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MEDICAL NEGLIGENCE AND THE *RES IPSA LOQUITUR* DOCTRINE IN THE ADMINISTRATION OF CANCER TREATMENT IN SOUTH AFRICA

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SUMMARY

Medical negligence is one of the leading socio-economic challenges faced by the health sector in South Africa and across the globe. This is attributed to the fact that millions of Rands are paid out by private and public hospitals to victims of medical malpractice on a daily basis, with dire consequences. For example, health establishments, particularly in the public sector, are unable to realise their duty to provide health care to millions of disadvantaged people as enshrined by section 27(1) of the Constitution[1] as funds meant to provide health care go instead towards the payment of medical malpractice claims. Furthermore, medical practitioners in private and public hospitals now practise defensive medicine in order to avoid being sued for medical malpractice and this results in compromised health care for patients. This contribution aims to prove that people living with cancer can be exposed to medical malpractice just like patients who suffer from any other chronic medical condition, and also to dispel the myths connected to cancer treatment and care from a medical and a social perspective. In addition to the above, the contribution exposes the importance of the *res ipsa loquitur* doctrine (the thing speaks for itself) in solving complex medical negligence cases, with the aim of ensuring that justice is served to all patients living with cancer or other health impairments.

1 INTRODUCTION

Cancer is a chronic medical condition that can affect human beings, and people living with this medical condition therefore seek medical intervention. Cancer treatment is a specialised field of medicine, and is dealt with by oncologists who are specialists in cancer treatment. Cancer can be defined as the process whereby cells in the body grow in an uncontrollable manner. Different forms of cancers may affect people – for example, breast cancer, liver cancer, pancreatic cancer and lung cancer, among others.[2] People can acquire cancer in different ways; for example, it can be hereditary, like

[1] S 27(1) of the Constitution of the Republic of South Africa, 1996 states that everyone has a right to access health care.

[2] Heney and Young *Rethinking Experiences of Childhood Cancer* (2005) 21.

breast cancer, or based on exposure to a harmful environment such as inhalation of smoke or gas in industrial areas, which can cause lung cancer.[3] Against this brief background on cancer, it should be noted that, cancer patients depend on different support mechanisms for their survival. These include, among others, God (for those who are spiritual), while other patients rely on adequate health care services. This article explores, among other things, the role of oncologists in cancer treatment and also examines how medical negligence cases are dealt with in practice.

This article focuses on medical negligence and specifically on the history of medical negligence and how medical negligence is established and then links it to the position of the oncologist as the medical practitioner who administers cancer treatment. Furthermore, the legal principle of *res ipsa loquitur* doctrine (the thing speaks for itself) is considered with the aim of exposing or showing how this doctrine can assist courts to solve complex medical negligence cases – especially in instances where the medical practitioner cannot account for or verify what took place in a particular case. Whether this doctrine is of beneficial value in solving complex medical negligence cases like cancer treatment is a question of fact and is explored in this contribution.

2 DEFINITION OF MEDICAL NEGLIGENCE

Medical negligence is not just a legal term applicable to the medical profession, and nor is it confined simply to professional occupations; it also extends to allied health care industries like nursing and dentistry.[4] As outlined by Carstens and Pearmain, professional negligence can be committed either intentionally or negligently and embraces all forms of negligence or misconduct on the part of a medical practitioner. However, the doctor-patient relationship is based on confidentiality and on fiduciary duties that are foundational; these also serve as a reflection on the broader health care sector. Medical negligence is a very broad concept that is applied to many different situations each day. In layman's terms, negligence refers to harm that a person suffers at the hands of another who should have taken steps to guard against the possibility of harm occurring.[5] At this point, it is very important to note that, depending on the facts of each case and the degree of harm suffered by the patient, an error of judgement on the part of a medical practitioner does not necessarily constitute medical negligence.[6] It is a factual issue to be decided by the court on the facts of each case and the degree of harm suffered by the patient. A medical practitioner relying on a defence of error in judgement will be absolved from liability if it can be shown that it was a reasonable error of professional judgement that another reasonably competent medical practitioner in the same profession and in the same circumstances would also have made. This is because when an oncologist makes an error in clinical judgement, this mistake will not constitute medical negligence where the misjudgment could reasonably

3 Heney and Young *Rethinking Experiences of Childhood Cancer* 21.

4 Scott *Cancer: The Facts* (1995) 3.

5 Carstens and Pearmain *Foundational Principles of South African Medical Law* (2007) 606.

6 This was the view that was taken in the English case of *Whitehouse v Jordan* (1981) 1 All ER 267 (HL).

have been made by any oncologist under the same circumstances. In this case, the conventional negligence test will be applied with the view that only misjudgment that is obviously or exceptionally below the standard of care would be classified as negligence on the part of the oncologist.[7] The kinds of mistake that constitute medical negligence are those where the conduct of the defendant medical practitioner is considered to have gone beyond the bounds of what is expected of a reasonably skilful and competent medical practitioner.[8] The aforementioned view was emphasised in the English case of *Whitehouse v Jordan*.[9] The court held that a surgeon's mere error in judgement does not constitute negligence. The court further held that, to say that a surgeon has committed an error in clinical judgement is wholly ambiguous and does not indicate whether or not he has been negligent.[10] While some errors or clinical judgements may be completely consistent with the due exercise of professional skill, other acts or omissions in the course of exercising clinical judgement may be so glaringly below the proper level of skill required as to make a finding of negligence inevitable.[11] Before exploring in detail the concept of medical negligence from a South African perspective, the focus shifts to the definition and discussion of the *res ipsa loquitur* doctrine owing to the link this doctrine shares with medical negligence.

3 THE CONCEPT OF MEDICAL NEGLIGENCE AS DEVELOPED IN SOUTH AFRICAN JURISPRUDENCE

In a medico-legal context, medical negligence refers to the failure of a medical practitioner to act in accordance with medical standards that have been set and are practised by any ordinary and reasonable medical practitioner in the same field. When a patient undergoing medical treatment suffers injury or dies owing to a lack of care and skill on the part of the medical practitioner, it can be said that the medical practitioner was negligent.[12] The injured party must prove certain elements in a claim for medical negligence. The plaintiff must prove the existence of a legal duty on the part of a medical practitioner, a breach of the alleged legal duty, and the damage caused by the breach of the legal duty.[13] The standard of care and skill to measure medical negligence differs for a general practitioner and a specialist in the medical field respectively. The specialist is required to display a higher degree of care and skill within his or her field of speciality.

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7 Van den Heever and Carstens *Res Ipsa Loquitur & Medical Negligence: A Comparative Survey* (2011) 7.

8 Van den Heever *The Application of the Doctrine of a Loss of a Chance to Recover in Medical Law* (LLD thesis, University of Pretoria) 2007 35.

9 *Whitehouse v Jordan supra* 267. See also *R v Meiring* 1927 AD 41, in which the reasonable standard of care was affirmed as a simple and standard practice with which medical practitioners must comply in order to avoid liability in the form of negligence.

10 *Whitehouse v Jordan supra* 267.

11 *Whitehouse v Jordan supra* 268.

12 Carstens and Pearmain *Foundational Principles of South African Medical Law* 606.

13 *Ibid*.

From the above, it is clear that the degree of care and skill expected to be displayed by a general practitioner is not similar to that expected of an expert such as an oncologist. In cases where the negligence of an oncologist needs to be determined, the test is not how an ordinary and reasonable doctor could have acted in the same circumstances, but rather how a reasonable oncologist could have acted to prevent the patient from sustaining injury or harm.[14] Surgical negligence can take many different forms, including failure on the part of the oncologist to inform the patient prior to the surgery about the risks that are associated with the procedure in question.[15]

An oncologist can also be held liable where he or she deviates from the treatment that had been agreed upon with the patient. If the oncologist thinks it might be necessary to deviate from the agreed medical procedure, then he or she must first obtain consent from the patient or, if this is not possible, from one of the patient's family members.[16] The aforementioned view was confirmed in the court case of *Esterhuizen v Administrator, Transvaal.*[17] In this case, the court held that the medical practitioner was not allowed to deviate from the agreed treatment as the patient enjoyed autonomy when it came to making decisions regarding medical treatment.

The medical practitioner was held liable because his conduct was viewed as unlawful.[18] The same conclusion was reached in the case of *Castell v De Greef*.[19] The court held that the surgeon's failure to inform the patient about the risks of the procedure constituted negligence. The *Castell v De Greef* case is considered in more depth later in this contribution under the discussion of medical negligence on the part of an oncologist.

4 BACKGROUND AND DEFINITION OF *RES IPSA LOQUITUR*

The many technical aspects and formalities surrounding both the law and the medical profession often result in the plaintiff being unable to discharge his or her onus of proof in medical negligence cases; a need has therefore been identified for the plaintiff to obtain assistance in this regard. Besides the engagement of expert witnesses, the *res ipsa loquitur* doctrine was established to alleviate some of the burden on the plaintiff. This is a rule of evidence and does not form part of substantive law. It permits a supposition of probable cause based on circumstantial evidence. The doctrine was first introduced by Baron Pollock in 1863 after a barrel of flour fell out of a two-storey building onto a pedestrian walking in the street.[20] The defendant, who

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14 A specialist like a surgeon is required in law to display a higher degree of care and skill in respect of matters that fall within his or her area of expertise than a general practitioner in a comparable situation. See Verschoor and Claassen *Medical Negligence in South Africa* (1992) 15.

15 Vij *Textbook of Forensic Medicine and Toxicology: Principles and Practices* (2009) 470.

16 Goyal and Sharma *Hospital Administration and Human Resource Management* (2013) 541.

17 *Esterhuizen v Administrator, Transvaal* 1957 (3) SA 710 (T).

18 *Esterhuizen v Administrator, Transvaal supra* 711.

19 *Castell v De Greef* 1994 (4) SA 408 (C).

20 Please refer to both Van Dokkum "*Res ipsa loquitur* in Medical Malpractice Law" 1996 15 *Medicine and Law* 228 and *Byrne v Boadle* 2 Hurl and Colt 722, 159 Eng Rep 299 1863.

was the owner of the building could not offer any explanation as to the cause of the incident and was therefore found to be negligent on the basis of the *res ipsa loquitur* doctrine.[21]

The *res ipsa loquitur* doctrine means that the evidence speaks for itself.[22] In the above case, the plaintiff showed that the existence of damage pointed to the negligence of the defendant. The plaintiff did not have to go to great lengths to prove the negligence of the defendant because the injuries sustained by the plaintiff were sufficient to prove this. Most plaintiffs who resort to the *res ipsa loquitur* doctrine are unsuccessful in their bid to be relieved of the onus of proving negligence on the part of the defendant.[23] This is because, as argued by Van den Heever and Carstens, how clearly such facts speak for themselves will depend on the particular circumstances of each case. Thus, the role and aim of *res ipsa loquitur* as argued by Van den Heever and Carstens can best be described as merely to make an inference where the action of the defendant is concerned. If the defendant fails to rebut the inference made by the plaintiff, then the plaintiff will have succeeded in proving his or her case, and the defendant will be found liable of negligence.[24] Owing to the important role of this doctrine in assisting the plaintiff with his or her claim, medical law scholars hold differing views as to what it exactly entails. It is important to outline these legal opinions for a comprehensive understanding of this doctrine.

