular; 1,9 per cent Muslim; 0,9 per cent Hindu; and 0,2 per cent Jewish.[16] The Preamble of the Constitution of India[17] unapologetically states that India is a secular state. Article 15(1) of the Indian Constitution expressly provides that the state shall not discriminate against any citizen on grounds of, *inter alia*, religion. Such proscription against state interference in the affairs of religion is also evident in sections 15(1) and 31(1)–(2), as read with section 9(3) of the Constitution.

When India gained independence from Britain[18] it maintained its independence as a dominion within the British Commonwealth.[19] South Africa's departure from the commonwealth[20] endured until it became a democracy in 1994.[21] As member states of the Commonwealth, India and South Africa also share significant international economic and political cooperation as two of the BRICS countries.[22]

Finally, a relationship of reciprocity exists between our Constitutional Court – in the interpretation of the Bill of Rights – and the Indian Supreme Court to the extent that each draws on the jurisprudence of the other.[23] The common heritage shared between India and South Africa establishes a basis to discuss the different approaches to the application of the principle of legality and the rule of law.

3 THE RULE OF LAW IN INDIA

The Constitution of India[24] (the Indian Constitution) contains fundamental rights as set out in part III.[25] Part III of the Indian Constitution sets out the fundamental rights. As suggested in the rubric "fundamental rights", specific articles govern the constitutional guarantee of, for example, equality before

16 Additional religious affiliations are indicated as: other religion, nothing in particular or do not know.

17 Dated 26 January 1950, see Brigg and Uddin "Government of India, Ministry of Law and Justice, Legislative Department" (2019) http://legislative.gov.in/sites/default/files/COI-updated.pdf (accessed 2020-09-10).

18 On 14 August 1947.

19 Kreling "India and the Commonwealth: A Symbiotic Relationship?" 2009 98 *The Round Table* 49 50.

20 On 31 May 1961. For further reading see Miller "South Africa's Departure" 1961 1 *Journal of Commonwealth Political Studies* 56 58–63.

21 Shaw and Ashworth *Commonwealth Perspectives of International Relations* (2010) 210.

22 Anuoluwapo "Gandhi's 'Hind Swaraj' – Swarajya, the Swadeshi Way" 2019 64 *The Indian Journal of Political Science* 25 29.

23 In accordance with s 39(1)(*b*)–(*c*) of the Constitution. See Lollini "The South African Constitutional Court Experience: Reasoning Patters Based on Foreign Law" 2012 8 *Utrecht Law Review* 55 66–67 esp. the authorities cited at fn 50 and 51; *S v Makwanyana* 1995 (3) SA 391 (CC) 16; *S v Dodo* 2001 (3) SA 382 (CC) 32; *S v Mamalobo* 2001 (3) SA 409 (CC) 49 fn 48; Pillay "Protecting Judicial Independence Through Appointments Processes: A Review of the Indian and South African Experiences" 2018 3 *Indian Law Review* 283–311; Bentele "Mining For Gold: The Constitutional Court of South Africa's Experience With Comparative Constitutional Law" 2009 37 *Georgia Journal of International and Comparative Law* 219 248.

24 Adopted by the Indian Constituent Assembly 26 November 1949, coming into effect on 26 January 1950.

25 Articles 12–35.

the law.[26] Express provision is made for fundamental rights such as freedom of religion, race, caste, sex, or place of birth;[27] equality in matters of public employment;[28] and the right to freedom of expression.[29] None of the aforesaid articles, nor any other substantive provision of the Indian Constitution specifically expressly refer to the rule of law. It may be argued that the rule of law is anticipated with reference to the Preamble, which provides, among other things, that India secures "to all its citizens justice".

It is no surprise that justice is expressly mentioned. Gandhi advocated the necessity for a "just society" as essential for India's future and survival.[30] The concept of *Ram Rajya* and *Swarajya* was central to Gandhi's views. The former concept was first articulated by Valmiki Ramayana in Hindu epic literature in the 2nd century.[31] It is one which may be considered Utopian in its vision in the concept of an idealised society in which all people were endowed with virtues and lived in harmony with all other living creatures, trees, and plants without inflicting any form of harm on the latter. Gandhi interpreted this ancient vision as applying to a democratic society in which "the land of Dharma[32] and a realm of peace, harmony and happiness for young and old, high and low, all creatures and the earth itself, in recognition of a shared universal consciousness".[33] Applied to a more contemporary civil-political setting it aims to conceive of a society in which justice, peace, and prosperity prevail.[34] The latter concept (which is also Vedic related) pertains to the concept of self-governance or self-rulership. In particular, it was argued by Gandhi that the imperative of "self-rule" translating into a self-imposed rule of one's own emotions, namely discipline from within, is central to the independence of India.[35] Axiomatic to Indian independence (under the dictates of Swarajya) was a government that that was neither oppressive nor tyrannical but in which the rule of justice prevailed for all people in a democratic dispensation.[36]

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26 Article 14.

27 Articles 15(1)–(5).

28 Articles 16(1)–(3).

29 Articles 19(1)(*a*)–(*e*).

30 Sarda and Akhtar "Concept of Dharma, Justice and the Law: A Study" 2017 1 *Bharati Law Review* 179 179 esp. authority cited at fn 8.

31 The 2nd century refers to the period from 1 January 199 BC to 31 December 100 BC https://www.trismegistos.org/time/detail.php?period_id=48945_85469&strict=2#geodetail-able (accessed 2021-11-30) which forms part of the Classical era, see De Meister *Introducing Philosophy of Religion* (2009) 10.

32 Hinduism can be considered as an indigenous religion of India that takes into account the Vedas (a large body of religious texts from ancient India composed in Vedic Sanskrit – the oldest scriptures of Hinduism – in terms of which dharma may be interpreted as right and proper moral conduct in respect of one's own acts and toward the human community. See Hacker "Dharma in Hinduism" 2006 34 *Journal of Indian Philosophy* 479 480; Balakrishnan and Hamid "Valmiki Ramayana: A Spiritual Hermeneutic Meaning" 2018 10 *International Journal of Academic Research in Business and Social Sciences* 1235 1236.

33 Modh "International Humanitarian Law: An Ancient Indian Perspective" (2011) 1 2 esp the authority cited at ftn 5 http://dx.doi.org/10.2139/ssrn.1738806 (accessed 2021-11-30).

34 *Ibid*.

35 Anjaneyulu "Gandhi's 'Hind Swaraj' – Swarajya, the Swadeshi Way" 2003 64 *The Indian Journal of Political Science* 25 36.

36 Ghandi *Young India* (1928) 774.

Regarding the "land of Dharma", it is significant to note that Dharma itself has been identified as a Sanskrit noun akin to the Greek term "ethos Max Muller makes a compelling argument to define dharma as an Indian version of natural law since people of ancient times used dharma as "a way of life, to regulate their behaviour and govern themselves".[37] Notably, the classical law of India is characterised by the moral authority and duty imposed by Dharma, which emphasises eternal rules necessary to maintain oneself and the entire world, as opposed to the restraining power of legality in Western traditions. Lingat correctly refers to the fact that rules in classical India were perceived to be of divine origin.[38] From a Vedic view, the order required in the life of an individual was a micro-version of the order necessary for order in the public realm. This came to inform the important concept in classical Indian traditions that all members of society, including the King, were subordinate to the Priest (the Brahman). Hence, temporal power is subordinate to spiritual power. By subordinating himself to this spiritual power even the King (head of the executive) was subject to a greater power. Law in classical India came to consist of the sacred texts (Manu Smriti) and custom or unwritten laws (classical Indian law). Considering the fact that custom often contradicted the sacred texts, the relationship between the two was regarded as complex and at times contradictory. These doctrines, which may be perceived as being of a spiritual nature, took on meanings that transcended the religious or spiritual realm and came to inform the socio-legal structure of society by imposing obligations on how a person was required to conduct themselves and behave in relation to other persons. Dharma thus prescribed a moral code to be followed individually and universally. Since ancient times,[39] dharma was thus regarded as the only source of law, referred to as the Dharmashastras.[40] The significance of the latter is that it formed a part of the Civil Code of Conduct in India under colonial British rulership.[41]

A seismic shift in Indian law took place under British colonial rulership commencing with the East India Company in the 18th century. The latter sought to impose a uniform judicial and administrative system. An abiding concern was to impose British law[42] while preserving classical law. This was a challenging process compounded by the fact that, at the time of colonialism, parts of India were subject to British rulership while other parts fell within the remit of various Indian Princes. Warren Hastings,[43] continued

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37 Rocher "Hindu Conceptions of the Rule of Law" 1978 29 *Hastings Law Journal* 1283 1291.

38 Linglat *The Classical Law of India* (translated from the French with additions by Derrett) (1973) 305.

39 Medieval era is described as the time referring to the fall of the Western Roman empire in the 5th century AD continuing to the signing of the Magna Carta in 1215; see Amarasinghe "Evaluating the Concept of Dharma in Medieval Hindu Legal Traditions with Thomas Aquinas' Natural Law Philosophy" (LLM mini-dissertation, South Asian University, New Delhi) 2017 32 and especially the authority cited at fn 32.

40 Or Dharmasutras.

41 Rajpal and Vats "Dharma and the Indian Constitution" 2016 5 *Christ University Law Journal* 57 65. British domination (colonialisation of India) took place circa 1858 to 15 August 1947, see Ahanchi "Reflections of the Indian Independence in the Iranian Press" 2009 42 *Iranian Studies* 423 424.

42 Consisting of written rules pertaining to private and public law.

43 Appointed as Governor-General in 1772.

this tradition (acknowledging classical law) as did subsequent Governor-Generals.[44] They saw it as their charge to attempt to preserve and incorporate as much of classical Indian law into the imposed English law.[45] The rationale therefor was to establish a constructive relationship between British domination and the people of India. In furtherance of colonialism, the aforesaid view of classical Indian law was opposed by subsequent British Governor-Generals.[46]

Although the Dharmashastras were considered during British colonial rule, it is interesting to note that when the Constituent Assembly debated the formation of a Constitution,[47] no efforts were made to include Dharmashastras in the Constitution. Instead, the Indian Constitution would provide an alternative to the Dharmashastras. Whilst the rule of law is not expressly stated in the text of the Constitution itself, the Constitution is recognised as being based on the rule of law, consonant with the realisation of a democratic society. Moreover, the drafters of the Constitution were also familiar with the rule of law concept as postulated by Albert Vinn Dicey.[48] Dicey's theories[49] are all-pervasive in the Indian Constitution.[50]

It is through judicial activism that the rule of law has survived from ancient times to modern-day India. In addition, it has been conceptually expanded for purposes of protecting the rights of citizens and supervising the extent to which the other two arms of government act within the powers conferred upon them.[51] Judgments of the Supreme Court of India affirm the extent to which the rule of law is recognised as an inexorable part of constitutionalism. In *Golaknath v State of Punjab*[52] the Court held that parliament could not curtail any of the fundamental rights contained in the Constitution and stated

> "[r]ule of laws under the Constitution has the glorious content. It embodies the concept of law involved over the centuries."[53]

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44 Such as Henry Munro. For further reading in this regard see Peers "Colonial Knowledge and the Military in India, 1780–1860" 2005 3 *The Journal of Imperial and Commonwealth History* 159.

45 For further reading on India under British colonialism see Wiener "The Idea of 'Colonial Legacy' and the Historiography of Empire" 2013 3 *Journal of the Historical Society* 25.

46 Namely Cornwallis, Governor-General from 1793.

47 From 1947–1949.

48 In his work: Dicey *The Law of the Constitution* (1885).

49 Namely, absence of discretionary power supremacy of the law; equality before the law; and protection of the rights of citizens through the administration of justice.

50 The framing of the Indian Constitution, which took a period of three years, from 1947–1949 falls outside the focus of this article. For reading in this regard, see Raju "Dr B.R. Ambedkar and the Making of the Constitution: A Case Study of Indian Federalism" 1991 52 *The Indian Journal of Political Science* 153–164; Murthy and Mahin "Constitutional Impediments to Decentralization of the World's Largest Federal Country" 2015 26 *Duke Journal of Comparative and International Law* 79–138.

51 For general reading on judicial activism in the sense of the courts' having the power to determine and pronounce what the law is by protecting liberty of all persons against the exercise of arbitrary or irrational power, see Tripathi "Rule of Law, Democracy, and the Frontiers of Judicial Activism" 1975 17 *Journal of the Indian Law Institute* 17–36; Singhania "Judicial Activism in India" 2018 4 *International Journal of Law* 238–242; Rishi and Ananth "Judicial Activism in India: Whether More Populist or Less Legal?" 2017 1 *Indian Journal of Constitutional and Administrative Law* 11–23.

52 (1967) 2 SCR 276.

53 Par 98.

This judgment recognises the rule of law as it has evolved over the centuries and makes clear that a derivative of the rule of law in the realm of administrative law is the judicial review of administrative action to ensure that the exercise of public power is *intra vires*.[54] Unlike the South African Constitution, which expressly recognises the rule of law, the rule of law "permeates[55] the entire fabric" of the Indian Constitution.[56] In *ADM Jabalpur v S Shukla*[57] Kanna J held

> "[the] rule of law is the antithesis of arbitrariness […]. Rule of law is now the accepted norm of all civilized societies".[58]

By envisaging a rule of law (as opposed to a rule of men), the Indian Constitution conceptually and notionally recognises that nobody is above the law and the Constitution.[59] This is not unlike the South African Constitution which recognises the supremacy of the Constitution and the rule of law.[60] It is also clear that the rule of law is the basic rule of governance in India, which accords with the notion of the Indian Constitution being based on the concept of the rule of law. Every person, irrespective of their status in society or the executive, is subject to the supremacy of the rule of law.[61] Moreover, in a system that is subject to the rule of law, unbridled power can never be countenanced; it is always subject to the constraints imposed by the rule of law.[62] Authorities who are vested with wide discretionary powers such as the Prime Minister (chief of government and leader of the executive) and the courts are subject to the rule of law in as much as their decisions must be premised upon cogent legal principles that promote fairness, transparency, and equality.[63]

There can be no doubt as to the centripetal role played by the rule of law in Indian Constitutional law, in general, and administrative law, in particular. The genesis of the rule of law may have "mystical" connotations in light of its comity with ancient religious thought. However, with the influence of Dicey's theory on the rule of law, it has gained significant recognition as a trailblazer for how the judiciary can play a pivotal role in gauging whether the exercise of administrative and executive decisions are rational and conform to the tenets of the Constitutional values.

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54 See *ADM Jabalpur v S Shulka* (1976) 2 SCC 521.

55 Jain and Jain *Principles of Administrative Law* (2015) 20.

56 Adopted by the Indian Constituent Assembly on 26 November 1949 and becoming effective 26 January 1050.

57 *ADM Jabalpur v S Shulka supra* 154.

58 Par 154.

59 Jain and Jain *Principles of Administrative Law* 21.

60 See ss 1(c), 2 and 8(1)–(2).

61 See *State of Punjab v Khanchand* (1974) 2 SCR 768; *VC Mohan v Union of India* (1969) 2 SCC 262; *Pancham Chand v State of HP* (2008) SCC 123.

62 *Maya Devi v Raj Kumari Batra* (2010) 486; *Mohinder Singh Gill v Chief Election Commissioner* (1978) 1 SCC 405.

63 *Maya Devi v Raj Kumari Batra supra*; and Tyagi 2017 63 "The President of India: The Constitutional Head With Discretionary Powers" *Indian Journal of Public Administration* 330 337–340.

The principle of legality, as discussed below, does not feature in Indian administrative law like in South African administrative law. The following section examines the rule of law in South African administrative law with particular focus on the significant role assumed by the principle of legality as an incident of the rule of law.

4 THE PRINCIPLE OF LEGALITY IN SOUTH AFRICAN LAW

A perusal of our law reports is replete with judgments[64] in which our courts frequently employ the principle of legality in judicial review applications. Based on the reasons discussed below, the principle of legality should, strictly speaking, only be applied where the exercise of public power does not constitute administrative action in terms of the definition thereof under section 1 of the Promotion of Administrative Justice Act[65] (PAJA).[66]

The principle of legality (expressed as an incident of the rule of law) was embraced with much acclaim by judges and legal academics.[67] It serves as a means of holding accountable the exercise of all public power.[68] It is sufficiently flexible to permit the review of public powers that do not constitute administrative action in terms of PAJA.[69] It proves effective in animating the right to just administrative action expressed in section 33(1) of the Constitution until the latter is required to be given effect by national legislation such as PAJA. Elsewhere I explore the conceptual and restrictive difficulties encountered by employing PAJA for purposes of the judicial review of administrative action. Consequently, more reliance is placed on the principle of legality.[70] However, the merit of employing the principle of legality in all instances (even where PAJA is applicable) is legally unsound in that it is contrary the principle of subsidiarity. Moreover, the discernible lack of consistency on the part of our courts in failing to apply PAJA (where same is applicable) and resorting to the principle of legality has also created uncertainty as to the basis upon which one can expect a matter will be judicially reviewed.[71] Notwithstanding, the principle of legality provides an

64 In respect of administrative and non-administrative action.

65 3 of 2000.

66 For further reading on why it is a legal prerequisite to bring a review application of administrative action first in terms of PAJA, and under the alternative the principle of legality, see Henrico "Subverting the Promotion of Administrative Justice Act in judicial review: the cause of much uncertainty in South African administrative law" 2018 2 *Journal of South African Law* 288 291–293.

67 Hoexter "The Principle of Legality in South African Administrative Law" 2004 4 *Macquarie Law Journal* 165 174ff.

68 Hoexter *Administrative Law* (2012) 122.

69 On account of falling within one of the exclusions listed in s 1(aa)–(ii) which exclusions fall outside the definition of administrative action as provided for in s 1 of PAJA. The aforesaid exclusions essentially concern themselves with powers or functions that are legislative, judicial or of an executive nature. See Burns and Henrico *Administrative Law* (2020) 208.

70 Henrico "Re-Visiting the Rule of Law and the Principle of Legality: Judicial Nuisance or Licence?" 2014 4 *Journal of South African Law* 742 753–754 and the authorities therein cited.

71 Henrico "Subverting PAJA in Judicial Review: The Cause of Much Uncertainty in South African Administrative Law" 2018 2 *Journal of South African Law* 288 296–304. See also *Adonis v Minister of Public Works Western Cape* [2020] ZAWCHC 87 (31 August 2020)

abiding assurance that the exercise of all public (and even private) power is subject to judicial review in guaranteeing administrative justice and the realisation of transformative constitutionalism.[72] In this sense, the principle of legality in South African administrative law is undeniably a positive phenomenon.

In the South African context, the principle of legality must be understood against the transformative constitutional project and culture of justification. Transformative adjudication on the part of our courts speaks to the former. Judicial review, in particular, speaks to the latter in terms of which there is a commitment to accountability, openness, and responsiveness. Because of the draconian measures imposed under the Apartheid regime and the extent to which judicial review was effectively marginalised and restricted in its operation,[73] it comes as no surprise that our Constitution directly gives expression to the rule of law and its incident, the principle of legality.

The Constitutional Court adopts a teleological approach to interpret the Bill of Rights by taking into account foreign law. This is not a novelty as the Court is duty bound to do so.[74] Axiomatic to our constitutional compact is the fact that the rule of law serves as a founding value of the South African democratic state.[75] Drawing on the Canadian authority of *The Matter of a Reference by the Government in Council Concerning Certain Questions Relating to the Secession of Quebec from Canada*,[76] the Supreme Court of Canada held:

> "Simply put, the constitutionalism principle requires that all government action comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the Constitution. This Court has noted on several occasions that with the adoption of the *Charter,* the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy. The Constitution binds all governments, both federal and provincial, including the executive branch (*Operation Dismantle Inc v The Queen* [1985] 1 SCR 441 455). They may not transgress its provisions: indeed, their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution and can come from no other source."[77]

Gamble J at par 213 correctly points out that the primary route to judicial review of administrative action is by using PAJA and using the principle of legality in instances where the exercise of public power does not constitute administrative action under PAJA. Such reasoning is consistent with the authority established by the Constitutional Court in *Bato Star v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) 25 and confirmed in subsequent cases such as *Minister of Health v New Clicks (Pty) Ltd* 2006 (2) SA 311 (CC) 431, 433 and 586; and *Minister of Defence and Military Veterans v Motau* 2014 (5) SA 69 (CC) 29 and 30.

72 Burns and Henrico *Administrative Law* 129–157.

73 See Madala "Rule under Apartheid and the Fledgling Democracy in Post-Apartheid South Africa: The Role of the Judiciary" 2001 26 *North Carolina Journal of International Law and Commercial Regulation* 743 748.

74 In terms of s 39(1)(*b*) of the Constitution. Also see Currie and De Waal *South African Constitutional Law in Context* (2015) 31–32 and the authorities therein cited; *Carmichele v Minister of Safety & Security* 2001 (4) SA 938 (CC) 45–48.

75 S 1(c).

76 [1998] 2 SCR 217.

77 *Secession of Quebec supra* 72. Also see *Reference Re Language Rights under the Manitoba Act, 1870* (1985) 19 DLR (4th) 1 24 where it was held: "Additional to the inclusion

The above and article 20(3) of the Basic Law confirms the *rechtstaatprinzip*, which is related to the concept of the rule of law.[78] The Constitutional Court in *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*[79] introduced the principle of legality into South African administrative law. Chaskalson P observed:

> "It seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the interim Constitution. *Whether the principle of the rule of law has greater content than the principle of legality is not necessary for us to decide here.* We need merely hold that fundamental to the interim Constitution is a principle of legality."[80]

According to the author's knowledge, there has since been no judgment[81] that purports to answer the issue of whether the rule of law has greater content than the principle of legality. The terms "rule of law" and "principle of legality" are used by our courts interchangeably when dealing with the review of the exercise of public power. In *Masethla v President of the Republic of South Africa*,[82] the majority judgment held that the exercise of executive power is constrained by the principle of legality and specifically rationality.[83] The minority (per Ngcobo J) held:

> "The rule of law principle requires that the actions of all those who exercise public power must comply with the law, including the Constitution. It is central to the conception of our constitutional order that those who exercise public power including the President […]."[84]

In *Allpay Consolidated Investment (Pty) Ltd v CEO of SASSA*,[85] Froneman J (for the majority) referred to vagueness and uncertainty as grounds for review under section 6(2)(1) of PAJA and emphasised how certainty in legislation and administrative law is central to the rule of law.[86]

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of the rule of law in the preambles of the *Constitution Acts* of 1867 and 1982, the principle is clearly implicit in the very nature of a constitution. The Constitution, as the supreme law, must be understood as a purposive ordering of social relations providing a basis upon which an actual order of positive laws can be brought into existence. The founders of this nation must have intended, as one of the basic principles of nation building, that Canada be a society of legal order and normative structure: one governed by rule of law. While this is not set out in a specific provision, the principle of the rule of law is clearly a principle of our Constitution."

78 Article 20(3) provides that "[t]he legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice."

79 *Supra*.

80 *Fedsure supra* 57 (own emphasis added).

81 By the Constitutional Court, Supreme Court of Appeal or any High Court.

82 2008 (1) BCLR 1 (CC), which had to do with the power of the President to remove the head of the NIA from office.

83 *Masethla v President supra* 78.

84 *Masethla v President supra* 173. See also Kruger "The South African Constitutional Court and the Rule of Law: The *Masethla* Judgment, A Cause for Concern" 2010 13 *Potchefstroom Electronic Law Journal* 468 473–474.

85 2014 (1) SA 604 (CC), which had to do with the setting aside of an unlawful tender.

86 *Allpay supra* 87.

The Constitutional Court in *Affordable Medicines Trust v Minister of Health*,[87] (per Ngcobo J for the majority) held:

> "The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution."[88]

Although a bifurcated approach to the judicial review of administrative action is often adopted by our courts, it is clear that the principle of legality plays a pivotal role in South African administrative law[89] as illustrated by our courts.[90]

5 THE RULE OF LAW IN INDIA VERSUS THE PRINCIPLE OF LEGALITY IN SOUTH AFRICAN LAW

From the above discussion, it should be apparent that the rule of law, as employed in Indian administrative law, is as effective as the principle of legality in constraining the arbitrary and irrational exercise of all public power and in particular, the executive branch of government. The question arises: why do the approaches to the judicial review of the exercise of public power of the two judicial systems differ? Put differently, why has the rule of law been effective in Indian administrative law, while South African administrative law has distilled the principle of legality from the rule of law? To this, the author proposes an open-ended question followed by a submission. First, the debate concerning the rule of law has given rise to prismatic meanings and interpretations of the rule of law.[91] In India, the

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87 2006 (3) SA 247 (CC) which had to do with a constitutional challenge to certain aspects of a licensing scheme introduced by the government.

88 *Affordable Medicines supra* 49 [footnotes excluded].

89 See Hoexter 2004 *Macquarie Law Journal* 165ff; De Beer "A New Role for the Principle of Legality in Administrative Law: *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd"* 2018 135 *SALJ* 613 614ff.

90 Meaning that where PAJA is supposed to be relied upon as the national legislation giving effect to just administrative action under s 33(1) of the Constitution, instead the principle of legality is relied upon.

91 The "rule of" law as mentioned in s 165(3) of the Constitution must refer to, among other things, the doctrine of separation of powers; and ratio decidendi, whilst the rule of law as mentioned in s 1(c) of the Constitution clearly has a more expansive meaning. For reading on the various meanings to be attributed to the rule of law, see Stein who refers to the "chameleon-like" character of the rule of law, Stein "Rule of Law: What Does It Mean?" 2009 18 *Minnesota Journal of International Law* 293 296; Gosalbo-Bono "The Significance of the Rule of Law and its Implications for the European Union and United States" 2010 72 *University of Pittsburgh Law Review* 229 231; Tamanaha "The History and Elements of the Rule of Law" 2012 1 *Singapore Journal of Legal Studies* 232 235; Waldron "The Concept of the Rule of Law" 2008 1 *Georgia Law Review* 1 10–12; Stephanopoulos and Ginsburg "The Concepts of Law" 2017 84 *University of Chicago Law Review* 147 153–158; Raz "The Rule of Law and its Virtue" in [this is the work of Raz, please see following: https://www.worldcat.org/title/authority-of-law-essays-on-law-and-mortality/oclc/749001172; and citation of work by Fox-Decent "Is The Rule of Law Really Indifferent to Human Rights?" 2008 27 *Law and Philosophy* 533–581 and the citation as appears on 533 at fn 1] *The Authority of Law and its Virtue* (1979) 210–232]; Fuller "The Morality that makes Law Possible" in *The Morality of Law* (1969) 146; Venter "South Africa: A *Rechtstaat*?" 2012 57

Diceyean influence of the rule of law cannot be gainsaid; neither can the ancient spiritual philosophies be ignored. Is it on account of these two aspects that the rule of law in and of itself has proved adequate? Secondly, as mentioned above, South Africa's socio-political past is rooted in an authoritative culture where government actions and the exercise of public power previously took place in the context of our courts having limited powers of review. In this ~~a~~ sense, something more than the mere rule of law is required. Hence, the principle of legality, as an incident of the rule of law, is a guarantee in our constitutional democracy that the exercise of all public power is subject to judicial review. This underscores the constitutional imperatives of accountability, responsiveness, and transparency.

6 CONCLUSION

It would appear that the rule of law is as effective as the principle of legality in holding to account the exercise of discretionary powers in administrative law. Whilst not expressly mentioned in the Indian Constitution, the rule of law is a bastion upon which the interpretation of the Constitution rests and is referred to for purposes of giving effect thereto. South African administrative law deemed it necessary to distil the principle of legality from the rule of law. In terms of both Indian and South African administrative law, the exercise of discretionary powers or public powers may be set aside on judicial review if it is exercised in a manner that is contrary to the provisions of the respective constitutions. An additional common feature between the two countries is that, at the very minimum, the rule of law operates to constrain the exercise of arbitrary or irrational power. In South African administrative law, any exercise of power that impugns the rule of law, in general, or the principle of legality, in particular, may be set aside on judicial review. In comparison to Indian administrative law, it may thus be argued that the rule of law is a general ground upon which judicial review may take place. On the other hand, in South African administrative law, the principle of legality (as an incident of the rule of law) is a more specific ground upon which judicial review takes place.

McGill Law Review 721 741; Mathews *State, Security and the Rule of Law* (1986) 16*;* De Ville "The Rule of Law and Judicial Review: Re-Reading Dicey: The Constitutional Context" 2006 1 *Acta Juridica* 62 65–68; and Dworkin *Freedom's Law: The Moral Reading of the American Constitution* (1997) 82–83. Also see *S v Mabena* 2007 (1) SACR 482 (SCA) 2.

VALUE-ADDED TAX IN THE DIGITAL ECONOMY: A FRESH LOOK AT THE SOUTH AFRICAN DISPENSATION*

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SUMMARY

The online purchase of digital goods has the propensity to generate tax liability involving a notable rise in administrative costs for tax authorities. Online transactions involving the supply of digital goods by foreign businesses to South African consumers are subject to Value-Added Tax ("VAT"). Since 2014, the Value-Added Tax Act 89 of 1991 provides for registration and the reverse-charge mechanism as a means to collect VAT on online cross-border trade in digital goods. From 1 April 2019, significant changes to the VAT Act have been implemented regulating VAT on online cross-border trade in digital goods. This article examines these amendments by way of a comparative analysis of similar legislation in Australia and the European Union with the main aim of making recommendations for the adequate and cost-effective collection of VAT on online cross-border trade in digital goods.

* This article is partly based on Ruddy Kabwe's mini-dissertation entitled "Consumption Tax Collection Models in Online Trade in Digital Goods" submitted in partial fulfilment of an LLM (tax law) at the University of South Africa under supervision of Prof SP van Zyl.

1 INTRODUCTION

The growth of the digital economy has seen consumers buy digital goods[1] such as electronic books (e-books), games and music effortlessly at the click of a button. The online cross-border purchase of digital goods by consumers creates Value-Added Tax (VAT) collection challenges.[2] The challenges are compounded by an apparent lack of international guidelines on the implementation of VAT collection mechanisms on online cross-border trade in digital goods.[3]

Governments face the unwelcome prospect of losing significant revenue in an era where e-commerce transactions, by nature, create a niche market for the purchase of a large quantity of inexpensive digital goods.[4] The online purchase of digital goods has the propensity to generate tax liability involving a notable rise in administrative costs for tax authorities.[5]

Until fairly recently, South Africa's tax laws did not match the rise of the digital economy.[6] In respect of VAT legislation, the advent of the Taxation Laws Amendment Act[7] has brought about change: electronic services, as defined,[8] supplied by foreign businesses to South African consumers are now subject to VAT in South Africa.[9] Since 2014, the Value-Added Tax Act[10] (VAT Act) provides for registration and the reverse-charge mechanism as a means to collect VAT on online cross-border trade in digital goods. From 1 April 2019, significant changes to the VAT Act have been implemented to regulate VAT on online cross-border trade in digital goods.

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1 In this context, "digital goods" is a broad term used to describe any *goods* that are stored, delivered and used in an intangible *electronic* format. *Digital goods* are shipped electronically to the consumer through email or downloaded from the Internet or a similar network. This term must not be confused with the specific definitions that have been adopted in VAT/GST legislation.

2 OECD "Addressing the Tax Challenges of the Digital Economy" (2014) http://www.oecdilibrary.org/docserver/download/2314251e.pdf?expires=1447015283&id=id&accname=guest&checksum=5748F58F355A1981B097C2E1AB83CC5D (accessed 2018-07-06).

3 *Ibid*.

4 *Ibid*.

5 *Ibid*.

6 De Wet "Tax and the Digital Economy: Value Added Tax" 2015 353 *Tax Breaks Newsletter* 4 4.

7 43 of 2014.

8 The Regulations prescribing electronic services for the purpose of the definition of "electronic services" in s 1 of the Value-Added Tax Act define "electronic services" as "any services supplied by means of an electronic agent, electronic communication or the Internet for any consideration, other than– (a) educational services supplied from a place in an export country and regulated by an educational authority in terms of the laws of that export country; or (b) telecommunications services; or (c) services supplied from a place in an export country by a company that is not a resident of the Republic to a company that is a resident of the Republic if–

(i) both those companies form part of the same group of companies; and

(ii) the company that is not a resident of the Republic itself supplies those services exclusively for the purposes of consumption of those services by the company that is a resident of the Republic."

9 S 7(1)(*c*) read with paragraph 1(b)(vi) of the definition of "enterprise" in the Value-Added Tax Act 89 of 1991.

10 89 of 1991.

From the outset, it must be noted that the list of what constitutes "electronic services" for purposes of the VAT Act was very limited and, since the promulgation of the amendment, the list had not been updated to keep up with technological advances and new business models. This created uncertainty among taxpayers and suppliers as to the tax treatment of certain digital goods. On 18 March 2019, the revised Regulations to the VAT Act were published, prescribing what constitutes "electronic services" as contemplated in the VAT Act. The revised Regulations came into effect on 1 April 2019.

In 1998, the Organisation for Economic Cooperation and Development (OECD) adopted the Ottawa Taxation Framework for the development of domestic consumption tax laws to deal with electronic commerce.[11] In this respect, the OECD recommends that VAT rules must be as neutral and equitable as possible for vendors, the VAT system and laws should be efficient and effective, and must create certainty and fairness in treatment for all taxpayers.[12] In addition, tax rules must be simple and clear to understand.[13] This article examines the 2019 amendments by way of a comparative analysis of similar legislation in Australia and the European Union (EU) with the main aim of making recommendations for a simplified and effective VAT regime on online cross-border trade in digital goods in compliance with the Ottawa Taxation Framework.

As the collection of VAT in the case of Business to Consumer (B2C) transactions poses the biggest risk,[14] the scope of this article is limited to a discussion of VAT on B2C transactions only – that is, the sale of digital goods by foreign suppliers to South African consumers. From the outset, it must be noted that the VAT Act, read together with the Regulations[15] does not distinguish between Business to Business (B2B) and B2C e-commerce transactions.

2 VAT ON B2C ONLINE TRANSACTIONS FOR DIGITAL GOODS

In order to impose VAT on a specific transaction, it is necessary to determine whether that transaction falls within the realm of the VAT Act. In terms of section 7(1) of the VAT Act, VAT is levied on the supply of goods and services by a vendor in the course of furtherance of its enterprise; on the importation of goods into South Africa; and on the supply of imported services into South Africa.[16]

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11 OECD Committee on Fiscal Affairs *Electronic Commerce: Taxation Framework Conditions* (1998) 3 4–6.

12 OECD Committee on Fiscal Affairs *Electronic Commerce: Taxation Framework Conditions* 3 4–5.

13 *Ibid*.

14 Van der Merwe "VAT and E-Commerce" 2003 15 *South African Mercantile Law Journal* 371 373; Steyn "VAT and E-Commerce: Still Looking for Answers?" 2010 22 *SA Merc LJ* 230 235. This risk is also explained further in this article.

15 The Regulations prescribing electronic services for the purpose of the definition of "electronic services" in s 1 of the VAT Act.

16 S 7(1) of the VAT Act.

It follows that transactions that fall within the ambit of this provision must be levied with VAT at 15[17] per cent on the value of the supply.[18] Section 7(2) of the VAT Act states that a vendor is responsible for paying VAT when the latter supplies goods and services for the furtherance of its enterprise. In contrast, the recipient of imported services is liable for VAT and must pay VAT to the relevant tax authorities.[19] The VAT Act does not provide for specific place-of-supply rules.[20] Instead, the place of supply must be deduced by the reading together of section 7(1) (the charging provision), section 14 (the reverse-charge mechanism), and the definitions of "goods", "services", "electronic services", "vendor", and "enterprise" in section 1. For this reason, these concepts are discussed below.

2 1 Is the supply of digital goods a supply of "goods" or "services"?

"Services" are defined in the VAT Act as including "granting, assignment, cession or surrender of any right or the making available of any facility or advantage".[21] This definition is far-reaching and encompasses all commercial activities that are not defined as a supply of goods for purposes of the VAT Act.[22] SARS has accepted that digital goods form part of the definition of "services" for purposes of VAT. This is in line with the OECD recommendation. However, as the importation of services relies on the reverse-charge mechanism,[23] a subcategory of services (electronic services) has been incorporated in the VAT Act to allow for deemed place-of-supply rules in respect of the supply of electronic services.[24] The VAT Act merely defines "electronic services" as the services prescribed by the Minister of Finance in the Regulations.

Regulation R221 of the South African Government Notice 37489 dated 28 March 2014, with an effective date of 1 June 2014 (the old Regulations), listed the services that are classified as "electronic services" for purposes of the VAT Act.[25] These include:

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17 The VAT rate increased from 14 to 15 per cent on 1 April 2018.

18 S 7(1) of the VAT Act.

19 S 7(2) of the VAT Act.

20 See specifically the concerns raised by the Davis Tax Committee *Second Interim Report on Base Erosion and Profit Shifting (BEPS) in South Africa, Summary of DTC Report on Action 1: Address the Challenges of the Digital Economy* (2014) 7; Davis Tax Committee *Final VAT Report* (2018) 68–82.

21 S 1 of the definition of "services" in the VAT Act.

22 Silver and Beneke *Deloitte VAT Handbook* (2015) 11; Meiring *A Critical Evaluation of Proposed Methods to Collect Value-Added Tax on Electronically Supplied Services* (MCom dissertation, University of Pretoria) 2013 12; SARS *Interpretation Note 70* http://www.sars.gov.za/AllDocs/LegalDoclib/Notes/LAPD-IntR-IN-2013-03%20-%20IN70%20Supplies%20made%20for%20no%20consideration.pdf (accessed 2017-10-28).

23 In terms of this mechanism, the recipient importer (customer) of the services must submit a VAT return and account for VAT on the transaction. See s 14 of the VAT Act.

24 S 1 of the definition of "electronic services" in the VAT Act.

25 Silver and Beneke *Deloitte VAT Handbook* 30; Van der Merwe "Foreign VAT Compliance" Paper presented at the Annual Tax Indaba (11–15 September 2017)

- educational services where the supplier is not regulated by an educational authority in the country (the services include distance-teaching programmes, educational webcasts, internet-based courses or education programmes and webinars);
- games, including electronic games, interactive games and electronic betting or wagering;
- internet-based auction services;
- the digitised contents of any book or electronic book (e-books);
- audio-visual content (any set of moving visual images or other visible signals) and the right to view such content;
- still images and the right to view such images;
- music, including audio clips, broadcasts not simultaneously broadcast over any conventional network in South Africa, jingles, live-streaming performances, ringtones, songs, sound effects and the right the listener has to listen to any of these items; and
- subscription services to any blog, journal, magazine, newspaper, game, internet-based auction service, periodical, publication, social network service, webcast, webinar, website, web application or web series.[26]

Although the VAT Act does not distinguish between B2B and B2C transactions, advertising and computer programmes or software were excluded from the list because it was perceived that these services are generally consumed in the B2B market. Thus, inadvertently, the application of the definition of "electronic services" differentiates between B2B and B2C transactions.[27]

According to SARS, the definitions of "goods" and "services" are expansive to ensure that all economic transactions are included in the tax base.[28] However, a closer inspection of the definition of "electronic services" (as it then was) suggests that some services had been excluded. The

http://www.taxindaba.co.za/img/downloads/presentations/1.Foreign%20VAT%20Compliance%20Suzanne%20vd%20Merwe.pdf (accessed 2017-03-29).

[26] GN R221 "Electronic Services Regulations" in *GG* 37489 of 2014-03-28; see also Silver and Beneke *Deloitte VAT Handbook* 30; Van der Merwe http://www.taxindaba.co.za/img/downloads/presentations/1.Foreign%20VAT%20Compliance%20Suzanne%20vd%20Merwe.pdf.

[27] In the case of B2C transactions, the foreign supplier of electronic services must register as a VAT vendor in South Africa where the taxable supplies exceed the R50 000 threshold (the threshold that applied until 31 March 2019). In the case of perceived B2B transactions (the supply of computer software), the recipient importer accounts for VAT in terms of the reverse-charge mechanism.

[28] SARS "Note Interpretation 70" (2013) http://www.sars.gov.za/AllDocs/LegalDoclib/Notes/LAPD-IntR-IN-2013-03%20-%20IN70%20Supplies%20made%20for%20no%20consideration.pdf (accessed 2017-10-28) 12.

definition did not include services like cloud computing,[29] live video streaming,[30] applications (apps),[31] and online advertising services.[32]

This problem may be illustrated by the following example:

Mary, a South African resident, has recently started her own business. Mary is not a VAT vendor. She would like to advertise her products to a potential worldwide customer base. She pays Company X, a French online advertising company, to enable her to advertise her products online. Company X provides Mary with advertising services. Assume that Company X is carrying on an enterprise in South Africa and is duly registered as a vendor in South Africa because it also supplies digital music to South African customers. As Mary is not a VAT vendor, the transaction is treated as a B2C transaction. In this instance, although Company X is a vendor, there was no obligation on it to account for VAT to SARS on the supply of advertising services because it did not supply "electronic services" as defined to Mary.[33] Similarly, Mary as an importer of the "electronic services" does not have to account for output tax in terms of the reverse-charge mechanism. This is because the type of services rendered does not constitute a supply of "electronic services" because it was not specifically defined in the Act. Of course, it can be argued that, as the advertising service constitutes "imported services", Mary must account for output VAT in terms of the reverse-charge mechanism. However, as the advertising is rendered worldwide, the place of use and consumption, in terms of the use-and-consumption principle,[34] cannot be determined with accuracy. Accordingly,

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29 According to Goetsch *ECommerce in the Cloud* (2014) 55, cloud computing is "any service delivered over the Internet". This service includes online photo sharing or web-based email. While it can be argued that cloud computing may fall under any of the "electronic services" so listed, it will be difficult to argue that the storage of data in the cloud against a fee constitutes "electronic services" as defined.

30 It may be argued that live video streaming falls under audio-visual content. However, in the authors' view, audio-visual content as defined in the Regulations refers to the download or viewing of a copy of audio-visual files and it does not include the live streaming of audio-visuals.

31 According to Laudon and Traver *E-commerce* (2014) 59. An app is software application typically operated on a mobile internet-enabled device. While it may be argued that a mobile app may fall under any of the categories listed, the authors are of the view that app-based navigation services, or app-based chat services, or live streaming falls outside the scope of the definition of "electronic services". Similarly, it can be argued that a mobile app constitutes computer software that is excluded from the definition of "electronic services".

32 Online advertising includes displaying banners, games, classifieds and sponsorships. It has been established above that online advertising is excluded from the definition based on the perception that it is consumed primarily in the B2B market.

33 S 7(1)(*a*) of the VAT Act read with the definition of "enterprise" in the VAT Act. See also the definition of "electronic services" in the Regulations.

34 In terms of the use-and-consumption principle, the services must be taxed in the jurisdiction where the services are used and consumed. In this example, the use and consumption of the advertising service is where the benefit of the services is reaped. As the advertising service cannot be linked to a specific location, the place of use and consumption cannot be determined with accuracy. Accordingly, it is argued that specific place-of-supply rules are essential to resolve this legal conundrum. For a complete discussion of the use-and-consumption principle, see Van Zyl "Determining the Place of Supply or the Place of Use and Consumption of Imported Services for Value Added Tax Purposes: Some Lessons for South Africa from the European Union" 2013 25 *SA Merc LJ* 534–554; Van Zyl "The Place-of-Supply Rules in Value Added Tax: *Commissioner of the South African Revenue Services v De Beers Consolidated Mines Limited*" 2013 25 *SA Merc LJ* 255–265; Van Zyl "Is the

in the absence of definitive place-of-supply rules, insofar as the advertising is not used and consumed in the Republic, the transaction can potentially escape VAT in South Africa.

The challenge is compounded when different jurisdictions adopt different terms to refer to digital goods and define them differently. For instance, the EU defines "electronically supplied services" as those services that are "delivered over the [I]nternet or an electronic network and the nature of which renders their supply automated and involving minimal human intervention".[35] The EU published a list of what it deems to be electronically supplied services. The list includes, but is not limited to, the supply of online advertising services, the supply of digital software and the download of digital films.[36] These services were not listed in the old Regulations under South African law. An EU foreign supplier of software was thus supplying "electronically supplied services" in the EU but this did not constitute "electronic services" if that foreign supplier supplied digital software to a South African consumer for download. Instead, the supply of software fell under imported services in the VAT Act. It follows that services that were not defined in the old Regulations were subject to VAT liability in terms of section 7(1)(*c*) of the VAT Act.[37] Accordingly, the recipient of the software had to account for VAT on the value of the software so imported in terms of the reverse-charge mechanism.

Interestingly, electronic services are currently defined in the Norwegian VAT Act as those "services delivered remotely using the [I]nternet; which are obtained through the use of information technology".[38] An essential part of the definition of electronic services is that the delivery of the services should take place without the involvement of any human element.[39] While this definition is considered broad, the inclusion of the word "Internet" limits the scope to digital goods delivered via the World Wide Web. Digital goods delivered by any other electronic means or system may escape the VAT net.

It is the authors' view that a lack of international coordination and cooperation regarding a uniform definition for digital goods has resulted in a lot of confusion and uncertainty especially for foreign businesses. The responsibility was left to foreign suppliers to determine how a jurisdiction defines digital goods before transacting with its customers. Accordingly, foreign suppliers must familiarise themselves with the consumption tax legislation in every country of supply to ensure that they are compliant. This

Supply of Services in the Duty-Free Area at an International Airport in South Africa Subject to VAT? *Master Currency (Pty) Ltd v Commissioner for the South African Revenue Services*" 2014 26 *SA Merc LJ* 515–532; *Commissioner for SARS v De Beers* (503/2011) [2012] ZASCA 103 (1 June 2012); *Master Currency v CSARS* (155/2012)[2013] ZASCA 17 (20 March 2013).

35 European Commission "Electronically Supplied Services" https://ec.europa.eu/taxation_customs/individuals/buying-goods-services-online-personal-use/buying-services/electronically-supplied-services_en (accessed 2017-05-20).

36 European Commission "List of Electronically Supplied Services" http://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/common/buying_online/electronically_supplied_services.pdf (accessed 2017-05-20).

37 See discussion on registration of foreign suppliers below.

38 S 1–3 of the Norwegian VAT Act.

39 The definition of "electronic services" in s 1–3 of the Norwegian VAT Act.

uncertainty may also cause foreign suppliers to stop making supplies altogether to consumers in jurisdictions with cumbersome consumption tax rules. This has a potentially negative impact on international trade and economic advancement in developing countries.

The extension of the definition of "electronic services" in the new Regulations is intended to allow the legislator to amend the regulations easily, so as to keep the list updated in accordance with new technology without the same parliamentary hassles associated with amending the Act. The Davis Tax Committee specifically recommended that the Regulations be refined in order to provide for a comprehensive understanding and appreciation thereof.[40]

With effect from 1 April 2019, the definition of "electronic services" in the Regulations has been amended. The previous list of electronic services was replaced by a much broader definition, similar to that of Norway.[41] Electronic services are now defined as "[a]ny services supplied by means of an electronic agent, electronic communication or the [I]nternet for any consideration".[42] Specifically excluded from the definition are: educational services supplied from a place in an export country and regulated by an educational authority in terms of the laws of that country; telecommunications services; and certain intra-group supplies.[43] The old Regulations provided a list of specific services constituting electronically supplied services. The new Regulations provide a wide definition and list those services that do not constitute electronically supplied services. While this wide definition encompasses almost any form of technology in existence or yet to be developed, this may lead to instances of double taxation of the service in the jurisdiction of origin and in South Africa. For example, the simultaneous broadcast of a live concert, which physically takes place in the United Kingdom, in the United Kingdom and in South Africa may be subject to VAT in the United Kingdom and in South Africa if it is viewed in South Africa. Similarly, consulting or professional services physically rendered, used and consumed in a foreign jurisdiction may be subject to foreign consumption tax and VAT in South Africa by virtue of the fact that the advice, report, or opinion is also emailed to a recipient in South Africa.[44]

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40 Davis Tax Committee 2014 *Second Interim Report on BEPS* 7–8; Davis Tax Committee 2018 *Final VAT Report* 90–92.

41 See s 1–3 of the Norwegian VAT Act.

42 National Treasury *Regulations Prescribing Electronic Services for the Purpose of the Definition of "Electronic Services" in Section 1 of the Value Added Tax Act, 1991* (2018) 3.

43 "Services supplied from a place in an export country by a company that is not a resident of the Republic to a company that is a resident of the Republic if–

(i) both those companies form part of the same group of companies; and

(ii) the company that is not a resident of the Republic itself supplies those services exclusively for the purposes of consumption of those services by the company that is a resident of the Republic." See National Treasury *Regulations Prescribing Electronic Services for the Purpose of the Definition of "Electronic Services" in Section 1 of the Value Added Tax Act, 1991* (2018) 3.

44 Of course, this is no different for imported services where advice is physically presented in a foreign jurisdiction but where the benefit of the advice is used and applied in the Republic in the furtherance of an enterprise. For a complete discussion of the application of the use-and-consumption principle on foreign supplies services, see Van Zyl 2013 *SA Merc LJ* 534–554; Van Zyl 2013 *SA Merc LJ* 255–265; Van Zyl 2014 *SA Merc LJ* 515–532.

Accordingly, the amended Regulations exacerbate the interpretation dilemma of the use-and-consumption principle instead of providing clear and definitive place-of-supply rules. Also, it can be argued that the specific exclusion of "telecommunication" equates to an exclusion of any service delivered via a telecommunication network. It is common knowledge that both fixed-line and mobile internet services are delivered via a telecommunication network, and that digital downloads are likely to be delivered via a fixed or mobile internet network. At the time of writing, SARS has tried to remedy this confusion on its FAQ page by explaining that any "digital goods" delivered over a telecommunication network do not fall under the exclusion.[45] The new all-inclusive definition removes the perceived B2B and B2C distinction that was created by the previous list. This is in line with National Treasury's mandate that the VAT Act does not distinguish between B2B and B2C transactions. However, this is in direct contrast to the OECD recommendations that B2B and B2C transactions must be treated differently.[46]

2 2 The importance of place-of-supply rules

South Africa adopts the destination principle[47] as a justification to impose VAT.[48] In terms of this principle, economic activity should be taxed in the jurisdiction where it is used and consumed.[49] This means that the VAT Act applies to South African residents and to the supply of services to South African residents by foreign suppliers in other jurisdictions.[50] However, owing to the nature of e-commerce, it is often difficult for tax authorities to establish that a supply of services occurred within the borders of South Africa or that it is consumed in the Republic. Hence, the concept of "supply" has become an important concept for tax authorities.[51]

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45 See South African Revenue Service website https://www.sars.gov.za/Legal/Legal-Publications/Pages/FAQs.aspx (accessed 2020-01-08).

46 OECD "International VAT/GST Guidelines" (2017) http://dx.doi.org/10.1787/9789264271401-en (accessed 2020-01-08).

47 In terms of the destination principle, consumer taxes are levied in the jurisdiction where the supply is made. In the case of the origin principle, consumer taxes are levied in the jurisdiction where the supply originates. Generally, in the case of consumer taxes, the destination principle applies. For the purpose of this article, it is assumed that the destination principle applies. See in general Ebrill, Bodin, Keen and Summers *The Modern VAT* (2001) 15–23; Bird and Gendron *The VAT in Developing and Transitional Countries* (2007) 108–138.

48 Van der Merwe 2003 *SA Merc LJ* 374; Steyn 2010 *SA Merc LJ* 239; Van Zyl *The Collection of Value Added Tax Online Cross-Border Trade in Digital Goods* (doctoral thesis, UNISA) 2013 343.

49 Basu *Global Perspectives on E-Commerce Taxation Law* (2007) 288; Cockfield, Hellerstein, Millar and Waerzeggers *Taxing Global Digital Commerce* (2013) 68; Van der Merwe 2003 *SA Merc LJ* 374; Steyn 2010 *SA Merc LJ* 239.

50 Musgrave "Digital Taxes Around the World: What to Know About New Tax Rules" https://quaderno.io/blog/digital-taxes-around-world-know-new-tax-rules/ (accessed 2018-07-06); Silver and Beneke *Deloitte VAT Handbook* 25; *Commissioner for SARS v De Beers supra*; *Master Currency v CSARS supra*.

51 Cleartax "Place of Supply Rules" https://cleartax.in/s/place-of-supply-gst (accessed 2018-07-06).

Assuming the destination principle applies, it is paramount to establish where the supply takes place, or is consumed, as this determines which jurisdiction will collect the necessary consumption tax.[52] Where the place of supply cannot be determined, place-of-supply proxies[53] must be incorporated in the VAT Act. As stated above, the VAT Act, in its current form, does not provide for specific place-of-supply rules/proxies. Instead, the place of supply is determined by the use-and-consumption principle. In the absence of clear place-of-supply proxies, transactions can escape the VAT net.[54] It follows that having explicit place-of-supply rules, particularly in cases of e-commerce transactions, enables tax authorities to impose VAT on transactions, since the place-of-supply rules will establish which transactions will be deemed to take place in South Africa.[55]

Rooi correctly states that if the place of supply is unidentifiable, then it becomes impractical, ineffective and inefficient to implement the relevant legislation.[56] It is the authors' view that appropriate and express place-of-supply rules for e-commerce transactions must be included in the VAT Act. The way the place-of-supply rules are deduced by the reading together of the charging provision and the definitions of "electronic services", "vendor", and "enterprise" is confusing for foreign suppliers who are not familiar with the South African legal system. While ignorance is no excuse, the authors believe that the complexity of the structure of the VAT Act contributes directly to non-compliance by foreign suppliers and/or an additional administrative burden on SARS officials having to cope with an influx of queries. To mitigate an influx of queries, on 5 July 2019, SARS launched a Frequently Asked Questions (FAQ) section on its website.[57] This FAQ is updated regularly. However, the authors must note that the FAQ section on the website is not easy to find, nor is it easy to navigate.

2 3 Who must register as a foreign supplier of electronic services in South Africa?

A vendor is any person who is, or is required to be, registered under the Act.[58] A vendor is required to levy VAT on goods and services supplied in the course or furtherance of that vendor's enterprise.[59] Generally, a person becomes liable to register as a vendor if the taxable supplies made during that period exceed or are likely to exceed R1 million at the end of a 12-

52 Van der Merwe 2003 *SA Merc LJ* 374. The term "consumption tax" is used here as a broad term that includes VAT and General Sales Tax (GST) or any derivative thereof.

53 A proxy, for purposes of VAT, is a deemed place of consumption that assists in establishing the jurisdiction of taxation. For example, the recipient's physical address can be used as proxy where an e-book is purchased online but is consumed in multiple jurisdictions.

54 See in general Van Zyl 2013 *SA Merc LJ* 534–554; Van Zyl 2013 *SA Merc LJ* 255–265; Van Zyl 2014 *SA Merc LJ* 515–532.

55 Kruger and Moss-Holdstock "The South African VAT Implications for Foreign Suppliers of Electronic Services" 2014 5 *Business Tax and Company Law Quarterly* 14 15.

56 Rooi *An Evaluation of the Practical Application of the South African VAT Legislation on Electronic Services: A Case Study* (MCom mini dissertation North-West University) 2015 80.

57 SARS https://www.sars.gov.za/Legal/Legal-Publications/Pages/ FAQs.aspx (accessed 2020-01-08).

58 S 1 of the definition of "vendor" of the VAT Act.

59 S 7(1)(*a*) of the VAT Act.

month period.[60] In the case of the supply of "electronic services" as defined, the annual registration threshold, from 1 April 2019, is R1 million.[61] Prior to the amendment, the registration threshold for foreign suppliers of "electronic services" was R50 000.[62] This created a differentiation between domestic suppliers of "electronic services" and foreign suppliers of "electronic services". At the time of the first amendments in respect of VAT on e-commerce transactions, domestic suppliers of digital goods[63] complained to Parliament that foreign suppliers of digital goods had an advantage in that they could make similar supplies free of VAT.[64] In order to protect the domestic market, Treasury found that a differentiated threshold for foreign and domestic suppliers of "electronic services" was optimal.[65] However, this resulted in a significant number of registrations of foreign vendors in respect of taxable supplies lower than the R50 000 threshold.[66] Furthermore, this created an additional and costly administrative burden for SARS.[67] The threshold amendment removed the differentiation between foreign and local suppliers of "electronic services", and it complies with the principle of neutrality.[68] In addition, it complies with the OECD Ottawa recommendations that there must not be any significant differences between the taxation of electronic commerce and conventional commerce transactions.[69]

2 3 1 Locating the place of supply: the definition of "enterprise"

The term "enterprise" is an important concept for purposes of the VAT Act.[70] An enterprise is defined as:

> "In the case of any vendor, any enterprise or activity which is carried on continuously or regularly by any person in the Republic or partly in the Republic and in the course or furtherance of which goods or services are supplied to any other person for a consideration, whether or not for profit, including any enterprise or activity carried on in the form of a commercial, financial, industrial, mining, farming, fishing, municipal or professional concern or any other concern of a continuing nature or in the form of an association or club."[71]

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60 S 23(1)(*a*) of the VAT Act.

61 S 23(1A) of the VAT Act, with effect from 1 April 2019.

62 S 23(1A) of the VAT Act, as it applied until 31 March 2019.

63 The authors refer to the term "digital goods" here because the definition of "electronic services" did not exist at the time.

64 Naidoo *Taxing Cross-Border Trade in the Digitised Economy,* Session 6 OECD Workshop 10–14 June 2019 South African Revenue Service, Megawatt Park.

65 *Ibid*.

66 *Ibid*.

67 *Ibid*.

68 See the concerns raised by the Davis Tax Commission that the VAT registration threshold for foreign suppliers of electronically supplied services does not comply with the principle of neutrality. Davis Tax Committee *Second Interim Report on BEPS* 13; Davis Tax Committee 2018 *Final VAT Report* 92–93.

69 OECD Committee on Fiscal Affairs *Electronic Commerce: Taxation Framework Conditions* 4.

70 SARS Interpretation Note 70.

71 S 1 of the definition of "enterprise" of the VAT Act.

The definition of enterprise is quite broad. It is the authors' view that the legislator incorporated every possible commercial activity in the definition for the activity to be subject to the VAT Act.

The definition of "enterprise" is not limited to businesses operated in South Africa. A foreign business that regularly supplies services in South Africa will be deemed to be conducting an enterprise in South Africa.[72] Whether a foreign business conducts its business from inside or outside South Africa is a question of fact. Generally, a foreign business is considered to have a permanent or fixed address in a foreign jurisdiction. The problem occurs when a supplier of services (particularly a foreign supplier of "electronic services") does not have a physical presence anywhere in the world but operates in the cloud and supplies services to recipients in South Africa regularly. In instances like these, in the absence of clear and definitive place-of-supply rules, it is difficult to ascribe the transactions to a specific jurisdiction, and to tax them (for VAT purposes) accordingly.

However, in South Africa, in the context of "electronic services", a foreign supplier of electronic services is deemed to conduct an enterprise in the Republic if it satisfies any two of the following three requirements:

i) the recipient of the services is resident in South Africa;
ii) the payment for the electronic services originates from a bank in South Africa; and
iii) the recipient has a business, postal or residential address in South Africa.[73]

The term "resident" is defined in the VAT Act as "a resident as defined in the Income Tax Act 58 of 1962" (Income Tax Act).[74] An extensive discussion of the term "resident" is not necessary for the purposes of this article. However, it suffices to say that residency in respect of natural persons consists of two tests: the ordinary resident test and the physical presence test.[75] In respect of persons other than natural persons, a person is resident if it is

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72 Paragraph (*b*)(vi) of s 1 of the definition of "enterprise" of the VAT Act; also see Van Zyl "The Collection of Value Added Tax on Cross-Border Digital Trade – Part 1: Registration of Foreign Vendors" 2014 47 *Comparative International Law Journal of Southern Africa* 154 157–161; De Swardt and Oberholzer "Digitised Products: How Compliant is South African Value Added Tax Act?" 2006 14 *Meditari Accountancy Research* 15 20–21.

73 Paragraph (*b*)(vi)(aa), (bb) and (cc) of s 1 of the definition of "enterprise" of the VAT Act.

74 S 1 of the definition of "resident" in the VAT Act.

75 A resident is a person who ordinarily resides in the Republic of South Africa. Unfortunately, the Income Tax Act does not define the term "ordinarily resident". Hence, whether a person is resident in South Africa is a matter of fact. A person will be deemed to be ordinarily resident in South Africa if they call their natural abode as their real home or alternatively, a person's usual or physical residence. The physical presence test applies if a person is not ordinarily resident in South Africa. In terms of the physical presence test, a person will be deemed to be resident in South Africa if they are physically present in South Africa for periods:

-exceeding 91 days in aggregate during the current year of assessment; and

-exceeding 91 days in aggregate during each of the five years of assessment preceding the current year of assessment; and

-exceeding 915 days in aggregate during the five years of assessment preceding the current year of assessment.

incorporated, established, or formed in the Republic, or has its place of effective management in the Republic.[76]

The VAT Act does not state who is liable to establish the residency of the recipient of "electronic services". From the wording of the VAT Act, it appears that the onus is on the foreign supplier of "electronic services" to determine the recipient's residency.[77] Establishing a recipient's residency creates an unnecessary administrative burden on foreign suppliers of "electronic services".[78] The OECD recommends that the tax rules be clear and simple to understand so that taxpayers can anticipate the tax consequences in advance of a transaction, including knowing when, where and how the tax is to be accounted.[79] The authors argue that this additional duty – the duty to determine the residency status of the recipient – adds to the existing complexity of the South African VAT system, and that it does not comply with the Ottawa agreement and the OECD recommendations.

The residence of a consumer of "electronic services", and payment originating from a South African bank, apply as proxies to establish the place of supply for "electronic services".[80] However, it remains to be seen if these proxies prove to be sufficient in accurately establishing the identity of a consumer of "electronic services" in South Africa.[81] It is also not clear what efforts the supplier must go to to determine the residency status of a recipient or the origin of a payment. What happens if the supplier fails to identify that the recipient is in South Africa, that payment originates from a South African bank, or that the recipient is resident in South Africa to the satisfaction of the Commissioner?[82] The authors posit that the normal non-compliance or understatement penalties and interest as provided for in the Tax Administration Act (TAA)[83] may apply. This can have a huge financial impact on foreign suppliers and may also lead to reputational damage. It is submitted that where a foreign supplier has verified that the customer has provided consistent information with a valid credit card, billing address, and IP address, all indicating the same address as residence, the supplier must be deemed to have discharged itself of the duty to determine the location of the recipient. Similarly, where the supplier has verified that the customer has provided consistent information indicating that payment originates from a South African bank, the supplier must be deemed to have discharged itself of the duty to locate the origin of the payment. At the time of writing, the SARS FAQ did not provide any guidelines on how and to what extent the

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76 Par (*b*) of the definition of "resident" in s 1 of the Income Tax Act 58 of 1962.

77 S 7(1)(*c*) of the VAT Act read with s 7(2) along with paragraph (*b*)(vi) of s 1 of the definition of "enterprise".

78 See in general the concerns raised in Van Zyl 2014 *Comparative International Law Journal of Southern Africa* 168–171, 175–183.

79 OECD Committee on Fiscal Affairs *Electronic Commerce: Taxation Framework Conditions* 4.

80 National Treasury *Explanatory Memorandum on the Taxation Laws Amendment Bill 2013.*

81 If the identity of the consumer is known, then, by implication, the place of consumption can be established.

82 See, for e.g., the concerns raised by Harmse "Value-Added Tax Consequences for Foreign Suppliers of Electronic Services into South Africa" 2015 3 *World Journal of VAT/GST Law* 115 117.

83 See Ch 15 of the Tax Administration Act 28 of 2011. A complete discussion of the penalties falls outside the scope of this article.

supplier must verify residency, establishment, or the origin of payment for purposes of raising South African VAT.

2 3 2 Locating the place of supply in Australia

In terms of Australian law, a foreign online business supplying digital goods to Australian consumers is required to charge an additional 10 per cent on the value of every transaction.[84] An Australian consumer is defined as an Australian resident who is not registered for Australian GST purposes.[85]

As explained below, whether or not a consumer is an Australian resident for purposes of the Australian GST is a question of fact. However, the onus to establish whether a consumer is an Australian resident rests solely on the foreign supplier of digital goods.

In order to establish that a recipient of digital goods is an Australian customer, an online business should form a reasonable basis to believe that a recipient is in fact an Australian consumer.[86] The basis upon which the online business relies consists of the typical systems and processes that a business uses in day-to-day operations.[87]

The following indicators are used to determine whether a recipient is an Australian consumer:

- the recipient's billing address;
- the recipient's mailing address;
- the recipient's banking or credit card details, including the location of the bank or the credit card;
- location-related data from third-party payment intermediaries;
- mobile phone SIM or landline country code;
- the recipient's country selection;
- IP address;
- geolocation software;
- the place of establishment of the recipient;
- representations and warranties given by the recipient;
- the origin of the correspondence; and
- locations, such as a Wi-Fi spot, where the physical presence of the person receiving the service at that location is needed.[88]

Foreign suppliers of digital goods have a duty to employ all pertinent information that is available on the day of the transaction, including personal information provided by the recipient, to enable them to decide whether or not a recipient is an Australian resident.[89] If the foreign supplier is still unable to decide on a recipient's residency, then the foreign supplier must weigh the

84 S 9–25(5)(*d*) of the Australian GST Act.
85 S 9–25(7) of the Australian GST Act.
86 S 84–100(2)(*a*) of the Australian GST Act.
87 Australian Goods and Services Tax Ruling 2017/1.
88 *Ibid*. According to the Australian government, the list of indicators pointing to a recipient's residency is not closed.
89 *Ibid*.

information it has at its disposal in order to formulate the residency of the recipient.[90] However, foreign online businesses are not required to attain extra information from the Australian consumer.[91]

Alternatively, a foreign online business may take reasonable steps to obtain information that will show whether a recipient is an Australian consumer.[92] It follows that the steps taken by an online business are objective and every case should be judged on its own merits.[93] It is recommended that SARS develop guidelines similar to those mentioned above to alleviate the administrative burden on foreign suppliers. Furthermore, foreign suppliers following the guidelines in good faith must be exempted from non-compliance or understatement penalties.

2 3 3 Locating the place of supply in the EU

In the EU, the location of the customer recipient of electronically supplied services is established by using what the EU describes as "presumptions". The presumptions are provided for as follows:

1. "Where a supplier of telecommunications, broadcasting or electronically supplied services provides those services at a location such as a telephone box, a telephone kiosk, a wi-fi hotspot, an internet café, a restaurant or a hotel lobby where the physical presence of the recipient of the service at that location is needed for the service to be provided to him by that supplier, it shall be presumed that the customer is established, has his permanent address or usually resides at the place of that location and that location and that service is effectively used and enjoyed there."[94]
2. "If the location referred to above is on board a ship, aircraft or train carrying out a passenger transport operation effected within the community the country of the location shall be the country of departure of the passenger transport operation."[95]

The above two presumptions are deemed to be "irrebuttable" for the purposes of locating the customer recipient of electronically supplied services.[96] The "rebuttable" presumptions for the location of a customer provide that

> "where telecommunications, broadcasting or electronically supplied services are supplied to a non-taxable person:
>
> (a) through his fixed land-line, it shall be presumed that the customer is established, has his permanent address or usually resides at the place of installation of the fixed land-line;
> (b) through mobile networks, it shall be presumed that the place where the customer is established, has his permanent address or usually resides is

90 *Ibid*.
91 *Ibid*.
92 S 84–100(1)(*a*) of the Australian GST Act.
93 Australian Goods and Services Tax Ruling 2017/1.
94 Article 24a of the EU Council Implementing Regulation No 1042/2013.
95 *Ibid*.
96 Cockfield *et al Taxing Global Digital Commerce* 310.

the country identified by the mobile country code of the SIM card used when receiving those services;

(c) for which the use of a decoder or similar device or a viewing card is needed and a fixed land line is not used, it shall be presumed that the customer is established, has his permanent address or usually resides at the place where the decoder or similar device is located or if that place is not known, at the place to which the viewing card is sent with a view to being used there; and

(d) under circumstances other than those referred to in Article 24a and the points above, it should be presumed that the customer is established, has his permanent address or usually resides at the place identified as such by the supplier on the basis of two items of non-contradictory evidence as listed in Article 24f of the Regulation."[97]

The evidentiary information used to identify the location of the recipient of electronically supplied services includes the customer's billing address; the customer's bank address; the customer's IP address; the customer's fixed landline through which the service is supplied; the mobile country code (MCC) of the international mobile subscriber identity (IMSI) stored on the subscriber identity module (SIM) card used by the customer, and any other commercially relevant information.[98]

2 4 Simplified registration of foreign vendors

2 4 1 The simplified VAT registration of foreign suppliers of electronic services in South Africa

SARS has adopted a streamlined registration for foreign suppliers of "electronic services". What follows is a summary of this process to highlight its simplicity. Once the required threshold of taxable supplies has been met,[99] a foreign supplier of electronic services must register for VAT on the SARS website and download a copy of the VAT 101 form. After completing and signing the VAT 101 form, it must be emailed together with supporting documents to SARS at eCommerceRegistration@sars.gov.za.[100] The supplier will be notified within 24 hours of the outcome of registration. Similarly, deregistration can be effected by sending supporting documents to the same email address. Unlike domestic suppliers, the foreign supplier is not required to open a South African bank account, and it is not required to have a physical address in South Africa. This simplified registration process complies with the recommendations of the OECD.[101] As supplier existence cannot be verified, the number of fake vendor registrations may increase. Such vendors may submit fake invoices in order to benefit from the input VAT regime. Even where these vendors submit tax compliance certificates

97 Article 24b of the EU Council Implementing Regulation No 1042/2013.

98 Article 24e and Article 24f of the EU Council Implementing Regulation No 1042/2013.

99 The current threshold is R50 000 per annum. From 1 April 2019, the threshold is R1 million per annum.

100 SARS "VAT Registration Guide for Foreign Suppliers of Electronic Services" http://www.sars.gov.za/AllDocs/OpsDocs/Guides/VAT-REG-01-G02%20-%20VAT%20Registration%20Guide%20for%20Foreign%20Suppliers%20of%20Electronic%20Services%20-%20External%20Guide.pdf (accessed 2018-04-01).

101 OECD http://dx.doi.org/10.1787/ 9789264271401-en 68–78.

issued by the revenue authority of the country where they are established, there is no guarantee that the vendors actually conduct trade in South Africa, which is required for them to benefit from the input VAT regime. It must be noted that input VAT claims by a foreign registered vendor supplier of electronic services are limited to expenditure incurred in South Africa. To prevent fake vendor registration, it is recommended that input VAT deductions should not exceed any output VAT liability. Where the inputs exceed outputs, an input credit must be rolled over until the next reporting period. No pay-out of input VAT credits to foreign vendors should be executed. Of course, such a strict regime may prevent prospective legitimate vendors from registering and it may distort the market.

Once registered, a foreign supplier of electronic services is required to issue a tax invoice to a recipient within 21 days of the date of supply.[102] The invoice must contain the following particulars:[103]

- the name and VAT registration number of the electronic services supplier;
- the name and address of the electronic services recipient;
- an individual serialised number;
- the date of issue;
- a description of the electronic services supplied;
- the consideration in money for the supply in the currency of any country (If the consideration is reflected in the currency of–
  - the Republic of South Africa, the amount of the VAT charged or a statement that it includes a charge for the VAT and the rate at which the VAT was charged; or
  - any country other than the Republic, the amount of the tax charged in the currency of the Republic or a separate document issued by the electronic services supplier to the electronic services recipient reflecting the amount of the tax charged in the currency of the Republic.); and
- the exchange rate used.[104]

It follows that the foreign supplier of "electronic services" will account for and remit VAT to SARS and that the reverse-charge mechanism remains as backdrop.[105] However, when the recipient imports "electronic services" from a non-registered foreign supplier of "electronic services", the burden to account for VAT shifts to that recipient.[106]

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102 S 20 of the VAT Act.

103 S 20(5B) of the VAT Act.

104 SARS "Binding General Ruling 28 Issue 1–2: Electronic Services" http://www.sars.gov.za/AllDocs/LegalDoclib/Rulings/LAPD-IntR-R-BGR-2015-03%20-%20BGR28%20Electronic%20Services.pdf (accessed 2017-03-31).

105 Louw and Botha "Value-Added Tax on Electronic Services Supplied by Person Outside South Africa" http://www.thesait.org.za/news/168149/Value-added-Tax-on-electronic-services-supplied-by-persons-outside-South-Africa.htm (accessed 2017-04-05); Davis Tax Committee *Second Interim Report on BEPS* 9–10.

106 This is no different from the importation of services.

Currently, there are no provisions in the VAT Act that enable SARS to monitor the compliance of foreign businesses. Moreover, there are currently no provisions in place within the VAT Act that impose penalties on foreign suppliers of "electronic services" in the event of non-compliance. However, as stated above, the non-compliance penalties and interest as provided for in the TAA apply. Notably, the TAA does not grant the Commissioner extra-territorial power to collect outstanding taxes, penalties and interest.[107] In the absence of multilateral treaties and information exchange treaties, extra-territorial enforcement remains challenging.[108] In other words, while the TAA empowers the Commissioner to impose penalties where a foreign supplier fails to register as a VAT vendor, the Commissioner has no legal basis to enforce such penalties in the jurisdiction in which the foreign supplier is incorporated or from which it operates. However, Spamer and Moonsamy opine that reputational damage from bad publicity might render foreign suppliers of "electronic services" willing to comply with the VAT Act.[109] Well-known multinational corporations cannot afford to be associated with tax non-compliance. Another option is to disallow input VAT deductions in the hands of domestic VAT vendors who make use of non-compliant foreign vendors. Similarly, deductions for income tax purposes in respect of "electronic services" supplied by non-compliant foreign suppliers to domestic taxpayers may be denied. Of course, this requires extensive auditing and close cooperation between different departments in SARS.

As stated above, the reverse-charge mechanism applies as backdrop. Accordingly, where the foreign supplier of "electronic services" is registered for South African VAT, but fails to collect and remit VAT, the South African consumer of the "electronic services" by default becomes liable to self-assess the transaction and remit VAT.[110] The authors' own experiment at the SARS office in Pretoria revealed that SARS officials are unaware of the reverse-charge mechanism, and they were unable to process the authors' VAT return.

2 4 2 The administrative burden of VAT registration for foreign suppliers of electronic services

Upon registration as a VAT vendor in South Africa, a foreign supplier must levy VAT at 15 per cent on the supply of electronic services.[111] SARS issued

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[107] The definition of "international agreement" in s1 of the TAA, read together with s 3(3), alludes to international cooperation only in cases where a foreign jurisdiction requests SARS's cooperation. It does not provide SARS with powers to enforce a South African tax liability in a foreign jurisdiction. Such extra-territorial powers or right of exchange of information must be negotiated by way of multilateral and bilateral agreements.

[108] Davis Tax Committee *Second Interim Report on BEPS* 12.

[109] Spamer and Moonsamy "New VAT Regulations for Electronic Services Effective April 2019" (2018) *Lexology* https://www.bakermckenzie.com/en/insight/publications/2018/12/new-vat-regulations-for-electronic (accessed 2018-12-05).

[110] In terms of s 14(1) of the VAT Act, the recipient importer of imported services (including electronic services) must within 30 days of the earlier of the payment of the services or issue of an invoice furnish the Commissioner with a VAT return and remit VAT on the transaction.

[111] S 7(1)(*a*) of the VAT Act.

a Binding General Ruling for "electronic services" on 23 February 2016. In it, SARS states that a supplier of electronic services "may" advertise the price of its electronic services exclusive of VAT on condition that it has a statement on its website indicating that VAT will be levied on supplies of "electronic services" to "electronic services" recipients.[112] This means that a supplier is not obliged to advertise the price of "electronic services" inclusive of VAT. However, the consumer must be made aware of the fact that South African VAT will be levied on the purchase price if South African VAT applies.

The OECD has made reference to the fact that the registration mechanism imposes an unnecessary compliance burden on foreign suppliers.[113] This stems from foreign businesses transacting with consumers in multiple jurisdictions.[114] It is the authors' view that a foreign business may have to register in each and every jurisdiction where it has customers. It is fair to assume that this is not a path many businesses will be willing to follow – considering the expense and resources that may be incurred in facilitating registration in different states situated on as many as six different continents.[115]

It has also been stated that the registration mechanism poses an administrative burden on foreign suppliers of electronic services.[116] A foreign business that registers in a foreign state must comply with that foreign state's laws. This can entail familiarising themselves with laws that they possibly do not understand. While it can be argued that these duties form part and parcel of doing business, many smaller businesses simply do not have the capacity to familiarise themselves and comply with difficult foreign law. Not only will they have to monitor online transactions, but foreign businesses must also keep records of all the transactions in instances where foreign law requires them to do so. As such, they are potentially prevented from trading internationally, which may lead to market distortions. While the concessions made by SARS to streamline the VAT registration of foreign suppliers of electronic services comply with the OECD guidelines, the Davis Tax Committee recommends that the registration process be closely monitored and reviewed on a regular basis to ensure that it remains compliant with the OECD simple registration guidelines.[117] Despite the simplified registration process, many foreign suppliers are still unaware of their obligations in terms of the Act.[118]

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[112] SARS "Binding General Ruling (VAT): No. 28 (Issue 2)" (23 February 2016) https://www.sars.gov.za/wp-content/uploads/Legal/Rulings/BGR/LAPD-IntR-R-BGR-2015-03-BGR28-Electronic-Services.pdf (accessed 2021-09-01).

[113] OECD Technical Advisory Group "Report by the Technology Technical Advisory Group" (2000) http://www.oecd.org/tax/consumption/1923248.pdf (accessed 2017-03-08).

[114] *Ibid*.

[115] Asia, Africa, Europe, South America, North America and Oceania.

[116] Van Zyl 2014 *Comparative International Law Journal of Southern Africa* 168–171; Steyn 2010 *SA Merc LJ* 241–255; Steyn 2010 *SA Merc LJ* 241–255; OECD Consumption Tax Advisory Group "Consumption Tax Aspect of Electronic Commerce" (2000) http://www.oecd.org/tax/consumption/1923240.pdf (accessed 2017-06-15).

[117] Davis Tax Committee *Second Interim Report on BEPS* 10.

[118] *Ibid*.

2 4 3 The simplified VAT registration of foreign suppliers of digital goods in Australia

Foreign suppliers of digital goods are required to register for purposes of GST if they carry on an enterprise within the Indirect Tax Zone (ITZ)[119] and have an annual threshold turnover that exceeds $75 000.[120] A foreign supplier is then required to collect the GST and remit it to the Australian Tax Office (ATO).[121] Businesses may choose between two different registration systems – namely, the limited registration and the standard full registration.

The limited registration system is done online and allows foreign businesses to remit tax to the ATO expeditiously. In terms of this registration method, registration for foreign online businesses is simplified in the following manner:

- The online business is not required to establish its identity.
- Registration will be facilitated online.
- An ATO reference number (ARN) is issued instead of an Australian Business Number (ABN).
- The online business is not entitled to any GST credits.
- The online business must lodge GST returns and pay GST quarterly.
- The online business cannot issue tax invoices.[122]

In terms of the standard registration system, an online foreign business must apply for an ABN number. This number will enable identification to a foreign business on the ATO system.[123] An ABN number is obtained after supplying the ATO with evidentiary documentation for the purposes of identification.[124] The downside of this system is that the registration process may be tedious for foreign online businesses.[125]

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119 The ITZ refers to Australia excluding other territories that fall outside the ambit of the GST.

120 S 23–5 read with s 23–15 of the Australian GST Act.

121 The Parliament of the Commonwealth of Australia "Explanatory Memorandum to the Tax and Superannuation Laws Amendment Bill of 2016" http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r5613_ems_80fe4701-d459-4971-9100-126d942757f1/upload_pdf/504670.pdf;fileType=application%2Fpdf (accessed 2017-08-31).

122 Australian Taxation Office "Australian GST Registration for Non-Residents" https://www.ato.gov.au/Business/International-tax-for-business/In-detail/Doing-business-in-Australia/Australian-GST-registration-for-non-residents/ (accessed 2017-09-07); The Parliament of the Commonwealth of Australia "Explanatory Memorandum to the Tax and Superannuation Laws Amendment Bill of 2016" http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r5613_ems_80fe4701-d459-4971-9100-126d942757f1/upload_pdf/504670.pdf;fileType=application%2Fpdf (accessed 2017-08-31); PWC Australia "Changes to Australian GST for Cross-Border Supplies Commencing 1 July 2017: Are You Ready?" (2017) *TaxTalk* http://ebiz.pwc.com/wp-content/uploads/2017/06/australia-gst-changes-13jun17.pdf (accessed 2017-09-07).

123 Australian Taxation Office https://www.ato.gov.au/Business/International-tax-for-business/In-detail/Doing-business-in-Australia/Australian-GST-registration-for-non-residents/.

124 *Ibid*.

125 *Ibid*.