In the first instance, Strauss defines this doctrine as follows:

> "It is well known that this doctrine rests within the fundamental principle that mere proof by the plaintiff of an injurious result caused by an instrumentality which was in the exclusive control of the defendant medical practitioner or following the happening of an occurrence solely under the defendant's control [;] gives rise to a presumption of negligence on the part of the latter. The damage or injury must be of such a nature that it would ordinarily not occur except for negligence. The *res ipsa loquitur*: the thing speaks for itself, does not necessarily mean that the burden of proof has shifted to the defendant. [However, if] the defendant fails to [render] an acceptable or reasonable account of the events, the court might readily come to the conclusion that the defendant was negligent."[25]

Van den Heever argues that this doctrine can best be described as follows:

> "[This] doctrine constitutes a rule of evidence peculiar to the law of negligence and is an exception [,] or perhaps more accurately [,] a qualification of the general rule that negligence is not to be presumed but must be affirmatively proved. By virtue of this doctrine, the law recognises that an accident or injurious occurrence is of itself sufficient to establish *prima facie* the fact of negligence on the part of the defendant, without further or direct proof thereof, thus casting upon the defendant the duty to come forward with an exculpatory

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21 *Byrne v Boadle supra.*

22 Please see Van den Heever and Carstens *Res Ipsa Loquitur & Medical Negligence: A Comparative Survey* 7 and Patel 2008 *SAJBL* 59 where the doctrine of *res ipsa loquitur* is explained in detail.

23 Scott *Cancer: The Facts* 102.

24 Please refer to both Van den Heever and Carstens *Res Ipsa Loquitur & Medical Negligence: A Comparative Survey* 9 and Mason and Laurie *Law and Medical Ethics* (2011) 295.

25 Strauss "The Physician's Liability for Malpractice: A Fair Solution to the Problem of Proof" 1967 24 *SALJ* 419.

> explanation, rebutting or otherwise overcoming the presumption or inference of negligence on his [or] her part."[26]

It is apparent from the descriptions rendered by these two commentators that they share the common view that the defendant ought to be given an opportunity to advance an explanation about what occurred, and failure to do so will result in an inference being drawn that the defendant was negligent in the particular case. From the discussion above, it is clear that there is a link between medical negligence and the *res ipsa loquitur* doctrine with regard to the duty of care on the part of the defendant – in this case, the oncologist. It is clear that the defendant must be afforded the opportunity to state his or her side of the story in medical negligence cases before being held liable. This is in line with principles of natural justice. The practical application of, as well as debate around, the *res ipsa loquitur* doctrine is explored later on in the contribution. Attention now moves to the development of the concept of medical negligence from a South African perspective or position.

5 BACKGROUND TO MEDICAL NEGLIGENCE

5 1 History and development of medical negligence

Medical negligence has a long and complex history. Evidence of medical negligence can be traced back to ancient civilisations such as those in Egypt, Assyria, Babylon and Mesopotamia.[27] All these countries were united in their belief that a disease was punishment from the gods and therefore a supernatural phenomenon.

To restore people to normal health, the causes of a disease needed to be treated or known.[28]

During these ancient times, medical practice was considered a noble profession and serious respect was bestowed on those who practised it.[29] If a surgeon or physician was negligent in performing certain procedures, the punishment would be very severe as life was considered to be precious and valuable and deserving of respect, and all efforts to preserve it needed to be made. The kinds of punishment that were meted out to negligent surgeons in those days included life imprisonment, and the negligent surgeon being handed over to the family of the injured patient so that they could exact their own form of punishment. In extreme cases, a surgeon's body parts were cut off.[30]

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[26] Van den Heever *The Application of the Doctrine of a Loss of a Chance to Recover in Medical Law* 6. It is important to take into account that the author in his thesis stated the requirements for the application of the doctrine of *res ipsa loquitur*: he states first that the occurrence must be such a nature that it does not ordinarily happen unless someone is negligent; and secondly, the instrumentality must be within the exclusive jurisdiction or control of the defendant in order for this doctrine to find application.

[27] Swanepoel "The Development of the Interface Between Law, Medicine and Psychiatry: Medico-Legal Perspectives in History" 2009 12 *PER\PELJ* 2.

[28] Swanepoel 2009 *PER\PELJ* 3.

[29] Carstens and Pearmain *Foundational Principles of South African Medical Law* 608.

[30] Carstens and Pearmain *Foundational Principles of South African Medical Law* 609.

When medical negligence was proved in those ancient times, money was not a dominant factor and ordinary people had few legal rights. However, a change was noted in the eighteenth and nineteenth centuries when cases of medical negligence were investigated in the United States of America and Great Britain.[31] During this period, people were starting to acquire rights and were becoming more independent. More emphasis was also being placed on the surgeon-patient relationship. The view was that lawyers should be brought on board to institute legal actions in order to inflate their clients' (and their own) wealth; as ordinary citizens became more aware of their rights and how they were protected under the law, the number of medical negligence cases began to grow.[32] In the modern world, medical practitioners, and in this case oncologists, need to be cautious in all their dealings with patients to avoid legal liability. This development has resulted in affording the aggrieved patient different avenues to seek relief for harm they may have suffered at the hands of a medical practitioner. Such relief includes instituting a civil claim for damages and lodging a criminal case for assault. Furthermore, the aggrieved party can resort to lodging a complaint with the Health Professions Council of South Africa (HPCSA) (the regulatory body) against the negligent medical practitioner with a view to having his or her name removed from the roll of medical practitioners.[33]

5 2 Case law on the development of medical negligence

South Africa's medical law is peppered with medical negligence cases that contribute to the rich and fascinating history of this field. At least some of these cases deserve mention here. The landmark case of *Lee v Schönnberg,*[34] is a classic example of medical negligence. The plaintiff in this case lost both his legs in an accident, and the defendant (a physician) was consulted. It is not known what the nature and extent of the injuries were or the type of treatment that was administered by the defendant. However, the plaintiff claimed that the defendant was negligent in carrying out his professional duties, and therefore claimed damages.[35] Since there were few relevant South African cases to refer to, the court had to rely on the precedent set by the English case, *Lanphier v Phipos*,[36] which had been decided in 1835. In this case, the judge made the following ruling in response to the charge of medical negligence:

> "There can be no doubt that a medical practitioner, like any professional man, is called upon to bear a reasonable amount of skill and care in any case to which he has to attend, and where it is shown that he has not exercised such skill and care, he will be liable in damages."[37]

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31 Carstens and Pearmain *Foundational Principles of South African Medical Law* 608; Price "The Art of Medicine Towards a History of Medical Negligence" 2010 375 *The Lancet* 192.

32 Price 2010 *The Lancet* 193.

33 Coetzee and Carstens "Medical Malpractice and Compensation in South Africa" 2011 86 *Chicago-Kent Law Review* 406. Please also refer to Mokoena *A Guide to Bail Applications* (2012) 27.

34 *Lee v Schönnberg* 1877 7 Buch 136.

35 *Lee v Schönnberg supra* 137.

36 *Lanphier v Phipos* 1838 42 All ER 421.

37 *Lanphier v Phipos supra* 421. These two cases (*Lee v Schönnberg* and *Lanphier v Phipos*) form an important basis for the determination of medical negligence in South Africa and

Another well-known case in South Africa, which was reported in 1910, is the case of *Kovalsky v Krige*.[38] This case centred on the question of a surgeon's medical negligence. A nine-month-old baby had been circumcised for religious reasons, but the surgery led to complications. The child began to bleed excessively, and the surgeon had to come to his assistance.[39] The surgeon provided treatment but it was not appropriate in the circumstances because the child later developed gangrene in his private parts, which could not be reversed. A claim was instituted on behalf of the child against the surgeon for medical negligence, in which it was claimed that the surgeon had failed to demonstrate the necessary care and skill in treating the child, and had in fact abandoned the child because he had neither checked whether the initial bleeding had stopped nor followed up on the child's general well-being after the circumcision.[40]

The court in considering this case referred to the earlier case of *Lee v Schönnberg* discussed above*,* and the English case of *Lanphier v Phipos*. Both these cases served as precedents to the *Kovalsky* case. The court concluded that the surgeon was indeed negligent because he had failed to act in a way that a reasonable surgeon in the same circumstances should have acted.[41] As a result of the *Kovalsky* case,[42] the standard that is now used to determine medical negligence, or otherwise, of a medical practitioner is the reasonable standard of care or skill that another medical practitioner in the given field would demonstrate if he or she were confronted by the same circumstances.[43]

About 38 years after the *Kovalsky* case,[44] the case of *R v Schoor* was reported.[45] This is one of the first reported criminal cases in South Africa on the topic. The facts briefly stated include the following: a young doctor, V, was an assistant to Dr R who had a medical practice. Dr R had another assistant E. E asked V to administer an injection of a new serum to some of the patients that E was also attending to. When V asked E what quantity he should give to the patient, E told him to administer 9 cc of the drug, which he was instructed to mix with water. V wrongly assumed that each pack contained 0.99g of the drug.[46] He had failed to read the labels on the drug and therefore administered an incorrect dosage, which led to the death of two patients. V was charged with culpable homicide and was found guilty because he failed to act in a way that a reasonable person or expert in the same position would have acted to protect the patient from harm.

In the case of *S v Mahlalela*,[47] a herbalist was charged with murder for the death of a child to whom he had given herbs that he had mixed with beer.

offer valuable precedents, which many court cases have referred to over the years. See Carstens and Pearmain *Foundational Principles of South African Medical Law* 619.

38 *Kovalsky v Krige* 1910 20 CTR 822.

39 *Ibid*.

40 *Kovalsky v Krige supra* 823.

41 *Lanphier v Phipos supra* 422.

42 *Kovalsky v Krige supra* 823.

43 *Kovalsky v Krige supra* 824.

44 *Ibid*.

45 *R v Schoor* 1948 (4) SA 349 (C).

46 *R v Schoor supra* 351.

47 *S v Mahlalela* 1966 (1) SA 226 (A).

The mixture turned out to be poisonous, and thus caused the death of the child. The court held that the defendant was an expert in the field of herbs and should have foreseen that the herbs might potentially be toxic and potentially lead to the death of an individual. The herbalist was therefore expected to have taken reasonable steps to avoid such an occurrence.[48] His failure to take such reasonable steps resulted in his conviction for culpable homicide.

In *S v Burger*,[49] the appellant was convicted for culpable homicide. In considering his appeal against the conviction, the Appellate Division (as it was known then) pointed out that, in order for a conviction of culpable homicide to stand, there must be negligent conduct on the part of the accused. The court went further to express that such negligent conduct may take the form of a surgeon failing to exercise the necessary care during a medical operation.[50] It was held that it is not necessary for a surgeon to perform to a very high standard of skill but rather to a reasonable standard, as a prudent practitioner in the same situation would have done. This view reflects the objective test to determine the negligence of a surgeon.[51]

More recent court cases are discussed in this article, but the above-mentioned court cases represent many years of deliberation regarding the subject of medical negligence in South Africa. In fact, one cannot speak about medical negligence in South Africa without making reference to these court cases. They also serve as important precedents when it comes to modern-day investigations into medical negligence.[52]

6 TEST FOR MEDICAL NEGLIGENCE

6 1 Preventability and foreseeability

Negligence in a medical context means failure by a medical practitioner to act in a way that a reasonable practitioner in the same situation would have acted to prevent a particular event from taking place. The test for negligence therefore involves aspects of both preventability and foreseeability of harm.[53] In other words, a medical practitioner must see to it that harm does not occur by foreseeing harm before it takes place and by taking steps to prevent it, thereby protecting the patient from its ill effects.[54] This view was confirmed in the case of *Kruger v Coetzee*,[55] which sets out the general test for negligence. It was held that a defendant is liable for negligence in general if a reasonable person in the position of the defendant not only would have

48 *S v Mahlalela supra* 227.

49 *S v Burger* 1975 (4) SA 877 (A).

50 *S v Burger supra* 879.

51 *Ibid*.

52 These are the cases that are central when it comes to medical negligence in the South African context as outlined in the text. One can argue that these cases are the backbone of medical negligence in South Africa. These are in addition to *Lee v Schönnberg supra* 136, among other cases as discussed in this contribution.

53 Gorney *Plastic and Reconstructive Surgery* (2010) 182.

54 Swanepoel *Law, Psychiatry and Psychology: A Selection of Constitutional, Medico-Legal and Liability Issues* (LLD thesis, University of South Africa) 2009 318.

55 *Kruger v Coetzee* 1966 (2) SA 428 (A).

foreseen the reasonable possibility of his conduct injuring another person but would also have taken reasonable steps to prevent such an occurrence, but the defendant failed to do so.[56] This case did not deal with a case involving a medical practitioner.

6 2 The objective test

The test for negligence is an objective test, which requires the determination of whether a reasonable person in the same position as the accused or defendant would act in the same way. Reference is made to both the defendant and the accused because negligence on the part of a medical practitioner could lead to both civil and criminal proceedings as already outlined above.[57] If the defendant or the accused can prove to the court that a reasonable person in the same situation could have acted in the same way that he or she did in the actual circumstances, then the defendant or accused will not be found to be negligent. The reasonable man is defined not as a perfect man, but as a man of average intelligence, knowledge, competence, care, skill and prudence.[58]

The English case of *Lanphier v Phipos* first used the objective test to determine medical negligence in 1838.[59] Tindal CJ maintained that every person who enters into a learned profession undertakes to bring to the practice a reasonable degree of care and skill.[60] However, an attorney does not undertake to win all his or her cases, nor does a surgeon undertake to achieve a 100 per cent success rate in all his or her operations. Furthermore, neither of these two professionals undertake to use the highest possible degree of skill. After all, there are many others who have superior education to, and greater advantages than the defendant or accused.[61] What the defendant or accused does undertake is to exercise a fair and reasonable level of skill when performing a medical procedure, and as such, what needs to be determined is whether the injury to a patient was occasioned by a lack of such skill on the part of the defendant or the accused.[62]

Where medical practitioners are concerned, it is not necessary for the practitioner to have the highest level of knowledge or technology at his or her disposal in order to care for a patient;[63] nor is brilliance required. However, it is important for him or her to have a profound knowledge of the medical intervention before undertaking it. It is clear then that the test to determine the negligence of a physician is not the same as the test used to determine the negligence of an expert like an oncologist. The test to determine whether the oncologist was negligent in a particular case is

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56 *Kruger v Coetzee supra* 429.

57 Slabbert *Medical Law in South Africa* (2011) 186.

58 Hanna *Outdoor Pursuits Programming: Legal Liability and Risk Management* (1991) 24; Laster *Law as Culture* (2001) 209.

59 *Lanphier v Phipos supra* 421.

60 *Ibid*.

61 *Lanphier v Phipos supra* 422.

62 Verschoor and Claassen *Medical Negligence in South Africa* 13.

63 Verschoor and Claassen *Medical Negligence in South Africa* 14 and Barnes *Health Care Law: Desktop Reference* (2001) 114.

whether another oncologist in the same position could have acted in the same way.[64]

This test was confirmed in the 1924 case of *Van Wyk v Lewis*.[65] The court stated that a medical practitioner is not expected to bring the highest degree of professional expertise to the case to which he or she is assigned but is obliged to bring reasonable skill and care thereto. In deciding what is reasonable, the court will have to give consideration to the general level of skill and care that is exercised by members of the particular branch of medicine to which the medical practitioner belongs.[66] As with other cases, the *Lewis* case has come to serve as a precedent in our law when determining the professional standard that is required from a medical practitioner. In the 1953 case of *R v Van der Merwe,*[67] Roper J was of the view that when a general practitioner is tried, the test is not what a specialist must do to prevent harm because a general practitioner is not required to possess the same degree of skill, care, knowledge and experience as a specialist.[68]

The test to determine medical negligence on the part of a specialist such as an oncologist is the famous *Bolam* test, which was developed by the courts in the United Kingdom.[69] According to this test, an oncologist is not guilty of negligence if he or she has acted in accordance with a practice accepted as proper by a responsible body of medical men or women skilled in that particular art.[70] The rationale for the test originated in the case of *Bolam v Friern Hospital Management Committee*.[71] According to the court, a judge is not in a position to choose between the opinions of two expert witnesses in a case where such witnesses are in conflict with one another. The court was of the view that as long as there is a school of thought in place that determines that the conduct of the defendant or accused is reasonable, then the judge is bound to find the defendant or accused not guilty of negligence.[72] The court also held that a practitioner is not negligent if he is acting in accordance with a certain practice merely because there is a body of opinion that would take the contrary view. At the same time, that does not mean that a medical practitioner can obstinately and pig-headedly carry on with the same old technique if it has been proved to be contrary to what is really substantially the whole of informed medical opinion.

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64 Barnes *Health Care Law: Desktop Reference* 116.

65 *Van Wyk v Lewis* (1924) AD 438.

66 *Van Wyk v Lewis supra* 439.

67 *R v Van der Merwe* 1953 (2) PHH 124 (W).

68 *R v Van der Merwe supra* 125.

69 The *Bolam* test was adopted from the English tort law and is used to assess medical negligence. The *Bolam* test states that the law imposes a duty of care between a doctor and a patient, but the standard of care is a matter of medical judgement. Under this test, for the plaintiff to succeed with a medical negligence claim, he or she must prove the following: that there was a duty of care between the medical practitioner and the patient; and that this act or omission breached the said duty of care, which resulted in negligence. See Herring *Medical Law and Ethics* (2010) 106.

70 Herring *Medical Law and Ethics* 107.

71 *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118.

72 *Ibid*.

7 PROOF OF MEDICAL NEGLIGENCE ON THE PART OF THE ONCOLOGIST

To prove that an oncologist was negligent, the plaintiff in a civil claim must show the following:

a) The oncologist owed a duty of care to the patient. (A surgical oncologist owes a duty of care to the plaintiff when a reasonable surgical oncologist can foresee the possibility of injury resulting from surgery.)
b) The duty of care was breached by the oncologist.
c) The patient who is the plaintiff was injured due to the negligent breach by the defendant surgical oncologist. (The negligent conduct of the defendant surgical oncologist must be the actual cause of injuries sustained by the plaintiff.)[73]

Based on the above formulation, it can be deduced that in the case of a defendant surgical oncologist who operates on a person living with cancer, negligence is present if a reasonable surgical oncologist owes a duty of care to the plaintiff in that a reasonable surgical oncologist would foresee the possibility of an injury resulting from the applied surgery. The applicable test is that a reasonable surgical oncologist in the same position as the defendant surgical oncologist would have foreseen that there would be risks in performing the surgery. Negligence is present where elements of foreseeability and preventability have been established and proved. If a patient who is a plaintiff was injured due to the negligent breach by the defendant surgical oncologist and the negligent conduct is the actual cause of injuries sustained by the plaintiff, then it can be said that the defendant surgical oncologist was negligent. Once the plaintiff has succeeded in proving all these elements, the court must find the defendant surgical oncologist liable. The plaintiff in such cases would be entitled to be compensated for all the loss that he or she has suffered due to the negligent conduct of the defendant surgical oncologist.[74] However, it is important to note that not all cases that involve medical negligence can be easily solved as has been discussed. If any difficulty is experienced, the doctrine of *res ipsa loquitur* must be applied, where necessary. This doctrine advocates for patients to get the justice they deserve, especially in cases where the defendant medical practitioner cannot account for his or her actions. A discussion on the application of the *res ipsa loquitur* doctrine in South Africa is therefore considered in the article.

8 APPLICATION OF THE *RES IPSA LOQUITUR* DOCTRINE IN CASE LAW

One of the first cases in which the *res ipsa loquitur* doctrine was applied is the English decision of *Cassidy v Ministry of Health*.[75] The plaintiff went to

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[73] Otto "Medical Negligence" 2004 8 *SAJR* 20. A distinction is made between surgical oncologists and oncologists in general. The reason for this distinction is because surgical oncologists perform cancer surgery, while oncologists provide cancer treatment in general.
[74] Kennedy and Grubb *Medical Law* (2000) 527.
[75] *Cassidy v Ministry of Health* [1951] 2 KB 343.

hospital to have an operation to correct a Dupuytren's contracture experienced in two fingers. The plaintiff left the hospital with four stiff fingers and a practically useless hand as a result of the surgery – an eventuality that would have been avoided if proper care had been exercised. The defendant surgeon was held liable for the plaintiff's injuries as a result of negligence.[76] In this case, the plaintiff was left injured instead of being healed after the surgery as a result of the negligence of the defendant surgeon.

In South Africa, the *res ipsa loquitur* doctrine was first applied in the case of *Gifford v Table Bay Dock and Breakwater Management Commission*.[77] This case involves a claim lodged by the plaintiff as master and captain of a vessel known as the China.[78] The plaintiff instituted legal proceedings against the defendant on the basis that the China was wrecked while under the care and control of the defendant. In this case, there was no actual evidence to indicate that the defendant was negligent in handling the vessel, and the court resolved this case through the application of the *res ipsa loquitur* doctrine. The court made reference to English law in order to award damages to the plaintiff for the loss suffered owing to the negligence of the defendant.[79]

However, years later the position on the application of this doctrine in South African law seemed to have changed as it was rejected in two leading cases as a means of resolving medical negligence cases. In the famous case of *Van Wyk v Lewis*,[80] the patient underwent surgery, but the physician failed to remove a swab from the patient's body, leaving the patient in a great deal of pain. The court refused to find the surgeon liable, because the court was of the view that a swab left in the patient's body did not serve as evidence that the surgeon was negligent.[81]

Another case in which the *res ipsa loquitur* doctrine was rejected is the case of *Pringle v Administrator, Transvaal*.[82] The plaintiff had undergone surgery as a result of lung problems that she had been experiencing. There were complications during the surgery that Dr S performed on the plaintiff, resulting in the plaintiff suffering brain damage, losing her eyesight and losing her ability to work. The complications were as a result of her losing excessive blood during the operation. The court found that Dr S was indeed negligent as he had torn the superior vena cava of the plaintiff.[83] Dr S was found liable for the injuries to the plaintiff on the basis of his conduct and the court confirmed the view expressed in the *Van Wyk* case that there was no room for the application of the *res ipsa loquitur* doctrine in this matter and rejected it as a means of proving medical negligence.[84]

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76 *Cassidy v Ministry of Health supra* 344.

77 *Gifford v Table Bay Dock and Breakwater Management Commission* 1874 Buch 926 118.

78 *Ibid*.

79 *Gifford v Table Bay Dock and Breakwater Management Commission supra* 119.

80 *Van Wyk v Lewis supra* 438. The *res ipsa loquitur* doctrine has no absolute application in cases that involve negligence. In the case of a surgeon not acting in a certain way vis-à-vis a patient, it does not amount to negligence; in some cases, it can be a lifesaving move.

81 *Van Wyk v Lewis supra* 439.