The registration system is beneficial to Australian consumer recipients as their compliance burden will be all but insignificant.[126]

2 4 4 The simplified VAT registration of foreign suppliers of electronic supplied services in the European Union

A foreign supplier that provides electronically supplied services can register and account for VAT in the jurisdiction of the identified customer if the online business does not have a permanent establishment in that jurisdiction.[127] This mechanism, known as the Mini One Stop Shop (MOSS), is optional; online businesses are not compelled to use it. MOSS is available to online businesses situated inside and outside the EU.[128]

Upon registration in an EU state, an online business declares the transaction to the relevant tax authorities and pays the VAT due by means of a web portal in the state where the identity of the customer has been established.[129]

An online business that has a fixed or permanent establishment in the EU may not use MOSS to collect VAT for the supplies made in another EU state in which it has a permanent establishment.[130] The EU VAT directive does not define the term "permanent establishment". The definition can, however, be found in the implementing regulation. A permanent or fixed establishment is an "establishment that is characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to receive and use the services supplied to it for its own needs".[131]

An EU online business that uses MOSS must register in the EU state where it has identified the consumer.[132] When the online company registers for VAT purposes, it is issued with a VAT identification number. A VAT identification number is also issued to a non-EU online company that supplies services to an EU state where the consumer has been identified.[133]

It appears that having some sort of permanent establishment is a prerequisite to use MOSS. The requirement of a fixed or permanent establishment could stem from the necessity to establish the identity of the

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126 The Parliament of the Commonwealth of Australia "Explanatory Memorandum to the Tax and Superannuation Laws Amendment Bill of 2016" http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r5613_ems_80fe4701-d459-4971-9100-126d942757f1/upload_pdf/504670.pdf;fileType=application%2Fpdf (accessed 2017-08-31).

127 European Commission "Guide to the VAT Mini One Stop Shop" (2013) http://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/vat/how_vat_works/telecom/one-stop-shop-guidelines_en.pdf (accessed 2017-07-01).

128 *Ibid*.

129 Dale and Vincent "The European Union's Approach to VAT and e-Commerce" 2017 6 *World Journal of VAT/GST Law* 55–61.

130 European Commission http://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/vat/how_vat_works/telecom/one-stop-shop-guidelines_en.pdf.

131 Article 11 of the EU Council Implementing Regulation No 282/2011.

132 European Commission http://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/vat/how_vat_works/telecom/one-stop-shop-guidelines_en.pdf.

133 *Ibid*.

business and the place of taxation for the supply of electronically supplied services. This can be a hurdle for businesses operating in the cloud. Mikutiené states that the fixed establishment concept can be used to determine the place of supply for B2B as well as B2C transactions.[134] According to Mikutiené, the fixed establishment concept "strongly influences the entitlement of the Member States to tax supplies and affects the cash flow of both the Member States and the businesses supplying and acquiring cross-border services".[135]

2 4 5 MOSS: Successes, challenges and further improvements

The European Commission states that the implementation of MOSS has been largely successful. According to its findings,[136] an amount of €3 billion of VAT was paid and collected in the year 2015. During that same period, 12 000 businesses made use of the MOSS system. Furthermore, the use of MOSS has led to the reduction of costs for businesses of €500 million. MOSS also covered 70 per cent of EU turnover on electronic services. Overall, businesses were satisfied with the implementation of MOSS and revenue collection rose significantly as a result.[137]

According to the European Commission, one of the main challenges when using MOSS is the compliance costs that businesses face when transacting in different states.[138] Online businesses have to deal with as many as 28 different states when transacting with customers in the EU. Moreover, with the EU having 24 official languages, it seems almost impossible for online businesses to familiarise themselves with each and every language when dealing with the EU states.

Online businesses have identified market distortions as another impediment.[139] An online business transacting with EU states will encounter different VAT rates that could apply to the same type of electronic services. For instance, a supply of computer software will be subject to VAT at 24 per cent in Italy and 19 per cent in Germany. These market distortions could lead to little or no taxation of that electronic service in certain countries.[140]

Interacting with customers in different states translates into an engagement with different legal frameworks.[141] An online business transacting in the EU will encounter multiple sets of legal rules relating to

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134 Mikutiené "The Preferred Treatment of the Fixed Establishment in European VAT" 2014 3 *World Journal of VAT/GST Law* 166 166.

135 *Ibid*.

136 European Commission "Modernising VAT for Cross-Border B2C e-Commerce" (2016) https://ec.europa.eu/taxation_customs/sites/taxation/files/swd_2016_379.pdf (accessed 2017-07-05).

137 *Ibid*.

138 *Ibid*.

139 *Ibid*.

140 *Ibid*.

141 Ecommerce Europe "Analysis of the Survey Barriers to Growth" (2015) https://www.ecommerce-europe.eu/app/uploads/2016/07/survey-barriers-to-growth-ecommerce-europe-2015-1.pdf (accessed 2017-07-05).

things such as the law of contract, privacy and data protection.[142] These rules are set out differently in each EU state. Becoming familiar with and complying with these separate rules could prove to be burdensome for an online business.

Krinis[143] argues that MOSS poses additional challenges for online businesses. These include difficulties with the identification of customers, record-keeping and home country audits. In terms of record-keeping requirements, an online business is required to keep records for a period of 10 years.[144] Krinis states that the time frame for record-keeping should be reduced.[145] Krinis also states that home country audits should be introduced for online businesses in the state where the customer has been identified.[146] Moreover, Krinis recommends that only two items of evidence[147] be used to establish the identity of a customer.[148]

Along with these improvements suggested by Krinis, the European Commission has also highlighted other enhancements that can be applied to MOSS. First, the European Commission agrees with Krinis and has acknowledged that the 10-year record-keeping period is lengthy and that other avenues should be explored.[149] Secondly, better communication is required between micro-businesses, member states and the European Commission.[150] Thirdly, after micro-businesses stressed the lack of a threshold as a problematic area, the European Commission on 1 January 2019 introduced thresholds to the amount of €10 000[151] and €100 000[152] to

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142 *Ibid*.

143 Krinis *VAT Challenges of the Digital Economy: An EU Perspective* (Master of Accounting dissertation, Universidade do Minho Portugal) 2016 66.

144 European Commission https://ec.europa.eu/taxation_customs/sites/taxation/files/swd_2016_379.pdf.

145 Krinis *VAT Challenges of the Digital Economy* 67.

146 Krinis *VAT Challenges of the Digital Economy* 85.

147 Krinis *VAT Challenges of the Digital Economy* 85.

148 Krinis *VAT Challenges of the Digital Economy* 69–70.

149 European Commission https://ec.europa.eu/taxation_customs/sites/taxation/files/swd_2016_379.pdf.

150 *Ibid*.

151 An annual €10 000 turnover threshold is introduced from 1 January 2019, up to which threshold the place of supply of relevant supplies of cross-border telecommunication, broadcasting, and electronically supplied services (TBE services) remains in the member state where the supplier is established, has his permanent address or usually resides. The application of this threshold is subject to the following conditions: a) the supplier is established, has his permanent address or usually resides in only one member state; b) he supplies TBE services to customers who are established, have their permanent address or usually reside in another member state; c) the total value of TBE services supplied to other member states does not exceed €10 000 (exclusive of VAT) in the current and in the preceding calendar year.

152 A threshold applies of €100 000 up to which one piece of evidence is sufficient to determine the place of supply. The application of this threshold is subject to the following conditions: 1) the total value (exclusive of VAT) of TBE services provided by the supplier from his business establishment or a fixed establishment located in a member state to customers who are established, have their permanent address or usually reside in other member states does not exceed €100 000 in the current and in the preceding calendar year; 2) the item of evidence is provided by a person involved in the supply of the services other than the supplier or the customer; 3) the item of evidence is listed in points (a) to (e) of Article 24f of the VAT Implementing Regulation. As soon as the threshold is exceeded during a

assist micro-businesses (SMEs).[153] The thresholds apply to suppliers who are incorporated in an EU member state. For foreign suppliers of electronically supplied services, a threshold has not yet been implemented. Fourthly, identification of the customer remains a concern.[154] As a way to simplify the identification of consumers, Veltrop suggests that a universal pricing system should be adopted to entice consumers to provide the correct personal details to suppliers.[155] Veltrop also states that as a means to reduce compliance costs for suppliers, "fast and simple" ordering systems should be made accessible to consumers.[156] In addition, a supplier is not protected in a case of discrepancies where inaccurate information is obtained *bona fide*.[157] However, where the supplier has verified that the customer has provided consistent information with a valid credit card, billing address, and IP address, all indicating the same residence, it can be said that the supplier has acquitted itself of the duty to determine the customer's location.[158]

Other commentators have underlined the need for the harmonisation of EU VAT rules in order to reduce the compliance burden on suppliers.[159]

The implementation of MOSS has obviously not been plain sailing. Although it has helped tax authorities to collect an increased amount of VAT, MOSS has given rise to a set of challenges. Among those challenges faced by online businesses is the unenviable task of dealing with 24 different languages, 28 different legal frameworks and, potentially, audits from 28 different states. There is a need for the relevant rules, policies and legal frameworks to be harmonised to stem the trend of under-taxation.

The European Commission is in the process of improving MOSS. These improvements will be implemented over an extended period of time. Since the EU is the recognised forerunner in the implementation and use of MOSS,[160] perhaps members of regional African trade organisations[161] will

calendar year, the normal rules apply, meaning that again two pieces of evidence are required.

153 Dale and Vincent 2017 *World Journal of VAT/GST Law* 56.

154 European Commission https://ec.europa.eu/taxation_customs/sites/taxation/files/swd_2016_379.pdf; Merkx "Fixed Establishments and VAT Liabilities Under EU VAT: Between Illusion and Reality" 2012 23 *International VAT Monitor* 22 22.

155 Veltrop "How to Identify Customers of e-Services in VAT" 2014 1 *Taxation Perspectives* 121 137.

156 *Ibid*.

157 Fitzgerald "US Companies' Sales to EU Consumers Subject to VAT on Digital Downloads" 2002 *The Tax Adviser* 382.

158 European Parliament: Directorate-General for Internal Policies *Simplifying and Modernising in the Digital Single Market* (2012) European Parliament 61.

159 Vazquez, Duncan and Phillipe "The European Mini One-Stop Shop: A Model for Future Indirect Tax Compliance?" (2017) *The Tax Adviser* http://www.thetaxadviser.com/issues/2017/jun/european-mini-one-stop-shop-indirect-tax-compliance.html (accessed 2018-07-4); Lamensch "Are the 'Reverse-Charging' and the 'One-Stop-Scheme' Efficient Ways to Collect VAT on Digital Supplies?" 2012 1 *World Journal of VAT/GST Law* 1 3; Parrilli "Electronically Supplied Services and the Value Added Tax: The European Perspective" 2009 14 *Journal of Internet Banking and Commerce* 1 14–17; Minor "A Primer on the 'One-Stop-Shop' VAT Compliance Scheme for Non-EU Suppliers of e-Commerce Services" 2011 13 *Tax Notes International* 1043 1045.

160 European Commission https://ec.europa.eu/taxation_customs/sites/taxation/files/swd_2016_379.pdf.

follow suit in adopting mechanisms that are similar to MOSS. The implementation of MOSS has brought about a shift in the way VAT is collected in the EU. Albeit not flawless, MOSS, or a mechanism akin to MOSS may be employed in the Southern African Development Community (SADC). Its implementation in the SADC[162] region would enable foreign suppliers of digital goods to register for and account for VAT in one country in the SADC region instead of registering in each country in SADC. A model similar to that of MOSS will not be easy to implement without examining MOSS in its current form; improving on it where the need arises; harmonising VAT rules in the SADC region;[163] greater cooperation between member states; and expanding the tax administration, among other things.

2 5 Other new developments in South Africa: VAT vendor registration of platforms

In 2016, SARS published a draft Binding General Ruling on Electronic Services Supplied via Intermediaries (the Ruling).[164] In terms of the Ruling, foreign suppliers of electronic services would not be required to register or account for VAT in South Africa, subject to the following provisos:[165]

> "(a) [The foreign supplier] only supplies electronic services via an intermediary's platform;
> (b) The intermediary is a registered vendor in the Republic;
> (c) The electronic services supplier and the relevant intermediary enter into a written agreement confirming that the intermediary will–
> (i) account for VAT on the supply of the electronic services supplied *via* its platform;
> (ii) be liable for the payment of VAT in respect of the supply of said electronic services;
> (d) The intermediary will retain accounting records, as envisaged in section 29 of the Tax Administration Act 28 of 2011[166] for the supply of electronic

[161] Southern African Development Community (SADC) of which South Africa is a member; Economic Community of West African States (ECOWAS); Common Market for East and Southern Africa (COMESA).

[162] Currently consisting of Angola, Botswana, Malawi, Lesotho, Namibia, Zimbabwe, Swaziland, Democratic Republic of Congo, Mozambique, Zambia, Madagascar, Tanzania, South Africa, Seychelles and Mauritius.

[163] In 2016, the SADC Secretariat published *Guidelines for Co-Operation in Value Added Taxes in the SADC Region*, the main aim of which is to harmonise the VAT rules in the SADC region. However, these guidelines cannot be construed to reflect the policy or laws of any of the SADC member countries.

[164] SARS "Draft Binding General Ruling on Electronic Services Supplied via Intermediaries" https://www.sars.gov.za/wp-content/uploads/Legal/Drafts/LAPD-LPrep-Draft-2016-22-Draft-BGR-on-electronic-services-supplied-via-intermediaries.pdf (accessed 2017-04-09).

[165] Visser "Tax Practitioners Favour Move to Simplify VAT Rules for Foreign e-Commerce" (2016) http://www.thesait.org.za/news/287478/Tax-practitioners-favour-move-to-simplify-VAT-rules-for-foreign-e-commerce-.htm (accessed 2017-04-09); SARS http://www.sars.gov.za/AllDocs/LegalDoclib/Drafts/LAPD-LPrep-Draft-2016-22%20-%20Draft%20BGR%20on%20electronic%20services%20supplied%20via%20intermediaries.pdf.

[166] S 29 of the TAA states: "(1) A person must keep the records, books of account or documents that (*a*) enable the person to observe the requirements of a tax Act; (*b*) are specifically required under a tax Act or by the Commissioner by public notice; (*c*) enable SARS to be satisfied that the person has observed those requirements. (2) The

services by the electronic services supplier falling within this arrangement; and

(e) The intermediary, by entering into this arrangement accepts that it is liable for any outstanding taxes of the electronic services supplier in respect of the supply of the said electronic services as made *via* an intermediary's platform."[167]

In terms of the Ruling, a foreign supplier of electronic services will not be required to register for VAT if the intermediary is already registered for VAT and the foreign supplier has entered into an agreement with the intermediary wherein the latter will account for and pay the VAT to SARS.[168]

It follows that if a foreign supplier does not supply electronic services via an intermediary's platform, the former will still be required to register and account for VAT where the taxable supplies at the end of any year exceed R1 million.[169]

The Ruling defines an "intermediary" as a person who facilitates the supply of "electronic services" supplied by an "electronic services" supplier and that is responsible for, *inter alia*, issuing invoices and collecting payment for the supply.[170]

The South African Institute of Tax Practitioners (SAIT) said in its submissions to SARS that the Ruling allows South African intermediaries to assume responsibility for VAT *in lieu* of foreign suppliers of "electronic services".[171] SAIT also submitted that the Ruling is based on SARS's discretionary power in terms of section 72[172] of the VAT Act.[173] The use of

requirements of this Act to keep records, books of account or documents for a tax period apply to a person who (*a*) has submitted a return for the tax period; (*b*) is required to submit a return for the tax period and has not submitted a return for the tax period; or (*c*) is not required to submit a return but has, during the tax period, received income, has a capital gain or capital loss or engaged in any other activity that is subject to tax or would be subject to tax but for the application of a threshold or exemption. (3) Records, books of account or documents need not be retained by the person described in: (*a*) subsection (2)(*a*), after a period of five years from the date of the submission of the return; and (*b*) subsection (2)(*c*), after a period of five years from the end of the relevant tax period."

167 SARS http://www.sars.gov.za/AllDocs/LegalDoclib/Drafts/LAPD-LPrep-Draft-2016-22%20-%20Draft%20BGR%20on%20electronic%20services%20supplied%20via%20intermediaries.pdf.

168 Visser http://www.thesait.org.za/news/287478/Tax-practitioners-favour-move-to-simplify-VAT-rules-for-foreign-e-commerce-.htm.

169 Visser http://www.thesait.org.za/news/287478/Tax-practitioners-favour-move-to-simplify-VAT-rules-for-foreign-e-commerce-.htm; SARS http://www.sars.gov.za/AllDocs/LegalDoclib/Drafts/LAPD-LPrep-Draft-2016-22%20-%20Draft%20BGR%20on%20electronic%20services%20supplied%20via%20intermediaries.pdf.

170 *Ibid*.

171 The SAIT letter to the South African Revenue Service in respect of the Draft Binding General Ruling Relating to Electronic Services Supplied by Intermediaries (VAT) dated 25 April 2016, [online] www.thesait.org.za/resource/resmgr/2016_Submissions/25_Apr_2016_-_SAIT_ BGR_Elect.pdf (accessed 2017-04-09).

172 S 72 of the VAT Act states: "If in any case the Commissioner is satisfied that in consequence of the manner in which any vendor or class of vendors conducts his, her or their business, trade or occupation, difficulties, anomalies or incongruities have arisen or may arise in regard to the application of any of the provisions of this Act, … the Commissioner may make a decision as to – (*a*) the manner in which such provisions shall be applied; or (*b*) the calculation or payment of tax or the application of any rate of zero per cent or any exemption from tax provided in this Act, in the case of such vendor or class of

an intermediary for the purposes of tax collection should not be underestimated. Ligthart argues that enabling intermediaries to collect VAT could potentially reduce compliance costs.[174] This could be an important aspect for both foreign suppliers of "electronic services" and tax authorities. It would enable foreign suppliers to transact with customers with the knowledge that the administrative burden of tax collection has shifted to the intermediary. Hence, they would not incur unnecessary expenses when transacting online with customers. For tax authorities, the burden of tax collection and VAT liability would shift to a third party. Tax authorities' administrative costs would be significantly reduced. A tax authority's resources could then be channelled into other activities like consumer tax awareness campaigns, international cooperation and improving tax policies.

Section 8 of the Rates and Monetary Amounts and Amendment of Revenue Laws Act[175] introduced into the definition of "enterprise" "the activities of an intermediary". An "intermediary" is defined as "a person who facilitates the supply of electronic services supplied by the electronic services supplier and who is responsible for issuing the invoices and collecting payment for the supply".[176] The effect of the amendment is that intermediaries or platforms that facilitate the supply of "electronic services" (on behalf of a foreign supplier), and who are responsible for invoicing and collecting payment, are required to register as VAT vendors in South Africa. The platform or intermediary is then deemed to be the supplier. The platform or intermediary, and not the actual supplier, is liable to collect and remit VAT. Although the amendment is in line with the OECD Working Party 9 (WP9) recommendations,[177] some of the OECD recommendations were not incorporated. First, under the South African position (and counter to the OECD view), the digital platform or intermediary cannot apply for an exclusion where it cannot essentially fulfil the role of VAT-collecting vendor.[178] Secondly, the OECD recommends that taxing point must be determined as the time at which confirmation of payment is received by or on behalf of the supplier.[179] The authors posit that the general time-of-supply rules apply: where an intermediary is registered on the invoice basis, the earliest of issue of the invoice or receipt of payment will be deemed to be the time of supply; and where an intermediary is registered on the payment

vendors or any person transacting with such vendor or class of vendors as appears to overcome such difficulties, anomalies or incongruities: Provided that such decision or arrangement shall not have the effect of substantially reducing or increasing the ultimate liability for tax levied under this Act."

173 See SAIT letter to the South African Revenue Service in respect of the Draft Binding General Ruling Relating to Electronic Services Supplied by Intermediaries (VAT) dated 25 April 2016, [online] www.thesait.org.za/resource/resmgr/2016_Submissions/25_Apr_2016_-_SAIT_ BGR_Elect.pdf (accessed 2017-04-09).

174 Ligthart "Consumption Taxation in a Digital World: A Primer" 2004 102 *CentER Discussion Paper* 1 13–14.

175 21 of 2018.

176 S 8(1)(*b*) of the Rates and Monetary Amounts and Amendment of Revenue Laws Act 21 of 2018. See also s 1 of the definition of "intermediary" in the VAT Act.

177 See, in general, OECD "The Role of Digital Platforms in the Collection of VAT/GST on Online Sales" (2019) http://www.oecd.org/tax/consumption/the-role-of-digital-platforms-in-the-collection-of-vat-gst-on-online-sales.pdf (accessed 2020-01-08).

178 *Ibid*.

179 *Ibid*.

basis, the time at which confirmation of payment is received by or on behalf of the supplier applies will be the time of supply. Thirdly, the OECD recommends that the intermediary's VAT compliance liability must be limited to what is strictly necessary.[180] The VAT Act is silent on the extent of the intermediary's liability where it has made reasonable efforts to secure the accuracy and reliability of the information received from the underlying supplier, and where it collects and remits VAT accordingly. In the absence of limited liability rules, the authors postulate that non-compliance and understatement penalties in terms of the TAA may apply. It is submitted that where an intermediary has verified that the underlying supplier has provided consistent information in respect of the value of the "electronic services", billing, place and time of supply, the intermediary must be deemed to have discharged itself of the duties imposed on it by the VAT Act.

3 CONCLUSION

Notably, Van Zyl and Schulze submit that the collection of VAT on the supply of digital goods by means of the registration mechanism is ineffective if there is no collaboration between existing states.[181] In addition, the reverse-charge mechanism relies solely on the integrity of the recipient of imported services. There is a likelihood that a recipient of imported services will not account for VAT to SARS. This is because the taxpayer is either unaware of the duty to pay VAT or the taxpayer perceives tax collection to be an unnecessary burden and time consuming. SARS's reliance on a consumer's integrity to report the transaction places an unnecessary burden on the consumer. Such reliance on the consumer highlights the inadequacies of the reverse-charge mechanism to collect VAT on imported services. Moreover, SARS does not have a provision or mechanism available to enforce tax compliance on the reverse-charge mechanism other than the provisions in the TAA. In the authors' opinion, the value of the majority of individual transactions escaping the VAT net are too insignificant for SARS to audit individual consumers and raise additional tax and penalties. Collectively, however, these transactions may result in base erosion.

A recipient may easily dispose of digital services after consumption without SARS becoming aware of their existence. It then becomes difficult for SARS to establish or to prove that the services were imported and consumed. Furthermore, in order for SARS to prove that services were imported, the recipient's identity must be ascertained. At present, SARS is not able to do this because there are currently no measures in place in the VAT Act to facilitate the verification of a recipient of imported services on B2C transactions. It may be concluded that the inability to verify an identity translates into an ineffective process to conduct an audit on the transaction. In addition to identifying the recipient, SARS must establish the type of service rendered. This can only be done where the place of consumption is known.

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180 *Ibid*.

181 Van Zyl and Schulze "The Collection of Value Added Tax on Cross-Border Digital Trade – Part 2: VAT Collection by Banks" 2014 47 *Comparative International Law Journal of Southern Africa* 316 317.

While the taxation of digital goods in Australia is still in its infancy, and although it is perceived that the Australian model is significantly based on the South African model,[182] there are a lot of positives that may be garnered from the new laws. First, the registration procedure has been simplified to allow foreign suppliers of digital goods to register for Australian GST without much trouble. With the added incentive of having a choice between two types of registration system, foreign suppliers may well be encouraged to conduct business in Australia. Secondly, shifting the GST liability from supplier to the operator of an electronic distribution platform (EDP) should be welcomed by suppliers.

The indicators to identify a consumer recipient as applied in Australia are significantly more extensive than the proxies applied in terms of the South African VAT Act. On the one hand, an extensive list of indicators simplifies the identification task for the supplier; on the other, an extensive list could pose a strenuous burden on foreign suppliers. It would seem that the obligation to identify consumer recipients may not be sustainable in the long term as it constantly demands time and resources.

Throughout, the authors have argued that SARS has difficulty in ascertaining whether a supply of electronic services has occurred in South Africa. This is simply because there are presently no mechanisms in place in the VAT Act that will aid the fiscus to identify consumer recipients of digital goods. This problem is compounded by the fact that the current VAT Act does not have explicit place-of-supply rules.

Despite the introduction of proxies in the VAT Act, it seems that the burden is on the foreign suppliers of digital goods to ascertain the jurisdiction of the consumer recipient of digital goods. This is an unnecessary burden on the foreign suppliers of digital goods.

A lack of international cooperation and coordination regarding what constitutes "electronic services" has compounded the problem. The new Regulations broaden the scope of what constitutes electronic services. While the updated Regulations are long overdue, the authors stress that the overly broad definition allows for unintended double-taxation of transactions. Additional measures must be put in place to exempt a transaction from South African VAT where it is subject to VAT/GST in a foreign jurisdiction.

It remains difficult for a single state to apply the registration mechanism effectively without cooperation from other states. If other states are reluctant or unwilling to cooperate, then the efficacy of the registration mechanism becomes tenuous. The authors endorse the Davis Tax Committee recommendation that the option of payment or collection agents either acting as agents or third-party service providers – to be appointed as registered VAT vendors on behalf of foreign suppliers of electronically supplied services – must be considered.[183]

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[182] The similarities in the Australian and South African systems are indicated in this article. It is well known that the Australian legislator collaborated with the National Treasury of South Africa in developing the Australian GST rules on the taxation of e-commerce transactions.

[183] Davis Tax Committee *Second Interim Report on BEPS* 11, 99–103. For a complete discussion of third-party collection agents, see Van Zyl and Schulze 2014 *Comparative International Law Journal of Southern Africa* 316–349.

The new registration threshold is welcomed. In the authors' view, it removes the discrimination between foreign and local suppliers of e-commerce, and it will result in a more competitive e-commerce market.

With the growth of e-commerce comes the possibility of new technological advancements. These new technological advancements will bring about a new set of encounters for tax authorities. If tax authorities do not find ways to come to terms with the growth of e-commerce, the conclusion is that the taxes due will go uncollected. This becomes an obstacle, particularly in developing countries where there is an overreliance on VAT as a source of revenue for government expenditure.

THE 1982 UNITED NATIONS LAW OF THE SEA CONVENTION: UNRESOLVED ISSUES REMAIN

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SUMMARY

Despite the 1982 United Nations Law of the Sea Convention (UNCLOS) being generally viewed as one of the major successes of United Nations treaty-making, unresolved issues remain. These range from maritime boundary disputes to straight baselines to artificial islands to military activities in the exclusive economic zone to environmental issues. Four decades have altered the fundamental nature of the regime relating to the law of the sea and have created major implementational challenges. The oceans are becoming more crowded by competitive human activities and, as technology progresses and geopolitical shifts occur, it has become imperative that the unresolved issues be resolved. In so doing UNCLOS's initial vision can be augmented. This article focuses on five of the more problematic unresolved issues.

1 INTRODUCTION

Although the 1982 United Nations Law of the Sea Convention (UNCLOS)[1] (ratified by South Africa on 23 December 1997) is generally accepted as a success story in the history of United Nations (UN) treaty-making, with some 160 states as parties, there are in practice still many unresolved issues.

This article concerns a discussion of five major issues that remain unresolved close on four decades after UNCLOS was concluded. At the signing ceremony on 10 December 1982, the UN Secretary-General Javier Peréz de Cuéllar declared, "International law is now irrevocably transformed, so far as the seas are concerned".[2] However, this "irrevocable transformation" did not result in the disappearance of intractable problems that existed before UNCLOS was signed, and interpretational problems also emerged following the signing of UNCLOS.

* The author wishes to thank the law library of the University of Western Australia for assisting in the accessing of various materials referred to.

1 1982 21 *ILM* 1261. See Barrie "Exit Mare Liberum: The 1982 Law of the Sea Convention" 1983 9 *SAYIL* 78.

2 *The Law of the Sea: Official Text of the United Nations Law of the Sea With Annexes and Index* (1983) xxiv.

It is not within the ambit of this article to discuss extensively the historical background leading to UNCLOS, nor its contents. This has been done more than adequately elsewhere.[3] The focus of the article is rather on five of the persistent remaining unresolved issues that continue to plague UNCLOS. To place these unresolved issues in context, it is nevertheless opportune to set out a brief holistic overview of the history and contents of UNCLOS.

The First United Nations Conference on the Law of the Sea 1958 (UNCLOS I) followed demands by coastal states to extend their jurisdiction over the natural resources off their ocean borders. UNCLOS I adopted four conventions. These were the Geneva Conventions on the Territorial Sea and Contiguous Zone (TSC);[4] on the High Seas (HSC);[5] on the Continental Shelf (CSC)[6] and on the Fishing and Conservation of the Living Resources of the High Seas.[7] These are generally referred to as the four 1958 Geneva Conventions on the Law of the Sea. UNCLOS I also adopted an optional protocol on the compulsory settlement of disputes, and eight resolutions concerning nuclear tests on the high seas; pollution of the high seas by radioactive materials; fishery conservation; cooperation in conservation measures; killing of marine life; coastal fisheries; historic waters; and the convening of a second UN Conference on the Law of the Sea.

The Second United Conference on the Law of the Sea (UNCLOS II) had no real impact on the four 1958 Geneva Conventions on the Law of the Sea, and newly independent states continued to call for a reassessment of the law of the sea and an extension of their sovereignty over the seas adjacent to their coasts. On 17 December 1970, the UN with General Assembly Resolution 2750 (XXV) decided to convene a third conference in 1973 to adopt a comprehensive convention on the law of the sea. This Third United Nations Conference on the Law of the Sea is known as UNCLOS III. UNCLOS III (1973–1982) was characterised by various features: (i) near-universal participation gave its decisions legitimacy; (ii) the conference was of long duration; (iii) dealing with various issues relating to the ocean in a comprehensive manner was a quantitatively enormous task; (iv) a consensus procedure was followed, which in effect meant no voting took place until all efforts at consensus had been exhausted; (v) most substantive meetings were informal, without records, making it possible to resolve many intractable issues in privately-set-up negotiating groups; (vi) the three committee chairmen were tasked to formulate a single negotiated treaty text; (vii) the consensus formula was abandoned at the final stage owing to

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3 Much has been written on UNCLOS. Among recent works are Rothwell, Elferink, Scott and Stephens (eds) *Oxford Handbook on the Law of the Sea* (2015); Tanaka *The International Law of the Sea* (2016); Walker *Definitions for the Law of the Sea* (2012) and Rothwell and Stephens *The International Law of the Sea* (2016). Of specific relevance to South Africa is Vrancken *South Africa and the Law of the Sea* (2011) and Vrancken and Tsamenyi (eds) *The Law of the Sea: The African Union and Its Member States* (2017). Oxman "The 1982 Convention on the Law of the Sea: An Overview" 1983 69 *American Bar Association Journal* 156 and Sanger *Ordering the Oceans and Making the Law of the Sea* (1987) give a cryptic historical overview of UNCLOS.

4 516 UNTS 205; 1958 52 *American Journal of International Law* 814.

5 450 UNTS 82; 1958 52 *American Journal of International Law* 842.

6 499 UNTS 311; 1958 52 *American Journal of International Law* 858.

7 599 UNTS 285; 1958 52 *American Journal of International Law* 851.

differences of opinion and UNCLOS was adopted on 30 April 1982 by 130 states in favour, 4 against, 18 abstentions and 18 unrecorded.

2 UNCLOS

UNCLOS has four main features. *First*, comprising, as it does, 320 articles and 9 annexes, it covers global marine issues comprehensively and is rightly referred to as the "constitution of the oceans". *Secondly*, the breadth of the territorial waters is limited to 12 miles seaward of a state's territory. *Thirdly*, a compulsory dispute settlement is set out. *Fourthly,* three new institutions are created: the International Seabed Authority; the International Tribunal for the Law of the Sea (ITLOS) and the Commission on the Limits of the Continental Shelf.

Viewed holistically, UNCLOS, by spatially distributing state jurisdiction, has attempted to ensure international cooperation in the oceans by reconciling the various interests of states and protecting the common interests of the international community.

2 1 The Territorial Sea and Contiguous Zone Convention

The 1958 Territorial Sea and Contiguous Zone Convention distinguished between territorial waters and a contiguous zone. UNCLOS contains a number of technical rules on how to delimit these two zones; these are drawn to a large extent from the 1958 Territorial Sea and Contiguous Zone Convention.

According to UNCLOS, every coastal state exercises sovereignty over a belt of sea adjacent to the coast, including its seabed and airspace. This is the territorial sea that is measured seaward from the coast or baselines delimiting the internal waters. Twelve nautical miles is the maximum breadth of the territorial sea. The sovereignty of the coastal state is subject to the right of "innocent" passage for foreign ships. This principle was taken from the 1958 Territorial and Contiguous Zone Sea Convention but UNCLOS describes "innocent" passage in greater detail by prohibiting discrimination based on the flag or destination of a ship and clarifies the right of the coastal state to control pollution. UNCLOS adds a list of activities that are not "innocent passage." It has also extended the contiguous zone adjacent to territorial sea (in which coastal states could under the 1958 Convention prevent and punish infringement of its customs, fiscal, immigration or sanitary laws in its territory or territorial waters) from 12 nautical miles to 24 nautical miles from the coastal baseline.

2 2 The Continental Shelf

The 1958 Convention on the Continental Shelf defined the continental shelf as the area of the seabed and subsoil adjacent to the coast and extending from the territorial sea to where the waters reach a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the

exploitation of the natural resources of the seabed and subsoil. UNCLOS permits a coastal state to establish a permanent outer limit of its continental shelf at either 200 nautical miles from the coastal baseline or the outer edge of the continental margin (the submerged prolongation of the landmass, whichever is further). These elaborate criteria for locating the edge of the continental margin are designed to allocate basically all seabed oil and gas to coastal states. Additionally, UNCLOS gives coastal states effective control over scientific research on the continental shelf, exclusive rights to authorise and regulate drilling, and the right to give consent to the course to be followed by pipelines.

2 3 The Exclusive Economic Zone

Under UNCLOS, every coastal state has the right to establish an exclusive economic zone (EEZ) seaward of the territorial sea and extending to 200 nautical miles from its coastal baseline. Seabed areas beyond the territorial sea and within 200 nautical miles of the coast are subject to the continental shelf and EEZ regimes.

UNCLOS's provisions on the EEZ are extensive and affect an overwhelming proportion of the rights concerning activities in the sea. These rights include the right to control the construction and use of all artificial islands and installations used for economic purposes or which may interfere with the coastal state's exercise of its rights in the EEZ; the right to be informed of and participate in marine research projects and the right to control the dumping of wastes. Rights of all states in the EEZ include the freedoms of the high seas, navigation, overflight and the laying of submarine cables. Flag states must ensure that their ships observe accepted international antipollution regulations. If EEZs or continental shelves overlap, they are to be delimited by agreement between the relevant states on the basis of international law to achieve an equitable solution.

2 4 The High Seas

Similar to the 1958 Convention on the High Seas, UNCLOS does not contain an exhaustive list of the freedoms of the seas. UNCLOS refers to the freedom of navigation, overflight, fishing and the laying of submarine cables and pipelines, the freedom of scientific research and the freedom to construct artificial islands and other installations permitted under international law. The high seas regime places extensive safety and environmental obligations on flag states, and fishing is subject to strict conservation requirements. Whereas the 1958 Convention on the High Seas defined the high seas, UNCLOS states that the high seas encompass all parts of the sea beyond the EEZ, and further that most of the articles referring to the high seas also apply within the EEZ to the extent that they are not incompatible with the articles referring to the EEZ.

2 5 The International Seabed Area

An international seabed area (the "Area") has been created; it comprises the seabed and subsoil "beyond the limits of national jurisdiction" – that is, beyond the limits of the continental shelf subject to coastal state jurisdiction. The Area is declared to be the *common heritage of mankind*. Its principal interest resides in poly-metallic nodules lying at or near the surface of the deep ocean bed. These nodules contain nickel, manganese, cobalt, copper and traces of other metals. The International Seabed Area is open to be used exclusively for peaceful purposes by all states without discrimination. Activities must however be carried out with reasonable regard for other activities in the marine environment.

2 6 Reservations and disputes

UNCLOS requires all parties, without a right of reservation, to submit an unresolved dispute concerning its interpretation, or application at the request of either party, to arbitration or adjudication for a binding decision. There are exceptions to the rule, which for purposes of this article do not need attention. UNCLOS does not allow reservations but does permit declarations and statements. A party may withdraw at any time on one year's notice. Being a compromise document following on great complexities, UNCLOS cannot possibly fully suit all states. It is however the only body of rules related to the use of the oceans that has global legitimacy. The choice before UNCLOS I, UNCLOS II and UNCLOS III was to create imperfect law or no law.

2 7 South Africa and UNCLOS

With its 3 000km long coastline, abundance of marine species off its coast, a seabed containing only partially exploited resources such as natural gas, and sitting on the important sea route around the Cape of Good Hope, South Africa has, for obvious reasons, an intense interest in the implementation and interpretation of UNCLOS.[8]

2 8 Unresolved issues

Although UNCLOS is rightly referred to as the "constitution of the oceans", certain unresolved issues remain. These cover a wide range of issues, which relate constantly to key interpretational and implementational points and often lead to difficult procedural matters arising before the Permanent Court of Arbitration (PCA) (which may arbitrate pursuant to Annex VII of UNCLOS) or UNCLOS's other dispute settlement bodies. The PCA is not a court but is an arrangement to facilitate inter-state arbitrations. It was established pursuant to the Convention for the Pacific Settlement of International Disputes adopted at the 1899 Hague Peace Conference.

[8] See Vrancken *South Africa and the Law of the Sea* in general and Dugard and Tladi in *Dugard's International Law: A South African Perspective* (2018) 539–577.

Unresolved issues relating to UNCLOS that can conceivably be referred to *inter alia* cover maritime boundary disputes; non-state actors making maritime claims; third-party state interventions in maritime claims; innocent passage for warships; straight baselines; the regime of islands; historic maritime rights; military activities in the EEZ during peacetime and environmental issues in general. The complexity of such unresolved issues was aptly illustrated in the *South China Sea Arbitration* (*The Republic of the Phillipines v The People's Republic of China*).[9] This article focuses on five of these unresolved issues, namely: (i) historic maritime rights; (ii) military activities in the EEZ during peacetime; (iii) the regime of islands; (iv) straight baselines and (v) environmental issues. Being the product of various preparatory conferences such as UNCLOS I, UNCLOS II and UNCLOS III, the final adoption of UNCLOS was the result of various compromises, and it was predictable that ambiguous interpretations would result as time progressed. This is precisely what has materialised.

3 HISTORIC RIGHTS

Historic rights can be defined as rights over certain land or *maritime* areas acquired by a state through continuous usage from time immemorial with the acquiescence of other states, although those rights would not normally accrue to it under international law.[10] The International Court of Justice (ICJ) in the *Anglo-Norwegian Fisheries Case*[11] defined "historic waters" as waters that are treated as internal waters but which would not have that character were it not for the existence of an historical title. Once established as historic waters, such waters are thus regarded as *internal waters*; as confirmed by article 2(1) of UNCLOS, a state enjoys full territorial sovereignty over its internal waters, including the complete freedom to determine the status of such waters in domestic law while complying with its international obligations.[12] Foreign ships, for example, do not have a general right to enter internal waters except in limited circumstances. What precisely is meant by "historic rights" in the context of the oceans has become a matter of controversy because the term, despite its importance, remains undefined in

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9 PCA Case No 2013 19. For a synopsis of the South China Sea Arbitration, see Rosenberg and Chung "Maritime Security in the South China Sea: Coordinating Coastal and User State Priorities" 2008 39 *Ocean Development and International Law* 51; Nordquist, Moore and Fu (eds) *Recent Developments in the Law of the Sea and China* (2006).

10 Blum "Historic Rights" in Bernhardt (ed) *Encyclopaedia of Public International Law* (1984) 120. See Booysen *Volkereg en Sy Verhouding tot die Suid-Afrikaanse Reg* (1989) 201; Kohen and Hébié (eds) *Research Handbook on Territorial Disputes in International Law* (2008) 36. The relevance of historic title in modern times was emphasised in *Territorial Sovereignty and Scope of the Dispute (Eritrea Yemen)* First Phase of the Proceedings 1998 XXII RIAA 209 par 7, where the arbitrator of the tribunal was requested to decide the sovereignty dispute between the parties "in accordance with the principles rules and practices of international law applicable to the matter and on the basis of historical title". This arbitration was related to fisheries and the delimitation line of the territorial sea. See Antunes "The 1999 *Eritrea-Yemen* Delimitation Award and the Development of International Law" 2001 50 *International and Comparative Law Quarterly* 299; Kwiatskova "The Eritrea-Yemen Arbitration" 2001 32 *Ocean Development and International Law* 1.

11 42 ICJ Rep 2001 par 212.

12 O'Connell *The International Law of the Sea* (1982) 417.

UNCLOS. This issue is also most relevant to the waters found in bays and is compounded by the fact that "historical bays"[13] are similarly undefined in UNCLOS. As was held in the ICJ in *Continental Shelf (Tunisia v Libyan Arab Jamahiriya)*:[14]

> "It seems clear that the matter continues to be governed by general international law which does not provide for a *single* 'regime' for 'historic waters' or 'historic bays,' but for a particular regime for each of the concrete recognized cases for 'historic waters' or 'historic bays'. Basically the notion of historic rights or waters in customary international law ... is based on acquisition and occupation."

This approach was also followed by the ICJ in *Case Concerning the Land, Island and Maritime Frontier Dispute* (*El Salvador/Honduras, Nicaragua Intervening*)[15] where the ICJ observed that the regime of historic bays in the case of the Gulf of Fonseca (wherein the waters would allegedly be "historical waters") was *sui generis.* This implies that each historic bay may have its own *distinctive* regime and must be evaluated on a case-by-case basis.[16]

Such an implication can only lead to complications and make it extremely difficult to establish a definitive list of historic bays. It can only further lead to claims to historic bays evoking protests from other states. The most dramatic example of this is the 1973 claim by Libya to the Gulf of Sidra as internal waters when it drew a closing line of approximately 300 miles across that gulf making the gulf, according to Libya, a historical bay. This led to the United States, Australia, France, Germany, Italy, Norway, Spain and other European Community members protesting this claim. It also led to the United States Sixth Fleet conducting military manoeuvres in the proximity of the contested area with two Libyan Sukhoi-22 fighters shot down above the Gulf of Sidra and 24 persons killed in a later confrontation with Libya.[17]

The necessity for clarity on the issue of "historic rights" and historic bays relating to the law of the sea was brought to the fore on 26 June 1998 when China promulgated the Law on the Exclusive Economic Zone and the Continental Shelf, which in section 14 provides that "the provisions of the Law shall not affect the historic rights enjoyed by the People's Republic of China".[18] This section 14 clearly refers to China's claims in the South China Sea. China sees its "historic rights" in the South China Sea as complementary to its general rights under international law and UNCLOS.

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13 Goldie "Historic Bays in International Law" 1984 11 *Syracuse Journal of International Law and Commerce* 205.

14 1982 ICJ Rep 18 74.

15 1992 ICJ 351 384.

16 Roach and Smith *Excessive Maritime Claims* (2012) 50; Symmons *Historic Waters in the Law of the Sea: A Modern Re-Appraisal* (2008) 301.

17 Ratner "The Gulf of Sidra Incident of 1981: A Study of Lawfulness of Peacetime Aerial Engagements" 1984–85 10 *Yale Journal of International Law* 59; Spinnato "Historic and Vital Bays: An Analysis of Libya's Claims to the Gulf of Sidra" 1983 16 *Ocean Development and International Law* 65.

18 An English version of this Law is reprinted in Keyuan *China's Marine Legal System and the Law of the Sea* (2005) 342. See Keyuan "Historic Rights in International Law and China's Practice" 2001 32 *Ocean Development and International Law* 162.

These "historic rights" were widely recognised by members of the international community, including the Philippines, *except* that the Philippines denied the existence of China's "historic rights" in the latter's EEZ. Because there was no clear delimitation of a maritime boundary between China and the Philippines, the limit line of the Philippine's EEZ was not clear and the Philippines sought clarity on the issue, including the status of China's "historic rights" under general international law. The Philippines consequently approached the PCA under article 287 and article 1 of Annex VII of UNCLOS. The PCA concluded[19] that China's activities in the South China Sea interfered with the rights of the Philippines in its EEZ. This arbitral award has been most controversial, and China does not recognise it. China also refused to participate in the arbitration. This type of conflict could have been averted if UNCLOS had been clear as to the meaning of "historic rights".

South Africa has not as such made any demands regarding "historic waters" or "historic bays", and because all its bays meet the requirements of article 10 of UNCLOS, which defines a bay as having a closing line of a distance not exceeding 24 nautical miles between the two low-water marks, it would appear the doctrine of "historical bays" has no relevance along the South African coast.[20]

It has become important that the term "historical rights", which includes "historical bays" and "historical waters", be clearly defined. A UN International Law Commission (ILC) study[21] on the juridical status of historic waters completed in 1962 could not come to a conclusive definition and the issue was not incisively discussed at UNCLOS III. According to Zou,[22] UNCLOS deliberately avoids the issue of "historic rights" or "historic waters" and leaves it to be governed by customary international law. The Preamble to UNCLOS specifically declares that "matters not regulated by this Convention continue to be governed by the rules and principles of general international law".

As illustrated above, claims to historic bays give rise to serious international disputes. At present, article 298(1)(*a*)(i) of UNCLOS states that disputes involving historic bays or titles may be exempted from the compulsory procedure of peaceful settlement of international disputes embodied in Part XV of UNCLOS.[23] This does not augur well for the

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19 *The South China Sea Arbitration supra.* See Dupuy "A Legal Analysis of China's Historic Rights Claims in the South China Sea" 2013 101 *American Journal of International Law* 124; Beckman, Townsend-Gault, Schofield, Davenport and Bernard (eds) *Beyond Territorial Disputes in the South China Sea* (2013) 144; Symmons "Maritime Zones from Islands and Rocks" in Jayakumar, Koh and Beckman (eds) *The South China Sea Disputes and Law of the Sea* (2014) 60; Hayton *The South China Sea: The Struggle for Power in Asia* (2014).

20 Vrancken *South Africa and the Law of the Sea* 92. For a discussion of False Bay see Barrie "Historical Bays" 1973 6 *Comparative and International Law Journal of Southern Africa* 39.

21 UN Doc A/CN4/143 6.

22 Zou "Certain Controversial Issues in the Development of the International Law of the Sea" in Minas and Diamond (eds) *Stress Testing the Law of the Sea* (2018) 171.

23 Tanaka *The International Law of the Sea* 60.

settlement of such disputes. Roach and Smith[24] in 2012 identified 34 historic bays claimed by 19 states as not meeting the international legal standard.

4 NAVIGATION BY WARSHIPS AND MILITARY SURVEY ACTIVITIES IN THE EEZ DURING PEACETIME[25]

Despite the EEZ being a zone of coastal state resource sovereignty and jurisdiction, it is not a zone that gives the coastal state capacity to regulate navigation. Articles 58 and 90 of UNCLOS are clear that every state has the right to sail ships flying its flag on the high seas and that the EEZ is subject to the coastal state's lawful use of its EEZ. In principle, warships thus enjoy freedom of navigation within the EEZ of coastal states. When UNCLOS was concluded, however, some states were of the opinion that article 301, which provides for the peaceful uses of the oceans, may be limited regarding the activities of foreign warships. Brazil,[26] in its ratification of UNCLOS, asserted that article 301's reference to "peaceful uses of the oceans" applied in particular to maritime areas under the sovereignty or jurisdiction of the coastal state and that consequently states were not to conduct military exercises or manoeuvres in such areas.

This interpretation has been contested by states such as the United States, the United Kingdom, Italy and the Netherlands; they maintain that article 58(1) of UNCLOS states that the rights enjoyed by coastal states in their EEZs are subject to the freedoms referred to in article 87, which relate to navigation, overflight, laying of submarine cables, pipelines and other lawful international uses of the sea. These states hold the view that the freedoms of the seas associated with the operation of ships *imply* the legality of naval manoeuvres in a foreign state's EEZ in peacetime. It is also submitted by such states that military exercises and activities of military aircraft such as aerial reconnaissance fall under the freedoms of the seas conditional on the rights and interests of third states. The United States protested against provisions of the Iranian Marine Areas Act 1993, which sought to place limitations on foreign warships within the EEZ on the grounds that the freedom of navigation by foreign warships was being constrained.[27] The argument is also put forward that because UNCLOS does not specifically prohibit military uses of the oceans in the EEZ in peacetime, it is permissible and should be regulated by customary international law. So viewed, military activities in the EEZ must be seen to be a historically lawful use of the oceans. Contrary to the above arguments, states such Bangladesh, Brazil, Cape Verde, India, Malaysia, Pakistan, Uruguay and

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24 Roach and Smith *Excessive Maritime Claims* 36.

25 See Vrancken *South Africa and the Law of the Sea* 414 for examples of the varied military uses of the ocean in peacetime. In cases of international armed conflict, a different body of treaty and customary law applies.

26 Rothwell and Stephens *The International Law of the Sea* 296.

27 Van Dyk "Military Ships and Planes Operating in the Exclusive Economic Zone of Another Country" 2004 28 *Marine Policy* 29; Kaufman "Military Activities in the Exclusive Economic Zone: Preventing Uncertainty and Defusing Conflicts" 2002 32 *California Western International Law Journal* 253.

India submit that if UNCLOS does not expressly mention military uses of the ocean within the EEZ, it cannot be lawful. It seems incomprehensible to accept that article 246(2) of UNCLOS requires the consent of a coastal state for marine research within its EEZ but that it does not refer to military activities within the EEZ of another state.

A further aspect of naval operations in a third state's EEZ that has been contentious is that of military survey activities or scientific research. Such activities may gather innocuous oceanographic data or may attempt to secure data relating to military intelligence. Must such activities be seen to fall under article 246 of UNCLOS (which refers to legitimate marine scientific research) or does such research fall under article 87 (which grants high seas freedoms that are also enjoyed within the EEZ)? The legality of such military and hydrographic surveys in another state's EEZ without its authorisation remains highly debatable. Military surveys raise particular sensitivities associated with the national security of coastal states. The United States and the United Kingdom take the position that military surveys may be undertaken freely in the EEZ without the authorisation of the coastal state. China is of the view that military surveys in the EEZ are subject to the regulation of the coastal state.[28] The difference in these positions is practically illustrated by two incidents. In March 2001, an unarmed hydrographic survey ship USNS *Bowditch* was confronted by a Chinese naval frigate and ordered to leave the EEZ. The *Bowditch* complied but returned a few days later accompanied by an armed United States naval escort. In March 2009, the United States ocean surveillance ship USNS *Impeccable*, which was undertaking military survey activities in China's EEZ, was surrounded and harassed by five Chinese vessels. The *Impeccable* withdrew but returned to the same area under the escort of a United States guided-missile destroyer. The United States protested these incidents. China responded by asserting that the *Bowditch* and the *Impeccable* were operating in the Chinese EEZ in violation of international and Chinese Law.[29] Hydrographic and military survey activities in the EEZ of another state, owing to their highly political nature, strongly affect the interests of coastal states.[30] What is the dividing line between scientific research and military surveys? It seems at present that disputes on these issues will remain unresolved.[31]

5 THE REGIME OF ISLANDS

According to article 121(1) of UNCLOS, an island is "a naturally formed area of land surrounded by water, which is above water at high tide". According to

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28 Tanaka *The International Law of the Sea* 369.

29 Pedroza "Close Encounters at Sea: The USNS *Impeccable* Incident" 2009 62 *Naval War College Review* 101.

30 Bateman "Hydrographic Surveying in the EEZ: Differences and Overlaps with Marine Scientific Research" 2005 29 *Marine Policy* 167.

31 Franckx "American and Chinese Views on Navigational Rights of Warships" 2011 11 *Chinese Journal of International Law* 187. For South Africa's approach to the military uses of its EEZ in peacetime, see Vrancken *South Africa and the Law of the Sea* 414–419.

article 121(2), the normal baseline[32] around all islands is the same as the normal baseline used off the mainland. According to article 121(3), that baseline may be used to determine territorial waters, the EEZ, the continental shelf and the contiguous zone of the island. A proviso,[33] however, is that the "island" must be able to "sustain *human habitation or economic life of its own*". This means that rocks that cannot sustain human habitation or economic life of their own do not have territorial waters or EEZs or continental shelves or contiguous zones.

The interrelationship between the test for "economic life" and "human habitation" is not free of controversy. A literal interpretation suggests that the text of article 121(3) provides for a test requiring either "human habitation" *or* "economic life of its own". That would mean that only one of these tests must be met. It could also be argued that the phrase is a *single* concept. In support of the latter interpretation, it could be submitted that it is difficult to imagine economic life detached from human life and hence the two elements are intertwined.

UNCLOS does not elaborate as to the *extent* to which a piece of land surrounded by water and above water at high tide can be regarded as an island. This has created problems, with "island" being interpreted extremely broadly to include even permanently submerged features such as rocks. Some states go to extreme attempts to define small pieces of maritime land as being islands. These various interpretations of "island" have caused some controversy, as emerged in the *South China Sea Arbitration*.[34]

The *South China Sea Arbitration* was confronted with these issues. It is beyond the ambit of this article to discuss this arbitration in detail as it has been adequately done elsewhere; what follows is a brief review of the *South China Sea Arbitration*'s views on what constitutes "human habitation" and what constitutes an "economic life of its own". These two terms in article 121(3) remain prone to different interpretations. According to the *South China Sea Arbitration*, a critical factor for "human habitation" is the *non-transient* character of the habitation, such that the inhabitants can fairly be said to constitute the natural population for whose benefit the resources of the island's exclusive economic zone are seen to merit protection. The habitation must be a stable community of people for whom the feature constitutes a home on which they can remain.[35] Regarding "economic life of its own", the South China Sea Arbitration linked it to human habitation and held that the economic life will ordinarily be the life and livelihoods of the *human population* inhabiting the "maritime feature". Economic life must be oriented around the feature itself and not focused solely on the waters or seabed of the surrounding territorial sea. Extractive economy activity to harvest the natural resources of a feature for the benefit of a population

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32 A normal baseline may not depart from the general direction of the coast. In the *Anglo-Norwegian Fisheries* case ICJ Rep 1951 127 par 128, the ICJ held that the belt of territorial waters must follow the general direction of the coast. This is the basic principle governing the baseline. Exceptions are referred to below.

33 See the judgment of ITLOS Vice-president Vukas in *Volga (Russian Federation) v Australia* 2002 ITLOS Reports 10; 2003 42 *ILM* 159.

34 *Supra* par 542.

35 *South China Sea Arbitration supra* par 543.

elsewhere cannot reasonably be considered to constitute the economic life of the island as its own.[36] Importantly, the *South China Sea Arbitration* also held that a feature that is only capable of sustaining habitation through the continued delivery of supplies from outside does *not* meet the requirements of being an "island" as referred to in article 121(3) of UNCLOS. In a nutshell, the tribunal held that a lack of vegetation, drinkable water and other items needed for survival would make human habitation impossible.[37]

Smith[38] states that the *South China Sea Arbitration* pointed out that state practice indicated excessive, if not abusive, interpretations of what constitutes an "island" as referred to article 121(3) of UNCLOS.

One problem that emerged after the signing of UNCLOS relates to "artificial islands". Article 60 of UNCLOS states that "[a]rtificial islands, installations and structures do not possess the status of islands". Thus, they have no territorial sea, EEZ or continental shelf of their own. Article 67 of UNCLOS declares that the rights of coastal states with regard to artificial islands are limited to those parts of the EEZ where no interference is caused to the use of recognised sea lanes essential to international navigation. Not being more specifically defined, an "artificial island" has in state practice been interpreted extremely broadly. Some states such as China and Malaysia have built large artificial islands on rocks and reefs. Malaysia has an artificial island consisting of a fishing port and a 1.5 km airstrip.[39] China and Japan, in order to extend their maritime spaces, are making use of article 121(3) of UNCLOS to turn "rocks" into "islands" that can fulfil the conditions of sustaining "human habitation" or "economic life on their own". The result is that an artificial island built on a rock or a reef may be seen to be an "island" that can consequently generate its own territorial sea, EEZ and continental shelf whereas a "rock" could not. This type of activity could be seen as tantamount to territorial accretion and is creating international concern.[40]

Being undefined, artificial islands vary from those found in offshore-Dubai to much smaller installations used solely for scientific research elsewhere. State practice is not uniform when it comes to the reasons for building artificial islands. Under article 60 of UNCLOS, a coastal state has exclusive jurisdiction to construct and operate artificial islands for *economic purposes* in its territorial sea, its EEZ or on its continental shelf. Such islands may also be built for exploration or marine scientific research. "Economic purposes" is not defined. Brazil, Cape Verde and Uruguay claim that coastal states have the right to construct artificial islands, whatever their nature and purpose. By contrast, Germany, Italy, the Netherlands and the United Kingdom hold the view that a coastal state has the right to build artificial islands for economic

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36 *South China Sea Arbitration supra* par 547.

37 See Zou in Minas and Diamond (eds) *Stress Testing the Law of the Sea* 171 186.

38 Smith "Maritime Delimitation in the South China Sea; Potentiality and Challenges" 2010 41 *Ocean Development and International Law* 223.

39 See Tanaka *The International Law of the Sea* 132–134, 149–150; Papadakis *The International Regime of Artificial Islands* (1977); Molenaar "Airports at Sea: International Legal Implications" 1999 14 *International Journal of Marine and Coastal Law* 371.

40 Vrancken *South Africa and the Law of the Sea* 182–186.

purposes only. In practice, one finds artificial islands, besides those used for scientific research, built for purposes such as tide observations, resorts or residences, air terminals, transportation centres and traffic control.[41]

The removal of artificial islands or similar installations poses problems. Once removed, how are they to be disposed of? In the North Sea area alone, there were at one stage approximately 400 steel and concrete installations with a mass of 8 million tons and using 18 370 kms of pipeline. In 1991, Shell UK decommissioned the *Brent Spar* and planned to dispose of it at sea off the northwest coast of Scotland, after obtaining a British permit. Greenpeace protesters, however, occupied the *Brent Spar* in May 1995, complaining about possible pollution from waste in the installation. This led to consumer boycotts of Shell products and the company abandoned its plan. In 1995, the United Kingdom and Norway agreed that the *Brent Spar* could be temporarily moored in a fjord off western Norway but remain registered as a British offshore installation. The *Brent Spar's* hull was eventually cleaned and sliced with the slices reused in a quay extension in Mekjarvik, Norway.

South Africa's two main islands are Prince Edward Island and Marion Island. Each island can sustain human habitation owing to the availability of fresh water and food, and South Africa uses the low-water line around each island to determine its territorial sea, EEZ and continental shelf. According to Vrancken[42] there is no reference to artificial islands in South African law but problems could arise if they were to be built close to the landward side of these islands, compelling vessels to navigate further south.

6 STRAIGHT BASELINES

According to article 5 of UNCLOS, the baseline from which all the maritime zones are measured (such as, for example, the territorial sea, contiguous zone and EEZ) is the low-water line along the coast. According to article 7(1) of UNCLOS, under "normal circumstances" a baseline must not depart to any appreciable extent from the "general direction of the coast". Article 14 of UNCLOS however allows states to determine their baselines by methods *other* than the *"normal"* baseline if *special conditions* are present. Such special conditions are alluded to in article 7(1) and (2) of UNCLOS, such as for example where the coastline is "deeply indented and cut into";[43] if there is a *fringe of islands* along the coast in its "*immediate vicinity"* or where the

41 See Walker *Definitions for the Law of the Sea* 104.

42 Vrancken *South Africa and the Law of the Sea* 182. In the United States, the Outer Continental Shelf Act 1953 provides that the laws of the United States extend to all artificial islands and installations attached to the seabed erected for the purpose of *inter alia* producing resources. See Gaudet "The Application of Louisiana's Strict Liability Law on the Outer Continental Shelf: A Quandary for Federal Courts" 1982 28 *Loyola Law Review* 101.

43 The term "deeply indented and cut into" comes from the *Anglo-Norwegian Fisheries Case* 1951 ICJ Rep 116 par 128, which related to the coastline of Norway, which has countless fjords. See Evenson "The Anglo-Norwegian Fisheries Case and Its Legal Consequences" 1952 41 *American Journal of International Law* 609; Green "The Anglo-Norwegian Fisheries Case" 1952 15 *Modern Law Review* 373; Johnson "The Anglo-Norwegian Fisheries Case" 1952 1 *International and Comparative Law Quarterly* 145; Waldock "The Anglo-Norwegian Fisheries Case" 1951 28 *British Yearbook of International Law* 114.

presence of a delta and other natural conditions make the coastline unstable. South Africa follows the "normal baseline" approach along most of the Atlantic Ocean coast as well as along most of the Indian Ocean coast. However, where straight baselines have been drawn, they all fall within one of the exceptions set out in article 7(1) and (2) of UNCLOS.[44]

There is however a substantial body of state practice that does *not* conform to the normal approach (which demands that the baseline must not depart to any appreciable extent from the direction of the coast) and uses *straight* baselines instead. The latter practice, especially in East Asia, is becoming more common than the use of "normal baselines." States that have been criticised for this are China, the Republic of Korea, Japan, Taiwan and Vietnam. By using straight baselines, states can extend the area of their territorial seas and economic zones. An example is China's straight baseline from the Shandong peninsula to the Shanghai area, which covers an area of few indentations and no fringing islands. It has been persuasively submitted that a straight baseline method should not apply in this instance.[45] This practice is becoming extremely controversial and is being challenged by other states and could lead to major maritime disputes and conflicts.

These problems are caused by the ambiguity of the criteria laid down for the drawing of straight baselines. There is no objective test to identify "deeply indented" coasts, or for what constitutes a "fringe of islands". How is a coast's "immediate vicinity" to be determined? Do straight base lines have a maximum length? Myanmar, for example, has established a 222.3 mile straight baseline across the Gulf of Martaban and thereby enclosed 14 300 square miles of ocean as internal waters. Vietnam draws a 161.3 mile straight baseline between Bay Canh Islet and Hon Hai Islet. There is similarly no objective criteria to determine "the general direction of the coast".

Because rules governing straight baselines are so abstract, the rules have to a large extent become subject to the discretion of coastal states, which consequently, as seen above, make excessive straight baseline claims. The view of the ICJ in the *Qatar/Bahrain* case[46] was that the rules relating to the drawing of straight baselines should be applied restrictively.[47] This case is an example of where the International Court of Justice had to rule on the validity of a state's straight baseline claims owing to interpretational problems.

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44 Prescott "Publication of a Chart Showing the Limits of South Africa's Claims" 1999 14 *International Journal of Maritime and Comparative Law* 559; Vrancken *South Africa and the Law of the Sea* 85–90.

45 Reisman and Westerman *Straight Baselines in International Maritime Boundary Delimitation* (1992) 133; Roach and Smith "Straight Baselines and the Need for a Universally Applied Norm" 2000 31 *Ocean Development and International Law* 65; Oxman "Drawing Lines in the Sea" 1992 18 *Yale Law Journal* 663.

46 ICJ Rep 2001 103 par 212; 2001 40 *ILM* 847.

47 See Roach and Smith *Excessive Maritime Claims* 72–133 for examples of excessive maritime claims.

7 ENVIRONMENTAL ISSUES

A feature of the period following the conclusion of UNCLOS has been the setting out of norms and principles that reflect international priorities for managing the oceans. The majority of these principles have a strong environmental dimension and relate to sustainable use and development, the duty to prevent transboundary environmental damage, integrated oceans management and protecting marine ecosystems.[48] These principles have not been prioritised and consequently there are different views as to what weight each must be accorded. Given the lengthy period that has elapsed since the Rio Declaration adopted at the UN Conference on Environment and Development in 1992,[49] it is imperative that these principles be consolidated in a single instrument,[50] especially in the context of the oceans. UNCLOS would be the ideal instrument for such consolidation. Broadly, the most important environmental principles alluded to in UNCLOS are the protection and preservation of the marine environment and the prevention of transboundary harm; the principle of cooperation; the principle of the common heritage of mankind; the polluter-pays principle; the precautionary principle; the principle of evaluating likely environmental impacts on activities and the principle of sustainability. These principles are briefly referred to to emphasise their importance when it comes to their environmental significance and the need to get clarity on their meaning.

The principle of preventing *transboundary* environmental damage in a maritime context has not yet been directly applied by an international court or tribunal. It has been implied by the ICJ in the *Nuclear Test Cases*,[51] by ITLOS in the *MOX Plant Case*[52] and the *Straits of Johor Case*,[53] and by the Seabed Disputes Chamber of ITLOS in *Seabed Mining Advisory Opinion*.[54] In the latter case, it was held that article 194(2) of UNCLOS (which refers to transboundary environmental harm) creates an *obligation* of due diligence.[55] This was a significant decision of the Seabed Disputes Chamber of ITLOS. The Seabed Disputes Chamber has a central role in mining disputes with respect to exploration for or exploitation of minerals in the "Area". The Seabed Disputes Chamber, acting under articles 186–191 of UNCLOS, may act as a commercial court hearing disputes between parties to a mining contract or may exercise a review function in considering whether the Seabed Authority has exceeded its jurisdiction. It may also render advisory opinions at the request of the Seabed Authority's Assembly or Council.

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48 For UNCLOS and South Africa's duties to protect and preserve the marine environment, see Vrancken *South Africa and the Law of the Sea* 350–405.

49 UN General Assembly A/Conf.151/26 (Vol II), 12 August 1992.

50 Freestone "Principles Applicable to Modern Oceans Governance" 2008 23 *International Journal of Marine and Coastal Law* 385.

51 *Nuclear Tests (Australia v France)* 1974 ICJ Rep 457.

52 *MOX Plant (Ireland v United Kingdom)* 2002 41 *ILM* 405.

53 *Land Reclamation by Singapore in and Around the Straits of Johor (Malaysia v Singapore)* 8 Oct 2003 www.itlos.org.

54 2011 50 *ILM* 458.

55 *Seabed Mining Advisory Opinion supra* par 113.

Considering that fish are no respecters of national jurisdictions, it has been realised for a long time that *cooperation* between states is imperative when it comes to governing the sea. This was emphasised in the *Fisheries Jurisdiction (United Kingdom v Iceland)* case[56] where the ICJ held that there is a duty to have regard to the rights of other states on the issues relevant to conservation. The ICJ saw this duty as an obligation on states to act together when deciding on measures required for conservation and development of fishery resources. In the *MOX Plant* case,[57] ITLOS held that there is a *duty* to cooperate in the prevention of pollution of the marine environment under part XII of UNCLOS.

The principle of the "common heritage of mankind"[58] was given legal force in UNCLOS for the first time, bolstered by an institutional structure to give it effect.[59] A problem however is that the *common heritage of mankind principle* in the context of UNCLOS *only* applies to *mineral resources* found in the "Area" and is not a general principle relating to other open access oceanic resources. Should it not in some instances be extended further to encompass further defined living resources found in the high seas?

The *polluter-pays principle,* which is to the effect that the costs of pollution should be borne by the polluter, is not directly mentioned in UNCLOS. It may be implicit for example where article 235(2) of UNCLOS declares that states must see to prompt and adequate compensation for damage caused to the marine environment by pollution. Despite the fact that the polluter-must-pay principle is referred to in other environmental conventions, it does not seem to be rational that it is not specifically provided for in UNCLOS.

The *precautionary principle*, largely as a result of the 1992 Rio Declaration and Agenda 21 (which discusses the oceans from a global environmental perspective), has become an important principle in the context of the marine environment. The precautionary principle is a key element that focuses on a new dimension in international law with the goal of protecting the marine environment and the conservation of marine species. Traditionally, there was an obligation to prevent transboundary harm once convincing evidence was presented that harm may occur. The precautionary principle, however,

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56 1974 ICJ Rep 3 par 72.

57 *MOX Plant (Ireland v United Kingdom) supra* par 82–84. See Devine "Provisional Measures Ordered by the International Tribunal of the Law of the Sea in the Area of Pollution" 2003 28 *South African Yearbook of International Law* 263. Kwiatkwska "The Ireland v United Kingdom (MOX Plant) Case: Applying the Doctrine of Treaty Parallelism" 2003 18 *International Journal of Marine and Coastal Law* 1.

58 Art 136 of UNCLOS declares that the "Area" and its resources are the common heritage of mankind. The "Area" referred to is the seabed and ocean floor, and the subsoil thereof, *beyond* the limits of national jurisdiction as well as the resources of the "Area". All rights in the resources of the "Area" are vested in mankind as a whole on whose behalf an "Authority" shall act by virtue of article 137(2) of UNCLOS. The principle of the common heritage of mankind has three elements. First, the "Area" and its natural resources may not be appropriated. Secondly, any activities in the "Area" shall be carried out for the benefit of mankind. Thirdly, the "Area" shall be open to use exclusively for peaceful purposes. See Schmidt *Common Heritage or Common Burden?* (1989).

59 Art 153(1) of UNCLOS provides that activities in the "Area" shall be controlled by the International Seabed Authority on behalf of mankind. All states parties to UNCLOS are parties to the International Seabed Authority, which consists of the Assembly, the Council, the Secretariat and the Enterprise.

calls for action even when there is uncertainty regarding the specific degree of risk concerning the environmental harm. In the *Southern Bluefin Tuna* case,[60] ITLOS granted provisional measures under article 290 of UNCLOS to restrain Japan from undertaking an experimental fishing programme and encouraged the parties to act with caution to ensure effective conservation measures. The majority of ITLOS did *not* however hold that the precautionary principle is a *legal* concept. Including the precautionary principle in UNCLOS would make the principle a binding concept.

Related to the precautionary principle is the *environmental impact assessment* (EIA) issue, which aims to evaluate the possible environmental effects of a *proposed* activity. It has become generally recognised that an EIA should take place at an earlier stage than the developmental stage; it should take place at the stage of the *origination* of the proposed activity and should be an obligation set out in UNCLOS. This was suggested by the Seabed Dispute Chamber in its *Seabed Mining Advisory Opinion.*[61]

Sustainable development can be seen as development that meets the needs of the present without compromising future generations' ability to meet their needs. Axiomatically, humanity's involvement with the ecological and economic development of the oceans is engaged. The ICJ encapsulated this basic idea in the *Gabcikova-Nagymaros Project* case.[62] Various treaties and non-binding agreements relating to the conservation of marine living resources are introducing the concept, such as in section 2 of the 1995 UN Fish Stocks Agreement[63] and section 7.2.1 of the 1995 Code of Conduct for Responsible Fisheries.[64] Despite these developments, there is no uniform understanding of the principle of sustainable development and considerable uncertainty about the principle's normative contents. Because the extent to which the principle can legally bind states is debatable, it is imperative that the principle of sustainable development be set out in greater detail in UNCLOS.[65] The UN Secretary General's 2015 report[66] on oceans and law of the sea focused specifically on the influence of sustainable development on the oceans, referring to the principle's three dimensions – environmental, social and economic – and saw these as being at the core of UNCLOS.

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60 *Southern Bluefin Tuna (New Zealand v Japan; Australia v Japan)* 1999 117 ILR 148 par 77. See Boyle "*The Southern Bluefin Tuna Arbitration"* 2001 50 *International and Comparative Law Quarterly* 447; Romano "The *Southern Bluefin Tuna* Dispute: Hints of a World to Come ... Like it or Not" 2001 32 *Ocean Development and International Law* 313; Morgan "Implications for the Proliferation of the International Legal Fora: The Example of the *Southern Bluefin Tuna* Case" 2002 43 *Harvard International Law Journal* 541; Marr *The Precautionary Principle in the Law of the Sea: Modern Decision Making in International Law* (2003).

61 2011 50 *ILM* 458 par 145.

62 1997 ICJ Rep par 78.

63 2167 UNTS 1996. The full title is the UN Agreement for the Implementation of the UN Convention on the Law of the Sea 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.

64 See Tanaka *The International Law of the Sea* 249 for further examples.

65 Lowe "Sustainable Development and Unsustainable Arguments" in Boyle and Freestone (eds) *International Law and Sustainable Development: Past Achievements and Future Challenges* (1998) 26; Zou (ed) *Sustainable Development and the Law of the Sea* (2006).

66 *Oceans and the Law of the Sea, Report of the Secretary-General* UN Doc A/70/74 (2015) par 5.

8 CONCLUSION

The discussion above has only touched briefly on five conspicuous unresolved issues relating to UNCLOS. These unresolved issues should not be allowed to remain unresolved as they could lead to serious confrontations between states. Historic waters must be defined more specifically because such waters are regarded as internal waters. Conflicting views on the use of the EEZ of third states for military activities in peacetime could lead to a conflagration in a short time. A more precise definition of an island, and especially artificial islands, is clearly called for owing to possible abuse of the interpretation of such features. The same applies to straight baselines, as interpretation can be used to extend the jurisdiction of coastal states relative to the ocean. The *South China Sea Arbitration* was seized with the latter two issues. The vastly different approaches by the parties to the issues, and different reactions of the parties to the ruling, bear witness to the need for comprehensive resolution of these issues. The same applies to environmental issues, the principles relating to the common heritage of mankind, the polluter-pays principle, the precautionary principle, EIA and sustainable development.

These serious unresolved issues in UNCLOS call for review and reform. A modification of UNCLOS is essential to its longevity. This can be done in four main ways.[67] First, there is the mechanism previously adopted for the 1994 Implementation Agreement,[68] which was adopted by the UN General Assembly; it modified the effect of Part XI of UNCLOS and facilitated the ratification of UNCLOS by industrialised states. Secondly, the mechanism used with the 1995 Fish Stocks Agreement[69] elaborated on provisions concerning the conservation and management of fish stocks provided in Parts V and VII of UNCLOS. There is nothing to stop similar agreements being negotiated in the future. Thirdly, UNCLOS provides for formal amending procedures in articles 312, 313 and 314. Articles 312 and 313 deal with general amendments to UNCLOS, except those dealing with the deep seabed. Article 312 provides for a review conference. Article 313 provides for a simplified procedure to review UNCLOS that dispenses with the need for a conference. Article 314 provides for amendments to the deep seabed regime. Fourthly, reference can be made to the potential of the UN Secretary-General to convene a Meeting of States Parties to the United Nations Convention on the Law of the Sea (SPLOS) and to take on a more substantive role in reviewing UNCLOS. The UN Secretariat contains a Division for Ocean Affairs and the Law of the Sea (DOALOS), which is part of the UN Office of Legal Affairs. DOALOS could conceivably play a more prominent role in suggesting that UNCLOS be reviewed by emphasising the unresolved issues.

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67 A more extensive exposition of ways to modify UNCLOS is set out by Tanaka *The International Law of the Sea* 32–38.

68 1836 UNTS 1996.

69 2167 UNTS 1996.

SEPARATION OF POWERS, CHECKS AND BALANCES AND JUDICIAL EXERCISE OF SELF-RESTRAINT: AN ANALYSIS OF CASE LAW

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SUMMARY

The Constitution of the Republic of South Africa, 1996 creates a system in which there is a separation of the powers exercised by the different branches of the State. It also creates a system of checks and balances. The exercise of a power by one arm of state is checked by another to ensure that there is no abuse of state power. Organs of state ought to respect each other and the powers allocated to them by the Constitution. To this end, no organ of state should encroach upon the domain of the other organs. However, the courts wield enormous power because they are the ultimate guardians and custodians of the Constitution in South Africa. Courts have the power to declare any law or conduct unconstitutional. Where decisions have been taken by other arms of the State on matters falling within their exclusive domain and such decisions violate the Constitution, courts have a duty to intervene in order to make organs of state act within constitutional bounds. However, courts should not be overzealous and should not encroach upon the powers of the other arms of the State when exercising their judicial power and authority. Against this backdrop, this article analyses how the South African courts have cautioned themselves to exercise self-restraint in order not to usurp or encroach upon the powers of the other arms of the State while exercising their judicial authority and power.

1 INTRODUCTION

The Constitution of the Republic of South Africa, 1996 (the Constitution) provides for the implementation of the doctrine of separation of powers. The doctrine is based on several generally held principles in terms of which the government is separated into three branches, namely the legislative, executive, and judicial branches, with the conception that each branch should perform unique and identifiable functions that are appropriate to that

branch, and that there should be a limitation of the personnel of each branch to that branch, so that no one person or group should be able to serve in more than one branch simultaneously.[1]

Essentially, the constitutional framework is to the effect that the legislative authority of the Republic, in the national sphere of government, is vested in Parliament; in the provincial sphere of government, it is vested in the provincial legislature; and in the local sphere of government, it is vested in the municipal council.[2] The executive authority of the Republic, in the national sphere of government, is vested in the President;[3] in the provincial sphere, the executive authority is vested in the premier of the province;[4] and in the local sphere of government, it is vested in the municipal council.[5] The judicial authority of the Republic is vested in the courts.[6]

The legislative arm of the State has the power to pass legislation. In terms of section 44 of the Constitution, only the legislative arm of the State is empowered to pass legislation. No organ of state except the legislative arm is given the power to pass legislation. At a national level, the National Assembly has the power to amend the Constitution, pass legislation and to assign any of its legislative powers, except the power to amend the Constitution, to any sphere of government.

The executive branch of the State is tasked with the duty to implement the law, while the judiciary interprets and applies the law.

Organs of state should run their own affairs and exercise powers given to them by the Constitution. Courts should not interfere with the functioning of the other branches of the State. Courts should be resorted to when organs of state have breached their constitutional obligations or boundaries. In instances where an organ of state has exercised a power given to it by the Constitution within constitutional bounds, it is undesirable for a court to get involved. Courts should not dictate how the other arms of the State exercise their constitutional powers.

There has been constant friction in the way and manner different branches understand the application of the separation-of-powers doctrine.[7] Most times, when there are notable political disputes to be resolved, the court is usually approached by the aggrieved party whereas the issues are supposed to be resolved using political means. The aggrieved party would argue that through checks and balances the issue should be resolved by the court while the other party would argue that it was against the separation of powers doctrine. In most cases, the judiciary is put on the spot in an attempt to police the maintenance of the two doctrines.[8] The good news is that these

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1 Bradley and Morrison "Historical Gloss and the Separation of Powers" 2012 *Harvard Law Review* 411–421.

2 S 43 of the Constitution.

3 S 85 of the Constitution.

4 S 125 of the Constitution.

5 S 151(2) of the Constitution.

6 S 165 of the Constitution.

7 Bradley and Siegel "Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers" 2016 *Georgia Law Journal* 255–264.

8 Garry "The Unannounced Revolution: How the Court Has Indirectly Effected a Shift in the Separation of Powers" 2005 *Alabama Law Review* 689–694.

days, the courts have been up to speed and taking the bull by the horns by adjudicating cases involving the doctrines.

There has been much debate on the meaning of the separation of powers. Ultimately, a minimal consensus has emerged on its scope, and the principle has evolved in contemporary constitutional law owing to changing historical and political circumstances.[9] Separation of powers is one of the essential principles that have brought about democracy and constitutionalism.[10] It could be said that the sole purpose of the separation of powers is to protect liberty from tyranny.[11] In most constitutional systems that provide for constitutional review, the issue of the separation of powers soon emerges in constitutional jurisprudence; the different branches and institutions of government begin to exercise power and challenges are brought to test the extent of these powers in different contexts.[12]

The Constitution plays a very broad role in governance, a role that is essential to good governance. It is the Constitution that empowers all the institutions of government, providing an institutional framework through which power is to be exercised and controlled.[13] The Constitution divides the powers between the executive, legislative and judicial arms of the State. The division of power is not watertight. In certain instances, the different arms of the State interact with each other.

The judiciary stands out from the three branches. The Constitution allocates enormous power to the judiciary, and the judiciary is in fact the guardian and custodian of the Constitution. The judiciary has broad powers of checks and balances on the other branches and has power to declare any act or action of the executive or legislature invalid and unconstitutional. However, despite the authority and responsibility with which the judiciary is vested, it still has to operate and exercise its power in accordance with the Constitution and the doctrine of separation of powers. Recently, in the case of *Economic Freedom Fighters v Speaker of the National Assembly*,[14] the minority judgment found the majority judgment to be in violation of the separation of powers doctrine. Mogoeng CJ classified the majority judgment as "a textbook case of judicial overreach – a constitutionally impermissible intrusion by the judiciary into the exclusive domain of Parliament".[15] According to Mogoeng CJ, the majority judgment encroached upon the domain of Parliament by not observing the limits of the judiciary in the exercise of judicial powers. The intrusion by the judiciary into the exclusive domain of Parliament is constitutionally not permissible. The Constitution requires that each branch of the State should exercise the powers bestowed upon it and not usurp the powers bestowed upon another branch. In this

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9 Whittington *Constitutional Construction: Divided Powers and Constitutional Meaning* (1999) 20.

10 Manning "Separation of Powers as Ordinary Interpretation" 2011 *Harvard Law Review* 939–945.

11 Mollers *The Three Branches: A Comparative Model of Separation of Powers* (2013) 16.

12 Klug "Separation of Powers, Accountability and the Role of Independent Constitutional Institutions" 2016 *New York Law School Law Review* 153–159.

13 Robinson "Expanding Judiciaries: India and the Rise of the Good Governance Court" 2009 *Washington University Global Studies Law Review* 3–8.

14 2018 (2) SA 571 (CC).

15 *Economic Freedom Fighters v Speaker of the National Assembly supra* par 223.

case, the judiciary went beyond exercising the checks and balances permitted by the Constitution; the judiciary was dictating to Parliament how it should exercise its (Parliament's) powers, although the Constitution allows Parliament to make its own rules to govern its processes. Mogoeng CJ's view was criticised by Froneman J who disagreed with the characterisation of the majority judgment as a "text book case of judicial overreach".

It is submitted that the judiciary cannot simply declare any constitutional act or action of the executive and Parliament invalid. Interestingly, the judiciary itself has realised that there might be a tendency for presiding judges to overreach while exercising their judicial review powers. In order to contain this, the judiciary is expected to respect other branches and exercise self-restraint while exercising its powers.