82 *Pringle v Administrator, Transvaal* 1990 (2) SA 378 (W).

83 *Pringle v Administrator, Transvaal supra* 380.

84 *Pringle v Administrator, Transvaal supra* 381.

However, it is important to note that the South African position on excluding the application of the *res ipsa loquitur* doctrine in medical negligence cases was subjected to criticism by eminent writers Carstens and Van den Heever. This is because of the important role that is played by this doctrine in resolving complex medical malpractice cases or claims. The authors argued that despite the refusal by the courts to apply this doctrine, the door has not been entirely closed for the application of this doctrine in medical malpractice cases; they argued that it can only be applied in cases where there is a form of alleged negligence derived from something absolute, and where the occurrence could not reasonably have taken place without negligence.[85] Furthermore, the two authors place emphasis on the point that the doctrine can be excluded in cases where regard is given to the surrounding circumstances to establish the presence or absence of negligence.[86] This can be interpreted to mean that the decision whether or not to apply the *res ipsa loquitur* doctrine must be judged on the facts of each case and not be absolutely excluded in our law, as has been the case in the two cases discussed above.

The *res ipsa loquitur* doctrine is in line with the principles of procedural equality, in which each party is afforded an opportunity to state its side of the story in legal proceedings. The Constitution as the supreme law in the land allows for the application of this doctrine in medical negligence cases.[87] However, the position in South African law regarding the applicability of the *res ipsa loquitur* doctrine only became clear in the year 2009 when the first step towards the future position of this doctrine was taken in medical negligence cases – as well as later in the year 2014, when the High Court in *Lungile Ntsele v MEC for Health, Gauteng Provincial Government*[88] cemented the role and importance of this doctrine in resolving complex medical negligence cases.

The *Lungile Ntsele* case involved a plaintiff who was instituting legal proceedings on behalf of her minor child against the employees of the defendant health establishment.[89] The plaintiff brought a claim of negligence against a hospital whose employees, it was claimed, had caused the minor child of the plaintiff to suffer from cerebral palsy. In this case, the plaintiff sought *inter alia* an order for the separation of the issues of merit and damages and that such an order be granted by the court.[90] To succeed with her claim on behalf of her minor child, the plaintiff had to prove negligence on the part of the defendant as well as causation of the harm to her minor child. The plaintiff showed that the employees of the defendant were negligent as they did not exercise proper care in treating her child and the

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85 Van den Heever *The Application of the Doctrine of a Loss of a Chance to Recover in Medical Law* 65; Carstens and Pearmain *Foundational Principles of South African Medical Law* 27.

86 *Ibid*.

87 Carstens "Judicial Recognition of the Application of the Maxim *Res Ipsa Loquitur* to a Case of Medical Negligence: *Lungile Ntsele v MEC for Health, Gauteng Provincial Government*" 2013 20 *Obiter* 349.

88 *Lungile Ntsele v MEC for Health, Gauteng Provincial Government* (2009/52394) [2012] ZAGPJHC 208; [2013] 2 All SA 356 (GSJ).

89 *Ibid*.

90 *Lungile Ntsele v MEC for Health, Gauteng Provincial Government supra* 357.

plaintiff provided circumstantial evidence that satisfied the court.[91] Based on the proven facts, an inference could be drawn that the negligence of the employees of the defendant was the factual cause of the injuries that were sustained by the plaintiff's child.

The effect of this inference was that the burden of proof shifted to the defendant to prove that its employees were in fact diligent and not negligent, but the defendant failed to prove this since it failed to call its employees to testify in court and the expert witness of the defendant was found to be biased.[92] Furthermore, the defendant failed to provide the medical records of the plaintiff in court and did not give a valid reason for why this was the case. The court found that it would be unreasonable to allow the defendant to require the plaintiff to be precise and clear about what really happened to her 15 years previously.[93] The court drew an inference on the basis that since the defendant was unable to prove that its staff members were not the factual cause of the minor suffering from cerebral palsy, it would be in the interests of justice to apply the *res ipsa loquitur* doctrine. The defendant was held liable for damages that the plaintiff had suffered because of its employees' negligence.[94]

This judgment is supported and welcomed as a breakthrough in a long-standing confusion in medical law. Carstens[95] affirms this by pointing out that the *res ipsa loquitur* doctrine was applied in line with section 27 of the Constitution, which deals with the right to access health care services.[96] Furthermore, this doctrine extends to the relationship between the patient and medical practitioner on the basis of the contract between the two parties. This affirms that the application of the *res ipsa loquitur* doctrine is in line with the provisions of the Constitution. Thus, the case of *Lungile Ntsele* is the first case to apply the *res ipsa loquitur* doctrine in a medical negligence case in the new constitutional dispensation in South Africa.

Two years after the *Ntsele* judgment, a landmark case on the *res ipsa loquitur* doctrine followed in *Cecilia Goliath v Member of the Executive Council for Health Eastern Cape*,[97] where the Supreme Court of Appeal confirmed the importance of this doctrine in our law. This case is discussed in detail below in order to show how our jurisprudence is shaped when it comes to the importance and role of the *res ipsa loquitur* doctrine: the discussion includes the reasons as well as the criticisms that are levelled against previous court cases by authors such as Carstens and Van den Heever.

The case of *Cecilia Goliath v Member of the Executive Council for Health Eastern Cape*[98] arose as a result of the negligent conduct of an employee of the respondent, a health institution. The employee performed an operation

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91 *Lungile Ntsele v MEC for Health, Gauteng Provincial Government supra* 358.

92 *Lungile Ntsele v MEC for Health, Gauteng Provincial Government supra* 359.

93 *Ibid*.

94 *Lungile Ntsele v MEC for Health, Gauteng Provincial Government supra* 360.

95 Carstens 2013 *Obiter* 349.

96 *Lungile Ntsele v MEC for Health, Gauteng Provincial Government supra* 361.

97 *Cecilia Goliath v Member of the Executive Council for Health Eastern Cape* (085/2014) [2014] ZASCA 182.

98 *Ibid*.

on the appellant and left a swab inside the patient's body after the procedure was completed. Later on, the appellant experienced pain and returned to the hospital for further examination. At the hospital, she was told that there was nothing wrong with her and she was discharged without being told to come back to the hospital for further treatment or examination in order to ascertain what might be wrong with her.[99]

Upon her return home, she was still in great pain and decided not to go back to the respondent health establishment for treatment and examination.[100] Instead, she decided to go to another hospital to check what might be wrong with her. In the second hospital, it was confirmed that a swab had been left inside her during the surgery she underwent in the care of the respondent, which was the main reason she was experiencing great pain in her abdomen, and she had to undergo laparotomy surgery. The appellant therefore decided to sue the respondent for negligence as proper care was not afforded to her during the operation.[101] She claimed that the medical practitioner as well as the nursing staff should have exercised care in that that they should have made sure that all the operating equipment used during the surgery was in place before closing her up at the end of the surgery, because that is how a reasonable medical practitioner would have acted in order to prevent harm.[102]

Furthermore, the appellant in this case argued that she had incurred financial loss because of the corrective surgery that she had to undergo in order to correct the mistake of the respondent doctor, and claimed damages to this effect. However, the respondent in this case, the Department of Health, objected to the claims of the appellant on the basis that she had received good care and that there was no form of negligence displayed by the employees of the respondent in administering treatment to the appellant. They further argued that the standard expected of a reasonable medical practitioner was applied in this case. The court *a quo* dismissed the claim of the appellant, who was the plaintiff, on the basis that the plaintiff had failed to discharge her onus of proof on a balance of probabilities that the conduct of the medical practitioner and nursing staff who were involved in performing surgery was in actual fact negligent.[103]

However, the court *a quo* granted the appellant leave to appeal its decision on the basis that it is bound by the decision of *Van Wyk*, in which the application of the *res ipsa loquitur* doctrine was rejected by the court.[104] The court further reasoned that revising the application of the *res ipsa loquitur* doctrine would be in the interests of justice, as argued by scholars like Carstens and Van den Heever above. Had the court applied the *res ipsa loquitur* doctrine in this case, the decision of the court could have been different owing to the fact that if the defendant was unable to provide a reasonable explanation for the issue at hand, then the court could have ruled in favour of the appellant.

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99 *Cecilia Goliath v Member of the Executive Council for Health Eastern Cape supra* 183.
100 *Ibid*.
101 *Cecilia Goliath v Member of the Executive Council for Health Eastern Cape* 184.
102 *Cecilia Goliath v Member of the Executive Council for Health Eastern Cape* 185.
103 *Ibid*.
104 *Cecilia Goliath v Member of the Executive Council for Health Eastern Cape supra* 186.

On appeal, the appeal court attached much weight to the evidence of both the appellant and her doctor who performed the corrective surgery as to the possibility of when the swab was left inside the body of the appellant. Furthermore, what weighed against the respondent's case was that the respondent did not adduce evidence that could rebut the version of the appellant and her doctor to show that she had received reasonable care while in hospital.[105] There was also no explanation as to why the respondent did not testify in court through its medical staff in order to challenge the testimony of the appellant. The court held that a reasonable inference could be drawn that the respondent avoided calling in its employees to testify as they might have revealed unfavourable facts about what happened on the day of the operation, which could have been detrimental to its case. After having weighed all the evidence and circumstances of the case, the court found that the appellant had indeed discharged her onus of proof on a balance of probabilities. The appeal of the appellant was successful, and the application of the *res ipsa loquitur* doctrine resulted in the appellant receiving an amount of R250 000 in damages for the loss that she suffered as a result of the negligence of the respondent.[106] What this case has shown is that once the plaintiff has made out a *prima facie* case and the defendant fails to rebut the evidence, the defendant runs the risk of judgment being granted against the defendant.

These two cases have brought about legal certainty and clarity about the application of the *res ipsa loquitur* doctrine in our law. It is clear that this remedy now forms part of our law, which was the position before the case of *Van Wyk* and there is no longer any confusion about the role of this doctrine. This clarification was much needed since this remedy is an important tool in our law as outlined in the above cases – particularly in resolving complex medical negligence cases where the defendant is unable to provide reasonable explanations about the actual cause of injury that a plaintiff has suffered owing to alleged negligence.

9 MEDICAL NEGLIGENCE IN THE CONTEXT OF CANCER

9 1 Medical negligence in the form of incompetent surgical procedure

One of the leading medical negligence cases with regard to cancer in South Africa is *Castell v De Greef*.[107] The plaintiff was admitted to hospital for a mastectomy and the surgery was performed by the defendant, a plastic surgeon. The operation involved the plaintiff undergoing a couple of operations on her breasts to remove lumps that were linked to breast cancer, which was a condition that ran in her family. The plaintiff originally consulted her doctor about the problems she was having with her breasts and was referred to the defendant surgeon by her doctor.[108] When the

[105] *Cecilia Goliath v Member of the Executive Council for Health Eastern Cape supra* par 7.
[106] *Cecilia Goliath v Member of the Executive Council for Health Eastern Cape supra* par 21.
[107] *Castell v De Greef supra*.
[108] *Castell v De Greef supra* 409.

defendant had examined the plaintiff, he recommended that she undergo a mastectomy to arrive at a diagnosis. After discussing the matter with the defendant surgeon and her husband, the plaintiff decided to go ahead with the surgery.