2 EXERCISING SELF-RESTRAINT IN DISCHARGING JUDICIAL POWERS: ANALYSIS OF CASE LAW

In exercising judicial power, the court must be sensitive and accord other branches due respect. Against this backdrop, salient cases where the court held that the judiciary should exercise self-restraint are considered. In the case of *President of the Republic of South Africa v South African Rugby Football Union*,[16] the Constitutional Court found that it was not in the interests of justice for the High Court to ask the President to come and give oral evidence as this would amount to disrespecting the President. The Constitutional Court emphasised that the dignity and status of the President must be protected. The court reasoned that it is in the interests of the public that the dignity and status of the President of the Republic be preserved and protected in order for the executive to function effectively and efficiently, unimpeded at all times. Even at Cabinet meetings, where sensitive and important matters of policy are discussed by the President and Cabinet ministers, the dignity and status of the President should be protected. The court observed that insisting that the President appear in person in court to give oral evidence undermines the executive branch and the presidency. Therefore, the Constitutional Court cautioned that the judiciary should exercise appropriate restraint in such cases, being sensitive to the status of the head of state and the integrity of the executive arm of government. On the other hand, there is the equally important need to ensure that the courts are not disrupted in the administration of justice.

This case established that the branches of the State ought to respect each other and the powers allocated to them by the Constitution. The fact that the arms of the State should respect each other does not mean that they must not discharge their constitutional responsibilities. Accordingly, the court disagreed with the High Court's calling of the President to present oral evidence.

Similarly, in the case of *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*,[17] the Constitutional Court refused to encroach upon the domain of the executive. In this case, the applicant was

16 2000 (1) SA 1 (CC).
17 2004 (4) SA 490 (CC).

dissatisfied with the allocation of fishing quotas it had received in the 2001 allocation process for the 2002 to 2005 fishing seasons and it sought to review that allocation. The review succeeded in the Cape High Court, but on appeal that judgment was overturned by the Supreme Court of Appeal (SCA). The case raised the question of the extent to which such a decision was susceptible to review under the new constitutional order. The court emphasised the need for one arm of the State to respect another arm of the State. Courts should not conduct themselves in a manner that suggests that they are wiser than the other branches of the State in matters falling within the exclusive competence of another branch. Where decisions have been taken by other branches of the State on matters falling within their exclusive domain, courts should not interfere unless it can be shown that such decisions violate the Constitution. In other words, courts should exercise a higher degree of care when dealing with matters involving the exercise of power by other branches of the State.

The judiciary should not step into the terrain of the executive branch of the State by ordering a minister to provide medical care despite the fact that it would go beyond the available resources of the State. In the case of *Soobramoney v Minister of Health, KwaZulu Natal*,[18] the court refused to order the Minister of Health to provide dialysis treatment to a patient whose health condition was not requiring emergency health care. The appellant in this case was a 41-year-old diabetic suffering from ischemic heart disease, cerebro-vascular disease, and irreversible chronic renal failure. In order to prolong his life, he sought dialysis treatment from a state hospital in Durban. He was not admitted to the dialysis programme of the hospital because the hospital did not have enough resources to provide dialysis treatment for all patients suffering from chronic renal failure. According to the hospital's policy, patients suffering from acute renal failure that could be treated and remedied by renal dialysis were admitted automatically to the renal dialysis programme. Patients suffering from irreversible chronic renal failure were not admitted automatically. To qualify for automatic admission to the dialysis programme, a patient had to be eligible for a kidney transplant. A patient who was eligible for a transplant would be provided with dialysis treatment until an organ donor was found and a kidney transplant had been completed.

According to the guidelines designed by the hospital, patients were not eligible for kidney transplants unless free of significant vascular or cardiac disease. Since the appellant suffered from ischemic heart disease and cerebro-vascular disease, he was not eligible for a kidney transplant. The appellant then made an urgent application to the High Court for an order directing the hospital to provide him with ongoing dialysis treatment and interdicting the respondent from refusing him admission to the renal unit of the hospital. The application was dismissed. The appellant appealed to the Constitutional Court, which dismissed the appeal.

The Constitutional Court did not want to step into the terrain of the executive branch of the State by ordering the minister to provide medical care that would go beyond the available resources of the State. The Constitutional Court said that a court will be slow to interfere with rational

[18] 1998 (1) SA 765 (CC).

decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters.[19]

In the case of *Mazibuko NO v Sisulu NNO*,[20] the High Court warned against the politicisation of the judiciary. In this case, the applicant, as leader of the opposition and on behalf of eight opposition parties, brought an urgent application that first respondent be directed to ensure that a tabled motion of no confidence in the President be scheduled for debate and a vote before the National Assembly on or before the last day of its annual sitting. The applicant alleged that "procedural machinations" frustrated the scheduling of the debate and argued that, notwithstanding the National Assembly Rules not providing for breaking the resulting deadlock, the first respondent had a residual power to order scheduling of the debate. The court said that the judiciary has no mandate to run the country or govern the country. The overall responsibility of the court is to police the constitutional boundaries and where there is any transgression, the court has the power to act without fear or favour against any branch that has transgressed. The court thus strongly cautions against politicising the judiciary by drawing it into every political dispute when there is another appropriate forum to resolve such political impasse relating to policy disputes. The courts should not be seen to be telling Parliament when and how to arrange its precise order of business matters, provided that Parliament operates within a constitutionally compatible framework.

In the case of *United Democratic Movement v President of the Republic of South Africa* (*African Christian Democratic Party intervening; Institute for Democracy in South Africa as Amici Curiae*),[21] the court considered the effect of an order of the High Court suspending the operation of a piece of legislation in view of the doctrine of the separation of powers.

The applicant had brought an application in the High Court to suspend the operation of certain "floor-crossing" legislation, pending an application to the Constitutional Court to declare the legislation to be unconstitutional. The High Court granted the application. The Constitutional Court subsequently heard the parties on the desirability of it hearing the matter as a court of first instance and whether it could make an order prior to hearing the main application, which would stabilise the situation pending the hearing of the main application. The court observed that since the legislative authority of the national sphere of government is vested in Parliament in terms of section 43 of the Constitution, the suspension of the coming into operation of a piece of legislation has the effect of defeating the will of the elected legislature and hampering its ability to exercise the legislative authority conferred upon it by the Constitution.

The Constitutional Court was reluctant to interfere with the functioning of the legislative arm of the State. According to the court, suspending the coming into operation of a piece of legislation violates Parliament's exercise of legislative authority. The court respected the fact that law-making falls within the exclusive terrain of Parliament.

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19 *Soobramoney v Minister of Health, KwaZulu Natal supra* par 29.

20 2013 (4) SA 243 (WCC).

21 2003 (1) SA 488 (CC).

The courts are the ultimate guardians of the Constitution. Courts have the power to declare any law or conduct unconstitutional.[22] Courts have the power to review conduct of the other arms of the State to the extent that the conduct is inconsistent with the Constitution. However, in exercising their judicial review powers, courts should know their own limits or boundaries. In the case of *Mazibuko NO v Sisulu NNO*,[23] the court observed that courts should be careful not to exceed their constitutional bounds. The court stated that in terms of the system of separation of powers, the judiciary is forbidden from intervening in matters that fall within the domain of Parliament, except where the intervention is mandated by the Constitution. Therefore, the courts should caution themselves and exercise self-restraint by staying in their lane when exercising their review power and should stick strictly to what the Constitution permits them to do. The Constitution is supreme and binds all arms of government, including the courts.

The doctrine of separation of powers underlies the principle of judicial independence, being the idea that only the judicial branch of government should discharge judicial functions and that it should do so free of interference from the other two branches. Independence also expresses the idea that the judiciary should decide disputes impartially and without bias.[24] The judicial arm of the State should not step into the terrain of the other branches of the State unless it is constitutionally allowed to do so.

When adjudicating, courts should be careful not to venture into policy formulation, which is the role of the executive, or law-making, which is performed by the legislative arm. The case of *Government of the Republic of South Africa v Grootboom*[25] presents a temptation that may lead a court to encroach upon the domain of the other branches of the State in the area of justiciable socio-economic rights. In this matter, the respondents left their place of residence, which was congested and in a devastating state. They occupied privately owned land that was earmarked for development. The owner of the land applied for and was granted an eviction order against the respondents. When the eviction was carried out, the respondents were left stranded and without accommodation.

The respondents applied to the High Court for an order requiring the government to provide them with adequate basic shelter or housing until they obtained permanent accommodation. The High Court held that section 28(1)(*c*) of the Constitution obliged the State to provide rudimentary shelter to children and their parents on demand if the parents were unable to shelter their children, that this obligation existed independently of and in addition to the obligation to take reasonable legislative and other measures in terms of section 26 of the Constitution and that the State was bound to provide this rudimentary shelter irrespective of the availability of resources.

The appellant appealed the decision of the High Court to the Constitutional Court. The legislative and reasonable measures imposed on the State by section 26(2) of the Constitution are measures to be taken by

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22 S 172 of the Constitution.
23 2013 (6) SA 249 (CC).
24 Currie and De Waal *The Bill of Rights Handbook* (2013) 34.
25 2001 (1) SA 46 (CC).

the executive and the legislature. When the court is called upon to determine whether the executive and/or legislature have complied with their constitutional obligations, it (the court) should not require the legislature or executive to do more than is reasonable. In other words, if the measures taken by the State are reasonable under the prevailing circumstances, the court should not interfere with the decisions taken by the State.

In order to exercise self-restraint and not exceed its boundaries, a court should know what functions should be performed by which organ of state. One arm of the State should not dictate to the others what they should do, but the court may order compliance with constitutional obligations in the event of breach. In the *Grootboom* case,[26] the court was alive to the responsibility that rested on the executive to ensure compliance with the obligations imposed by section 26 of the Constitution. The court recognised the responsibility that is bestowed on the national sphere of government to decide on allocation of the national housing budget. The court cannot interfere with the exercise of the power by the executive to decide on the allocation of budget unless the exercise is unreasonable and violates the Constitution or the Bill of Rights.

In the case of *International Trade Administration Commission v SCAW South Africa (Pty) Ltd*,[27] the Constitutional Court dealt with a situation where the High Court had encroached upon the domain of the executive. The court cautioned that courts must know their boundaries as the ultimate guardians of the Constitution.

In this case, the Minister of Trade and Industry, acting on a recommendation made by the predecessor of ITAC, imposed anti-dumping duties on steel cable and similar products manufactured by Bridon International Ltd UK. Such duties would, under the Anti-Dumping Regulations of 2003, endure for a period of five years unless a sunset review investigation was initiated prior to the expiry of the five-year period that would have allowed ITAC to extend it for a maximum of 18 months, for a review of the duties and the making of recommendations to the Minister.

In February 2007, just before the expiry of the five-year period, SCAW, a South African manufacturer of competing products, asked ITAC for a sunset review that would maintain the anti-dumping duties in question. Contrary to SCAW's expectations, ITAC recommended the termination of the anti-dumping duties pertaining to Bridon in October 2008.

Three days later, SCAW made a High Court application for an interim interdict pending the final determination of a review application restraining ITAC from forwarding its recommendations to the Minister and restraining the Minister of Finance from implementing ITAC's recommendation. The High Court granted both interdicts. The matter ultimately came to the Constitutional Court on appeal. The Constitutional Court said that in a constitutional democracy, all public power is subject to constitutional control and that each arm of the State must act within the boundaries set out by the Constitution. However, if there is a trespassing by one arm of the State into

[26] *Government of the Republic of South Africa v Grootboom supra*.
[27] 2012 (4) SA 618 (CC).

the terrain of another, the courts, being the ultimate guardians of the Constitution, have the right to intervene in order to prevent the violation of the Constitution; they also have the constitutional duty to do so. However, when exercising their oversight power, the courts must observe the limits of their own power.

In the *National Treasury* case,[28] the respondents approached the North Gauteng High Court on an urgent basis for an interim interdict restraining South African National Roads Agency (SANRAL) from levying and collecting tolls on the Gauteng roads pending the final determination of their application to review and set aside the decisions of *(a)* SANRAL and the Transport Minister to declare the Gauteng roads as toll roads; and *(b)* the Director-General to grant certain environmental approvals related to the Gauteng Freeway Improvement Project (GFIP). The GFIP was approved by Cabinet for SANRAL to upgrade roads in the economic hub of the Gauteng Province. The High Court granted the interdict.

The appellant appealed to the Constitutional Court. The Constitutional Court found that the High Court stepped into the domain of the executive. The High Court had granted the interdict without checking what implications the interim order would have on the separation-of-powers doctrine.[29] The effect of the interim order granted by the High Court in the matter was that the court had interfered with the functioning of the executive arm of the State. The executive arm of state was functioning in terms of legislation that was never challenged as being invalid. Despite the fact that the legislation in terms of which the executive exercised a power was never challenged, the court had granted an order interdicting the executive from exercising its powers. This type of an intrusion into the domain of the executive by the courts is not constitutionally permissible. The High Court had failed to respect the functioning of the executive and to observe its own constitutional bounds. The court interdict against the executive in this matter, as granted by the High Court, caused government to spend more because the order prevented government from collecting revenue.[30] When dealing with a matter that involves the exercise of authority by an organ of state, a court must have regard to the doctrine of separation of powers. The court should determine whether the power was exercised by the relevant authority and, if so, whether the relevant authority did not exceed its constitutional boundaries in the exercise of such power. If the court finds that the power was exercised by the relevant authority and that such power was exercised in a reasonable manner, the court should not interfere.

The order of the High Court was accordingly set aside and held to offend the separation of powers. A proper application of the doctrine of separation of powers is hindered when one branch of the State encroaches upon the exclusive domain of another. In certain instances, the courts are unable to limit their own power and they end up in the domain of the executive or legislature.

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28 *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC).

29 *National Treasury v Opposition to Urban Tolling Alliance supra* par 27.

30 *National Treasury v Opposition to Urban Tolling Alliance supra* par 47.

In *National Director of Public Prosecutions v Freedom Under Law*,[31] the High Court had reviewed and set aside four decisions taken by or on behalf of the first three appellants in favour of the fourth appellant and directed the first three appellants to reinstate criminal prosecutions and disciplinary proceedings against him. The Supreme Court of Appeal held that the High Court encroached upon the exclusive domain of the executive. In this matter, the High Court had usurped the powers of the executive. It is not constitutionally justifiable for the court to make decisions on behalf of the National Director of Prosecutions and the South African Police Services. The High Court failed to observe its constitutional boundaries and encroached upon the exclusive domain of the executive arm of the State. The Supreme Court of Appeal disagreed with the High Court; it found that the High Court went too far – the High Court had exercised powers that belong to another branch of the State.

In the case of *Minister of Health NO v New Clicks South Africa (Pty) Ltd* (*Treatment Action Campaign as Amici Curiae*),[32] the Minister had made and published Regulations Relating to a Transparent Pricing System for Medicines and Scheduled Substances in terms of the Medicines and Related Substances Act 101 of 1965 in the *Government Gazette* in April 2004. The first respondent (New Clicks), second respondent (the Pharmaceutical Society of South Africa) and others launched separate applications in the High Court for orders declaring the regulations unconstitutional and invalid on various grounds. The challenges included an attack on the functioning of the Pricing Committee established in terms of the Medicines Act, the procedures used by the Pricing Committee and the substance of the regulations promulgated by the Minister on the Pricing Committee's recommendation. The Pricing Committee chose to abide the decision of the High Court. The two applications were consolidated and heard by a full bench of three judges. In a majority judgment, the High Court dismissed the consolidated applications, the minority holding that the regulations should be set aside on various grounds. On appeal, the Supreme Court of Appeal declared the regulations to be invalid and of no force and effect.

When the matter came to the Constitutional Court, the court warned that legislative administrative action is a special category of administrative action. It involves the making of laws and the taking of policy decisions. The court said that, under the Constitution, these are decisions that are within the domain of the executive, to whom Parliament has delegated its law-making power. The exercise of this power is also subject to constitutional control. The importance of the special role of the executive in exercising this power is acknowledged in constitutional democracy and as such, the courts should exercise restraint not to usurp it.

The Constitutional Court urged courts not to usurp powers belonging to other branches of the State. Although the courts have a duty to check that powers are exercised within constitutional bounds, they must not exercise

31 2014 (2) SACR 107 (SCA).
32 2006 (2) SA 311 (CC).

powers that belong to other arms of government. Courts must respect the powers bestowed upon the other arms of the State by the Constitution.

3 IMPLEMENTING CHECKS AND BALANCES

In *Mazibuko's* case,[33] the appellant made an application for an order that the speaker of the National Assembly be directed to ensure that a tabled motion of no confidence in the President be scheduled for debate and a vote before the National Assembly on or before the last day of its 2012 annual sitting. The Constitutional Court upheld the High Court's finding that, on a proper reading of the rules, the Speaker acting alone had no residual power to schedule a motion of no confidence in the President for a debate and a vote in the Assembly, and therefore dismissed the appeal. The Constitutional Court observed that the significance of a motion of no confidence is to ensure that the President and the national executive are accountable to the Assembly, made up of elected representatives. Therefore, a motion of no confidence plays an important role in giving effect to the checks and balances element of the separation-of-powers doctrine. The essence of the doctrine of separation of powers is to limit the power of a single individual or institution and to make the branches of government accountable to one another.[34] The principle of checks and balances allows the other arms of the State to see if one arm is abusing its power or exercising powers it does not have. In this sense, the arms of the State become accountable to one another, and abuse of power is avoided.

In terms of the Constitution, only the National Assembly can remove the President from office. The executive authority of a province is vested in the premier of that province.[35] The executive authority of a municipality is vested in its municipal council.[36] The doctrine of separation of powers requires that when functions have to be performed by the executive arm of the State, the other arms should respect this allocation and not interfere with it.

In the case of *President of the Republic of South Africa v United Democratic Movement*,[37] the first appellant had signed four Acts of Parliament into law. The effect of two of the Acts is to suspend, during certain specified periods, the anti-defection provisions contained in item 23A(1) of Schedule 2 of the Constitution relating to the National Assembly and provincial legislatures. The first of these "window periods" of suspension was to commence on the coming into force of the legislation. Provision is also made for consequential changes to a provincial legislature's delegates to the National Council of Provinces. The purpose of the other two Acts is to allow defection, during the same periods, from political parties in the local government sphere of government. The respondent brought an urgent application in the Cape High Court for the suspension of the Acts on the

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33 *Mazibuko NO v Sisulu NNO* 2013 (6) SA 249 (CC).
34 *Mazibuko NO v Sisulu NNO supra* par 21.
35 S 125(1) of the Constitution.
36 S 151(2) of the Constitution.
37 *President of the Republic of South Africa v United Democratic Movement* (*African Christian Democratic Party intervening; Institute for Democracy in South Africa as Amici Curiae*) 2003 (1) SA 472 (CC).

ground that these Acts were unconstitutional. The order was granted by the High Court. The order of the High Court in this regard had the effect of interfering with law-making. On appeal, the Constitutional Court observed that in a situation where legislation amends the Constitution and has thus achieved the special support required by the Constitution for such amendments, courts should be all the more alert not to thwart the will of the legislature, save in extreme cases.

4 ARMS OF THE STATE ARE INTERRELATED

Unless it is necessary and constitutionally permissible to do so, a court should not interfere with the functioning of the legislative arm of the State provided the legislature acts within the bounds of the Constitution.[38]

Although given different functions by the Constitution, the arms of the State are interrelated. There are instances where they need each other in order to function. For instance, before members of the National Assembly begin to perform their functions in the Assembly, they must swear or affirm faithfulness to the Republic and obedience to the Constitution.[39] Members of a provincial legislature are required to swear or affirm faithfulness to the Republic and obedience to the Constitution before they begin their functions in the legislature.[40] The oath or affirmation must be administered by the Chief Justice or another judge designated by the Chief Justice.[41] In other words, in order for the legislative arm of the State to start operating after an election, the judicial arm has first to administer an oath or affirmation to the members of the National Assembly or provincial legislature. The functions of the legislature must be respected by the other arms of the State. The other branches or arms of the State should be careful not to intrude into the domain of the legislative arm of the State.

The National Assembly has the power to make rules regulating the conduct of its business. The National Assembly may determine and control its internal arrangements, proceedings and procedures.[42] In terms of section 165 of the Constitution, the judicial authority of the Republic is vested in the courts.[43] Judges are appointed by the President as head of the executive.[44] In terms of section 174(3), the President has to consult with the Judicial Service Commission and the leaders of parties represented in the National Assembly before he appoints the Chief Justice and Deputy Chief Justice. Before he appoints the President and the Deputy President of the Supreme Court of Appeal, the President as head of the executive has to consult with the Judicial Service Commission. All the other judges of the various courts are appointed by the President as head of the national executive. Section 177 of the Constitution deals with the removal of judges. The Judicial Service Commission is made up of, among others, the Chief Justice, cabinet

38 Gerangelos *The Separation of Powers and Legislative Interference in Judicial Process: Constitutional Principles and Limitations* (2009) 39.
39 S 48 of the Constitution.
40 S 107 of the Constitution.
41 Schedule 2 of the Constitution.
42 S 57 of the Constitution.
43 S 165 of the Constitution.
44 S 174 of the Constitution.

member responsible for the administration of justice, six persons designated by the National Assembly from among its members and four persons designated by the President as head of the national executive.[45]

The executive and legislative arms of the State play a crucial role in the appointment of judges. In other words, the Constitution dictates that the executive and legislative arms of the State should play a role in setting up the judicial arm of the State. Similarly, the Constitution dictates that the judiciary should play a role in setting up the legislative and executive arms of the State. The Constitution does this by requiring the President to swear an oath or affirm faithfulness to the Republic and obedience to the Constitution. Members of the National Assembly are also required to swear an oath or affirmation. The oath or affirmation is administered by the Chief Justice, or another judge designated by the Chief Justice.

The Constitution vests the executive authority of the Republic in the President.[46] The President exercises this authority with the other members of the Cabinet.[47] In order for a person to occupy the position of the President, such a person must first be a member of the National Assembly. This is so because the Constitution requires that the election of the President should be from among members of the National Assembly. Another arm of the State, the judiciary, also plays a role in the election of the President. The Constitution provides that the election of the President must be presided over by the Chief Justice, or another judge designated by the Chief Justice.

Both the legislative and judicial arms of the State play an important role in the election of the President. First, the President must be a member of the National Assembly, secondly, members of the National Assembly must elect a President from among the members of the National Assembly, and thirdly, the Chief Justice (judiciary) must preside over the election of the President.

The executive authority is, among other things, responsible for preparing and initiating legislation. The function of legislating is predominantly the function of the legislative arm of the State. In terms of section 84 of the Constitution, the President is also responsible for assenting to and signing Bills into law. In other words, unless a Bill is assented to and signed by the President, it will not become a law. Members of the executive are accountable to Parliament both collectively and individually for the exercise of their powers and performance of their functions.[48]

5 CONCLUSION

Courts are the major actors in the challenges faced by the doctrine of separation of powers. As custodian of the Constitution, the judiciary has a duty to ensure that the arms of the State exercise their powers within constitutional bounds, but in exercising their checks-and-balances role, the courts also intrude into the terrain of the other branches of the State. In order

45 S 178 of the Constitution.
46 S 85(1) of the Constitution.
47 S 85(2) of the Constitution.
48 S 92(2) of the Constitution.

to avoid intrusion or usurpation of other powers, the judiciary must observe their own limits and avoid usurping power that is constitutionally allocated to another arm of the State.

When approached to adjudicate on a matter involving the exercise of power by another arm of state, courts should first determine whether such powers were exercised within constitutional bounds. If the power was exercised within constitutional bounds, courts should refrain from interfering with the functioning of the other branches of the State.

In exercising their power to observe constitutional compliance, courts should resist a temptation to dictate how other branches of the State should run their affairs. Courts should limit themselves to ordering constitutional compliance and leave the arm of state concerned to exercise its constitutional powers.

CORRUPTION IN LAND ADMINISTRATION AND GOVERNANCE: A HURDLE TO TRANSITIONAL JUSTICE IN POST-APARTHEID SOUTH AFRICA?

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SUMMARY

The persistence of corruption in post-apartheid South Africa and the failure to control it adequately pose a significant threat to the country's transitional justice project and transformation imperatives. This article provides a detailed account of the depth and impact of corruption in land administration and governance in South Africa. It relies on the documented evidence of corruption scandals to establish the emerging trends, scope and impact of land-related corruption. The article is premised on the notion that corruption (which has become an intrinsic political norm in South Africa) not only impedes development and exacerbates rife inequalities in land ownership and access as a result of the apartheid regime, but also strangles the aims and objectives of transitional justice, which are to alleviate those inequalities. A further premise is that land-related corruption is a direct manifestation of untrammeled political power, patronage and impunity. The article problematises the latter premise and tackles the former by attempting to understand the complex interfaces between land, human rights, corruption and women in South Africa. Women are singled out from vulnerable groups because land ownership has traditionally been, and arguably still is, a male privilege. Of concern is the scale and pace of corruption, which boosts this anomaly, allowing it to thrive exponentially in post-apartheid South Africa. The article also presents a brief overview of operational and institutional challenges facing various initiatives aimed at combatting corruption generally. It concludes by proposing some realistic options to consider for the way forward.

1 INTRODUCTION

In South Africa, the land is without a doubt a vital resource, an important economic and cultural asset for both rural and urban communities. It is arguably also a key driver for economic growth and sustainable development.[1] For this reason, therefore, how land is governed and

[1] In many countries, the land is the fundamental factor shaping the country's wealth and development. Put differently, how land is used and administered determines the prospects of economic success in that particular country. This is so because it is at the point of land

administered ought to feature significantly in both practice and policy reform debates. Over the past two decades, control over and access to land has been steered by various factors, including corruption, which has become a strategy and normalised way of living in post-apartheid South Africa. Certainly, the reform of land governance and administration in any country, especially developing ones, is a long-term prospect requiring decades of sustained commitment, a major investment of capital and transparent and accountable leadership in order to achieve development goals and sustainable outcomes.[2]

Therefore, the question this article seeks to address is whether land administration in post-apartheid South Africa is sufficiently resilient in the context of a high prevalence of corruption. The article argues that it is not satisfactorily resilient, at least to the extent envisioned by the Constitution of the Republic of South Africa, 1996 (the Constitution).[3] A corollary of this observation is the argument that the key institutions and law enforcement agencies mandated to fight corruption have seemingly succumbed to political influences that divert their focus from the anti-corruption mandate. While this article maintains that the best and surest path to achieving equal access to land lies in the process of transitional justice, it is regrettable to note that corruption crushes these aspirations and reform potential.

The need for good governance in land administration is anything but new. A survey of recent literature affirms that land administration, if not properly managed through good governance practices, can be regressive and thus negatively affect the country's economic outlook and future prospects.[4] What

that there is a convergence of all the key activities such as agricultural production (which is directly linked to food security), infrastructural development (which attracts foreign investments), forestry, industrialisation, urbanisation, biodiversity conservation, cultural and customary rights, and ecological and environmental protection.

2 Corruption may breed where government officials are afforded discretion without adequate accountability mechanisms, especially in government departments or agencies entrusted with the responsibility of distributing and providing services to the public, including land.

3 South Africa is counted among the countries with a strong and comprehensive anti-corruption legal framework. While the Constitution makes no mention of "corruption", several constitutional provisions have a direct or indirect implication on the phenomenon. Furthermore, the Constitution not only establishes a number of institutions to enforce transparency and accountability of public officials, but also contains anti-corruption provisions that influence the entire public sector components such as administration, public service, security services, finances and others. Examples of these constitutional provisions include s 32(1)(*a*) and (*b*) (which provides for the right of access to information); s 33(1) and (2) (which provides for the right to administrative action that is lawful, reasonable and procedurally fair); s 182(1)(*a*) (which gives the Public Protector power to investigate any conduct in state affairs or in the public administration of any sphere of government that is alleged or suspected to be improper); s 188(1) (which requires the Auditor-General to audit and report on the accounts, financial statements and financial management of all state entities); s 188(2) (which authorises the Auditor-General to audit and report on the accounts, financial statements and financial management of any state-funded institution); s 195 (which outlines basic values and principles governing public administration) and s 215 (which requires national, provincial and municipal budgets and budgetary processes to promote transparency, accountability and the effective financial management).

4 Branson "Land, Law and Traditional Leadership in South Africa" Briefing note published by *Africa Research Institute: Understanding Africa Today* (2016) 1. See also Ocheje "'In the Public Interest': Forced Evictions, Land Rights and Human Development in Africa" 2007 51(2) *Journal of African Law* 178 and Botha "Can Whistle-Blowing Be an Effective Good Governance Tool?" 2008 *Journal of Contemporary Roman-Dutch Law* 482–495.

is particularly paralysing in South Africa is the lack of political will to confront corruption. Concerningly, the country is plagued with endemic fraud and corruption that permeates all sectors. Land governance is not immune from this problem. In fact, there is general consensus among experts that a lack of good governance in land administration processes is an Achilles heel of land reform in South Africa.[5] This disconcerting trend has also recently been confirmed and noted with contempt by the Expert Advisory Panel on Land Reform and Agriculture in its famous report, namely *Final Report of the Presidential Advisory Panel on Land Reform and Agriculture*.[6]

To this end, all the narratives and discourses seem to point to a common conclusion that, in order to achieve an equitable distribution of land in line with the country's commitment to transitional justice and the objectives of the land reform project, improved land governance needs to be fostered and developed.[7] Even so, there is still no clear direction and lead as to how exactly the government can walk this talk, and overcome the current corrupt land administration system to secure a more transparent and accountable one. At the receiving end of this problem are the poorest and marginalised class of society and vulnerable groups – that is, women, children and people with disabilities who are denied access to land. This has a negative bearing on human rights, ultimately defeating the country's commitment to transitional justice.

Against this background, this article explores the impact of land-related corruption on human rights generally and, in particular, on women in South Africa. The exploration is undertaken in the context of transitional justice. To be answered is the politico-legal question: can corrupt conduct in land governance be properly conceptualised, not only as a human rights violation but also as a threat to transitional justice imperative in South Africa? The answer is in the affirmative, i.e. indeed, endemic corruption in land governance in South Africa has long defeated the aspirations of transitional justice. The discussion unfolds as follows. The article begins with a clear explanation of the problem – that is, of corruption – and why it should be addressed systematically. It contends that the absence of clear policies, strong institutions, transparency, political goodwill and public participation, among other things, are the major causes of thriving corruption in land governance. It further outlines the anti-corruption legal framework, both in South Africa and at the international level. In doing so, it questions the lack of enforcement of these laws. Then, the article briefly discusses the impact of land-related corruption on human rights. Here it is argued that land-related corruption is a classical form of human rights violation and has not received adequate attention in transitional justice scholarship. Next, the article

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5 See for e.g., Pienaar "Aspects of Land Administration in the Context of Good Governance" 2009 12(2) *Potchefstroom Electronic Law Journal* 15–16. See also USAID *Land Tenure and Property Rights* (2013) 16–17 https://www.land-links.org/wp-content/uploads/2016/09/USAID_Land_Tenure_Framework.pdf (accessed 2020-06-26).

6 The Report (2019) is accessible online at https://www.gov.za/sites/default/files/gcis_document/201907/panelreportlandreform_0.pdf (accessed 2019-08-23).

7 See generally Meer *Women, Land and Authority: Perspectives from South Africa* (1997); Walker "Women, Gender Policy and Land Reform in South Africa" 2005 32 *Politikon* 297–315; Walker "Elusive Equality: Women, Property Rights and Land Reform in South Africa" 2009 25 *South African Journal on Human Rights* 467–490.

highlights a number of the impacts and ways in which land-related corruption affects women in South Africa. In conclusion, the article reflects on the implications of its analysis and demonstrates the regressive nature of land-related corruption. The potential for corruption to defeat the aspirations of the country's transitional justice programme by stifling substantive gender equality for women with regard to land rights is also briefly outlined. In the last part, several suggestions are proffered for measures that could help to make the fight against corruption a reality and not just political rhetoric.

2 METHODOLOGICAL APPROACH

By its nature, corruption is a complex and multifaceted phenomenon with several causes and effects. It takes various forms and functions in a wide variety of contexts. For this reason, studies on corruption are often fraught with methodological complexities that require careful analysis. This is because of the contested nature of the evidence that is proffered to back up corruption claims in scholarly material. Given the serious legal implications attached to corruption claims, any evidence provided needs thorough verification and unsubstantiated claims have to be avoided at all costs.

As such, this article involves an in-depth analysis of the relevant readings. This kind of analysis entails an exploratory study based on desktop research that seeks to use already-existing information on alleged instances of corruption generally and in land administration in particular; the methodology is quantitative in approach. This approach provides the most effective way to a better understanding of the impact of land corruption on transitional justice in South Africa. To conceptualise this, the article places women's access to and ownership of land at issue.

In other words, the article does not feature field-based research. It relies significantly on already-documented evidence of corruption incidents in South Africa to establish the emerging trends, scope and impact of land corruption in particular. It is thus an analytic study of discourse that was purely desktop and library-based. The literature review includes both primary and secondary sources that are relevant to the subject matter of the article. The primary sources consulted comprise international and regional legal instruments on corruption, the Constitution, legislation, policy, case law and official documents of the South African government and other international and regional institutions. The secondary sources consulted include textbooks, journal articles, newspaper articles, conference papers and relevant verifiable Internet sources.

3 STATEMENT OF THE PROBLEM

Corruption, it is true, is a complex and multifaceted phenomenon. The specific focus on corruption in this article underscores the desperation and sense of urgency with which the author views its far-reaching impact on South Africa and its potential generally. By its very nature, corruption poses a significant threat to sustainable development, peace and stability in the country. It undermines all the efforts that have been made over the past two

decades to reinforce and embrace the culture of good governance, democracy, transparency and regard for the rule of law.[8]

There exists a broad literature base on the concept of corruption and its construct from various perspectives. However, this does not necessarily cover the land governance aspect. Across the world, corruption is high on the human rights and sustainable development docket. South Africa is no exception. The country is plagued with corrupt activities that permeate all sectors, including land administration. This is evident from the report prepared by the Expert Advisory Panel on Land Reform and Agriculture, which confirms:

> "There is growing evidence of corruption of various kinds in land reform … some of this information is in the public realm. This pattern has been confirmed by Special Investigating Unit (SIU) investigations and proclamations."[9]

This is fundamentally driven by an absence of clear policies, strong institutions, transparency and public participation, and perhaps inadequate resources as well. It goes without saying that improved land governance is key to ensuring the ultimate success of the land reform project. The former Secretary-General of the United Nations (UN), Kofi Annan posits:

> "Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish. This evil phenomenon is found in all countries – big and small, rich and poor – but it is in the developing world that its effects are most destructive."[10]

International institutions are making calls to countries to stop corruption and take rigorous measures to rectify the damage it continues to cause.[11] It is a most difficult exercise to find a common or universally accepted definition of corruption in literature. However, in the context of this article, it suffices to say that corruption is a phenomenon that generally arises where an individual or group of individuals exploit their positions of authority and trust by subverting rules to attract undeserved benefits. The understanding of corruption in various settings will always depend on the extent, degree and form of corruption committed.

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8 See Fombad and Steytler *Corruption and Constitutionalism in Africa* (2020) general introduction.

9 See the *Final Report of the Presidential Advisory Panel on Land Reform and Agriculture* (2019) 12.

10 Annan "Foreword to the United Nations Convention Against Corruption" (2004) https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf (accessed 2020-05-09).

11 See, for instance, the UN General Assembly's Agenda 2030 for sustainable development of 2015, which calls out all states to be decisive on the anti-corruption project and appeals to all public officials to return stolen public resources by 2030.

4 WHY CORRUPTION MATTERS IN LAND ADMINISTRATION?

Corruption matters anywhere. Denying people equitable access to land as a result of corruption constitutes a human rights violation. This follows the sentiment held by an established academic discourse that conceptualises, in correct terms, access to land as a human right in its nature. It is thus almost impossible to talk about corruption in land governance without talking about the damage it causes – that is, as a human right (access to land) violation – and the threat it poses to undermine the aspirations of the transitional justice project. The settled position is that corruption and human rights are intrinsically connected in the real-life experiences of people, especially the poor, in most parts of the world, including South Africa.

Broadly speaking, much as corruption matters in human rights work, it matters equally in land governance because it is a promising entry point to analyse and understand the acts and events that precede the violent act of human rights violations, particularly land dispossessions in South Africa, traceable from the apartheid regime.[12] Alternatively put, corruption is a phenomenon not to be conceived of as an inconsequential anecdote in human rights discourse, analysis or activism. Furthermore, corruption and human rights violations, often termed as implied corporal violence, are the direct manifestations of the same root causes and are both the by-product and actual product of the same conditions. It is for this reason that the two should not be treated separately in policy or analysis in global and national efforts to improve the lives of the poor who suffer the most from systems engulfed by endemic corruption. This means that, for human rights research

[12] In their article titled "The Natives Land Act of 1913 Engineered the Poverty of Black South Africans: A Historico-Ecclesiastical Perspective", Modise and Mtshiselwa provide a short and precise historical account of how black South Africans were dispossessed of their lands. They write: "Prior to the Natives Land Act of 1913 and the dispossession of land owned by black Africans was an era where very few natives experienced poverty. Thus, to strengthen the case that poverty was entrenched by such an Act and that the economic stability of the black South African was grounded in the use of land, we present a historical overview of land possession and usage. Maylam (1986:8) reports that in 1874 it was estimated that about five million acres of land owned by the colonists and companies were occupied by black South Africans. In this instance, they paid rent to the white landlords. It is difficult, though to be convinced that black South Africans generated wealth and/or economic welfare from renting land. Nonetheless, it seems evident that land was accessible to black South Africans, irrespective of land ownership. Furthermore, the mission stations were allocated areas of land, often amounting to between 6 000 and 8 000 acres for each station, for occupation by black South Africans (Maylam 1986:86). In this case, many black Africans did not own land. Instead, it is apparent that they partly benefited from the land allocation. Later in 1880, land purchased by black South Africans was more widely reported. To this end, land ownership and its productive use by black South Africans expanded. In addition, the acres of land owned by black South Africans expanded from 6 000 to 8 000 acres to 238 473 acres of land in Natal by 1905 (Maylam 1989:86). Based on the evidence presented by Maylam, one can be certain that black South Africans owned and utilised land effectively for their welfare as well as for their economic stability prior to the Natives Land Act of 1913. If there had been no evidence of productive use of land by black South Africans as well as of their accumulation of productive land, the view that the Act under discussion engineered poverty would not stand. By productively using the land, the black Africans participated in the economic market of South Africa. Based on this, the discussion now turns to an inquiry into how the Nguni tribes and the Basotho people used their land in South Africa."

and practice, it is pertinent to place corruption at centre stage and reflect on it beyond the orthodox.

It is important to acknowledge that a substantial amount has been written about the anti-corruption project in the context of the broader public sector in South Africa and globally. However, to date, an apparent vacuum is demonstrable from very limited academic work engaging at length with the existence and impact of corruption in land administration, particularly in South Africa, and how this mightily frustrates much-needed transformation through transitional justice. In many instances, this topic features only as an incidental issue, with minimal interest shown in exploring it in greater detail. The most cited piece in this regard, for South Africa, is Pienaar.[13] Although Pienaar's work is a good point of reference in this topic and places good governance fittingly in the broader system of land governance, the author did not exhaust the topic. Commendably, the author appreciates this and states that this "is a topic that should be explored further, with a specific indication of what good governance principles should be applied to the different aspects of land administration in South Africa" and other related aspects.

The same can also be said of the work by Botha,[14] who explores whistle-blowing only as a potential mechanism to curb corruption in the public sector in general. The author does not link this to land administration necessarily and, as such, the piece might be of doubtful relevance to the direction taken by this article.

5 TRANSITIONAL JUSTICE AND ITS ASPIRATIONS

The previous sections have attempted to sketch out some of the issues that stand out most in contemporary South Africa concerning land policy and administration, and the socio-economic impact of policy decisions made by politicians in that regard. The next section entails the discussion of the South African anti-corruption legal framework, including the main institutions mandated to fight corruption in the public sector. It has been reported that contemporary land issues in South Africa have been occasioned by, among others: irregular land ownership patterns (race and gender disparities); inappropriate policies and priorities in resolving the concerns and issues relating to land access; and dishonest and unscrupulous administration characterised by fraud, corruption and the use of land as a political resource.[15] The concerns, if not adequately addressed, can cause further serious human rights abuses with an immense negative and long-lasting impact on the country's development agenda. Thus, the transitional justice project is often undertaken in a context of severely compromised social institutions, the end result being gross human rights violations.[16] In the particular context of this article, the violations upon which the transitional

[13] Pienaar 2009 *Potchefstroom Electronic Law Journal* 15–55.

[14] Botha 2008 *Journal of Contemporary Roman-Dutch Law* 482–495.

[15] The Expert Advisory Panel on Land Reform and Agriculture *Final Report of the Presidential Advisory Panel on Land Reform and Agriculture* https://www.gov.za/sites/default/files/gcis_document/201907/panelreportlandreform_0.pdf (accessed 2019-08-23).

[16] See the UN "Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice" file:///C:/Users/s2000156/Documents/TJ_Guidance_Note_March_2010FINAL.pdf (accessed 2021-01-27).

justice imperative is brought to bear relate to equality rights of women in relation to land access and independent property (land) ownership as enumerated in the Constitution.[17]

Transitional justice is not "soft" justice. It constitutes, instead, an effort to provide the most meaningful justice possible in the political conditions at a particular time and space. The workable definition of "transitional justice", in the context of this article, is the one provided by the International Centre for Transitional Justice (ICTJ). According to the ICTJ, transitional justice refers to

> "the ways countries emerging from periods of conflict and repression [such as Apartheid] address large-scale or systematic human rights violations so numerous and so serious that the normal justice system will not be able to provide an adequate response."[18]

Furthermore, transitional justice is deeply grounded in accountability and redress for those who suffered from past atrocities and systematic repression. It is, by its nature, a corrective programme that recognises the dignity of victims and views them as worthy citizens and human beings deserving justice and protection of the law. The transitional justice programme is also rooted in the sentiment that "[i]gnoring massive abuses is an easy way out but it destroys the values on which any decent society can be built".[19] These corrective mechanisms ask the most critical questions imaginable about the state of law and politics in a particular country. In so doing, they never forget to put victims and their dignity first, and point the way forward for a renewed commitment to ensure that ordinary citizens are safe in their own countries and protected against the unthinkable abuses of their authorities and others.[20]

In most countries where transitional justice is carried out, there is a bitter history of mass atrocities and systematic abuses that have left the societies devastated and hopeless. For instance, in South Africa, the apartheid regime left a legacy that makes the conditions of the country fragile, with political and legal institutions, the judiciary, state security and the prosecution authority being weak, unstable, politicised and under-resourced owing to corruption, patronage and elitism. The gross violations emanating from the bitter past have themselves substantially eroded the confidence that might have existed in the State to guarantee the rights and safety of citizens. Also, communities have often been ripped asunder in the process, with social and political organisations alike being severely weakened. Finding legitimate and reasonable responses to human rights violations under these real constraints of scale and societal fragility is the very essence of transitional justice and sets it apart from human rights promotion and advocacy mechanism in general.

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17 S 9 of the Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law, which includes the full and equal enjoyment of all rights and freedoms. S 25 goes further to guarantee that no one should be deprived of property arbitrarily.

18 See ICTJ "What is Transitional Justice" https://www.ictj.org/about/transitional-justice (accessed 2020-06-28).

19 *Ibid*.

20 *Ibid*.

Insofar as the objective(s) of the transitional justice programme is concerned, it will always vary from one country to the other, depending on the context and reasons necessitating its invocation. For instance, in South Africa, the transitional justice programme is aimed at addressing the inequalities and systemic repressive legacies of the apartheid regime. Besides the objectives being largely dependent on the context, there are certain defining variables that are constant in most transitional justice programmes. These include, among others, the recognition of the dignity of individuals, the redress and acknowledgment of violations, restitution and compensation for any deprivation or dispossession and an undertaking to prevent them from recurring. Furthermore, it is often aimed at establishing strong and accountable state institutions and restoring confidence in them; ensuring respect for the rule of law; integrating women and marginalised groups in pursuit of a just society; devising strategies to address the underlying causes of ensuing conflicts and marginalisation and, most importantly, making access to justice a reality for the most vulnerable segments of the constituency.[21]

The ICTJ highlights that transitional justice may occur according to four traditional approaches.[22] The first is by *criminal prosecutions* for at least those most responsible for the serious crimes of the past. Secondly, transitional justice may be pursued by "*truth-seeking*" or a fact-finding process into mass human rights violations by non-state bodies. The perfect example of this, in the context of South Africa, is the Truth and Reconciliation Commission (TRC), which invited witnesses identified as victims of gross human rights violations under the apartheid government to testify about their experiences. The third approach involves *reparations*, whereby those (individual, collective, material or symbolic) who are identified as victims of human rights violations are compensated for their suffering and harm. The last approach is the *reform* of laws and state institutions responsible for law enforcement, including the police, judiciary, military, and intelligence. This approach is the most prevalent in South Africa. This is evident from the fact that South Africa has a relatively strong anti-corruption legal framework (albeit ill-enforced), an aspect to which attention returns. However, it is contended that a lack of political goodwill poses the most challenging hurdle for South Africa to achieve reform through one of these four transitional justice approaches. This is well evidenced, for instance, by the apparent reluctance or lethargy of the political structures (in particular, Parliament) to finalise the Expropriation Bill, which would to a certain extent support the pursuit of justice for the dispossessed (blacks) and marginalised (women).

21 *Ibid*.
22 *Ibid*.

6 ANTI-CORRUPTION LEGISLATIVE FRAMEWORK IN SOUTH AFRICA: A GENERAL OVERVIEW

6 1 Constitutional framework

The Constitution of the Republic of South Africa, 1996 serves as an important guidepost in all legal matters in the country. This includes corruption and the measures created to counter and deal with it. Although there is no express mention of the word "corruption" in the Constitution, several constitutional provisions have both direct and indirect bearing on corruption. This is seen from the fact that the Constitution establishes a number of institutions aimed at ensuring transparency and accountability for government officials. These include Chapter 9 independent institutions charged with a mandate of protecting constitutional democracy and advancing its enshrined values. The Constitution also contains several provisions on anti-corruption that span different government units, such as administration, social security, public service, security services and finance.

Constitutional provisions that are closely related to combatting corruption include section 32, which guarantees everyone the right of access to information; section 33, which provides for the right to administrative action that is lawful, reasonable and procedurally fair and the right to be given written reasons for a decision taken; and section 182(1)(*a*), which empowers the Public Protector to investigate any conduct in state affairs or in the public administration of any sphere of government that is alleged or suspected to be improper or that can potentially result in prejudice.

Furthermore, section 188 also mandates the Auditor-General to ensure accountability by conducting routine auditing and reporting on the status of accounts, financial statements and financial management of all state departments and administrations, municipalities and any other institutions or entities funded from the National Revenue Fund or a Provincial Revenue Fund. Also relevant is section 195, which outlines the fundamental values and principles guiding public administration. Lastly, section 215 requires national, provincial and municipal budgets and budgetary processes to abide by the transparency, accountability and effective financial management requirements imposed by the Constitution, and section 217 lays the constitutional basis for public sector procurement in the country.

6 2 Legislative framework

Corruption is dealt with, directly or indirectly, in several statutes in South Africa. The primary anti-corruption statute in South Africa is the Prevention and Combating of Corrupt Activities Act[23] (PCCA). Commendably, the PCCA is a very comprehensive piece of legislation. In its preamble, it recognises that corrupt activities bear the potential to negatively affect constitutionally protected rights, sustainable development and the rule of law. It also recognises that corrupt activities have a notable negative bearing on democratic institutions, national economies and ethical values. The purpose

[23] 12 of 2004.

of the PCCA is to criminalise general corruption and various related activities. It places a positive duty on certain persons assuming positions of authority to investigate and report on any corrupt activities.

The PCCA also creates the general offence of corruption and related offences in respect of corrupt activities relating to public officers, members of the legislative authority, judicial officers and members of the prosecuting authority.[24] Section 10 criminalises certain activities such as receiving or offering unauthorised gratification by or to a party to an employment relationship. Sections 11, 12, 13, 14 and 15 provide a list of offences in respect of corrupt activities relating to witnesses and evidential material during certain proceedings, offences in respect of corrupt activities relating to the contract, procuring and withdrawal of tenders, auctions and offences in respect of corrupt activities relating sporting events.

The PCCA provides for the establishment and endorsement of a register to place certain restrictions on those persons and enterprises convicted of corrupt activities relating to tenders and contracts. In that regard, section 28(1)(*a*) and (*b*) provides that where a person or enterprise has been found guilty and sentenced with regard to an offence of corrupt activities relating to contracts or tenders, that person or enterprise's name, conviction, sentence and the order made by the court will be endorsed in the register. Any other business or enterprise belonging to a person who has been convicted of corrupt activities, and that was involved in the commission of a crime, may also be entered into the register. Under section 32, this register becomes a public record.[25]

Another relevant anti-corruption statute in South Africa is the Prevention of Organised Crime Act.[26] It provides for measures to combat organised crime, money laundering and criminal gang activities. Furthermore, the Act also prohibits certain activities that are linked to racketeering and provides for the prohibition of money laundering. An important aspect of the Act is that it creates an obligation to report certain information. In that regard, sections 2 to 6 provide for offences related to racketeering activities, money laundering, assisting a person to benefit from proceedings of unlawful activities and acquiring or using proceeds of unlawful activities.

Also relevant is the Protected Disclosures Act (PDA),[27] which makes provision for the procedure in terms of which employees and workers, in the private and public sector may disclose information relating to unlawful or irregular conduct by their employers or employees. It also protects employees or workers who make such disclosure. The objects of the PDA, in terms of section 2, are to protect employees/workers from occupational detriment on account of making a protected disclosure, to provide remedies if the employee/worker has suffered an occupational detriment, and to provide procedures in terms of which the disclosure is made.

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24 S 3–9 of PCCA.

25 See further discussion on this in Mathiba "Corruption, Public Sector Procurement and COVID-19 in South Africa: Negotiating the New Normal" 2020 55(4) *Journal of Public Administration* 651-652.

26 121 of 1998.

27 26 of 2000.

The Public Finance Management Act (PFMA)[28] is another relevant statute. It was adopted to modernise financial management by ensuring transparency, accountability and the sound management of revenue, expenditure, assets and liabilities of provincial and national government. It sets out procedures for efficient and effective management of all revenue, expenditure, assets and liabilities. It also provides for certain responsibilities of persons entrusted with financial management in government.[29]

The Municipal Finance Management Act (MFMA)[30] provides for the sustainable management of the financial affairs of municipalities and other institutions in the local sphere of government. The object of the Act is, *inter alia*, to ensure transparency, accountability, and appropriate responsibility in the financial affairs of municipalities and municipal entities. Accordingly, it provides the legal framework for the implementation of an integrated supply chain management process in local government.

Other relevant statutes include the Companies Act,[31] the regulations of which create a duty to combat corruption, and which addresses certain issues relating to whistleblowers, and the Public Services Act,[32] which provides for the organisation and administration of the public service. It also regulates conditions of employment and discipline within the public service. It should be noted that section 41(1)(*b*)(v) of the Act empowers the Minister to make regulations providing for a code of conduct in terms of which public servants must act in the best interests of the public, act honestly in dealing with public money and report fraud and corruption. The Code of Conduct for the Public Service prohibits employees from undertaking outside remunerative work without prior approval.[33] A contravention of the Code amounts to misconduct. Another relevant statute is the Executive Members' Ethics Act (EMEA),[34] which provides for the publishing of a code of ethics (after consultation with Parliament and by proclamation in the *Government Gazette*) governing the conduct of members of the Cabinet, Deputy Ministers and members of the provincial Executive Council.

In analysing South Africa's anti-corruption legislation, mention ought to be made of the Promotion of Access to Information Act (PAIA),[35] which gives effect to the constitutional right of access to any information held by the State or by any other person. This Act is intended to foster a culture of transparency and accountability in public and private bodies. Similarly, the Promotion of Administrative Justice Act (PAJA)[36] aims to give effect to the constitutional right to procedurally fair, lawful and reasonable administrative action.

Finally, mention also ought to be made of subsidiary legislation, such as the PFMA Regulations (which provide for a practical framework within which

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28 1 of 1999.
29 S 38 of the PFMA.
30 56 of 2003.
31 71 of 2008.
32 103 of 1994.
33 The Code of Conduct is gazetted in: GN R 1091 *GG 18065* of 10 June 1997.
34 82 of 1998.
35 2 of 2000.
36 3 of 2000.

supply chain management practices are to take place), the MFMA: Municipal Supply Chain Management Regulations (which regulate the procedure for competitive bidding procurement) and the Preferential Procurement Policy Framework Act (PPPFA) Regulations (which provide for an operational framework for the preference point system envisaged in the PPPFA).

In sum, it is observable from the above discussion that the South African anti-corruption legal framework is a progressive one in many ways. However, despite having these progressive laws in place, corruption continues to thrive across the country. Little if any evidence exists to suggest that these anti-corruption measures are making headway in bringing corruption under control. Hence, the immediate question of practical relevance is why enforcement of these progressive laws fails? It is argued that this failure is attributable, in the main, to the endemic corruption that damages the institutional capacity and credibility of relevant state agencies adequately to dispense their mandate of ensuring compliance with these anti-corruption measures. It is for this reason, among others, that this article problematises land corruption as the most imminent threat to the transitional justice projects in South Africa.

7 INTERNATIONAL INSTRUMENTS AGAINST CORRUPTION

The primary international anti-corruption legal instrument is the United Nations Convention against Corruption (UNCAC).[37] The focus of this instrument is on the prevention, criminalisation, international cooperation, asset recovery and implementation of anti-corruption mechanisms. South Africa is a signatory to this convention, having ratified it on 22 November 2004. The other important international legal instrument is the United Nations Convention Against Transnational Organised Crime (UNCTOC),[38] which focuses mainly on the fight against organised crime, but includes several provisions relating to corruption. South Africa ratified the convention on 20 February 2004.

In the specific African context, the African Union Convention on Preventing and Combating Corruption (CPCC)[39] is the continent's guidepost in the fight against corruption. Its main emphasis is on the need for member states to develop mechanisms for preventing, eradicating, and punishing acts of corruption. Although its content is comprehensive, the CPCC has over the years had a negligible impact on the laws and practice of its signatories. Article 7 of the Convention is dedicated to the fight against corruption and related offences in the public service and article 8(1) obliges state parties to create, within their domestic legal systems, an offence of illicit enrichment. South Africa ratified the CPCC on 11 November 2005.

Another international instrument that has a bearing on public corruption in Africa is the OECD Convention on Combating Bribery of Foreign Officials in

[37] Adopted by the UN General Assembly on 31 October 2003, by Resolution 58/4.
[38] Adopted by the UN General Assembly on 15 November 2000, by Resolution 55/25.
[39] Adopted by the 2nd Ordinary Session of Assembly of the Union, Maputo on 11 July 2003.

International Business Transactions.[40] Its main purpose is to provide a framework for criminalising corruption in international business transactions. South Africa has long been a ratified party to this convention. There is also the 2011 UNCITRAL Model Law on Public Procurement,[41] which contains international best practices on public procurement procedures and principles in a national setting. It also seeks to harmonise public procurement processes across nations. As far as South Africa is concerned, the Southern African Development Community Protocol against Corruption[42] is also important.

8 THE GENERAL IMPACT OF CORRUPTION ON HUMAN RIGHTS IN SOUTH AFRICA

Wherever it occurs, corruption has the effect of channeling public funds and resources from their lawful and intended purposes into the pockets of unscrupulous public officials. As such, corruption has a devastating impact on the human rights of the majority of the population where, as in South Africa, that majority consists of poor people. The South African Constitution, particularly its Bill of Rights, is hailed as one of the most progressive in the world, mainly because it provides for all categories of human rights including socio-economic rights. By their nature, socio-economic rights have important social and economic dimensions, as they reflect specific areas of basic needs or delivery of particular goods and services. The delivery of such goods and services requires substantial budgets that are often allocated by the government. However, corruption has the effect of putting pressure on such budgets thereby undermining the quality of goods and services delivered and violating the socio-economic rights of the people. It is therefore submitted that the abuse of public funds meant for the provision of socio-economic goods constitutes a violation of socio-economic rights.

It is important to note that it is not only socio-economic rights that are negatively affected by corruption. Indeed, corruption affects all human rights, including civil and political rights. It is for this reason that the Constitutional Court held in *South African Association of Personal Injury Lawyers v Health* that

> "corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms."[43]

The Constitutional Court has since made several other pronouncements on the effect of corruption on human rights including in the case of *Hugh Glenister v President of the Republic of South Africa*, where it stated:

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40 Adopted by the OECD Negotiating Conference on 21 November 1997.

41 Adopted by the UN General Assembly Resolution 66/95 of 9 December 2011.

42 Adopted by the Southern African Development Community (SADC) on 14 August 2001.

43 [2000] ZACC 22 par 4.

> "Endemic corruption threatens the injunction that government must be accountable, responsive and open …. It is incontestable that corruption undermines the rights in the Bill of Rights, and imperils democracy."[44]

As already indicated above, South Africa is a democratic state. However, it must be pointed out that corruption has been identified as one of the greatest threats to this democracy. Reflecting on alliances that have emerged in post-apartheid South Africa, one commentator has warned against "corruptive collusions that ... run the risk of creating a parallel system of power that turns our democracy into an empty shell".[45] A similar argument is made by Soma Pillay who contends that "corruption is likely to appear on every observer's list of factors that threaten to obstruct South Africa's path towards sustainable development".[46] It may well be argued that by impacting democracy and sustainable development in South Africa, corruption also impacts human rights.

9 LAND GOVERNANCE, LAND-RELATED CORRUPTION AND THE IMPACT ON WOMEN IN SOUTH AFRICA

Generally, more men than women own land in South Africa. This gender gap in land beneficiation can be explained by many factors, and corruption is a key one. The gender disparity problem in relation to land ownership exists despite the Constitution's recognition of women as citizens who are equal to their male counterparts,[47] and the fact that there are several pieces of legislation put in place to achieve equitable access to land through land reform projects and to eliminate the legal barriers towards the realisation of women's land rights. While South Africa's land reform project makes an explicit commitment to targeting women as beneficiaries,[48] several analysts have argued that this objective has not been realised.[49] The magnitude of the negative impact this bears on women cannot be quantified easily. In the absence of appropriate and gender-disaggregated data, the ability to assess the impact of land reform and related policies on women and gender inequalities is limited, as is the ability to design a more effective policy to

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44 [2011] ZACC 6 par 176 and 177.

45 Bruce "Control, Discipline and Punish? Addressing Corruption in South Africa" 2014 *SA Crime Quarterly* 49–62 58.

46 Pillay "Corruption – The Challenge to Good Governance: A South African Perspective" 2004 17(7) *The International Journal of Public Sector Management* 586–605.

47 S 9 of the Constitution.

48 Walker 2005 *Politikon* 297–315.

49 See Chenwi and McLean '"A Woman's Home is Her Castle?' Poor Women and Housing Inadequacy in South Africa" 2009 25 *South African Journal of Human Rights* 517; Classens and Mnisi "Rural Women Redefining Land Rights in the Context of Living Customary Law" 2009 25 *South African Journal of Human Rights* 491; Walker 2005 *Politikon* 297; Hassim "Voices, Hierarchies and Spaces: Reconfiguring the Women's Movement in Democratic South Africa" 2005 32 *Politikon* 175; Claassens and Ngubane "Women, Land and Power: The Impact of the Communal Land Rights Act" in Claassens and Cousins (eds) *Land, Power and Custom; Controversies Generated by South Africa's Communal Land Rights Act* (2008); Hargreaves and Meer "Out of the Margins and Into the Centre: Gender and Institutional Change" in Cousins (ed) *At the Crossroads: Land and Agrarian Reform in South Africa Into the 21st Century* (2000).

address the problem. We turn to deal with the constitutional underpinnings that speak to the critical question of women and land.

9 1 Women and land ownership: the constitutional context

In post-apartheid South Africa, the constitutional foundations guiding the land reform programme are found in section 25 of the Constitution, often called the "property clause".[50] The property clause is a product of a highly fraught series of negotiations between the apartheid government and the African National Congress.[51] Despite being fraught, these negotiations paved a way for the Interim Constitution of 1993, under which the first democratic elections of 1994 were held. Building upon the resolutions of the 1993 negotiations, the final Constitution of 1996 represents a substantial compromise and a balancing exercise between, on the one hand, respect for the established property rights of the white minority and, on the other, recognition of the restitutional and redistributive claims over land on the side of the black majority. Hence, alongside the entrenchment of the general right of people not to be deprived of property arbitrarily, but only "in terms of a law of general application",[52] section 25(4) of the Constitution goes on to affirm the public interest in a land reform programme as being designed specifically to bring about equitable access to all South Africa's natural resources.

In section 25(5), the State is required to take "reasonable … measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis". It is clear from the wording of section 25(5) that the State does not have a discretion on whether or not to embark on such a programme. This is seen from the use of the word "must", which implies a peremptory provision. However, in striving towards realising equitable distribution of land, the State is guided by two main considerations, namely *reasonableness* and *availability of resources*. In section 25(6), the State is once again required to pass sector-specific legislation to govern issues in relation to tenure (in)security spanning the past racially discriminatory laws and practices of the apartheid regime. In addition, there is section 25(7), wherein a provision is made for a land restitution programme aimed at addressing the land claims of those who suffered land dispossessions after 19 June 1913 as a result of past racially discriminatory laws and practices.

The most critical observation to make about section 25(5) is that it expressly acknowledges "equitable access" as a general principle applicable to the benefit of all citizens. This provision alone, therefore, confirms the unqualified right of all women not to be deprived of their rights in the land on account not only of their gender but, it is argued, on account of endemic land corruption as well. Thus, the State must act decisively to combat corruption that threatens women's right to land. It has a constitutionally imposed duty to

50 In particular, subsections 4–9.

51 See Walker 2009 *South African Journal of Human Rights* 481.

52 S 25(1) of the Constitution.

respect, protect, promote and fulfil the rights contained in the Bill of Rights. In this regard, Walker argues that

> "the elimination of gender-based discrimination is not usually seen as the main concern of the property clause … direct attention [is] specifically to remedying past racial discrimination, while the focus of the post-1994 land reform programme … has certainly been on addressing the massively skewed land inequalities and injustices that are the result of South Africa's history of race-based oppression".[53]

While this might be true – that land reform was "certainly" meant to address racial inequality – the author warns against a minimalistic approach towards gender aspects in the property clause. It is argued that gender-based discrimination is of equal concern and should not be seen as less deserving of being relevant to a land reform programme.

Alternatively put, the broader objective of land reform, it is argued, is not only to address racial inequality, but gender inequality as well. This means that any efforts intended to rectify the effects and patterns of the past racial discrimination in respect of black men, should apply equally to black women. The lack of focus on the issue of gender imbalance in land ownership is attributable, perhaps, to the specification and express mention of "race" by the Constitution, while it omits an express reference to "gender". This can also be explained by a deeply entrenched masculinity in the political norm in South Africa, which treats the subject of racial redress as being male-centered unless otherwise specified. Therefore, confronting gendered inequalities in land rights in South Africa means confronting first the construct and interpretation of the constitutional basis for land reform.

Also relevant is section 9, which guarantees equality and, by my interpretation, recognises women as fully autonomous beings not to be discriminated against based on their gender. The section states that "[e]veryone is equal before the law and has the right to equal protection and benefit of the law" while subsection 9(3) rules out unfair discrimination on the grounds not only of "race" but also of "gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth".[54] However, the right to equality, including for women, has always been countered with cultural rights in sections 30 and 31 of the Constitution respectively, some of which encompass patriarchal practices to the detriment of women.[55]

In balancing these seemingly conflicting rights through interpretation, the courts have to be cautious in ensuring that their interpretation points to these cultural rights not being exercised "in a manner inconsistent with any provision of the Bill of Rights". In other words, cultural rights, especially those entrenching patriarchal values, should not be exercised in a manner that infringe on the rights of everyone, including women, to equality. The Constitutional Court has rich jurisprudence on this aspect and has been very

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53 See Walker 2009 *South African Journal of Human Rights* 482.

54 S 9(1) of the Constitution.

55 For example, in some communities, traditional leaders still prohibit women from having titles to land or assuming positions of leadership. See, for instance, the case of *Shilubana v Nwamitwa* 2008 (9) BCLR 914 (CC).

consistent,[56] despite facing loud criticism from the traditionalists and proponents of patriarchy.

9 2 The impact of land corruption on women in South Africa

In South Africa, especially in the rural areas, the rights to have control over and use land are pertinent to the lives of rural women, whose lives and livelihoods are largely dependent on land and its natural resources.[57] The marginalisation of women and girls in relation to land ownership, access and land rights not only undermines the transformative aspirations of the Constitution, but also threatens their living conditions, their economic empowerment and potential, their physical well-being and their struggle for equality within a deeply patriarchal society.

The other impact of land corruption on women is that it affects their economic potential negatively. The 2019 Report of the Presidential Advisory Panel on Land Reform highlights that "women in South Africa's rural societies are responsible for the majority of the agricultural food production and household labour".[58] However, despite their significant contribution towards food production, women continue to suffer the scourge of gender discrimination. The patriarchal nature of South African society, especially in the rural areas, is such that women are unapologetically precluded from owning land and from putting it up as collateral to secure funding for expanding their farming operations or for debt management. The report of the panel observes that

> "women are often overlooked [and undermined] when it comes to issues regarding land ownership although they are the ones that work it. Rules of access and inheritance in rural societies favour men over women and women with children over those without."[59]

This treatment (being considered useless or less important) also has negative emotional and psychological effects on women.

10 CONCLUSION

The current substantive realities around the land question and corruption in South Africa betray the underlying principles of justice and fairness, the guarantee of fundamental freedoms envisaged by the Constitution, and the enacted anti-corruption and land-related laws. Practically, decisive measures need to be taken to align these realities with the notions of justice. This article has attempted to contextualise this need in South Africa. The article has provided some insights into the emerging trends in land corruption. The

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[56] See, among others, *Bhe v Khayelitsha Magistrate* 2005 (1) BCLR 1 (CC); *Shilubana v Nwamitwa supra* and *Gumede (born Shange) v President of the Republic of South Africa* 2009 (3) BCLR 243 (CC).

[57] See the Expert Advisory Panel on Land Reform and Agriculture *Final Report of the Presidential Advisory Panel on Land Reform and Agriculture* 36.

[58] *Ibid*.

[59] *Ibid*.

article makes four key conclusions from the analysis of surveyed material. First, it is important to note that while land corruption is a relatively new phenomenon in South Africa's academic discourse, its gendered impact is immense and should never be underestimated. More policy strides are still needed to ensure gender equality in access to land. Secondly, it is observable from evidence in this article that political power is at the heart of any analysis of land-related corruption. In other words, corruption in South Africa is largely a function and abuse of political power as it occurs mainly in the public sector and through political offices. Thirdly, and related to this, is the apparent lack of political will to take a decisive stance against corruption by enforcing the comprehensive anti-corruption legal framework outlined above. The success and sustainability of good governance measures for land administration require the commitment of the government to act genuinely in bringing about tangible reforms rather than just having a "talk shop". One way of achieving good governance in land administration is to forge strong and credible state institutions to ensure the enforcement of and compliance with these measures but this has yet to be seen. Lastly, the article has briefly highlighted how land-related corruption erodes livelihoods and thus impacts negatively on marginalised groups – women in particular. While those in powerful positions accumulate wealth, it is the poor who suffer the brunt of corruption.

To this end, until all the necessary corrective measures are taken by the government to deal with corruption in the land sector, good governance in land administration will remain hypothetical. However, with a culture of good governance in land administration, more equitable access to land, the rule of law as well as the protection of citizens' rights (especially those of vulnerable social groups such as women and widows) can be realised, thus fulfilling the transitional justice aspiration. The corrective measures to achieve this include the creation and strengthening of mechanisms to monitor the implementation and effectiveness of anti-corruption and good governance measures in the land sector, and being prepared to take corrective steps where there are failures, or evidence of failures. As mentioned earlier, South Africa is renowned for its robust and comprehensive anti-corruption legal framework. However, this legal framework often fails owing to government actions of reluctance and lethargy towards its enforcement. Another factor accounting for this failure is the weak resilience of anti-corruption institutions and agencies, which are often alleged to succumb to political influences.

PROTECTING THE VULNERABLE IN SOUTH AFRICA: PROHIBITION OF CORPORAL PUNISHMENT IN THE PRIVATE SPHERE

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SUMMARY

On 18 September 2019, the Constitutional Court confirmed that the common-law defence of "reasonable and moderate chastisement" is unconstitutional as it unjustifiably violates sections 10 and 12(1)(*c*) of the Constitution of the Republic of South Africa, 1996. As a result, parents are no longer permitted to punish their child at home by way of inflicting physical punishment behind a facade of discipline. Despite the aforesaid, it should be noted that corporal punishment in the private sphere is not explicitly prohibited by South African legislation. In addition, South Africa's legislative system lacks an appropriate regulatory framework to administer the anticipated proliferation of assault cases against parents. It is against this backdrop that this article first analyses the current legislative framework regulating the protection of children from physical punishment, and then follows with a succinct overview of the Constitutional Court ruling. The article assesses whether the mere repeal of the common-law defence of "reasonable and moderate" chastisement will be sufficient to eradicate corporal punishment in the private sphere, and if not, whether legislative prohibition and/or other interceding strategies will be required to give effect to the objective of the Constitutional Court ruling. In this regard, by way of comparative research, the legislative framework adopted by Sweden, being the first country in the world to prohibit all forms of corporate punishment of children is evaluated. Lastly, recommendations are made for the incorporation of practical steps, including possible legislative measures, to establish a regulatory framework from a children's rights perspective to prohibit corporal punishment in the private sphere. Accordingly, for purposes of analysis and consideration, a qualitative approach is applied for purposes of the research. Primary sources such as the Constitution, case law, legislation, governmental documents, statistical data and research reports are consulted in conjunction with journal articles and textbooks.

1 INTRODUCTION

The Biblical quote "spare the rod and spoil the child"[1] and an instilled tradition of physical reprimand have often been used to rationalise the

[1] *Holy Bible New King James Version* (1982) Proverbs 13:24.

practice of corporal punishment as far as child chastisement is concerned.[2] Although corporal punishment in the public sphere was banned in 1996 with the promulgation of the South African Schools Act,[3] corporal punishment in the private sphere was, until recently, still an acceptable practice. In this regard, the common law permitted a parent to inflict "moderate and reasonable chastisement on a child for misconduct provided the chastisement was not done in a manner offensive to good morals or for objects other than correction and admonition".[4]

On 18 September 2019, in the case of *Freedom of Religion South Africa v Minister of Justice and Constitutional Development*,[5] the Constitutional Court confirmed that the common-law defence of "reasonable and moderate chastisement" is unconstitutional as it unjustifiably violates sections 10 and 12(1)(*c*) of the Constitution of the Republic of South Africa, 1996 (the Constitution). Effectively, the judgment repealed the common-law defence of "reasonable and moderate chastisement", thereby removing a parent's defence to inflict physical punishment on their child behind a facade of discipline.

Consequently, it can be argued that this ruling is the impetus that the South African government needs to comply with its international and national undertakings, as well as to give effect to the protection afforded to children in terms of the Constitution and the Children's Act.

2 ACKNOWLEDGING THE NEED TO PROTECT CHILDREN: INTERNATIONAL AND REGIONAL INSTRUMENTS

2 1 International instruments

"*Mankind owes to the child the best it has to give*."[6]

The Geneva Declaration of the Rights of the Child, 1924[7] was the initial instrument on the subject; it identified five principles[8] that acknowledged

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2 World Health Organisation "Violence Prevention: The Evidence" www.who.int./violenceprevention (accessed 2020-02-24).

3 S 10 of the South African Schools Act 84 of 1996 states: "(1) No person may administer corporal punishment at a school to a learner. (2) Any person who contravenes subsection (1) is guilty of an offence and liable on conviction to a sentence which could be imposed for assault."

4 *R v Janke and Janke* 1913 TPD 382.

5 [2019] ZACC 34; confirming *YG v The State* [2017] ZAGPJHC 290.

6 Preamble to the *Geneva Declaration of the Rights of Children* http://www.un-documents.net/gdrc1924.htm (accessed 2020-02-25).

7 League of Nations *Geneva Declaration of the Rights of the Child* http://www.un-documents.net/gdrc1924.htm. Commonly referred to as the Declaration of Geneva, it was adopted by the Save the Children Union in Geneva, Switzerland on February 23, 1923.

8 The *Geneva Declaration of the Rights of the Child* recognised the following child rights: "1. The child must be given the means requisite for its normal development, both materially and spiritually. 2. The child that is hungry must be fed, the child that is sick must be nursed, the child that is backward must be helped, the delinquent child must be reclaimed, and the orphan and the waif must be sheltered and succored. 3. The child must be the first to receive relief in times of distress. 4. The child must be put in a position to earn a livelihood

parental responsibilities and child-specific rights. With the adoption of the Declaration of the Rights of the Child in 1959, the United Nations General Assembly,[9] extended the principles to ten principles, which represented the first internationally codified set of children's rights. One most profound addition to the principles of the 1924 Declaration was the acknowledgement of child autonomy.[10] However, the recognition that children are bearers of rights separate from their parents also required that they be given special care and protection as a result of their "physical and mental immaturity".[11] Although the 1924 and 1959 Declarations were not legally binding, they formed the foundation on which the Convention on the Rights of the Child, 1989 (CRC) was built.

The CRC denotes the most widely ratified human rights treaty in the world and the first legally binding international instrument that comprehensively addresses children's rights.[12] In terms of the CRC, every person under the age of 18[13] has the right to be protected from all forms of violence, abuse, neglect and bad treatment by their parents or anyone else who looks after them.[14] In protecting and enforcing children's rights, the CRC mandates that all signatory states promulgate legislation safeguarding children's rights by passing laws that promote such rights.[15] The CRC moreover not only reinforces the best-interests-of-the-child principle but also expands its ambit to include "all decisions and actions that affect children".[16] Although the CRC explicitly provides for the protection of children from all forms of violence, it is noteworthy that the CRC does not specifically make reference to corporal punishment.

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and must be protected against every form of exploitation. 5. The child must be brought up in the consciousness that its talents must be devoted to the service of its fellow men." The Declaration of the Rights of the Child http://www.un-documents.net/gdrc1924.htm.

9 United Nations General Assembly *Declaration of the Rights of the Child* A/RES/1386(XIV) (1959) Adopted: 20/11/1959 http://cpd.org.rs/wp-content/uploads/2017/11/1959-Declaration-of-the-Rights-of-the-Child.pdf.

10 Principle 2 of the UN *Declaration of the Rights of the Child* states: "The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration." For a list of the ten principles on which the World Welfare Charter was based after being endorsed by the United Nations in 1959 generally, see the *Declaration of the Rights of the Child* http://cpd.org.rs/wp-content/uploads/2017/11/1959-Declaration-of-the-Rights-of-the-Child.pdf (accessed 2020-02-25).

11 "*Whereas* the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth" (UN *Declaration of the Rights of the Child* A/RES/1386(XIV) (1959) Adopted: 20/11/1959 http://cpd.org.rs/wp-content/uploads/2017/11/1959-Declaration-of-the-Rights-of-the-Child.pdf (accessed 2020-02-25)).

12 Freeman "The Value and Values of Children's Rights" in Invernizzi and Williams (eds) *The Human Rights of Children: From Visions to Implementation* (2011) 251 284.

13 Article 1 of the CRC.

14 Article 19 of the CRC.

15 Article 4 of the CRC.

16 Article 3 of the CRC. Article 3(1) of the CRC states: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

2 2 Regional instruments

The CRC provided the foundation for the African Charter on the Rights and the Welfare of the Child (ACRWC)[17] and is accordingly designed in line with the principles of the CRC. The ACRWC, however, also incorporates the unique situation of most African children – *inter alia*, their socio-economic, cultural and traditional circumstances.[18] Fundamental to the ACRWC is the fact that, as in the case of the CRC, the best interests of the child must always be applied in "all actions" concerning children[19] and that member states are obliged to recognise children's rights and adopt laws to protect those rights.[20] In this regard, article 16 of the ACRWC specifically prohibits all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment of a child. As in the case of the CRC, the ACRWC likewise does not make specific reference to corporal punishment.

3 DEFINING CORPORAL PUNISHMENT

Notwithstanding that neither the CRC nor the ACRWC defines corporal punishment, the United Nations Committee on the Rights of the Child[21] noted that physical punishment of children is contrary to the ethos of the aforementioned conventions and accordingly, that by interpretation, corporal punishment is overtly prohibited by the CRC and the ACRWC.[22] This interpretation is shared by the Human Rights Council, which views corporal punishment as a fundamental violation of a child's right to human dignity and physical integrity as well as a child's right to equal protection under the law.[23]

Corporal punishment is therefore defined by the Committee on the Rights of the Child as "any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light".[24] It therefore includes "physical force such as hitting, kicking, shaking, scratching, pinching, biting or forcing a person to stay in uncomfortable positions, locking or tying them or burning and scalding" them.[25] In addition to physical

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

18 Preamble to the ACRWC.

19 Article 4(1) of the ACRWC states: "In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration."

20 Article 1 of the ACRWC.

21 UN Committee on the Rights of the Child https://www.unicef.org/southafrica/protection_10381.html (accessed 2020-01-16).

22 UN Committee on the Rights of the Child *General Comment No. 8 (2006): The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment (art 19 and 28, par 2 and 37)* CRC/C/GC/8 (2007) https://www.refworld.org/docid/460bc7772.html (accessed 2020-01-20) par 20.

23 UN Committee on the Rights of the Child *General Comment No. 8 (2006)* par 11 and 16. See Global Initiative to End All Corporal Punishment of Children "South Africa: Briefing for the Human Rights Council Universal Periodic Review – 13th session, 2012" https://lib.ohchr.org/HRBodies/UPR/Documents/session13/ZA/GIEACPC_UPR_ZAF_S13_2012_GlobalInitiativetoEndAllCorporalPunishmentofChildren_E.pdf (accessed 2020-01-20).

24 UN Committee on the Rights of the Child *General Comment No. 8 (2006)* par 11.

25 *Ibid.*

forms of corporal punishment, the Committee also included non-physical forms of corporal punishment such as "punishment which belittles, humiliates, denigrates, scapegoats, threatens, scares or ridicules the child".[26] Consequently, in view of the aforementioned and as in the case of all state parties to the CRC, the government of South Africa is obliged to safeguard children from physical and non-physical forms of punishment that may violate a child's right to dignity and physical integrity.

4 CORPORAL PUNISHMENT WITHIN THE SOUTH AFRICAN CONTEXT

Corporal punishment is endemic, and is not unique or limited to a specific populace. Accordingly, as in the case of many other countries, the practice of disciplining a child by way of corporal punishment is deeply entrenched in the history of South African communities. The influence of colonisation, South Africa's diverse cultures (each with its own set of norms and beliefs), and the inadequate socio-economic circumstances that the majority of South African's face do, however, create a breeding ground for the perpetuation of corporal punishment in the private sphere.

One of the dogmas South Africa adopted during British rule was the English defence of "reasonable chastisement"; parents using corporal punishment used the defence against a charge of assault and other crimes. The adoption of the authoritarian system of discipline under colonial rule[27] was based on the notion that a child can only be effectively disciplined by instilling a fear of disobedience.[28] This belief was furthermore supported by certain religious organisations that perpetuated the use of corporal punishment by adopting and imbedding the philosophy of corporal punishment in their teachings and religious ideology.[29]

Even after independence in 1910, apartheid laws endorsed the use of corporal punishment when the South African criminal justice system adopted corporal punishment as a form of sanction. This conception paved a way in which the patriarchal, racial and authoritarian apartheid system rooted itself in terms of societal beliefs, acceptance and norms.[30] The controlling dogmas of corporal punishment therefore became a socially acceptable method to educate unruly children – correcting a child's transgression by either physical punishment or by way of fear.[31]

In addition to historical factors endorsing the use of corporal punishment, one cannot ignore the influence that cultural beliefs, traditions and religious dogmas have had on the manner in which diverse cultures view corporal

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26 *Ibid*.

27 Pete "A Practice that Smacks of Abuse" 1999 *Children First* 3–6.

28 *Ibid*.

29 Porteus, Vally and Ruth *Alternatives to Corporal Punishment: Growing Discipline and Respect in Our Classrooms* (2001) 34–49.

30 *Ibid*.

31 Snyman *Criminal Law* 6ed (2015) 138.

punishment in South Africa.[32] The dominant line of patriarchy, which leads to subordination, is especially well embedded in the Afrikaans and African cultures.[33] These beliefs and practices are in turn proliferated by generational repetition, thereby inhibiting change in the social acceptance of corporal punishment.[34]

Although the research acknowledges the importance of the socio-cultural context of corporal punishment, as well socio-economic factors (especially poverty) that may perpetuate the application of corporal punishment in the private sphere, the focus of the study is limited to legislative measures and interceding strategies to eradicate corporal punishment.

4 1 South African legislation

As a signatory of the CRC and the ACRWC, South Africa is obliged to recognise and accept the universally agreed set of non-negotiable standards and obligations to be honored by the conventions' signatories – *inter alia*, the importance of children's rights, and the right a child has to be protected from violence.[35]

4 1 1 The Constitution of the Republic of South Africa, 1996[36]

The Constitution does not specifically refer to corporal punishment. It may be argued that the exclusion of a specific mention of corporal punishment in section 28 of the Constitution was deliberate to accommodate religious beliefs and cultural traditions that favour the practice.[37] On the other hand, one could also argue that the constitutional provisions are wide enough to encompass protection against corporal punishment, making it unnecessary to make specific reference to corporal punishment.

In this regard, section 12(1) of the Constitution explicitly provides that "[e]veryone has the right to freedom and security of the person, which includes the right … (*c)* to be free from all forms of violence from either public or private sources". In addition, section 28(2) of the Constitution provides that in all matters concerning a child, the best interests of the child are of paramount importance.[38] Section 28(2) of the Constitution[39] therefore

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[32] Khoi and San culture, the Zulu culture, Xhosa culture, Ndebele culture, Sotho culture, the Shangaan culture, Venda culture, Indian and Cape Malay culture and the cultures brought by the European settlers.

[33] Kruger *Gender Stereotyping and Roles* (unpublished PhD thesis, University of the Orange Free State) 1997.

[34] Coetzee "Informed by Bandura's Social Learning Theory: South African Education and the Ideology of Patriarchy" 2001 4 *South African Journal of Education* 21.

[35] South Africa ratified the CRC in 1995 and the ACRWC in 2000.

[36] The Constitution of the Republic of South Africa, 1996 was adopted on 8 May 1996 and promulgated on 18 December 1996.

[37] S 31(1) of the Constitution provides that "[p]ersons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community- (*a*) to enjoy their culture, practise their religion and use their language".

[38] S 30 of the Interim Constitution of the Republic of South Africa 200 of 1993 stated: "For the purpose of this section a child shall mean a person under the age of 18 years and in all

imposes a duty on all courts to consider the best interests of a child and the paramountcy of such interests in all matters concerning the child.[40] Accordingly, section 28(2) can be regarded as "'an extensive guarantee"[41] affording children additional protection.[42]

As a consequence of the extension of the ambit of the application of the best-interests-of-the-child principle to all matters relating to children, section 28(1) of the Constitution provides children with further legal protection by way of certain socio-economic human rights.[43] One of these rights is the right to be protected from maltreatment, neglect, abuse or degradation.[44] This right was later adopted by the Children's Act[45] and is discussed hereunder.[46]

4 1 2 Children's Act 38 of 2005

The circumstances that should be considered in establishing what constitutes the best interests of the child are listed in section 7 of the Children's Act.[47] One of the factors listed in section 7 is the need to protect the child from any physical or psychological harm that may be caused by maltreatment, abuse, neglect, exploitation, degradation or exposure to violence.[48] Although protection from violence is thus afforded to children in

matters concerning such child his or her best interests shall be paramount." The application of the principle was however restricted to the ambit of s 30(3) of the Interim Constitution.

39 S 28(2) of the Constitution provides that "[a] child's best interests are of paramount importance in every matter concerning the child".

40 Heaton *South African Family Law* 4ed (2015) 276–277.

41 *Sonderup v Tondeli* 2001 (1) SA 1172 (CC) par 29.

42 Heaton *South African Family Law* 271.

43 S 28(1) of the Constitution states: "(1) Every child has the right–
(*a*) to a name and a nationality from birth; (*b*) to family care or parental care, or to appropriate alternative care when removed from the family environment; (*c*) to basic nutrition, shelter, basic health care services and social services; (*d*) to be protected from maltreatment, neglect, abuse or degradation; (*e*) to be protected from exploitative labour practices; (*f*) not to be required or permitted to perform work or provide services that– (i) are inappropriate for a person of that child's age; or (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development; (*g*) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be– (i) kept separately from detained persons over the age of 18 years; and (ii) treated in a manner, and kept in conditions, that take account of the child's age; (*h*) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and (*i*) not to be used directly in armed conflict, and to be protected in times of armed conflict."

44 S 28(1)(*d*) of the Constitution.

45 S 7 of the Children's Act 38 of 2005.

46 Ch 2 of the Children's Act.

47 S 7 of the Children's Act states that the best interests of the child must be applied whenever the provisions of the Children's Act so require as well as s 9 of the Act that states that "In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied."

48 S 7(1)(*l*) of the Children's Act.

the Children's Act,[49] the Act does not explicitly prohibit corporal punishment, and in particular corporal punishment in the private sphere.

The 2002 draft Children's Bill did, however, include a prohibition of corporal punishment.[50] In addition, the Bill advocated the revocation of the common-law defence of "reasonable and moderate chastisement" and the adoption of an education awareness approach to change society's perception of corporal punishment.[51] With the division of the Children's Bill,[52] the Children's Act was promulgated in 2005, leaving the issue of corporal punishment to be dealt with in terms of the Children's Amendment Bill.[53] Clause 139 of the Children's Amendment Bill provided that "no child may be subjected to corporal punishment or be punished in a cruel, inhuman, or degrading way".[54] The clause furthermore provided: "The common law defence of reasonable chastisement available to persons referred to in subsection (1) in any court proceeding is hereby abolished."[55] It should be noted that the clause did not address corporal punishment in the home but only in the public sphere. Despite submissions being made during public hearings and clause 139 being amended to incorporate appropriate parenting programmes across the country, consensus could not be reached on the topic. Clause 139 was ultimately removed from the Children's Amendment Bill to allow for further investigation while the Children's Amendment Act[56] was passed towards the end of 2007.

Subsequent to amendments to the Children's Act, article 8 of the Draft Children's Third Amendment Bill[57] called for the removal of the common-law defence of reasonable and moderate chastisement[58] while also advocating

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49 *Inter alia* in terms of ss 7, 9 and 10 of the Children's Act.

50 S 142 of the Draft Children's Bill, 2002.

51 Tarabella Marchesi "Corporal Punishment of Children in South Africa" https://pmg.org.za/call-for-comment/707 (accessed 2020-02-21).

52 The Draft Children's Bill was divided into the Children's Bill (s 75 Bill) and the Children's Amendment Bill (s 76 Bill). The later Bill was to address corporal punishment.

53 Clause 139 of the Children's Amendment Bill B19B of 2006 stated *inter alia:* "(2) No child may be subjected to corporal punishment or be punished in a cruel, inhuman, or degrading way. (3) The common law defence of reasonable chastisement available to persons referred to in subsection (1) in any court proceeding is hereby abolished."

54 Clause 139(2) of the Children's Amendment Bill B19B of 2006.

55 Clause 139(3) of the Children's Amendment Bill B19B of 2006.

56 41 of 2007.

57 Article 8 of the Children's Third Amendment Bill, 2019, *GG* 42005 of 2019-02-25.

58 Article 8 of the Bill stated: "Positive discipline of children – 12A. (1) A person who has care of a child, including a person who has parental responsibilities and rights in respect of a child, must not treat or punish the child in a cruel, inhuman or degrading way, when disciplining the child, to ensure the child's right to physical and psychological integrity as conferred by section 12 (1)(*c*), (*d*) and (*e*) of the Constitution. (2) The common law defence of reasonable chastisement available in any court proceeding to a person contemplated in subsection (1) is hereby abolished. (3) A parent, guardian, care-giver or any person holding parental responsibilities and rights in respect of a child who is reported for subjecting such child to any inappropriate form of punishment, including corporal punishment, must be referred to a prevention and early intervention programme as contemplated in section 144. (4) The Department in partnership with relevant stakeholders must take all reasonable steps to ensure that– (*a*) education and awareness-raising programmes concerning the effect of subsections (1) and (2) are implemented across the Republic; and (*b*) programmes promoting positive discipline at home and in alternative care are available across the Republic. (5) When prevention and early intervention services have failed, or are deemed to

that a person who has ill-treated a child (which includes using corporal punishment) should be referred to a prevention and early intervention programme as contemplated in section 144 of the Children's Act.[59] The proposed amendment includes the implementation of awareness programmes as well as programmes promoting positive discipline.[60]

The new version of the Children's Third Amendment Bill[61] in turn proposed the insertion of section 12A in the Children's Act to address discipline of children specifically.[62] It is however noteworthy that section 12A does not provide for the programmes envisaged by section 8 as discussed above.

It is thus evident that although legislative progress has been made in terms of the Children's Act to protect child rights, and in particular the right to be protected from violence, children are still one of the last vulnerable groups of society to be effectively protected from all forms of corporal punishment.[63] In this regard, there is an inconsistency in that corporal punishment in the public sphere is regulated in contrast to corporal punishment in the private sphere.

4 2 Underpinning the prohibition of corporal punishment in the private sphere: international pressure

Corporal punishment in the public sphere was explicitly prohibited by the South African Schools Act.[64] Nonetheless, the Committee on the Rights of the Child (the regulatory body of the CRC) and other committees[65] were concerned about the lack of adequate implementation and governance of the Schools Act, as well as the absence of legislation prohibiting corporal punishment in the private sphere.[66]

be inappropriate, and the child's safety and wellbeing is at risk, the designated social worker must assess the child in terms of section 110."

59 S 144 of the Children's Act provides for early intervention programmes.

60 S 144 of the Children's Act.

61 *GG* 42005 of 2019-02-25.

62 Article 7 of the Children's Third Amendment Bill proposes the insertion of section 12A "Discipline of children" in the Children's Act. The article states "(1) Any person caring for a child, including a person who has parental responsibilities and rights in respect of a child, must not treat or punish the child in a cruel, inhuman or degrading way. (2) Any punishment, within the home or other environment, in which physical force or action is used and intended to cause some degree of pain or harm to the child is unlawful. (3) Any person who is reported for contravening subsection (1) must be dealt with in accordance with section 110 of this Act."

63 Sonke Gender Justice "Policy Briefing: Prohibition of Corporal Punishment in the Home in South Africa" https://www.saferspaces.org.za/uploads/files/Prohibition_of_Corporal_Punishment_in_the_Home_in_South_Africa.pdf (accessed 2020-01-20).

64 South African Schools Act, 84 of 1996.

65 The Committee on the Rights of the Child, Human Rights Committee, Committee Against Torture; Committee on the Rights of Persons with Disabilities, African Committee of Experts on the Rights and Welfare of the Child.

66 Global Initiative to End All Corporal Punishment of Children "South Africa: Briefing for the Human Rights Council Universal Periodic Review" https://www.ohchr.org/EN/HRBodies/UPR/Pages/MeetingsHighlightsSession13.aspx.

In 2002, the Committee on the Rights of the Child was briefed by the Global Initiative to End All Corporal Punishment of Children.[67] Subsequently, corporal punishment of children has been on the agenda of the Committee Against Torture, the Committee on the Elimination of Discrimination Against Women, the Committee on Economic, Social and Cultural Rights, the Human Rights Committee and the Committee on the Rights of Persons with Disabilities.[68] The paramountcy of the right of the child to be protected from corporal and other cruel or degrading forms of punishment was reiterated by the Committee on the Rights of the Child in its adoption of General Comment No. 8 (2006), emphasising state parties' obligation to prohibit and eliminate corporal punishment in all settings of children's lives.[69]

In the UN Secretary General's Study on Violence Against Children in 2006, the resistance of the South African government, despite recommendations to introduce prohibition by way of international human rights mechanisms, was highlighted.[70] In 2008, during the first cycle of the Universal Periodic Review, the Human Rights Council recommended that South Africa "commit to criminalise corporal punishment, remove the defense of reasonable chastisement, pledge to raise awareness and provide the required resources to support alternative forms of discipline".[71] In response to the recommendation, the South African government submitted that corporal punishment was addressed in terms of the Domestic Violence Act 116 of 1998.[72]

During the second cycle of the Universal Periodic Review of South Africa in 2012, it was once more recommended that government: "Prohibit and punish corporal punishment both in the home, as well as in public institutions such as schools and prisons."[73] The South African government retorted by stating that adequate legislation exists to prohibit corporal punishment.[74] In addition to international pressure to ban corporal punishment in the home, national instruments such as the African Committee of Experts on the Rights and Welfare of the Child also advocated the ban of corporal punishment in the home.[75]

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67 *Ibid*.

68 *Ibid*.

69 UN Committee on the Rights of the Child *General Comment No. 8 (2006): The Right of the Child to Protection From Corporal Punishment and Other Cruel or Degrading Forms of Punishment (arts. 19; 28, para. 2; and 37, inter alia)* (CRC/C/GC/8).

70 Briefing for the Human Rights Council Universal Periodic Review https://violenceagainstchildren.un.org/content/un-study-violence-against-children#:~:text=The%20United%20Nations%20Secretary%2DGeneral's,prevent%20and%20respond%20to%20it.

71 UN Human Rights Council *Report of the Working Group on the UPR: South Africa, 23 May 2008* https://www.refworld.org/docid/4857aa23d.html (accessed 2020-01-20).

72 UN Human Rights Council *Report of the Human Rights Council on its Eighth Session* A/HRC/8/52 (1 September 2008) par 567.

73 UN Human Rights Council *Report of the Working Group on the UPR: South Africa* A/HRC/21/16 (9 July 2012) par 124.88.

74 UN Human Rights Council *Report of the Human Rights Council on its Eighth Session* A/HRC/21/16 (9 July 2012) par 567.

75 African Committee of Experts on the Rights and Welfare of the Child (ACERWC) *Mission Report of the ACERWC to Assess the Situation of Children Affected by the Conflict in*

In 2017, during the third cycle of the Universal Periodic Review of South Africa, it was recommended that the South African government "adopt legislation to prohibit all forms of corporal punishment in the private sphere and expedite the adoption of legislation to prohibit all forms of corporal punishment including "reasonable chastisement" and "to develop, adopt and implement a national strategy to prevent and eradicate all forms of corporal punishment".[76] The Human Rights Committee further advocated that South Africa should develop appropriate policies and support services to promote non-violence and positive parenting as well as to address sustainable awareness campaigns to address cultural and religious arguments in favour of corporal punishment. The South African government reacted by "noting" the recommendation and stating that the government "cannot commit to [the recommendation] at this stage".[77]

4 3 The intervention of the Constitutional Court

The debate surrounding the infliction of corporal punishment in the home was finally and unequivocally put to rest in the case of *Freedom of Religion South Africa v Minister of Justice and Constitutional Development*[78] (*Freedom of Religion* case).

The case emanated from the Johannesburg magistrates' court where a parent was convicted of common assault after he was found guilty of kicking and punching his 13-year old son.[79] The child was found sitting on his bed looking at, what the father believed to be, pornographic material on the family iPad.[80] It should be noted that the father and his son stringently followed the Muslim faith and that such conduct was strictly against their faith.[81] Owing to the manner in which the child was assaulted, as well as the degree of force applied by his father, a defence of reasonable and moderate chastisement or discipline on religious or cultural grounds could not be justifiably raised against the charge.[82] On appeal, the constitutional validity of the common-law right of parents to chastise their children moderately and reasonably was deliberated.[83]

The right of parents to inflict reasonable and moderate chastisement was argued on the basis of their religious rights,[84] cultures and traditions giving them independent authority to raise their children.[85] In turn, the

Central African Republic (December 2014) https://www.refworld.org/docid/555c51244.html (accessed 2020-02-07).

76 UN Human Rights Council *Draft Report of the Working Group* A/HRC/WG.6/27/L.14 (18 May 2017) par 6(233) and 6(234); *Draft Report of the Working Group* A/HRC/WG.6/27/L.14 (18 May 2017) par 6.

77 UN Human Rights Council *Report of the Working Group on the UPR: South Africa* A/HRC/36/16/Add.1 (19 September 2017) Addendum par 4 and 32.

78 [2019] ZACC 34.

79 *S v YG* 2018 (1) SACR 64 (GJ).

80 *Freedom of Religion* case *supra* par 5 and 6.

81 *S v YG supra* par 4.

82 *Freedom of Religion* case *supra* par 5 and 6.

83 *Freedom of Religion* case *supra* par 6.

84 *Freedom of Religion* case *supra* par 33.

85 *Freedom of Religion* case *supra* par 8.

unconstitutionality of moderate and reasonable chastisement was argued in terms of various rights (the best interests of the child,[86] a child's right to human dignity,[87] freedom of security of the person[88] and equal protection).[89] Ultimately, the Constitutional Court decided to consider the merits of the matter based on two key rights, namely sections 12(1)(*c*) and 10 of the Constitution.[90]

In deriving its finding, the court acknowledged that an integral part of parental responsibilities is to raise a child to become a responsible and disciplined citizen of our country.[91] The court however held that

> "parental authority or entitlement to chastise children moderately and reasonably has been an escape route from prosecution or conviction and that violence proscribed by section 12(1)(*c*) could still be committed with justification if that parental right is retained."[92]

In considering whether corporal punishment at home violates a child's right "to be free from all forms of violence from either public or private sources",[93] the court held that "the mere exertion of some force or the threat thereof", which is the objective of corporal punishment, falls within the ambit of section 12(1)(*c*) of the Constitution.[94] Ultimately, the Constitutional Court accepted that "the common law defence of moderate and reasonable chastisement … is indeed what section 12(1)(*c*) seeks to prevent".[95] In addition, "as there is a sense of shame and a feeling of being less dignified than before, that comes with the administration of chastisement to whatever degree", corporal punishment also violates a child's right to dignity.[96] The court concluded that, as less restrictive means are available to discipline a child, there is no justification to limiting a child's rights in terms of sections 10 and 12 of the Constitution, and, accordingly, that the common-law defence of moderate and reasonable chastisement is unconstitutional.[97] In effect, the ruling criminalised corporal punishment, as a parent can no longer use the common-law defence of "reasonable and moderate chastisement" if charged with the assault of his or her child. Consequently, children are now equally protected from assault.

5 THE WAY FORWARD

In view of the Constitutional Court ruling, parents are no longer permitted to punish their children by way of corporal punishment. It is, however,

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86 S 28(2) of the Constitution.
87 S 10 of the Constitution.
88 S 12 of the Constitution.
89 S 9 of the Constitution.
90 *Freedom of Religion* case *supra* par 30–31.
91 *Freedom of Religion* case *supra* par 24, 51. See also Burchell and Milton *Principles of Criminal Law* 3ed (2005) 19–28.
92 *Freedom of Religion* case *supra* par 43.
93 S 12(1)(*c*) of the Constitution.
94 *Freedom of Religion* case *supra* par 40–41.
95 *Freedom of Religion* case *supra* par 43.
96 *Freedom of Religion* case *supra* par 47.
97 *Freedom of Religion* case *supra* par 71.

questionable whether the repeal of the common-law defence of "reasonable and moderate chastisement" on its own is enough to bring about the effective prohibition of corporal punishment at home.

Studies have shown that, in countries that opted merely to remove the defence of reasonable and moderate chastisement without additional legislative amendment, parents were left with uncertainty as to whether they could still discipline their children, and if so, to what extent.[98] At the same time, although social approval rates for corporal punishment have decreased in countries where legislation was adopted to prohibit it (such as in New Zealand,[99] Germany,[100] and Poland),[101] the most progress in eradicating corporal punishment at home was made in countries where a multi-faceted approach was adopted.[102] In this regard, the manner in which the Swedish government has changed the complexities of societal behaviours and perceptions of corporal punishment by, *inter alia*, extensive training and awareness-raising campaigns is noteworthy.

5 1 Sweden as a case study

In Sweden, corporal punishment was widespread until the beginning of the twentieth century.[103] In 1928, corporal punishment was abolished at secondary schools.[104] This was followed by a series of legislative reforms aimed at overtly eliminating all forms of corporal punishment in law.[105]

As in the case of South Africa, parents were permitted to reprimand their child by way of corporal punishment, provided the reprimand did not cause severe injury to the child. Although the section in the Swedish Penal Code allowing a parent to reprimand a child was removed in 1957, it was only in

98 RAPCAN "Banning Corporal Punishment in the South African Experience" https://www.childlinesa.org.za/wp-content/uploads/banning-corporal-punishment-the-sa-experience.pdf (accessed 2020-03-21).

99 A study in New Zealand showed that disapproval of child punishment increased by 18 per cent in a year after legislative prohibition was promulgated (Wood *Physical Punishment of Children in New Zealand: Six Years After Law Reform* (2013)).

100 In Germany, full prohibition of corporal punishment was introduced in 2000. According to a study, parental approval of corporal punishment dropped by 7 per cent within a year after the legislation was promulgated (Federal Ministry of Justice & Federal Ministry for Family Affairs, Senior Citizens, Women and Youth *Violence in Upbringing: An Assessment After the Introduction of the Right to a Non-Violent Upbringing* (2003)).

101 In a 2011 study in Poland, it was found that since the full prohibition of corporal punishment at home in 2010, social acceptance of parents hitting children decreased by 9 per cent in three years (TNS OBOP on behalf of Ombudsman for Children of the Republic of Poland "Social Resonance of the Amendment to the Act on Counteracting Domestic Violence". (2011) 10).

102 Durrant "Evaluating the Success of Sweden's Corporal Punishment Ban" 1999 23(5) *Child Abuse & Neglect* 435–448.

103 *Ibid*.

104 In 1928, the Education Act was amended to forbid corporal punishment in the gymnasium.

105 The Parental and Guardianship Code was amended in 1949 by replacing "punish" with "reprimand". Corporal punishment was, however, still a legal defence in terms of the Penal Code and the Parents' Code. In 1957, the Penal Code defence for caretakers using corporal punishment was repealed, thereby clarify the grounds for criminal prosecution of parents who physically harmed their children. Mild forms of corporal punishment that were allowed in terms of the civil Parent's Code (Fo¨ra¨ldrabalken) were removed in 1966.

1966 that the use of physical discipline by parents was struck from the Parents' Code.[106] Even so, and with the support of a strong children's rights movement, a Commission on Children's Rights reviewed the Parenthood and Guardianship Code after a 3-year-old girl was beaten by her stepfather.[107] The Commission showed that despite the removal of the legal defence for corporal punishment from both the Penal Code and the Parents' Code, it was unclear whether corporal punishment was actually understood to be prohibited. Consequently, in 1979, a paragraph was added to the Parents' Code explicitly and clearly prohibiting physical punishment or other injurious or humiliating treatment, thereby making Sweden the first country in the world to ban all forms of corporal punishment.[108] It should however be noted that the Parents' Code does not carry criminal penalties; thus, the intention of the ban was not to criminalise parents but rather to employ proactive and educational goals to change the mindset of parents to raise children without violence of any kind and to set clear guidelines for parents.[109]

Though there was a noticeable increase in the opposition by Swedish society to corporal punishment, a poll conducted in 1971 showed that 60 per cent of the Swedish population was unaware that corporal punishment was not legally defensible.[110] As a result, the Swedish government also implemented supportive measures, such as media broadcasts and a public education campaign that introduced positive parenting and non-violent discipline programmes.[111] As part of the campaign, a comprehensive pamphlet was translated and circulated to every household informing Swedish society of the legislative amendment. The effectiveness of the campaign was evident after a 1981 study concluded that 99 per cent of Swedish society was aware that corporal punishment of a child as a means to reprimand a child's wrongdoing was illegal in Sweden.[112]

In addition to the awareness campaigns, the Swedish government adopted a coherent preventive approach as far as parenting was concerned by prioritising measures allowing for supportive intervention, such as day care systems, parental leave and sickness insurance, as well as by providing educational programmes such as baby-care courses, alternative conflict resolution measures and support groups for the early identification of child abuse.[113] As a result of the awareness campaigns as well as educational programmes, Swedish parents supporting the ban on corporal punishment increased from 50 per cent in 1960 to more than 90 per cent of

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106 Durrant 1999 *Child Abuse & Neglect* 435–448.

107 *Ibid*.

108 Ch 6 s 1 of the Parents' Code states: "Children are entitled to care, security and a good upbringing. Children are to be treated with respect for their person and individuality and may not be subjected to physical punishment or other injurious or humiliating treatment."

109 Durrant *Family Violence Against Children: A Challenge for Society* (1996) 19–25.

110 Durrant *Child Abuse & Neglect* 435–448; Durrant and Olsen "Parenting and Public Policy: Contextualizing the Swedish Corporal Punishment Ban" 1997 *Journal of Social Welfare and Family Law* 19 443–461.

111 Durrant *Family Violence Against Children: A Challenge for Society* 19–25; Durrant and Olsen 1997 *Journal of Social Welfare and Family Law* 19 443–461.

112 Durrant *Family Violence Against Children: A Challenge for Society* 19–25.

113 *Ibid*.

parents in 1996, thereby signifying a broad public mind shift to eradicate corporal punishment.[114]

5 2 Lessons learned from Sweden and recommendations

In South Africa, as was the case in Sweden, corporal punishment has historically been regarded as a socially acceptable and appropriate measure to reprimand a child for wrongdoing. Although the societal shift and decline in support for corporal punishment that transpired in Sweden started with the removal of the common-law defence of moderate chastisement, the true success in eradicating corporal punishment in Sweden was much more broadly based.

From the Swedish experience, it is clear that simply disallowing parents' use of the common-law defence to inflict corporal punishment that is moderate and reasonable does not necessarily result in parents understanding that they are not entitled to hit their children. Accordingly, explicit legislation is required to set a clear message that smacking a child at home is no longer permitted. In addition to clear and explicit legislation prohibiting corporal punishment in the private sphere, there is a need for social and traditional transformation. It is submitted that, as in Sweden, a multi-faceted approach, which includes ongoing legislative amendment, extensive public awareness campaigns and training programmes, is required to effectively bring about societal change and behaviour by definitively disapproving of corporal punishment in all spheres.

6 CONCLUSION

Evidence suggests that merely removing the common-law defence of reasonable and moderate chastisement will not give effect to the Constitutional Court ruling in *Freedom of Religion South Africa v Minister of Justice and Constitutional Development.*[115] From the Swedish experience, it is evident that explicit legislative prohibition of corporal punishment in the private sphere will be required. It is furthermore evident that there is a need for social and traditional transformation to ensure that there is a societal mindset shift so that, instead of condoning corporal punishment in the home, society condemns it. Accordingly, there is a need for the development of appropriate policy measures to support sustainable awareness campaigns to address cultural and religious arguments in favour of corporal punishment. These changes will not only comply with government's constitutional responsibility to protect its citizens by reducing the levels of violence in South Africa, but will also ensure that South Africa is in line with various international and regional treaties and conventions that it has ratified.

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[114] *Ibid*.

[115] *Supra.*

THE RELIEF PROVIDED TO A COMPLAINANT UNDER SECTION 163(1)(*a*) OF THE 2008 COMPANIES ACT: AN EXAMINATION OF THE CRITERION WITH REFERENCE TO *PEEL v HAMON J&C ENGINEERING (PTY) LTD*

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SUMMARY

The remedies in favour of minority shareholders that have developed over the years have been informed by the discriminatory manner in which the proper-plaintiff rule has been applied within the management of companies, in disregard of the rights and interests of minority shareholders. Broadly, section 163(1) of the Companies Act 71 of 2008 accords shareholders or directors of a company three circumstances in which they have rights to apply to court for relief. One ground for application is that an act or omission of a company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant. From the contemporary debates and court decisions consulted, it is clear that the criterion that complainants must satisfy under section 163(1) – "any act or omission of the company, or a related person, has had a result", – and the manner in which parties must go about meeting such criterion, is not yet settled. The intention of this paper is to analyse and examine this criterion. The paper seeks to contribute to the debate by using the case of *Peel v Hamon J&C Engineering (Pty) Ltd* as the point of reference. The case is pertinent because it touches on all the elements that must be satisfied under section 163(1). Secondly, much as the decision is supported, it seems an error of law was made in one aspect of the decision.

1 INTRODUCTION

The remedies in favour of minority shareholders that have developed over the years have been informed by the discriminatory nature in which the proper-plaintiff rule has been applied in disregard of the rights and interests of minority shareholders within the management of companies.[1] Because

[1] In *Foss v Harbottle* (1843) 2 Hare 461; 67 ER 189, a claim was lodged in reaction to the majority rule, seeking relief for losses orchestrated by directors of that company. However,

companies are under the direction of a board of directors, all decisions are their prerogative. At times, however, the board of directors discharges its duties to manage a company's affairs in a manner that is unexpected, and that causes disharmony.[2] To counter these often-unnecessary occurrences, a scan of various statutes across jurisdictions shows that countries have tended to develop potent remedies in favour of minorities within companies. The Companies Act 71 of 2008 (2008 Act)[3] is no exception. It provides a remedy for oppressive and prejudicial conduct under section 163(1). Previously, this remedy was regulated under section 252(1) of the Companies Act 61 of 1973 (1973 Act). In accordance with the remedy's intended purpose, courts have tended to interpret the latter section broadly, depending on the circumstances of the particular case. Looking at the provisions of section 163, it appears that the 2008 Act intended to refine the remedy and make it more accessible to a wider class of persons – that is, not confine it only to shareholders of that company.

Broadly, section 163(1) provides a shareholder or a director of a company with three grounds on which to apply to court for relief. One of these is that an act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant.[4] From the contemporary debates and court decisions consulted, it is clear that the criterion that complainants must satisfy under section 163(1) – "any act or omission of the company, or a related person, has had a result" – and the manner in which parties must go about meeting this criterion, is not yet settled. The intention of this article is to analyse and examine this criterion. The article seeks to contribute to that debate using the case of *Peel v Hamon J&C Engineering (Pty) Ltd*[5] as the point of reference. The case is pertinent because it touches on all the elements that must be satisfied under section 163(1). Secondly, much as the decision is supported, an error of law seems to have been made in one aspect of the decision. Under heading 2, the article sets out the legal framework and the criteria to be satisfied by a complainant under section 163(1)(*a*). Thereafter, under heading 3, the facts and interpretative context to be observed are

shareholders in the case claimed in their own names, instead of in the name of the company through derivative action. The plaintiffs lost the case on the basis that the claim was lodged in their names rather than in the name of the company, which was the proper plaintiff – hence the "proper plaintiff rule". The money/funds that were fraudulently misappropriated belonged to the company as an incorporated entity and not to the plaintiffs. See also *Hand v Dexter* 41 Ga. 454, 462 (1871), cited in Thompson "The Shareholder's Cause of Action for Oppression" 1993 *The Business Lawyer* 699.

2 Thompson 1993 *The Business Lawyer* 703.

3 GN 421 in *GG* 32121 of 2009-04-09. It has been amended by the Companies Amendment Act 3 of 2011 (GN 370 in *GG* 34243 of 2011-04-26).

4 The second ground arises where the *business* of the company, or a related person, is being or has been carried on or conducted in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant. Thirdly, where the powers of a director or prescribed officer of a company, or person related to the company, are being or have been exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant, there is also cause for relief. See s 163(1)(*a*), (*b*) and (*c*) of the 2008 Act; *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd* 2014 5 SA 179 (WCC) par 51; *Lazarus Mbethe v United Manganese of Kalahari (Pty) Ltd* [2017] ZASCA 67 par 35; *Smyth v Investec Bank Ltd* [2017] ZASCA 147 par 54; *Westerhuis v Whittaker* [2018] ZAWCHC 76 par 30.

5 2013 (2) SA 331 (GSJ).

tabulated. Heading 4 ventures to unpack in detail the concept "has had". On the other hand, heading 5 seeks to unpack the words "a result". Under heading 6, there is an examination of the reasoning of the court in *Peel*. Thereafter, a conclusion is reached under heading 7.

2 REGULATORY FRAMEWORK AND THE CRITERIA TO BE SATISFIED

The relevant wording of section 163(1) of the 2008 Act provides:

> "A shareholder or director of a company may apply to a court for relief if- (*a*) any act or omission of the company, or a related person has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of the applicant; …"

It is plain that five elements must be shown to exist before a court will consider whether other criteria have been adequately satisfied so as to allow the granting of an order in favour of a complainant. Relief may be sought only by (i) "a shareholder or a director" of a company when (ii) "any act or omission" of (iii) "the company, or related person" (iv) "has had" a (v) "result". There is a marked difference in the wording of this section and that of section 994(1) of the UK Companies Act 2006 (UK 2006 Act). As far as it is relevant, the latter section provides that a member of a company may apply to the court by petition for an order on the ground "(b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial".[6] This subsection gives a legal right to a member of a company to apply if an (i) "actual or proposed act or omission" of the company, or (ii) an "act or omission on behalf" of the company, is an act or omission that (iii) "is or would be" prejudicial. Under the United States of America's (US) Model Business Corporation Act 1984 (MBCA), corporate powers are exercised by directors.[7] Section 14.30 of the Act permits a court to order a dissolution of a company if a shareholder has established in an action that directors or those in control of a company "have acted, or are acting, or will act in a manner that is illegal, oppressive or fraudulent".[8]

The focus of this article is on the last two of the five elements of section 163(1)(*a*) – that is, "has had" and a "result". However, practically it is impossible to examine these two elements without necessarily touching on the other elements. This is by virtue of the fact that, under the 2008 Act, these elements are crafted to be umbilically connected to one another. Under section 994(1)(*b*) of the UK 2006 Act, the comparable wording on the two noted elements in section 163(1)(*a*) concerns an act or omission that "is or would be so prejudicial". Under the US MBCA, the precise wording is "have acted, or are acting, or will act". Thus, section 14.30(2)(ii) of the MBCA applies to conduct in the past, present and, most importantly, future, as is the case under the UK Act 2006.

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6 S 994(2) provides that the provisions of subsection (1) apply to a person who is not a member of a company but to whom shares in the company have been transferred or transmitted by operation of law as they apply to a member of a company.

7 See s 8.01(*b*) of the MBCA.

8 See s 14.30(2)(ii) of the MBCA.

3 THE FACTS IN *PEEL* AND THE INTERPRETATIVE CONTEXT

In the *Peel* case, the application was based on a number of complaints. The applicants relied on section 163, alleging that an act or omission of Hamon SA and/or Hamon & Cie had a result that was oppressive and unfairly prejudicial to, or that unfairly disregarded, the interests of the applicants. The claim was based on a sale and transfer agreement and a shareholder's agreement that the parties had entered into during October 2010 to combine their businesses for the benefit of both parties.[9] As a result, a joint venture was formed between Hamon J&C/J&C Engineering and the Hamon respondents under the holdership of Hamon & Cie (International SA).[10] The applicants sought an order for relief to sever ties with the Hamon respondents so that Hamon J&C was no longer associated with Hamon SA and Hamon & Cie. Pertinently, one of the applicants' contentions was that the Hamon respondents had failed to disclose a material fact, and that such failure (omission) had a result that was oppressive and unfairly prejudicial to their interests and/or unfairly disregarded their interests. The applicants were of the view that non-disclosure by the respondents suggested that they had no regard for their interests. The applicants contended that because they (applicants) had transferred their company (J&C Engineering) into the joint venture company (Hamon J&C) with the Hamon respondents so as to have the benefit of Hamon's alleged good name, they should have been advised of all material matters concerning the joint venture company that would affect the company's good name, as well as matters that the respondents should have known had the potential to affect the company's good name.

What the applicants were not aware of was that the respondents, immediately before concluding the joint venture agreement with them, had entered into a Black Economic Empowerment contract with two of their staff members for purposes of attaining an upper BEE score in terms of the B-BBEE Act (BEE issue) and to be in line to receive contracts from other government entities. The applicants' view was that they should have been advised about the BEE issue as it had potential to affect the applicants' business in Hamon J&C and posed serious business risks for the future, even though the BEE issue did not occur in Hamon J&C, but in Hamon SA.[11] The applicants viewed the allegations (of fraud in their BEE deal) in a serious light; their take was that if they and their business were to be tainted by the serious allegations, such had a potential to destroy their business prospects going forward. For this reason, the applicants and their business "have been or are" thus exposed to serious business risk.[12] As a result, the applicants could not continue to work or be associated with the Hamon respondents in a business relationship because the BEE issue had caused an irretrievable breakdown in their relationships owing to mistrust that had

9 *Peel v Hamon J&C Engineering (Pty) Ltd supra* par 8–9.
10 *Peel v Hamon J&C Engineering (Pty) Ltd supra* par 13–15.
11 *Peel v Hamon J&C Engineering (Pty) Ltd supra* par 35–40.
12 *Peel v Hamon J&C Engineering (Pty) Ltd supra* par 46.

arisen.[13] The worst part was that the respondents took the attitude that the BEE issue was of no consequence and as such was not material.[14]

From the provisions of section 163(1), it is evident that the legislature intended to provide a remedy to a specific applicant to challenge an act or omission (occurring through the exercise of powers by a director or prescribed officer of a company or person related to that company)[15] that "has had" a "result". Thus, as referred to above, the criteria that must be satisfied first are that the applicant be a shareholder or director of that company, and that the conduct of the company "has had" a "result" affecting the applicant adversely.[16] The words of Moshidi J in *Peel* are crucial for those who make an application for relief. The court held that, where the criteria as laid down in section 163(1) have not been satisfied, an applicant would not be granted relief in terms of section 163(2) of the 2008 Act.[17] When a complaint has been lodged and a court is engaged in the interpretation of the criteria set out, courts begin by interpreting the provisions of that particular section of the Act.[18]

To that end, the approach adopted by Moshidi J in coming to the *Peel* decision is relevant to the arguments in this article. The court took the approach that the ambit of the section was not to be constrained such as to inhibit its intended purpose.[19] One may argue that in respect of section 163, this approach is notable, and is consistent with section 7 of the 2008 Act, which vividly states the purpose of the Act as including the balancing of the interests of stakeholders. In that context, the provisions of the section 163(1) remedy are unambiguous in their purpose.

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13 *Peel v Hamon J&C Engineering (Pty) Ltd supra* par 22.

14 *Peel v Hamon J&C Engineering (Pty) Ltd supra* par 40 and 46.

15 *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd supra* par 53.

16 Also see in *Kudumane Investment Holdings Ltd v Northern Cape Manganese Company (Pty) Ltd* [2012] 4 All SA 203 (GSJ) par 49–50; *Lewis Group Limited v Woollam (2)* [2016] ZAWCHC 162; [2017] 1 All SA 231 (WCC). In *Wootliff v Rushton-Turner* [2017] EWHC 3129 (Ch) par 57, the court said that the plaintiff had to demonstrate to the satisfaction of the court requirements similar to s 163(1), citing *Hawkes v Cuddy (No 2)* [2008] B.C.C 390 347, 440; *Re Saul D Harrison & Sons plc* [1994] B.C.C.475 499 based on s 994 of the UK Companies Act 2006.

17 *Peel v Hamon J&C Engineering (Pty) Ltd supra* par 45; *Westerhuis v Whittaker supra* par 36 and 46; *Louw v Nel* 2011 (2) SA 172 (SCA) par 23; Beukes and Swart "*Peel v Hamon J&C Engineering (Pty) Ltd*: Ignoring the Result-Requirement of Section 163(1)(*a*) of the *Companies Act* and Extending the Oppression Remedy Beyond its Statutorily Intended Reach" 2014 17 *PER/PELJ* 1691 1696–1698. See also *Count Gotthard SA Pilati v Witfontein Game Farm (Pty) Ltd* 2013 2 All SA 190 (GNP) par 17.

18 *Lazarus Mbethe v United Manganese of Kalahari supra* par 6.

19 *Off-Beat Holiday Club v Sanbonani Holiday Spa Shareblock Limited supra* par 27; *Donaldson Investments v Anglo-Transvaal Colliers* 1979 (3) SA 713 (W) 719; 1980 (4) SA 204 (T) 209. This was so because since section 252 of the 1973 Act was interpreted in previous case law as would advance the remedy rather than to limit its reach, to him, the interpretation of section 163 contemplates that the section should be approached from or be given a broad context as was section 252. *Peel v Hamon J&C Engineering (Pty) Ltd supra* par 44 and 52; *Donald Investments (Pty) Ltd v Anglo-Transvaal Collieries Ltd: SA Mutual Life Assurance Society Intervening* 1979 (3) SA 713 (WLD) 719H, endorsed by full court in *Donaldson Investments (Pty) Ltd v Anglo-Transvaal Collieries* 1980 (4) SA 204 (T) 709B–F. Also see *Smyth v Investec Bank Ltd supra* par 20.

4 ACT OR OMISSION THAT "HAS HAD" …

Section 163(1)(*a*) of the 2008 Act empowers a shareholder or director with standing, as the case may be, to approach a court for an order to protect an interest threatened by an act or omission (occurring through the exercise of power by a director of that company or a related person) that "has had a result". Effectively, the application here is meant to be lodged against the company or a related person/company and not against the directors in person who would have made the decision on behalf of the company. However, looking at the orders that may be issued by a court under section 163(2), an applicant may request, and an order may be granted, by a court to declare as delinquent a director whose conduct or decision was incongruent with the provisions of the Act; or the court may order that the director be placed under probation regardless. Where such an order is applied for, the criteria set out in section 162 of the 2008 Act would have to be satisfied.

Ordinarily, if the language of the provision is read in its proper context and in line with the purpose of the section as a whole,[20] the wording "has had" suggests that, for a court to rule in favour of an applicant, the conduct complained of (as relates to the element under this criterion) *has to have had a result* that has affected the complainant's interests. The words are not futuristically framed to read that the conduct *"will or would have*". The phrasing represents continuous conduct which started in the past but continues to the present informed by the use of the phrase "has had". This phrase indicates that that which occurred in the past is symbiotically connected to the present result, or *vice versa*. It indicates progression of an occurrence.

It is interesting to note that the wording under section 163(1)(*a*) of the 2008 Act is different to that under the US MBCA and the UK Act 2006. The latter statutes, in addition to protecting against conduct that occurred in the past and is still persisting, also offer protection or give a right to challenge conduct that might lead to an adverse result in the future. The wording in section 14.30(2)(ii) of the MBCA refers to conduct "in the past, present and future". Under section 994(1)(*b*) of the UK 2006 Act, reference is made to conduct that "is or would be so prejudicial". Section 163(1)(*a*) of the 2008 Act does not offer this futuristic directed flexibility to protect one's interest.

5 ACT OR OMISSION THAT HAS HAD A "RESULT"

The second phrase that is central to the interpretation of the relief found under section 163(1)(*a*) is "result". Among the criteria to be satisfied under section 163(1)(*a*), only under one criterion does the word "result" appear. The question then is: in the context of the section, how must a result be determined?

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[20] *Smyth v Investec Bank Ltd supra* par 28; *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 543; *South African Transport and Allied Workers Union v Garvas* [2012] ZACC 12; 2013 (1) SA 83 (CC) par 37; and *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) (SCA) 581.

As alluded to above, the ordinary[21] meaning of the language of a provision determines the interpretation of that provision. How a "result" must be ascertained is informed by the words "has had". This means that there must have been or there must be an occurrence that will produce or lead to a result at a particular point. At that point, a determination will be made as to what the result is. If the language of the provision is read in its proper context and in line with the purpose of the section as a whole, the word "result" suggests that for a court to rule in favour of an applicant, the conduct complained of *has to have had a result* affecting the complainant's interests. The result must not be one of no consequence; it must have caused a detriment to the complainant's interests. Thus, practically, it appears that the conduct complained of has to have been complete at the time the complaint is lodged, so that the parties can be in a position to ascertain whether, and/or show, that the conduct has indeed had a result that is adverse to the interests of the complainant.[22] If the wording were phrased as in the US MBCA and the UK 2006 Act, one could advance an argument that the wrongful action would not need to be complete, and a completed result would not need to be proved.

Beukes and Swart are in agreement with this submission as they opine that the result and its effect must exist at the time an applicant applies to court.[23] The authors of *Henochsberg on the Companies Act 71 of 2008* support this interpretation as well. They observe that it is the "result" that must be oppressive or unfairly prejudicial,[24] or that disregards the interests of the applicant – not the act. Thus, for a court to support a complainant, the result complained of (which has had an adverse effect on the interests of that complainant) must have been caused by that act or omission. Therefore, the "present result" requires that the "*past-present act or omission*" must be a *sine qua non* for the result. It is submitted that there is nothing within the interpretation of the combined words "has had a result" to suggest a reference to conduct that may or would arise in future.[25] This is unlike the wording under the US MBCA and the UK 2006 Act where future development of a prejudicial conduct is apparently anticipated.

A practical understanding of whether a result has eventuated, and how this criterion must be satisfied, may be gleaned through the lens of what occurred in *Peel*. In summary, what the applicants argued for in *Peel* can be reduced to three factors. First, they alleged that the Hamon respondents failed to disclose a material fact, or to remedy the non-disclosure of that fact, immediately after the parties entered into the agreement in question. Secondly, the applicants had a legitimate expectation that they would profit from being associated with the name Hamon, but, because of the actions of the Hamon respondents, they did not and could no longer do so. Thirdly,

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21 *Ibid*.

22 *Peel v Hamon J&C Engineering (Pty) Ltd supra* par 47; Delport, Fourie, Vorster, Burdette, Esser, and Lombard *Henochsberg on the Companies Act 71 of 2008* (2021) 574(2).

23 Beukes and Swart 2014 *PER/PELJ* 1704.

24 Delport *et al Henochsberg on the Companies Act 71 of 2008* 597.

25 Under s 163(1) the words "any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial", which appear under s 994 of the UK Companies Act, do not appear. The words "*would be so prejudicial*" appear to refer to future conduct.

their company was exposed to serious business risks as a result of the conduct of the Hamon respondents.[26] The question that then arose was whether a "result" had eventuated as contemplated under the first criterion in section 163(1)(*a*)?

One of the respondents' contentions was that the conduct complained of occurred in the past and so was irrelevant to the applicants.[27] Moshidi J held that the complaint of the applicants fell squarely under section 163 of the 2008 Act.[28] The judge regarded the argument presented by the respondents to be contrary to the express provisions of section 163(1). In his analysis, he reasoned that the section covers both "past and future" conduct.[29] After listing all the criteria that must be satisfied, the court held that section 163(1)(*a*) was designed such that it applies to past conduct even when such conduct is no longer persisted with. Therefore, in the context of the Hamon respondents' conduct, the court found the section to be applicable and the conduct to comprise sufficient ground to invoke the provisions of the section. On the basis presented, the respondents' arguments were found to be without merit.[30] What was not certain or clear in the court's reasoning was what he meant when he referred to "future conduct". This point is ventilated below.

The court went on to determine another contention that – since the BEE issue was still under investigation by the department – the applicants could not argue that a risk had eventuated because, at the time, their concerns were still speculative. Their risk would materialise once it was found from the investigation undertaken by the department that the BEE deal was indeed a sham. On this argument, the court's view was that when a matter is already under investigation, there can hardly be a question of speculation.[31] The court was suggesting that if a matter is a subject of investigation, then it is only fair and reasonable to conclude that a result has eventuated, or that an accommodative interpretation can be adopted as if a result had eventuated.

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[26] They then sought an order directing: an exchange of shares between the parties in terms of section 163(2)(*e*); the restoration of Hamon SA by the applicant of a part, alternatively, the whole of the consideration that Hamon SA paid for the shares, with conditions as envisaged in section 163(2)(*g*); the varying or setting aside of the sale of shares transaction between Hamon SA, the second applicant and Hamon J&C and compensating Hamon J&C and/or second applicant, or any other of the applicants as envisaged in section 163(2)(*h*); and that Hamon SA pay compensation to the second applicant and/or Hamon J&C as envisaged in section 163(2)(*j*). *Peel v Hamon J&C Engineering (Pty) Ltd supra* par 23. It is submitted that there is no doubt that relief in respect of the complaints raised by the applicants in *Peel* could be ordered by a court under section 163(2) of the 2008 Act. This is notwithstanding that the orders requested could have been prayed for under other sections of the 2008 Act. Thus, insofar as entertaining and granting of the orders was concerned, the court did not err.

[27] *Peel v Hamon J&C Engineering (Pty) Ltd supra* par 61.

[28] *Peel v Hamon J&C Engineering (Pty) Ltd supra* par 62.

[29] *Peel v Hamon J&C Engineering (Pty) Ltd supra* par 61.

[30] *Ibid*.

[31] *Peel v Hamon J&C Engineering (Pty) Ltd supra* par 62.

6 EXAMINATION OF THE REASONING IN *PEEL*

With the aforegoing background in mind, as well as the arguments and the views expressed by Moshidi J, the question is whether the approach adopted by the court was reasonable in the circumstances of the case?

The court appears to have interpreted the words "has had a result" too broadly. It held that the words allowed for relief for conduct "in the past" as well as "in the future".[32] If this interpretative approach means that section 163(1)(*a*) also applies in the future, it is submitted that the court erred insofar as it included the phrase "in the future". By including these words, the court's interpretation suggests that it would be acceptable to interpret the section, in a claim relying on conduct that "has had" a result (which suggests past-present conduct), as including in its ambit an act or omission that *would have* a result – that is, conduct that would still lead to a result. It is submitted that, in line with the argument presented earlier, including a "would have" future result as Moshidi J's interpretation seems to suggest, is an overly broad interpretation in line with the arguments presented by the respondents, which he dismissed. If that is indeed what Moshidi J meant, it is submitted that his interpretation constitutes an overreach. The interpretation amounts to an importation of words into the criterion. The words do not seem to have been in contemplation when the drafters of section 163(1)(*a*) crafted the criterion to refer to an act or omission that had already reaped its result, and they could not have been unaware of the provisions of section 994(1) of the UK 2006 Act, which uses the words "would be so prejudicial" within its provisions. Clearly, that section of the phrase "would be so prejudiced" signifies reference to an anticipated future result that is adverse to the interests of a member or that company.

Another angle from which the court's decision can be viewed is to ask whether it was referring to conduct (and the ensuing result) that occurred prior to entering into the contractual arrangement but that could fall to be addressed after entering into that arrangement. From the context of paragraph 61 of the judgment, it appears that the court seems to have meant that relief can be sought by a person even if the conduct was only discovered at a later stage. Section 163(1) could be invoked not only when conduct produced a result in that moment. Even if the conduct occurred at a time in the past, it could still be challenged in the present-future time. Approached from this angle, it does not appear that the court meant that the section applies even to conduct that has yet to produce a result in the future. Looked at closely, it appears that when the court made its decision, it had in mind section 219(1) of the 2008 Act, relating to continuous conduct. This is despite the fact that at the time, there was no legal obligation between the parties, or a duty to negotiate in good faith by each of the parties.[33]

Assuming that there was overreach, the court nevertheless, after citing the principles applicable to the provisions of section 163(1) and various other

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[32] *Peel v Hamon J&C Engineering (Pty) Ltd supra* par 61.

[33] For a discussion of the concept of continuous practice, see Bidie "A Reflection on the Interpretation Germane to an 'Act or Omission' or 'Course of Conduct or Continued Practice' in terms of the 2008 Companies Act: A Critical Analysis of *Singh v The CIPC*" 2020 34 *Spec Juris* 1.

provisions of the section showing its broad nature,[34] correctly concluded that it was clear that the BEE transaction that formed the substance of the complaint was inappropriate. It held that the fact that the Hamon respondents "did not take" steps to remedy their conduct was oppressive to the interests of the applicants.[35] The words the court used to express itself are "were and are exposed" to serious business risks (suggesting that there was a "result"). This would be so especially if the DTI in its investigation were to find that the whole BEE deal was a sham.[36] Notwithstanding the divergent arguments presented above, when one considers the words used by the court ("was and is" and "disregards or disregarded"),[37] it is interesting that, when referring to the words "has had a result", they were interpreted as being capable of applying to an act or omission in the "past-present" as well as "in the future". In selecting the words, "was and is" and "disregards or disregarded", it appears that the court did realise that a result had to be connected to an act or omission that "is being or has already" been committed and now has produced a particular adverse/detrimental eventuality. It is thus interesting that the court stated that the words "has had" were capable of an interpretation encompassing an act or omission yet to occur in the future.

Writing a paper in reference to the case, Beukes and Swart argued that the applicants should not have been successful in *Peel*. First, this was so because the conduct complained of had not been completed by the time the joint venture company was incorporated and the applicants became shareholders of Hamon J&C.[38] By the same token, they further argued that, in their opinion, the applicants should have used a remedy from the law of contract in the form of *restitutio in integrum*, rather than section 163 as they seemed to argue for misrepresentation and as such should not have been successful in terms of the section.[39] In the alternative, section 165 of the 2008 Act (derivative action) would have been more suitable.[40] Furthermore, the authors disagreed with the decision in *Peel* with respect to when a business risk had to be taken to have eventuated. According to them, "a potential serious business risk" was not a result that satisfied the requirement of "result" under section 163(1) because the risk had not eventuated at the time of the application; the result was still a possibility that may or may not occur.[41] Because the court held that the applicants "were and are exposed to serious business risks especially if the DTI eventually finds that the whole BEE issue was a sham", [42] Beukes and Swart are of the view that the court did not in fact find that the applicants "were exposed" to a serious business risk, but only that they *would be exposed* to a serious business risk if the DTI eventually found that the BEE transaction was

34 He also referred to other foreign jurisdictions and penned the purpose of Broad-Based Black Economic Empowerment (B-BBEE).
35 *Peel v Hamon J&C Engineering (Pty) Ltd supra* par 55.
36 *Peel v Hamon J&C Engineering (Pty) Ltd supra* par 46.
37 *Peel v Hamon J&C Engineering (Pty) Ltd supra* par 55.
38 Beukes and Swart 2014 *PER/PELJ* 1700.
39 Beukes and Swart 2014 *PER/PELJ* 1701.
40 Beukes and Swart 2014 *PER/PELJ* 1704.
41 Beukes and Swart 2014 *PER/PELJ* 1702–1703.
42 *Peel v Hamon J&C Engineering (Pty) Ltd supra* par 55.

improper.[43] That view was fortified in their observation that the court did not specifically indicate that the exposure constituted prejudice, oppression or a disregard of the applicants' interests. Therefore, the implication of the decision was that not only would a serious business risk be a result that satisfies the requirements of section 163(1)(*a*), but that the same would also be true for the mere possibility of a serious business risk.[44]

It is submitted that there is a preferred alternative to the understanding proffered by Beukes and Swart. First, it is important to clarify that there existed a contract between the parties to merge their companies. The terms of that contract were not infringed by any party at the time the application in terms of section 163 had been instituted, so the contract and its terms were not in contention.[45] From reading the case, what turned out to be the point of contention was something that was not contemplated by the parties in their contract, being the "BEE issue", which was viewed by the applicants as serious enough to have an adverse effect on their interests.[46] Thus it was something the applicants as party to the contract felt had a bearing on the credibility of the relationship created through the contract, such that it "had seriously affected/impaired" and "would continue to affect/impair" the parties' business relationship moving forward. To put the arguments into perspective, according to the first argument by the applicants, the second and third respondents engaged in an inappropriate BEE exercise, and they did not and had not sought to take appropriate measures to remedy their conduct.[47] They transacted with November and Mangwana and did not disclose this fact. As a result, the applicants "were and are exposed" to serious business risks.[48] This would be especially so if the DTI were to eventually find that the whole BEE issue was a sham.[49] The arguments in the case thus centred on two factors: "respondent's failure to disclose"; and the fact that the applicants "were and are exposed". In hindsight, the argument meant that disclosure did not occur when reasonable complainants would expect that it should have, and as held by Moshidi J, evidence proved this to be so.[50] The complainants felt that their interests at the time had been undermined by the non-disclosure and that the conduct of undermining continued well after the parties had entered into their business relationship. Because, in law, a failure to disclose is characterised as an omission, it is not clear why the court was wrong, as Beukes and Swart aver, to regard the non-disclosure by the Hamon respondents as a "result" that had affected the interests of the applicants. It is clear in the judgment that Moshidi J was convinced that a result had eventuated by the use of the

43 Beukes and Swart 2014 *PER/PELJ* 1703.

44 *Ibid*.

45 Starting the analysis of the case in *Wootliff v Rushton-Turner supra*, Chief Registrar Briggs made a similar observation that the petition in the case did not allege breach of any of the agreements regulating the affairs of the company in question, and the case was not carried out on those bases.

46 *Peel v Hamon J&C Engineering (Pty) Ltd supra* par 57.

47 *Peel v Hamon J&C Engineering (Pty) Ltd supra* par 55.

48 *Ibid*.

49 *Ibid*.

50 *Ibid*.

words “were and are exposed” to “business risks” as this was the underlying argument by the applicants.[51]

Developing from the first argument, in their second, the applicants averred that they had “legitimate expectations to profit” from their association with the Hamon company/respondents. Because of the respondent’s conduct, there existed a clear chance that they would no longer profit, or the chance that they would was close to nil. According to the court, the presented evidence proved this to be so – a “result” had eventuated. The result was that the applicants would no longer derive benefits from their association with the name “Hamon” as they had legitimately expected. The actions of the Hamon respondents with regard to the BEE issue had made such procurement impossible.

Lastly, the applicants asserted that the resondents’ conduct (the BEE issue) caused their company to be exposed to business risks. The fact that the company’s business was exposed to risks, and that this was accepted by the court as having been evidently proved, constituted “a result”. The result is that the “company’s business was exposed due to the BEE issue”. The conduct of exposing their business to risks was complete and the result was “exposure to risks”. In this regard, the DTI did not need to complete its investigation to establish the extent of the risk of exposure. The fact is there was exposure at that time. This exposure was given impetus by the fact that the respondents admitted that the BEE transaction was not in line with the law. The risk here was that the companies associated with Hamon would no longer be eligible to be considered for business contracts by state entities. This was especially so given that the Hamon respondents had acknowledged that the BEE transaction was not in line with the B-BBEE Act with which they had to comply. The exposure was factually proved notwithstanding that the complaint was phrased in arguments as if the risk were still a possibility, instead of it being real at the time.

7 CONCLUSION

The aforegoing discussion centres on a liberal interpretation of the criterion under section 163(1)(*a*) of the 2008 Act, and on whether that interpretation is consistent with the overall purpose – first, of the section as a whole, and secondly, of the 2008 Act generally. It is the writer’s considered view that Moshidi J’s approach in the case aligns well with the general purpose of the Act and that it may be interpreted as one that fosters a liberal interpretative approach to strengthen observance of corporate governance, as intended by the drafters of the Act.

Further, the writer is of the view that the applicants’ argument in *Peel* with regard to the BEE issue (that it had potential to affect the company’s business) must not be read literally or strictly to mean that a business risk had not materialised at the time. The term “materialised” in the context of the

[51] Moshidi J defined “business risk” as: “The probability of loss inherent in organisations operations and environment (such as competition and adverse economic conditions) that may impair its ability to provide returns on investment. Business risks plus the financial risk arising from the use of debt (borrowed capital and/or trade credit) equal to corporate risk” *Peel v Hamon J&C Engineering (Pty) Ltd supra* par 55.

facts of the case must be given a flexible meaning so as to assist in curbing conduct of the nature seen in *Peel*; otherwise, if interpreted strictly, courts would be running the risk of allowing company directors breathing space to circumvent corporate governance rules. The argument must be understood to mean that, at the conclusion of the joint venture company, it should have, or it ought to have occurred in the minds of the Hamon respondents that their failure to disclose the BEE issue to the applicants was accompanied by the knowledge that it was a contract that was legally impermissible and wrong. It therefore ought to have occurred to them that on discovery that the BEE issue was indeed a sham, the interests of the applicants would be detrimentally affected, as the sham was not only a crime, but was also conduct that would shutter business opportunities. It is submitted that this is how the court's argument has to be understood. Based on the presented evidence, there is no doubt that the Hamon respondents knew that the BEE contract was a sham. Moshidi J established this from the evidence, as well as from the respondents, who themselves confirmed that they knew it was impermissible. Moshidi J pointed out from their answering affidavit that the respondents conceded that the contracts with the two ladies did not comply with the requirements of the B-BBEE Act.[52] Thus, it is submitted in support of the court's decision, that in ruling for the applicants, it recognised that in all scenarios the actions or omissions of the Hamon respondents had to be interpreted as having had a result that could be interpreted as having eventuated. This decision closes any potential loopholes within section 163(1)(*a*) of the 2008 Act that company directors are likely to and/or would be likely to explore as a means not to be held accountable for their actions.

[52] *Peel v Hamon J&C Engineering (Pty) Ltd supra* par 63.

A COMPARATIVE STUDY OF ISLAMIC AND SOUTH AFRICAN LAW ON LIVING AND CADAVERIC ORGAN DONATIONS: CONSENSUS AND DIVERGENCE*

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SUMMARY

Religion plays a pivotal role in people's attitude to organ donation. Generally, practising Muslims (adherents of the Islamic faith) are unlikely to consent to organ donation because they believe it is not in keeping with the tenets of Islamic law (*Sharī`ah*). Although there is a wealth of information on organ donation with reference to both South African and Islamic law, there has not been a study comparing the two sets of laws. The purpose of this article is to develop the literature on living and cadaveric organ donation by drawing a comparison between Islamic law and South African law on this issue. Apart from a few minor differences inherent in each set of laws, there is a startling consensus in South African law and *Sunnī* (mainstream) Islamic law[1] on the issue of organ donation.[2] This research is also significant in that it provides legal and medical professionals, academics and practitioners with an informed position from which to advise clients and/or patients. This may in turn raise awareness among clients and/or patients, which could result in a desirable increase in organ donation rates among Muslims in South Africa. This article makes a number of recommendations in this regard.

* This article is based on SS Nadvi's LLM dissertation entitled *Living and Cadaveric Organ Donations: A Comparative Study of Islamic and South African Law – Consensus and Divergence.* We are grateful to Professor Magda Slabbert, Professor of Jurisprudence at UNISA for encouraging us to publish an article based on the dissertation.

1 Muslims can be divided into two main groups: a majority of *Sunnī* Muslims, and a minority of *Shī`ah* Muslims. Iran is the only *Shī`ah* Muslim country.

2 *Shī`ah* Islamic scholars hold a more liberal view and allow for the sale of organs in Iran through a state-run compensated organ procurement system.

1 INTRODUCTION AND BACKGROUND

Transplantation is necessary when a patient's organ has failed or has been damaged by disease or injury;[3] organ transplantation remains among the most effective methods to treat a patient with end-stage organ disease.[4] Apart from saving lives, it drastically improves the quality of life of persons and is also the most cost-effective means of treatment.[5]

Organ donation is the process of surgically removing an organ or tissue from one person (the organ donor) and placing it into another person (the recipient).[6] This process is also referred to where the donor is alive.[7] Cadaveric organ donations occur once the donor is dead.[8] Organ transplantation in South Africa is regulated by the National Health Act[9] (NHA) and its regulations.[10] "Organ", as defined by the NHA, means any part of the human body adapted by its structure to perform any particular vital function, including the eye and its accessories, but does not include skin and appendages, flesh, bone, bone marrow, body fluids, blood or a gamete.[11] Although "organ" is separately defined, it is also included in the definition of "tissue".[12]

The biggest limitation to organ transplantation, both in South Africa and globally, is the dire shortage of organs.[13] For example, in 2016, only 249 kidney transplants were performed in South Africa, with 512 organ transplants being performed in total, and this included corneal transplants. Considering that there are approximately 6 000 people awaiting kidney transplants, and that only 249 kidney transplants were performed in 2016, it is apparent that the number of organ transplants being performed in South Africa is woefully inadequate.[14]

The root cause of the shortage of organs in South Africa is the reluctance of people to bequeath their organs upon death, to donate an organ while still alive (living donation by a related or non-related living donor), or to consent

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3 Agrawal "Organ Donation and Transplantation" https://my.clevelandclinic.org/health/articles/11750-organ-donation-transplantation (accessed 2019-05-29).

4 Miller "Organ Donation and Transplantation in South Africa: An Update" 2013 31(6) *CME* 220–222; Etheridge, Turner and Kahn "Public Attitudes to Organ Donation Among a Sample of Urban-Dwelling South African Adults: A 2012 Study" 2013 27(5) *Clinical Transplantation* 684–692.

5 Sparaco "Increasing Organ Donation: Is Presumed Consent the Answer?" 2017 6(1) *Transplantation News 5.*

6 Agrawal https://my.clevelandclinic.org/health/articles/11750-organ-donation-transplantation.

7 Blumenthal "The Living Donation Process" https://www.organdonor.gov/about/process/living-donation.html (accessed 2019-05-29).

8 *Ibid*.

9 61 of 2003.

10 *GG* 35099 of 2012-03-02.

11 National Health Act 61 of 2003. Definitions.

12 Mcquoid-Mason and Dada "Tissue Transplantation and the National Health Act" 2006 24(3) *CME* 128–130.

13 Sparaco 2017 *Transplantation News 5*; Etheridge *et al* 2013 *Clinical Transplantation* 684–692.

14 Nicholls "Organ Donation Foundation of South Africa, Transplant Statistics, South Africa; Organ Donor Foundation" http://www.odf.org.za/ info and faq-s/statistics.html (accessed 2019-03-14).

to the donation of an organ of a deceased family member (cadaveric organ donation). The question of organ donation and transplantation most commonly arises when a family loses a loved one – a time when there is deep emotional conflict and a sense of loss.[15] The consent rates, and consequently the number of organ transplants taking place in South Africa, are steadily declining.[16] There are a myriad reasons for this decline – lack of awareness, ignorance, fallacies and myths.[17] Certain categories of people in South Africa are particularly reluctant to consent to organ donation, including people with strong religious beliefs.[18]

Because practising Muslims (adherents of the Islamic faith) regard Islamic law as being immutable and God-ordained,[19] they are hesitant or are unlikely to consent to organ donation as they believe it is not in keeping with the tenets of Islamic law. While Islamic law may be in accordance with South African law, Muslims are hesitant or are unlikely to consent to organ donation owing to their mistaken belief that it is not in keeping with Islamic law.[20] However, there has, as yet been no study comparing Islamic law and South African law with regard to living and cadaveric organ donation.

Two prominent scholars have addressed the issue of organ donation in South Africa.[21] Ebrahim has conducted research and written exhaustively on a wide range of biomedical issues affecting Muslims in South Africa.[22] More pertinent to this study, Ebrahim has written extensively on Islamic law and organ donation.[23] However, he writes from an Islamic law perspective,

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15 *Ibid*.

16 Etheridge, Turner and Kahn "Attitudes to Organ Donation Among Some Urban South African Populations Remain Unchanged: A Cross-Sectional Study (1993–2013)" 2014 184(2) *SAMJ* 135–137; Etheridge *et al* 2013 *Clinical Transplantation* 684–692; Van Heerden and Du Plessis "Where Do Organs Come From" 2016 5(1) *Transplantation News* 6–7; Thompson "Organ Donation in South Africa: A Call to Action" 2017 33(2) *SAMJ* 36–37.

17 *Ibid*.

18 Blignaut "More People Than Expected in Marginalized Communities Know About Organ Donation" 2017 6(2) *Transplantation News* 2; Dimo "Organ Donation Behaviour: Debates Amongst Black South African" 2018 16(3) *Gender and Behaviour* 12200–12210; Mphore "Obliviousness, Not Disease, Is What Kills the Nation" 2016 15(3) *Transplantation News* 6; Thompson 2017 *SAMJ* 36–37.

19 *Ibid*.

20 Sheikh "Shariah: Law and Ethics of Organ Donation in Islam" 2017 13(2) *J Int L Islamic L* 30–44; Thompson 2017 *SAMJ* 36–37.

21 For the purposes of this article, the focus is on the South African scholars. There are scholars who address this topic in other parts of the globe.

22 Ebrahim *Islam and Vaccination* (2013) 82; Ebrahim *Biomedical Issues: Islamic Perspective* (1988) 164; Ebrahim *Reproductive Health and Islamic Values: Ethical and Legal Insights* (2011) 107; Ebrahim *Intensive Care Unit (ICU) Ethical Dilemmas: Guidelines for Muslim Families* (2014) 60; Ebrahim, Hoosen and Hathout *Death and Dying: Advising Patient and Family* (1995) 21; Ebrahim, Randeree and Vawda *Ethics of Medical Research: Some Islamic Considerations* (1994) 13; Ebrahim "Euthanasia (Qatl al - alma)" 2007 39 *Journal of the Islamic Medical Association of North America* 10–13. Professor Abul Fadl Mohsin Ebrahim is an emeritus Professor of Islamic Law at the University of KwaZulu-Natal.

23 Ebrahim *Shariah and Organ Transplants* (1989) 67; Ebrahim "Organ Transplantation: Contemporary Sunni Muslims Legal and Ethical Perspectives" 1995 9(34) *Bioethics* 291–302; Ebrahim "Islamic Perspective on Brain Death and Organ Transplantation: Current Issues and Challenges" in Bagheri and Alali (eds) *Islamic Bioethics* (2017) 4; Ebrahim *Organ Transplantation: Contemporary Islamic Legal and Ethical Perspectives* (1988) 146; Ebrahim "The Living Will (Wasiyat Al-Hayy) A Study of its Legality in the Light of Islamic Jurisprudence" 2000 19 *Med Law* 147–160.

without reference to South African legislation. On the other hand, Slabbert has written extensively on organ donation and South African law, with little or no reference to Islamic law.[24] This study, therefore, attempts to close a gap in the literature through a comparative study of Islamic and South African law regarding organ donation and the bequest of organs, paving the way for better and more informed advice to the community.

This article commences by explaining the South African law on organ donation and includes a discussion on the opt-in and opt-out systems. This is followed by an explanation of the Islamic law position. A comparative analysis of the two systems is then made, followed by some concluding remarks and recommendations.

2 SOUTH AFRICAN LAW AND ORGAN DONATION

Organ transplantation in South Africa is regulated by the NHA[25] and its regulations, namely the Regulations Regarding the General Control of Human Bodies, Tissue, Blood, Blood Products and Gametes.[26] The NHA replaced the Human Tissue Act, which was repealed on 1 March 2012.[27] Chapter 8 of the NHA deals specifically with aspects of organ donation. For the purposes of this study, the term "organ" refers to any solid vital organ – for example, the kidney, liver, or heart. The regulations provide that an organ may be removed from a living person only with the written consent of the donor, if he or she is over 18 years of age, or by the parents or guardians of donors under 18 years of age.[28] In terms of the Act, persons under the age of 18 years may not donate tissue that is not replaceable by natural processes.[29]

Section 58 of the Act deals with the institutions that may perform transplants and the authorisations required.[30] Section 60 of the Act deals with issues of payment for organs and is very specific. It is an offence for an organ donor to receive financial or other reward for organ donation, except for reimbursement of reasonable costs incurred (for example, travel costs and medical bills).[31] It is also an offence to sell or trade in organs, except as provided for in the Act. A person convicted of either of these offences may be fined or imprisoned for up to five years or both.[32] However, a healthcare provider (transplant doctor) registered with a statutory health professional council may receive remuneration for any professional service rendered.[33] According to the Act, it is illegal to transplant a human organ into a person who is not a South African citizen or permanent resident without the

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24 Professor Magda Slabbert is a Professor of Jurisprudence at the University of South Africa and is the leading expert on organ donation in South African law.

25 National Health Act 61 of 2003.

26 *GG* 35099 of 2012-03-02.

27 Human Tissue Act 65 of 1983.

28 GM R180 in *GG* 33099 of 2012-03-02.

29 S 56(2) of the NHA.

30 S 58 of the NHA.

31 S 60(4) of the NHA.

32 S 60(5) of the NHA.

33 S 60(3) of the NHA.

Minister's written authorisation.[34] Even if a non-South-African or non-permanent-resident potential donor is genuinely related to the South African recipient, ministerial consent is still required. In genuine cases, it is likely that the Minister will consent.[35] Doctors who transplant organs into non-South African citizens or permanent residents without ministerial consent, as occurred in the kidney organ-trafficking saga in Durban (discussed below), or who charge a fee for a human organ, as opposed to a fee for professional services, are guilty of an offence and on conviction may be subject to a fine or imprisonment of up to five years or both.[36]

In an important development, the NHA defines death as "brain death".[37] The regulations provide that in the case of organ transplantation, the death of the deceased has to be determined by two doctors, one of whom must have been qualified for at least five years, and neither of whom may be members of the transplant team.[38] Where a deceased has not prohibited organ donation while still alive, or has not bequeathed organs while alive, the Act provides a specific order for relatives to consent to organ donation – namely, the spouse, partner, major child, parent, guardian, major brother or major sister.[39]

Under the NHA, persons competent to make a will may donate their organ/s in a will or document signed by them and two competent witnesses, or in an oral statement in the presence of two competent witnesses.[40] Persons have to be over the age of 16 years in order to be regarded as competent to make a will.[41] Competent witnesses must be older than 14 years.[42] The bequest of organs in a will, document or statement must be carried out in the prescribed manner, and the donee (recipient) determined in accordance with the prescribed procedure.[43] Where no specific institution or donee is named, the regulations stipulate that the institution in the appropriate category that is nearest to the place where the donor's body is kept shall be deemed to be the donee.[44] Also, the regulations stipulate that if the donation is made to a specific recipient who is not within easy reach at the time and place of the donor's death, the institution in the appropriate category that is nearest to the place of the donor's death shall be deemed to be the donee.[45] With regard to conflicting donations, effect is to be given to the donation made last.[46] Donation of organs in a will or document can be revoked by intentional destruction of the will or document, or by drawing up a

34 S 61(3) of the NHA.
35 Mcquoid-Mason "Human Tissue and Organ Transplant Provisions: Chapter 8 of the National Health Act and its Regulations, in Effect from March 2012 – What Doctors Must Know" 2012 102(9) *SAMJ* 734–735.
36 S 61(5) of the NHA.
37 This was not previously defined in the repealed Human Tissue Act.
38 GN R180 in *GG* 35099 of 2012-03-02.
39 S 62(2) of the NHA.
40 S 62(1) of the NHA.
41 S 4 of the Wills Act 7 of 1953.
42 S 1 of the Wills Act 7 of 1953.
43 Ss 62(1) and 61(1) and (2) of the NHA.
44 Mcquoid-Mason 2012 *SAMJ* 734–735); GN R180 in *GG* 35099 of 2012-03-02.
45 GN R180 in *GG* 35099 of 2012-03-02.
46 GN R180 in *GG* 35099 of 2012-03-02.

new will or document.[47] Slabbert reflects that new statutes such as the Protection of Personal Information Act[48] should not hinder the organ donation process.[49]

There are two approaches to organ donation – namely, the opt-in system and the opt-out system. Currently, South African organ donation is based on the opt-in system.[50] This requires explicit consent to harvest organs from the family of a deceased person. There are an increasing number of countries adopting the opt-out system. This means that every person after death is presumed to be a potential organ donor unless the patient has indicated otherwise during his or her lifetime. Many countries adopt "soft" opt-out systems, where family members can decline organ donation on behalf of the deceased person, if they so wish.[51]

However, implementation of the opt-out systems does not always increase organ donation rates.[52] In fact, Etheredge and co-workers studying attitudes to organ donation among South Africans felt that an opt-out system would have a negative effect on organ donation rates in South Africa.[53] Etheredge postulates that the opt-out system of presumed consent is not consistent with South African law.[54] Furthermore, religious and cultural freedom as well as the concept of informed consent would be compromised.[55] Slabbert and Venter reiterate that it is not the opt-in organ procurement system in South Africa that is the problem.[56] At present, the majority of researchers believe that an opt-out system is not feasible in South Africa, as the population lacks sufficient information about organ donation to make an informed decision.[57]

3 ISLAMIC LAW (SHARI'AH) AND ORGAN DONATION

3 1 Background and sources of Islamic Law

Muslims believe that the *Qur'ān* is the divine word of God (Allah) and was revealed to the Prophet Muḥammad (born 571, died 632), whom they believe is the last messenger of God.[58] Islam is a complete way of life and

47 S 65 of the NHA.

48 4 of 2013.

49 Slabbert and Molusi "The Possible Effect of the Protection of Personal Information Act 4 of 2013 on Organ and Tissue Donations" 2017 38(3) *Obiter* 662–640.

50 Sparaco 2017 *Transplantation News 5.*

51 *Ibid*. Spain is the world leader with regard to the soft opt-out option.

52 *Ibid.*

53 Etheridge *et al* 2014 *SAMJ* 135–137; Etheridge *et al* 2013 *Clinical Transplantation* 684–692.

54 *Ibid*.

55 *Ibid*.

56 Slabbert and Venter "Routine Referrals: A Possible Solution for Transplantation Shortages" 2017 10 *S Afr J Bioethics Law* 15–19. They emphasise that Spain, even with its soft opt-out system, still asks the relatives of the deceased for consent.

57 Etheridge *et al* 2014 *SAMJ* 135–137; Etheridge *et al* 2013 *Clinical Transplantation* 684–692; Slabbert and Venter 2017 *S Afr J Bioethics Law* 15–19.

58 *Ibid*.

encompasses the spiritual together with the mundane activities of life.[59] Although their core beliefs are the same, Muslims can be divided politically into two groups: the majority (about 95 per cent) are *Sunni,* and the remainder are *Shī`ah*.[60] Iran is the only *Shī`ah* Muslim country.

Sharī`ah* (Islamic law) and *fiqh* (Islamic jurisprudence) provide the conceptual basis upon which all Islamic legal principles are founded. *Sharī`ah is laid out in the *Qur'ān,* revealed by God to Prophet Muḥammad and the *Sunnah* (verbal commands and practices of Prophet Muhammad) as recorded in the *Ḥadīth* (compilations of the *Sunnah*).[61] Muslims maintain that all laws are derived from careful study of these primary sources and there can be no new addition to them, except in interpretation.[62] Islamic jurisprudence is known as *fiqh* and is the human understanding and interpretation of the *Sharī`ah*.[63] An Islamic jurisprudential scholar (*faqīh*), after study of the law, will determine whether an action is lawful (*ḥalāl*) or unlawful (*ḥarām*).[64] In addition to the two primary sources (the *Qur'ān* and *Sunnah*/*Ḥadīth* of Prophet Muḥammad), there are two secondary sources. These are Islamic scholarly consensus (*ijmā`*) and legal reasoning by analogy (*qiyās*).

When a scholar attempts to find an existing legal principle or develop a new one, the sources need to be carefully examined, and have to be consulted in a particular order. The first source needing to be considered is the *Qur'ān*. *Sharī`ah* is principally based on the Holy *Qur'ān*.[65] About 500 verses in the *Qur'ān* have legal content. These cover a broad range of issues, including personal matters (charity and fasting), family matters (marriage, divorce and inheritance), commercial transactions (sales, leases and interest), crimes and penalties, justice, equality, evidence and citizen's rights and duties.[66] The *Qur'ān* expresses the law both in legal and ethical principles.[67]

The next source is the *Sunnah* or *Ḥadīth*. *Sunnah* (literally "well-trodden path") is based on the practices of Prophet Muhammad and constitutes Islamic traditions.[68] Books of *Ḥadīth* (literally "to report") are the collections of words and deeds of the Prophet Muhammad that were recorded both verbally and in writing by his companions.[69] *Hadith* are based on Prophet Muḥammad's own life and are the biographical basis of *Sharī`ah*. The

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59 Albar "Organ Transplantation: A Sunni Islamic Perspective" 2012 23 *Saudi J Kidney Dis Transpl* 817–822.

60 Goodarzi "Tissue and Organ Donation and Transplantation in Iran" 2015 16 *Cell Tissue Bank* 295–301.

61 Ahadith.co.uk "Hadith Search Engine" http://ahadith.co.uk/search (accessed 2019-04-12); Sheikh 2017 *J Int L Islamic L* 30–44.

62 *Ibid*.

63 *Ibid.*

64 *Ibid*.

65 Ali *The Holy Qur'an: Test, Translation and Commentary* (1984); Ahadith.co.uk http://ahadith.co.uk/search.

66 Kamali "Law and Society: The Interplay of Revelation and Reason" in Esposito (ed) *The Oxford History of Islam* (1999) 107.

67 Sheikh 2017 *J Int L Islamic L* 30–44.

68 Ahadith.co.uk http://ahadith.co.uk/search.

69 Sheikh 2017 *J Int L Islamic L* 30–44.

Sunnah is the entire system of religious, legal and social obligations derived from the *Hadith*.[70] The categorisation and authentication of *Ḥadīth* is an arduous science and is beyond the scope of this article.

The third source is *Ijmā`*, which is the consensus of legal opinion by jurists on religious and legal issues.[71] Legitimacy of scholarly decisions is achieved by consensus within the Muslim community. *Ijmā`* is an important source of *Sharī`ah* in Islam. In a *Ḥadīth*, Prophet Muḥammad was reported to say: "My people (the Muslim *ummah*) will never agree upon an error."[72] The final source is *Qiyās*, which are strict analogical deductions derived from the *Qur'ān*, *Sunnah* and *Ḥadīth,* and *Ijmā`*.[73] Islamic scholars use *Qiyās* to formulate legal decisions on matters not directly addressed in the *Qur'an*, *Sunnah/Ḥadith* and by *Ijmā`* – for example, organ donation. *Qiyās* allow Islamic scholars and jurists to develop a principle on an issue not decided earlier, thus ensuring that *Sharī`ah* remains dynamic and equally applicable to the present day.[74]

Where the sources are silent on an issue, a legal principle can be developed through *Ijmā* (consensus of jurists) or *Qiyās* (analogical deduction). Jurists have arrived at an Islamic principle on organ donation through considered examination of the sources and the objectives of Islamic law and this is set out below.

3 2 Legal principle of organ donation in Islamic law

Organ transplantation *per se* is not addressed in the two primary sources of *Sharī`ah* (the *Qur'ān* and *Sunnah)*.[75] It is in the secondary sources that we find jurisprudential legal principle on organ donation in Islam. The Muslim jurists in favour of organ donation base their arguments on the objectives of *Sharī`ah*. The three objectives discussed below are *Al Maṣlaḥah* (greater public welfare and interest), *Al Īhār* (Altruism), and the directive to seek medical treatment.

The concept of greater public welfare is extremely important in the *Sharī`ah* and is a principal component of Islamic jurisprudence.[76] When considering this objective, three Islamic judicial rules apply.[77] First is the principle of necessity (*ḍarūrah)* (since necessity makes the unlawful permissible). Secondly, when two conflicting interests arise, the one that derives greater benefit takes precedence. Finally, the lesser of two evils is selected.