Immediately after the surgery, everything seemed to be in order. However, two hours later, complications were evident when the plaintiff's breast turned black and she experienced pain.[109] Her state of health deteriorated further after she was discharged from hospital, and she experienced pain in the area that was treated during surgery, as well as a discharge that had a very unpleasant odour. The plaintiff returned to the defendant surgeon in connection with these complications and he prescribed painkillers while also recommending corrective surgery. The second surgery was not performed by the defendant surgeon himself but by another surgeon working at the same hospital. After the corrective surgery, the plaintiff recovered and instituted a civil claim for the expenses she had to incur in having to have this additional procedure.[110] The plaintiff also instituted a specific action against the defendant surgeon for the pain, suffering and embarrassment she had to endure, on the grounds that he had been negligent by failing to act in a way that a reasonable individual in the same profession would have acted.

In the court *a quo*, the presiding officer, Scott J, stated that a surgeon does not have to perform to the highest possible standards but ought to adhere to a standard of care that reasonable people in the same profession would adhere to.[111] The fact that complications arise in surgery does not mean that care has not been exercised by the surgeon. For purposes of this case, expert witnesses were called in to give their testimonies and all of them said that it was not inappropriate for the plaintiff to have had this type of surgery. However, they agreed that if the surgeon had made use of the pedicle flap, the complications could have been prevented. The argument that the defendant did not warn the plaintiff about the risks was rejected by the court on grounds that not all risks could be foreseen by the surgeon and the patient herself should have been cautious about agreeing to the procedure.[112]

In the court *a quo*, the plaintiff's claim was dismissed with costs in favour of the defendant surgeon. However, on appeal, Ackermann J was of the view that the defendant was negligent in not taking steps to prevent the infection from setting in.[113] The surgeon only took corrective action 12 days after the occurrence. Ackermann J found it appropriate to compensate the plaintiff for the pain, suffering and embarrassment she had suffered as a result of the operation. The appeal was accordingly successful.[114]

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109 *Ibid*.
110 *Castell v De Greef supra* 410.
111 *Castell v De Greef supra* 411.
112 *Castell v De Greef supra* 412.
113 *Ibid*.
114 *Castell v De Greef supra* 413.

9 2 Medical negligence in the form of incorrect drug treatment

Another relevant case dealing with medical negligence is *P v Pretorius*.[115] It involved the alleged negligence of a general practitioner who was the defendant. In this case, an oncologist diagnosed the plaintiff with cancer and suggested chemotherapy as treatment, but the plaintiff opted instead for Insulin Potentiation Therapy (IPT) treatment offered by a general practitioner as an alternative method since he was uncomfortable with undergoing chemotherapy.[116] The plaintiff underwent IPT treatment, which he then suspended after three months and continued later. Consequently, the patient went into remission. The court found that the defendant had performed a comprehensive and proper examination and that he had properly ascertained the medical history of the plaintiff; he had also acted in accordance with the results of the pathology report of the plaintiff. The court found further that the defendant had explained the nature of IPT to the plaintiff and had also referred the latter to a patient who had been successfully treated using IPT.[117] The court held that the fact that the plaintiff was not cured by the treatment that the defendant administered did not in itself justify an inference that the latter had been negligent and had not acted with the necessary diligence and skill expected from practitioners practising in his branch of speciality.[118] The court emphasised that in order to analyse the defendant's treatment of the plaintiff properly, it would be useful to have regard to the general skill and diligence possessed and exercised by practitioners having the same expertise as the defendant; and yet *in casu* this evidence was not produced by the plaintiff. On the evidence, the court could not come to a finding of negligence because the plaintiff could not show that the defendant had been negligent on a balance of probabilities. Therefore, the plaintiff's claim was dismissed with costs.[119] This case clearly reveals how medical negligence is proved by means of an objective test on the standard of reasonableness, and how the mere fact that a patient is not healed cannot bring about an inference of negligence.

9 3 Medical negligence in the form of misdiagnosis

The pandemic of cancer is a global problem. This article therefore makes brief reference to the United Kingdom (UK) and the United States of America (US), which have developed means to protect people living with cancer. The focus shifts to the UK and US with the aim of probing these legal systems and determining their approach when it comes to the protection of employees living with cancer. Again, the historical and the legal influence of English law in South African law warrants a comparison with these two countries. The position of the US is legally relevant to this context as a result of the progress it has made in recognising that employees living with cancer

[115] *P v Pretorius* (74157/2013) [2016] ZAGPPHC 602.
[116] *P v Pretorius supra* par 7.
[117] *P v Pretorius supra* par 86.
[118] *P v Pretorius supra* par 88.
[119] *P v Pretorius supra* par 90–91.

must be protected against unfair discrimination in the workplace.[120] The American position is considered in an attempt to draw a comprehensive comparative analysis. The progress that the US has made in advocating for the specialised legal protection of employees living with cancer is relevant to supporting this investigation.

In cancer incidents, most malpractice claims arise from misdiagnosis of patients, which is a major problem all over the world.[121] For example in America, delayed diagnosis or misdiagnosis of breast cancer is the major reason for medical malpractice claims in the area of cancer. This is evident from the 3 500 cases heard by courts annually based on misdiagnosis or late diagnosis of breast cancer.[122] This is cause for concern and proper care on the part of oncologists is required in order to prevent the increase of misdiagnosis cases. Misdiagnosis or delayed diagnosis means that an oncologist failed to act in a way a reasonable person in the same position would have acted, to see or know whether the patient does or does not have cancer.[123] Failure to diagnose breast cancer is one of the leading causes of medical malpractice claims in the UK. As a result, there lies a great responsibility on the part of lawyers to carefully select a case in order to win it. This simply means that for a lawyer to win a case relating to breast cancer, it is important that the lawyer have an understanding of the origin and clinical aspects of breast cancer to be able to make a comprehensive analysis of the facts at hand.

However, it is important to note that having a legal practitioner acquire background knowledge about cancer does not substitute for the role that should be played in the proceedings by medical experts, such as an oncologist or radiologist.[124] Negligence or a misdiagnosis of a person living with cancer has a devastating effect on the patient, to the extent that the patient has to undergo treatment such as chemotherapy, which leads to the deterioration of health, pain and suffering, medical expenses and loss of income in case of a patient who is rendered incapable of working.[125] An important aspect that needs to be taken into consideration by both patients and lawyers when it comes to misdiagnosis is that failure to diagnose or an erroneous diagnosis is not actionable unless the patient is in a position to prove that it has resulted in injury.[126] There must be a link or causation

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120 Americans with Disabilities Amendment Act (ADAA of 2008).

121 Jaslow "Most Common Medical Malpractice Claims for Missed Cancer, Heart Attacks" (19 July 2013) http://www.cbsnews.com/news/most-common-medical-malpractice-claims-for-missed-cancer-heart-attacks/ (accessed 2014-01-07).

122 Kern "The Delayed Diagnosis of Breast Cancer: Medico-Legal Implications and Risk Prevention for Surgeons" 2008 12 *The Breast* 148–149. Furthermore, it is important to consider that there is a significant increase when it comes to litigation with respect to breast care delivery by medical practitioners – oncologists in this context. This has resulted in insurers paying out large sums of money and causes oncologists to practise defensive medicine with the aim of averting litigation, which is not in the interests of both medical practitioners and patients.

123 Cranor *Toxic Torts: Science, Law and the Possibility of Justice* (2006) 365.

124 Freider, Ellerin and Hillerich "Selecting and Presenting a Failure to Diagnose Breast Cancer Case" 2001 20 *AM J Trial Advoc* 254.

125 Freider *et al* 2001 *AM J Trial Advoc* 254.

126 In *Barnett v Chelsea and Kensington Hospital Management Committee* (1986) 1 ALL ER 1068, the plaintiff was the wife of the deceased and brought a claim of negligence against the defendant on the basis of misdiagnosis which she claimed resulted in the death of the

between the misdiagnosis and the harm that the patient has suffered for a claim of misdiagnosis to succeed. This view is supported by reason that misdiagnosis or failure to diagnose does not amount to negligence in all cases; courts are willing to accept that no human being, including a medical practitioner, is infallible and thus this reality must be accepted as a part of life.[127]

This was the position of Herlinda Garcia, a 54-year-old American woman, who was misdiagnosed with breast cancer by her oncologist.[128] After she had gone for a gruelling period of seven months of chemotherapy treatment, she went to see another doctor to treat her anxiety; she got the shock of her life when she was told by the second doctor that she did not have cancer at all. The first oncologist was held liable for negligence and ordered to pay her $367 500 for all the loss she had suffered as a result of the negligence.[129]

It is important to take into account that misdiagnosis is a broad concept that can result in underdosing, overdosing, prescribing the wrong drug, choosing the wrong dose frequency, omitting a drug or dose and neglecting to add premedication or supportive care medication.[130] This shows that misdiagnosis in cancer can take different forms and can result in dire consequences for patients. This is evident in the fact that such medical errors are claiming the lives of 7 000 people annually,[131] all of which could be prevented if medical practitioners were to exercise the required degree of care and skill when they exercise their duties.

Liability on the basis of misdiagnosis of persons living with cancer is also applicable in American and English law, which further recognises liability for the late diagnosis of cancer and improper administration of cancer treatment to the patient. This is because a doctor owes a duty of care to the patient and, when treating a patient, must act in a reasonable way in the same way that another doctor in the same position could have acted.[132] The South African legal system is influenced by the English model, and these rules or principles are also applicable in South Africa. Although in South Africa, a lot of cases of death caused by cancer are related to late diagnosis of the

deceased. However, the claim of the plaintiff was dismissed on the basis that the cause of death of the deceased was not misdiagnosis on the part of the defendant, but in actual fact the deceased would have died soon because of his critical medical condition. There was no link between the misdiagnosis and the death of the deceased, hence the application was dismissed.

127 Dutton *The Practitioner's Guide to Medical Malpractice in South African Law* (2015) 104. The view that courts are willing to accept that all human begins are fallible, and that that includes medical practitioners who are not exempted from this reality, was confirmed in the court case of *Crivon v Barnet Group Hospital Management Committee* 1959 *The Times* (19 November) 56 in the English court.

128 Castillo "Woman Gets Chemo Only to Find Out She Never Had Cancer" (17 July 2013) http://www.cbsnews.com/news/woman-gets-chemo-only-to-find-out-she-never-had-cancer/ (accessed 2014-01-07).

129 Castillo http://www.cbsnews.com/news/woman-gets-chemo-only-to-find-out-she-never-had-cancer/.

130 Swanepoel "Medication Errors in Oncology: A Literature Review" 2013 80 *SAfr Pharm J* 48.

131 Swanepoel 2013 *SAfr Pharm J* 49.

132 Breakstone "Delayed Diagnosis of Cancer" (undated) http://www.bwglaw.com/lawyer-attorney-1368134.html (accessed 2015-01-08).

disease by the medical practitioner.[133] In cancer cases, it is clear, as outlined above, that the *res ipsa loquitur* doctrine*,* which champions for social justice can find application especially in cases where the oncologist failed to act in a way that a reasonable oncologist in the same position could have acted. Furthermore, when the oncologist fails to furnish reasons for his or her conduct to rebut a claim of negligence, then it can be deduced that the *res ipsa loquitur* doctrine will find application and the oncologist will be held liable based on this doctrine.