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70 *Ibid*.

71 *Ibid*.

72 Ahadith.co.uk "A Hadith Search Engine" http://ahadith.co.uk/search.

73 *Ibid*.

74 Sheikh 2017 *J Int L Islamic L* 30–44.

75 Ebrahim *Organ Transplantation: Contemporary Islamic Legal and Ethical Perspectives* 18; Sheikh 2017 *J Int L Islamic L* 30–44; Sharif "Organ Donation and Islam: Challenges and Opportunities" 2012 94(5) *Transplantation Journal* 442–446.

76 Sheikh 2017 *J Int L Islamic L* 30–44.

77 Ebrahim *Organ Transplantation: Contemporary Islamic Legal and Ethical Perspectives* 62.

The concept of *Maṣlaḥah* is based on the doctrines of necessity and equitable consideration.[78] In terms of necessity, the *Qur'ān* says in *Sūrat Baqarah*, chapter 2, verse 173 (2:173):[79]

> "He hath only forbidden you dead meat, and blood, and the flesh of swine, and that on which any other name hath been invoked besides that of Allah. But if one is forced by necessity, without willful disobedience, nor transgressing due limits, then is he guiltless. For Allah is Oft-forgiving Most Merciful."

Thus, in the face of necessity the unlawful becomes lawful.

Furthermore, Ebrahim explains that, if the general gain outweighs the negative aspects of an action, the action would be allowed.[80] In this context, *Sharī`ah* would allow the cutting of the belly of a dead pregnant woman in order to save the life of the baby. Thus, the rights of the living supersede consideration of the dead.[81] Similarly, Ebrahim explains that *Sharī`ah* would allow the cutting of the belly of a deceased person who swallowed a valuable object (for example, a diamond), in order that it may be returned to the rightful owner. The explanation for this is that, even if the valuable object belonged to the deceased, the heirs would be in a position to benefit from it.[82] Ebrahim argues that, following the same line of reasoning, it would be justifiable to retrieve a deceased person's organ, for the purposes of transplanting it into a living person, thereby benefiting the recipient.[83]

Furthermore, in accordance with the principle of equity, lesser harm is tolerated if it leads to a greater good for the community. According to this principle, Sheikh believes that if one person dies because an organ cannot be found, all of society is harmed.[84] The *Qur'ān* emphasises the sanctity of human life in chapter 5, verse 32 (5:32):[85]

> "If anyone slays a human being unless it be (in punishment) for murder or for spreading corruption on earth – it shall be as if he had slain the whole of mankind; whereas if anyone saves a life, it shall be as if he had saved the life of all mankind."

Nevertheless, Ebrahim and others caution that the following conditions must be present for transplantation to take place:[86]

(a) Transplantation must be the only means of treatment for the patient in need of the organ.
(b) The degree of success of the procedure must be relatively high.

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78 Sheikh 2017 *J Int L Islamic L* 30–44.
79 Ali *The Holy Qur'an: Test, Translation and Commentary*; Ahadith.co.uk http://ahadith.co.uk/search.
80 Ebrahim *Organ Transplantation: Contemporary Islamic Legal and Ethical Perspectives* 63.
81 *Ibid*.
82 *Ibid*.
83 *Ibid*.
84 Sheikh 2017 *J Int L Islamic L* 30–44.
85 Ali *The Holy Qur'an: Test, Translation and Commentary*; Ahadith.co.uk http://ahadith.co.uk/search.
86 Ebrahim *Organ Transplantation: Contemporary Islamic Legal and Ethical Perspectives* 64; Sheikh 2017 *J Int L Islamic L* 30–44.

(c) The consent of the owner of the organ or the heirs must have been obtained.
(d) Death must have been fully established.
(e) The recipient must have been informed of the operation and its implications.

The second objective of *Sharī`ah* is *Al Īhār* (Altruism). The *Qur'ān* and the *Sunnah* both exhort Muslims to do good deeds and to cooperate with one another in acts of kindness. The Qur'anic imperative in chapter 5, verse 215 (5:215) is:[87]

> "Help you one another in righteousness and piety."

The *Qur'ān* admonishes believers in chapter 59, verse 9 (59:9) to:[88]

> "show their affection to such as came to them for refuge, and entertain no desire in their hearts for things given to the (latter), but give them preference over themselves, even though poverty was their (own lot). And those save from the covetousness of their own souls, they are the ones that achieve prosperity."

Again, in chapter 3, verse 92 (3:92), the *Qur'ān* addresses the believers, stating:[89]

> "by no means shall ye attain righteousness unless ye give (freely) of that which ye love."

As for the *Sunnah*, Prophet Muhammad is reported to have said:

> "None of you truly believe till he wishes for his brother what he wishes for himself"[90]

and

> "whoever helps another, will be granted help in the hereafter."[91]

Islamic scholars use a combination of the above authoritative directives to promote organ donation under the principle of altruism. Donation of an organ could be considered as an act of charity (*ṣadaqah*).[92] Such acts of charity are not confined to Muslims only. Prophet Muḥammad exhorted his followers to love all humanity. Once, when Prophet Muḥammad stood in veneration of the passing funeral of a Jewish man at a time when Jews were waging war against him and Islam, one of his companions exclaimed, "It is the funeral of a Jew." The Prophet answered, "Is it not a human soul?"[93]

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87 Ali *The Holy Qur'an: Test, Translation and Commentary*; Ahadith.co.uk http://ahadith.co.uk/search.
88 *Ibid*.
89 *Ibid*.
90 Ahadith.co.uk http://ahadith.co.uk/search.
91 *Ibid*.
92 Zahidul Islam "Organ Donation and Transplantation Issues in Islam and Present Situation" 2014 22 *Journal of Law, Policy and Globalization* 99–103.
93 Ahadith.co.uk http://ahadith.co.uk/search.

The Prophet ordered Muslims to be compassionate to all human beings. He declared:

> "All mankind is the family of Allah. Those who best serve his family are best loved by God."[94]

However, all scholars agree that a vital organ, such as the heart, cannot be donated by a living donor, as this would be tantamount to suicide.[95]

The third objective of *Sharī`ah* is the directive to seek medical treatment. Prophet Muḥammad has exhorted his followers to seek medical treatment.[96]

> "Make use of medical treatment, for Allah has not made a disease without a remedy for it."

Thus, using the sources cited above, individual jurists and scholars declare organ donation to be permitted in Islam, subject to certain conditions. There are also collective resolutions (*Qarārāt*) on organ donation, as discussed below.

3 3 Islamic organisational judicial resolutions (Qarārāt) on organ donation

A *qarar* is a collective resolution of Muslim scholars that is binding upon the Muslim community. *Shī`ah* scholars were the first to sanction organ donation.[97] In 1995, the Council of the Islamic *Fiqh* Academy of the Muslim World League, Makkah, Saudi Arabia resolved that organ donation was permissible, that it does not violate the dignity of the body of the donor, and that it is a praiseworthy act, as long as the following conditions are met:[98]

(a) The donor's life is not harmed.
(b) The donor voluntarily consents without coercion.
(c) The procedure is the only medical means to alleviate the plight of the patient.
(d) The success of transplantation is relatively high.

In 1988, the Council of the *Fiqh* Academy of the Organization of Islamic Conference, Jeddah, Saudi Arabia concurred with the above *fatwa*.[99] The Supreme Council of *`Ulamā'*, in Riyadh, Saudi Arabia, sanctioned organ donation as did the Grand Mufti of Egypt.[100] Positive rulings on organ donation and transplantation were issued in Egypt (1966), Malaysia (1969), Algeria (1972), Jordan (1977), and Kuwait (1979).[101] In the United Kingdom, the Muslim Law Council has encouraged Muslims to carry organ donation

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94 *Ibid*.
95 Ebrahim *Organ Transplantation: Contemporary Islamic Legal and Ethical Perspectives* 70.
96 Ahadith.co.uk http://ahadith.co.uk/search.
97 Goodarzi 2015 *Cell Tissue Bank* 295–301.
98 Ebrahim *Organ Transplantation: Contemporary Islamic Legal and Ethical Perspectives* 69.
99 *Ibid*.
100 Sheikh 2017 *J Int L Islamic L* 30–44.
101 Sharif 2012 *Transplantation Journal* 442–446.

cards.[102] Approval for organ donation from unidentified cadavers, provided there are no next of kin, was issued by the Grand Mufti of Egypt; approval from a magistrate was required.[103] The Islamic *Fiqh* Academy of the Organization of Islamic Conference, Jeddah, Saudi Arabia made a similar positive ruling on the harvesting of organs from unidentified cadavers, or where relatives could not be found. In this case, approval from the leaders of the Muslim community was required.[104]

However, all Islamic scholars agree that certain restrictions apply to organ donation (discussed above), and that a single vital organ, such as a heart, cannot be donated, even with consent of the donor, as this would be tantamount to suicide.[105]

Although virtually all Islamic scholars and councils across the Muslim world have issued approval for organ donation from both living and cadaveric donors, Muslims are still very hesitant to engage in the practice. Currently, issues such as harvesting of organs from anencephalic babies and embryonic stem cell transplants are being debated by these bodies, but the information and resolutions do not seem to filter down to Muslim communities.[106]

3 4 Islamic law and the opt-in versus opt-out system

The opt-in and opt-out systems were discussed under heading 2 above. All Islamic scholars are agreed that explicit consent by the living donor or the deceased's relatives is imperative.[107] There is no exception to this rule, unless the deceased is unidentified or relatives cannot be found, but in this case, consent will need to be obtained from a magistrate.[108] Thus, *Ṣharī`ah* strictly adheres to the opt-in system of explicit consent; opt-out and even soft opt-out options are not seen to be consistent with the tenets of Islamic law.

3 5 Islamic law and the sale of organs

The vast majority of *Sunnī* Islamic jurists concur that the sale of organs is forbidden.[109] Such a sale would be deemed null and void (*bāṭil*), as one cannot sell that which one does not own: God is the owner of the body which is held by a person as a trust or *amīnah*. Furthermore, the selling of an organ is akin to selling a person. In support of this resolution, Islamic scholars quote Prophet Muḥammad, who is reported to have said:

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102 *Ibid*.

103 Albar 2012 *Saudi J Kidney Dis Transpl* 817–822.

104 Zahidul Islam 2014 *Journal of Law, Policy and Globalization* 99–103.

105 Ebrahim *Organ Transplantation: Contemporary Islamic Legal and Ethical Perspectives* 69.

106 Albar 2012 *Saudi J Kidney Dis Transpl* 817–822.

107 Ebrahim *Organ Transplantation: Contemporary Islamic Legal and Ethical Perspectives* 76.

108 Albar 2012 *Saudi J Kidney Dis Transpl* 817–822; Zahidul Islam 2014 *Journal of Law, Policy and Globalization* 99–103.

109 Sheikh 2017 *J Int L Islamic L* 30–44; Natour and Fishman "Islamic Sunni Mainstream Opinions on Compensation of Organ Donors" 2011 2(2) *Rambam Maimonides Medical Journal* 46–59.

> *"*There are three categories of people against whom I shall myself testify against on the day of judgement. Of those three, one is he who enslaves a free man, then sells him, and eats this money.*"*[110]

This strong warning by Prophet Muḥammad is regarded as pivotal in concluding that organ sales are not permissible in Islamic law. *Shī`ah* Islamic scholars, however, support the sale of organs by a living donor or by the deceased donor's relatives through the concept of "divine consent".[111] Divine consent requires that an act be done with a sincere intention, confirmed by reason and divine revelations that bring about peace, while preserving dignity and autonomy. In Iran, the only *Shī`ah* Muslim country, a ***fatwā*** by the Ayatollah sanctioning the sale of organs paved the way for legislation of a state-run compensated organ procurement system.[112]

3 6 Islamic law and the bequest of organs

Al-Waṣiyah is the Arabic equivalent of the last will and testament.[113] Muslims are encouraged to draw up a will during their lifetime. In chapter 5, verse 106, (5:106), the *Qur'ān* says:

> *"*O you who believe! When death approaches any of you, (take) witnesses among yourselves when making bequests – two just men of your own (brotherhood), or others from outside if you are on a journey when the affliction of death befalls you."[114]

Since the *Qur'ān* is a primary source of Islamic law, it means that this legal principle should not be taken lightly. Muslims should implement it accordingly.

Likewise, Prophet Muḥammad emphasised the importance of drawing up a will. He was reported to have said:

> *"*It is not right for any Muslim person, who has anything to bequeath, that he may pass even two nights without having his last will and testament written and kept ready with him."[115]

The *Sunnah* (traditions of the Prophet Muhammad) too is regarded as a primary source. The idea of making a will is therefore important as it is encouraged in both the *Qur'ān* and the *Sunnah.*

Despite the position in Islamic law encouraging Muslims to provide for in a will, Ebrahim cautions that there are certain restrictions in the *Sharī`ah* as to what one may will.[116] For example, one cannot bequeath one's wealth or possessions as one wishes, as these bequests are governed by specific

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110 Ahadith.co.uk http://ahadith.co.uk/search.

111 Larijani, Zahedi and Taheri "Ethical and Legal Aspects of Organ Transplantation in Iran" 2004 36(15) *Transplantation Proceedings* 1241–1244; Sheikh 2017 *J Int L Islamic L* 30–44.

112 Denghan "Ethical Challenges of Kidney Sale: A Review of Three Major Assumptions Based on the Theories of Tabatabat" 2019 61 *J Forensic Leg Med* 27–33.

113 Ebrahim 2000 *Med Law* 147–160.

114 Ali *The Holy Qur'an: Test, Translation and Commentary*; Ahadith.co.uk http://ahadith.co.uk/search.

115 Ahadith.co.uk http://ahadith.co.uk/search.

116 Ebrahim *Organ Transplantation: Contemporary Islamic Legal and Ethical Perspectives* 73.

Sharī`ah* directives that determine how one's wealth and possessions are to be distributed after death.[117] Legal heirs will receive proportionate shares as laid down by *Sharī`ah, and this is not dependent upon the will or any other instruction of the deceased.[118] A "living will" that stipulates that life-saving measures should be withdrawn in the event of severe illness has no legal status in the *Sharī`ah*, as it is considered a crime in Islam to hasten death.[119] In summary, a will cannot contradict the broad teachings of the *Qur'ān* and *Sunnah*.

With regard to bequeathing an organ or organs in a will while still alive, there have been several religious decrees (*fatwas*) sanctioning this. In 1982, the Grand *Muftī* of Egypt, Gād Al Ḥaq sanctioned the bequest of organs in a will or testament.[120] The Saudi Grand `*Ulamā*' *Fatwa* No. 99, 1982 also declared the permissibility of bequeathing organs in a will.[121] The *Fatwa* Committee of Kuwait issued a similar ruling.[122] Ebrahim, writing on the living will in the light of Islamic jurisprudence, was also of the view that bequeathing one's organs in a will is permissible.[123]

4 COMPARATIVE ANALYSIS OF SOUTH AFRICAN AND ISLAMIC LAW

There are fundamental differences between the general laws that comprise each of the legal systems. First, Muslims regard Islamic law as the ultimate, God-given, immutable law; unlike South African law, they believe it is not subject to change.[124] Secondly, Islamic law is all-encompassing and concerns itself not only with legal matters, but also with moral, spiritual and personal matters. In contrast, South African law confines itself to legal matters.[125] Thirdly, unlike South African law, which is drafted in Parliament, Islamic law is not presently as structured and codified, and is compiled by Muslim jurists within each Muslim country. Lastly, and perhaps most importantly, Ebrahim explains that sources of *Ṣharī`ah*, strictly speaking, are not legal documents, but offer a set of Islamic legal principles and moral and ethical guidelines, from which legal principles can be inferred.[126] It is, therefore apparent that there will be many minor differences between South African and Islamic law that are inherent to each legal system. The focus below is on the overwhelmingly broad general consensus as opposed to the minor divergence.

The broad similarities between Islamic and South African law are startling. Both systems permit living and cadaveric organ donation. Both systems recognise brain death as death. Thus, in the NHA, brain death is defined as

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117 *Ibid*.
118 *Ibid*.
119 *Ibid*.
120 Albar 2012 *Saudi J Kidney Dis Transpl* 817–822.
121 *Ibid*.
122 Zahidul Islam 2014 *Journal of Law, Policy and Globalization* 99–103.
123 Ebrahim 2000 19 *Med Law* 147–160.
124 Sheikh 2017 *J Int L Islamic L* 30–44.
125 *Ibid*.
126 Ebrahim 2000 19 *Med Law* 147–160.

death.[127] At the third International Conference of Islamic Jurists (Amman, Jordan, 1986), *Fatwā* No. 5 equated brain death with cardiac and respiratory death.[128] Death in Islam is the departure of the soul. However, as this cannot be identified, the medical signs of death are acceptable.[129] Both the Muslim Law Council of U, and the Islamic Medical Association of North America from the USA equate brain death with death.[130] Both Islamic and South African law stipulates that brain death (death) needs to be confirmed by medical practitioners. South African law is more specific; the regulations stipulate that the diagnosis of brain death needs to be made by two doctors, one of whom must have been qualified for more than five years and neither of whom may be members of the transplant team.[131] In Islamic law, death should be confirmed by doctors of "upright character".[132]

Both systems forbid the donation of a single vital organ from a living donor. South African law stipulates that a person under the age of 18 years may not donate tissue that is not replaceable by natural means, while Islamic law directs that there must be no imminent danger to the life of the donor.[133] Both systems allow for the harvesting of organs from an unidentified cadaver or where the relatives cannot be found. In South African law, this must be approved by the Director-General of Health, and in Islamic law, by a magistrate or leaders of the Muslim community.[134] Both South African and Islamic law require explicit positive consent from the living donor for organ donation, or from the relatives of the deceased. Both South African and the *Sunni* Islamic law forbid the sale of organs or compensation of the donor (other than medical expenses and travel costs).

Bequeathing organs in a will, testament or document is permissible both in South African and Islamic law. In Islamic law, drawing up a will while alive is a divine injunction and enjoined by Prophet Muhammad. Although an oral statement in the presence of competent witnesses is acceptable, both South African and Islamic law encourage a written document signed in the presence of appropriate witnesses.

Thus, there is complete consensus on bequeathing organs in South African and Islamic law. There is, however, a striking difference between *Shi'ah* Islamic law (minority in the Muslim world) and South African law since the sale of organs and compensation of the donor is permitted by *Shī`ah* Islamic scholars, while this is considered an offence in South African law.[135]

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127 S 1 of the NHA.

128 Albar 2012 *Saudi J Kidney Dis Transpl* 817–822.

129 *Ibid*.

130 Athar and Fadel "Islamic Medical Ethics: The IMANA Perspective" 2005 37(1) *Journal of Islamic Medical Association of North America* 32–41; Sharif 2012 *Transplantation Journal* 442–446.

131 GN R180 in *GG* 35099 of 2012-03-02.

132 Ebrahim *Organ Transplantation: Contemporary Islamic Legal and Ethical Perspectives* 93.

133 S 56(2) of the NHA; Ebrahim *Organ Transplantation: Contemporary Islamic Legal and Ethical Perspectives* 64.

134 S 62(3) of the NHA; Albar 2012 *Saudi J Kidney Dis Transpl* 817–822; Zahidul Islam 2014 *Journal of Law, Policy and Globalization* 99–103.

135 S 60 of the NHA; Goodarzi 2015 *Cell Tissue Bank* 295–301.

Iran thus has a national organ procurement agency, and South Africa does not.[136]

5 CONCLUSION AND RECOMMENDATIONS

Apart from very minor differences inherent in South African and mainstream Islamic law (*Shari'ah*) respectively, there is near-total consensus in the two legal systems with regard to living and cadaveric organ donation. Iran, which is the sole *Shīah* Muslim country, diverges from South African law in allowing the sale of organs and compensation of donors.

Many Muslims believe that bequeathing organs is forbidden in Islamic law.[137] On the contrary, Islamic law not only permits the bequest of organs, but encourages it as an altruistic act of charity and a commendable gesture for the benefit of the greater community.[138] This article contributes to the research literature available to professionals such as doctors and lawyers, placing them in a position to share this knowledge, with a view to increasing organ donation rates among Muslims in South Africa.

It must be noted that various interventions aimed at different levels are required in order to improve organ donation rates in South Africa. Slabbert and others have suggested a number of legislative reforms.[139] In addition, Moosa proposes improving resources for organ transplantation (increased facilities for the care of brain-dead donors, dedicated theatre time, improving the skills pools, extending the role of the transplant coordinator and promoting organ donation among healthcare professionals).[140] South Africa has a two-tiered health system, a robust private healthcare sector and an ailing public sector with limited resources and long waiting lists.[141] Moosa emphasises the role of public-private collaborative initiatives to promote organ donation.[142]

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136 Mahdavi-Mazde, Rouchi, Norouzi and Ahrabi "Renal Replacement Therapy in Iran" 2007 5(2) *Urology Journal* 66–70.

137 Tumin, Noh, Satar and Chong "Organ Donation in Muslim Countries: The Case of Malaysia" 2013 18 *Annals of Transplantation* 671–676.

138 Zahidul Islam 2014 *Journal of Law, Policy and Globalization* 99–103.

139 Slabbert "Combat Organ Trafficking: Reward the Donor or Regulate Sales" 2008 73(1) *Koers* 75–99; Slabbert and Venter 2017 *S Afr J Bioethics Law* 15–19; Venter and Slabbert "Rewarding a Living Kidney Donor: A Comparison Between South Africa, Singapore and Iran" 2013 34(2) *Obiter* 185–199; Slabbert and Oosthuizen "Establishing a Market for Human Organs in South Africa Part 1: A Proposal" 2007 28(1) *Obiter* 44–69; Slabbert and Oosthuizen 'Establishing a Market for Human Organs in South Africa Part 2: Shortcomings in Legislation and the Current System of Organ Procurement' 2007 28(2) *Obiter* 304–323; Slabbert "The Law as an Obstacle in Solid Organ Donations and Transplantations" 2018 8(1) *THRHR* 70–84; Slabbert "One Heart, Two Patients: Who Gets a Donor Organ?" 2009 *Stell L R* 1 124–138; Slabbert "Ethics, Justice, and the Sale of Kidney for Transplantation Purposes" 2010 13(2) *PER/PELS* 77–105; Venter "A Selection of Constitutional Perspectives on Human Kidney Sales" 2013 16(1) *PER/PELJ* 352–403.

140 *Ibid.*

141 Harrichandparsad, Nadvi, Naidoo and Mahomed "A Tale of Two Cities: A Snapshot Survey of Neurosurgical Procedures Performed in Public and Private Sectors in Ethekwini" 2019 57(2) *South African Journal of Surgery* 61–64.

142 Moosa "The State of Kidney Transplantation in South Africa" 2019 109(4) *SAMJ* 235–240.

To improve organ donation rates in South Africa, perhaps the most beneficial initiative is to change attitudes to organ donation.[143] Public campaigns to provide accurate information on organ donation need to be employed, both for the general South African public and also in the Muslim community. Albar writes compellingly on the need to campaign for organ donation at mosques.[144] He believes that the moral code of Islam encourages organ donation, and campaigns should be directed at Muslims attending mosques.[145]

It is our belief that this study, which has identified a broad consensus in South African and Islamic law on the issues of living and cadaveric organ donation, will place professionals in a knowledgeable position to provide informed advice to their client base. It is also envisaged that the knowledge disseminated from this article could be used to develop broad educational campaigns aimed at the public generally and the Muslim community specifically, which will in turn inspire the public and Muslims in South Africa to actively engage in organ donation practices.

143 *Ibid*.
144 Albar 2012 *Saudi J Kidney Dis Transpl* 817–822.
145 *Ibid*.

BALANCING INVESTOR PROTECTION WITH A STATE'S REGULATORY AUTONOMY IN THE AMENDED SADC FIP

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SUMMARY

This article focuses on the 2016 Amended Annex 1 to the Southern African Development Community (SADC) Finance and Investment Protocol (FIP) (the Amended Annex), which entered into force on 22 August 2017. It aims at a comprehensive assessment of the adequacy of the Amended Annex in balancing investor protection with SADC member states' quest for domestic policy space in the content of the treaty provisions. Prior to the amendment, the 2006 SADC FIP contained clauses that were considered challenging in the old international investment agreements (IIAs) – such as broad definitions of "investor" and "investment", provision for international arbitration as a recourse, and according foreign investors fair and equitable treatment (FET) and most favoured nation (MFN) treatment. The challenges associated with bilateral investment treaties (BITs) (especially investor-state dispute settlement (ISDS) mechanisms, restrictions on sovereign policy space and regulatory autonomy) necessitated a review by the SADC member states of the 2006 SADC FIP. The purpose of this article is to reflect on the implications of the 2016 Amended Annex 1 to the SADC FIP with a view to finding a balance between protection enjoyed by investors and the host states' right to regulate. The article adopts a comparative international law approach, which is useful in order better to understand a SADC member country's approach to foreign investment protection.

1 INTRODUCTION

This article focuses on the 2016 Amended Annex 1 to the SADC Finance and Investment Protocol (FIP) (the Amended Annex), which entered into force on 22 August 2017. It aims at a comprehensive assessment of the adequacy of the Amended Annex in balancing investor protection with SADC member states' quest for domestic policy space in the content of the treaty provisions.[1] Prior to the amendment, the 2006 SADC FIP had several

[1] Southern African Development Community "Agreement Amending Annex 1 (Co-Operation on Investment) of the Protocol on Finance and Investment" Adopted: 31/08/2016; EIF: 24/08/2017 (New Annex 1) https://www.sadc.int/files/7114/9500/6315/Agreement_Amending_Annex_1_-_Cooperation_on_investment_-_on_the_Protocol_on_Finance__Investment_-_English_-_2016.pdf (accessed 2020-09-12). The current SADC member states are Angola, Botswana, the Democratic Republic of Congo, Lesotho,

clauses that were regarded as pro-foreign investor and as problematic in the old-generation international investment agreements (IIAs) – such as those providing broad definitions of "investor" and "investment", and according foreign investors fair and equitable treatment (FET), national treatment and most favoured nation (MFN) treatment, as well as investor-state dispute settlement (ISDS) clauses.[2] The challenges associated with bilateral investment treaties (BITs) (especially ISDS mechanisms, restrictions on sovereign policy space and regulatory autonomy) necessitated a review by SADC member states of the 2006 SADC FIP.[3] Most fundamentally, the 2006 SADC FIP became a highly controversial instrument as a number of investment claims were filed against SADC member states.

The broad scope of the 2006 SADC FIP's substantive provisions led many tribunals to deem it applicable to all foreign investors, as well as domestic investors in SADC member states.[4] Based on experience with ISDS, SADC member states raised serious concerns about the settlement of investor-state disputes by international arbitration.[5] These concerns included, *inter alia*, lack of legitimacy and transparency, huge costs of arbitration and arbitral awards, inconsistent and erroneous decisions, and forum shopping. In addition, SADC member states were concerned that the Annex's ambiguous provisions (such as MFN, expropriation clauses and FET standards) were likely to give very wide interpretative discretion to international tribunals. These concerns, together with ongoing legitimacy concerns over ISDS, triggered the treaty amendment and resulted in the recognition that signatories to the 2006 SADC FIP with valid BITs in place may face investment disputes initiated using the old FIP. Notably, the motivation for the treaty amendment is clearly spelt out in the Preamble to the 2016 Amended Annex of the SADC FIP, namely that the provisions of the 2006 SADC FIP may have unintended consequences for SADC member states. The drafters of the 2016 SADC FIP also noted that some of the provisions of the 2006 SADC FIP failed to balance investor protection adequately with the development of policy space for host states. They recognised that there was a need to amend the 2006 Annex 1 of the SADC FIP in order to address its shortcomings.[6]

It is against this backdrop that SADC member states decided to amend the Annex. While the amended 2016 SADC FIP has already drawn comments, this article adds value to the existing literature by carrying out a

Madagascar, Malawi, Mauritius, Mozambique, Namibia, the Seychelles, South Africa, Swaziland, the United Republic of Tanzania, Zambia and Zimbabwe.

2 Chidede "Amendments of Annex 1 to the SADC Finance and Investment Protocol: Are They in Force Yet?" https://www.tralac.org/discussions/article/11875-amendments-of-annex-1-to-the-sadc-finance-and-investment-protocol-are-they-in-force-yet.html (accessed 2020-07-21).

3 Chidede https://www.tralac.org/discussions/article/11875-amendments-of-annex-1-to-the-sadc-finance-and-investment-protocol-are-they-in-force-yet.html 11.

4 *The Burmilla Trust, The Josias Van Zyl Family Trust and Josias Van Zyl v The Kingdom of Lesotho* (PCA Case No. 2016/21).

5 Parliamentary Monitoring Group "Summary of the Key Amendments to Annex of the SADC Finance and Investment Protocol" (2016) http://pmg.org.za/files/150922summary.pdf (accessed 2020-09-12).

6 Kondo "A Comparison With Analysis of the SADC FIP Before and After Its Amendment" 2017 *Potchefstroom Electronic Law Journal* 4.

comprehensive and detailed analysis of the Amended Annex, especially from the standpoint of two key objectives that the SADC member government claims the Amended Annex achieves. First, SADC member countries claim that the purpose of the Amended Annex is to provide "appropriate protection to foreign investors in the SADC region, while maintaining a balance between investors' rights and the government's obligations."[7] The South African government told Parliament the

> "new Amended SADC FIP text is aimed at providing appropriate protection to foreign investors in SADC Member States and SADC investors in the foreign country, in the light of relevant international precedents and practices, while maintaining a balance between the rights of the investors and the obligations of the Government."[8]

Secondly, it is claimed that the Amended Annex aims to make the treaty provisions more precise so as to minimise arbitral discretion.

The purpose of this article is to reflect on the implications of the Amended Annex from the standpoint of whether a balance has been found (in the Amended Annex) between the protection enjoyed by investors on the one hand, and a host state's right to regulate on the other. The article does this by adopting a comparative international law approach. A comparative analysis is useful in order better to understand a SADC member country's approach to foreign investment protection. The article compares, on the one hand, the Amended Annex to modern regional treaty practice (for example, the Pan-African Investment Code (PAIC), investment chapters in comprehensive free trade agreements (FTAs) such as the Trans-Pacific Partnership (TPP),[9] and comprehensive economic and trade agreements (CETAs) between the European Union and Canada).[10] Some of these international investment agreements (IIAs) contain innovative provisions and it would be useful to provide insights into whether SADC member countries' respective approaches differ from the current practice of other countries and regions. It also compares the Amended Annex to SADC member countries' investment treaties and domestic laws in order to gain a clear picture of how the Amended Annex builds upon the investment regulatory framework of SADC member countries' investment regimes, and it examines its limitations in achieving the same.

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7 SADC https://www.sadc.int/files/7114/9500/6315/Agreement_Amending_Annex_1_-_Cooperation_on_investment_-_on_the_Protocol_on_Finance__Investment_-_English_-_2016.pdf Preamble.

8 Parliamentary monitoring Group "The African Continental Free Trade Area, SADC Protocol on Finance and Investment, Copy Amendment Bill, Clauses to be advertised, BRRR" https://pmg.org.za/committee-meeting/27213/ (accessed 2021-12-01).

9 Office of the United States Trade Representative "Trans-Pacific Partnership Agreement" https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text (accessed 2020-08-13).

10 UNCTAD Investment Policy Hub "Comprehensive Economic and Trade Agreements (CETA) between the European Union and Canada" https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3546/canada---eu-ceta-2016- (accessed 2020-08-14).

2 THE PREAMBLE

The primary significance of a preamble is its influence on how IIAs will be interpreted in the event of a dispute between investor and host state.[11] In contemporary treaty drafting, there are broader investment treaty objectives that have become prevalent, including, prominently, the objective of sustainable development.[12] In the SADC region, sustainable development imperatives and responsible investment are crucial, given the developmental challenges involving economic, social and environmental issues with which the region still grapples. In the same vein, in terms of the 2016 SADC FIP Preamble, SADC member countries are committed to achieving economic growth and sustainable development through regional integration and by working through investment promotion agencies in the region.[13] They recognise the significant role played by investment in advancing productive capacity and its contribution to the economic growth of a country and sustainable development and linkages between trade and investment. In drafting the Preamble of the 2016 SADC FIP, a clear link between the importance of investment and sustainable development has been made.[14]

By comparison, the Preamble to the continent-wide Pan-African Investment Code (PAIC)[15] and the SADC Model BIT[16] also capture the essence of promoting and encouraging investment opportunities that enhance sustainable development within the territories of member states. Specifically, sustainable development objectives permeate the provisions of PAIC and promote sustainable development-oriented investments. More importantly, the required kind of investment is that which has spill-over effects on job creation, promotion of technology transfers and support for long-term economic growth, and which makes a significant contribution in the fight against poverty. The member states party to the 2016 SADC FIP recognise that without sustainable development policies, which have become a prevailing norm in treaty drafting, the SADC region will continue to be marginalised. Notably, the protection of investors has not been given priority as a significant objective in the Preamble of the 2016 SADC FIP. Instead, the objectives of the treaty are to achieve an overall balance between the rights and obligations among states and investors.[17] Indeed,

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11 Dolzer and Schreuer *Principles of International Investment Law* (2013) 201.

12 UNCTAD "Investment Policy Framework for Sustainable Development" http://unctad.org/fr/PublicationsLibrary/diaepcb2012d5_en.pdf (accessed 2020-08-13).

13 Southern African Development Community https://www.sadc.int/files/7114/9500/6315/Agreement_Amending_Annex_1_-_Cooperation_on_investment_-_on_the_Protocol_on_Finance__Investment_-_English_-_2016.pdf Preamble.

14 Mbengue and Schacherer "The Africanization of International Investment Law: The Pan-African Investment Code and Reform of the International Investment Regime" 2017 *The Journal of World Investment and Trade* 418.

15 African Union Commission "Draft Pan African Investment Code PAIC" https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf (accessed 2020-8-15) Preamble.

16 SADC "The Southern African Development Community (SADC) Model Bilateral Investment Treaty Template" Adopted: 2012. https://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf (accessed 2020-08-16) Model Preamble. The model BIT is not binding and is not intended to be binding.

17 *Ibid*.

SADC member states were concerned with the low levels of investment in the region. Accordingly, SADC member states also aim to create employment opportunities, improve living standards, enhance attractiveness of the region as an investment destination through cooperation among the investment regional agencies and by creating a conducive investment environment.[18]

3 DEFINITION OF INVESTMENT

Given the contentious nature of the investment definition, the drafting of the clause dealing with the scope of what constitutes an investment was critical for SADC member states.[19] In departing from a pro-investor investment definition, SADC member countries reasoned that the previous 2006 SADC FIP definition of "investment" was asset-based, too broad and lacking in precision. They noted that an asset-based definition was known for being too wide, often covering a non-exhaustive list of assets regardless of whether such assets form part of a functioning business operating in the host state where an investment has been made.[20] The drafters of the Amended Annex decided to replace the asset-based definition with an enterprise-based definition. Hence, the Amended Annex states that an investment means

> "an enterprise within the territory of the state party which is established, acquired or expanded by an investor, including through the constitution, maintenance or acquisition of shares, debentures or other ownership instruments of such an enterprise."[21]

In addition, the assets of the enterprise in the Amended Annex are included among the covered assets of the investor in an open and indicative list of assets.[22]

In this regard, in 2016, SADC followed the correct trend since PAIC has also opted for a similar approach.[23] In many jurisdictions, such as Brazil,[24] India,[25] and recently in the Nigeria-Morocco BIT,[26] a similar approach has

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18 Kondo 2017 *Potchefstroom Electronic Law Journal* 5.

19 Qumba "Assessing African Regional Investment Instrument and Investor-State Dispute Settlement" 2021 *International & Comparative Law Quarterly* 199.

20 Kondo 2017 *Potchefstroom Electronic Law Journal* 5.

21 Art 1 of the Amended Annex https://www.sadc.int/files/7114/9500/6315/Agreement_Amending_Annex_1_-_Cooperation_on_investment_-_on_the_Protocol_on_Finance__Investment_-_English_-_2016.pdf (accessed 2021-12-01).

22 *Ibid*.

23 African Union Commission https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_ december_2016_en.pdf.

24 UNCTAD Investment Policy Hub "Investment Cooperation and Facilitation Treaty Between the Federative Republic of Brazil and the Republic of India" https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5912/download (accessed 2020-08-14) art 2(4).

25 Law Commission of India Report 260 "Analysis of the 2015 Draft Indian Model Bilateral Investment Treaty August 2015" http://1awcommissionofindia.nic.in/reports/Report260.pdf (accessed 2020-08-18).

26 UNCTAD Investment Policy Hub "Reciprocal Investment Promotion and Protection Agreement Between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria" https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5409/download (accessed 2020-08-15).

been adopted. The SADC Model BIT also adopts the enterprise-based definitions as being the most beneficial option for the purposes of sustainable development.[27] In general, the acquisition and establishment of an enterprise is viewed as more likely to generate long-term interests in the host state. Therefore, the drafters of the Amended Annex opted for an investment definition that encourages stimulation of broad-based economic growth and generates the required linkage necessary to make foreign direct investment work for sustainable development.[28] This approach is in contrast to an open-ended investment definition, which could be extended to investments tainted by wilful misrepresentation, bad faith or fraud, or which constitute a violation of national or international public policy owing to broad interpretations of what constituted investments under the old generation BITs.[29]

The agreement of the SADC FIP excludes a series of assets in the scope of its investment definition.[30] Notably, it excludes portfolio investment altogether. There may be good policy reasons for excluding portfolio investments from the definition of investment; they are merely speculative investments initiated without any intention to hold on to them or to contribute towards the economic development of the host state.[31] It also excludes investments that arise purely from commercial contracts. Most other treaties also exclude certain categories. The most typical are the exclusion of pure commercial contract claims by CETA,[32] the exclusion of loans issued by one party to another party and an order or judgment entered in a judicial or administrative action under the TPP.[33] Similarly, PAIC excludes portfolio investments but, unlike others, PAIC excludes investments in any sector that is sensitive to the host state's development and investments that would have an adverse impact on its economy.[34] In safeguarding domestic policy space by excluding certain categories of entity from its investment definition, the 2016 SADC FIP follows the contemporary trends.

The investment definition in the treaty should be drafted so as to indicate a strong relationship between covered investments and development of the host state's economy. To do this, the author suggests that the Amended

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27 SADC https://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf art 2.

28 SADC https://www.sadc.int/files/7114/9500/6315/Agreement_Amending_Annex_1_-_Cooperation_on_investment_-_on_the_Protocol_on_Finance__Investment_-_English_-_2016.pdf Art 1(2).

29 *Phoenix Action v Czech Republic*, *Phoenix Action Ltd v Czech Republic* ICSID Case No. ARB/06/5.

30 SADC https://www.sadc.int/files/7114/9500/6315/Agreement_Amending_Annex_1_-_Cooperation_on_investment_-_on_the_Protocol_on_Finance__Investment_-_English_-_2016.pdf.

31 Rajput "Safeguarding India's Regulatory Autonomy: Analysis of the New Model Bilateral Investment Treaty" 2017 *Manchester Journal of International Economic Law* 284.

32 UNCTAD Investment Policy Hub https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3546/canada---eu-ceta-2016- Art 8(1).

33 Office of the United States Trade Representative https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text Art (9)(1).

34 African Union Commission https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_ december_2016_en.pdf art(4)(i)–(ii).

Annex could have incorporated what is known as the *Salini* test[35] in its definition of covered investment. The investment definition could have required the following characteristics:

> "(1) the commitment of capital or other resources, (2) the expectation of gain or profit, (3) the assumption of risk, and (4) a significant contribution to the host State's economic development."[36]

The suggestion comports with today's treaty practice. The presence of these objective elements under the *Salini* test ensures that the foreign investor has made an actual investment in good faith and is contributing to the development of the host state's economy.[37] However, the inclusion of the *Salini* test in the covered investment varies from jurisdiction to jurisdiction. The Nigeria-Morocco BIT,[38] PAIC and the Indian Model BIT[39] contain all four elements of the *Salini* test, while the US Model BIT,[40] like CETA and TPP, excludes the element involving a significant contribution to the host state's economic development.

4 DEFINITION OF AN INVESTOR

The Amended Annex limits the definition of an investor. An investor is defined as

> "a natural or a juridical person of another State Party, in accordance with the laws and regulations of the State Party in which the investment is made."[41]

This narrow definition of an investor means that the Amended Annex only covers investors that originate from SADC member countries. Investors that originate outside the SADC region are no longer protected under the Amended Annex. The way the investor is defined presents a significant limitation to the protection of foreign investors, usually the major investors in SADC member countries. For this reason, it has been argued that the investor definition "limits the usefulness" of the Amended Annex.[42]

In addition, the investor definition has been drafted in sharp contrast to the recommendation by South Africa in its *travaux préparatoires*, in which it

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35 *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco* ICSID Case No. ARB/00/4, Decision on Jurisdiction (23 July 2001) par 53.

36 Grabowski "The Definition of Investment Under the ICSID Convention: A Defense of Salini" 2014 *Chicago Journal of International Law* 291.

37 Ngobeni "Do the SALINI Criteria Apply to the Definition of an Investment Provided in Annex 1 of the 2006 and 2016 SADC Protocol on Finance and Investment? An Assessment" 2020 *Potchefstroom Electronic Law Journal* 6.

38 UNCTAD Investment Policy Hub https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5409/download Art 1(3).

39 Law Commission of India Report 260 http://1awcommissionofindia.nic.in/reports/Report260.pdf (accessed 2020-08-18).

40 Office of the United States Trade Representative "US Model BIT" (2012) https://ustr.gov/sites/default/files/BIT%20text%20 for%20ACIEP%20Meeting.pdf (accessed 2020-08-17) Art 1.

41 SADC https://www.sadc.int/files/7114/9500/6315/Agreement_Amending_Annex_1_-_Cooperation_on_investment_-_on_the_Protocol_on_Finance__Investment_-_English_-_2016.pdf Art 1(2).

42 Kondo 2017 *Potchefstroom Electronic Law Journal* 9.

suggested that all foreign investments from any state be covered, subject to the condition that a dispute between an investor and a member state be adjudicated in terms of the domestic law of such a state.[43] Furthermore, the definition does not resolve outstanding issues in the previous definition on the treatment of dual nationals and companies managed in effect in other jurisdictions. Therefore, a juristic person owned or controlled by foreign nationals may not qualify as an investor under the Amended Annex regardless of its substantial business activity in a member state in which it is duly constituted or organised.[44] The definition of investor therefore defeats the purpose of the Amended Annex, which is to provide a balance or preserve the interests of investors and states alike. The writer suggests that a more sensible definition of investor could have been drafted in the following terms:

> "Investor means any national, company or enterprise of a Member State or a national, company or enterprise from any other country that has invested or has made investments in a Member State."

Most fundamentally, the suggested definition of investor could have addressed the notion of a juristic person, given the enterprise-based definition in the Amended Annex. With regard to juristic persons, contemporary treaty drafters base their definitions on three concepts to determine an enterprise's nationality: control, incorporation and social seat.[45] A treaty that defines the nationality of a legal entity solely on the basis of the place of incorporation has potentially the largest coverage. The most recent treaties, such as the TPP and the Indian Model BIT, often require that the juristic person's nationality not only be determined by the place of incorporation but also that it should have a "substantial business activity" in the home state.[46] PAIC builds on the concept of the place of incorporation by requiring substantial business activity in the member state in which the enterprise or company is located.[47]

5 NATIONAL TREATMENT

The Amended Annex adopts a slightly new approach to the relative standard of national treatment protection. It must be pointed out that the general tenor of the treatment standard is narrow in comparison to prior BITs and the 2006 SADC FIP. The Amended Annex uses two methodologies for enhancing regulatory autonomy and limiting investor protection: removal of controversial treatment standards, as discussed below, and narrowing existing national treatment standard. It requires state parties to accord no less favourable treatment to investors and their investments than the

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[43] Parliamentary Monitoring Group http://pmg.org.za/files/150922summary.pdf (accessed 2020-09-12).

[44] UNCTAD "Investment Policy Framework for Sustainable Development" (2015) https://unctad.org/system/files/official-document/diaepcb2015d5_en.pdf (accessed 2020-08-20).

[45] Mbengue and Schacherer 2017 *The Journal of World Investment and Trade* 425.

[46] Ranjan and Anand "The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction" 2017 *North-Western Journal of International Law & Business* 17.

[47] Mbengue and Schacherer 2017 *The Journal of World Investment and Trade* 425.

treatment it accords, in like circumstances, to its own domestic investors with respect to the management, operation and disposition of investments in its territory.[48] In terms of article 6(2), an express provision is made regarding the circumstances that should be considered when assessing the question of "like circumstances".[49] Investment chapters in earlier BITs and FTAs, such as the North American Free Trade Agreement (NAFTA) and the US BITs, also made reference to the wording of "in like circumstances".[50] However, the challenge with an unqualified reference to "like circumstances" was that it led to inconsistent interpretations of case law.[51] Indeed, the wide scope of likeness when determining "like circumstances" led to unpredictable decisions.

It is for this reason that recent treaties, such as PAIC and the 2007 COMESA Investment Agreement, include an additional criterion for the assessment of the concept of "in like circumstances".[52] Likewise, the concept of "in like circumstances" under the Amended Annex requires an overall examination, on a case-by-case basis, of all circumstances of an investment, such as its effects on third persons and the local community or on the local, regional, or national environment, including cumulative effects of all investments within a jurisdiction on the environment.[53] Relevant circumstances may also be the sector in which the investor is, the aim of the measure concerned, regulatory processes generally applied in relation to the measure concerned, other factors directly related to investment or to the investor in relation to the measure concerned.[54]

The list is non-exhaustive. However, it takes into consideration a broader view than taken by several arbitral tribunals, which found it adequate merely to enquire into whether foreign investors when compared to domestic investors are in the same business or economic sector. The Amended Annex also adds, in the same provision, a specific exception to the national treatment standard.[55] Presumably, the drafters of the Amended Annex considered it to be relevant to include a specific article on exceptions to national treatment in order to give SADC member countries the possibility of pursuing national development objectives without breaching the national

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48 South African Development Community https://www.sadc.int/files/7114/9500/6315/Agreement_Amending_Annex_1_-_Cooperation_on_investment_-_on_the_Protocol_on_Finance__Investment_-_English_-_2016.pdf Art 6(1).

49 *Ibid*.

50 UNCTAD Investment Policy Hub "North American Free Trade Agreement" https://investmentpolicy.unctad.org/international-investment-agreements/treaties/otheriia/3104/nafta-1992- (accessed 2020-07-21) Art 1102 and Art 1103; Office of the United States Trade Representative https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf art 3 and 4.

51 Sornarajah *The International Law on Foreign Investment* (2009) 206.

52 UNCTAD Investment Policy Hub "COMESA Investment Agreement" https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3092/download (accessed 2020-08-19) art 17(2).

53 SADC https://www.sadc.int/files/7114/9500/6315/Agreement_Amending_Annex_1_-_Cooperation_on_investment_-_on_the_Protocol_on_Finance__Investment_-_English_-_2016.pdf art 6(2)(a)–(f).

54 *Ibid*.

55 SADC https://www.sadc.int/files/7114/9500/6315/Agreement_Amending_Annex_1_-_Cooperation_on_investment_-_on_the_Protocol_on_Finance__Investment_-_English_-_2016.pdf art 6(3).

treatment standard. In this regard, SADC member states may, in accordance with their respective domestic legislation, "grant preferential treatment to qualifying investments and investors in order to achieve national development objectives".[56]

6 THE ABSENCE OF FET AND MFN

6 1 Fair and equitable treatment

It is well known that the majority of investment disputes under the international investment law regime are based on violation of the FET standard.[57] In other words, FET is the most invoked standard in international investment arbitrations. The arbitral tribunals have interpreted the FET standard widely and with much flexibility to hold host governments responsible for violation of due process and other general principles of international law.[58] The content of the standard has been developed through arbitral practice, with principal concerns that FET lacks precise content. Therefore, the tribunals have enjoyed wide discretion to interpret it broadly.[59] The question is whether FET is tied to the customary international law minimum standard. In 2001, the NAFTA Free Trade Commission "interpreted" that the fair and equitable treatment standard should be considered to be nothing more than the customary international law minimum standard. Questions have also been raised in the context of sustainable development on whether the FET standard hinders the achievement of sustainable development. This is because the standard is said to limit, more than other standards of treatment, the regulatory autonomy of the host state, especially in environmentally and socially sensitive areas.[60]

Various options exist in treaty drafting for resolving the challenges brought about by the FET treatment standard. They include: (1) linking the fair-and-equitable standard to the customary international law minimum standard, as noted above; (2) providing an exhaustive list of obligations related to FET; (3) completely eliminating the standard of FET from the treaty; and (4) providing an alternative formulation of the FET such as fair administrative treatment.[61] Given the controversy and uncertainty regarding the FET standard, current reform approaches in particular seek to draft clearer and more predictable FET provisions. For example, option 2 is contained in CETA, which provides as follows:

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56 *Ibid*.

57 Dolzer and Schreuer *Principles of International Investment Law* 201.

58 Sornarajah *Resistance and Change in the International Law of Foreign Investment* (2015) 425.

59 Schreuer "Fair and Equitable Treatment in Arbitral Practice" 2005 *Journal of the World Trade and Investment* 365.

60 Mbengue and Schacherer 2017 *The Journal of World Investment and Trade* 429.

61 United Nations Conference on Trade and Development, Fair and Equitable Treatment UNCTAD Series on Issues in International Investment Agreements IIhttps://unctad.org/system/files/official-document/unctaddiaeia2011d5_en.pdf (accessed 2020-08-21).

> "A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or series of measures constitutes: (a) denial of justice in criminal, civil or administrative proceedings; (b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings; (c) manifest arbitrariness; (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; (e) abusive treatment of investors, such as coercion, duress and harassment; or (f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article."[62]

This approach can arguably mitigate abuse of the FET standard in litigation by establishing, in specific terms, an exhaustive list of indicators. Similarly, the South African Protection of Investment Act,[63] Brazil and the SADC Model BIT[64] have adopted the fourth option with the aim of narrowing the FET standard to fair administrative processes, thereby eliminating the expansive interpretation of FET. A more radical reform approach is to avoid any inclusion of the standard in the treaty. In light of the prevailing uncertainties of interpretation and the more precise FET provisions, the drafters of the Amended Annex decided not to include the FET standard. Other new investment agreements such as PAIC and the Indian Model BIT have also done away with FET altogether.[65] Therefore, it is clear from the above discussion that the FET standard poses a direct challenge to the regulatory space and its removal only heralds the reassertion of regulatory freedom. By excluding FET, a major basis for challenge to regulatory freedom is removed.

6 2 Most favoured nation provision

Under the most favoured nation (MFN) treatment, contracting states enter into a binding obligation to treat investors and their investments in their territory on a basis that is no less favourable than the treatment accorded to investments of nationals of any third states. The aim of the MFN standard is to create equal competitive conditions for all foreign investors, independent of their nationality, by creating a level playing field for all foreign investors without discrimination on the basis of nationality.[66] On the basis of an MFN provision, a foreign investor is able to invoke benefits that the host state has extended to investors from a third state. The MFN standard, however, is not without its blemishes. The scope and use of the MFN standard in international investment law has attracted significant controversy. The central issue of this controversy relates to the broad interpretation of the MFN standard and the use of this standard by foreign investors to borrow advantageous substantive and procedural provisions from third-country

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62 UNCTAD Investment Policy Hub https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3546/canada---eu-ceta-2016- (accessed 2021-12-01).

63 22 of 2015.

64 SADC https://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf art 5.

65 Rajput 2017 *Manchester Journal of International Economic Law* 293.

66 Sornarajah *The International Law on Foreign Investment* 392.

investment treaties to replace the provisions of the primary investment agreement such as BITs.[67]

Consequently, such importation from a secondary treaty undermines the originally negotiated BIT, and the political and diplomatic reasons behind negotiating BITs. However, it is obvious from the wording of the MFN provision that foreign investors can successfully import substantive and procedural protections. Indeed, there is a precedent with regard to the broad use of this standard. It has been held that it is possible for a foreign investor that is protected by an investment treaty with a most favoured nation clause to use a better dispute-settlement provision from a treaty concluded by the respondent state with a third state. States have responded to these concerns by either modifying their treaty to provide express exceptions or by completely removing the MFN provision from their investment treaties. For example, the TPP clearly provides that the MFN provision does not apply to jurisdictional matters, especially in ISDS.[68] Article 8.7(4) of CETA makes it clear that the MFN provision prevents foreign investors from borrowing favourable substantive provisions from secondary BITs.[69] The South African Protection of Investment Act[70] completely removes the MFN provision.

Dolzer and Schreuer maintain that it is difficult to state clearly in which direction the interpretation of MFN might head in future, and especially whether MFN could be used to import provisions from agreements other than BITs (such as the WTO agreements).[71] If the tribunals proceed in such a direction, it will make sizable inroads into the regulatory space. The kind of treatment standards with which the host state would have to comply would be far greater than what it negotiated in the BIT which it is facing an investment claim. The effect of a broad interpretation of MFN is that a higher mandatory framework is created with the most onerous provisions, and the host state will have to comply with that highest standard. Therefore, through MFN, a common obligation is imposed on all host states, irrespective of the terms of the underlying BIT under which the dispute arose. The addition of new treatment standards through MFN poses a threat to regulatory freedom. In *White Industries v India*,[72] the tribunal held that the Government of India was not responsible for denial of justice owing to a long delay of nine years in not enforcing the commercial arbitration award. Thereafter, the tribunal imported the standard of effective means from the India-Kuwait BIT on the ground that the India-Australia BIT had an MFN clause. This manner of invocation of the MFN clause was bound to meet with criticism. The exclusion of MFN from the Indian Model BIT is a sharp reaction to the jurisprudence on MFN and the stance of the *White Industries* tribunal.

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67 Porterfield "The Exhaustion of Local Remedies in Investor-State Dispute Settlement: An Idea Whose Time Has Come?" 2015 *Yale Journal of International Law* 4.

68 UNCTAD Investment Policy Hub https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3546/canada---eu-ceta-2016- Art 28.

69 Office of the United States Trade Representatives https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text Art (9)(5)(3).

70 22 of 2015.

71 Dolzer and Schreuer *Principles of International Investment Law* 211.

72 *White Industries Australia Limited v The Republic of India* UNCITRAL, Final Award (30 November 2011) par 4.4.6.

Therefore, based on the unintended consequences of the MFN provisions as discussed above, the MFN provision has been removed by the Amended Annex 1 of the SADC FIP. This is in line with recommendations by the South African government that the MFN clause should be removed and replaced with a more substantive national treatment provision.[73] Notably, the MFN provision is also missing in the SADC Model BIT based on the consideration that the model is intended to be followed by bilateral investment treaties in SADC member states and, as such, they should not establish unintended multilateralisation through MFN provisions.[74] However, the exclusion of this principle from the Amended Annex is likely to cause a measure of unease among investors and indeed constitute a significant limitation because, without an MFN clause to fall back on, they will have to come to terms with the possibility that their investment will be receiving less favourable treatment compared with the investments of others.[75] A better and a balanced approach is the one adopted under PAIC. PAIC provides that there is no breach of MFN treatment when an AU member state adopts measures that are "designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment".[76] In addition, PAIC precludes measures that are taken by reason of "national security, public interest, and public health or public morals to be considered as a less favourable treatment" within the meaning of the MFN provision.[77]

7 EXPROPRIATION CLAUSE

Generally, the formulation of the term "expropriation" in international investment treaties includes words such as "measures tantamount" and "measures equivalent" to an expropriation.[78] The expansive nature of such language is intended to cover all forms of expropriation – not just direct expropriation, which is the forceful seizure of a foreign investor's property or the transfer of legal title away from investors. The purpose is also to cover indirect expropriation, which occurs when a state takes effective control of, or otherwise interferes with the use, enjoyment or benefit of investment, strongly depreciating its economic value, even without a direct taking of property.[79] The expropriation clause in IIAs is one that may limit most states' regulatory space. For this reason, it may be good to draft a detailed provision clarifying what constitutes indirect expropriation in order to provide guidance to tribunals, and to prevent expansive interpretations.

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73 Parliamentary Monitoring Group http://pmg.org.za/files/150922summary.pdf (accessed 2020-09-12).

74 Art 6 of the SADC Model BIT.

75 Qumba "Safeguarding Foreign Direct Investment in South Africa: Does the Protection of Investment Act Live up to Its Name?" 2018 *South African Journal of International Affairs* 347.

76 African Union Commission https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf Art 7(1).

77 African Union Commission https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf Art 8(2).

78 Rajput 2017 *Manchester Journal of International Economic Law* 297.

79 Chidede "The Right to Regulate in Africa's International Investment Law Regime" 2019 *Oregan Review of International Law Regime* 442.

It is also necessary to explain the circumstances and the criteria to determine and differentiate non-compensable regulatory measures from indirect expropriation. For instance, the provision of the IISD (International Institute for Sustainable Development) Model on expropriation reiterates that regulatory measures may not be considered as expropriation. The IISD Model, under its article 8(I), stipulates that non-discriminatory regulatory measures taken by a party that are designed to protect or enhance legitimate public-welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation.[80] Such measures, nevertheless, are required to be consistent with the right of states to regulate and the customary international law principles on police powers. While direct expropriations have been easy to identify, indirect expropriations have been the subject of debate and discrepancy in investment tribunals as well as host states. Drawing the line between an indirect expropriation and a *bona fide* non-regulatory measure adopted for public interest has been, in practice, very difficult.[81]

In response to this problem, the 2012 US Model BIT ties the elements of "indirect expropriation" with customary international law.[82] The Indian Model BIT goes a step further. It specifies the ingredients that have to be kept in mind when deciding cases on indirect expropriation.[83] In addition, certain actions are excluded, such as actions taken by a government in a commercial capacity. An investor cannot claim that a loss suffered while competing with a public enterprise acting in a commercial capacity amounts to indirect expropriation. Also, non-discriminatory regulatory measures or decisions of judicial bodies to protect a legitimate public interest or purposes, such as public health, safety and the environment, would not constitute expropriation.[84] These provisions directly protect legitimate regulatory exercises. This comports with the United Nations Commission on Trade and Development's recommendation on the need for precision, in which it stated that

> "the expropriation clause has the potential to pose undue constraints on State's regulatory capacity. To avoid this, policy makers could clarify the notion of indirect expropriation and introduce some criteria to distinguish between indirect and legitimate regulation that does not require compensation."[85]

However, the Amended Annex does not provide distinct definitions for the terms "expropriation" and "indirect expropriation", the difference between the two being a formal transfer of title and an outright seizure of property.

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80 International Institute for Sustainable Development "IISD Model International Agreement on Investment for Sustainable Development" https://www.iisd.org/publications/iisd-model-international-agreement-investment-sustainable-development-negotiators (accessed 2020-08-21) art 8(1).

81 Titi *The Right to Regulate in International Investment Law* (2014) 32.

82 Office of the United States Trade Representatives https://ustr.gov/sites/default/files/BIT%20text%20 for%20ACIEP%20Meeting.pdf Art 6(1).

83 The Government of the Republic of India "Indian Model BIT" art 5(3).

84 The Government of the Republic of India "Indian Model BIT" art 5(4).

85 United Nations Commission on Trade and Development, Expropriation UNCTAD Series on International Investment Agreements https://unctad.org/system/files/official-document/unctaddiaeia2011d7_en.pdf (accessed 2020-08-21).

Secondly, the provision sets out the legality requirements, which are the classic quartet that can be found in most BITs – namely, public purpose, due process of law, non-discrimination, and payment of compensation. Although the due process requirement is not common to most IIAs, all four requirements are well accepted today as the criteria for examining the legality of expropriation under international law.[86] Contemporary case law indeed admits that they reflect customary international law. Most significantly, the provision requires payment of fair and equitable compensation.[87] This is part of the recommendation by the South African government that the expropriation provision should be drafted in line with the now controversial section 25 of the South African Constitution, which requires that the "amount of compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interests of those affected and all the relevant circumstances".[88] Consequently, the compensation provision in the amended annex has rather been drafted while keeping in mind the need to offer guidance to the arbitral tribunals that have been finding it difficult to assess the value of wrongfully expropriated properties, otherwise they would be nugatory.

The Amended Annex[89] therefore dispenses with the requirement to pay prompt, adequate and effective compensation, which obviously refers to the Hull formula, named after the US Secretary of State who first used it in 1938.[90] Due to its contestation as expressed by formerly colonised states during the 1960s and 1970s, its customary value cannot be ascertained. In particular, this position was supported by the UN General Assembly Resolutions 1803 (on Permanent Sovereignty Over Natural Resources)[91] and 3281 Charter of Economic Rights and Duties of States.[92] Both have established that the standard of compensation has to be determined by reference to the domestic law of the expropriating state. The Amended Annex approach on determining the value of compensation has been said to reflect a proper approach for determining compensation because it strikes a balance between the public interest and the interests of those affected.[93] The reason is that while there is a presumption that the fair market value will be used, a state can still rebut this presumption on the basis of the equitable criteria set out in the provision.

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86 SADC https://www.sadc.int/files/7114/9500/6315/Agreement_Amending_Annex_1_-_Cooperation_on_investment_-_on_the_Protocol_on_Finance__Investment_-_English_-_2016.pdf Art 5(1).

87 *Ibid*.

88 S 25(3) of the Constitution of the Republic of South Africa, 1996.

89 SADC https://www.sadc.int/files/7114/9500/6315/Agreement_Amending_Annex_1_-_Cooperation_on_investment_-_on_the_Protocol_on_Finance__Investment_-_English_-_2016.pdf Art 5(1).

90 Mendelson "Compensation for Expropriation: The Case Law" 1985 *The American Journal of International Law* 420.

91 General Assembly Resolution 1803 (XVII) of 14 December 1962, "Permanent Sovereignty over Natural Resources" https://www.ohchr.org/Documents/ProfessionalInterest/resources.pdf (accessed 2020-08-23).

92 United Nations General Assembly "Charter of Economic Rights and Duties of States" https://www.aaas.org/sites/default/files/SRHRL/PDF/IHRDArticle15/Charter_of_Economic_Rights_and_Duties_of_States_Eng.pdf (accessed 2020-08-23).

93 Kondo 2017 *Potchefstroom Electronic Law Journal* 15.

Secondly, the Amended Annex provides for the manner in which the compensation must be given. It states that the payment shall be made in a freely convertible currency in accordance with the applicable law of the host state.[94] Thirdly, the investor is given a right under domestic law to challenge the expropriation, or the valuation of the compensation awarded. This can be done by means of a judicial review or by means of an independent authority. This ensures that an investor's rights to fair administrative action are realised. Fourthly, and more interestingly, the Amended Annex notes that where a payment is significantly burdensome on a host state, such a state may pay the amount due yearly over a 3-year period. Alternatively, the investor and the host state may agree on a suitable period and interest rate. The option to stagger the payment for expropriation or nationalisation is crucial in the developing country context, where resources may not always be available to immediately provide for compensation. Lastly, the 2016 SADC FIP addresses the issue of indirect expropriation. It provides that where a host state undertakes a measure of general application:

> "that is designed and applied to protect and enhance legitimate public welfare objectives, such as public health, safety and the environment, it shall not constitute indirect expropriation."[95]

This is important because it reinforces the crucial right to regulate, which is discussed under the next heading. Furthermore, it protects the host state from frivolous and litigious suits related to the indirect expropriation of investments owing to a domestic measure.

8 RIGHT TO REGULATE

The right to regulate as a concept in international investment law is a legal right, exceptionally permitting the host state to regulate in derogation of international commitments it has undertaken by means of an investment agreement without incurring a duty to compensate.[96] This definition focuses on international investment law as a public international law discipline, with reference to investment treaties as opposed to investment contracts. It is now beyond doubt that governments retain their right to regulate within their borders under public international law. However, when an exercise of this broad public-international-law right to regulate breaches investment treaty provisions, a state becomes liable towards an investor and compensation is generally due. The dilemma that has emerged under international investment law is how to exercise the right to regulate without incurring the duty to compensate adversely affected investors.[97] While a state has a right

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94 SADC https://www.sadc.int/files/7114/9500/6315/Agreement_Amending_Annex_1_-_Cooperation_on_investment_-_on_the_Protocol_on_Finance__Investment_-_English_-_2016.pdf art 5(3).

95 SADC https://www.sadc.int/files/7114/9500/6315/Agreement_Amending_Annex_1_-_Cooperation_on_investment_-_on_the_Protocol_on_Finance__Investment_-_English_-_2016.pdf art 5(7).

96 Henckels "Indirect Expropriation and the Right to Regulate: Revising Proportionality Analysis and the Standard of Review in Investor-State" 2012 *Journal of International Economic Law* 225.

97 Korzun "The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory Carve-Outs" 2017 *Vanderbilt Journal of Transnational Law* 368.

to regulate, the exercise of this right comes with the concomitant responsibility to compensate an affected investor where such a measure leads to indirect expropriation.[98] The Amended Annex elaborates more comprehensively than the original Annex on provisions regarding each host state's right to regulate with respect to domestic health, safety and environmental protection. Article 11 of the Amended Annex stipulates:

> "State parties recognise that it is inappropriate to encourage investment by relaxing domestic health, safety and environmental measures and agree not to waive or otherwise derogate from, international treaties they have ratified, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in their territories, of an investment."[99]

This provision reiterates state parties' international obligations on the protection of health, safety and environmental standards. The right of a host state to adopt environmental measures has increasingly become part of modern IIA practice, and most treaties contain provisions specifically addressing the relationship between investment and the environment.[100] The non-lowering of standards is inserted to prevent race-to-the-bottom actions by host states in a bid to lure investments. Measures directed at environmental protection in IIAs guarantee a host state's right to regulate in the field of environment. In addition, the Amended Annex preserves the right of host states to take regulatory measures to ensure that development in their territory is consistent with sustainable development and legitimate social and economic policy objectives. In particular, article 12 provides:

> "(1) In accordance with customary international law and other general principles of international law, the Host State has the right to take regulatory or other measures to ensure that development in its territory is consistent with the goals and principles of sustainable development, and with other legitimate social and economic objectives.
>
> (2) Except where the rights of a Host State are expressly stated as an exception to the obligations of this Annex, a Host State's pursuit of its rights to regulate shall be understood as embodied within a balance of the rights and obligations of investors and investments and Host States, as set out in this Annex.
>
> (3) Non-discriminatory measures taken by a State Party to comply with its international obligations under other treaties shall not constitute a breach of this Annex."

It is clear from the reading of these provisions in the Amended Annex that SADC host states preserve the right to regulate investments in accordance with their sustainable development goals and in line with customary international law and other general principles of international law. This is contrary to the 2006 Annex, which merely provided that a state party has the

> "right to regulate in the public interest and to adopt, maintain or enforce any measure that it considers appropriate to ensure that investment activity is

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98 Titi *The Right to Regulate in International Investment Law* (2014) 34.

99 SADC https://www.sadc.int/files/7114/9500/6315/Agreement_Amending_Annex_1_-_Cooperation_on_investment_-_on_the_Protocol_on_Finance__Investment_-_English_-_2016.pdf art 5(7).

100 Subedi *International Investment Law Reconciling Policy and Principle* (2020) 78.

> undertaken in a manner sensitive to health, safety or environmental concerns."[101]

These kinds of provision establish vague standards capable of broad interpretation. The Amended Annex further requires the host states to balance their regulatory autonomy with the rights and obligations of investors provided under the SADC FIP.[102]

Furthermore, it provides that "non-discriminatory measures taken by a state party to comply with its international obligations under other treaties shall not constitute a breach of this Annex". This provision aligns with the language in CETA, which specifies that the fact that a party regulates (such as by modifying its laws in a manner that negatively affects an investment) or that a party interferes with an investor's legitimate expectations, does not, by itself, mean that such regulation or interference amounts to a violation of the treaty's section on investment protection.[103] The Indian Model BITs contain a similar clause providing that non-discriminatory, regulatory measures or decisions of judicial bodies to protect issues of legitimate public interest or purposes such as public health, safety and the environment would not constitute expropriation.[104] These provisions directly protect the legitimate exercise of regulatory powers.

9 INVESTOR OBLIGATIONS

The majority of traditional IIAs impose reciprocal obligations on contracting state parties and do not impose direct legal obligations on investors in terms of international law principles regarding their business conduct. Consequently, in the traditional BITs there was no balance between investors' rights and obligations and those of the contracting states under international investment law. Recently, the inclusion of direct obligations for investors has gained traction and real recognition under investment treaty practice. The prospect of significant change to the current IIA regime is a reality. Reform of ISDS, as well as rebalancing and recalibration of investment obligations, are on the agenda of many states, including notably the European Union as it moves towards creating a new generation of EU investment agreements.[105] More recent treaties have included, for instance, the obligation of foreign investors to comply with all applicable domestic law

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[101] Zamir and Barker "The Trans-Pacific Partnership Agreement and States Right to Regulate Under International Investment Law" 2017 *Denver Journal of International Law and Policy* 215.

[102] SADC https://www.sadc.int/files/7114/9500/6315/Agreement_Amending_Annex_1_-_Cooperation_on_investment_-_on_the_Protocol_on_Finance__Investment_-_English_-_2016.pdf Art 12.

[103] UNCTAD Investment Policy Hub https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3546/canada---eu-ceta-2016- Article 8(10).

[104] The Government of the Republic of India "Indian Model BITs" art 5(5).

[105] Bjorklund and Marcoux "Foreign Investor's Responsibilities and Contributory Fault in Investment Arbitration" 2020 *International & Comparative Law Quarterly* 878.

and measures of the host state, or to accord priority to workers coming from the concerned state, provided they have the same qualifications.[106]

In light of the asymmetrical structure of most IIAs, which impose legal obligations on host states but not on foreign investors, host states have generally raised investor wrongdoing primarily as a defence against an investor's claim, although a few cases have involved counterclaims by host states. The final award in *Al-Warraq v Indonesia*[107] contributes to and develops this jurisprudence. The tribunal stated that article 9 of the Agreement on Promotion, Protection and Guarantee of Investments among members of the Organisation of the Islamic Conference[108] imposes a positive obligation on investors to respect the law of the host state, as well as public order and morals. An investor, of course, has a general obligation to obey the law of the host state, but article 9 raises this obligation from the plane of domestic law (and jurisdiction of domestic tribunals) to a treaty obligation binding on the investor in an investor-state arbitration. An analogy can be drawn with a so-called "umbrella clause" that elevates contractual obligations to the treaty plane. The fact that the contracting parties imposed treaty obligations on investors (which the claimant assented to by accepting the open offer of investment arbitration made by the respondent in the Organisation of Islamic Conference (OIC) agreement) confirms the interpretation of article 17 of the Agreement on Promotion, Protection and Guarantee of Investments among members of the Organisation of the Islamic Conference that permits counterclaims by the respondent state. Although the *Al Warraq* decision can be criticised for failing to consider the status and content of the "clean hands" doctrine, the final award is important in solidifying a jurisprudential trend in which investor-state tribunals find that an investor may be liable.

In addition, the IISD was first to adopt an alternative approach in its 2006 Model Investment Agreement.[109] Within the African continent, as part of the latest round of negotiations on the UN Binding Treaty on transnational corporations and other business enterprises with respect to human rights, African civil society organisations are calling for a treaty that reflects African perspectives and effectively addresses African experiences.[110] This is because over the last few decades, the continent has witnessed an increased involvement of foreign and local investors in massive human rights abuses and violations, sometimes with the implicit backing of the host state. These investments, often by large and economically powerful transnational corporations, have a long history of profiting from human rights

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[106] UNCTAD Investment Policy Hub https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5409/download Art 24.

[107] *Hesham T. M AL Warraq v Republic of Indonesia*, UNCITRAL.

[108] Art 9 of the Agreement on Promotion, Protection and Guarantee of Investments among members of the Organisation of the Islamic Conference https://www.italaw.com/sites/default/files/laws/italaw6203.pdf (accessed 2021-12-01).

[109] IISD Model "International Agreement on Investment for Sustainable Development" https://www.iisd.org/system/files/publications/investment_model_int_handbook.pdf (accessed-2020-08-23).

[110] Bruce "African Organisation Push for a Legally Binding Treaty" https://www.wits.ac.za/news/sources/cals-news/2020/african-organisations-push-for-a-legally-binding-treaty.html (accessed 2020-08-23).

abuses and environmental destruction, especially in countries that may have weaker laws and depend on foreign investment. Unfortunately, it remains difficult to hold them accountable for their actions, owing to the huge power imbalances that exist between states, corporations and communities. The few attempts to address this, like the UN Guiding Principles on Business and Human Rights, have been voluntary and ineffective.[111]

The Amended Annex specifically provides for a clause dealing with investor responsibility.[112] It requires that investors and their investments abide by the laws, regulations, administrative guidelines and policies of the host state for the full cycle of the investment. The challenge with this provision is that it focuses on compliance with domestic laws and procedures but does not require the investor or the investment to comply with international standards or to participate in international bodies, as is required by the corporate social responsibility (CSR) clause in PAIC, for example.[113] It is therefore important to clarify the corporate responsibility clause in the SADC FIP so as to shift its emphasis from the current specific compliance with law and policy to a broader and more general compliance.

Moreover, there is also a key personnel provision under the Amended Annex, which is a critical provision on how a foreign company will fill important vacancies such as managerial positions within their company structures. This is because foreign companies often look to bring in expatriates to take up positions requiring special skills. This provision is expressed differently in investment treaties. Some of its forms include entry and sojourn, key personnel, permits, and the sourcing of requisite skills. The provision states that state parties shall, subject to their national laws and regulations, permit investors to engage key personnel and other necessary human resources of their choice, regardless of their nationality, under the following circumstances:

> "(a) where the skills do not exist in the Host State and the Region,
> (b) where State Parties are satisfied that the sourcing of such skills will be in compliance with regional policies; and
> (c) where such sourcing would enhance the development of local capacity through skills transfer."[114]

While this provision is partially protectionist, it supports the domestic policies of SADC member states. Most countries now seek to ensure that investments benefit their citizens through employment and, as a result, they want to ensure that investors bring in only specialised employees who will transfer their skills to locals. As far as the use of natural resources is

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111 United Nations Human Rights office of the High Commissioner "The U.N. Guiding Principles on Business and Human Rights" https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf (accessed 2020-08-24).

112 SADC https://www.sadc.int/files/7114/9500/6315/Agreement_Amending_Annex_1_-_Cooperation_on_investment_-_on_the_Protocol_on_Finance__Investment_-_English_-_2016.pdf Art 8.

113 African Union Commission https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_ december_2016_en.pdf art 22.

114 SADC https://www.sadc.int/files/7114/9500/6315/Agreement_Amending_Annex_1_-_Cooperation_on_investment_-_on_the_Protocol_on_Finance__Investment_-_English_-_2016.pdf Art 9.

concerned, the Amended Annex imposes an obligation on state parties to promote the use of their natural resources in a sustainable and environmentally friendly manner.[115] For developing countries, the provision is key to ensuring that resources are used optimally. Considering this context, it can be argued that this provision should impose responsibility also on investors, not just on the State. The investor should be held to a standard of responsibility not to exploit or use natural resources to the detriment of the rights and interests of the host state and to respect the rights of the local population as well as avoid land-grabbing practices *vis-à-vis* local communities. For instance, the obligations on the use of natural resources under PAIC are as follows:

> "1. Investors shall not exploit or use local natural resources to the detriment of the rights and interests of the host State.
> 2. Investors shall respect rights of local populations and avoid land grabbing practices vis-à-vis local communities."[116]

While international investment law was traditionally not concerned with the conservation of natural resources, issues of environmental protection and the social well-being of a host state's population directly relate to most investment operations in a host country. Today, the perception has changed, and sustainable development objectives have become recognised guiding principles for developing and developed states. In recent treaty practice, societal concerns have prudently been introduced into IIAs.[117] However, according to UNCTAD, there is still the need to harmonise new IIAs with the broader common concerns of society.[118] Therefore, the provisions that promote sustainable development, investor responsibility, protection of the environment, health, human rights and conservation of natural resources should be imposed on both host governments and investors alike. Finally, the Amended Annex also contains a "non-lowering of standards" clause that states that any relaxation of domestic health, safety and environmental legislation in order to attract investments is prohibited.[119] By comparison, PAIC also contains a specific chapter on the direct obligations of investors, counterbalancing the chapter on the guarantees of treatment for investors and investments. The chapter on investors' obligations contains six provisions entitled: (1) framework for corporate governance; (2) socio-political obligations; (3) bribery; (4) corporate social responsibilities; (5) obligations as to the use of natural resources; and (6) business ethics and human rights.[120]

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[115] SADC https://www.sadc.int/files/7114/9500/6315/Agreement_Amending_Annex_1_-_Cooperation_on_investment_-_on_the_Protocol_on_Finance__Investment_-_English_-_2016.pdf art 10.

[116] African Union Commission https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf art 23.

[117] Mbengue and Schacherer 2017 *The Journal of World Investment and Trade* 415.

[118] UNCTAD "International Investment Agreements Flexibility for Development" https://unctad.org/system/files/official-document/psiteiitd18.en.pdf (accessed 2020-08-24).

[119] SADC https://www.sadc.int/files/7114/9500/6315/Agreement_Amending_Annex_1_-_Cooperation_on_investment_-_on_the_Protocol_on_Finance__Investment_-_English_-_2016.pdf art 11.

[120] African Union Commission https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf art 24.

10 FULL PROTECTION AND SECURITY (FPS)

Full protection and security, or constant protection and security, is a standard that is present in most investment treaties, next to the fair and equitable treatment standard, which it complements. Full protection and security has been interpreted to involve the obligation of the State to act in order to protect an investment from adverse effects that stem from the State's own actions or from those of private parties.[121] However, like other investment standards, the interpretation of full protection and security is not free of controversy. In particular, some debate still exists regarding two topics: the first concerns the question of whether the standard covers not only physical but also legal security; and the second concerns whether the standard is linked to the customary international law minimum standard or whether it stands independently.[122] These two questions are linked inasmuch as it is unclear whether an unqualified full protection and security standard, if equated to the minimum standard under customary international law, may be construed not to extend beyond physical security.

In the context of NAFTA, as in treaties concluded on the basis of the post-2004 US and Canadian model BITs, the issue is settled. Where the standard is unqualified, tribunals have followed various approaches, sometimes determining that full protection and security is no more than the customary international law standard of the treatment of aliens, despite the absence of an explicit limitation to this effect. An example of this strain of arbitral jurisprudence is the *El Paso* case, adjudicated on the basis of the 1991 US-Argentina BIT.[123] Full protection and security has sometimes been construed to offer protection beyond mere physical security – and especially it has been considered to include legal protection. Here again, the jurisprudence has not been consistent, since other tribunals have been reluctant to recognise protection beyond physical security (although sometimes in *obiter dicta*). There is already evidence from the *Vivendi* tribunal that the full protection and security standard would naturally be limited to physical protection if the parties had clearly stated so in the BIT.[124] Treaties such as the US Model BIT refer to protection equivalent to "the level of police protection required under customary international law".[125]

Many African countries have been confronted with civil strife and internal conflicts over the past decades and, as a consequence, the FPS standard, especially the protection against destruction of physical property, has a practical significance in claims against African states. The relevant example is the case of *Wena Hotels v Arab Republic of Egypt,*[126] a dispute that arose out of two long-term agreements between Wena Hotels Limited (Wena) (a

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121 Qumba 2018 *South African Journal of International Affairs* 348.

122 Qumba 2018 *South African Journal of International Affairs* 349.

123 *El Paso Energy International Company v Argentine Republic* ICSID Case No. ARB/03/15.

124 Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. (formerly *Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v Argentine Republic* ICSID Case No. ARB/97/3).

125 United States Office of the Trade Representative "US Model BIT" https://ustr.gov/sites/default/files/BIT%20text%20 for%20ACIEP%20Meeting.pdf art 5(2)(*b*) 2012.

126 *Wena Hotels v Arab Republic of Egypt* ICSID Case No. ARB /98/4 par 5.

British investor) and the Egyptian Hotels Company (EHC) to lease, operate and manage two hotels in Egypt. EHC was wholly owned by the Egyptian government. Shortly after the signing of the agreement, Wena alleged that the condition of the hotels was far below that agreed in the lease. Wena therefore withheld part of the rent under the terms of the lease. Owing to the non-payment, EHC threatened to repossess the hotels through force. Wena informed the Egyptian Minister of Tourism about this situation but there was no resolution. Witnesses reported that one night more than one hundred EHC personnel stormed the two hotels, and threatened and physically attacked the hotels' employees and guests. They were also reported to have removed a number of the hotels' belongings. The International Centre for Settlement of Investment Disputes (ICSID) arbitral tribunal found, *inter alia*, that there had been a breach of the protection and security standard under the UK-Egypt Treaty.

Based on the above discussion on the FPS standard of protection, it is important to note that African states have been confronted with claims by investors for physical security damage to their investments caused during conflict that destroys investors' property.[127] Therefore, it is precisely in view of the many internal conflicts, destructive protests and civil upheavals that have characterised African states that the removal of the FPS clause under the Amended Annex was ill-advised. The application and respect for the FPS in African countries is relevant under the circumstances. Considering the issue of availability of resources, as discussed in tribunal decisions above, and in arguments against the protection of investment when caused by strife and violent protest in the host state, it can be concluded that the current practice and interpretation of this standard is not unreasonable. One may wonder why section 9 of the South African Protection of Investment Act[128] did not inspire the drafting of this provision. Section 9 provides:

> "The Republic must accord foreign investors and their investments a level of physical security as may be generally provided to domestic investors in accordance with minimum standards of customary international law and subject to available resources and capacity."

The adoption of this provision could have provided a better balance rather than completely removing the provision.

11 TRANSFER OF FUNDS

The vast majority of modern IIAs contain a provision on the transfer of funds. However, investment treaties are drafted in different ways. They often deal with three basic issues: the type of payment that is covered by the right to make transfers, the issue of convertibility and exchange rates, and limitations on free transfer. The question of free transfer of funds presents a conflict between the interests of host states and those of foreign investors. For the foreign investor, the transfer of funds such as capital and profits into the home state characterises the main purpose of the business of

[127] Qumba 2018 *South African Journal of International Affairs* 392.
[128] 22 of 2015.

investment.[129] By contrast, many host governments seek to administer their currency and foreign reserves, which means large currency transfers into and out of the host states need to be controlled and monitored in order to protect national policies.

Unlike the old-generation BITs, recent treaty practice shows that completely free and unlimited transfer of funds is rare in the newer generation of IIAs. Current treaty drafting contains limitations on the free transfer of funds. A notable exception is the Germany Model BIT, which contains an absolutely free transfer of funds clause.[130] Under newer IIAs, provisions on the transfer of funds are typically subjected to regulations and laws of the host governments relating, among other things, to insolvency, bankruptcy, criminal and penal offences, ensuring compliance with judgments and orders of administrative or judicial proceedings.[131] A majority of IIAs impose restrictions on the movement of capital during periods when host governments are facing balance-of-payment problems. For example, PAIC provides first that restrictions can be adopted provided that they are in accordance with taxation as well as financial laws and regulations of the concerned member state.[132]

Secondly, AU member states can prevent a transfer in a non-discriminatory manner and in accordance with its laws and regulations relating to bankruptcy, insolvency or other legal proceedings to protect the rights of creditors, address criminal or administrative violations or ensure the satisfaction of judgments in adjudication proceedings.[133] Thirdly, PAIC foresees the possibility of AU member states adopting or maintaining measures in the event of serious balance-of-payments and external financial difficulties or the threat thereof, as well as in cases where movements of capital cause or threaten to cause serious difficulties for macroeconomic management – in particular, monetary and exchange rate policies.[134] South Africa's Protection of Investment Act now briefly stipulates as follows:

> "A foreign investor may, in respect of an investment, repatriate funds subject to taxation and other applicable legislation."[135]

Similarly, the Amended Annex recognises that investors are allowed to repatriate their investments and returns. However, such repatriation is subject to restrictions such as rules and regulations stipulated by the host state. Another novel provision is a possible exception to the guarantee of

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129 Kondo 2017 *Potchefstroom Electronic Law Journal* 9.

130 UNCTAD Investment Policy Hub "German Model Treaty" (2008) https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2865/download (accessed 2020-08-24) Art 6.

131 UNCTAD Investment Policy Hub https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5409/download art 11(2).

132 African Union Commission https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf art 15.

133 African Union Commission https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf art 16(3)(*a*).

134 African Union Commission https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf art 16(4)(*a*).

135 S 11 of the Protection of Investment Act 22 of 2015.

free transfer of funds as indicated in article 13(2).[136] Under this provision, the drafters of the Amended Annex considered it relevant for SADC member states to have a safeguard provision to respond to emergency problems first before they could allow investors to repatriate their funds. First, restrictive measures can be adopted, provided they are in line with the laws and regulations of member states. Secondly, SADC member states foresee the possibility of a state party to the Amended Annex adopting restrictive measures in the event of serious balance-of-payment problems, external financial difficulties and macroeconomic management problems, including monetary policy or exchange rate policy. While the inclusion of a list of what qualifies as an economic constraint grants a state party the leeway to use domestic laws and policy to counter tough macro-economic challenges by restricting the transfer of funds in order to facilitate sustainable economic development, it is argued that the provision could also be abused by the same host state.

12 DISPUTE RESOLUTION MECHANISMS

Over the last few years, ISDS has become extremely controversial and probably constitutes the most controversial issue in today's investment reform debate. Controversies regarding the utility of ISDS mechanisms reached another level in July 2017 when member states of the United Nations Commission on International Trade Law (UNCITRAL) entrusted its Working Group III with a broad mandate to work on the reform of ISDS. As can be observed in the discussions that have taken place so far in Working Group III, the legitimacy crisis faced by ISDS is multi-faceted and has dimensions ranging, among others, from the perceived length and cost of investment arbitration, and the inadequacy *of ad hoc* adjudication bodies to ensure consistency in the interpretation of treaties, to the perceived lack of impartiality and independence of investment arbitrators, as well as so-called third-party funding; mass actions, as well as class actions, are considered extremely problematic developments in international investment protection. It must be noted, however, that the debate in the UNCITRAL Working Group III negotiation process about a state's right to regulate and ISDS has brought some concerns back to the policy agenda.[137] However, the discussions that focus on the resolution of disputes (ISDS) as opposed to background rules on foreign direct investment (FDI) from a development perspective remove significant issues from the policy agenda. IIAs and ISDS are relevant not only for what they do but also for how they have reshaped the debate; attention has shifted away from a development-oriented and holistic perspective of FDI governance.

As a result of the legitimacy crisis facing ISDS, both developed and emerging economies are currently re-evaluating their approaches to investor-state dispute mechanisms through various institutional reform approaches as well as IIAs including BITs and the investment chapters of

[136] African Union Commission https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf art 13(2).

[137] United Nations Commission on International Trade Law (UNCITRAL) "Working Group III: Investor-State Dispute Reform" https://uncitral.un.org/en/working_groups/3/investor-state (accessed 2020-08-22).

free trade agreements. It is well known that South Africa, for instance, has a clear policy against ISDS. The country recently reviewed all of its IIAs and terminated most of them. The law that is applicable to foreign investors in South Africa is the Protection of Investment Act, which does not contain ISDS.[138] Article 25 of the Amended Annex maintains access to domestic courts and tribunals for investors. However, article 26 makes a hard exit from investor-state arbitration. It provides that any dispute between state parties will be resolved in the manner provided for under the Protocol of the Tribunal. Effectively, this means that the 2016 SADC FIP deals with state-state arbitration only.[139] This is in line with the proposal by South Africa that article 28 of the 2006 SADC FIP be removed as a result of concerns with the settlement of investor-state disputes by international tribunals. Although South Africa is the only country in the SADC region that rejects ISDS, the 2016 SADC FIP shows clear signs of a growing dissatisfaction with this ISDS mechanism.[140]

Therefore, the 2016 SADC FIP surprisingly maintains the defunct SADC Tribunal, despite that body's questionable legitimacy. Following the matter of *Mike Campbell v Republic of Zimbabwe*,[141] the SADC Tribunal suffered a blow to its integrity, and in effect became toothless. In this case, the Tribunal found Zimbabwe's chaotic and violent land reform programme to be contrary to several SADC Treaty provisions. It thereafter ordered the Zimbabwean government to protect the right to property in relation to the farms that had not been expropriated and to pay compensation to those whose farms had been expropriated.[142] The Zimbabwean government defied this ruling. The non-compliance was referred to the Summit. Zimbabwe failed to comply with the SADC Tribunal's judgments, even after the successful litigants sought and obtained orders from the Tribunal to enable the SADC Summit to compel compliance by Zimbabwe.

Instead of the SADC Summit acting to ensure that Zimbabwe complied with the SADC Tribunal judgments, it sided with Zimbabwe, which had begun a diplomatic attack on the Tribunal, employing very weak legal arguments alleging that the SADC Tribunal was not lawfully established owing to the non-ratification of the 2000 Tribunal Protocol.[143] Furthermore, Zimbabwe claimed that the SADC Tribunal did not have jurisdiction to determine human rights issues. The Summit eventually decided not to reappoint those members of the Tribunal (the judges) whose terms of office were ending in 2010 and not to replace those whose terms of office would end in 2011. The Summit also directed the Tribunal not to receive any new cases pending a review of the Tribunal's "terms of reference". These developments effectively meant that the SADC Tribunal was emasculated and could not operate. In the words of one scholar, the Tribunal was

138 S 13 of the Protection of investment Act 22 of 2015.

139 SADC https://www.sadc.int/files/7114/9500/6315/Agreement_Amending_Annex_1_-_Cooperation_on_investment_-_on_the_Protocol_on_Finance__Investment_-_English_-_2016.pdf Art 26.

140 Kondo 2017 *Potchefstroom Electronic Law Journal* 29.

141 Qumba 2018 *South African Journal of International Affairs* 392.

142 Qumba 2018 *South African Journal of International Affairs* 233.

143 Qumba 2018 *South African Journal of International Affairs* 234.

"disbanded".[144] All this – the non-renewal of the judges' terms of office, the non-appointment of their replacements, and the directive not to receive new cases – had no basis in the SADC Treaty and the 2000 Tribunal Protocol, and was therefore unlawful.[145] SADC member states also regulate foreign investments through their internal laws. Therefore, there are two conflicting layers of laws that regulate foreign investments in SADC. Furthermore, SADC member states are parties to 127 BITs, the majority of which provide for ISDS. Therefore, ISDS is very much alive in SADC, despite SADC's repeal of the 2006 Annex 1. At the super-regional level, the newly formed COMESA-EAC-SADC Tripartite Free Trade Area (T-FTA) agreement of 2015 is entitled to have its investment protocol.[146] However, the T-FTA agreement is not yet fully ratified, and there is no draft investment protocol in sight.

However, the Amended Annex is unlikely to be the last instrument that will regulate foreign investments in SADC, owing to the formation of the Tripartite Free Trade Area (T-FTA) and the African Continental Free Trade Agreement (AfCFTA). The T-FTA Agreement was concluded in Egypt on 15 June 2015,while the AfCFTA Agreement was signed in Rwanda on 21 March 2018. The T-FTA is supposed to have its own investment protocol, while the AfCFTA Agreement also provides for the conclusion of an investment protocol by 2020. This means that SADC faces the loss of regulatory authority over foreign investments. The position of PAIC, with regard to ISDS, shows that some AU member states want to provide ISDS for their investors, while others, including SADC member states, do not. It is, therefore, possible that ISDS may return to SADC via the AfCFTA investment protocol or T-FTA investment protocol. The legality of the measure of the host state under international law is a distinct aspect from access to dispute resolution. If access to dispute resolution is limited, then the violation of substantive provisions becomes academic. Procedural obstacles to access judicial settlement would reduce the enthusiasm of the foreign investor to pursue the remedy. The procedural challenges, along with the loss of investor enthusiasm, would reduce potential challenges to the actions of the host state and would have the effect of allowing several regulatory measures to go unchallenged. Access to investment arbitration is then limited to violations of treatment standards. Thus, the possibility of using MFN to expand the scope of the BIT is excluded.

SADC can learn the following lessons from the Investment Court System (ICS)proposal, the Brazilian Agreement on Cooperation and Facilitation of Investments (ACFI) and the India Model BIT. These lessons may be useful to SADC as it prepares for negotiations on the regulation of foreign investments at CFTA, T-FTA or other levels. The Brazilian ACFI provides an alternative to the traditional options of ISDS or local courts. It shows that ISDS and litigation before the courts of host states are not the only options

144 Kondo 2017 *Potchefstroom Electronic Law Journal* 29.

145 Phooko "The Revival of the SADC Tribunal by South African Courts: AContextual Analysis of the Decision of the South African Constitutional Court" 2019 *Dejure Law Journal* 421.

146 Ngobeni "The African Justice Scoreboard: A Proposal to Address Rule of Law Challenges in the Resolution of Investor-State Dispute in the Southern African Development Community" 2019 *The Comparative and International Law Journal of Southern Africa* 8.

available for the resolution of investor-state disputes.[147] SADC can learn to use state-state consultations in the form of preventative alternative dispute resolution (ADR). The India Model BIT provides a pro-state lesson in the tightening of foreign investment regulation with a view to maximising regulatory space for host states. The India Model BIT directs that contractual disputes have to be submitted before domestic courts. A foreign investor is barred from instituting arbitration if the investor has indulged in fraud, misrepresentation, concealment, corruption, money laundering or conduct amounting to an abuse of process. The India Model BIT also offers good lessons in the management of treaty and forum shopping, and the denial of benefits to corrupt investors. Furthermore, the India Model BIT shows that ADR can be a useful tool in the resolution of investor-state disputes, whether as a prelude to ISDS or not. Indeed, ADR is important, both prior to commencement of ISDS or litigation, and thereafter. Although making ADR mandatory will increase legal costs, in the long term it will inculcate a culture that promotes the settlement of disputes rather than the invoking of ISDS or litigation.[148]

13 CONCLUSION

Over the years, investor protection in Africa has become a necessity, yet challenging and controversial. It is a necessity because of the undeveloped adjudication practices that create uncertainties and multiple concerns relating to the pre-existing justice system's efficiency, fairness and effectiveness. It is challenging because of the legitimacy concerns that suggest a pro-investor posture. The Amended SADC FIP is characterised by challenges and controversies in the areas otherwise deemed settled in international investment law – namely, FET, MFN, FPS and ISDS. However, the bottom line is that IIL is all about balancing the somewhat conflicting interests of investors and host states. It is hard to imagine the end of this tension, especially in Africa. As shown in the analysis of this article, PAIC is intended to be a balanced model treaty, meaning it seeks a balance between investment protection and non-investment-related public interests. The drafters of PAIC did not underrate the need to attract foreign capital into Africa; yet recognised that this need should not neutralise the long-term goal of sustainable development.

Consequently, sustainable development plays a prominent role throughout PAIC. However, with the Amended Annex, the pendulum has swung decisively in favour of SADC host states in the substantive content of investment provisions. There is no doubt that in recent treaty drafting, there is a trend to create a balanced approach in the provisions of treaties. While the balancing of investor interests and public interests is a legitimate public interest exercise, it is argued that the Amended Annex drastically reduces the investor's substantive and procedural rights. By excluding provisions such as MFN, FPS and FET, the Amended Annex has not been able to reconcile and balance the interests of foreign investors with the host states' right to regulate. The exclusion of these provisions defeats the objective of

147 Ngobeni 2019 *The Comparative and International Law Journal of Southern Africa* 15.

148 The Government of the Republic of India "Indian Model BIT" art 15.

this treaty, which is to achieve a balance in the amendment of the SADC FIP. Furthermore, a flat rejection of the investor-state dispute mechanism and its replacement with the defunct SADC Tribunal completely undermines the legal protection of foreign investors. It is argued that the current concerns over investor-state dispute arbitrations could have been addressed by introducing appropriate provisions dealing with the requirements to exhaust local remedies, fork-in-the-road clauses, provisions dealing with the transparency of investment dispute counterclaims and so on. Given the history of expropriation in countries in the SADC region, the flat rejection of the investor-state dispute arbitration system may prove counter-productive and drastically erode the protection of foreign investors and can potentially discourage desirable foreign investment.

SELECTED CHALLENGES AFFECTING THE RETROACTIVE TRANSFER PRICING ADJUSTMENTS OF IMPORTED GOODS IN SOUTH AFRICA*

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SUMMARY

The article analyses selected challenges associated with retroactive transfer pricing adjustments of imported goods under the Customs and Excise Act 91 of 1964 (Customs and Excise Act). This is done in order to examine the regulatory challenges affecting retroactive transfer pricing adjustments and customs valuation processes of imported goods under the Customs and Excise Act. Thus, the enforcement of retroactive transfer pricing adjustments of imported goods for Multinational Enterprises (MNEs) is scrutinised in terms of the Customs and Excise Act. To this end, the article provides an overview analysis of selected regulatory and related challenges affecting retroactive transfer pricing adjustments and actual valuation processes of imported goods within different MNEs in South Africa. Accordingly, the article explores selected challenges in order to recommend possible remedies and measures that could be employed by policy makers to enhance the regulatory and enforcement framework under the Customs and Excise Act.

1 INTRODUCTORY REMARKS

Transfer pricing generally occurs when the demarcated price at which certain goods or services are provided by Multinational Enterprises (MNEs) is transferred to other companies or enterprises that are subsidiaries of the same MNEs. Put differently, transfer pricing refers to the sharing of transaction prices between related MNEs or bigger companies and their

controlled subsidiary companies. This normally occurs during the buying and selling of goods or services within related MNEs and/or their subsidiaries.[1] On the other hand, retroactive transfer pricing adjustments of imported goods are effected by MNEs and/or their subsidiary companies at the end of a financial year in order to achieve a certain target and/or gross margin in relation to their core business activities. Thus, retroactive transfer pricing adjustments refer to the adjustments made to the cost price of the goods or services that are imported by MNEs throughout the year to ensure that they reflect the true price in their financial-year-end documents. The adjustments are usually made when the price of the imported goods or services were either too low or too high at the time of the initial transactions to ensure that they correctly reflect the actual prices. Retroactive transfer adjustments of imported goods and services are effected in accordance with the arm's length principle (ALP), which, *inter alia*, enables transfer prices to be periodically set, monitored and carefully adjusted to ensure that their correctness and profitability are protected. The ALP requires that the financial results of MNEs be reviewed and where possible, a transfer pricing adjustment be made either as a debit and/or credit note to enable the MNEs in question to satisfy the targeted operating profit margin at the end of a financial year.[2] Notably, all transfer pricing adjustments made at the end of a financial year constitute retroactive adjustments that must be effected by the relevant parties at arm's length.[3] The ALP was first used in the early 1900s in some treaties of developed countries such as France, the United Kingdom (UK) and the United States of America (USA).[4] The ALP was first adopted in article 3 of the League of Nations Draft Convention on the Allocation of Profits and Property of International Enterprises of 1933.[5] Thereafter, the ALP was adopted in the Organisation for Economic Co-operation and Development (OECD) Draft Tax Convention of 1963 and was subsequently employed in all tax-related instruments of the OECD, such as in the Model

* This article was influenced in part by Maselwa's Master of Laws (LLM) dissertation, *The Regulation of Retroactive Transfer Pricing Adjustments and Valuation of Imported Goods Under the Customs and Excise Act 91 of 1964* (unpublished LLM dissertation, North-West University) 2018 64–78.

1 Ngundi *Transfer Pricing Management Strategies by Multinational Enterprises Within the Main Investment Segment of the Nairobi Securities Exchange* (unpublished MBA dissertation, University of Nairobi) 2012 1–41; Allan *The OECD Transfer Pricing Guidelines: An Analysis of Their Application in the South Africa Legal Regime* (unpublished LLM dissertation, University of Cape Town) 2007 1–83; Perčević and Hladika "Application of Transfer Pricing Methods in Related Companies in Croatia" 2017 *Economic Research* 611 613–626; Benari "Tricky Tax: Two Tax Avoidance Schemes Explained" (10 June 2009) http://www.financialtransparency.org/wp-content/uploads/2015/04/Tricky_Tax_GBenari.pdf (accessed 2020-11-26) 1–15, who argues that transfer pricing is the setting of prices for internal transactions between two subsidiaries of the same company; Cristea and Nguyen "Transfer Pricing by Multinational Firms: New Evidence From Foreign Firm Ownerships" 2016 *American Economic Journal: Economic Policy* 170 171–202; Merville and Petty "Transfer Pricing for the Multinational Firm" 1978 *The Accounting Review* 935 936–951.

2 Baistrocchi "The Transfer Pricing Problem: A Global Proposal for Simplification" 2006 *The Tax Lawyer* 941 959–979.

3 *Ibid*.

4 World Customs Organisation "Guide to Customs Valuation and Transfer Pricing" 2018 *WCO Guide* 4 6–75.

5 World Customs Organisation 2018 *WCO Guide* 16–18.

Tax Conventions as well as the United Nations (UN) tax treaties.[6] The ALP entails that the prices, profit margins, quantities of goods and other conditions of any transactions between related parties should be similar to those that would have prevailed between two unrelated and independent parties in similar transactions under similar conditions.[7] The ALP obliges all related parties to price their goods and related transactions objectively, as if they were wholly independent of each other. This is probably aimed at curbing aggressive tax avoidance and tax evasion so as to ensure that the taxable profits of MNEs are not illegally syphoned out of their jurisdictions.[8] Moreover, it is submitted that the ALP is employed to ensure that the tax base reported by MNEs in their countries correctly reflects the relevant transactions in respect thereof, and so to curb double taxation disputes that could ensue between affected countries in relation to the determination and application of the ALP on remuneration and other related cross-border transactions.[9] Nevertheless, the terms "retroactive transfer pricing" and "transfer pricing" are not expressly defined in the Customs and Excise Act,[10] the Customs Duty Act[11] and the Customs Control Act[12] in South Africa.

Illegal transfer pricing and illegal retroactive transfer pricing adjustments occur when MNEs manipulate the prices of goods sold within such MNEs and/or their subsidiary companies *inter alia* to evade customs duties on imported goods in a bid to gain illegal profits.[13] In South Africa, the South African Revenue Service (SARS) works hand in hand with the Customs Valuation Department to oversee transfer pricing, retroactive transfer pricing and the customs valuation processes of imported goods. SARS is empowered to issue compliance notices regarding retroactive transfer pricing adjustments and to police taxpayers' compliance with customs rules in South Africa.[14] In this regard, it is important to note that the customs value of imported goods is determined by using the price payable for such goods when they are sold for export purposes in South Africa. This is done in accordance with the price determined by the transfer pricing policy for related-party transactions in South Africa.[15] Thus, the transfer price is annually adjusted upwards or downwards to bring the profit margins within a range determined by the transfer pricing policy at arm's length. Transfer pricing adjustments may have a negative impact on the customs value of

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6 *Ibid*.

7 World Customs Organisation 2018 *WCO Guide* 24–25.

8 *Ibid*.

9 World Customs Organisation 2018 *WCO Guide* 24–25; Dos Reis and Sarmento "The Tension Between Transfer Pricing and Customs Valuation" 2012 *ISEG Paper* 1 8–20; Article 9 of the OECD Model Tax Convention on Income and Capital of 2017 (Model Tax Convention).

10 91 of 1964.

11 30 of 2014.

12 31 of 2004.

13 Els "Arm's Length Standard Transfer Pricing Disputes on the Rise" 2017 *Deloitte Paper* 1 2–5; Ping "Transfer Pricing and Customs Valuation: Exploring Convergence" 2007 *Global Trade & Customs Journal* 117 118–128; Clausing "Tax-Motivated Transfer Pricing and US Intrafirm Trade Prices" 2003 *Journal of Public Economics* 2207 2208–2223.

14 Wier "Tax-Motivated Transfer Mispricing in South Africa: Direct Evidence Using Transaction Data" 2020 *Journal of Public Economics* 1 2–15; Urquidi "An Introduction to Transfer Pricing" 2008 *New School Economic Review* 27 28–42.

15 Wier 2020 *Journal of Public Economics* 2–15.

imported goods, especially when the payable price of such goods was declared as the customs value to SARS, which requires additional retroactive transfer pricing adjustments for customs purposes in South Africa.[16] The Customs Valuation Department and the Transfer Pricing Department of SARS are reportedly collaborating relatively well to increase information sharing and conduct joint audits in order to curb double taxation problems in South Africa.[17] This has enabled SARS to detect some year-end non-compliance cases of retroactive transfer pricing adjustments between MNEs and related parties.

South Africa has tightened its control measures for customs valuation and transfer pricing in relation to cross border transactions within MNEs and their subsidiary companies by increasing the number of audits conducted.[18] Since 2012, this is evident in increased SARS audits on retroactive transfer pricing adjustments and related transactions recorded in South Africa.[19] These audits are conducted by SARS in an attempt to curb possible manipulation and abuse of retroactive transfer pricing adjustments and customs valuations of imported goods in South Africa.[20] Accordingly, any improper transactions where MNEs do not perform their retroactive transfer pricing adjustments well are detected and penalised by SARS.

Retroactive transfer pricing adjustments are still prone to manipulation by MNEs in South Africa.[21] This could be indicative of the gaps and flaws in the current customs and valuation regulatory framework on imported goods in South Africa.[22] For instance, the Customs and Excise Act,[23] the Customs Duty Act[24] and the Customs Control Act[25] do not have provisions that adequately provide for retroactive transfer pricing adjustments. As a result, SARS has to date struggled to detect and combat the aggressive tax avoidance and tax evasion activities perpetrated by MNEs and/or their subsidiary companies through illegal retroactive transfer pricing adjustments and incorrect customs valuation processes. This is exacerbated by the fact

16 *Ibid*.

17 *Ibid*.

18 Els 2017 *Deloitte Paper* 2–5; Wier 2020 *Journal of Public Economics* 2–15; Tuominen *The Link Between Transfer Pricing and the EU Customs Valuation Law: Is There Any and How Could It Be Strengthened?* (masters dissertation, Lund University) 2018 7–9.

19 Wier 2020 *Journal of Public Economics* 2–15; Zuvich, Abad and Zaharatos "Enhancing Compliance Through Customs and Tax Coordination" 2010 *Tax Executive* 41–46; Marsilla "Customs Valuation and Transfer Pricing" 2008 *ERA Forum* 399–412.

20 Wier 2020 *Journal of Public Economics* 2–15; Allan *The OECD Transfer Pricing Guidelines* 4–83; Neubig and Wunsch-Vincent "A Missing Link in the Analysis of Global Value Chains: Cross-Border Flows of Intangible Assets, Taxation and Related Measurement Implications" 2017 *Economic Research Working Paper No. 37* 3–45.

21 Markham *Advance Pricing Agreements: Past, Present and Future* (2012) 33–400; Florence "Transfer Pricing: Challenges and Solutions Within the Asean Regime" 2016 *Indonesian Journal of International Law* 60 61–80 and Beebeejaun "The Efficiency of Transfer Pricing Rules as a Corrective Mechanism of Income Tax Avoidance" 2018 *Journal of Civil & Legal Sciences* 1 2–8.

22 Wier 2020 *Journal of Public Economics* 3–15; see further Solomon "Multinational Corporations and the Emerging World Order" 1976 *Case Western Reserve Journal of International Law* 329 330–428.

23 Ss 65–67 and 71–74A of the Customs and Excise Act.

24 Ss 127–140 of the Customs Duty Act.

25 Ss 411–429 of the Customs Control Act.

that the Customs and Excise Act, the Customs Control Act and the Customs Duty Act[26] do not provide a clear valuation method for use on retroactive transfer pricing adjustments of imported goods in South Africa. Additionally, these Acts do not have specific provisions that deal with the administrative burden that comes with the processing of numerous vouchers of correction during retroactive transfer pricing adjustments to amend incorrect customs valuation processes and prices of imported goods.[27] It is also very difficult for SARS to obtain and evaluate the transfer pricing policies of MNEs timeously during their annual retroactive transfer pricing adjustments.[28] This difficulty is worsened by the fact that the current customs and valuation laws do not impose a statutory obligation on MNEs to have their own transfer pricing policies,[29] which must be shared with SARS, especially during retroactive transfer pricing adjustments. Without access to the transfer policy of the relevant MNEs, it is almost impossible for SARS to determine the actual transaction value of the goods and services sold within the MNEs.[30] Moreover, the current customs and valuation regulatory framework does not specify what must be included in the transfer pricing policies of MNEs and this gap could give rise to manipulative retroactive transfer pricing adjustments of imported goods in South Africa. The task of compiling transfer pricing documents is onerous and cumbersome for MNEs since there is no statutory guidance on the format and contents of a transfer pricing policy.[31] Neither SARS nor the relevant customs and valuation laws provides guidance on the contents of a transfer pricing policy, which makes it very difficult for MNEs to compile the relevant information on their retroactive transfer pricing adjustments of imported goods.[32] The limited

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[26] Ss 65–67 and 71–74A of the Customs and Excise Act; ss 112–140 of the Customs Duty Act and ss 411–429 of the Customs Control Act; see related discussion by Fyfe *Understanding and Managing Risks at the Intersection of Transfer Pricing and Customs Valuation Rules* (LLM dissertation, University of Pretoria) 2016 17–108; Fritz *An Appraisal of Selected Tax-Enforcement Powers of the South African Revenue Services in the South African Constitutional Context* (unpublished LLD thesis, University of Pretoria) 2017 57–303.

[27] See related discussion by Vinti "The Scope of the Powers of the Minister of Finance in terms of Section 48(1)(*b*) of the Customs and Excise Act 91 of 1964: An Appraisal of Recent Developments in Case Law" 2018 *Potchefstroom Electronic Law Journal* 1 2–22; Subban "Draft Customs Control Bill and Draft Customs Duty Bill Released for Public Comment" 2009 *Tax Insight* 4.

[28] Ratombo and Blumenthal "The Challenges Faced by Developing Countries Regarding Transfer Pricing" 2017 *Southern African Accounting Association Biennial International Conference Proceedings* 749 751–764.

[29] A transfer pricing policy is an intercompany policy that sets out how transactions of goods sold within MNEs are priced. See further Fyfe *Transfer Pricing and Customs Valuation Rules* 35–36.

[30] Allan *The OECD Transfer Pricing Guidelines* 4–83; Neubig and Wunsch-Vincent 2017 *Economic Research Working Paper No. 37* 3–45; Eden "Taxes, Transfer Pricing, and The Multinational Enterprise" in Rugman (ed) *The Oxford Handbook of International Business* 2ed (2009) 591–617.

[31] See *Meditor Capital Management Ltd v Feighan* (HMIT) (2004) SPC (SCD) 409 par 273, in which the taxpayer did not provide the revenue authority with a transfer pricing policy and argued that information requested by the revenue authority was irrelevant to determine the tax liability. The court ruled in favour of the revenue authority and held that information that might be relevant to determine tax liability must be provided. See further Cooper, Fox, Loeprick and Mohindra *Transfer Pricing and Developing Economies: A Handbook for Policy Makers and Practitioners* (2016) 2–129.

[32] Vinti 2018 *Potchefstroom Electronic Law Journal* 2–22; also see Friedhoff and Schippers "ECJ Judgment in Hamamatsu Case: An Abrupt End to Interaction Between Transfer

resources available to SARS is another negative challenge that is impeding the proper enforcement of legitimate retroactive transfer pricing adjustments to combat possible manipulation by MNEs in South Africa.[33]

Owing to poor regulatory oversight, some MNEs are still able to manipulate their retroactive transfer adjustments of imported goods in South Africa through under-invoicing[34] of their transactions in order to pay lower import duties and less value added tax (VAT).[35] Downward retroactive transfer adjustments occur when the MNEs adjust the values of the goods bought and imported within such MNEs to be lower than what they would ordinarily be if the same goods were bought and sold between unrelated independent parties.[36] Under-invoicing occurs when the selling company within the MNE charges the related buying company lower prices.[37] Both under-invoicing and downward retroactive transfer adjustments are actions that can only occur between related parties, usually MNEs and their subsidiary companies. Consequently, retroactive transfer pricing adjustments pose a serious risk of under-invoicing and downward adjustments by unscrupulous MNEs, which resort to such unlawful activities to avoid paying high duties on their imported goods in South Africa.[38]

Given this background, the article analyses selected regulatory challenges associated with retroactive transfer pricing adjustments on imported goods under the Customs and Excise Act. This is done in order to examine the regulatory challenges affecting the retroactive transfer pricing adjustments and customs valuation processes of imported goods under the Customs and Excise Act. Thus, the enforcement of retroactive transfer pricing adjustments of imported goods for MNEs is scrutinised in terms of the Customs and Excise Act. To this end, the article provides an overview analysis of selected regulatory and related challenges affecting the retroactive transfer pricing adjustments and the actual valuation processes of imported goods within

Pricing and Customs Valuation?" 2019 *EC Tax Review* 32 33–42 and Cooper *et al Transfer Pricing and Developing Economies* 2–129; Ping 2007 *Global Trade & Customs Journal* 118–128.

33 Harmse and Van der Zwan "Alternatives for the Treatment of Transfer Pricing Adjustments in South Africa" 2016 *De Jure* 288 290–306.

34 Cooper *et al Transfer Pricing and Developing Economies* 2–129; Ping 2007 *Global Trade & Customs Journal* 118–128; Ratombo and Blumenthal 2017 *Southern African Accounting Association Biennial International Conference Proceedings* 751–764.

35 Harmse and Van der Zwan 2016 *De Jure* 290–306; Eden in Rugman *Oxford Handbook of International Business* 591–617; Ping 2007 *Global Trade & Customs Journal* 118–128; Musselli and Bürgi *Curbing Illicit Financial Flows in Commodity Trading: Tax Transparency (CDE Working Papers 4)* (2018) 17–58.

36 Allan *The OECD Transfer Pricing Guidelines* 4–83; also see Atci "Transfer Pricing and Customs Valuation Overlap: Is It Possible to Bridge Two Worlds?" 2020 *Gazi Journal of Economics and Business* 71 72–84; Bakker and Obuoforibo *Transfer Pricing and Customs Valuation* (2009) 41–450.

37 Atci 2020 *Gazi Journal of Economics and Business* 73. See related discussion by Geremew *Assessment of Under Invoicing Valuation System: The Case of Profit Tax and Accounting Practice* (unpublished MBA dissertation, St. Mary's University) 2017 18–33; Truel *A Short Guide to Customs Risk* (2010) 42–100.

38 Truel *Guide to Customs Risk* 42–100; Geremew *Under Invoicing Valuation System* 18–33; Michaeletos "More Holistic Planning Around Custom Valuation and Transfer Pricing 2013 *South African Institute of Tax Professionals*; Fyfe *Transfer Pricing and Customs Valuation Rules* 35–36.

different MNEs in South Africa. The selected challenges are explored in order to recommend possible remedies to such challenges as well as possible measures that could be employed by policy makers to enhance the regulatory and enforcement framework under the Customs and Excise Act.

2 CHALLENGES AFFECTING RETROACTIVE TRANSFER PRICING ADJUSTMENTS OF IMPORTED GOODS IN SOUTH AFRICA

2 1 Difficulties with requirement that MNEs pass a voucher of correction

A voucher of correction is a document that is mostly used in the South African shipping industry to amend any details that need to be changed in the bill of entry that has already been filed for a particular shipment with the customs department. Therefore, a voucher of correction is used by the South African customs department to update or amend details in a declaration or bill of entry that has already been passed and submitted to SARS in accordance with the Customs and Excise Act.[39] A voucher of correction is required when a bill of entry does not comply with the relevant requirements as set out in the Customs and Excise Act.[40] A clearing agent normally processes a voucher of correction on behalf of an importer and/or exporter, especially where there are amendments that need to be effected to the original bill of entry.[41] Retroactive transfer pricing adjustments must be effected by MNEs on each import transaction. As a result, an MNE in question is obliged to comply with this requirement for each import declaration in order to adjust either upward or downward the value of goods previously declared on the bill of entry so as to reflect the correct value.[42] Retroactive transfer pricing adjustments of the value of imported goods by MNEs usually affect the import duties that were paid at the time of importation; it is very difficult for SARS to levy import duties that are proportional to the original transaction value of the affected goods.[43] An upward retroactive transfer pricing adjustment of the value of imported

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39 S 40(3) of the Customs and Excise Act; see further Harmse and Van der Zwan 2016 *De Jure* 290–306; Fyfe *Transfer Pricing and Customs Valuation Rules* 31–36.

40 S 39 read with ss 39A and 39D of the Customs and Excise Act; see *Commissioner for the South African Revenue Service v Terraplas South Africa (Pty) Ltd* (375/2013) [2014] ZASCA 69 par 4–24.

41 Ss 98, 99, 99A and 100 of the Customs and Excise Act; see further *Commissioner for Customs and Excise v Container Logistics (Pty) Ltd, Commissioner for Customs and Excise v Rennies Group Limited t/a Renfreight* (196/96, 198/96) [1999] ZASCA 35 par 9–22.

42 Lux, Cannistra and Cuadros "The Customs Treatment of Royalties and License Fees With Regard to Imported Goods" 2012 *Global Trade and Customs Journal* 120 122–142; Ainsworth "IT-Advanced Pricing Agreements: Harmonizing Inconsistent Transfer Pricing Rules in Income Tax-Customs VAT" 2007 34 *Rutgers Computer & Tech. LJ* 1 4–167.

43 Ss 39, 39A, 39D, 44 and 44A of the Customs and Excise Act. See further *Trend Finance (Pty) Ltd v Commissioner for the South African Revenue Service* [2005] 4 All SA 657 (C) par 70–100; *CSARS v Van der Merwe NO* (598/2015) [2016] ZASCA 138 par 16–28; *International Business Machines SA (Pty) Ltd v Commissioner for Customs and Excise* 1985 (4) SA 852 (A); Gupta "The Arbitrary Rejection of the Declared Value by the Customs Administration" 2020 *Global Trade and Customs Journal* 42 44–49.

goods entails that the customs value is higher than what it was at the time of importation. Accordingly, there will be outstanding import and/or customs duties that must be settled by the affected MNE.[44] This essentially entails that affected MNEs have to comply with the onerous requirements of compiling and sending a voucher of correction to SARS in respect of all retroactive transfer pricing adjustments of imported goods in South Africa.

On the other hand, a downward retroactive transfer pricing adjustment entails that the customs value of the imported goods should be adjusted lower than what it was at the time of importation.[45] This means that higher duties were paid by the MNE at the time of importation.[46] In this regard, an affected MNE must comply with the onerous requirements of compiling and sending a voucher of correction to SARS to get a refund in respect of the overpaid duties.[47] In other words, before SARS can collect the duties that were underpaid at the time of importation through an upward retroactive transfer pricing adjustment, or before SARS can refund MNEs in the case of a downward retroactive transfer pricing adjustment,[48] a voucher of correction for all affected entries must be submitted to SARS by the relevant MNEs for processing and amendment of the customs value of every bill of entry that was subjected to the adjustments. This remains an onerous and challenging task for MNEs since the required vouchers of correction might involve thousands of bills of entry, each of which require a separate voucher of correction. Furthermore, it causes an administrative burden for SARS to process and approve numerous vouchers of correction for several bills of entry in respect of each retroactive transfer pricing adjustment performed by MNEs in South Africa. Likewise, it is costly for MNEs to enlist the services of clearing agents to process the numerous vouchers of correction that are required in respect of retroactive transfer pricing adjustments in South Africa.

Notably, a previous bill of entry for imported goods does not suffice as a valid entry under the provisions of the Customs and Excise Act, particularly after retroactive transfer pricing adjustments were effected by MNEs to correct and provide a true customs value for relevant imported goods.[49] As indicated above, MNEs must compile and submit a voucher of correction to SARS after retroactive transfer pricing adjustments are effected to substitute an original bill of entry with a new bill of entry that reflects the new customs value for the affected imported goods. The term "customs duty" means any duty that could be levied on the importer and/or MNEs under Part 1 of Schedule 1 or Schedule 2 of the Customs and Excise Act, on goods imported into South Africa.[50] Furthermore, for the purposes of the Southern

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44 Marsilla "Towards Customs Valuation Compliance Through Corporate Income Tax" 2011 *World Customs Journal* 73 74–84; Bakker and Obuoforibo *Transfer Pricing* 41–450; Dos Reis and Sarmento 2012 *ISEG Paper* 8–26.

45 Ping 2007 *Global Trade & Customs Journal* 118–128.

46 Marsilla 2011 *World Customs Journal* 74–84.

47 Bakker and Obuoforibo *Transfer Pricing* 41–450; Dos Reis and Sarmento 2012 *ISEG Paper* 8–26.

48 Wier 2020 *Journal of Public Economics* 3–15; Bakker and Obuoforibo *Transfer Pricing* 41–450; Dos Reis and Sarmento 2012 *ISEG Paper* 8–26.

49 Wier 2020 *Journal of Public Economics* 3–15; ss39, 39A, 39D, 40(1)(*c*), 44, 44A and 66 of the Customs and Excise Act; *Commissioner for the South African Revenue Service v Prudence Forwarding (Pty) Ltd* (A406/14) [2015] ZAGPPHC 1104 par 5–6.

50 S 1 read with ss 39, 39A, 39D, 40(1)(*c*), 44, 44A and 66 of the Customs and Excise Act.

African Customs Union Agreement, the term "customs duty" includes any duty that could be levied on the importer and/or MNEs, under Parts 3, 5 or 8 of Schedule 1 of the Customs and Excise Act, on goods imported into South Africa.[51] However, this definition excludes any meaning and/or purposes of articles 32, 33 and 34 of the Southern African Customs Union Agreement. Nevertheless, the Customs and Excise Act does not provide any specific definitions for the terms "customs value" and "transaction value". The term "customs value" is similarly defined in the Customs Control Act and the Customs Duty Act as the value of goods for customs purposes as calculated in accordance with Chapter 7 of the Customs Duty Act.[52] On the other hand, the term "transaction value" is not defined in the Customs Control Act. Nonetheless, the term "transaction value" is defined under the Customs Duty Act as the transaction value of the goods sold for export purposes to South Africa as determined in accordance with section 131 of the same Act.[53]

MNEs that fail to comply effectively with their retroactive transfer pricing adjustment responsibilities may risk incurring potential non-compliance penalties from SARS, especially in relation to their under-invoicing and/or under-declaration of imported goods.[54] Any under-declaration of the customs value of imported goods by MNEs renders the original bill of entry invalid.[55] In this regard, the Customs and Excise Act empowers SARS to impose penalties on the offenders for any under-declaration of the customs value of their imported goods.[56]

Once retroactive transfer pricing adjustments are made by an MNE, a related exporting party of the MNE in question is obliged to issue an amended invoice to the related importing party of the MNE to correct the initial declared customs value of the affected imported goods.[57] The MNEs are also required to notify SARS of any changes within 30 days of the retroactive transfer pricing adjustment of the customs value of the imported goods. If an MNE has paid higher duties, SARS is obliged to refund to the affected MNE the excess amount in respect of such duties. This is done after vouchers of correction relating to retroactive transfer pricing adjustments are effected by the MNEs in question.[58] A voucher of correction is usually required to update the customs value of an MNE's imported goods

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51 S 1(3) read with ss 39, 39A, 39D, 40(1)(*c*), 44, 44A and 66 of the Customs and Excise Act.

52 S 1 of the Customs Control Act and s 1 of the Customs Duty Act.

53 S 1 read with ss 131–140 of the Customs Duty Act.

54 Bakker and Obuoforibo *Transfer Pricing* 41–450; Dos Reis and Sarmento 2012 *ISEG Paper* 8–26; Antràs and Yeaple "Multinational Firms and the Structure of International Trade" 2014 *Handbook of International Economics* 55 56–130; Charlet and Holmes "Determining the Place of Taxation of Transactions Under VAT/GST: Can Transfer Pricing Principles Help?" 2010 *International Vat Monitor* 431 432–438.

55 Ss 81 and 84 read with ss 44, 44A, 78–80, 83, 91–94 of the Customs and Excise Act; see related discussion by Mendoza and Ko "Preliminary Insights From the Philippine Bureau of Customs Imports Database" 2015 *World Customs Journal* 83 84–88.

56 Ss 81 and 84 read with ss 44, 44A, 78–80, 83 and 91–94 of the Customs and Excise Act; *Commissioner of the South African Revenue Service v Formalito (Pty)* [2006] 4 All SA 16 (SCA) par 1–12; Bulana "Transfer Pricing and Customs Valuation: Key Differences and Mitigation of Potential Risks" 2015 *MPRA* Paper 1 2–17.

57 Ss 40 and 41 of the Customs and Excise Act.

58 S 76 of the Customs and Excise Act; Bakker and Obuoforibo *Transfer Pricing* 41–450; Dos Reis and Sarmento 2012 *ISEG Paper* 8–26.

since the bill of entry passed before the retroactive transfer pricing adjustments will be non-compliant with the provisions of the Customs and Excise Act.[59]

2 2 The complexity of customs valuation methods negatively affects retroactive transfer pricing adjustments of imported goods

Customs valuation methods are key to the accurate and effective enforcement of retroactive transfer pricing adjustments of imported goods in any country. Various complex customs valuation methods such as transaction value of identical goods, transaction value of similar goods, the deductive value method, the computed value method and the fallback option can be employed in respect of retroactive transfer pricing adjustments of imported goods by MNEs.[60] The determination of the actual customs value of imported goods is crucially important for the realisation and imposition of the customs duty liability on MNEs for imported goods, especially the ad valorem duty.[61] Furthermore, tariff classification and preferential origin are key to the establishment and imposition of customs duty liability on MNEs in respect of imported goods in South Africa and other countries. Valuation, classification and origin of goods are some of the complex factors that are very difficult to determine in respect of international trade activities between MNEs. In this regard, it is generally accepted that the transaction value method is the primary customs valuation method employed in respect of retroactive transfer pricing adjustments of imported goods by MNEs in different countries and/or jurisdictions.[62]

Article 8 of the WTO Agreement empowers customs authorities and/or MNEs to adjust the actual price paid or payable for imported goods in cases where certain specific elements that are considered to be part of the customs value are incurred by the buyer, yet were not included in the price actually paid or payable for the imported goods. In addition, article 8 of the WTO Agreement provides for the inclusion of certain considerations in the transaction value that may pass from the buyer to the seller in the form of specified goods or services other than in the form of money.[63] Nonetheless, it is difficult to establish whether the elements stipulated in article 8 of the WTO Agreement should be strictly included in the customs value of imported goods. The determination of the actual transaction value is a complex process that requires consultation with the importer or MNEs in order to obtain all relevant information. The consultation process is also very expensive, especially the determination and approval of some elements such as royalties. Notably, there are two main factors that affect the

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59 Ss 39 and 40 of the Customs and Excise Act; see related discussion by Bakker and Obuoforibo *Transfer Pricing* 41–450; Dos Reis and Sarmento 2012 *ISEG Paper* 8–26.

60 World Customs Organisation 2018 *WCO Guide* 10–13; see articles 2, 3, 5, 6 and 7 of the World Trade Organisation (WTO) Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (WTO Agreement).

61 World Customs Organisation 2018 *WCO Guide* 6–7; see articles 1 and 8 of the WTO Agreement.

62 *Ibid*.

63 *Ibid*.

determination of the transaction value for imported goods by MNEs. First, the actual price paid or payable for the goods when sold for export to the country of importation by MNEs.[64] Secondly, a series of all cost elements (that were not included in the initial invoice, yet must be added to the price of the goods in question in terms of article 1 of the WTO Agreement,) are also considered when determining the transaction value.[65] Furthermore, article 1 of the WTO Agreement also outlines certain conditions and restrictions that may affect the validity of the actual price paid or payable in respect of imported goods by MNEs.

The transaction value method for identical goods, which is provided under article 2,[66] and the transaction value method for similar goods, which is provided under article 3,[67] requires comparable consignments to be established in order to determine any previous transaction value that was accepted by the customs department in question. The WTO Agreement provides a criterion for distinguishing identical goods from similar goods, which includes the consideration of factors such as time of importation and the commercial level of consignment for affected imported goods.

The deductive value method is generally based on the price at which the imported goods are sold on the domestic market.[68] In this regard, one must establish a unit price from which costs pertaining to post-importation activities such as import transportation, storage costs and general expenses are deducted.[69] Therefore, the customs value for imported goods is determined after such deductions are made.[70]

The computed value method is based on a price derived from various elements that relate to manufactured goods. Such elements include the cost of relevant materials, manufacturing costs, general expenses and transport costs.[71] The computed value method is expensive and is rarely used because it requires financial data that may be confidential to the manufacturer. It also involves information that the manufacturer may not be willing to release to the importer and/or the customs department of the importing country.[72]

The fallback option is not a specified customs valuation method, but it provides a possible means of establishing the customs value of imported goods, especially where other traditional customs valuation methods cannot be applied.[73] The fallback option enumerates approaches whose value is sometimes not based on minimum customs value or where customs value is

64 *Ibid*.
65 *Ibid*.
66 Article 2 of the WTO Agreement; World Customs Organisation 2018 *WCO Guide* 11–13.
67 Article 3 of the WTO Agreement; World Customs Organisation 2018 *WCO Guide* 11–13.
68 Article 5 of the WTO Agreement; World Customs Organisation 2018 *WCO Guide* 11–13.
69 Article 8.2 of the WTO Agreement; World Customs Organisation 2018 *WCO Guide* 11–13.
70 Article 5 of the WTO Agreement; World Customs Organisation 2018 *WCO Guide* 11–13.
71 Article 6 of the WTO Agreement; World Customs Organisation 2018 *WCO Guide* 11–13.
72 Article 6 of the WTO Agreement; World Customs Organisation 2018 *WCO Guide* 11–13; Tuominen *The Link Between Transfer Pricing* 7–9.
73 Article 7 of the WTO Agreement; World Customs Organisation 2018 *WCO Guide* 11–13; Tuominen *The Link Between Transfer Pricing* 7–9.

arbitrary and/or fictitious value that is expressly prohibited by the WTO Agreement.[74]

No specific customs valuation methods are provided to determine the customs value of imported goods under the Customs and Excise Act in South Africa.[75] However, it appears that South Africa relies on the transaction value method to determine the actual value of imported goods by MNEs.[76] Therefore, it is important to note that the transaction value method provides that the value of goods imported into South Africa is determined by the price paid or payable for such goods when they are sold for export into South Africa.[77] This suggests that the transaction value method is employed to determine the actual value of imported goods after retroactive transfer pricing adjustments are made by MNEs in South Africa. Nonetheless, it is very difficult to determine whether the prior relationship within and/or between MNEs influences the price payable for the affected imported goods in South Africa. SARS has to look outside the confines of the transaction value method and its rigid application to determine the actual price of imported goods after retroactive transfer pricing adjustments are effected by MNEs.[78] Furthermore, alternative customs valuation methods such as the deductive value method, computed value method and the fallback option are complex and difficult for MNEs and SARS to use to determine the customs value of imported goods in respect of retroactive transfer pricing adjustments in South Africa.

The prior relationship that exists between MNEs and their subsidiary companies makes it difficult for SARS to use the transaction value method effectively to determine the actual customs value of imported goods by such MNEs after their retroactive transfer pricing adjustments in respect thereof. In this regard, the authors submit that the transaction value method should be used together with other customs valuation methods so as effectively to obtain the actual customs value of imported goods after the retroactive transfer pricing adjustments are made by MNEs. In addition, SARS should determine the price of the imported goods sold within the MNEs and contrast it with the price of identical goods sold between independent parties in order

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74 *Ibid*.

75 Ss 65–67, 69, 71–76 and 76A–76C of the Customs and Excise Act. For related discussion, see Massimo "Customs Value and Transfer Pricing: WCO and ICC Solutions to Be Adopted by Customs Authorities" 2020 *Global Trade and Customs Journal* 273 274–287; Geremew *Assessment of Under Invoicing Valuation System* 42–100; Lushi and Gashi "Potential Risks to Avoidance of Customs Duties: Research in Kosovo" 2016 *European Journal of Sustainable Development* 67 68–74.

76 Fyfe *Transfer Pricing and Customs Valuation Rules* 20–36; see related discussion by Rajkarnikar "Implementation of the WTO Customs Valuation Agreement in Nepal: An Ex-Ante Impact Assessment" 2006 *Asia-Pacific Research and Training Network on Trade (Working Paper Series 1806)* 6–33.

77 Ss 65–67, 69, 71–76 and 76A–76C of the Customs and Excise Act; see related discussion in *Levi Strauss SA (Pty) Ltd v Commissioner for the South African Revenue Service* (20923/2015) [2017] ZAGPPHC 990 (2 May 2017); *Trend Finance (Pty) Ltd v Commissioner for the South African Revenue Service* (2006) 2 *BCLR* 304 (C) par 7–100; Lux *et al* 2012 *Global Trade and Customs Journal* 122–142.

78 Marsilla 2011 *World Customs Journal* 74–84; Bakker and Obuoforibo *Transfer Pricing* 41–450; Dos Reis and Sarmento 2012 *ISEG Paper* 8–26.

to examine whether the prior relationship between MNEs and their subsidiary companies influenced the actual customs value of such goods.[79]

Import transactions between two separate entities of an MNE, where one is in South Africa and another is based in a foreign country, are regarded as related party transactions.[80] In this regard, note that the customs valuation of transactions between related parties of MNEs is extremely challenging for SARS.[81] Accordingly, SARS should carefully scrutinise transactions between MNEs and their subsidiary companies to curb the possible abuse of retroactive transfer pricing adjustments for imported goods by MNEs in South Africa.[82] Put differently, transactions between MNEs and their related parties should be carefully examined by SARS to detect and curb any possible abuse of retroactive transfer pricing adjustments of imported goods through the manipulation of prior relationships between MNEs and their related parties.[83] Furthermore, if SARS discovers that the relationship between MNEs and their subsidiary companies influenced the price paid or payable for imported goods by such MNEs after retroactive transfer pricing adjustments, SARS may impose penalties on the offenders for under-declaration and falsification of the customs value of such goods.[84]

In cases of related party transactions, SARS requires MNEs to complete a customs valuation questionnaire in order to determine whether the customs valuation method used to determine the customs value at the time of importation was correct and/or effectively applied by the relevant MNEs. If a wrong customs valuation method was used to determine the customs value of the imported goods, SARS must request the relevant MNE to adopt the correct customs valuation method and make retroactive transfer pricing adjustments to correct the customs value of the affected imported goods.[85]

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79 Ruggie "Multinationals as Global Institution: Power, Authority and Relative Autonomy" 2018 *Regulation & Governance* 317 319–333; Allan *The OECD Transfer Pricing Guidelines* 4–83; O'Shea and Rosenow *A Handbook on the WTO Customs Valuation Agreement* (2010) 42–177.

80 See article 15 of the WTO Agreement; see related discussion by Ping 2007 *Global Trade & Customs Journal* 118–128.

81 O'Shea and Rosenow *A Handbook on the WTO Customs* 42–177; Borkowski "Transfer Pricing Documentation and Penalties: How Much Is Enough?" 2003 *International Tax Journal* 1 3–31.

82 Wolfgang and Konrad *Fundamentals of International Transfer Pricing in Law and Economics* (2012) 91–254; Miesel, Higinbotham and Yi "International Transfer Pricing: Practical Solutions for Intercompany Pricing" 2002 28 *International Tax Journal* 1 3–22; Cooper *et al Transfer Pricing and Developing Economies* 2–129; Ping 2007 *Global Trade & Customs Journal* 118–128; Ratombo and Blumenthal 2017 *Southern African Accounting Association Biennial International Conference Proceedings* 751–764.

83 Ratombo and Blumenthal 2017 *Southern African Accounting Association Biennial International Conference Proceedings* 751–764; De Pagter and Van Raan *The Valuation of Goods for Customs Purposes* (1981) 33–53.

84 S 84 of the Customs and Excise Act; also see ss 875–882 of the Customs Control Act and see ss 211–219 of the Customs Duty Act; *Trend Finance (Pty) Ltd v* Commissioner for the *South African Revenue Service supra* par 19–100; *Sasol Oil Proprietary Limited v Commissioner for the South African Revenue Service* (923/2017 [2019] 1 All SA 106 (SCA) par 8–145; for further discussion, see Mashiri and Sebele-Mpofu "Illicit Trade, Economic Growth and the Role of Customs: A Literature Review" 2015 9 *World Customs Journal* 38 40–50,.

85 Harmse and Van der Zwan 2016 *De Jure* 290–306; Lushi and Gashi 2016 *European Journal of Sustainable Development* 68–74.

In this regard, SARS should determine the customs valuation method supposed to have been used at the time of importation and in some instances, a penalty for under-declaration and falsification of the customs value of the imported goods can be levied against the relevant MNE.[86]

The selection of the most suitable customs valuation method to determine the transaction value of imported goods between MNEs and the effective enforcement of retroactive transfer pricing adjustments in respect thereof is still very problematic for SARS.[87] For instance, if SARS establishes that the relationship between an MNE and its subsidiary companies influenced the price paid or payable for the imported goods by such MNE, an alternative customs valuation method must be adopted to determine the actual price of the imported goods in question since the transaction value method will not be applicable in this regard.[88] The use of alternative customs valuation methods is complex and very difficult to enforce for SARS. Alternative customs valuation methods – for example, the transaction value for similar goods method – requires an investigation into what the price of the goods being valued would be if the transaction were effected between independent parties.[89] Moreover, the transaction value for similar goods method requires financial data from independent parties, which is at times difficult for SARS to get since most companies are reluctant to disclose their financial data. This is worsened by the fact that there is no express statutory obligation on MNEs to disclose their financial data to SARS for customs valuation purposes under the Customs and Excise Act, the Customs Duty Act and the Customs Control Act. In this regard, the adoption and use of alternative customs valuation methods for retroactive transfer pricing adjustments of imported goods is a difficult task for both SARS and MNEs.

The onus is normally placed on the importer (affected MNE) to prove that the price paid or payable is the same as the price of similar or identical imported goods sold under the same conditions as the goods being valued between unrelated parties.[90] This is a time-consuming and costly exercise for both MNEs and SARS as the services of a customs valuation specialist are needed to evaluate all retroactive transfer pricing adjustments of imported goods by MNEs.[91] In addition, the process of comparing the prices of identical goods can be hindered by the reluctance of companies trading with the same or similar products to those being valued to disclose their

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86 Harmse and Van der Zwan 2016 *De Jure* 290–306; Lushi and Gashi 2016 *European Journal of Sustainable Development* 68–74; Eden in Rugman *Oxford Handbook of International Business* 591–617.

87 Subban "Customs and Transfer Pricing: What Is SARS up to?" 2013 13 *Without Prejudice* 44 44–45; Ainsworth 2007 *Rutgers Computer & Tech. LJ* 4–167; Lord *Transfer Pricing in South African Income Tax Law* (unpublished LLM dissertation, University of Cape Town) 2014 8–65; Erturk "Intangible Assets and Customs Valuation" 2018 12 *World Customs Journal* 69 70–78.

88 Fritz *An Appraisal of Selected Tax-Enforcement Powers* 57–303; De Wulf and Sokol *Customs Modernization Handbook* (2005) 159–300; Erturk 2018 *World Customs Journal* 70–78.

89 De Pagter and Van Raan *The Valuation of Goods* 33–53.

90 Wolfgang and Konrad *Fundamentals of International Transfer Pricing* 91–254.

91 McClure "Coordinating Transfer Pricing Reports for Income Tax and Customs: Can an OECD Report Be Tailored to Satisfy Both Section 482 and Customs Purposes?" 2008 60 *Tax Executive* 435 436–444.

manufacturing and pricing processes. Thus, the determination of the prices of comparable transactions is a complex and difficult task for both SARS and MNEs.[92]

2 3 The complexity of transfer pricing policies and transfer pricing methods negatively affects retroactive transfer pricing adjustments of imported goods

The OECD transfer pricing guidelines stipulate about five transfer pricing methods that may be employed by MNEs and customs authorities to interpret and enforce the ALP – namely, the comparable uncontrolled price method; resale price method; cost-plus method; transactional net-margin method and the transactional profit-split method.[93] The comparable uncontrolled price method, resale price method and cost-plus method are generally referred to as the "traditional transactional methods".[94] Likewise, the transactional net-margin method and the transactional profit-split method are also known as the "transactional profit methods".[95]

The comparable uncontrolled price method (CUP method) compares the price charged for goods or services (including the provision of finance and intangibles) transferred in a controlled transaction to the price charged for goods or services transferred in a comparable uncontrolled transaction in comparable circumstances.[96] The CUP method may be used to determine the ALP for royalties in respect of intangible assets. The CUP method applies to both internal and external comparable transactions and where the transaction prices for imported goods or services by MNEs differ, it is generally regarded as an indication that the conditions in the controlled transaction were not agreed by the relevant parties at arm's length.[97] In this regard, it is crucial to note that even minor comparability differences may have a material impact on the condition being examined by the relevant customs authorities. The required standard of comparability for the CUP method is higher relative to the other transfer pricing methods stated above.[98] The main advantage of the CUP method is that the actual price of imported goods or services for MNEs in an affected transaction is compared to other related transactions to achieve an objective and independent analysis. Notably, an uncontrolled transaction is generally considered comparable to a controlled transaction if there are no differences in the transactions being compared that would materially affect the price of the

92 Melnychenko, Pugachevska and Kasianok "Tax Control of Transfer Pricing" 2014 *Investment Management and Financial Innovations* 40 42–49.

93 UN "Practical Manual on Transfer Pricing for Developing Countries" 2013 *United Nations Practical Manual on Transfer Pricing* 1 196–257; Bakker and Obuoforibo *Transfer Pricing* 41–450.

94 UN 2013 *United Nations Practical Manual on Transfer Pricing* 196–257; World Customs Organisation 2018 *WCO Guide* 32–45.

95 *Ibid*.

96 *Ibid*.

97 *Ibid*.

98 *Ibid*.

imported goods or services.[99] An uncontrolled transaction is also generally considered comparable to a controlled transaction if accurate adjustments can be performed objectively to account for material differences between the controlled and uncontrolled transactions.[100] Nonetheless, the challenges associated with the comparability differences and related analysis could suggest that the CUP method is less likely to be the most appropriate method for more complex transactions, especially the retroactive transfer pricing adjustments involving imported non-commoditised goods, services or intangibles in South Africa.[101]

The resale price method entails that goods or services that are subject to a controlled transaction are resold to an independent party to obtain a resale price and that the price is then reduced by an appropriate gross profit margin (resale price margin) in order to determine an arm's length price.[102] The appropriate resale price margin is determined by reference to the relevant gross margin and other comparable uncontrolled transactions. Proper accounting measures must be in place and consistently applied by customs authorities such as SARS for the effective application of the resale price method. The resale price margin earned by the reseller of the imported goods or services should be carefully examined by the customs authorities and/or SARS in South Africa. It appears that the resale price method merely requires the selection of a tested party. A tested party is a party that purchases the goods or services in the controlled transaction for reselling. The resale price margin represents the margin that a reseller of the relevant goods or services seeks to make in order to cover its operating expenses, taking into account all the relevant factors such as the expenses incurred and the risks involved.[103] The appropriate resale price margin may be determined by reference to gross profit margins earned in internal comparable uncontrolled transactions or by reference to the gross profit margins earned by independent parties in external comparable uncontrolled transactions.[104] It is important to note that minor differences in the comparability and characteristics of the affected goods may negatively affect the condition being examined in terms of the resale price method. The resale price method provides that parties with comparable functional profiles should be compensated similarly. One of the main advantages of the resale price method is that the relevant condition is examined at the gross margin level by customs authorities such as SARS and there is minimal scope for variables that are unrelated to the transfer price under the controlled transaction to affect the independent price.[105] Nonetheless, the resale price method requires the selection of a tested party. Furthermore, an arm's length resale margin for one party may give rise to a negative result for the other party to a controlled transaction that was not concluded by the relevant MNEs at arm's length.[106]

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99 *Ibid*.
100 *Ibid*.
101 *Ibid*.
102 *Ibid*.
103 *Ibid*.
104 *Ibid*.
105 *Ibid*.
106 *Ibid*.

The cost-plus method entails that the costs incurred by the supplier of the goods or services that are the object of the controlled transaction should be marked up appropriately in order to determine an arm's length price.[107] Accordingly, the appropriate cost-plus mark-up is determined by reference to the gross margins earned in comparable uncontrolled transactions. Furthermore, proper accounting measures must be in place and consistently applied by the customs authorities to establish an appropriate composition of the relevant cost base for the relevant goods or services of the MNEs.[108] This is key to the effective application of the cost-plus method. The cost-plus mark-up represents the margin that a supplier of the relevant goods or services seeks to make in order to recover all its incurred operating expenses. The appropriate cost-plus margin may be determined by reference to the gross profit margins earned in internal uncontrolled comparable transactions or by reference to the margins earned by independent parties in external comparable uncontrolled transactions of the affected MNEs.[109] Nevertheless, it is very difficult for SARS to establish, interpret and apply comparable cost-plus margins, whether to test compliance of the relevant MNEs with the arm's length principle (especially in respect of their retroactive transfer pricing adjustments) or as a reference point for setting the prices in the controlled transactions.

The transactional net-margin method (TNMM) entails that an appropriate financial indicator based on the net profit that a tested party realises in controlled transactions should be compared with that realised in comparable uncontrolled transactions to establish an arm's length price for the MNE's imported goods or services.[110] The appropriate financial indicator will vary, depending on the facts, circumstances and the selection of the tested party. The appropriate financial indicator is determined by reference to the net profit (operating margin) earned in comparable uncontrolled transactions. Minor differences in the characteristics of the goods or services of the affected MNEs may not materially affect the condition being examined or the net profit margin under the TNMM. However, minor differences regarding the industry, goods or services of the affected MNE are more likely to have a material impact on the price or gross margin as opposed to the net profit margin of the goods or services of that MNE. Parties with comparable functional profiles will be compensated similarly under the TNMM.

The transactional profit-split method entails that the relevant profits or losses arising from controlled transactions should be split between the associated companies of the MNEs that are party to those transactions on an economically valid basis.[111] This economically valid basis should be supported by market data. Nevertheless, such market data is not always easily accessible to SARS and/or other customs authorities. Consequently, different approaches may be employed to determine the appropriate arm's length split of profits between the relevant parties. For instance, under the comparable profit-split approach, relevant profits are split after comparing

[107] *Ibid*.
[108] *Ibid*.
[109] *Ibid*.
[110] *Ibid*.
[111] *Ibid*.

the split of profits observed between independent companies in comparable transactions.[112] Using the contribution analysis approach, relevant profits or losses from controlled transactions are allocated between the associated parties on the basis of their relative contributions.[113] Residual analysis approach allocates profits to non-unique activities of the associated parties and then splits the residual profit or loss on an economically valid basis between the relevant parties. The transactional profit-split method is used in controlled transactions where each party to the transaction makes unique and valuable contributions that cannot reliably be measured by reference to comparable uncontrolled transactions.[114] As a result, the relevant parties to the transactions share significant economic risks associated with those transactions. This transactional profit-split method is very difficult for SARS to comply with.

Flawed transfer pricing policies and onerous documentation requirements for retroactive transfer pricing adjustments of imported goods by MNEs in South Africa represent a further challenge. For instance, SARS uses a difficult transfer pricing and valuation questionnaire to investigate and determine whether the relationship between MNEs and their subsidiary companies influenced the price of their imported goods.[115] The transfer pricing and valuation questionnaire requires the importers (MNEs) to provide information on how the value of their imported goods was determined. Moreover, SARS may require MNEs to provide supporting documents such as invoices and sale agreements to verify the correctness of each completed transfer pricing and valuation questionnaire.[116] In this regard, when MNEs file their annual corporate income tax returns, they are required to indicate if they have performed any retroactive transfer pricing adjustments on their imported goods in the year. This is required by SARS to combat any possible misuse of retroactive transfer pricing adjustments of imported goods by unscrupulous MNEs in South Africa.[117]

Notwithstanding that it is not compulsory for MNEs to prepare and submit their transfer pricing policies, SARS may request such policies from MNEs.[118] SARS recommends that all MNEs should prepare and submit their transfer pricing policies to avoid incurring penalties for non-disclosure.[119] MNEs that do not provide documentary proof and transfer pricing policies to

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112 *Ibid*.

113 *Ibid*.

114 *Ibid*.

115 UN 2013 *United Nations Practical Manual on Transfer Pricing* 196–257; Harmse and Van der Zwan 2016 *De Jure* 290–306; Fyfe *Transfer Pricing and Customs Valuation Rules* 31–36.

116 Rule 65.01 to the Customs and Excise Act; Schippers "A Series of Sales: Determining the Customs Value under the Union Customs Code" 2018 13 *Global Trade and Customs Journal* 36 40–48.

117 Muljee *South African Transfer Pricing Income Tax Legislation: Is There Still a Gap?* (unpublished Master of Commerce dissertation, University of the Witwatersrand) 2017 2–85; Markham *The Transfer Price of Intangibles* (2005) 50–300.

118 Allan *The OECD Transfer Pricing Guidelines* 4–83; The South African Institute of Tax Practitioners (SAIT) *Compendium of Tax Legislation* (2010) 100–523; Feinschreiber *Transfer Pricing Methods: An Applications Guide* (2004) 5.

119 Ss 210–215 and 221–224 of the Tax Administration Act 28 of 2011; SAIT *Compendium of Tax Legislation* 100–523.

substantiate that the prices of their imported goods were valued at arm's length will be penalised by SARS.[120] MNEs that prepare and maintain a transfer pricing policy enable tax and customs authorities to detect and combat risks associated with the manipulation of retroactive transfer pricing adjustments of imported goods by MNEs in South Africa.[121] A transfer pricing policy provides SARS with guidelines on how the retroactive transfer pricing adjustments for imported goods were effected, as well as the formulas and factors that led to such adjustments being performed by the relevant MNEs.[122] Transfer pricing documentation must be drafted so that it can be used to prove compliance by the MNEs and prove that the price paid or payable for imported goods complies with the transactional value method.[123] However, maintaining a transfer pricing policy is time-consuming and costly for MNEs and is difficult to comply with effectively.[124]

On its own, a transfer pricing policy cannot be accepted as proof that the price paid or payable for imported goods was at arm's length and/or not influenced by the relationship between an MNE and its subsidiary companies.[125] Accordingly, additional information and documents such as pricing agreements must be submitted by MNEs to SARS for it to determine whether the prior relationship between an MNE and its subsidiary companies influenced the price of imported goods during retroactive transfer pricing adjustments.[126] In this regard, it must be noted that the onus is on the MNEs to indicate such relevant additional information in the transfer pricing policy and submit it to SARS.[127]

There is no express statutory provision regarding the establishment and enforcement of transfer pricing policies under the Customs and Excise Act, the Customs Control Act and the Customs Duty Act. Moreover, there are no statutory requirements for MNEs to adopt and maintain a transfer pricing policy in South Africa.[128] This suggests that MNEs are not statutorily obliged

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120 Cooper *et al Transfer Pricing and Developing Economies* 2–129; Ping 2007 *Global Trade & Customs Journal* 118–128; Muljee *Transfer Pricing Income Tax Legislation* 2–85; *Unilever Kenya Ltd v Commissioner of Income Tax* Appeal 753 of 2003 par 11.

121 Cooper *et al Transfer Pricing and Developing Economies* 2–129; Ping 2007 *Global Trade & Customs Journal* 118–128.

122 Ping 2007 *Global Trade & Customs Journal* 118–128.

123 Allan *The OECD Transfer Pricing Guidelines* 4–83; Muljee *Transfer Pricing Income Tax Legislation* 2–85.

124 Lord *Transfer Pricing in South African Income Tax Law* 8–65; Allan *The OECD Transfer Pricing Guidelines* 4–83; King *Transfer Pricing and Corporate Taxation: Problems, Practical Implications and Proposed Solutions* (2009) 54–150.

125 Ping 2007 *Global Trade & Customs Journal* 118–128; Eden in Rugman *Oxford Handbook of International Business* 591–617.

126 Ainsworth 2007 *Rutgers Computer & Tech. LJ* 4–167; David, Toro and Caballero "An Opportunity to Support US Customs Valuations" 2012 23 *International Tax Review* 46 47–49; Bakker and Levey *Transfer Pricing and Intra-Group Financing: The Entangled World of Financial Markets and Transfer Pricing* (2012) 121–450; Wolfgang and Konrad *Fundamentals of International Transfer Pricing* 91–254.

127 Ainsworth 2007 *Rutgers Computer & Tech. LJ* 4–167; David *et al* 2012 *International Tax Review* 47–49; Jovanovich *Customs Valuation and Transfer Pricing: Is it Possible to Harmonise Customs and Tax Rules?* (2002) 20–120.

128 See SARS Practice Note 7 par 10.2.1; Mberi *Addressing Challenges Facing SARS Relating to the Application of Transfer Pricing in Business Restructurings* (Master of Commerce dissertation, North-West University) 2012 7–60; Mazansky "Transfer Pricing Documentation

to adopt and maintain transfer pricing policies and related documents under the Customs and Excise Act, the Customs Control Act and the Customs Duty Act.[129] This statutory gap could enable MNEs to ignore SARS's recommendation that they adopt and maintain adequate transfer pricing policies and related documentation.[130]

The transfer pricing documentation and transfer policies differ from company to company, making it difficult for SARS to understand each of them.[131] For example, MNEs often include what they deem to be pertinent and important information in their transfer pricing documentation and transfer policies. This approach is biased and inaccurate.[132]

2 4 The disruptive effect of the coronavirus (Covid-19) pandemic on transfer pricing activities of MNEs

The Covid-19 pandemic has affected the global economy and various business activities, including transfer pricing policies and retroactive transfer pricing adjustments of imported goods by MNEs in South Africa and many other countries. The disruptive impact of the Covid-19 pandemic has affected governments and customs authorities of various countries around the world, including South Africa.[133] The closure of borders, global lockdown and other Covid-19 pandemic restrictions imposed by governments of many countries globally have negatively affected the collection of additional revenue by customs authorities. Consequently, transfer pricing policies and retroactive transfer pricing adjustments of imported goods by MNEs need to be reconsidered by SARS in light of the devastating effects that the Covid-19 pandemic has had on the South African economy to date;[134] very few MNEs have post-Covid-19 pandemic recovery plans in place to deal with and/or ameliorate the negative effects of Covid-19 on retroactive transfer pricing adjustments of imported goods and related activities by MNEs in South Africa.[135] One potential challenge faced by MNEs concerns permanent establishments and their effect on tax liabilities for MNEs, especially during

Requirements Clarified" 2005 *Tax Breaks* 7–8; Alecu and Vasilescu "What Will Transfer Pricing Look Like After Covid-19?" 2020 *Tax Magazine* 115 116–118.

129 Allan *The OECD Transfer Pricing Guidelines* 4–83; Schnorberger, Gerdes, Van Herksen "Transfer Pricing Documentation: The EU Code of Conduct Compared with Member State Rules (Part 3)" 2006 34 *Intertax* 514 515–520.

130 Allan *The OECD Transfer Pricing Guidelines* 70–83; *Meditor Capital Management Ltd v Feighan supra*; Shrivastava, Sharma, Chauhan and Meitram *Income Tax Act 2009* (2009) 689–900.

131 Moyo *A Comparative Analysis of the Legislative Requirements of Transfer Pricing Documentation* (unpublished Master of Commerce dissertation, University of Johannesburg) 2015 6–47; Miesel *et al* 2002 *International Tax Journal* 1 3–22.

132 Drtina and Reimers "Global Transfer Pricing: A Practical Guide for Managers" 2009 74 *SAM Advanced Management Journal* 4 6–12.

133 Alecu and Vasilescu 2020 *Tax Magazine* 115 116–118.

134 Alecu and Vasilescu 2020 *Tax Magazine* 116–118; Löffie "Divisionalization and Domestic Transfer Pricing for Tax Considerations in the Multinational Enterprise" 2019 *Management Accounting Research* 1 2–9.

135 Collier, Pirlot and Vella "COVID-19 and Fiscal Policies: Tax Policy and the COVID-19 Crisis" 2020 *Intertax* 794 796–804; Löffie 2019 *Management Accounting Research* 2–9.

global lockdown, where, by virtue of the closed borders some MNEs were locked down in other countries where they do not normally conduct their businesses. A permanent establishment generally refers to a fixed place of business that gives rise to income or value-added tax liability on the part of MNEs in a country or a particular jurisdiction.[136] This created a huge challenge for MNEs that extended their stay in certain countries or jurisdictions owing to closed borders and other Covid-19 restrictions. It is unclear whether such MNEs should be treated as having satisfied permanent-establishment requirements and be liable for value-added tax. All these challenges make it difficult for MNEs to comply effectively with the retroactive transfer pricing adjustments for imported goods in South Africa. In this light, SARS should reconsider its rules and regulations for retroactive transfer pricing adjustments for imported goods by MNEs and address the negative effects of the Covid-19 pandemic on the activities of MNEs in South Africa.

The Covid-19 pandemic has also led to increased transfer pricing documentation and imposed a higher burden of proof on MNEs regarding their retroactive transfer pricing adjustments and compliance with ALP requirements for imported goods.[137]

3 CONCLUDING REMARKS

The article has unpacked various regulatory challenges affecting the retroactive transfer pricing adjustments and customs valuation processes of imported goods under the Customs and Excise Act, the Customs Duty Act and the Customs Control Act.[138] Accordingly, an overview analysis of selected regulatory and related challenges affecting the retroactive transfer pricing adjustments and the actual valuation processes of imported goods by MNEs and the SARS were discussed. For instance, it was noted that most MNEs struggle to pass a voucher of correction effectively on retroactive transfer pricing adjustments for imported goods and to comply timeously with all the relevant customs regulations of SARS. This reality is worsened by the complexity of the customs valuation methods, which negatively affects the retroactive transfer pricing adjustments of imported goods by MNEs in South Africa. Furthermore, the complexity of transfer pricing policies and transfer pricing methods also negatively affects retroactive transfer pricing adjustments of imported goods by MNEs in South Africa. Covid-19 challenges have also contributed to negative compliance with retroactive transfer pricing adjustments and valuation measures by MNEs in South Africa.

In light of the above, the authors submit that SARS should reconsider its rules and regulations for retroactive transfer pricing adjustments for imported

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136 Löffie 2019 *Management Accounting Research* 2–9; Collier *et al* 2020 *Intertax* 796–804.

137 Visser "Multinationals: Transfer Pricing Policies To Be Scrutinised Post-Covid" (2 December 2020) https://www.moneyweb.co.za/news/south-africa/multinationals-should-expect-intense-scrutiny-on-transfer-pricing-policies-post-covid/ (accessed 2020-12-02).

138 Tanzi "Globalisation, Technological Developments, and the Work of Fiscal Termites" 2000 *IMF Working Paper WP/00/181* 1 3–19; Blouin "Taxation of Multinational Corporations" 2012 6 *Foundations and Trends in Accounting* 1 3–55.

goods by MNEs so as to combat all possible negative effects of the Covid-19 pandemic on the activities of MNEs in South Africa. Owing to the challenges associated with the Covid-19 pandemic, SARS should streamline its transfer pricing documentation requirements and evidentiary burden on MNEs in respect of their retroactive transfer pricing adjustments to improve their compliance with ALP requirements for imported goods in South Africa. Moreover, policy makers should consider enacting adequate statutory provisions to deal with the establishment and enforcement of transfer pricing policies in the Customs and Excise Act, the Customs Control Act and the Customs Duty Act. Moreover, policy makers should amend the Customs and Excise Act, the Customs Control Act and the Customs Duty Act to introduce robust and mandatory statutory requirements for MNEs to adopt and maintain transfer pricing policies in South Africa. The aforesaid legislation should be further amended to enact provisions that specifically deal with customs valuation methods and transfer pricing methods to enhance the customs valuation and retroactive transfer pricing adjustments of imported goods by MNEs in South Africa.[139]

[139] Kamdar "Acceptable Methods for Determining an Arm's Length Price for Transfer Pricing" 2018 *Tax Professional* 18 19–27; Melnychenko *et al* 2014 *Investment Management and Financial Innovations* 42–49; Riedel and Zinn "The Increasing Importance of Transfer Pricing Regulations: A Worldwide Overview" 2014 42 *Intertax* 352 355–404.

NOTES / AANTEKENINGE

MISTAKEN IDENTITY OF THE VICTIM IN CRIMINAL LAW

1 Introduction

Along with the drama and pathos that the trial of Oscar Pistorius brought to a multitude of South Africans, who devotedly followed the events (and dissections of events) with great dedication a few years ago, the case also highlighted and publicized a number of legal rules and doctrines. Who would have thought, for example, that the term of art *dolus eventualis* would emerge as the subject of such quizzical interest for so many?

Other issues which emerged are no less interesting from a legal perspective, but are admittedly of much more narrow and parochial interest, being limited to those who are required to apply substantive criminal law, whether in the courts or in the classroom. One of these is the *error in obiecto* notion (the spelling "*obiecto*", rather than "*objecto*" which more typically appears in the textbooks and the case law, is more correct, although, both spelling forms will be used below, as needs be). The word "notion" is carefully selected, since describing *error in obiecto* as a *rule*, has been firmly and correctly dismissed as incorrect by Snyman (Hoctor *Snyman's Criminal Law* 7ed (2020) 171): "[It] is not the description of a legal rule; it merely describes a certain type of factual situation." Burchell's point of departure is even more stark: "[T]he so-called *error in objecto* rule has uncertain, dubious origins and reference to it, even as a description of a factual predicament, should be excluded from the lawyers' lexicon" (*Principles of Criminal Law* 5ed (2016) 406n58). Phelps ("The Role of *Error in Objecto* in South African Criminal Law: An Opportunity for Re-evaluation Presented by *State v Pistorius*" 2016 *Journal of Criminal Law* 45 46) uses the phrase "little-known principle" to describe this "factual predicament". The author in Kemp, Walker, Palmer, Baqwa, Gevers, Leslie and Steynberg *Criminal Law in South Africa* 3ed (2018) 263 does not use any nomenclature when discussing the legal position arising out of this factual situation.

2 Definition and content of *error in obiecto*

A South African definition of *error in obiecto* (in the criminal law context) is "mistake as to the quality or identity of the object of the attack" (Hiemstra and Gonin *Trilingual Legal Dictionary* 2ed (1986) 192). This definition reflects the full heading encompassing this kind of error: *error in persona vel obiecto*, which extends to both an *error in persona*, a mistake regarding the identity of the person on whom the harm is inflicted, and an *error in obiecto*,

a mistake as to the quality of an object. Therefore, when Hamlet stabs the person standing behind the curtain, thinking that it is Claudius, whereas it is in fact Polonius, this is an *error in persona*. In the case of *error in persona*, in the context of murder, X wants to kill Y, but at the moment that the harm is inflicted, X mistakes Z for Y, and kills Z. As indicated, the definition of *error in obiecto*, in itself, relates to the quality of an object, and so could be exemplified by the situation where X imports cocaine, thinking it is heroin, or when X sets fire to building A, thinking it is building B, or when X unlawfully appropriates item A, thinking it is item B (De Wet *De Wet en Swanepoel Strafreg* 4ed (1985) 144–145).