9 3 1 Example of South African case law on negligent misdiagnosis

A case of interest in relation to cancer negligence is *Esterhuizen v Administrator Transvaal*.[134] This case involved a 10-year-old child who was diagnosed with Kaposi's sarcoma cancer. The child was initially treated with superficial radiation therapy with the consent of her parent. However, following the recurrence of the cancer, she was subjected to radical radiation therapy, which resulted in severe burns on her body and the amputation of her limbs. The parent of the child brought an action for damages as a result of the negligence of the medical practitioner and on the basis that the parent of the child did not provide consent for the medical intervention in question.[135] The court held that while the superficial radiation therapy was duly performed with the consent of the parent of the child, the second procedure, which resulted in extensive burns on the child, was performed without the consent of the parent.

The defendant medical practitioner raised the defence of implied consent, in the sense that owing to the prior consent given by the parent of the child to the first medical intervention, it meant that it was no longer necessary for the parent to give consent for the second medical procedure and that he was acting in the best interests of the child.[136] The court rejected this defence. The court reasoned that owing to the fact that radical radiation therapy is different from the prior superficial radiation therapy, it was necessary for the parent of the child to be informed about the dangers inherent in the new treatment before such implied consent could be considered as valid. The court ruled in favour of the plaintiff who was the parent of the child and found that the medical practitioner in question was negligent, in the sense that he failed to act in a way that a reasonable practitioner in the same situation which he was exposed to could have acted in order to prevent harm or loss from taking place.[137] In this case, it can be argued that the court would have applied the *res ipsa loquitur* doctrine if the medical practitioner failed to provide reasons for his conduct towards the negligence claims levelled

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[133] Omenah and Buckle "Factors Influencing Time to Diagnosis and Initiation of Treatment of Endemic Burkitt Lymphoma Among Children in Uganda and Western Kenya: A Cross Sectional Survey" 2013 15 *BioMed* 2–4.

[134] *Esterhuizen v Administrator Transvaal* 1957 (3) SA 710 (T).

[135] *Esterhuizen v Administrator Transvaal supra* 711.

[136] *Esterhuizen v Administrator Transvaal supra* 712.

[137] *Esterhuizen v Administrator Transvaal supra* 713.

against him. This would in effect mean that failure to speak or defend himself would have been an indication of his negligence. It can be asserted that the *res ipsa loquitur* doctrine goes hand in hand with the *audi alteram partem* rule (hear the other side of the story), which is central in ensuring that justice is achieved on all levels.

9 3 2 An example from American case law

In the case of *McRae v Group Health Plan*,[138] Mr McRae was the patient and a misdiagnosis on the part of the defendant surgeon changed his life. Mr McRae went to the medical practitioner for a routine check-up; during the process, he alerted the practitioner about the skin lesion on his left leg, and, after conducting a shave biopsy, the defendant practitioner confirmed that the lesion was benign. Three years later, owing to the pain the patient was suffering, the defendant had to re-evaluate his biopsy and informed Mr McRae of a misdiagnosis on his part and that Mr McRae was in actual fact suffering from melanoma cancer. The cancer had already developed to an extent that it was too late to treat it and as a result of this, Mr McRae later died because of the cancer.[139] Mrs McRae brought this claim against the defendant on the basis of misdiagnosis on the part of the defendant. The defendant raised the defence that the claim had prescribed as four years had gone by since the cause of action arose. The court dismissed the claim of the plaintiff on the basis of prescription, but there was no question or dispute that the defendant medical practitioner was indeed negligent on the basis of misdiagnosis.[140]

10 CONCLUSION

With so many variables at stake when setting out to determine negligence, it is important for a plaintiff to have a strong legal team and, if necessary, expert testimony. Medical practitioners, in turn, need to take the necessary precautions to ensure that patient disappointments do not escalate into full-blown court cases that could put practitioners' reputations at risk and expose them to the unpleasant and expensive ramifications of civil and criminal claims. This is especially so when unnecessary litigation with an aim to get financial compensation is becoming a problem in South Africa, as already outlined. Medical negligence claims are avoidable, especially in instances where there is foreseeability and preventability of damage. Failure by a medical practitioner – in this context, an oncologist – to act in a way a reasonable oncologist in the same position could have acted means that the medical practitioner would be liable. This point can be taken a step forward: the failure by a medical practitioner to explain or rebut allegations of negligence levelled against him or her means that an inference can be drawn of the medical practitioner's negligence on the basis of the doctrine of *res ipsa loquitur*. It is worth noting that a failure to discharge this obligation

[138] *McRae v Group Health Plan* 753 NW 2d 711 714–15 (Minn.2008).
[139] *McRae v Group Health Plan* 755 NW 2d 711 714–15.
[140] *McRae v Group Health Plan* 756 NW 2d 711 714–15.

could cause the defendant practitioner to run the risk of being rendered liable. All this means that a medical practitioner must be in a position to fully account for his or her actions when dealing with a patient in the interests of fairness and justice. One of the many ways of minimising the risk of not placing a defence before the court is to keep proper patient records, particularly in the event of being sued. Furthermore, it has been a requirement of the National Health Act 61 of 2003, as well as the requirement of good practice required by the HPCSA.

LIVING WITH ALBINISM IN SOUTH AFRICA: UNCOVERING THE HEALTH CHALLENGES FROM A LEGAL PERSPECTIVE*

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SUMMARY

The Cancer Association of South Africa (CANSA) has acknowledged that persons with albinism face the highest risk of developing skin cancer. While information concerning their susceptibility to cancer is very important, CANSA observed that such information is communicated to persons with albinism at a very late stage, especially those living in rural areas of South Africa. The Albinism Society of South Africa has revealed that the national health system has failed to adequately consider and take into account the health care needs of persons living with albinism. Very few persons with albinism have access to sunglasses with a high UV protection screen to relieve light sensitivity, or to preventative services such as dermatological skin checks, eye checks and eye corrections. This article establishes that the specialised health intervention required by persons with albinism is not prioritised in South Africa's health care plan. The author argues that a well-timed intervention into the health needs of persons with albinism will have a penetrative influence on the fate of a small yet significant population. The recognition of the right of access to health care in the South African Constitution affords persons living with albinism the right to challenge the government's failure to provide them with essential health care services and health accessories. This article also discusses the pertinent clinical aspects of albinism, with the aim of contextualising the legal discussion in the rest of the article.

1 INTRODUCTION

Despite the fact that albinism affects several South Africans, it is a condition that remains deeply misunderstood. Albinism is steeped in myth and false notions and is perceived by many as a curse and contamination.[1]

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1 Mswela and Slabbert "Colour Discrimination Among People With Albinism in South Africa" 2013 6(1) *South African Journal of Bioethics and Law* 25 25–27; Mswela *A Selection of Legal Issues Relating to Persons Living With Albinism* (thesis, University of South Africa) 2016 1–283; Olagunju "Towards a Biblical Response to Myth and Discrimination Against the

Throughout history, persons with albinism (PWA) have been treated with doubt and suspicion. In schools and in the wider community, children with albinism are also subjected to violence and ridicule.[2] In certain areas on the African continent, including South Africa, PWA are killed for the trade in body parts for use as sacramental medicines, or sexually assaulted as a result of the belief that raping them may offer a cure for HIV/AIDS.[3] All of this highlights the extreme vulnerability of PWA, apart from the many violations of their fundamental rights that follow from the manner in which they are treated.[4] The vulnerability of PWA is exacerbated as a result of the unique health concerns associated with their condition. For those living with albinism in Africa, life may be particularly difficult.[5] Poverty and a lack of knowledge about the condition deprives these individuals of protection against skin cancer.[6] Many PWA die prematurely because of skin cancer.[7] The susceptibility of PWA to skin cancer leading to premature death is one result of the lack of insight into their health needs.[8] They are either unaware of this danger or only informed when a cancer has reached an advanced stage.[9] Severe eye problems, which in many cases translate into blindness, are another health issue affecting PWA.[10] The vicious cycle of social ostracism, stigmatisation and discrimination towards PWA means that they are reluctant to seek medical help and even if they do, they may find themselves marginalised.

The primary purpose of this article is to highlight some of the pertinent health challenges faced by South Africans living with albinism. This article establishes that the specialised health intervention required by this small population is not prioritised in South Africa's health care plan. It is argued that a well-timed intervention into the health needs of PWA will have a decisive influence on the fate of a small yet significant population. The article argues that the recognition of the right of access to health care as enshrined in the South African Constitution affords PWA the right to challenge the government's failure to provide them with such essential health care necessities.

Although most legal researchers do not characteristically have training in medicine, the need to research health care, diagnoses, injuries, and of

Human Right of Albinos in Yorubaland" 2012 1 *Journal of Studies in Social Sciences* 46–58; United Nations General Assembly "Persons With Albinism" Report of the Office of the United Nations High Commissioner for Human Rights (12 September 2013) A/HRC/24/57 5–9.

2 Mswela *A Selection of Legal Issues Relating to Persons Living with Albinism v*.

3 *Ibid*.

4 *Ibid*.

5 Norman *The Woman Who Lost Her Skin and Other Dermatological Stories* (2004) 39.

6 *Ibid*.

7 *Ibid*.

8 CANSA "Albinism Increases Skin Cancer Risk in South Africa" (24 May 2012) http://www.cansa.org.za/albinism-increases-skin-cancer-risk-in-south-africa/ (accessed 2017-03-05) 1.

9 CANSA http://www.cansa.org.za/albinism-increases-skin-cancer-risk-in-south-africa/1.

10 *Ibid*.

course medical terminology arises from time to time.[11] Legal research involving a strong medical component requires the researcher to be aware of the finer points, and to have a fundamental understanding of the most relevant medical details. In what follows, the discussion briefly focuses on the pertinent clinical aspects of albinism in order to gain a greater insight into this condition, with the aim of contextualising the legal discussion in the rest of the article and addressing some of the misconceptions regarding albinism. Fostering an understanding of the genetics behind albinism is as important as in any other awareness campaign concerning a stigmatised condition or disease.

2 CLINICAL ASPECTS OF ALBINISM

Albinism, a condition caused by a lack of skin pigmentation in humans,[12] results from a mutation of one of numerous genes.[13] It is a heterogeneous genetic disorder, characterised by a lack of or huge reduction in pigment in the skin, hair and eyes.[14] The genetic information is stored within the deoxyribonucleic acid (DNA) molecule.[15] Specific genes within the DNA molecules encode for proteins involved in the production of melanin in the melanocytes.[16] A mutation in one or several genes may lead to a deficiency of melanin production or a complete stop in the production of melanin.[17]

A person has to inherit two copies of a mutated gene, one from each parent, to have albinism.[18] Clinically, this is known as recessive inheritance.[19] A person who has merely one copy of the mutated gene will

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11 Iyer *Nursing Home Litigation: Investigation and Case Preparation* (2006) 9.

12 Opara and Jiburum "Skin Cancers in Albinos in a Teaching Hospital in Eastern Nigeria: Presentation and Challenges of Care" 2010 8(73) *World Journal of Surgical Oncology* 701 701. Also see Hunter *Lets Review Biology: The Living Environment* (2008) 148; Kings and Summers "Albinism: Ocular and Oculataneous Albinism and Hermansky Pudlak Syndrome" in Suzzane *Management of Genetic Syndromes* (2010) ch 5; Riede and Werner *Color Atlas Pathological Principles* (2011) 96.

13 Hunter *Lets Review Biology* 148; Kings *et al* in Suzzane *Management of Genetic Syndromes* ch 5; Riede *et al Color Atlas Pathological Principles* 96.