Blomsma notes that both types of error seem to create problems for the correspondence principle, in that X's intent does not relate to the specific objective element that was fulfilled, and that given that a mistake of fact negates intent, it could be argued that these types of error also do so (*Mens Rea and Defences in European Criminal Law* (2012) 240). However, he points out that not all deviations between the state of mind and reality are regarded as relevant, and these mistakes fall into the category of not excluding fault. While there do not appear to have been any reported South African cases falling into this category, a related example of the courts not paying heed to an error of mistaken identity may be seen in *R v Njembeyiya* (1941 EDL 156), where the accused stabbed to death the deceased, after mistaking the woman found in a compromising position with the deceased for the woman's sister, who was the wife of one of the accused. The court rejected the plea that the mistake as to the identity of the woman should reduce the accused's crime from murder to culpable homicide (158).

For the purposes of the present discussion, and for the sake of simplifying the discussion, the term *error in obiecto* will be used. This is despite this usage being formally inaccurate, given the fact that both the South African courts and writers typically only refer to "*error in objecto*", irrespective whether the mistake is in fact an *error in persona* or an *error in obiecto* proper. The discussion will also be limited to mistaken identity in the context of homicide (thus actually relating to an *error in persona*), though clearly the notion of *error in obiecto* has a wider application in the South African context. The point of departure is the well-established understanding that such an error does not exclude liability (Snyman "Is Daar Plek in die Suid-Afrikaanse Strafreg vir die Doctrine of Transferred Intent" 1998 *SACJ* 1 16), as all the requirements of definition of the crime of murder – the "unlawful and intentional killing of another living person" (Milton *South African Criminal Law and Procedure Vol II: Common-law Crimes* 3ed (1996) 310) – have been fulfilled.

3 Application

3 1 Case law

Although mentioned in a number of textbooks, the term *error in obiecto* has to a large extent (but not entirely, see for e.g., *R v Mabena* 1968 (2) SA 28 (RA); *S v Raisa* 1979 (4) SA 541 (O); *S v Du Toit (2)* 2005 (2) SACR 411 (T)) lain dormant in the language of our legal practice, the judgments of the

courts (for examples of where the term was included in counsel's argument, see *S v Masilela* 1968 (2) SA 558 (A); *S v Marwane* 1982 (3) SA 717 (A)). However, it emerged in the extensively analysed and criticised judgment of the trial court in the Pistorius murder trial (*S v Pistorius* 2014 JDR 2127). In the judgment of the court the following statement of the law was set out (45):

> "There is thus in the case of error in *objecto* so to speak an undeflected *mens rea* which falls upon the person it was intended to affect. The error as to the identity of the individual therefore is not relevant to the question of *mens rea*."

This is a correct statement of the law, and indeed, the court's affirmation of this position is further clarified in relation to the facts (47), when it states:

> "We are clearly dealing with error in *objecto* or error in *persona*, in that the blow was meant for the person behind the toilet door, who the accused believed was an intruder. The blow struck and killed the person behind the door. The fact that the person behind the door turned out to be the deceased and not an intruder, is irrelevant."

Unfortunately, this is the high point of the court's reasoning, as it then proceeds to conclude (50) that the accused "did not subjectively foresee" as a possibility that the shots he fired would kill the deceased, thus excluding *dolus eventualis*, and the possibility of a murder conviction, and concomitantly rendering any discussion of *error in obiecto* unnecessary. If there is no intent to kill, there cannot be a murder conviction. This conclusion flies in the face of the court's further conclusion that the accused was acting in putative defence (69–70): either the accused failed to foresee the fatal harm resulting when he fired through the toilet door at the "intruder", and therefore lacked intention, *or* he acted intentionally, believing as he fired the shots that he was entitled to do so (putative defence). The accused cannot logically occupy both factual positions.

The accused in *Pistorius* having been found guilty on the basis of culpable homicide, the State launched an appeal to the Supreme Court of Appeal on a number of questions of law, including the curiously expressed question "[w]hether the principles of *dolus eventualis* were correctly applied to the accepted facts and the conduct of the accused, including *error in objecto*" (*Director of Public Prosecutions, Gauteng v Pistorius* 2016 (1) SACR 431 (SCA) par 20). The court (per Leach JA) identified a number of difficulties with the trial court's application of *dolus eventualis*, including the fact that it applied an objective, rather than subjective, test to the question of *dolus* (par 28) and that the test of what is required to establish *dolus directus* was conflated with the assessment of *dolus eventualis* (par 29).

For the purposes of the present discussion the next issue discussed by the court is of signal importance. It was held that the trial court was in error when it concluded that since the accused did not foresee that he could cause the victim's death (as opposed to whoever the person was behind the door), he could not be guilty of her murder (par 30). The SCA held that such an understanding of *error in objecto* was mistaken: "although a perpetrator's intention to kill must relate to the person killed, this does not mean that a perpetrator must know or appreciate the identity of the victim" (par 31). To exclude the accused's intention to kill on this basis constituted an incorrect application of the law (par 32).

The Supreme Court of Appeal therefore (entirely correctly, it is submitted) gave short shrift to the contention that the identity of the victim matters, applying the *error in obiecto* approach that mistaking the victim is not a material error. Consequently, although it did not clarify the puzzling formulation of the question of law indicating that *error in obiecto* is a principle of *dolus eventualis* – it is not – the court was unanimous in holding that Pistorius was guilty of murder.

3 2 Distinct from aberratio ictus

The question has been posed: "Is there in actual fact a realistic distinction between *error in objecto* and *aberratio ictus*?" (Feltoe "Review of Burchell and Hunt *South African Criminal Law and Procedure Vol I: General Principles of Criminal Law* (1970)" 1972 *Rhodesian Law Journal* 278 285).

De Wet (*De Wet en Swanepoel Strafreg* 145) states that the situation where the actor is mistaken as to the identity of his victim, which he classifies as an *error in objecto*, occupies a particular place in the law relating to mistake. This is not because *error in objecto* presents a particular theoretical problem in the context of mistake, but because cases of *error in objecto* are easily confused by unthinking people ("onnadenkende mense") with cases of *aberratio ictus*, which has nothing at all to do with mistake. As Snyman explains (Hoctor *Snyman's Criminal Law* 175):

> "*Aberratio ictus* means the going astray or missing of the blow. It is not a form of mistake. X has pictured what he is aiming at correctly, but through lack of skill, clumsiness or other factors he misses his aim, and the blow or shot strikes somebody or something else."

Thus the difference between the *error in obiecto/error in persona* and *aberratio ictus* may be expressed as that "in the former, the offender killed the person he had individualized as a target [while] in [the] case of *aberratio ictus* the offender does not kill the person he had individualized" (Badar "*Mens rea* – Mistake of Law & Mistake of Fact in German Criminal Law: A Survey for International Criminal Tribunals" 2005 *International Criminal Law Review* 203 239). Milton distinguishes between "an undeflected *mens rea* which falls upon the person it was intended to affect" in the case of *error in obiecto* as opposed to a deflected aim associated with possible unforeseen and unintended factors in the case of *aberratio ictus* ("A Stab in the Dark: A Case of *Aberratio Ictus*" 1968 *SALJ* 115 118). That these concepts are "entirely different" is stressed by Ghanayim and Kremnitzer as follows ("Mistaken Identity and Error in Performance: A Transferred Malice?" 2014 *Criminal Law Quarterly* 329 335, see also Badar 2005 *International Criminal Law Review* 239):

> "In the case of a mistake of identity [*error in obiecto/error in persona*] the injury is inflicted upon the object that is right before the actor's eyes or mind, whereas in the case of an error in performance [*aberratio ictus*], the injury is inflicted upon some third party who is not the object of the actor's attention. In the case of mistake of identity, there is just one deviation from the actor's plan, while an error in performance involves two deviations. First, the action itself deviates from the intended path, and second, it injures… [a possibly] unintended object."

The contrary position – that there is no fundamental difference in legal effect between *error in obiecto* and *aberratio ictus*, whatever the factual differences between the concepts, has been based on various grounds. First, some Roman-Dutch writers seem to fudge the distinction between these concepts, not least due to the influence of the *versari in re illicita* doctrine, such that an "error in performance" or *aberratio ictus*, in terms of which X misses the actual target Y, and hits Z, does not exclude liability even where the result is not foreseen or foreseeable (Milton 1968 *SALJ* 116; Boothby "The Deflected Blow: *Aberratio Ictus*" 1968 *Rhodesian Law Journal* 19 23–5). Hence the mistake has no legal effect, as with mistake in identity or *error in obiecto*, but this in itself does not render the concepts equivalent. While there were earlier cases that also seemed to regard these concepts in the same light (such as *R v Xulu* 1943 AD 616; *R v Kuzwayo* 1949 (3) SA 761 (A); *R v Koza* 1949 (4) SA 555 (A)), these cases were decided at a time previous to a fully subjective notion of intention in South African criminal law, and there is little doubt that such objective constraints could only result in courts assessing *mens rea* through the lens of reasonableness (Burchell "*Aberratio Ictus*" in Kahn (ed) *Fiat Justitia – Essays in Memory of Oliver Deneys Schreiner* (1983) 165 170). The support for the equivalence of legal effect between *error in obiecto* and *aberratio ictus* in the then Rhodesian Appellate Division case of *R v Mabena* (*supra*), where (36) Beadle CJ regarded the distinction as "rather academic" and "somewhat unrealistic", and the later support for the approach taken in *Mabena* by Pain ("*Aberratio Ictus*: A Comedy of Errors – and Deflection" 1978 *SALJ* 480) seems rooted in this outdated understanding of the notion of intent according to Exton Burchell (*Fiat Justitia* 169–171), who points out that Roman-Dutch law writers either failed to make the distinction, or were affected by the *versari in re illicita* doctrine, or both (170). The *Mabena* decision was overruled by the Zimbabwe Supreme Court in *S v Ncube* 1984 (1) SA 204 (ZS) as "contrary to principle".

3 3 Addressing the arguments of Phelps and Burchell

Having examined the nature of the notion *error in obiecto*, its application in the case law, and having noted its doctrinal antipathy to *aberratio ictus*, it remains for us to turn to the arguments regarding *error in obiecto* raised by Phelps and Burchell. Phelps (2016 *Journal of Criminal Law*) has written in support of the judgment of the trial court in *Pistorius*. After a good general synopsis of the development in South African law which has given rise to the current position based on the subjective, psychological approach to criminal liability, which incorporates a discussion of *dolus eventualis*, *error in obiecto* and putative defence, Phelps makes three arguments which pertain directly to what Phelps believes is a mistaken approach to *error in obiecto*. She argues (i) that the identity of the deceased is still relevant to some extent in a charge of murder (59–60); (ii) that if identity were never relevant, *dolus indeterminatus* would be rendered superfluous (60); and (iii) that in considering the relevance of the victim's identity in a charge of murder it is necessary "to distinguish between an abstract prohibition (the definition of the crime) and the concrete charge" (60–61).

Let us examine these matters in turn. Phelps argues that identity of the victim remains relevant insofar as a murder charge is concerned, citing (2016 *Journal of Criminal Law* 60) definitions of the test for intent in the case law and in academic writing referring to "the deceased" or "the victim" to indicate that the intent applies to a *particular* victim, on the basis of the definite article "the" (argument (i)). However, it is submitted, such definitions merely reflect the factual scenario in such a case. The accused in a murder trial is not charged with the death of a hypothetical victim, but a real one, and it is with regard to this real victim that the accused must intend harm.

But what of the contention that this would render *dolus indeterminatus* superfluous (argument (ii), Phelps 2016 *Journal of Criminal Law* 60)? Phelps states that *dolus indeterminatus*, which can occur in association with any of the standard forms of intention (direct, indirect or *dolus eventualis*), refers to where the perpetrator "does not have a particular victim in mind, but they intend to kill someone" (60). The SCA (in *DPP, Gauteng v Pistorius supra*) accepted that the situation in *Pistorius* – shooting at an intruder through a closed toilet door – would amount to *dolus indeterminatus* (par 31). In doing so, the court indicated that a perpetrator need not know the identity of the victim killed to be held liable for murder. However, although the "wild shootout" in the context of an armed robbery may be associated with *dolus indeterminatus* (the court cites Snyman's example in the fifth edition of *Criminal Law*, see Hoctor *Snyman's Criminal Law* 178), as may the planting of a terrorist bomb (De Wet *De Wet en Swanepoel Strafreg* 149), since the accused who acts in this way does not know and does not care who will get killed, this was not the case in *Pistorius*. The victim in *Pistorius*, though not known to the appellant, was certainly determinate – it was the person behind the door, a particular and specific victim, which may be contrasted with the examples of *dolus indeterminatus* mentioned earlier. The court seems to elide this distinction, switching seamlessly between a consideration of *dolus indeterminatus* proper and the factual situation in *Pistorius*. The court states incorrectly that *dolus indeterminatus* is "merely a label meaning that the perpetrator's intention is directed at a person or persons of unknown identity" (par 31). In fact, *dolus indeterminatus* is a label meaning that the perpetrator's intention is directed at *indeterminate* victims, or as Snyman puts it, "not at a particular person, but at anybody who may be affected by his act" (Hoctor *Snyman's Criminal Law* 178).

Understanding the true nature of *dolus indeterminatus* addresses Phelps's concern. As indicated, Phelps contends that "if identity were never relevant, *dolus indeterminatus* would be rendered superfluous" (2016 *Journal of Criminal Law* 60). Accepting that *error in obiecto* does not negate liability does not collapse the categories of intention or do away with *dolus indeterminatus* – it is murder where a specific human being is targeted and killed, even if the victim's identity is mistaken by the perpetrator, in terms of the ordinary rules of criminal liability pertaining to any form of *dolus*. This is the typical context for the *error in obiecto*, where the target is settled, established, definite and *determinate*, but mistaken. Where the target is *indeterminate* victims, then *dolus indeterminatus*, in association with one of the other forms of intention, would be of application.

Phelps's contention that a distinction must be drawn between the abstract prohibition and the concrete charge (argument (iii)) relates back to the point raised earlier (pertaining to argument (i)). Indeed, a criminal charge relates to a particular act, a particular harm, a particular victim. If the accused did not subjectively intend to unlawfully inflict the particular harm, then liability cannot follow for an intention-based crime. In this Phelps is entirely correct. However, the example that she proceeds to use, and the conclusion that she draws on this basis, are less secure. Phelps (2016 *Journal of Criminal Law* 61) uses the example of X, who intentionally blows up a shopping centre, killing a number of persons. X acts with *dolus indeterminatus* – that is, he does not know the identity of the victims he is targeting, but nevertheless intends their death. Unbeknown to X, his mother, who he believes to be safe in bed at home, is also at the shopping centre when the bomb detonates, and is one of the fatalities. Phelps argues that X does not have intention in respect of his mother's death, as he did not at any stage intend to kill *her*. However, in terms of *dolus indeterminatus* (as indicated above), X clearly intended the death of the unknown victims at the shopping centre when the bomb detonated. His mistake as to the identity of (one of) the victims can hardly avail him, in the light of his steadfast intent to kill all those who were in the vicinity of the bomb.

Before concluding, it may be useful to consider Burchell's analysis of the legal position. Burchell argues that *error in obiecto* amounts to a type of transferred intent "leading to an *automatic* exclusion from the intention inquiry of the relevance of the identity of the ultimate victim" (*Principles of Criminal Law* 404, author's emphasis). While one would agree that "transferring" fault is "anathema to the current approach" of individual, subjective liability, it is far from clear how Burchell can categorise the *error in obiecto* situation as such. The English doctrine of transferred intent is not a part of South African criminal law, as Burchell acknowledges, and it is incorrect to describe the *error in obiecto* situation in these terms. A mistake about the identity of the object is "irrelevant as long as the objects are of the same nature and kind" (Blomsma *Mens Rea and Defences in European Criminal Law* 241, see further De Wet *De Wet en Swanepoel Strafreg* 145). Thus, the intent, directed at the targeted but mistaken object, remains relevant for the purposes of criminal liability, and there is no transfer of intent to another person or entity.

Burchell continues to argue that such an approach is moreover "inflexible", and should, if applied, be limited to situations involving *dolus directus*, but should preferably be abandoned altogether "if it existed at all" (*Principles of Criminal Law* 405). He further contends (*Principles of Criminal Law* 405)

> "[a] rule that error as to the identity of the ultimate victim or victims is always irrelevant to criminal liability for homicide is very different from a particular general form of intent that requires the State, in every case where it is in issue, to prove the presence of this general form or forms of intent beyond reasonable doubt."

In response, it may first be noted that, as Burchell agrees (*Principles of Criminal Law* 406 fn58), *error in obiecto* is not a *rule* binding the court, but merely the description of a particular factual scenario. Secondly, given the

discussion of *error in obiecto* by Roman-Dutch law writers, contemporary academic authors, and in the case law, there can be little doubt in its existence. Thirdly, motive or desire plays no role in liability, thus it is irrelevant whether the accused *wanted* to kill the particular victim. The relevant question is whether the accused *intended* to kill the particular victim, whom he or she (at least) foresaw might be unlawfully killed as a result of the accused's act (or omission). Whether the result was *desired*, is a matter for sentencing (Blomsma *Mens Rea and Defences in European Criminal Law* 241). Fourthly, Burchell's argument does not sit well with Milton's statement (which Burchell cites with approval, *Principles of Criminal Law* 404), that *error in obiecto* liability flows from "an undeflected *mens rea* which falls upon the person it was intended to affect". Why abandon this terminology, when it usefully labels a particular situation where liability continues, as a result of such a mistake being non-material? Use of such a term helps to distinguish this situation from a material mistake, such as when the accused in fact killed a person while believing he was shooting an animal. Where the death of an animal was intended, the necessary element of murder that the killing of a human being must be intended would be excluded, and thus liability for murder could not follow. Finally, it is evident from the judgment of the Supreme Court of Appeal in *DPP, Gauteng v Pistorius* (*supra*) that even though it is not accurate to describe *error in obiecto* as part of the "principles of *dolus eventualis*" (par 31), the fact that the court did not seek to exclude the question of *error in obiecto* from the context of the operation of *dolus eventualis* clearly indicates that it is highly unlikely to be limited to *dolus directus*, or that it should be so limited, as Burchell and Phelps (2016 *Journal of Criminal Law* 51–52) contend. There is certainly a powerful policy argument to the contrary: where the actor has both choice and control over his actions, and the envisaged consequence is the death of another human being, how could it be argued that *dolus eventualis* should *not* be applicable (see Hoctor "The degree of foresight in *dolus eventualis*" 2013 *SACJ* 131 154–155)?

Both Phelps and Burchell baulk at the idea that mistaken identity is not legally relevant to liability. Both are motivated by the factual scenario in *Pistorius*, and their support for the finding in the trial court that culpable homicide was the appropriate basis for conviction (see Burchell "Masipa's decision to acquit Oscar of murder justified", available at *http://www.bdlive.co.za/opinion/2014/09/17/masipas-decision-to-acquit-oscar-of-murder-justified*, (accessed 30 October 2021); see Phelps 2016 *Journal of Criminal Law* 61–3). Central to their approach is that the fact that the actor would not have fired a shot if he knew that he was shooting the actual victim. As Blomsma points out, it "strains the common sense meaning of the word 'intend'" if killing the victim is the last thing that the accused desired (*Mens Rea and Defences in European Criminal Law* 241). In law, however, desires and motives do not serve to establish liability, and the crucial inquiry is whether intention to commit the crime was present. Why should a mistake in identity matter if the accused wished to kill a person? The only requisite constraint is that the objects should be of the same kind in so far as the definition of the crime is concerned (De Wet *De Wet en Swanepoel Strafreg* 145). What has happened in objective terms "should in its essential features be in line with what the actor *tempore delicti* thought

would happen" (Blomsma *Mens Rea and Defences in European Criminal Law* 241).

To conclude, there is no need to throw the baby out with the bathwater, on the basis of antipathy to the result in *Pistorius*. Though unelaborated in the case law and previously essentially limited to a theoretical concern in South African criminal law, and though non-existent in English law, *error in obiecto* (and *error in persona*, which as indicated above, is really what is contemplated when we are discussing mistaken identity in the context of murder) is well-known in Dutch and German law, and became a part of South African criminal legal theory at the same time as the reception of *dolus eventualis*.

While the *error in obiecto* notion has not always been accurately described in early sources, to describe it as having "uncertain, dubious origins", as does Burchell, is not appropriate. The focus of the confusion is the position of *aberratio ictus* in relation to *error in obiecto*, rather than the obscurity of *error in obiecto*. To point out, as does Phelps, that no reported South African case has turned on the point of *error in obiecto* is both entirely correct, and, it is submitted, entirely to be expected, given that such a mistake by definition (at least, in the present context of the crime of murder) does *not* provide an obstacle to liability being established.

If one departs from the context of the common-law crimes, it is possible that an *error in obiecto* situation can found a defence. As Blomsma notes (*Mens Rea and Defences in European Criminal Law* 241–2), a particular offence may indeed require that the object have a certain quality, such as where X is arrested while in the possession of drugs, but he argues that he thought he was transporting weapons or gold (or currency, as in the English case of *R v Taaffe* [1984] AC 539). Another example (also provided by Blomsma) would be where (as in section 102 of the German Criminal Code) it is an offence to assassinate a representative of a foreign state, and X believed the representative was a national. In these circumstances the mistake would be material, but the possibility of a defence in such circumstances may well be severely limited by the application of *dolus eventualis*.

Moreover, there is no cause for the notion of *error in obiecto* to be "excluded from the lawyers' lexicon", as Burchell suggests. Moreover, it is not accurate to argue, as does Phelps, that the notion of *error in obiecto* "has not gained such wide recognition as to become an entrenched principle of law" (2016 *Journal of Criminal Law* 54–55), if only because it is not so much a principle of law as a particular factual situation which does not give rise to a defence. As a descriptor of a particular factual situation which does *not* negate intention to commit a crime, *error in obiecto* still has a useful role to play in South African law, just as it does on the European continent (see, e.g., Badar 2005 *International Criminal Law Review* 238–239; Blomsma *Mens Rea and Defences in European Criminal Law* 240–242; Ghanayim and Kremnitzer 2014 *Criminal Law Quarterly* 331–333).

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(DON'T) HOLD YOUR BREATH: THE SOUTH AFRICAN COVID-19 VACCINE APPROVAL PROCESS AND REGULATORY FRAMEWORK

1 Introduction

The world seemed to sigh in relief in early November 2020, when it was announced that the Covid-19 vaccine developed by Pfizer and BioNTech showed itself to be 90 per cent effective in early data analysis. This announcement was followed by one from Moderna Inc that its vaccine in development was showing to be almost 95 per cent effective. Soon after, numerous other companies announced the efficacy of their respective vaccines and roll-out plans and policies were made and even implemented.

However, this sigh of relief was perhaps premature. Although these announcements were good news on the face of it, they also brought to light some concerns. The fast pace at which the vaccines were developed and made available for human use raises various ethical and legal issues as well as questions related to the safety and efficacy thereof. The correct dosage and timing of vaccination is still not fixed, vaccine expiration periods and the discovery of new variants of the Covid-19 virus has further added to these concerns (BusinessTech "Expiring Vaccines Doomed South Africa's Rollout Plans From the Start" (2021) http://www.businesstech.co.za/news/government/467932/expiring-vaccines-doomed-south-africas-rollout-plans-from-the-start-report/ (accessed 2021-03-18)). In addition, uncertainty exists regarding the approval process that should be followed for these vaccines. This last concern forms the focus of this note.

In South Africa, the above issues have been exacerbated by a less-than-smooth vaccine roll-out. In early February 2021, Minister of Health Dr Zweli Mkhize announced that South Africa would halt the roll-out of the Oxford/AstraZeneca vaccine, which had arrived in the country only a week before. This was due to the publication by the lead investigator in the trial describing the results as "disappointing" as shown against the South African N501Y variant of the virus. As a result, the South African government entered into negotiations with the Serum Institute of India (SII) for the Johnson & Johnson "silver bullet" vaccine, and embarked on a new roll-out plan, involving the vaccination of healthcare workers and an evaluation of the vaccine in the field (Ellis "South Africa Switches to J&J 'Silver Bullet' as AstraZeneca Vaccine Falters Against Local Variant of Coronavirus" (2021) http://www.dailymaverick.co.za/article/2021-02-08-south-africa-switches-to-jjs-astrazeneca-vaccine-halted/ (accessed 2021-03-18)). The Johnson & Johnson vaccine and roll-out plan, however, was not free of controversy, as it later emerged that the plan comprised not a "roll-out" of the vaccine, but

rather a clinical trial since proper approval and registration for the use of the vaccine had not (yet) been granted (Wa Afrika "Don't Use South Africans as Vaccine Guinea Pigs" (2021) http://www.iol.co.za/sundayindependent/news/dont-use-south-africans-as-vaccine-guinea-pigs-6bc4358e-49c2-4435-96a9-62142effc965 (accessed 2021-03-18)).

The National Control Laboratory for Biological Products (NCL), which is one of twelve laboratories worldwide contracted to perform vaccine testing for the World Health Organisation is in the process of testing various vaccines on behalf of the South African Health Products Regulatory Authority (SAHPRA). As variants of the virus become more prevalent, scientists are being pushed to develop vaccines targeting multiple versions of the relevant pathogens; as a result, Pfizer, Moderna, Johnson & Johnson and AstraZeneca have started development on booster shots to accompany their vaccines (BusinessTech http://www.businesstech.co.za/news/government/467932/expiring-vaccines-doomed-south-africas-rollout-plans-from-the-start-report/). Although vaccinations have now started, the virus is unlikely to be eradicated soon; next-generation vaccines will have to be developed (Ellis http://www.dailymaverick.co.za/article/2021-02-08-south-africa-switches-to-jjs-astrazeneca-vaccine-halted/). Again, questions may be raised as to how these new vaccines and boosters should be approved and registered for use.

The back-and-forth roll-out of vaccines in South Africa is alarming, does little to instil a sense of trust in the powers-that-be and adds to the general confusion and concern regarding a vaccine against Covid-19. To say the least, the current situation is less than ideal. Although we might still need to hold our breath, behind a mask, a little longer, the author feels somewhat assured knowing that South Africa has a well-established procedure for the approval of new medications, although it is not exactly swift. The aim of this piece is therefore explanatory in nature as it seeks to set out the process whereby new medicines are approved and registered in South Africa.

2 Approving a clinical trial in South Africa

The extensive and well-defined South African framework for the regulation of medicines is established and developed by various legal instruments. These are the Medicines and Related Substances Act 101 of 1965 (Medicines Act), the National Health Act 61 of 2003 (NHA) and the South African Good Clinical Practice Guidelines (Department of Health *South African Good Clinical Practice: Clinical Trial Guidelines* 3ed (2019) https://sahpra.org.za/wp-content/uploads/2020/01/31828e7f4thCombinedChapt3rdRevisedNHREC_CTC_SAGCP24May2019_v3clean_Draftforcomment__10.07.2019.pdf (accessed 2020-11-16)) (Good Practice Guidelines). Certain other regulations and policies are also relevant to the creation and functioning of this framework and, of course, all these instruments exist under the ever-present and supreme South African Constitution (Constitution of the Republic of South Africa, 1996).

In terms of the Constitution, the State is obliged to realise progressively the socio-economic rights of all South Africans and this incudes access to healthcare as provided for by section 27. In order to facilitate fair and equal

access to healthcare in South Africa, the NHA provides for a structured and uniform healthcare system. Chapter 2 of the NHA also provides extensively for the rights and duties of healthcare users and personnel and includes specific provisions related to health services for experimental or research purposes (s 11 of the NHA). Chapter 9 of the NHA also provides detailed provisions related to national health research and includes the establishment of a National Health Research Ethics Council (NHREC) and research ethics committees (RECs). The NHA further provides for the creation of topic-specific regulations such as those related to research involving human participants or the various regulations regarding the NHREC and RECs. The Good Practice Guidelines serve a similar purpose to the NHA regulations as they provide for further detailed scientific and ethical standards to be met for any clinical trial involving human participants.

The Medicines Act, as amended (Medicines and Related Substances Amendment Act 72 of 2008 and Medicines and Related Substances Amendment Act 14 of 2015), establishes and empowers SAHPRA. SAHPRA is a National Department of Health entity, which assumes the roles of the Medicines Control Council (MCC) and the Directorate of Radiation Control (DRC). This means that, at its core, it is tasked with the monitoring, investigation, inspection, registration and evaluation of all health projects in South Africa against standards of safety, efficacy and quality. This includes clinical trials (South African Health Products Regulatory Authority "Who We Are" (2020) https://www.sahpra.org.za/who-we-are/ (accessed 2020-11-16)).

As the name suggests, SAHPRA is the South African regulatory authority for the regulation of health products intended for human use and the conducting of clinical trials, the licensing of manufacturers, wholesalers and distributors of medicines and medical devices. In terms of section 2B(1)(*a*)–(*c*) of the Medicines Act, SAHPRA must:

> "(*a)* ensure the efficient, effective and ethical evaluation or assessment and of medicines, medical devices and IVD's that meet the defined standards of quality, safety, efficacy and performance, where applicable;
> (*b*) ensure that the process of evaluating or assessing and registering of medicines, medical devices is transparent, fair, objective and concluded timeously;
> (*c*) ensure the periodic re-evaluation or re-assessment and ongoing monitoring of medicines, medical devices and IVD's."

Although not pertinent to this note, in terms of the Medicines Act read with the Hazardous Substances Act 15 of 1973, SAHPRA also regulates radiation-emitting devices and radioactive nuclides (South African Health Products Regulatory Authority "Acts and Regulations" (2020) https://www.sahpra.org.za/acts-and-regulations/ (accessed 2020-11-16)).

In South Africa, clinical trials may not be conducted, nor may medicines be marketed, prescribed, sold or administered without prior SAHPRA approval. It must be mentioned that SAHPRA is a regulatory authority and does not in and of itself undertake any trials. It approves the trials of researchers and manufacturers and ensures that the set safety, efficacy, quality and ethical standards have been met.

The process of approval is as follows and will be discussed in more detail below:

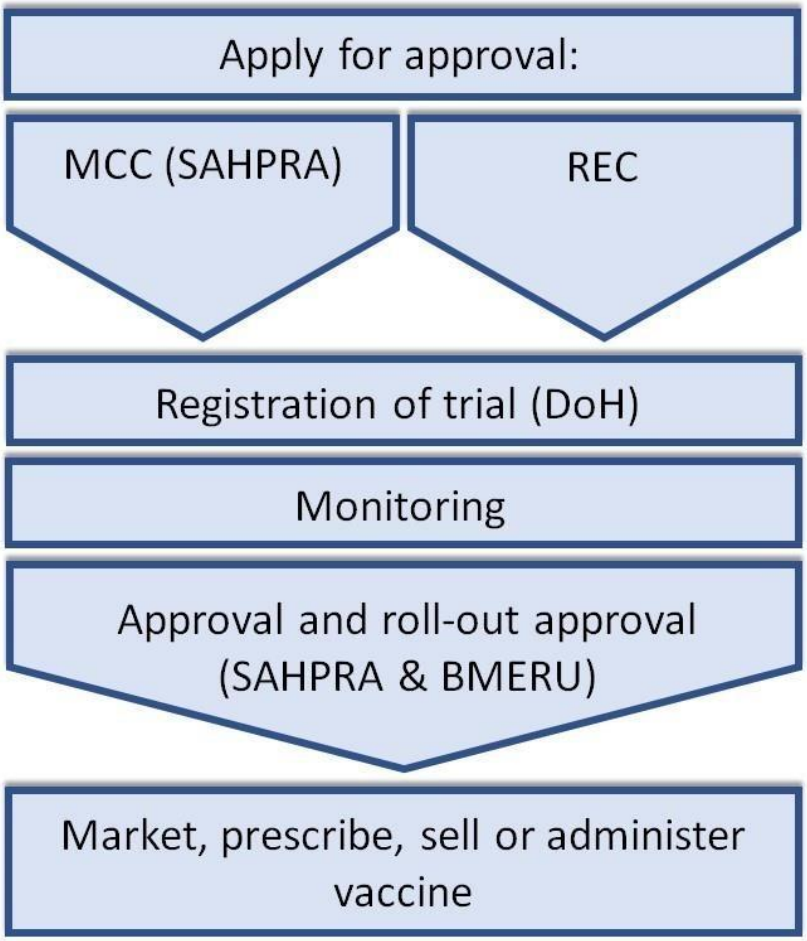

Figure 1: The approval process of a clinical trial for a Covid-19 vaccine in South Africa

3 Approval by the Medicines Control Council

In order to obtain approval for a clinical trial, the sponsor or principal investigator must apply to the MCC for approval of the trial to be conducted on human participants. A "sponsor" may be a pharmaceutical company or any other organisation responsible for the financing and management of a clinical trial whereas a "principal investigator" is a South African-based scientist who is responsible and accountable for the conducting and reporting of the trial.

The process of application is set out by the Regulations Relating to Medical Devices and In Vitro Diagnostic Medical Devices (IVDs) (GN 1515 in *GG* 40480 of 2016-12-09) which, in broad strokes, provide that:

1. A person who desires to initiate or conduct a clinical trial must apply to the MCC on a prescribed form for authorisation to conduct such a trial.
2. Such a trial must be conducted in accordance with the Good Practice Guidelines.
3. No clinical trials may be conducted without the prior authorisation of the MCC.
4. The person responsible for conducting the clinical trial must submit progress reports to the MCC every six months from the date of commencement of the trial and 30 days after the completion or termination of the trial.
5. Adverse events must, however, be reported as soon as is practically possible.
6. The MCC may request any additional information, may inspect a clinical trial or withdraw its authorisation if it is of the opinion that the safety of the participants is compromised or the scientific rationale behind the trial has changed.

However, MCC approval is only the first step in obtaining approval as ethical approval for the trial must also be obtained.

4 Approval by ethics committees

All clinical trials conducted in South Africa, including multinational trials, must apply for and receive ethical approval. Ethical approval must be granted by an accredited research ethics committee (REC) based in South Africa. RECs are responsible for ensuring that ethical norms and standards are met, but also for the safeguarding of the rights of the human participants and ensuring that a clinical trial is scientifically relevant in South Africa.

As mentioned above, the NHA in section 72 provides for the establishment of a National Health Research Ethics Council (NHREC), which must:

> "(*a*) determine guidelines for the functioning of health research ethics committees;
> (*b*) register and audit these health research ethics committees;
> (*c*) set norms and standards for conducting research on humans…, including … for conducting clinical trials;
> (*d*) adjudicate complaints about the functioning of health research ethics committees and hear any complaint by a researcher …;
> (*e*) refer to the relevant statutory health professional council matters involving the violation or potential violation of ethical or professional rules …;
> (*f*) institute … disciplinary action as … prescribed against any person found to be in violation of any norms and standards or guidelines …; and
> (*g*) advise the national department and provincial departments on any ethical issues concerning research." (s 72(6) of the NHA)

Section 69 of the NHA provides for the establishment of the National Health Research Committee. This committee must:

> "(*a*) determine the health research to be carried out by public health authorities; (*b*) ensure that health research agendas and research resources focus on priority health problems; (*c*) develop and advise the Minister on the

> application and implementation of an integrated national strategy for health research; and (*d*) coordinate the research activities of public health authorities." (s 69(3) of the NHA)

Specific provision is also made for research on or experimentation with human participants in section 71 of the NHA. This section provides for a wide variety of matters, including the conditions for research involving human participants in general, research involving a minor for therapeutic purposes, and research involving a minor for non-therapeutic reasons. The provisions found in the NHA are also supplemented by various regulations made in terms of the Act. Section 11, which provides for health services for experimental or research purposes, may also be relevant.

Currently, RECs must pay additional attention to Covid-19 trials, which are categorised as involving innovative therapy and, owing to this classification, additional control and review measures are imposed on the trial (see in general, De Vries "Research on COVID-19 in South Africa: Guiding Principles for Informed Consent" 2020 110(7) *SAMJ* 635–639 https://doi.org/10.7196/SAMJ.2020.v110i7.14863). Once ethical approval is granted, the clinical trial may be registered.

5 Registration of clinical trial

After MCC and ethical approval has been obtained, the person responsible for the trial, the sponsor or principal investigator, must apply to the Department of Health (DoH) to have the trial registered.

The DoH must record the trial on the South African National Clinical Trial Register and award the trial a number. Only once the trial has been registered with the DoH and awarded its unique number may the trial commence (South African National Clinical Trial Register and National Health Research Ethics Committee "South African National Clinical Trial Registry (SANCTR) and National Health Research Ethics Committee (NHREC)" (2020) http://www.crc.uct.ac.za/sites/default/files/image_tool/images/53/documents/Reg/CRC%20website_Regulatory%20Content_updated%2020171204_SANCTR_NHREC.pdf (accessed 2020-11-16)). At this stage, the monitoring plan also takes effect.

6 Monitoring plan

The sponsor or principal investigator must have in place a monitoring plan that stipulates the review and monitoring of the trial. Normally, such review is done on a six-monthly basis as clinical trials may last years. However, owing to the rapidly changing dynamics of Covid-19, SAHPRA currently allows for an expedited two-week abridged Covid-19 interim progress report form for clinical trials. This report deals specifically with safety and futility monitoring (South African Health Products Regulatory Authority "Clinical Trials" (2020) https://www.sahpra.org.za/clinical-trials/ (accessed 2020-11-16)).

The prescribed form must be completed two-weekly from the date of approval of the clinical trial and even if participant enrolment has not yet started. It does not, however, replace the required six-monthly progress report.

7 Approval granted and roll-out

After the trial delivers fruitful results – that is, the successful development of a vaccine – the vaccine must be registered with SAHPRA. Only then may it be marketed, sold, prescribed or administered in South Africa, regardless of any foreign approval thereof by another country. This means, for example, that even if the Pfizer BioNTech vaccine is fully approved abroad by the American Food and Drug Administration (FDA), it will still have to be locally approved and registered by SAHPRA. Note that, should a foreign regulatory authority that is recognised by SAHPRA (such as the FDA) already have approved the vaccine, SAHPRA may allow for expedited approval and registration within South Africa.

The registration of a new biological medicine, which includes a vaccine, is undertaken by the Biological Medicines Evaluation and Research Unit (BMERU), a sub-unit of SAHPRA. BMERU is responsible for the evaluation of applications for the registration of biological medicines, the evaluation of applications for amendments to registered biological medicines, communicating with the pharmaceutical industry on matters of policy, the establishment of regulatory frameworks for the use of blood products and stem cells, and the establishment of pertinent regulatory frameworks for vaccines (South African Health Products Regulatory Authority "Biological Medicines Evaluation and Research Unit" (2020) https://www.sahpra.org.za/biological-products/ (accessed 2020-11-16)).

Once SAHPRA and BMERU have concluded their evaluation of the registration application, taking into account any expert committee recommendations and all required documentation, it will decide whether a new biological medicine meets all requirements for registration.

If so, the medicine will be registered and may then be made available in South Africa.

8 Conclusion

This note has explained the process to be followed in approving new medication for human use within South Africa. Although the South African framework for the approval of new medication, such as a Covid-19 vaccine is clear cut, the virus has proved to be wiley; and constant vaccine improvement and development will be necessary. This in turn will make the processes discussed above even more important so as to ensure safe and efficient, legal and ethically sound vaccine availability. In the meantime, we wait with masked and bated breath.

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CASES / VONNISSE

DISMISSAL ARISING FROM FLOUTING COVID-19 HEALTH AND SAFETY PROTOCOLS

Eskort Limited v Stuurman Mogotsi [2021] ZALCJHB 53

1 Introduction

The Labour Court judgment handed down by Tlhotlhalemaje J in *Eskort Limited v Stuurman Mogotsi* (JR1644/20) (2021) ZALCJHB 53 (*Eskort Limited*) on 28 March 2021 raised the topical issue of fairness regarding the dismissal of an employee for gross misconduct and negligence related to his failure to follow and/or observe COVID-19-related health and safety protocols put in place at the workplace (*Eskort Limited supra* par 1).

In light of the above, the objectives of this case note are twofold. First, it examines the parameters under which the employer can discipline an employee for flouting the COVID-19 safety protocols and regulations. Secondly, it also considers the extent to which the employer can take appropriate action against an employee who wilfully refuses to obey the lawful and reasonable instructions of the employer during COVID-19 times.

2 Overview of the factual matrix

The employee (Mr Mogotsi) was employed as Assistant Butchery Manager by Eskort Limited (employer). Subsequently, the employee was charged with the following offences (*Eskort Limited supra* par 4): first, gross misconduct related to his alleged failure to disclose to the employer that he had taken a COVID-19 test on 5 August 2020 and was awaiting his results; secondly, gross negligence, in that after receiving his COVID-19 test results (which were positive), he had failed to self-isolate, had continued working on 7, 9 and 10 August 2020, and had consequently placed the lives of his colleagues at risk. It was further alleged that in the period during which he had reported for duty, he failed to follow the health and safety protocols at the workplace, including adherence to social distancing (*Eskort Limited supra* par 4).

Subsequent to his dismissal, the employee referred an alleged unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). At the arbitration hearing, the employer led the evidence of two witnesses to prove that the employee (Mr Mogotsi) was guilty of the allegations that had precipitated his dismissal. Similarly, the employee also

led evidence in his case (*Eskort Limited supra* par 6). The employer's first witness testified that it was common practice for the employee (Mr Mogotsi) to travel to and from work with a colleague, Mr Mchunu, in a private vehicle. On 1 July 2020, Mr Mchunu did not feel well and consulted with a medical practitioner, who booked him off sick from 1 to 3 July 2020 and extended his sick leave on 4 July 2020. Mr Mchunu was subsequently admitted to a hospital on 6 July 2020 and was informed on 20 July 2020 that he had tested positive for COVID-19 (*Eskort Limited supra* par 6.1). The witness further testified that at about the time that Mr Mchunu initially fell ill, his colleague Mr Mogotsi also started experiencing chest pains, headaches and coughs. According to the witness, the employee then consulted a traditional healer, who booked him off on 6 and 7 July 2020 and from 9 to 10 July 2020 (*Eskort Limited supra* par 6.2).

Upon being booked off by the traditional healer, the employee (Mr Mogotsi) was informed by management to stay at home. He nonetheless reported for duty after 10 July 2020. This was even after he became aware of Mr Mchunu's positive results (*Eskort Limited supra* par 6.3). The employee took a COVID-19 test on 5 August 2020 and was informed on 9 August 2020 *via* "SMS" that he had tested positive. The employer was unimpressed with the employee's conduct and raised a concern that despite having taken a COVID-19 test on 5 August 2020 and being informed of his positive results on 9 August 2020, he had reported for duty on 7, 9, and 10 August 2020, and came to the premises to hand in a copy of his results (*Eskort Limited supra* par 6.4).

In addition to the above, the second witness of the employer placed on record certain fundamental issues. First, the employer had COVID-19 policies, procedures, rules and protocols in place, and all employees had been constantly reminded of these through memoranda and various other means of communication posted at points of entry and also through emails (*Eskort Limited supra* par 6.5). Secondly, the employee was a member of the in-house "Coronavirus Site Committee", and was responsible, *inter alia*, for informing all employees [about their duties] if they suspected that they might have been exposed to COVID-19 (*Eskort Limited supra* par 6.6).

Furthermore, when the employer conducted its own investigations after the employee's test results were made known, it was discovered that on 10 August 2020, a day after he had received his results, he was observed in video footage at the workplace walking in the workshop without a mask, and hugging a fellow employee (Ms Milly Kwaieng) *(Eskort Limited supra* par 6.7). Upon his test results being known, and after further investigations and contact tracing, a number of employees who had contact with him had to be sent home to self-isolate, including Kwaieng and others who had other comorbidities (*Eskort Limited supra* par 6.8).

Under cross-examination, the employee testified that he received the test results on 9 August 2020 but alleged that he did not know he needed to self-isolate. He conceded having hugged Kwaieng on 10 August 2020, and having walked on the shop floor without a mask. His excuse was that he was on a phone call at the time and that he needed to remove his mask to have a clearer conversation with his caller. His main contention was that, despite asking for direction after he had reported ill and informing management that

he had been in contact with Mr Mchunu, nothing was done, as business had continued as usual when he reported for duty (*Eskort Limited supra* par 6.11).

3 The decision of the CCMA and the Labour Court

Given the above evidence and having regard to relevant provisions of the Labour Relations Act (66 of 1995), the CCMA Guidelines, the Code of Good Practice: Dismissal, and relevant cases, the CCMA commissioner held that the employer had failed to justify the sanction of dismissal in light of its own disciplinary code and procedure, which called for a final written warning in such cases; it had thus deviated from its own disciplinary code and procedure (*Eskort Limited supra* par 7.4). Consequently, this made the dismissal of the employee unfair.

Aggrieved by the decision of the CCMA commissioner, the employer lodged an application to review the commissioner's award on various grounds, including that he had failed properly to apply his mind to the evidence placed before him, and had made findings that were not those of a reasonable decision maker (*Eskort Limited supra* par 8). The Labour Court, per Tlhotlhalemaje J, held that the findings of the commissioner on the issue of the appropriateness of the sanction and the relief granted were entirely disconnected from the evidence placed before him, and consequently this made his award reviewable (*Eskort Limited supra* par 9).

Tlhotlhalemaje J also cautioned that the CCMA commissioner/s ought to be wary of refusing

> "to determine disputes involving dismissals for ordinary misconduct, simply because the employee (in most times unrepresented and throwing everything in the mix), happened to have alleged that he/she was victimised, harassed, discriminated against, or any other allegation that would divest the CCMA of jurisdiction." (*Eskort Limited supra* 7 par 11)

In the Labour Court's view, where such allegations are made, a commissioner is duty bound to look at the real nature of the dispute, irrespective of how the parties label the cause of a dismissal, before deciding whether the CCMA has jurisdiction to determine the dispute. The Labour Court held further that the mere mention of "victimisation" or "discrimination" by an employee at arbitration proceedings is not a gateway to the Labour Court (*Eskort Limited supra* par 11).

The Labour Court held that an important consideration in this case is that the commissioner had decisively concluded that the employee's conduct was "extremely irresponsible" in the context of the pandemic, and that he was therefore "grossly negligent". According to the court, that conclusion on its own, given the facts of this case, ought to have been the end of the matter, and the dismissal ought to have been confirmed (*Eskort Limited supra* par 12).

In its conclusion, the Labour Court held that the CCMA commissioner had failed to take into account the totality of circumstances as stated in *Sidumo v Rustenburg Platinum Mines Ltd* (2008 (2) SA 24 (CC)) (*Sidumo* case). The *Sidumo* case reads, in the relevant part:

> "In approaching the dismissal dispute impartially, a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. … [O]ther factors will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his/her long-service record. This is not an exhaustive list." (*Sidumo* case par 78)

To this end, the Labour Court held that the sanction of dismissal was appropriate. In the first place, the employee was aware that he had been in contact with Mr Mchunu, who had tested positive for COVID-19. On his own version, he had experienced known symptoms associated with COVID-19 as early as 6 July 2020. Be that as it may, the employee had recklessly endangered not only the lives of his colleagues and customers at the workplace, but also those of his close family members and other people he may have been in contact with (*Eskort Limited supra* par 17.1). Secondly, the employee's conduct came about in circumstances where, on the objective facts, and by virtue of being a member of the "Coronavirus Site Committee", he knew what he ought to do in an instance where he had been in contact with Mr Mchunu and where on his own version, he had experienced symptoms he ought to have recognised. He nonetheless continued to report for duty as if everything was normal, despite being told on no less than two occasions to stay at home during July 2020 (*Eskort Limited supra* par 17.2). Thirdly, the Labour Court held that the employee's conduct was not only irresponsible and reckless but was also inconsiderate and nonchalant in the extreme (*Eskort Limited supra* par 17.3). He had ignored all health and safety warnings, advice, protocols, policies and procedures put in place at the workplace related to COVID-19, of which he was aware of given his status not only as a manager but also part of the "Coronavirus Site Committee".

According to the Labour Court, the evidence presented before the CCMA commissioner showed that the employee was not only grossly negligent and reckless, but also dishonest. He had failed to disclose his health condition over a period of time, sought to conceal the date upon which he had received his COVID-19 test results, and completely disregarded all existing health and safety protocols put in place not only for his own safety but also for the safety of his co-employees and the applicant's customers (*Eskort Limited* 10 par 17.6).

Lastly, the Labour Court held that the egregious nature of the employee's conduct was such that "a trust and working relationship between him, the applicant, and his fellow employees, cannot by all accounts be sustainable" (*Eskort Limited supra* par 17.7). The Labour Court declared that the dismissal of the employee was procedurally and substantively fair. The court made an order setting aside the award of the CCMA commissioner, and substituting it with an order that the dismissal of the employee was substantively fair (*Eskort Limited supra* par 21).

4 Analysis of *Eskort Limited v Stuurman Mogotsi*

4 1 The employer's duty to ensure a safe working environment

The Labour Court judgment is welcomed as it compels employers to take the existing COVID-19 health and safety measures and protocols seriously. COVID-19 has taken dreadful control of the world and is described as an invisible enemy. It is an infectious disease caused by severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2). The disease was first identified in 2019 in Wuhan, the capital of Hubei, China, and has since spread globally, resulting in the 2019–2020 coronavirus pandemic (Musa, Sivaramakrishnan, Paget, and El-Mugamar "COVID-19: Defining an Invisible Enemy Within Healthcare and the Community" 2021 42(4) *Infection Control & Hospital Epidemiology* 495–497; Chauhan, Jaggi, Chauhan and Yallapu "COVID-19: Fighting the Invisible Enemy with MicroRNAs" 2021 19(2) *Expert Rev Anti Infect Ther.*137–145).

COVID-19 typically spreads during close contact and via respiratory droplets produced when people cough or sneeze. The WHO keeps a live count of the numbers of those who have perished. As of 6 May 2021, there had been 154 815 600 confirmed cases of COVID-19, including 3 236 104 deaths as reported to the WHO (WHO "WHO Coronavirus (COVID-19) Dashboard" https://covid19.who.int (accessed 2021-04-07)).

The drive to curb the COVID-19 pandemic, and its global health and economic effects, is unprecedented (WHO "Impact of COVID-19 on People's Livelihoods, their Health and our Food Systems" (13 October 2020) https://www.who.int/news (accessed 2021-04-07)). South Africa has not been spared. As of 6 May 2021, South Africa's confirmed mortality cases owing to COVID-19 stood at 54 620 deaths (National Institute for Communicable Diseases (6 May 2021) https://www.nicd.ac.za (accessed 2021-05-07)). With the third/fourth wave approaching, the death toll was expected to rise dramatically as elsewhere in the world (Buthelezi "A Third of SA's Covid-19 Survivors May Be at Risk of Reinfection, Warns Discovery" (6 May 2021) https://www.news24.com/fin24/companies/health/a-third-of-sas-covid-survivors-may-be-at-risk-of-reinfection-warns-discovery-2021050; Businesstech "South Africa's Third Covid-19 Wave Could Hit Earlier Than Expected: Expert" (18 April 2021) https://businesstech.co.za/news (accessed 2021-05-07)).

Henceforth, employers have a duty to take reasonable care for the safety of their employees in all conditions of employment (*Joubert v Buscor Proprietary Limited* 2013/13116 (2016) ZAGPPHC 1024 (9 December 2016) par 16 and 26; see also Lewis and Sargeant *Essentials of Employment Law* 8ed (2004) 23; Denyer *Employer's Common Law Duty to Take Reasonable Care for the Safety of His Worker's Industrial Law and its Application in the Factory* (1973) 47-48). The duty to provide a safe workplace relates to the employer's responsibilities imposed by the common law to ensure that the workplace is reasonably safe. In contrast, the employer's duty to provide a safe work system relates to ensuring that the actual mode of conducting work is safe (*SAR & H v Cruywagen* 1938 CPD 219 229; Tshoose

"Employer's Duty to Provide a Safe Working Environment: A South African Perspective" 2011 6(3) *Journal of International Commercial Law and Technology* 165; Tshoose "Placing the Right to Occupational Health and Safety Within a Human Rights Framework: Trends and Challenges for South Africa" 2014 47(2) *Comparative and International Law Journal of Southern Africa* 276–296). There is no specific legislation dealing with COVID-19; however, the Disaster Management Act 57 of 2002 (as amended) is the overarching legislation regulating and dealing with issues arising from COVID-19 (Tshoose and Ndlovu "COVID-19 and Employment Law in South Africa: Comparative Perspectives on Selected Themes" 2021 33(1) *SA Mercantile Law Journal* 25-56).

Section 24(*a*) of the Constitution of the Republic of South Africa, 1996 guarantees the right of everyone to an environment that is not harmful to their health or well-being. To give effect to the constitutional provision above, various overarching pieces of legislation were passed in South Africa to regulate employees' safety and compensation in the workplace. These are the Occupational Health and Safety Act (85 of 1993) (ÓHSA), Compensation for Occupational Injuries and Diseases Act (130 of 1993) (COIDA), Mines Health and Safety Act (29 of 1996) (MHSA), and the Occupational Diseases in Mines and Works Act (78 of 1973) (ODIMWA).

The overall objective of these pieces of legislation is to protect employees with regard to their safety in the workplace. However, viewed individually, they serve different purposes. OHSA and the MHSA deal with the health and safety of employees in the workplace. In contrast, COIDA and ODIMWA deal with the aftermath of injury or disease – for example, payment of compensation to injured employee/s. This approach is informed by the ILO conventions regarding employment injuries. They include the ILO's Minimum Standards Convention 102 of 1952 and its Employment Injury Benefits Recommendation 121 of 1964. The above pieces of legislation guarantee the right of everyone to a safe environment.

The Disaster Management Act Regulations set out other specific measures to be taken by employers – for example, social distancing, screening of employees, sanitising and disinfecting the workplace, monitoring and ensuring that employees wear their cloth masks. Similarly, employees are obliged to comply with measures introduced by their employer as required by the Regulations (Directive by the Minister of Employment and Labour in terms of Regulation 10(8) of the regulations issued by the Minister of Cooperative Governance and Traditional Affairs in terms of s 27(2) of the Disaster Management Act 57 of 2002).

Section 8(1) of OHSA places an express obligation on the employer to maintain a working environment that is safe and healthy. On the issue of a healthy working environment, the employer must ensure that the workplace is free from any risk to the health of its employees as far as is reasonably practicable. There is a clear obligation on the employer to manage the risk of contamination in the workplace, specifically considering COVID-19 (Olivier "The Coronavirus: Implications for Employers in South Africa" (6 March 2020) https://www.webberwentzel.com/News/Pages/the-coronavirus-implications-for-employers-in-south-africa.aspx (accessed 2020-04-14)). Practically, the employer can ensure a healthy working environment by

keeping the workplace clean and hygienic, promoting regular hand-washing, promoting vaccination of employees, proper ventilation, and keeping employees informed on developments related to COVID-19 (WHO "WHO Healthy Workplace Framework and Model: Background and Supporting Literature and Practices" (2010) https://www.who.int/occupational_health/healthy_workplace_framework.pdf (accessed 2020-04-14) 15–16).

4 2 The employee's duty to disclose his/her COVID-19 status under POPI Act and other relevant laws

Since the advent of the COVID-19 pandemic, information relating to infected employees has become a vital resource in managing the spread of the disease, and in protecting other employees and members of the community. Consequently, it is important also to unpack briefly how this confidential personal information is handled and disclosed in terms of the Protection of Personal Information Act, and its Regulations (Protection of Personal Information Act 4 of 2013 (POPI Act)).

The purpose of the POPI Act is to regulate the processing (including collection, use, transfer, matching and storage) of personal information by public and private bodies. The POPI Act gives effect to the constitutional right to privacy. In so doing, it balances the right to privacy with other rights and interests, including the free flow of information within South Africa and across its borders. The POPI Act adopts a principle-based approach to the processing of personal information. It sets out eight conditions for the lawful processing of personal information: accountability, processing limitation, purpose specification, further processing limitation, information quality, openness, security safeguards, and data subject participation. These principles apply equally to all sectors that process personal information. The Act prescribes certain conditions for the lawful processing of personal information. Personal information relating to a person's health is considered to be special personal information, owing to its sensitive nature, and a higher degree of protection is afforded to such information (De Bruyn "The POPI Act: Impact on South Africa" 2014 13(6) *International Business & Economics Research Journal* 1315–1334; for further reading on the POPI Act, see Burns and Burger-Smidt *A Commentary on the Protection of Personal Information Act* (2018) ch1–18).

Similarly, section 14(1) of the National Health Act provides that all patients have a right to confidentiality (National Health Act 63 of 2001 (NHA)). This is consistent with the right to privacy provided for in section 9 of the Constitution. Notwithstanding the above, section 14(2)(*a*)–(*c*) of the NHA makes an important exception to the general rules of absolute confidentiality set out in the POPI Act and the Health Professions Council of South Africa Guidelines (Health Professions Council of South Africa "Guidelines for Good Practice in the Health Care Professions" (2016) (HPCSA Guidelines) https://www.hpcsa.co.za/pdf (accessed 2021-05-06)).

Specifically, if the non-disclosure of a patient's medical information would pose a serious threat to public health, then the medical information must be disclosed. For the disclosure to be justified, the risk of harm to others must

be serious enough to outweigh the patient's right to confidentiality and privacy (s 14(2)(*a*)–(*c*) of the NHA). Collecting important information about the spread of COVID-19, while also protecting the patient's identity, is in line with both the POPI Act, and the Constitution. In terms of the POPI Act, information must be de-identified as soon as it has been used for the purpose it was collected. The de-identified data can then be disclosed to the public to keep it informed of the spread of the disease (Schindlers Attorneys "Testing Positive for Covid-19: Public Health vs Privacy" (2020) https://www.schindlers.co.za/2020/testing-positive-for-covid...11257 (accessed 2021-05-06)).

The gist of the matter is that a patient's right to privacy and confidentiality is a priority However, since the COVID-19 pandemic has been declared a national state of disaster under section 27(1)–(3) of the Disaster Management Act (57 of 2002), the right to privacy must be weighed against the risk of harm to the public health. The POPI Act, HPCSA Guidelines, the NHA, and the Constitution are amenable to the conclusion that public health outweighs the protection of personal information and the right to confidentiality and privacy (Donaldson and Lohr *Health Data in the Information Age: Use, Disclosure, and Privacy* (1994) 136–179).

In summary, it is clear that an employee has a duty to disclose his/her COVID-19 status in the following cases: first, where the risk of harm to others outweighs the patient's right to confidentiality and privacy; and secondly, where such a disclosure will play a role in assisting the government to find effective solutions to deal with the health, economic, and social impacts of COVID-19.

The first and second points (raised above) affect the duty of the employee to disclose his/her COVID-19 status. Section 36 of the Constitution provides that there is no absolute standard that can be laid down for determining the reasonableness and necessity of infringing fundamental rights in a democratic society; these circumstances have to be balanced on a case-by-case basis (*S v Makwanyane* 1995 (3) SA 391 par 104). In this balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; and the extent of the limitation, its efficacy, and (particularly where the limitation has to be necessary) whether the desired ends could reasonably be achieved through other means less damaging to the right in question (*S v Makwanyane supra* par 104).

4 3 Dismissal arising from flouting COVID-19 regulations

Generally, an employer cannot discipline an employee for what is done in the employee's private space and spare time (Van Niekerk, Christianson, McGregor,and Van Eck *Law@Work* 4ed (2017) 301) unless it can be shown that the conduct of the employee amounts to criminal misconduct that in some or other respect affects the business of the employer, or could be likely to affect other employees' rights to a safe working environment (*Edcon Limited v Cantamesa* (2020) 41 *ILJ* 195 (LC); *Moloto and Gazelle Plastics*

Management (2013) 34 *ILJ* 2999 (BCA); *Khutshwa v SSAB Hardox* (2006) 27 *ILJ* 1067; *Ibbett & Britten (SA) (Pty) Ltd v Marks* (2005) 26 *ILJ* 940 (LC); see also Van Niekerk *et al Law@Work* 302).

That said, there are circumstances in which an employer can dismiss an employee for acts of misconduct committed outside the scope of his/her employment – for example, for flouting the COVID-19 rules and regulations. The case in point involves cases where the employee commits misconduct. Generally, misconduct is the most common ground upon which employers seek to justify dismissal of an employee. In these instances, the employee is disciplined for conduct that contravenes a disciplinary rule of the employer (Collier, Fergus, Cohen, Du Plessis, Godfrey, Le Roux and Singlee *Labour Law in South Africa: Context and Principles* (2018) 207–209). In order to show that the employee has been fairly dismissed, the employer must show that it has acted both substantively and procedurally fairly (on the procedural fairness requirement, see *Schwartz v Sasol Polymers* (2017) 38 *ILJ* 915 (LAC) par 16; *Opperman v Commission for Conciliation, Mediation and Arbitration* (2017) 38 *ILJ* 242 (LC) par 18; *Hillside Aluminium (Pty) Ltd v Mathuse* (2016) 37 *ILJ* 2082 (LC) par 71–72; *SA Revenue Service v Commission for Conciliation, Mediation and Arbitration* (2014) 35 *ILJ* 656 (LAC) 34; *Rennies Distribution Services (Pty) Ltd v Bierman NO* (2008) 29 *ILJ* 3021 (LC) par 24; on substantive fairness, see *Mathabathe v Nelson Mandela Bay Metropolitan Municipality* (2017) 38 *ILJ* 391 (LC) par 22; *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation, Mediation and Arbitration* (2006) 27 *ILJ* 1644 (LC) 1654).

In respect of substantive fairness, the employer ought to have a good reason for the dismissal, while on the procedural fairness front, the employer ought to follow the proper procedure before an employee can be dismissed or disciplined (McGregor, Dekker, Budeli-Nemakonde, Germishuys, Manamela and Tshoose *Labour Law Rules* (2021) 125–129). If the employer is unable to prove the misconduct on a balance of probabilities, then the employer may not dismiss the employee.

Furthermore, it should always be borne in mind that an employee should only be dismissed for gross or repeated serious misconduct. Likewise, the merits of a Policy of Progressive Discipline and the Code of Good Practice, which appears in Schedule 8 of the Labour Relations Act (66 of 1995), ought to be considered. Thus, the gravity of the offence concerned and its impact on the employment relationship needs to be assessed in light of the circumstances of each case (Tshoose and Letseku "The Breakdown of the Trust Relationship Between Employer and Employee as a Ground of Dismissal: Interpreting LAC Decision in *Autozone*" 2020 1 *SA Mercantile Law Journal* 156–174). The seriousness of the misconduct will determine whether or not dismissal is warranted (Tshoose and Letseku 2020 *SA Mercantile Law Journal* 156-174).

In a case where the employee has flouted COVID-19 regulations – for example, where an employee openly attends mass/social gatherings and posts about it (e.g., posting the name of his/her employer) on their social media, and continues to attend the office as normal. This has the potential not only to endanger the health and safety of employees who share a workspace, but also to damage the employer's reputation. The employer

would be justified in taking disciplinary action against such employee/s in this situation. In fact, the Labour Court judgment in *Eskort Limited* has shown that in such circumstances the dismissal of an employee is warranted.

Manamela asserts that an employer may dismiss an employee who fails to comply and obey lawful and reasonable instructions in the form of an operational requirement dismissal (Manamela "Failure to Obey Employer's Lawful and Reasonable Instruction: Operational Perspective in the Case of a Dismissal: *Motor Industry Staff Association and Another v Silverton Spraypainters and Panelbeaters* (Pty) Ltd" 2013 25(3) *SA Mercantile Law Journal* 418–435). Proving an employee has not complied with the COVID-19 regulations in these kinds of situations is not always easy but, where there are suspicions and concrete evidence, formal disciplinary sanctions could be applied where an employer, following fair investigation, has a reasonable belief that misconduct warranting action has been committed.

With regard to the issue of misconduct committed outside working hours, the jurisprudence of the South African courts and academic discourse has shown that a link between an employee's off-duty misconduct and the employer's business can exist (*Edcon Limited v Cantamesa* 2020 41 *ILJ* 195 (LC); *Moloto and Gazelle Plastics Management* (2013) 34 *ILJ* 2999 (BCA); *NEHAWU obo Barness v Department of Foreign Affairs* (2001) 6 BALR 539 (P); *Khutshwa v SSAB Hardox* 2006 27 *ILJ* 1067; cf Tshoose "The Employers' Vicarious Liability in Deviation Cases: Some Thoughts From the judgment of *Stallion Security v Van Staden* 2019 40 *ILJ* 2695 (SCA)" 2020 34(1) *Speculum Juris Journal* 42–50). Courts have found that such a link exists where the employee's conduct had a detrimental or intolerable effect on the efficiency, profitability, or continuity of the business of the employer (*NEHAWU obo Barness v Department of Foreign Affairs supra*). In the absence of the aforementioned link, the employer cannot discipline the employee as it is then regarded as non-work-related conduct. As discussed above, the employer will have to prove that the misconduct affected the business negatively, or that the business lost or could lose clients or even that it could bring the company name into disrepute. In short, the employer will have to prove it has a legitimate interest in the matter (Le Roux "Off Duty Misconduct: When Can It Give Rise to Disciplinary Action?" 2011 20(10) *Contemporary Labour Law* 91–97).

In light of the above discussion, it becomes clear that an employer can discipline an employee for flouting the COVID-19 regulations. In fact, the Labour Court in *Eskort Limited v Stuurman Mogotsi* (*supra*) has conspicuously outlined the circumstances under which the employer can take appropriate action against an employee who wilfully refuses to obey the lawful and reasonable instructions of the employer in the time of COVID-19.

5 Concluding remarks

COVID-19 is a terrifying pandemic that may endanger humanity if it spreads and cannot be controlled. Following the Labour Court judgment in *Eskort Limited*, it is now clear that should an employer issue a lawful and reasonable instruction to its employees, even in the midst of a pandemic, the

employee is obliged to adhere to it and could face dismissal for failure to comply (*Botha v TVR Distribution* (2020) 12 BALR 1282 (CCMA)). The Labour Court judgment advances the need for more to be done at both the workplace and in our communities in ensuring that employers, employees, and communities be sensitised to the realities of COVID-19, and to further reinforce the obligations of employers and employees in the face of, or in the event of exposure to, this pandemic (*Eskort Limited supra* par 2).To conclude, employers are encouraged to update their policies to include specific guidelines on the conduct of employees during COVID-19 and to make it clear to employees that what they do during these times of the pandemic could “cost them their job”.

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BARKING UP THE WRONG TREE – THE *ACTIO DE PAUPERIE* REVISITED

Van Meyeren v Cloete (636/2019) [2020] ZASCA 100 (11 September 2020)

1 Introduction

It is trite that the South African law of delict follows a generalising approach (Loubser and Midgley *The Law of Delict in South Africa* (2017) 19–20; Neethling and Potgieter *Law of Delict* (2020) 4–5). This entails that liability will only ensue when all the elements of delict are present. South African law does not recognise individual "delicts" (Loubser and Midgley *The Law of Delict in South Africa* 19; Neethling and Potgieter *Law of Delict* 4). The generalising approach followed in South African law is qualified in that there are three main delictual actions, namely the *actio legis Aquiliae* for patrimonial loss; the *actio inuriarum* for loss arising from intentional infringements of personality rights; and the Germanic action for pain and suffering, in terms of which a plaintiff can claim compensation for negligent infringements of the physical-mental integrity (Loubser and Midgley *The Law of Delict in South Africa* 19; Neethling and Potgieter *Law of Delict* 5). This approach is further qualified in that numerous actions dating back to Roman law still exist in our law today. Included in this mix are the actions for harm caused by animals, such as the *actio de pauperie*, the *actio de pastu*, and the *actio de feris*, each with its own requirements (Neethling and Potgieter *Law of Delict* 435–440; Scott "Die *Actio de Pauperie* Oorleef 'n Woeste Aanslag *Loriza Brahman v Dippenaar* 2002 (2) SA 477 (HHA)" 2003 *TSAR*).

There have been questions as to whether these actions, in particular the *actio de pauperie*, still form part of South African law. In *Loriza Brahman v Dippenaar* (2002 (2) SA 477 (SCA) 487) the defendant claimed that the *actio* was no longer part of the South African law (par 14). The Supreme Court of Appeal (SCA) per Olivier JA held that the *actio de pauperie* had been part of South African law for more than 24 centuries and not fallen into disuse (par 15). Olivier JA held that the fact that the action is based on strict liability (one of the arguments raised against it) is no reason to ban it from South African law as strict liability was increasing and in suitable instances fulfils a useful function (par 15).

The SCA, again, recently confirmed the continued existence of the action in South African law in the case of *Van Meyeren v Cloete* ((636/2019) [2020] ZASCA 100 (11 September 2020) 40). In this case, the SCA had to decide whether to extend the defences against liability in terms of the *actio de pauperie* to the negligence of a third party that was not in control of the animal. The defendant held that the court should develop the common law in

this regard. Considering both case law and the requirements for the development of the common law, the SCA held that such an extension could not be justified.

2 Facts

Mr Gerhard Cloete, a gardener and refuse collector, was on his way to the shop, pulling the trolley in which he collects refuse. While walking past the Van Meyeren house, minding his own business, he heard dogs behind him. Three dogs subsequently attacked him from behind. The dogs belonged to Van Meyeren, who was the appellant in the case. The dogs savaged Mr Cloete, and this resulted in his left arm being amputated. Mr Cloete claimed damages in terms of the *actio de pauperie* and in the alternative, on the basis of negligence (presumably in terms of the *actio legis Aquiliae*). Mr Cloete's presence in the place where he was attacked was lawful and he had done nothing to provoke the dogs. The dogs also attacked Mr van Schalkwyk, a passer-by who had come to Mr Cloete's assistance. Nobody was at home at the time of the incident.

By all accounts, the dogs, mixed breed with pit-bull features, had never attacked anyone and slept in the house. They had the run of the house and the garden, which was fenced and sealed off from the street by means of a padlocked gate. Whether the gate was in fact padlocked on the day of the incident is uncertain. Mr and Mrs van Meyeren testified that the gate was at all times locked with two padlocks. They alleged that the gate had been opened by an intruder. Photographs taken on the day of the incident showed no padlocks. A photograph taken some time later showed the gate with two heavily rusted padlocks (see discussion in 3 1 and 3 2 below).

3 Judgment

3 1 Court a quo

The plaintiff claimed damages in terms of the *actio de pauperie* in the court *a quo* and succeeded (see Scott "Conduct of a Third Party as a Defence against a Claim Based on the *Actio de Pauperie* Rejected – *Cloete v Van Meyeren* [2019] 1 All SA 662 (ECP); 2019 2 SA 490 (ECP)" 2019 82(2) *THRHR* 321 for a case discussion of the decision of the court *a quo*). Initially, the defendant denied that his dogs had been responsible for the attack and if they had been, it was because an intruder had attempted to break into the front door and had broken open the gates to the garden where the dogs were kept. He denied liability and negligence.

The defendant eventually conceded that the dogs were his and that they had acted *contra naturam sui generis*. The court had to decide two questions, namely whether the fact that the gate had allegedly been opened and left open by an intruder could constitute an exception to liability in terms of the *actio* and if so, if the plaintiff could establish liability in terms of the *actio legis Aquiliae*? (*Cloete v Van Meyeren* 2019 2 SA 490 (ECP) 6). The defendant bore the onus of proving that the gate was left open by an

intruder. While the Court regarded the defendant as an unsatisfactory witness, it nevertheless accepted that the gates had been locked and later broken open by an intruder (*Cloete v Van Meyeren supra* par 16). As there was no negligence, the court held that liability in terms of the *actio legis Aquiliae* had to fail.

Dealing with the *actio de pauperie*, the Court commenced by looking at the history of the action (par 18), referring to the historical overview in *Lever v Purdy* (1993 (3) SA 17 (AD) 21C–25F as cited in *Cloete* par 20). With reference to the *Lever* case (*supra*) the court *a quo* found that there were two categories of conduct of third parties that would serve as a defence against the *actio de pauperie*, namely (a) where the third party through positive conduct provoked the animal; and (b) where the third party who was in control of the animal, culpably lost control.

In the present case, the defendant relied on the second defence but did not succeed. In *Lever v Purdy* (*supra*), the defendant argued that the negligence of the intruder who left the gates open but was not in control of the animals would be sufficient to bring the so-called "wider" exception as a complete defence against the *actio de pauperie*. Lowe J argued that while the existence of the "wider exception" finds some support in case law, there is no support for such an extension in Roman law or Roman-Dutch law. Looking at previous cases such as *Lever v Purdy* (*supra*) and *Loriza Brahman v Dippenaar* (*supra*), Lowe J stated that he could "find no convincing support either in principle or flowing from the rules as to pauperian liability justifying the extension of a pauperian defence or exception as contended by the defence" (par 40). The plaintiff's claim in terms of the *actio de pauperie* was, therefore, successful (par 42).

According to Scott (2019 *THRHR* 331), the outcome of this judgment had to be welcomed, as it was in accordance with the approach that the liability of an owner of a domestic animal was based on the risk principle. This is because the person who keeps such an animal creates potential danger, and this justifies holding the owner liable, even in the absence of fault (see discussion below in 4 3).

3 2 Supreme Court of Appeal

The defendant appealed to the SCA, where the court per Wallis JA dismissed the appeal (par 43).

The SCA dealt with three issues, namely:

(a) The treatment of the factual evidence in the court *a quo*;

(b) Whether the *actio de pauperie* was still part of South African law and if so;

(c) Whether the third-party defence should be extended to a situation where the harm would not have occurred, but for the negligent conduct of the third party in circumstances where the third party had no control over the animal.

3 2 1 The treatment of the factual evidence in the court *a quo*

Wallis JA criticised the court *a quo's* handling of the "unsatisfactory and speculative evidence" of the defendant (par 13). The onus of proving that the evidence was correct rested on Van Meyeren. The court was not obliged to accept an improbable explanation merely because there was no other explanation or that the alternative seemed even less probable to the judge (par 13). Wallis JA identified two possibilities, namely (a) the gates were not sufficiently secured to keep the dogs inside, and (b) there was an intruder (the explanation proffered by the Van Meyerens). The issue, in this case, was whether the explanation of the Van Meyerens (that the dogs escaped) was, on a balance of probabilities, the only conclusion that could be reached. Mr van Meyeren bore the onus of proof and did not discharge it. His defence should, therefore, have failed (par 13).

3 2 2 Is the *actio de pauperie* still part of South African law?

Wallis JA summarised the recent history of the action, starting with *O'Callaghan v Chaplin* (1927 AD 310), including a discussion of *Loriza Brahman v Dippenaar* (*supra* par 15–10). From the case law, it is clear that the *actio de pauperie* was and is a part of our law (see discussion below).

Wallis JA described the *contra naturam* requirement as reflecting an element of anthropomorphism (see discussion below) in that "for the owner to be liable, there must be something equivalent to *culpa* in the conduct of the animal" (par 19 referring to *SAR and H v Edwards* 1930 AD 3 9–10). If the animal has not acted *contra naturam* the owner will not be held liable. The onus, in this case, is on the owner to prove that the animal did not act *contra naturam* (par 19).

3 2 3 Should the third-party defence be extended to a situation where the harm would not have occurred, but for the negligent conduct of the third party in circumstances where the third party had no control over the animal?

Mr van Meyeren argued that the defence recognised in *Lever v Purdy* (*supra*) should be extended to exempt the owner from liability for harm caused by the animal in a situation where the harm occurred as a result of the negligent conduct of a third party, irrespective of whether the third party had control over the animal or not.

Wallis JA (par 23) referred to *Lever v Purdy* (*supra*), citing the two instances identified in that case where the conduct of a third would constitute a defence against the *actio de pauperie*, namely (a) striking or provoking the animal in some way; and (b) where the third party was in control of the animal and failed to prevent the animal from causing harm to the victim. These cases were identified by Joubert JA upon a reading of the common-law sources. The minority decision of Kumleben JA referred, in passing, to a

wider exception, but, according to Wallis JA, nothing in *Lever v Purdy* (*supra*) supported the wider third-party defence.

Wallis JA, stated that "these rather cryptic references in and to the old writers on the Roman-Dutch law" do not serve as a clear authority to indicate the existence of a wider defence (par 31).

Van Meyeren argued that the law in this regard should be developed to provide for the wider defence. Wallis JA (par 32, referring to *Mighty Solutions (Pty) Ltd t/a Orlando Service Station v Engen Petroleum Ltd* 2016 (1) SA 621 (CC) 38) summarised the court's power to develop the common law, stating that the power is vested in the High Courts, Supreme Court of Appeal, and the Constitutional Court, by virtue of section 173 of the Constitution. This power has to be exercised "in accordance with the interests of justice" (par 32). The courts are enjoined by section 39(2) to "promote the spirit, purport and objects of the Bill of Rights". When considering whether to develop the common law, a court has to do the following (par 32): (a) determine what the common law position is; (b) consider the underlying reasons for this position; (c) ask whether the rule offends the spirit, purport and object of the Bill of Rights; and (d) consider in which way the common law could be amended, and take into consideration the effects of the change on the particular area of the law.

Wallis J, having had already set out the common-law position (as per (a) above), proceeded to look at (b), namely the underlying reason for the *actio*, which, according to him was that between the owner of the dog and victim, it is "appropriate" for the owner to bear that harm, instead of the victim (par 33). Insofar as (c) is concerned, the appellant did not rely on any specific provision of the Bill of Rights; he also did not (correctly so, according to Wallis JA) allege that the limited exception offended the spirit, purport, and objects of the Bill of Rights. This, according to Wallis JA, was correct, because the *actio* in fact serves to protect the right to bodily integrity in section 12(2); the right to dignity in section 10; and the right to life in section 11 (par 34). The court held that the *actio* exists to protect these rights and it is right to rather develop the *actio* in ways that can protect these rights (par 34).

Counsel for the appellant submitted that given the levels of crime in South Africa it was reasonable for people to want to protect themselves and not everyone could afford sophisticated security systems (par 35). Wallis JA held that while this is true, deterrence and restraint do not mean that the intruder has to be killed or maimed (par 35).In this particular case, furthermore, the dogs harmed an innocent bystander, not an intruder; and this took place, not on the premises of the owner, but in the street (after the dogs escaped). The right to keep a dog for the protection of the home is extensive but this right becomes irrelevant where the dog harms someone outside the home (par 36). The appellant did not deny that the requirements for the *actio de pauperie* were met but claimed that fault was absent. However, as stated by Wallis JA, fault had never been a requirement for the *actio de pauperie* and a defence of absence of fault will not preclude pauperian liability.

Furthermore, Wallis JA held that where the conduct of either the victim or third parties exonerate the owner from liability in terms of the *actio de pauperie*, it is because the conduct directly caused the incident in which the victim suffered harm this refers to circumstances where the owner is unable to prevent the harm from taking place.

Wallis JA referred again to *Lever v Purdy* (*supra*), this time to the minority decision of Kumleben JA, in particular to the following points raised by Kumleben:

(i) The South African law of delict is based on the fault principle – in this regard, Wallis JA pointed out that vicarious liability is strict, as well as liability in terms of certain statutes (par 40);

(ii) Kumleben JA held that if one had to weigh up the interests of the owner, who was not at fault, and that of the victim, who had suffered damage as a result of the conduct of the animal, "considerations of fairness and justice favoured the owner". According to Wallis JA, this interpretation is incorrect, given the constitutional values that he mentioned earlier. Also the dog's owner can obtain insurance cover in terms of a household insurance policy (par 42).

In the final instance Wallis JA recognised that many South Africans choose to have dogs, both for companionship and for protection. This gives rise to responsibilities. When someone chooses to have an animal and someone is harmed by the animal while being innocent of fault, the interests of justice require that the owner should be held liable for the harm that ensued (par 42).

4 Discussion

4 1 The actio de pauperie of yesteryear

The *actio de pauperie* originated in the Twelve Tables (*O'Callaghan v Chaplin supra* 313; Kaser *Roman Private Law* (1984) 252; Neethling and Potgieter *Law of Delict* 435; Polojac "Actio de Pauperie Anthropomorphism and Rationalism" 2012 8(2) *Fundamina* 119; Zimmermann *The Law of Obligations* (1990) 1096) and is said to have been around as early as 450BC (Zimmermann *The Law of Obligations* 1097).

The action was a *noxal* action, meaning that the owner of an animal that caused harm either had to pay compensation or to give the animal to the injured party (Kaser *Roman Private Law* 252; Polojac 2012 *Fundamina* 137; Zimmermann *The Law of Obligations* 1099; *Lever v Purdy supra* 21A; O'Callaghan *v Chaplin supra* 314). Zimmermann writes that animals were regarded to have committed the delict, and "[t]he victim of the injury was thus allowed to wreak his vengeance upon the body of the animal – in the very same way as if the wrongdoer had been a human being" (Zimmermann *The Law of Obligations* 1099; see also Polojac 2012 *Fundamina* 137). If, however, the animal was owned by someone, the victim could not just kill the animal because by so doing he would be infringing the rights of the owner (Zimmermann *The Law of Obligations* 1099). He could, however,

request the surrender of the animal, which was known as *noxae deditio* (Zimmermann *The Law of Obligations* 1099; see also *O'Callaghan v Chaplin supra* 315; *Lever v Purdy supra* 21A).

Eventually, a claim for damages was regarded as a more appropriate remedy as the idea of private vengeance underpinning the law of delict fell away (Zimmermann *The Law of Obligations* 1100). According to Zimmermann, in classical and post-classical Roman law the victim could choose between claiming damages from the owner or the surrender of the animal (*The Law of Obligations* 1100; see also Polojac 2012 *Fundamina* 137).