14 Scott "New Category of Color: Analyzing Albinism Under the Title VII and the Americans With Disabilities Act" 1999 2 *The Journal of Gender, Race and Justice* 493 494; and Jack *Clinical Ophthalmology: A Systematic Approach* (2011) 648. Also see Hunter *Lets Review Biology* 148; Kings *et al* in Suzzane *Management of Genetic Syndromes* ch 5; Riede *et al Color Atlas Pathological Principles* 96. For a discussion on the definition of Genetic Heterogeneity, see Moll, Berry, Weidman, Ellefson, Gordon and Kottke "Detection of Genetic Heterogeneity Among Pedigrees Through Complex Segregation Analysis: An Application to Hypercholesterolemia" 1985 36 *American Journal of Human Genetics* 197 198; and Thomas, Francis and David *Principles of Medical Genetics* (1998) 28.

15 Naafs and Padovese "Rural Dermatology in the Tropics" 2009 27(3) *Clinics in Dermatology* 252 261 and 269. Also see Pearson "ATP Released via Gap Junction Hemichannels From the Pigment Epithelium Regulates Neural Retinal Progenitor Proliferation" 2005 46(5) *Neuron* 731 731.

16 Richards and Hawley *The Human Genome: A User's Guide* (2010) 35.

17 Denniston and Murray *The Oxford Handbook of Ophthalmology* (2009) 518. Also see Horobin (ed) *Diseases and Disorders* (2008) 29.

18 Richards and Hawley *The Human Genome* 35.

19 Horobin *Diseases and Disorders* 29. Also see Thomas and Kumar *Clinical Paediatric Dermatology* (2013) 114; and Kutzbach "Evaluation of Vision-Specific Quality-of-Life in

have normal hair, skin or eyes.[20] A gene that comprises several diverse properties is considered pleiotropic.[21] Albinism is believed to be pleiotropic since it has an effect on skin colour or eyes.[22]

In spite of the type of mutated gene that is present in any human being, vision impairment is a common feature in all types of albinism.[23] Such eye impairments are the result of a deranged development of the nerve trail from the eye to the brain, as well as an irregular growth of the retina.[24] The symptoms of albinism in early childhood comprise poor vision, sensitivity to bright light, nystagmus and strabismus.[25] Vision may vary from normal for persons who are moderately affected by albinism, to legal blindness or complete blindness for people with the more severe types of albinism.[26] Typically, persons with albinism who have the least pigmentation have the poorest vision.[27] An ophthalmologist can perform an electroretinogram to test vision problems associated with albinism. Where the test result is uncertain, a "visual evoked potentials test" may be useful.[28]

Where albinism affects the hair and the skin, it leaves a stark white to whitish-yellow colour. Such skin is extremely fair and people with this form of albinism suffer from photo-ageing cancer and an amplified prevalence of all types of skin cancer. An error in the synthesis of tyrosinase means people living with oculocutaneous albinism have little protection against ultraviolet radiation (UVR) damage.[29] As a result, exposure to high levels of UVR enhances the risk of contracting all three main types of skin cancer.[30] Long term exposure to sunburn promotes skin cancers among people living with albinism. The Cancer Association of South Africa (CANSA) believes that PWA in South Africa face the highest risk of developing skin cancer. While this information regarding their susceptibility to cancer is very important, CANSA has acknowledged that such information is often communicated at a very late stage to PWA, especially those living in rural areas of South Africa.

It would be impractical and impossible to discuss all the clinical aspects relating to albinism in this article. The vulnerability of PWA makes them a category in need of specific health protection, ranging from visual aids, eye surgery and regular check-ups for skin cancer, to sunglasses offering high

Albinism" 2009 13(2) *Journal of American Association for Paediatric Ophthalmology and Strabismus* 191.

20 Richards and Hawley *The Human Genome:* 35. Also see Horobin *Diseases and Disorders* 29.

21 Horobin *Diseases and Disorders* 29.

22 *Ibid.*

23 *Ibid*.

24 *Ibid*.

25 *Ibid*.

26 *Ibid*.

27 *Ibid*.

28 *Ibid*.

29 Reisler "Interesting Case Series: Albinism and Skin Cancer" http://www.eplasty.com/images/PDF/eplasty-d-09-00135.pdf (accessed 2020-03-05).

30 Reisler http://www.eplasty.com/images/PDF/eplasty-d-09-00135.pdf. Also see Lund and Taylor "Lack of Adequate Sun Protection for Children With Oculocutaneous Albinism in South Africa" 2008 8(225) *BMC Public Health* 1 2.

UV protection. To compound their vulnerability, they are also at increased risk of becoming victims of *muti* killings, stigmatisation and discrimination based on their appearance.

3 THE RIGHT TO HEALTHCARE SERVICES

The right to health as such is not explicitly mentioned in the South African Constitution.[31] The Bill of Rights, however, guarantees the right of access to health care services, adequate housing, sufficient food and social security, for the reason that insufficient access to such rights violates the protected interests of various other rights, such as the right to human dignity, equality and life, as well as the right to bodily and physical integrity.[32]

The right to health is basic to the physical and mental well-being of all human beings and is essential for the exercise of other human rights. Section 27(1)(*a*) of the Constitution states:

> "[e]veryone has the right to have access to health care services, including reproductive health care."

Section 27(2) states that the State must take reasonable legislative and other measures within its available resources to achieve the progressive realisation of the right to health.[33] This means that the government has to ensure that this right is protected, promoted and fulfilled, and that eventually universal access to quality and all-inclusive health care is realised. This incorporates the passing of laws by Parliament[34] and the provincial

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31 S 27(1) of the Constitution of 1996. Also see Rautenbach and Malherbe *Constitutional Law* (2012) 386.

32 Rautenbach and Malherbe *Constitutional Law* 386.

33 S 27(2) of the Constitution of 1996 reads as follows: "The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights."

34 The National Health Act 61 of 2003 was passed by Parliament to give effect to the right to access to health care services. The objectives of the National Health Act are to regulate the national health system, to afford equality in respect of health services by harmonising the inequalities of health services of the past and to institute a national health system that protects, respects, promotes and fulfils the rights of everyone in South Africa – in particular, the progressive realisation of the constitutional right of access to health care services. Section 3 of the National Health Act reads as follows: "The Minister must, within the limits of available resources– (a) endeavour to protect, promote, improve and maintain the health of the population; (b) promote the inclusion of health services in the socio-economic development plan of the Republic; (c) determine the policies and measures necessary to protect, promote, improve and maintain the health and well-being of the population; (d) ensure the provision of such essential health services, which must at least include primary health care services, to the population of the Republic as may be prescribed after consultation with the National Health Council; and (e) equitably prioritise the health services that the State can provide. (2) The national department, every provincial department and every municipality must establish such health services as are required in terms of this Act, and all health establishments and health care providers in the public sector must equitably provide health services within the limits of available resources." Not every person accessing the health system is able to exercise their health rights easily. Vulnerabilities such as having a disability or being an illegal migrant are further barriers to access to health care services. As a result, one of the objectives of the National Health Act is to protect, respect, promote and fulfil the rights of vulnerable groups such as women, children, older people and people

legislatures but is not limited to such. Section 27 is a powerful provision aimed at ensuring health policy and practice.

The right to health imposes a negative duty on the State and members of society not to impair access to the amenities and services associated with this right.[35] Limitations with respect to the right to health must meet the terms of the limitation clause.[36] The State has a further positive duty to fulfil the right to health.[37] Thus far, the Constitutional Court has addressed the impact and effect of the State's failure to act in terms of the conduct and interests protected by the rights to human dignity, equality, life, and personal freedom and security.[38] In the very first stage of an inquiry into an alleged infringement of the right to health, it must be established whether or not the State's failure to provide health care indeed impairs the right to human dignity and life, and the physical and psychological integrity of the claimants.[39]

In terms of the second stage of inquiry, section 27(2) of the Constitution stipulates that the State must take "reasonable legislative and other steps within its available resources to attain the progressive realisation of health care services".[40] This implies that the State may justify its failure to act or its failure to meet a positive obligation, provided that reasonable legislative and

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with disabilities. The National Health Act prescribes eligibility for free health services in public health institutions. Section 4 of the National Health Act reads as follows: "(1) The Minister, after consultation with the Minister of Finance, may prescribe conditions subject to which categories of persons are eligible for such free health services at public health establishments as may be prescribed.

(2) In prescribing any condition contemplated in subsection (1), the Minister must have regard to–
   (a) the range of free health services currently available;
   (b) the categories of persons already receiving free health services;
   (c) the impact of any such condition on access to health services; and
   (d) the needs of vulnerable groups such as women, children, older persons and persons with disabilities.

(3) Subject to any condition prescribed by the Minister, the State and clinics and community health centres funded by the State must provide–
   (a) pregnant and lactating women and children below the age of six years, who are not members or beneficiaries of medical aid schemes, with free health services;
   (b) all persons, except members of medical aid schemes and their dependants and persons receiving compensation for compensable occupational diseases, with free primary health care services; and
   (c) women, subject to the Choice on Termination of Pregnancy Act, 1996 (Act 92 of 1996) free termination of pregnancy services."

Also see Berger, Hassim and Heywood *Health & Democracy: A Guide to Human Rights, Health Law and Policy in Post-Apartheid South Africa* (2007) 296–307.

35 Rautenbach and Malherbe *Constitutional Law* 386.

36 *Ibid*.

37 *Ibid*.

38 Rautenbach and Malherbe *Constitutional Law* 386. Also see the following cases: *Soobramoney v Minister of Health, Kwazulu Natal* 1998 (1) SA 765 (CC) 37 42; *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) 23 25, 44 and 83; *Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC) 82; *Minister of Health v Treatment Action Campaign* 2002 (10) BCLR 1033 (CC) 72–73 and 78.

39 Rautenbach and Malherbe *Constitutional Law* 386.

40 *Ibid*.

other measures were taken within its available resources to accomplish the progressive realisation of the right.[41]

3 1 Guidelines formulated by the Constitutional Court to determine whether the State has realised its positive duties

The qualification "reasonable legislative and other measures" suggests that the State ought to institute rational programmes that assign responsibility to the various levels of government to guarantee appropriate resources are available.[42] Bearing in mind that both legislative and other measures may be taken, reasonableness can be evaluated at the level of a legislative programme as well as the level of its implementation.[43] Courts may require that the State demonstrate which measures were taken to realise socio-economic rights.[44]

Taking into account that socio-economic rights are a constitutional imperative and that the State ought to try to attain certain developmental objectives, the State has a duty to justify the choices it makes in achieving these objectives to the public.[45] Put differently, the reasonableness standard first calls for reasons to be given.[46] It is then the duty of the court to evaluate the reasonableness of these reasons[47] and a reasonable person should be convinced of the coherence of the reasons.[48]

The duty of justification involves the provision of explanations that would satisfy most people regarding the rationality of a policy, even if they are not convinced of the good judgment of choosing such a policy in the first place.[49]

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41 Rautenbach and Malherbe *Constitutional Law* 386. In *Minister of Health v Treatment Action Campaign supra* 71–73, the court found that the government's measures to make available health care services for both HIV-positive mothers as well as their newly born babies failed to conform with the State's duty as stipulated in s 27(2). In this matter, the court considered that the State could afford to buy Nevirapine and that the administration of Nevirapine was a straightforward matter.

42 *Minister of Health v Treatment Action Campaign supra* 71–73. Also see Rautenbach and Malherbe *Constitutional Law* 386.