Another rule – *noxa caput sequitur* – provided that the owner at the time of *litis contestatio* was liable for damages, rather than the owner at the time the harm was caused (Zimmermann *The Law of Obligations* 1100; see also *O'Callaghan v Chaplin supra* 314; *Lever v Purdy supra* 21A). Moreover, if the animal died before *litis contestatio*, the right to institute the action fell away (Zimmermann *The Law of Obligations* 1100).

According to the Twelve Tables, the animal had to be a *quadrupes*, specifically a domestic animal (Polojac 2012 *Fundamina* 123, Zimmermann *The Law of Obligations* 1101; *O'Callaghan v Chaplin supra* 314). Although the word "*quadrupes*" had both a wide meaning (which included wild animals) and a narrow meaning (which was limited to domestic animals) the Twelve Tables used the narrow meaning (Polojac 2012 *Fundamina* 123). According to Polojac, dogs were initially not included within the ambit of the *actio de pauperie*; this only happened once the action was extended by the *lex Pesolania de cane* (Polojac 2012 *Fundamina* 124; see also *O'Callaghan v Chaplin supra* 370). Polojac (2012 *Fundamina* 124) argues that in Classical Roman times the action was only applicable to domestic animals, even though there seem to be varying opinions about this.

Insofar as the *contra naturam* requirement is concerned, Polojac notes that the earliest sources included this requirement (Polojac 2012 *Fundamina* 134; see also *Lever v Purdy supra* 20I; *O'Callaghan v Chaplin supra* 313–314). The animal had to show ferocity beyond its instinctive *feritas*, in other words, the ferocity had to be *contra naturam* (Zimmermann *The Law of Obligations* 1102). According to Zimmermann, this requirement was introduced by Roman lawyers to limit the liability of the owners (Zimmermann *The Law of Obligations* 1102). Polojac notes that because of the "obvious anthropomorphism in its approach to domestic animals" this requirement has been contentious in the literature (see Polojac 2012 *Fundamina* 134–137).

The *actio de pauperie* was received in the Netherlands (*Lever v Purdy supra* 20I–21A). There is uncertainty whether the *noxal* requirement fell into disuse (*O'Callaghan v Chaplin supra* 318; see however Knobel "Remnants of Blameworthiness in the *Actio de Pauperie*" 2011 74 *THRHR* 633 634; Neethling and Potgieter *Law of Delict* 436; *Lever v Purdy supra* 21A). The *actio* came into South African law via Roman-Dutch law (*Lever v Purdy supra* 21A).

4 2 The actio de pauperie today

4 2 1 Requirements

To succeed with the *actio de pauperie* the following requirements have to be met (Knobel 2011 *THRHR* 637, Loubser and Midgley *The Law of Delict in South Africa* 458–462; Louw "Verwere by die Actio de Pauperie" 2001 *De Jure* 159, Neethling and Potgieter *Law of Delict* 436–437; Scott *THRHR* 321; Scott 2003 *TSAR* 194):

(a) The defendant must be the owner of the animal at the time the harm is inflicted. It is not enough that he has control over the animal; he must be the owner in terms of the property law definition of ownership (Loubser and Midgley *The Law of Delict in South Africa* 459).

(b) The animal must be a domestic animal; the following animals are examples of animals recognised by our law as being domesticated: dogs; cats; livestock; bees; horses; mules; and meerkats (Neethling and Potgieter *Law of Delict* 386; Loubser and Midgley *The Law of Delict in South Africa* 459).

(c) The animal must have acted *contra naturam sui generis*. This means that the animal must have acted contrary to what can be expected of a reasonable animal of that kind. The "flipside" of this requirement is that the animal must have caused the damage *sponte feritate commota* or from inward vice. In *Loriza Brahman*, the Court held that the yardstick is the conduct of the genus (in this case cattle) and not a specific species (Brahman cattle – see *supra* par 18). As mentioned above, in *Van Meyeren* Wallis JA speaks of "an element of anthropomorphism [that] underlies the pauperien action" (par 19):

> "It attributes to domesticated animals the self-constraints that are generally associated with human beings and attaches strict liability to the owner on the basis of the animal having acted from inward vice".

The owner in this case bears the onus of proving that the animal did not act *contra naturam sui generis* (*Van Meyeren supra* par 19).

Neethling and Potgieter (*Neethling-Potgieter-Visser Law of Delict* (2015) 386) are of the opinion that the *contra naturam* requirement should be abolished for the following two reasons (*Law of Delict* 386; this is not mentioned in the latest edition of the book):

(i) The requirement points to a "personification or humanisation (see above, Wallis JA describing the test as anthropomorphic) of an animal by virtue of the "reasonable animal" test. They describe this line of reasoning as "artificial and thus undesirable".

(ii) The requirement lends itself to a wider variety of interpretations, thus leading to legal uncertainty and also resulting in any harmful conduct being classified as *contra naturam*, which would then on the basis of policy considerations be felt to found an action for damages.

Knobel is also of the opinion that the *contra naturam* requirement "in the vast majority of applications […] can only function […] as a fiction or catch-phrase denoting a standard of behaviour imposed by the law on domestic animals, and one containing unacceptable remnants of blameworthiness at that" (Knobel 2011 *THRHR* 639). According to Knobel, the best way to rid the *actio de pauperie* of notions of blameworthiness is to drop the *contra natura* requirement all together (2011 *THRHR* 641, 643).

Loubser and Midgley (*The Law of Delict in South Africa* 460) note that the courts apply the *contra naturam* test inconsistently, and that some cases follow a subjective approach by referring to the "innate wildness, viciousness or perverseness" of the animal, while others follow an "objective or reasonable animal" approach. They also identify a third approach, which takes both objective and subjective factors into account.

(d) The plaintiff must have been present lawfully at the place where the harm was inflicted (*Van Meyeren supra* 20; *O'Callaghan v Chaplin supra* 326; see Neethling and Potgieter *Law of Delict* 384 about the approaches to this, namely whether the requirement is a lawful purpose or a legal right on the part of the plaintiff. Neethling and Potgieter (*Law of Delict* 438) regard the "legal right" approach as being preferable).

The following defences can be raised against the *actio de pauperie* (Neethling and Potgieter *Law of Delict* 437; Loubser and Midgley *The Law of Delict in South Africa* 462–463):

(a) *Vis maior* or an act of God;
(b) Culpable or provocative conduct on the part of the victim;
(c) Culpable or provocative conduct on the part of a third party;
(d) Provocation by another animal;
(e) The person who was attacked was not on the property lawfully (*Van Meyeren supra* 20; *O'Callaghan v Chaplin supra* 326 – the court uses the example of a housebreaker who is bitten by a dog); and
(f) *Volenti non fit iniuria.*

In *Lever v Purdy* (*supra*) the court identified two instances where the culpable conduct of a third party could constitute defences against the *actio de pauperie* (21C–25F; see also *Van Meyeren v Cloete supra* 23):

(a) Where a third party through a positive act (such as provocation) caused the animal to inflict an injury upon the victim; or
(b) Where the third party was in control of the animal and failed to prevent the animal from harming the victim.

The court in *Lever v Purdy* (*supra* 21C–25 F) traced these defences back to Justinian and through Roman-Dutch Law to the present day.

In the *Van Meyeren* case the appellant wanted the court to develop the common law to allow for the third-party defence to be extended to a situation where the harm would not have occurred "but for" the negligent conduct of

the third party in circumstances where the third party had no control over the animal. As indicated above, both the court *a quo* and the SCA held that the third-party defence could not be extended in this manner.

4 3 Is it time to put the actio de pauperie to rest?

From case law dating back to *O'Callaghan v Chaplin* (*supra*) it is clear that the action has been a part of South African law for decades:

> "In my opinion, therefore, obsolescence of the option of noxae deditio, leaving the basis of liability under the law of the Twelve Tables intact, would be a perfectly possible, and indeed a satisfactory, legal position"

In *Loriza Brahman v Dippenaar* (*supra*) the defendant argued that the *actio* had fallen into disuse (see also Scott 2003 *TSAR* 194). The court held:

> "[t]he time to carry the *actio de pauperie* to the grave, despite its age, has not yet arrived" (own translation from the Afrikaans)." (par 16)

An argument in favour of retaining strict liability for damage caused by animals is that of the risk theory. Knobel (2011 *THRHR* 639) regards it as the best explanation of why certain forms of delictual liability are strict, rather than fault-based. Scott describes the *actio de pauperie* as the oldest form of risk liability (2003 *TSAR* 194). Neethling and Potgieter (*Law of Delict* 434) write that the risk theory "provides a satisfactory explanation for most of the instances of strict liability which are recognised in our law." The risk principle entails that the defendant creates the risk by keeping the animal; hence, that is a justification for holding him liable should that danger materialise (Knobel 2011 *THRHR* 639; Scott 2019 *THRHR* 331). This sentiment is echoed by the courts. In the *Loriza Brahman* case (*supra* 16) the Court held as follows:

> "[I]f one follows the approach that delictual liability ought to be based on fault, the *actio de pauperie* would appear as "not elegant and anomalous". If, however one's point of departure is a broader vision of delictual liability, that includes deserving cases of risk liability, then the question only is whether the *actio de pauperie* fulfils a deserving role." (own translation from the Afrikaans).

Loubser and Midgley (*The Law of Delict in South Africa* 438) see regard liability as "a type of tax on activities that attract such liability, rather than a penalty for engaging in it".

Knobel (2011 *THRHR* 639) states that even though the *actio* has its origin "in a more primitive legal system" in terms of which an owner is punished for harm caused by the animal to punish an owner for harm caused by an animal, strict liability can be justified in a modern legal system based on the risk principle.

5 Conclusion

The *actio de pauperie* remains a part of South African law despite the fact that our law of delict follows a generalising approach. In addition, the SCA has brushed aside questions regarding its continued existence in South

African law. In *Van Meyeren v Cloete* (*supra*) the SCA reiterated the stance it adopted in the *Loriza Brahman* case, namely that the action remains a part of our law. The SCA has held, furthermore, that the third-party defence should not extend to the situation where the harm would not have occurred "but for" the negligent conduct of the third party in circumstances where the third party had no control over the animal. According to several authors, the risk principle is a justification for the continued presence of the *actio* in modern South African law as a form of strict liability. Keeping domestic animals comes with the risk that they may cause harm and if this risk materialises, it should be the defendant who is held liable for the harm that ensues from the conduct of the animal. (Knobel 2011 *THRHR* 639, Scott 2019 *THRHR* 331). The *actio de pauperie*, despite the onslaughts on its existence, lives another day and in the same guise.

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BREACH OF THE IMPLIED DUTY TO PRESERVE MUTUAL TRUST AND CONFIDENCE IN AN EMPLOYMENT RELATIONSHIP: A CASE STUDY OF

Moyo v Old Mutual Limited (22791/2019) [2019] ZAGPJHC 229 (30 July 2019)

1 Introduction

This case note is intended to revisit the contentious aspect of the implied duties of South African labour law in the individual employment relationship. Significantly, the case note intends to remind the reader about the importance of adhering to certain implied duties in the contract of employment. In this regard, the implied duty to preserve mutual trust and confidence is the central theme of this case note. On the one hand, the implied duty to safeguard mutual trust and confidence imposes an obligation upon the employer to conduct itself in a manner not likely to destroy, jeopardise, or seriously damage the trust relationship and confidence in the employment relationship. On the other hand, this implied duty is becoming a significant yardstick used by employers to address contractual labour disputes in South Africa. In order for an employer to invoke this implied duty, it must be expected that the employee would have to conduct him or herself in a manner likely to demonstrate to his employer loyalty, good faith and cooperation.

Against this background, the recent case of *Moyo v Old Mutual* (22791/2019) [2019] ZAGPJHC 229 (30 July 2019) (*Moyo*) demonstrates the impact of a breach of the implied duty to preserve mutual trust and confidence on the employment relationship. This case note intends to examine the implied obligation that rests upon the employer to safeguard trust and confidence in the relationship. The case note further reflects on the implied duty of employees to safeguard and protect mutual trust and confidence. After all, trust forms the basic fundamental core of the employment relationship, and any breach of this duty is likely to result in an irretrievable breakdown of the employment relationship. Once there is a breakdown of trust and confidence, it remains a mammoth task to restore the relationship.

2 Facts of the case

Mr Peter Moyo was an employee and also the Chief Executive Officer (CEO) of Old Mutual Limited (Old Mutual), the employer (*Moyo v Old Mutual* (22791/2019) [2019] ZAGPJHC 229 (30 July 2019) par 1). This court action

was triggered by a series of events that began in March 2018 when Moyo questioned certain conflict-of-interest elements involving Mr Trevor Manuel, (Chairperson of the Board governing the employer) and Rothschild (*Moyo v Old Mutual supra* par 3). This conflict of interest stems from a large multibillion rand commercial project on the delisting of Old Mutual PLC from the London Stock Exchange and the proposed listing of the employer on the Johannesburg Stock Exchange (*Moyo v Old Mutual supra* par 3). It is important to note that Manuel was a director of all these companies.

As soon as it became apparent to Moyo that there was a potential conflict of interest on the part of Manuel, he openly voiced his concerns and cautioned him not to participate in the discussion meetings (*Moyo v Old Mutual supra* par 5). However, Manuel ignored and failed to act on Moyo's objections, proceeding to participate in the discussion of this matter. From that point onward, Moyo noticed that his employment relationship with Manuel turned sour (*Moyo v Old Mutual supra* par 6) because Manuel continued to ignore Moyo's further advice relating to improper non-disclosure of a payment amounting to millions of rand paid by the employer in respect of the chairperson's legal fees (*Moyo v Old Mutual supra* par 7). Efforts to restore a good employment relationship between Moyo and Manuel yielded no results. On 23 May 2019, Moyo was suspended and was ultimately dismissed on 17 June 2019 for failure to discharge his fiduciary duties as a director of the employer. It was alleged that Moyo made certain disclosures about payment of Manuel's legal fees before allegations of a conflict of interest were then made against him in respect of another matter. This prompted Moyo to lodge an application in the High Court reinstating him to his position as CEO of Old Mutual.

3 Legal issues

Legal issues arising from this case are (a) whether the dismissal of Moyo was in line with the parties' contractual obligations and (b) whether the Protection of Disclosures Act (26 of 2000) is applicable in the matter.

4 Analysis of the employment relationship

The employee and employer relationship is founded on obligatory duties to work by the former, and the duty to pay wages and salaries by the latter (Fouche "Common Law Contract of Employment" in *A Practical Guide to Labour Law* 8ed (2015) 16 par 266). These obligatory duties fall within the confines of the contract of employment, even though not all these duties may invoke contractual elements. However, the *Moyo* case espouses all elements of an employment relationship, which is founded on the prescripts of contractual obligations.

The employment relationship between Moyo and Old Mutual can best be described as one where labour is bought and sold as a commodity (Davidson *The Judiciary and the Development of Employment Law* (1984) 7). In this instance, Old Mutual as an employer owns labour and further regulates Moyo, who is an employee. In the words of Kahn Freund, "there can be no employment relationship without a power to command and a duty

to obey, that is, without this element of subordination in which lawyers rightly see the hallmark of the contract of employment" (Davies and Freedland *Kahn Freund's Labour and the Law* 3ed (1983) 9). Furthermore, Strydom rightly justified this regulation when he asserted that the "employer's right to control the workforce is the cornerstone of the employment relationship" (Strydom *The Employer Prerogative from Labour Law Perspective* (LLD Thesis UNISA) 1997 1–38). Thus, the control dynamism of the employment relationship is deeply embedded in the jurisprudential philosophy of the contract of employment. In other words, the duty of subordination forms a central part in the contract of employment. The duty of subordination entails that the employee ought to conduct him or herself in an honest and obedient manner and also be willing to cooperate with the employer at all material times (*Impala Platinum Limited v Zirk Bernardus Jansen* (JA100/14)). In terms of power dynamics, this expressly implies that Old Mutual finds itself in a position of authority over Moyo. In return, Moyo is expected to carry out his employment duties subject to Old Mutual authority and further to obey the lawful orders that the employer expects him to carry out.

Generally, disobeying the lawful commands of the employer by an employee may constitute the misconduct of insubordination. For this reason, the discipline and ultimate dismissal of the employee may be justifiable, as long as those actions are compliant with both the substantive and procedural requirements for dismissal.

5 Implied duty to safeguard of mutual trust and confidence in *Moyo*

Although the duty to safeguard trust and confidence in the employment relationship was not expressly explored in the *Moyo* case, its implied significance could evidently be felt in the case. This is because this duty imposes an obligation on both parties in the contract of employment. However, it is significant to note that a much greater obligation of this duty is imposed on the employer. In the present case, the employer is Old Mutual. In the landmark case of *Malik v Bank of Credit & Commerce International (In liquidation)* [1998] AC 30) (*Malik*), Lord Steyn held that an employer may not, "without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee" (par 45). The *Malik* case laid a greater obligation at the doorstep of the employer not to act in a manner likely to breach mutual trust and confidence. In other words, not only is Moyo expected to act in good faith and fair dealing, but so too is Old Mutual.

The same principle of good faith and fair dealing was raised in the case of *Wallace v United Grain Growers Ltd* 1997 CanLII 332 (par 139), where Judge McLachlin held:

> "A contract of employment is typically of longer term and more personal in nature than most contracts, and involves greater mutual dependence and trust, with a correspondingly greater opportunity for harm or abuse. It is quite logical to imply that parties to such a contract would, if they turned their minds to the issue, mutually agree that they would take reasonable steps to protect each other from such harm, or at least would not deliberately and maliciously avail themselves of an opportunity to cause it."

In the same vein, Moyo's contract of employment appointing him as CEO of the employer was a permanent one and depended heavily on a trust relationship between employee and employer (par 3).

Consequently, Moyo owed a fiduciary duty to desist from acting contrary to the interests of Old Mutual. This fiduciary duty takes centre stage in the employment relationship between employee and employer. This notion was further upheld in the case of *Council for Scientific & Industrial Research v Fijen* ((1996) 17 ILJ 18 (A) 26D–E), where it was found:

> "It is well established that the relationship between employer and employee is in essence one of trust and confidence and that, at common law, conduct clearly inconsistent therewith entitles the 'innocent party' to cancel the agreement … It does seem to me that, in our law, it is not necessary to work the concept of an implied term. The duties referred to simply flow from *naturalia contractus*."

Once there is a breakdown of trust, therefore, termination of the employment contract may be justified as a result of the conduct of both parties in the employment relationship.

Against this background, this note now intends to examine the *Moyo* case based on the arguments advanced by both parties to the contract of employment. The case note further intends to reflect on what caused the judge to arrive at his decision. Such an examination would take into account the following:

(a) Confidential information

The principles of individual employment law dictate that an employee is expected to safeguard confidential information gained in the course of employment. Furthermore, the employee may not disclose such confidential information for personal gain whatsoever. One classic case on the protection of confidential information is *Cooler Ventilation Co Ltd (SA) Ltd v Liebenberg* (1967 (1) SA 686 (W) 691), where it was held that "an employer is entitled to be protected from unfair competition, as it is called in American law, brought by confidential information of his business to a rival by an employee or ex-employee." However, it was evidently clear from the *Moyo* case that the employee was actually persecuted for objecting to the non-disclosure of payments in respect of Manuel's legal fees (*Moyo v Old Mutual supra* par 7). Moyo further highlighted that these payments were quite irregular and improper (*Moyo v Old Mutual supra* par 7). In the end, Judge Mashile found:

> "The discovery of the alleged conflict therefore came well after the disclosures. For this reason, the connection is apparent – disclosure followed by alleged conflict and then the occupational detriment. On the understanding that causality was the only issue, I find that the Applicant [Moyo] should be protected." (*Moyo v Old Mutual supra* par 62)

It is evident from the above judgments that in the contract of employment, employees have an implied duty not to use information obtained at their workplace to advance personal interests contrary to those of their employers on the one hand. Furthermore, an employer is expected to protect those employees who protect the information gained during their course of

employment against those who seek to use confidential information against the employer's interests.

(b) Conflict of interest

It is a generally accepted principle of employment law that an employee may not engage him/herself in conduct that would result in a conflict of interest with the employer. In other words, an employee is under an obligation to promote the interests of the employer in the course of the employment contract. This assertion was also confirmed in *Prinsloo v Harmony Furnishers (Pty) Ltd* ((1992) 13 ILJ 1593 (IC)), where it was held in paragraph 5 that

> "at common law an employee is under an obligation to enhance the business interests of his employer and to avoid a conflict of personal interests and those of his employer. He should not involve himself in an undertaking that is in competition with his employer."

Having said that, an employee who engages in conflicting activities against those of the employer's interests is virtually dishonest and, as such, should be disciplined.

It is evident in the *Moyo* case that Manuel, who was simultaneously a director of Old Mutual PLC, the chairman of Old Mutual, and the chairman of Rothschild had subjected himself to three actual and/or potential conflicts among these entities (par 5). Therefore, Moyo's protest against and objection to Manuel's continued disregard of his conflicted role was justifiable and did not warrant dismissal. It was for this reason that Judge Mashile held:

> "The conclusion that the Respondents [Old Mutual Limited] first accused the Applicant [Moyo] of conflict of interest and misconduct and then denied him of the procedures laid down in the contract, specifically clause 25, is unavoidable. Having done so, they then invoked Clause 24.1.1, which in reality had nothing to do with the situation that they faced with the Applicant. The point is Clause 24.1.1 was incorrectly applied and the dismissal cannot be justified on that ground. Both the suspension and subsequent dismissal were unlawful." (par 67)

In light of this judgment, the employee ought to guard against all forms of conflict of interests emanating from the contract of employment. Furthermore, dismissal is justifiable against an employee who actively engages him/herself in activities contrary to the employer's interests.

6 Conclusion

This case note has managed to cement a view that the implied duty to preserve mutual trust and confidence remains a thrust of the contract of employment. In this context, a brief analysis of the employment relationship also laid a foundation for this case note. The implied obligations imposed on both employer and employee were revisited. In doing so, the case of *Moyo* was used to advance the importance of the implied duty to protect mutual trust and confidence. Furthermore, a thorough examination of the conduct of both Moyo and Old Mutual Limited that had the potential and likelihood to

destroy or seriously damage the employment relationship of confidence between the two parties. At the centre of this relationship, it is clear that good faith and loyalty reigned supreme on the part of Moyo to his employer. Towards the end, the case note examined the importance of non-disclosure of confidential information and avoiding conflict of interest.

The case of *Moyo* also draws some lessons that both parties to the contract of employment should honour at all times. Most importantly, the employer ought to refrain from acting in a manner likely to destroy the contract of employment. The employer further ought to be reminded of the fact that this duty does not only lie with the employee, but also heavily rests on itself.

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WARRANTLESS SEARCHES AND AWARDS FOR DAMAGES IN LIGHT OF THE JUDGMENT IN

Shashape v The Minister of Police Case No.: 1566/2018

1 Introduction

The law of criminal procedure is "double functional" in that it not only dictates the proper procedure for the execution of police functions but also serves as a ground of justification in substantive law against otherwise unlawful conduct (see Joubert *The Criminal Procedure Handbook* 13ed (2020) 8). Nevertheless, personal liberties, even in the pursuit of justice in a country overrun by crime, cannot be sacrificed indiscriminately simply to further the diligent investigation of crime (see Packer "Two Models of the Criminal Process" 1964 113(1) *University of Pennsylvania Law Review* 1–68; Van der Linde "Poverty as a Ground of Indirect Discrimination in the Allocation of Police Resources: A Discussion of *Social Justice Coalition v Minister of Police* 2019 4 SA 82 (WCC)" 2020 23 *Potchefstroom Electronic Law Journal* 1–28; South African Police Service "Crime Situation in Republic of South Africa Twelve (12) Months (April to March 2019_20)" (31 July 2020) https://www.saps.gov.za/services/april_to_march_2019_20_presentation.pdf (accessed 2020-09-01)).

An example of personal liberties being sacrificed in favour of the pursuit of justice is the search and seizure of private spaces of individuals. Search and seizure may be effected both with and without a warrant and is regulated by the Criminal Procedure Act 51 of 1977 (CPA). However, where a police official acts outside of this legislative matrix, his or her conduct is not regarded as lawful; he or she may not rely on official capacity as a ground of justification against an (unlawful) search. In such instances, the Minister of Police may be vicariously liable in delict owing to the unlawful conduct of police officials. Such cases are relatively rare.

This contribution will focus on two specific aspects – namely, search and seizure conducted *without a warrant*, and subsequent awards for damages based on unlawful, warrantless searches. The recent judgment in *Shashape v The Minister of Police* (WHC (unreported) 2020-04-30 Case no 1566/2018 (*Shashape*)) is discussed against this backdrop.

2 Relevant constitutional principles

Police search and seizure affects two specific and interrelated constitutional rights. These rights are the right to dignity under section 10 of the Constitution of the Republic of South Africa, 1996 (the Constitution) and the right to privacy under section 14 of the Constitution. Section 10 simply states that "[e]veryone has inherent dignity and the right to have their dignity respected and protected". Human dignity is furthermore a foundational value of our constitutional democracy. In this regard, section 7(1) holds that "[the] Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom". The right to privacy is, however, more elaborate. Section 14 provides:

> "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."

Section 14 is therefore quite elaborate in the sense that it provides for constitutional protection against arbitrary search and seizure. Section 36 of the Constitution, however, allows for the limitation of rights under "reasonable and justifiable" circumstances. The right to privacy must, for example, be balanced against the State's (and society's) legitimate interest in maintaining law and order (see *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd In Re: Hyundai Motor Distributors (Pty) Ltd v Smit No* 2001 (1) SA 545 (CC) par 55; *Thint (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions* 2009 (1) SA 1 (CC) par 73–80; *Magobodi v Minister of Safety and Security* 2009 (1) SACR 355 (Tk) par 7; *Tinto v Minister of Police* 2014 (1) SACR 267 (ECG) par 50). In *Minister of Safety and Security v Van der Merwe* (2011 (5) SA 61 (CC) par 56), Mogoeng CJ moreover held that when courts consider the validity of search warrants, they "must always consider the validity of the warrants with a jealous regard for the search person's constitutional rights". Furthermore, the Supreme Court of Canada in *Thomson Newspapers Ltd v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)* ([1990] 1 SCR 425 508) succinctly points to the consequences of reckless search and seizure:

> "The suspicion cast on persons who are made the subject of a criminal investigation can seriously, and perhaps permanently, lower their standing in the community. This alone would entitle the citizen to expect that his or her privacy would be invaded only when the state has shown that it has serious grounds to suspect guilt. This expectation is strengthened by virtue of the central position of the presumption of innocence in our criminal law. The stigma inherent in a criminal investigation requires that those who are innocent of wrongdoing be protected against overzealous or reckless use of the powers of search and seizure by those responsible for the enforcement of the criminal law. The requirement of a warrant, based on a showing of reasonable and probable grounds to believe that an offence has been

committed and evidence relevant to its investigation will be obtained, is designed to provide this protection."

(Also see *Magajane v Chairperson, North West Gambling Board* 2006 (2) SACR 447 (CC) par 70; *Tinto v Minister of Police supra* par 51–52.)

In this case, the Supreme Court of Canada *inter alia* reminds us that the execution of search and seizure must be performed keeping in mind that the suspect is presumed innocent (enshrined in s 35(3)(*h*) of the Constitution). An unlawful search may also impact the right to freedom and security of the person (especially under s 12(1)(*c*) and (*e*)). Section 25 also comes into play as it stresses that "[n]o one may be deprived of property except in terms of law of general application". In the context of the ensuing discussion, it becomes evident that (unlawful) searches are unfortunately also associated with a degree of undue physicality.

3 Search and seizure under the CPA

This section sets out the legislative framework for warrantless searches under the CPA, as well as the guidelines for warrantless searches performed based on information provided by informers, including anonymous informers. This is followed by an analysis of the most pertinent cases where damages were awarded based on warrantless searches. (The scope of this discussion therefore does not include instances of unlawful arrest or detention without a facet of search and seizure.) This section serves as a contextual background to the discussion of the *Shashape* judgment.

3 1 Relevant provisions dealing with warrantless searches

Section 20 of the CPA refers to articles susceptible to being seized, namely an article

"*(a)* which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence, whether within the Republic or elsewhere;
(b) which may afford evidence of the commission or suspected commission of an offence, whether within the Republic or elsewhere; or
(c) which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence."

Furthermore, according to section 22 of the CPA, a warrantless search may be effected against any persons, containers or premises, to seize an article listed in section 20. This may only occur in a few instances, namely:

"*(a)* if the person concerned consents to the search for and the seizure of the article in question, or if the person who may consent to the search of the container or premises consents to such search and the seizure of the article in question; or
(b) if he on reasonable grounds believes–
(i) that a search warrant will be issued to him under paragraph *(a)* of section 21(1) if he applies for such warrant; and

(ii) that the delay in obtaining such warrant would defeat the object of the search."

A warrantless search and seizure may, therefore, take place if a person who is authorised to do so consents to such a search in terms of section 22(*a*) of the CPA. This includes, most patently, the owner or tenant of a property. The consent provided must also be, as Du Toit points out, of a certain quality (Du Toit "Circumstances in Which Article May Be Seized Without Search Warrant" in Van der Merwe (ed) *Commentary on the Criminal Procedure Act* RS 63 (2019) 30E). A person can only give valid consent if he or she has the capacity to do so and has been informed of the purpose of the search (Du Toit in Van der Merwe (ed) *Commentary on the Criminal Procedure Act* 30E). A failure to properly inform someone of the purpose of the search will consequently render the "consent" and the subsequent search invalid (*Magobodi v Minister of Safety and Security supra* par 16). "Capacity" must also be understood in the sense of "authorisation". In *S v Motloutsi* (1996 (1) SACR 78 (C)), a warrantless search was effected based on the consent of a person who had no authority to give such consent. A lessee had given consent to search a sitting room that he had sublet to the accused. The court correctly held that this search was unlawful (see *S v Motloutsi supra* 87). A police official should ascertain whether a person has the authority to give consent before issuing a request for a warrantless search (*Magobodi v Minister of Safety and Security supra* par 14). Furthermore, if an item falls outside the scope of section 20, the question of consent and the validity to conduct a search becomes irrelevant (*Sigwebendlana v Minister of Safety and Security* (ECMHC (unreported) 2013-02-28 Case no 27/94; *Magobodi v Minister of Safety and Security supra* par 13). A person must also be informed of his or her right to refuse consent and to be informed of such right of refusal (*Magobodi v Minister of Safety and Security supra* par 14).

Section 22(*b*)(i)-(ii) involves a two-pronged inquiry. If, in terms of section 22(*b*)(i), a police officer has *reasonable grounds* to believe that a warrant would have been granted under section 21(1) (by means of a warrant issued by a judicial officer), a warrantless search may also be effected. In addition this, the officer must under section 22(*b*)(ii) on reasonable grounds believe that the delay in obtaining the search warrant would lead to obstructing the aim of the search. This typically covers instances where a suspect might be evading justice or where it is believed that the suspect might destroy evidence, or might otherwise attempt to evade justice if officers had first to obtain a search warrant. In *S v Brown* (ECPEHC (unreported) 2019-02-05 Case no CC 18/2018), a member of the Organised Crime Unit, Shaw, was patrolling the coast and noticed suspicious activity, where some of the accused were removing items from the ocean, placing it in bags and then in a vehicle's boot. Upon approaching the scene, he was obstructed by some of the parties and the latter fled the scene. A car chase ensued but Shaw managed to catch up with one party, Renier. Shaw enquired about the contents of the boot from this party who informed him that it was abalone (*S v Brown supra* par 17–20). It is clear that had Shaw obtained a search warrant, it would probably have frustrated the object of the search because the accused were in the process of leaving the scene. In *Seapolelo v Minister of Police, Republic of South Africa* (NWHC (unreported) 2018-03-

0263/17 Case no 64/2017), the officers asserted that they were tracing persons allegedly involved in an armed robbery. The suspects had stolen a firearm and a cellphone and one of the suspects was alleged to have entered the home of the plaintiff. Considering the fact that the items were capable of being hidden without difficulty, the court agreed that the officers had reasonable grounds to believe that a warrant would have been granted to them and that a delay would have obstructed the object of the search. This would still have rung true – regardless of the absence of consent – and the court appeared not to believe the plaintiff's version regarding the absence of consent to search (par 33, 35–36). In *S v Motloutsi*, it was held that although the police officer in question had reasonable grounds to believe that a warrant would have been granted, the objective of the search would not have been defeated had he obtained a search warrant (*S v Motloutsi supra* 80 and 87). In that case, the officer contended that a warrant was not obtained from the warrant-officer on duty because such a warrant does not have "the same credibility as a warrant issued by a magistrate", and that obtaining one from a magistrate would have frustrated the objectives of the search (*S v Motloutsi supra* 80 and 87). The court, however, held that there was a "conscious and deliberate violation of the accused's constitutional rights", and held further that the evidence obtained was inadmissible (*S v Motloutsi supra* 88). An underlying supposition of the court appears to be that the ground under section 22(*b*) becomes irrelevant when there is a reliance on consent as the ground of the warrantless search (see *Nombembe v Minister of Safety and Security* (1998 (2) SACR 160 (Tk); Du Toit in Van der Merwe (ed) *Commentary on the Criminal Procedure Act* 30E). The facts in *Seapolelo v Minister of Police* can be distinguished slightly here as it appears that the police relied on both grounds for a warrantless search listed in section 22 and the court did not believe the plaintiff's version of events regarding the absence of consent (par 35–36).

Furthermore, the "reasonable grounds" under section 20 (relating to the items susceptable to seizure) must be established on objective grounds. In *Magobodi v Minister of Safety and Security*, for example, Miller J held that there was an absence of reasonable grounds in deciding to search the vexed vehicle. The court pointed out that there was a lack of information to point to a conclusion that the vehicle was an article described in section 20 (*Magobodi v Minister of Safety and Security supra* par 16). There must, consequently, at least be "a reasonable suspicion" that the article in question is one that is described under section 20 (*Ngqukumba v Minister of Safety and Security* (ECMHC (unreported) 2011-10-20 Case no 1354/2010 par 17). Didcott J in *Ndabeni v Minister of Law and Order* (1984 (3) SA 500 (D)) held that the CPA "calls for the existence in fact of reasonable grounds" and the determination of whether these facts exist "must be determined objectively" (*Ndabeni v Minister of Law and Order* 511; see also *Watson v Commissioner of Customs and Excise* 1960 (3) SA 212 (N) 216). In fact, it has been held that a subjective belief by a police officer is essentially irrelevant and is considered a mere "by the way" (*Ndabeni v Minister of Law and Order supra* 511).

Finally, section 29 of the CPA also states that a search and seizure, whether of a person or premises "shall be conducted with strict regard to decency and order".

3 2 I heard it through the grapevine: Warrantless searches based on information provided by informers

In instances where warrantless searches are effected based on information provided by a police informer, the information must measure up to a certain standard in order to comply with the "reasonable grounds" standard required by the CPA. The Canadian case of *Regina v Zammit* ([1993] 15 CRR (2d)) has been relied on for guidance on the standard with which informer information should comply (*Tinto v Minister of Police supra* par 65; Du Toit in Van der Merwe (ed) *Commentary on the Criminal Procedure Act* 30K–30L). This case, however, relies heavily on the *dicta* in *R v Debot* ((1986) 30 CCC (3d) 207 (Ont CA) (*Debot I*) 275 and *R v Debot* [1989] 2 SCR 1140 (*Debot II*)). In *Debot I*, the court held that an informer's assertion that he or she had obtained the vexed information from "a reliable informer" personally would constitute an insufficient basis for granting a warrant. The "underlying circumstances" that led to the "tip" must, therefore, be disclosed to the relevant judicial officer. The same logic applies to a warrantless search and "a mere conclusory statement" would be insufficient. The informer's tip must contain enough detail to satisfy officials that

> "it is based on more than mere rumour or gossip, whether the informer discloses his or her source or means of knowledge and whether there are any indicia of his or her reliability, such as the supplying of reliable information in the past or confirmation of part of his or her story by police surveillance". (*Debot I supra* 218–219)

Martin JA held further that these criteria need not be present in all cases.

In *Debot II*, the Supreme Court of Canada (per Wilson J) held that "the totality of the circumstances [must meet] the standard of the necessary reasonable grounds" (*Debot II supra* 219). Wilson J continued as follows:

> "In my view, there are at least three concerns to be addressed in weighing evidence relied on by the police to justify a warrantless search. First, was the information predicting the commission of a criminal offence compelling? Secondly, where that information was based on a *'tip'* originating from a source outside the police, was that source credible? Finally, was the information corroborated by police investigation prior to making the decision to conduct the search?" (*Debot II supra* 1168)

Wilson J also agreed with Martin JA that officials must consider the "totality of the circumstances".

In this regard, the court in *Mabona v Minister of Law and Order* (1988 (2) SA 654 (SE)) refers to the circumspect treatment by courts of informer information. Jones J held that the information falls into the same category as "accomplices, quasi accomplices and police traps" and their tips "must be subjected to close and careful scrutiny" and corroboration before their

information can be trusted (*supra* 658). Other safeguards are also missing, such as the fear of perjury when testifying under oath (the credibility of which is closely monitored by the courts) and the lack of a formal complaint or statement – all exacerbated by the informer's insistence on anonymity (see *Mabona v Minister of Law and Order supra* 659). Pickering J relied on these sentiments in *Tinto v Minister of Police (supra)*. In that case, a police officer attempted to conduct a warrantless search (no search was ultimately effected) based on information provided by informers. The informers were known to the police and had provided reliable information "nine times out of ten" in the past. The plaintiff (and those who accompanied him) acted suspiciously by remaining in the plaintiff's motor vehicle for a prolonged period of time in the parking lot of a known crime "hotspot". The persons who accompanied the plaintiff furthermore walked between various banks and the vehicle. The cumulative conduct was thus in line with the known *modus operandi* of bank robbers (par 66–67). Pickering J relied on the standards set out in *Debot I* and *Debot II* and asserted that the reports by informers were detailed; "not based on mere gossip or rumour" and not merely a conclusory statement; pertained to information regarding a known crime hotspot and therefore the police had objective grounds to request a search (par 71–72).

It is therefore clear from a reading of the relevant case law that information supplied by informers must essentially also comply with the standard of reasonableness; attempts should be made to corroborate this information; and informer information must, in general, be treated with a degree of circumspection.

3 3 Overview: Previous cases dealing with damages for wrongful searches

In *Pillay v Minister of Safety and Security* ((2004/9388) [2008] ZAGPHC 463 (2 September 2008)), a 62-year-old woman was subjected to an unlawful search and seizure. The police broke through two security gates and two doors (located on the perimeter walls and main entrance to the house). Door frames and locks, cupboard door locks as well as internal doors were damaged during the process. The house was left in a chaotic state as cupboards were emptied, and clothes scattered throughout the house. The plaintiff was also subjected to a body search. So terrified by the experience was she that she called the South African Police Service (SAPS) flying squad to come to her aid. The sequence of events traumatised the plaintiff to such an extent that she was diagnosed with post-traumatic stress disorder (PTSD) by her psychiatrist. The plaintiff's symptoms included "flash-backs and reliving the traumatic event, anxiety, mood disturbances, upsetting dreams, persistent avoidance, sleep disturbances, impaired concentration, memory deficiencies, depression, feelings of guilt, rejection and humiliation" (*supra* par 7). Her psychiatrist gave a general prognosis that was "not positive" and confirmed she would need further treatment. The plaintiff's treatment at that time consisted of medication and counselling. However, he explained that her symptoms had subsided over time (*supra* par 6–7). The defendant's expert psychiatrist, Dr Fine, came to a similar conclusion citing

"chronic and ongoing PTSD and major depressive disorder" [*sic*] coupled with dysfunctional behavioural and mood patterns. This had led to the loss of amenities of life as well as emotional distress. Dr Fine, ironically, indicated that the plaintiff still suffered from severe psychiatric lesions years after the incident and that she would require lifelong intermittent treatment as her prognosis was poor (*supra* par 8).

Meyer J essentially rejected the references to previous awards by the parties as the learned judge pointed out that these were "not directly comparable" to the factual matrix in the present case. The court pointed towards the following broad factors in ascertaining the general damages claimed, specifically: the trauma suffered by the plaintiff; the gross violation of her privacy; her feelings of humiliation and degradation; her chronic PTSD; her poor prognosis; the probability of lifelong psychiatric treatment; caution against awarding extravagant awards for general damages; and fairness towards the defendant (*supra* par 10). Regarding the last factor, the court cited *De Jongh v Du Pisanie NO* (2005 (5) SA 457 (SCA)). In that case, the Supreme Court of Appeal (SCA) rejected the court *a quo*'s sentiments that frugal (or conservative) awards for serious injuries are at odds with a civilised society. Brand JA held that it is not society that is paying the damages but the defendant – in other words, the frugality of society is irrelevant in ascertaining the award (*supra* par 60). Brand AJ further evoked the words of Holmes J in *Pitt v Economic Insurance Co Ltd* 1957 (3) SA C 284 (D), where it was held that

> "the Court must take care to see that its award is fair to both sides – it must give just compensation to the plaintiff, but it must not pour out largesse from the horn of plenty at the defendant's expense." (*Pitt v Economic Insurance Co Ltd* 287)

The court in *Pillay* concluded that R150 000 would be appropriate in the circumstances (par 11).

As to special damages for damage to the plaintiff's property, the court pointed solely towards the reasonable costs for repairs. This amounted to R21 049 (*supra* par 12). There was also a third claim relating to monies and jewellery that had disappeared from the plaintiff's safe but the court found that the plaintiff had failed to discharge her onus sufficiently for the court to find that the police were responsible for that as well (*supra* par 13–17).

In *Minister of Safety and Security v Augustine* (2017 (2) SACR 332 (SCA)), the respondents comprised a family of four who were subjected to a search without a lawful warrant at 02:00 in the morning. This was followed by insults, humiliation and intimidation by *inter alia* pointing firearms at them. The third respondent was pushed to the ground by the boot of an officer and a rifle was pointed at his head. The first respondent was then ordered to lie down and also had a rifle pointed at his head. A vast number of officers, between 30 and 45, had furthermore entered the premises (*supra* par 7–9). The respondents were under the initial impression that they were being burgled. They were only informed after 30 minutes that the "intruders" were police officers who subsequently discovered that they were at the wrong house (*supra* par 10–12). Locks, doors, and glass panes had been broken in the process and the respondents experienced humiliation as neighbours

witnessed the police leaving their house (*supra* par 11 and 14). The respondents suffered a range of psychological consequences owing to the conduct of the police, which was attested to by an expert clinical psychologist. This included insomnia, flashbacks, PTSD, reduced level of general functioning, dysthymia, anxiety, guilt, self-blaming, psychosis, aggressive impulses, irritability, and paranoia. The first respondent's work performance was impacted and the third and fourth respondents suffered academic problems. The first respondent additionally suffered a heart attack and the family had to relocate owing to the negative association with their previous home (*supra* par 19–24).

Gorven AJA referred to the role of comparable awards and held that they should be used as guidance and not be followed slavishly (par 28). Reference is made to *De Jongh v Du Pisanie* (*supra*), where it was held the consequences of the harm might be more or less serious than a case currently under consideration; and that should consequently impact the award (*De Jongh v Du Pisanie supra* par 63). Courts should further refrain from mechanically applying the consumer price index (*Augustine supra* par 28). The SCA further referred to other comparable cases, varying in degrees of comparability, including *Pillay* (see *Kritzinger v Road Accident Fund* ([2009] ZAECPEHC 6 (24 March 2009); *Minister of Police v Dlwathi* [2016] ZASCA 6 (20604/14; 2 March 2016); *Minister of Safety and Security v Van der Walt* 2015 (2) SACR 1 (SCA)). The facts in *Kritzinger v Road Accident Fund* do not concern police action at all but they do, however, deal with emotional shock and trauma. Further, the facts in *Minister of Safety and Security v Van der Walt* are distinguishable from *Pillay* and *Shashape* in that the case deals with unlawful detention rather than a warrantless search. *Minister of Police v Dlwathi* also deals not with a warrantless search, but with assault. Gorven AJA points towards the "aggravating factors" present in the case, including the fact that it occurred at 02:00 in the morning and that the events traumatised the respondents to the extent that they had to relocate. The family as a whole was impacted in such a way that they could not even adequately comfort each other (*Augustine* par 34). The court also censured the police for their unlawful conduct, which was quite the opposite of their constitutional duty to protect inhabitants of the country (*Augustine* par 37; also see s 12(1)(*c*) of the Constitution; *K v Minister of Safety and Security* 2005 (6) SA 419 (CC); *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC); the Preamble to the South African Police Service Act 68 of 1995). The applicants were further censured because there were "deliberate falsehoods" presented to the court regarding a document that was found bearing the name of Eugene, the *actual* suspect they were looking for. The appellants purported to have found these documents in the home of the respondents, which would have justified their warrantless search. The appellants also misrepresented the fact that the semi-detached home of the respondents was in fact the same house Eugene was living in. This was also false (*Augustine supra* par 18 and 37). In addition, there was also a patent attempt to thwart efforts to report this conduct either to the police or the Independent Police Investigative Directorate (*Augustine supra* par 15). The SCA consequently dismissed the appeal and agreed with the court *a quo*'s award of R200 000 (for the first to third respondents each) and R250 000 (to

the fourth respondent, who displayed the most significant psychological impact) (*Augustine supra* par 35 and 38).

The court in *Augustine* referred to *Marwana v Minister of Police* (ECPEHC (unreported) 2012-08-28 Case no 3067/2010), which is sufficiently comparable to *Shashape* and *Pillay*. The plaintiff in *Marwana v Minister of Police* was employed as a domestic worker. She was arrested (without a warrant) and detained at the police station the day after a robbery occurred at her employer's residence. She was not present on the day of the robbery. The police took the plaintiff to her home and searched her home without her authorisation (*supra* par 4). Tshiki J held that the plaintiff would not have been able to consent in any case as she was not acting autonomously owing to her detention, assault, and never having been informed of her rights (*supra* par 18). There was also an absence of a search warrant. The plaintiff was subjected to an assault when she was struck by a wooden plank "and strangled with a plastic bag" (*supra* par 4). A medical practitioner confirmed the extent of her injuries, which included bruises on her upper arms and back, wrist abrasions, and bruises on her knees. The medical practitioner also relayed that the plaintiff informed him of strangulation with a plastic bag. This incident caused the plaintiff to soil herself (*supra* par 4). The court awarded damages for unlawful arrest and detention (R55 000), assault (R90 000) and unauthorised entry (R10 000). Note that the amounts were split as there were three separate and distinguishable events. The court referred to the fact that the plaintiff was unlawfully detained for approximately 30 hours but it regarded the assault as a particular violation of the plaintiff's rights – specifically, her rights to privacy and dignity (*supra* par 19–22). Tshiki J did not regard the unlawful search in as serious a light as the other violations because "there is no evidence that they had done something wrong or anything beyond their mandate" (*supra* par 22). The court, however, did specifically consider whether the ground under section 22(*b*) of the CPA was present but it seems to be implied that the police had no reasonable grounds to search the plaintiff's residence. One can, therefore, conclude that, as in *Marwana v Minister of Police*, an unlawful search on its own – in other words, without any damage to property, assault or psychological lesions – would attract an award for damages of R10 000.

4 *Shashape* case

4 1 Pertinent facts

The plaintiff, Ms Shashape, sued the Minister of Police for R100 000 in damages for an unlawful search and seizure and unlawful entry of her premises (*Shashape supra* par 1). The particulars of claim averred that a warrantless search and seizure, effected by two police officers, occurred on 24 March 2018 while she was not at the premises. This search and seizure was claimed to have been effected without her consent, as would have been required under section 22(*a*) of the CPA, or without a warrant in terms of section 25(1)(*a*) relating to State security, or without a warrant under section 21(1). It was further averred that the police officers did not have reasonable grounds to believe that a warrant would have been granted to them if they

had applied (s 22(*b*) read with s 21(1)(*a*); and s 25(3) read with s 25(1)). It was further averred that there were no reasonable grounds to believe that offences under the Drugs and Drug Trafficking Act 140 of 1992 had been committed or that there was a prospect that such offences were to be committed (see s 11(1)(*a*)). It was also alleged that the search had not been conducted in an orderly manner (s 29 CPA). Consequently, the unlawful entrance and search of the residence of the plaintiff constituted a violation of her constitutional rights to dignity and privacy, which caused the plaintiff to suffer harm in the amount of R100 000.

The plaintiff, a gospel singer and cultural dancer, left her home along with her group to record an album on 24 March 2018. No one remained in the house and the plaintiff requested her mother (who lived directly behind her) to keep an eye on her house. This was because the two external doors, as well as the kitchen door of the plaintiff's house, were unable to lock. In the kitchen were strips of beef hanging, "cut like biltong" (*Shashape supra* par 9 and 19). While at the studio, the plaintiff's brother (who lived with his mother behind the plaintiff's residence) phoned the plaintiff and informed her of police officers who had arrived at her house. The plaintiff requested to speak to one of the officers, an Inspector Phiricwane. Ms Shashape instructed the latter not to enter the house until she arrived – and he replied that he had already done so and had found meat in her kitchen relating to livestock that had been slaughtered and stolen at a nearby farm the previous evening. They had effected this warrantless search based on an "anonymous tip" (*supra* par 20 and 23). After this exchange, the plaintiff returned (with her children and the cultural group in tow) and found all the doors that had been closed open and four police vehicles leaving the premises while two remained. There was also "a large number of curious onlookers in her premises". Her home was in disarray and the kitchen was being searched in a disorderly fashion (*supra* par 21–22). After relaying the information regarding the alleged slaughter and theft of the livestock and the anonymous tip, the plaintiff indicated that she had no knowledge of this incident and the meat she purchased was purchased at an abattoir. She could not provide a receipt to the officers as she had bought the meat along with three others for a total of R1 200 (she had contributed R300) (*supra* par 22–24). The next day (25 March 2018), an officer from the Stock Theft Unit seized a strip of beef so that it could be compared to the heads of the stolen livestock. The plaintiff rebutted and queried how this could be done considering that the meat was already dry, but the officer "informed her that he had his ways of doing so" and the plaintiff never heard from him again (*supra* par 25). The plaintiff was never charged, arrested, or prosecuted relating to the alleged stock theft and slaughter.

Here, Gura J considered the applicable legal principles relating to warrantless search and seizure. He then proceeded briefly to discuss consent to permit a warrantless search under section 22(*a*) of the CPA. Ultimately, the court held that the plaintiff did not consent to the search, and neither did her relatives (*supra* par 28–29). It is submitted that they would in any event not have been authorised to consent to such a search (see *Motloutsi supra* 87). The court does not refer to the ground under section 22(*b*) directly but merely holds that "the searching official will have to show

that reasonable grounds existed at the time when he decided to enter and search the plaintiff's premises without a search warrant" (and references *Alex Cartage (Pty) Ltd v Minister of Transport* 1986 (2) SA 838 without context). Gura J further asserts, correctly, that search and seizure is an infringement of our constitutionally protected right to freedom and must be done in a just and reasonable fashion, considering the particular circumstances (*Shashape supra* par 29). The court accepted the plaintiff's version of events and correctly found that the search and seizure occurred outside of the framework of section 22 of the CPA and the Minister of Police was "therefore wholly liable for the plaintiff's damages" (*Shashape supra* par 33).

4 2 The court's approach to the determination of the quantum

The court in *Shashape* considered the impact of the wrongful search on the plaintiff's life – especially the social and financial impact. The general trend, especially regarding the former, was that the community that once supported her, started to ostracise her owing to gossip and speculation that she was a stock thief.

Gura J discussed the plaintiff's testimony in which she recounted specific incidents that have led to her embarrassment. At a singing and dancing showcase the week following the unlawful search, she was humiliated after audience members boycotted and dismissed her. The parents of the children who belonged to her singing group refused to let them continue in the group and even her children were questioned at school regarding their mother's involvement in stock theft. The plaintiff was rendered incapable of performing as she usually did and also ceased selling CDs. The sales of her CDs had previously garnered approximately (she did not keep any records of her sales) R8 000 per month. The plaintiff consequently developed insomnia and hypertension. The hypertension started to impact her vision. To the plaintiff's family she in effect became *persona non grata* and was the first to be suspected if anything was stolen in the neighbourhood. The situation was described as disgraceful to the family and led her to feel unsafe in the community (*supra* par 34–38).

The court considered *Augustine* and *Pillay* as discussed above, but focused predominantly on the *facts* of the cases and not the underlying principles in reaching their decisions (discussed in more detail below) (*Shashape supra* par 39–40). Gura J correctly pointed out that the harm suffered by the plaintiff was less severe than in *Augustine* and *Pillay* but the court still took cognisance of the "untold misery" caused to the plaintiff and her family, which was evident from her demeanour as she delivered her testimony. The court pointed towards her mental as well as psychological health as well as the impact on her constitutional rights, specifically privacy and dignity. This had all impacted on her earning capacity and standard of living as she was left to rely on the maintenance she received from the father of her children and her welfare grant (*Shashape supra* par 42–43). Gura J also noted that the plaintiff had no source of fixed income and "[d]espite that

she is still a singer and dancer, there is no one to entertain because who is interested to listen to the lyrics of a suspected thief" (*supra* par 43).

The court took the above circumstances into account, as well as the "limited resources which the respondent has at its disposal" and awarded the plaintiff R96 000 in compensation (*supra* par 44–45).

4 3 Discussion of Shashape judgment

The court found that the original warrantless search and seizure was unlawful but it did not comprehensively espouse or discuss the grounds under section 22 of the CPA. The court only referred to consent as a ground (s 22(*a*)) but did not pertinently refer to the two-pronged ground under s 22(*b)*. As alluded to above, it has been held (see *Magobodi v Minister of Safety and Security supra* par 16) that the ground under section 22(*b*) becomes invalid where the consent given was invalid but in this case, consent never appeared to be at issue. The plaintiff was absent from her home and therefore could not provide consent. It appears from the judgment that the family did not consent to the search either and *even if they had done so*, they would not have been authorised to do so. The more relevant ground to discuss was under section 22(*b*) – in other words, whether there was a reasonable belief by the officers that they would have been granted a warrant had they applied for one, and that the delay in obtaining a warrant would have thwarted the objective of their search. The court merely referred to the absence of reasonable grounds but it did not refer to these grounds at all.

It is submitted that this ground was in any event absent as well. The police relied on information provided by an "anonymous tip". Gura J also failed to discuss the principles relating to police reliance on informers (see heading 3 2 above). There was in any case not much to address, but it bears mentioning that the information supplied by the alleged informer did not comply with the *Debot I* and *II* standards. There was no mention as to whether there was an attempt to corroborate the information or whether the information was based solely on rumour and gossip in order to establish reasonable grounds for the search. Over and above that, it does not appear as if the Minister of Police (the defendant) had much of a defence to the plaintiff's allegations. In fact, the court held "that there is no explanation at all, let alone a reasonable account why the police decided to search the plaintiff's house" and further that the defendant had failed to discharge its onus in justifying the warrantless search (par 31).

Pillay is distinguishable, as the court in *Shashape* pointed out, in that the plaintiff in the former case had experienced severe emotional trauma, which was exacerbated by the fact that she was also subjected to a body search. The plaintiffs in *Pillay* and *Shashape* further differed in age and there were also comprehensive psychiatric reports substantiating Ms Pillay's claims – which reports pointed towards the need for lifelong psychiatric treatment.

The unlawful search in *Shashape* was not as egregious as that in *Pillay* (R150 000 award) or *Augustine* (R250 000 awards) as it did not involve the

element of physicality and property damage but was also not as minimal as the search in *Marwana v Minister of Police* (R10 000 award), which involved a mere unlawful search. What makes the facts in *Shashape* distinguishable from those in *Marwana* is that the former involved lasting and intense humiliation and loss of esteem in her community, which led to the effective destruction of her life's passion and source of income. This is exactly the type of harm the court spoke of in *Thomson Newspapers Ltd v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*; search and seizure may irreparably impact the social standing of a subject and therefore a suspect's right to privacy and presumption of innocence should be guarded zealously. The author does not attempt to suggest whether or not the award was appropriate but it appears to be in line with previous comparable awards. It is however unfortunate that the plaintiff could not prove her patrimonial harm as that would probably have increased her award.

5 Conclusion

The *Shashape* case provided an opportunity to revisit the principles relating to warrantless search and seizure and subsequent awards for damages flowing from such unlawful conduct.

The execution of a search and seizure, especially when done without a warrant, involves a delicate traverse of the constitutional spectrum. This involves protections of a person's right to privacy, dignity, freedom and security of the person, property rights and the presumption of innocence. These rights and values must be weighed against the police's constitutional duty to investigate crime and protect the inhabitants of the country. However, this balance can only be maintained through the careful consideration of objective facts. At the time of the execution of a warrantless search, the subject thereof is mostly only a suspect. Regardless of the strength of the evidence, all persons subjected to searches (of all kinds) must be treated with dignity and respect, with due consideration of their right to privacy and the presumption of innocence. Nevertheless, malfeasance often occurs during warrantless searches. This, necessarily, invokes the double functionality of the law of criminal procedure, as police officials faced with a claim for damages against an unlawful search cannot rely on the execution of their duties as a ground of justification.

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SOME CLARITY ON THE ACCRUAL OF LIVING ANNUITIES AT DEATH OR DIVORCE

CM v EM (1086/2018) [2020] ZASCA 48; [2020] 3 All SA 1 (SCA); 2020 (5) SA 49 (SCA) (5 May 2020)

1 Introduction

A conventional life annuity is a contract in terms whereof an annuity underwriter guarantees a periodical payment to an insured in exchange for an initial non-refundable premium. The insurer pools all the annuity premiums together and assumes both the investment performance and the mortality risk by way of actuarial comparisons (see Bester *Comparing Five Annuity Options Offered at Retirement in South Africa* (MComm dissertation, University of Stellenbosch) 2016 34–35). The annuitant's income is guaranteed for life or for a minimum period.

Living annuities on the other hand are regulated by the Long-Term Insurance Act 52 of 1998 and are market-linked investments (with no income guarantee) in respect of which the annuitant annually chooses the drawdown rate – currently between 2.5 and 17.5 per cent per annum (compare Regulations in terms of s 36 of the Pensions Act 24 of 1956 and s 106(1)(*a*) read with s 108(1) of the Financial Sector Regulation Act 9 of 2017.) When an annuitant dies, the death benefit is payable to a nominated beneficiary or the estate of the insured (see https://www.actuarialsociety.org.za and https://www.isasapensionfund.co.za (accessed 2021-04-25)). A pension-interest benefit is an asset for the purposes of the division of an estate at divorce, and includes both pension and provident funds (see s 7(7) and (8) of the Divorce Act 70 of 1979 and s 37D(4)(*a*) and (*d*) of the Pension Funds Act 24 of 1956; *GN v JN* 2017 (1) SA 342 (SCA)). Living annuities, however, do not fall within the definition of "pension interest" as defined in s 1 of the Divorce Act (see *Nailana v Nailana* 714/2018 [2019] ZASCA 185 (3 December 2019) for an interpretation of the term "pension fund"; De Klerk "Clarifying the Term Pension Fund in the Divorce Act and the Pension Fund Act" July 2020 *De Rebus* 25; see *Old Mutual Life Assurance Co (SA) Ltd v Swemmer* 2004 (5) SA 373 (SCA) par 8 on the term "pension interest").

In *CM v EM* ((1086/2018) [2020] ZASCA 48; [2020] 3 All SA 1 (SCA); 2020 (5) SA 49 (SCA) (5 May 2020)), the Supreme Court of Appeal, in an appeal from the full court of the Gauteng Division of the High Court, sitting as court of appeal, had the opportunity to determine where the ownership of capital invested in the form of a living annuity vests, as well as whether the value of an annuitant spouse's right to future annuity payments is an asset in his or her estate and therefore subject to accrual. Accrual in respect of an estate is the amount by which the net value of the estate at the dissolution of a marriage exceeds the net value of that estate at the commencement of the

marriage (see s 4 of the Matrimonial Property Act 88 of 1984). At the dissolution of a marriage owing to death and subject to the accrual system, the spouse whose estate shows no accrual, or a smaller accrual than the estate of the other spouse, has a claim against the other spouse or his or her deceased estate (see s 3(1) of the Matrimonial Property Act; *N v G* 2018 (4) SA 316 (WCC); Lotter "Estate Planning: The Inclusion of the Proceeds of a Life Policy When Accrual is Calculated" 2013 *Journal for Juridical Sciences* 38–57).

It is submitted that some implications of the accrual dispensation, particularly within the context of certain pension and financial products, are still in their discovery phase, nearly 40 years after their introduction (see Muller "The Treatment of Life Insurance Policies in Deceased Estates with a Perspective on the Calculation of Estate Duty" 2006 69 *THRHR* 259–278.) In the absence of any reference to a living annuity in an antenuptial contract, the question was always whether such an investment is subject to the accrual system at divorce or death. In the context of a life assurance policy, the surrender value of the policy was taken into account in the event of divorce, but in the event of death, the question was whether, for accrual purposes, the factor taken into account should be the surrender value or the policy proceeds. (Muller 2006 *THRHR* 270 submits that in the case of a marriage out of community of property that is subject to accrual, the policy benefits must be valued at the moment of death, which approach will be consistent with the result achieved in the case of a marriage in community of property.)

As only assets that form part of the estate of a spouse can be considered for accrual purposes, the very nature of a living annuity had to be investigated in the matter of *CM v EM* (*supra*). This case was an application for special leave to appeal from the full court in the matter of *Emilio Pietro Valfredo Montanari v Charmaine Helen Montanari (Montanari v Montanari*).

2 *Montanari v Montanari* ZAGPJHC (unreported) 2016-08-10 Case no 14/26868

The Montanaris were married out of community of property with inclusion of the accrual system. The respondent used his pension benefits to purchase three living annuities during the duration of the marriage and sought a declaratory order that these annuities should not be regarded as assets in his estate for the purposes of calculating the accrual in his estate. The parties agreed during the trial that the living annuities did not qualify as a pension interest as defined in s 1 of the Divorce Act and that the court needed first to decide, before the merits of the action could be determined, whether the living annuities acquired by the respondent formed part of his estate. The respondent's case was that the living annuities were also not subject to accrual, as the ownership of the capital was vested in the insurer, with the investor only being entitled to the annuity income (par 6) (see General Note 18 of General Notes Second Schedule to the Income Tax Act 58 of 1962, Issue 2, with effect 1 September 2008, on providing annuities on retirement).

Victor J accepted this version, but concluded that it was permissible for the annuity income to be taken into account in the future for the determination of maintenance needs (par 30). A benefit valuation actuary for the applicant testified that although he could not give an opinion on the actual ownership aspect, it was possible to place a market value on the respective income streams generated by the living annuities (par 24). This decision was taken on appeal to the Gauteng Division of the High Court before Keightley and Modiba JJ and Sardiwalla AJ. However, before the appeal to the full court was heard, judgment was delivered in *ST v CT* ((1224/16) [2018] ZASCA 73; [2018] 3 All SA 408 (SCA); 2018 (5) SA 479 (SCA) (30 May 2018)), where it was found that the annuities belonged to the insurer and not the annuitant. The applicant on appeal accepted the legal position and did not tender any new considerations, resulting in a confirmation by the full court of the decision by Victor J that the respondent's living annuities did not form part of his estate for the purposes of accrual.

3 *ST v CT*

The case of *ST v CT (supra)* was an appeal to the Supreme Court of Appeal (SCA) from the court of first instance (Weinkove AJ in the Western Cape Division), resulting from a bitterly contested divorce trial in which the value of the accrual in the appellant's estate had to be determined. Owing to the complexity of the appellant's estate and business structures, as well as his lack of cooperation, the court admitted that it would never be able to establish the exact value of his estate as at the time of the divorce (par 49). One of the contentious findings by the court *a quo* was that a particular living annuity had to be included as an asset in the appellant's estate for purposes of calculating the accrual (par 112). The SCA referred to the rejection of the contention that a living annuity fell within the annuitant's estate in the court of first instance in the *Montanari* case and was thus confronted with two opposite views by the High Court in different divisions on the novel question of whether a living annuity upon divorce forms part of the accrual. The court observed that the High Court matter before Victor J in *Montanari* was to its knowledge the only decision where the question under discussion had been dealt with in full (par 102 and 104).

A living annuity is in essence defined as the right of a member of a retirement fund to an annuity purchased from the fund on or after the retirement date of the member (see s 1 of the Income Tax Act 58 of 1962, read with GN 290 in *GG* 32005 of 2009-03-11). The definition continues to set certain requirements with which all living annuity contracts must comply. When an annuitant purchases a living annuity, he or she is no longer a member of a pension fund organisation, as the termination of all interests in the relevant retirement annuity fund took place when the funds were used to purchase the living annuity (see par 106–107). This is not unique to living annuities, as both life annuities and living annuities result in termination of the interest that the annuitant had in the retirement annuity fund.

By its nature, the capital value of a living annuity does not belong to the annuitant, but to the insurance company (par 108). The annuitant's contractual right is to be paid an annuity selected by him or her within the permissible range specified by the applicable legislation. *In casu*, the court

refrained from determining whether the conditional right of the annuitant to future annuity payments was an asset in his estate. The court did, however, make clear, albeit obiter, that the value of the annuitant's right could not be equated to the value of the capital, but had to be determined by the annuitant's life expectancy and the rate of past and future drawdowns from the annuity (see par 110; compare the life-expectancy table issued under GN R1942 in *GG* 5746 of 1977-09-23 under s 29 of the Estate Duty Act 45 of 1955).

4 *CM v EM*

CM v EM (supra) was an application for special leave to appeal in which the applicant challenged the judgment of the full court in the *Montanari* matter, which had affirmed the decision in *ST v CT* (*supra*) that the annuitant's living annuities did not form part of his estate for purposes of calculating an accrual. The applicant, relying on *Commissioner, South African Revenue Service v Higgo* (2007 (2) SA 189 (C)), raised a number of contentions on appeal, arguing that if the SCA had had the benefit of considering those aspects in *ST v CT*, it would not have found that the annuities belonged to the insurer. In the *Higgo* case, it was held that the provider of the living annuity was not the beneficial owner of the capital. In the case in hand, however, the court found that *Higgo* was not applicable, as in that matter the court was not dealing with a living annuity, but with a life annuity, before the current definition of living annuities was introduced into the Income Tax Act in 2008 (par 27 and 28). The court explained in detail the difference between living annuities and conventional life annuities (par 23 and 24).

The court agreed that living annuities were contracts complying with the requirements of the Income Tax Act and that neither the proceeds nor the annuity income fell within the ambit of "pension interest" as defined in the Divorce Act (par 22). The court agreed with the judgment in *ST v CT* (*supra*) that the capital of the living annuities belonged to the respective insurers and the client's only contractual right was to be paid an annuity in an amount by instalment (par 38). The annuitant had the right to direct into which investments the capital had to be placed, to nominate beneficiaries, and to further determine annually the level of income and the frequency of payment – within the pre-defined parameters set by ministerial regulation (par 21).

With analogy to the position of a right to a pension, the court supported the decision in *De Kock v Jacobson* (1999 (4) SA 346 (W)), in which it was decided that both the cash component and the accrued right to the pension that vested in a spouse in a marriage in community of property did qualify as an asset in the joint estate of the parties (par 37) (see *De Kock v Jacobson supra* 349G; compare further *Clark v Clark* 1949 (3) SA 226 (D), in which it was accepted that a spouse's interest, both in a pension that had accrued and in one that had not yet accrued, would form part of the communal estate, as well as *Commissioner for Inland Revenue v Nolan's Estate* 1962 (1) SA 785 (A) 791C–E, reaffirming that the right to a pension right that vests in the parties in a marriage in community of property vests in undivided shares; see Hands, Cloete, Slater, Muller and Peter 2016 113 *Premiums and Problems* C8 for a comparison between different retirement vehicles).

The court in *CM v EM* (*supra*) further determined that the relationship between the insurer and the annuitant was "purely contractual in nature", and did not create a fiduciary relationship between the parties (par 33). The insurer's obligation to the annuitant was limited to the payment of the stipulated annuity. The annuity, and not the capital, became an asset on the balance sheet of the annuitant (par 31–34). The question was whether the right to an annuity could consequently be regarded as an asset in the estate of the annuitant, and whether such an asset could be taken into consideration when determining accrual.

Supporting *ST v CT* (*supra*), the court in *CM v EM* (*supra*) confirmed that the respondent had a "clear right" to investment returns yielded by the capital invested in an annuity product that would give him an income in future. It was decided that the annuity was "evidently an asset which can be valued", as presented in evidence before the court (par 38). The main difference was that the trial court considered the annuity income as being relevant only for the determination of a maintenance claim, while the SCA found it to be an asset in the respondent's estate (par 38). If the annuity income is an asset in the estate of a spouse married out of community of property with inclusion of accrual, it should be taken into consideration in determination of the accrual claim between the parties.

The appeal was upheld with costs and the value of the respondent's right to future annuity payments had to be taken into account in calculating the accrual in his estate (par 39).

5 The impact of the SCA decision

The full bench of the High Court in *CM v EM* (*supra*) affirmed the trial court's decision on the strength of the judgment in *ST v CT* (*supra*) that the living annuities did not form part of the respondent's estate for purposes of calculating the accrual. The SCA had to decide in *CM v EM* (*supra*) on the question left open in *ST v CT* (*supra*) – namely, whether a married annuitant's right to future annuity payments is an asset that can be valued for accrual purposes. *CM v EM* (*supra*) confirmed the legal nature of living annuities as decided in *ST v CT* (*supra*), adding that the capital is vested in the insurer and not in the annuitant (par 28 and 37). The characterisation of a living annuity as actually consisting of two distinguishable monetary parts, namely the capital value and the income stream, was an important development. The SCA further acknowledged, both in *ST v CT* (*supra* par 109–112) and in *CM v EM* (*supra* par 31), that the annuitant had a contractual right to the future income stream and that this right was both identifiable and quantifiable. A contractual right is established, irrespective of whether it is a living annuity or a life annuity. The importance of the legal certainty brought by these cases – particularly *CM v EM* (*supra*) – must not be underestimated. Although both matters dealt with accrual during divorce, the principle is extendable to deceased estates (see Meyerowitz *The Law and Practice of Administration of Estates and their Taxation* (2010) 15.48). Except for the reference to life expectancy and the drawdown rate in *ST v CT* (*supra*), the courts did not give an indication on how the value of the future annuity should be determined (par 110).

6 How to determine the value of a living annuity

Although the court soberingly accepted in *ST v CT* (*supra*) that it was not able to establish the exact value of the appellant's estate as at the time of divorce, it still had a duty to determine *a* value to the best of its ability (par 49). In this context, the court referred to Mostyn J in *NG v SG* [2011] EWHC 3270 (Fam) (UK), stating that, at the least, the court had to "attempt a realistic and reasonable quantification of those funds, even in the broadest terms" (par 16). One must accept that the determination of the value of a future income stream will never be an exact process, but it is of importance to legal practitioners in cases of divorce and for financial and estate planners in advising clients properly. Executors of deceased estates in particular are confronted with determining the value of living annuities when liquidation accounts are prepared for estates where the deceased person was married in community of property or with inclusion of the accrual dispensation, or where a maintenance claim is instituted by the surviving spouse. (The Matrimonial Property Act contains no provision as to how the value of any asset of an estate is to be determined; compare Meyerowitz *Administration of Estates* 15–29 and 29–4.) The standard formula in calculating the present value of an annuity takes into consideration a number of factors based on particular facts or well-considered assumptions. In this case note, the focus is particularly on the formula to be used in determining an accrual claim where the living annuity is an asset in a deceased estate. (The living annuity may also be part of the estate of the surviving spouse, in which case the life expectancy of the survivor will be applicable.) In determining the net present value of the income stream, the following factors are to be considered: the estimated inflation rate over the period, the discount rate, the elected percentage income to be taken and the life expectancy of the annuitant. Each of these factors can be debated, but the executor will have to make certain defendable assumptions (see Boshoff "Valuing Living Annuities" March 2021 *De Rebus* 40–42).

When determining the applicable inflation rate, the latest published rate can be used, but it may be more appropriate to apply the average of the inflation target band set by the South African Reserve Bank, as that should be a better indicator of future economic realities (see Boshoff 2021 *De Rebus* 41; inflation-targeting by the South African Reserve Bank was instituted in the early 2000s in an attempt to create price stability and certainty, with the objective being to keep consumer price inflation at around 4.5%). Using the 10-year government bond rate to reduce a future value to a present value is the closest to using a so-called risk-free rate of return. The following factors must be considered when determining a discount rate: the required nominal return of the investor, the anticipated inflation rate during the investment period, and what compensation the investor should seek for the risk (see https://www.investopedia.com/terms/r/risk-freerate.asp (accessed 2020-07-27)). There must be good motivation for deviating from the annual withdrawal rate elected by the deceased during his or her lifetime – and in particular the last chosen drawdown rate. In the absence of such election exercised by the deceased, it would be prudent to consult with an experienced financial advisor in determining an acceptable rate. It is submitted that the annuitant's life expectancy on the day before his or her

demise, as per the most recently published actuarial tables, should be applied (see https://www.statssa.gov.za/publications/P0302/P03022019.pdf (accessed 2020-06-30)). Lastly, it is submitted that the most appropriate method to use for an annuity that is paid annually is to do the calculation on an annual basis, in advance (compare Hands *et al* 2016 *Premiums and Problems* F34–F36).

It is submitted that the following formula may be used to determine the present value of a growing annuity due (see https://xplaind.com/960274/growing-annuity-pv-fv (accessed 2020-07-28), adapted for the purposes of this article by Riaan Strydom CFP®, a wealth advisor at PSG Wealth in Port Elizabeth):

$$PV_{GAD} = \frac{C}{r-g} \times \left(1 - \left(\frac{1+g}{1+r}\right)^{n}\right) \times (1+r)$$

PV_{GAD} = present value of future annuities
C = annual annuity
r = discount rate (e.g., the 10-year government bond rate)
g = escalation rate of the income (e.g., the inflation rate)
n = total number of cash flows (determined by the life expectancy of the annuitant)

The practical application of the formula can be illustrated in the following example. The deceased is a male person, 70 years of age, and married in terms of the accrual dispensation. His life expectancy the day before his death was 9.37 years. The capital value of his life annuity is R5 000 000.00. The withdrawal rate at his death is 5 per cent. CPI is 4,5 per cent and the R186 bond rate is 9,5 per cent. The resulting value of the income stream to be taken into account for accrual purposes is R1 750 000.00.

7 Conclusion

Ever since the introduction of the accrual dispensation, questions have been asked about the rights of spouses to pension funds, mostly in matters of divorce. These have resulted in significant amendments to both the Divorce Act and the Pension Funds Act. (The Divorce Act was amended by Act 7 of 1989 and the Pension Funds Act in 2007 with the introduction of s 37D. In *MN v FN* (714/2018) [2019] ZASCA 185 par 25, it was determined that a reference to a right and interest in a pension fund included both the pension fund and the provident fund. (See *Old Mutual Life Assurance Co (SA) Ltd v Swemmer supra* par 5–8 for more on the ambit of s 7(7) and (8) of the Divorce Act.) The most important change was to determine legislatively that the pension interest of the spouse of a pension fund member is regarded as an asset in his or her estate (see *De Kock v Jacobson supra* 349G–H for the watershed decision in this regard; compare Marumoagae “A Non-Member

Spouse's Entitlement to the Member's Pension Interest" 2014 17(6) *PER/PELJ* 2014).

It is a basic principle that the assets of a joint estate belong in equal shares to the spouses; and the assets in the estate of a spouse married with accrual are taken into account when the accrual calculation is done, except if they fall within one of the legislative exclusions (see *Rosenberg v Dry's Executor* 1910 AD 679; *BF v RF* (2017/5018A) [2018] ZAGPJHC 699; see s 5 of the Matrimonial Property Act for exclusions from accrual.) It is also important to consider s 37C of the Pension Funds Act that deals with the distribution of lump sum benefits at the death of a member. The courts sometimes, unfortunately, compare the division of a pension interest with that of spousal maintenance, as in *Sempapelele v Sempapelele* (2001 (2) SA 306 (O) 312G–H). This was correctly rejected in *Ndaba v Ndaba* ((600/2015) [2016] ZASCA 162; [2017] 1 All SA 33 (SCA); 2017 (1) SA 342 (SCA) (4 November 2016) par 15–28; see Van Schalkwyk "Wanneer Vind Artikel 7(7) van die Wet op Egskeiding 70 van 1979 Toepassing?" 2013 46(3) *De Jure* 849; Pienaar "Does a Non-Member Spouse Have a Claim on Pension Interest?" Dec 2015 *De Rebus* 38). Pension interests should also not be confused with annuities regulated by the Long-Term Insurance Act (ss 37 and 63). A clear distinction is necessary between the question whether an asset forms part of an in-community or with-accrual estate, versus taking a pension fund or annuity into account in the determination of a right to maintenance.

The decision in *ST v CT* (*supra*) came very close to acknowledging that the contractual right to an annuity is an asset in the estate of the annuitant. The court unfortunately referred to this right as a "conditional right" and further equated the contract between the annuitant and the insurer with the capital value of the annuity (par 110 and 112). This was confusing, as the court acknowledged the right of the annuitant to income in terms of the same contract (par 108). It is submitted that both the High Court and the SCA erred in that they equated the contract with the capital of the annuity contract. However, it is clear that the annuity contract has two very distinct values – namely, the capital value of the annuity and the contractual right of the annuitant to receive an annual payment.

It is reassuring that in *CM v EM* (*supra*) the SCA clarified the legal nature of living annuities, including that the capital in annuities is no longer accessible to the annuitant and actually vests in the insurer. Furthermore, the annuity income does not fall within the ambit of "pension interest" as defined in the Divorce Act (par 22). With this decision, living annuities will be treated in future in terms of their true nature, which will make it more difficult for annuitants to use annuities to hide funds from their spouses (or make them inaccessible) at the termination of marriage. That the value of the annuity is not only used as a factor when a maintenance claim is considered, but actually forms part of the estate of the annuitant, is a major breakthrough and will result in a fairer distribution of assets at divorce or death. Clear direction on these matters was long overdue.

In *CM v EM* (*supra*), the court further differentiated between living annuities and so-called "conventional life annuities", which, according to the court, are fund-owned and purchased from an insurer by the fund on behalf

of the member, and they pay a guaranteed monthly pension until the death of the annuitant (par 23). It seems as if the court was not aware that not all life annuities are necessarily fund-owned; they may also be member-owned. Life annuities are purposed to provide insurance against longevity and investment risk, with the annuity ceasing at the death of the annuitant and the capital, if any, being forfeited. The risk of the capital being lost at the death of the annuitant can be insured against by the purchase of an additional insurance policy (see Benecke "What to Consider Before Choosing Between Living Annuity or Guaranteed Annuity for Retirement" 25 March 2020 Biznews https://www.biznews.com/wealth-advisors/2020/03/25/retirement-living-guaranteed-annuity (accessed 2020-07-22)).

It is unfortunately not clear from the *CM v EM* (*supra*) judgment whether the court is of the opinion that life annuities and living annuities should be dealt with differently. The statement that fund-owned life annuities "are completely different from ... member-owned living annuities" (par 23), as well as the apparent confusion in the *Higgo* case (meaning that it is not authoritative in the current matter (par 28)), may leave one with the impression that the principles applied to living annuities in this case are not necessarily applicable to life annuities. It is submitted that such inference would be unfortunate, as the convincing factor should not be the ownership of the annuity but the right of the annuitant. To treat the contractual rights of annuitants of life annuities any differently would fly in the face of the rationale followed by the court and may result in financial advisors identifying this as a new arbitrage opportunity. The real question is not the origin of the right, but whether there is indeed a right to income that can be regarded as an asset in the annuitant's estate.

Although most reported matters in this area have dealt with divorce, the case of termination of marriage by death is equally important. Fiduciary advisors and financial planners must take note of this important decision and determine how it will impact a client's estate plan as well as his or her final wishes. Although freedom of testation is a fundamental principle of the South African law of wills and is constitutionally guaranteed, it must be exercised within a framework of fairness (see *Minister of Education v Syfrets Trust Ltd* 2006 (4) SA 205 (C) par 48; Lehman "Testamentary Freedom Versus Testamentary Duty: In Search of a Better Balance" 2014 *Acta Juridica* 9).

This case comes as a relief and a balancing agent in a legal system of strict testamentary freedom, where the election of an appropriate marital property regime and the right to maintenance are the two most important protection mechanisms for the spouse who has less opportunity to grow his or her estate. (Protection mechanisms are included in the Maintenance of Surviving Spouses Act 27 of 1990, the Pension Funds Act and the Matrimonial Property Act. See Gordon "How a Court Ruling Will Change Living Annuities in Divorce Cases" (15 May 2020) https://www.iol.co.za/personal-finance/how-a-court-ruling-will-change-living-annuities-in-divorce-cases-47923306.

The case will also result in a fairer treatment of financially vulnerable spouses where life annuities have previously been deliberately used to exclude a spouse from an inheritance. The development brought about by

the *CM v EM* case should be welcomed by everyone in support of substantive justice between spouses. It is hoped that this case will serve as an example of how law can develop in an accountable and just manner without unwarranted attacks on common-law principles such as freedom of testation (see the approach by Victor AJ in *King NO v De Jager* (CCT 315/18) [2021] ZACC 4; 2021 (5) BCLR 449 (CC) (19 February 2021) par 244).

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