43 *Government of the Republic of South Africa v Grootboom supra* 21 28 35. Legislative measures by themselves are not likely to ensure constitutional compliance. The State is obliged to act to achieve the intended result, and legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive. These policies and programmes must be reasonable both in their conception and their implementation. The formulation of a programme is only the first stage in meeting the State's obligations. The programme should also be reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the State's obligations.

44 *Government of the Republic of South Africa v Grootboom supra* 32; and *Minister of Health v Treatment Action Campaign supra* 34.

45 Currie and De Waal *Bill of Rights Handbook* (2013) 581–584.

46 Currie and De Waal *Bill of Rights Handbook* 574.

47 *Ibid*.

48 *Ibid*.

49 *Ibid*.

Notwithstanding the centrality of the reasonableness standard, the Constitutional Court does not refer to any definition of such a standard. Instead, the court stipulates that each case should be determined on its own facts.[50] According to the court in the *Bel Porto* case,[51] the test of reasonableness when dealing with socio-economic rights is considered to be on a higher level than the rationality test in section 9(1).

A feature of the legal standard is that substantial "interpretive discretion" is given to the person in charge of adjudicating the application of the reasonableness standard, and that such application does not specify a result in advance.[52] Standards are applied *ad hoc* and their application varies considerably from one case to another.[53] However, standards gradually become "more rule-bound" as courts build up guidelines and sets of factors with future applications in mind.[54]

In the *Grootboom* case, the court held that reasonableness entails the "design, adoption and implementation" of certain measures to achieve the realisation of socio-economic rights that are inclusive in that they include those who need protection the most.[55] At the initial application of the *Grootboom* case*,* the court found that reasonableness was absent; hence the State was held to have failed in its duties in terms of section 26(2).[56]

In the *Minister of Health v Treatment Action Campaign* case,[57] the court's finding in the *Grootboom* case (that reasonableness is inclusive) was the foundation for the court's decision that the government's policy on the prevention of mother-to-child transmission (MTCT) of HIV was unreasonable. Government policy only made Nevirapine available to a small number of "pilot sites", namely two state hospitals in each province.[58] The reasoning behind this decision was that the results of the use of the medication at the selected sites would be used to assess the safety of Nevirapine before making it available to more people. For this reason, Nevirapine would not be available to the public but only at the specific pilot sites.[59]

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50 *Government of the Republic of South Africa v Grootboom supra* par 92.

51 *Bel Porto School Governing Body v Premier of the Western Cape Province* 2002 (3) SA 265 (CC) par 46.

52 Currie and De Waal *Bill of Rights Handbook* 574.

53 *Ibid*.

54 *Ibid*.

55 *Ibid*.

56 *Government of the Republic of South Africa v Grootboom supra* 99.

57 *Minister of Health v Treatment Action Campaign supra* par 1–2 and 23.

58 *Government of the Republic of South Africa v Grootboom supra* par 41.

59 *Government of the Republic of South Africa v Grootboom supra* par 92.

3 1 1 Progressive realisation

Progressive realisation means that it is accepted that socio-economic rights, including the right to health care services, cannot be attained instantly.[60] The State is nevertheless required to work towards its goal promptly and efficiently.[61] The meaning of the qualification of progressive realisation was interpreted in the *Soobramoney* case[62] as follows:

> "What is apparent from these provisions is that the obligations imposed on the State by sections 26 and 27 in regard to access to housing, health care, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled. This is the context within which section 27(3) must be construed."[63]

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[60] These guidelines are listed in the *Government of the Republic of South Africa v Grootboom supra* par 36–46. Also see Rautenbach and Malherbe *Constitutional Law* 386; *Government of the Republic of South Africa v Grootboom supra* par 35 and 71–73.

[61] *Government of the Republic of South Africa v Grootboom supra* 36–46. Also see Rautenbach and Malherbe *Constitutional Law* 386.

[62] *Soobramoney v Minister of Health, Kwazulu Natal supra* par 11. The Soobramoney case brought the issue of socio-economic rights to the Constitutional Court. The case involved the issue of access to renal dialysis in a government hospital; when provided, this is supplied at the cost of the State. Only those who meet stringent medical criteria qualify for renal dialysis. However, not all of those who require the dialysis qualify. One requirement for admission to the dialysis programme is medical eligibility for a kidney transplant. Mr Soobramoney did not satisfy the medical criteria and was therefore denied access. After an unsuccessful application to the Durban High Court, he appealed directly to the Constitutional Court, challenging the denial of access on the basis of two constitutional rights, namely the right to life in s 11 and the guarantee in s 27(3) that no person may be refused emergency medical treatment. The Constitutional Court, however, decided that his claim had to be considered under s 27(2), which sets out the State's positive duties in terms of the provision of health care services. In the court's view, the State had indeed complied with its s 27(2) constitutional duties, because the guidelines according to which access to renal dialysis is limited, are reasonable, and in the case at hand, had been applied "fairly and rationally". Mr Soobramoney's claim was therefore dismissed. A week later, he died from renal complications. The decision elucidates why the claim had to be considered under s 27(2) and not under s 27(1) or (3), the right to life or emergency medical treatment. Access to health care services is specifically dealt with in s 27, so it is not essential to see the right to health as part and parcel of the right to life as some courts (such as the Indian Supreme Court) have done. The focus should remain on s 27. The question arises as to why the courts opt to apply s 27(2) and not s 27(3). The court concluded that emergency medical treatment does not consist of chronic treatment for "an on-going state of affairs resulting from a deterioration of the applicant's renal function, which is incurable". Despite the fact that renal dialysis may be urgently needed, it is not seen as an emergency treatment. Such an analysis by the court is useful in construing why such reasoning is in fact sound. If s 27(3) had been construed in line with Mr Soobramoney's claim, the State's duty to guarantee access to health care services for everyone would have been severely compromised. Instead of the State taking realistic measures to guarantee the progressive realisation of the right to health, as described in s 27(2), the State would continually be required to supply instant access to health care services wherever and whenever such was required.

[63] *Soobramoney v Minister of Health, Kwazulu Natal supra* par 11.

The above denotes that the positive dimension of socio-economic rights is realised over a period of time.[64] However, the fact that the realisation of socio-economic rights occurs progressively does not prevent the State from taking those steps that are within its powers at any point in time.[65] The burden of proof lies with the State to prove its progress towards the realisation of the right in question.[66]

3 1 2 Within available resources

The qualification "within available resources" suggests that both the pace at which the goal is realised and the reasonableness of the measures employed are administered through and affected by available resources.[67] In the absence of available resources, it is clear that the State's failure to provide any particular service will not amount to a violation of the right to health.[68] However, where resources are available, it would be difficult for the State to justify its failure to allocate resources to the advancement of the right to health care services.[69] In circumstances where adequate resources are available, the State is expected to do more to realise the right to health care services and any other socio-economic right.[70] This implies that a significant aspect of the "positive dimension" of socio-economic rights is that the State should satisfactorily substantiate its use of public resources to its citizens.[71] The Constitutional Court in the *Soobramoney* case confirmed this through its action in terms of the policy justification advanced by the Department of Health's provincial health authorities.[72]

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64 Currie and De Waal *Bill of Rights Handbook* 572.

65 *Ibid*.

66 Currie and De Waal *Bill of Rights Handbook* 572. Also see *Government of the Republic of South Africa v Grootboom supra* par 45 and 88, where the court states: "Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the raison d'être, of the Covenant which is to establish clear obligations for State parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources." (The Covenant referred to is UNGA International Covenant on Economic, Social and Cultural Rights 999 UNTS 3 (1966). Adopted 16/12/1966; EIF 03/01/1976.)

67 *Government of the Republic of South Africa v Grootboom supra* 71–73. Also see Rautenbach and Malherbe *Constitutional Law* 386; and Currie and De Waal *Bill of Rights Handbook* 390.

68 Gabru "Some Comments on Water Rights in South Africa" 2005 8(1) *Potchefstroom Electronic Law Journal* 1 9.

69 Gabru 2005 *PELJ* 10.

70 *Ibid*.

71 Currie and De Waal *Bill of Rights Handbook* 572.

72 *Soobramoney v Minister of Health, Kwazulu Natal supra* 24–25 29, 24 reads: "At present the Department of Health in KwaZulu-Natal does not have sufficient funds to cover the cost of the services which are being provided to the public. In 1996–1997 it overspent its budget

The "available resources" qualification is also employed in the International Covenant on Economic, Social and Cultural Rights, and it refers to the discretion that an instrument of the State has in its selection of means for the realisation of socio-economic rights.[73] In particular, a shortage of resources does not reduce the State's duty to realise its "core minimum obligations".[74] Even when resources are scarce, the obligation still resides with the State to ensure fulfilment of the relevant socio-economic rights.[75]

In the *Grootboom* case,[76] the Constitutional Court rejected the call to set a minimum obligation guideline specifically in respect of the right to housing, finding instead that the real question in terms of our Constitution is whether the measures taken by the State to realise the right afforded by section 26 are reasonable.

The court stated that there may be circumstances in which it is possible to consider a core minimum obligation in determining the reasonableness of measures taken by the State.[77] This however cannot be done in the absence of adequate information to determine the minimum core duty in a given situation.[78]

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by R152 million, and in the current year it is anticipated that the overspending will be R700 million rand unless a serious cutback is made in the services which it provides. The renal unit at the Addington Hospital has to serve the whole of KwaZulu-Natal and also takes patients from parts of the Eastern Cape. There are many more patients suffering from chronic renal failure than there are dialysis machines to treat such patients. This is a nation-wide problem and resources are stretched in all renal clinics throughout the land. Guidelines have therefore been established to assist the persons working in these clinics to make the agonising choices which have to be made in deciding who should receive treatment, and who not. These guidelines were applied in the present case." Par 25, in addition, reads: "By using the available dialysis machines in accordance with the guidelines more patients are benefited than would be the case if they were used to keep alive persons with chronic renal failure, and the outcome of the treatment is also likely to be more beneficial because it is directed to curing patients, and not simply to maintaining them in a chronically ill condition. It has not been suggested that these guidelines are unreasonable or that they were not applied fairly and rationally when the decision was taken by the Addington Hospital that the appellant did not qualify for dialysis." Par 29, furthermore, states: "The provincial administration which is responsible for health services in KwaZulu-Natal has to make decisions about the funding that should be made available for health care and how such funds should be spent. These choices involve difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met. A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters."

73 Article 2 of the International Covenant on Economic, Social and Cultural Rights reads as follows: "1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

74 Par 10 of CESCR General Comment No 3 on the Nature of State Parties' Obligations (Art 2 Par 1 of the Covenant) E/1991/23 (1990). Adopted: 14/12/ 1990.

75 Gabru 2005 *Potchefstroom Electronic Law Journal* 11.

76 *Government of the Republic of South Africa v Grootboom supra* 14.

77 *Government of the Republic of South Africa v Grootboom supra* 33.

78 *Ibid*.

In the case of the *Minister of Health v Treatment Action Campaign*,[79] the court was again advised to establish a core minimum content for the right to health care services. The court rejected the argument that it only had the power to issue a declaratory order and further argued that where an infringement of any right has occurred, including a violation of a socio-economic right, a court is under an obligation to make sure that efficient relief is established.[80] In implementing section 27, the State is obliged to take reasonable measures progressively, and it is the court's duty to ensure that this occurs.[81]

3 2 How the principle of freedom from discrimination relates to health

Within the public at large, vulnerable and marginalised people are often burdened with a range of health problems.[82] Unfair discrimination not only violates basic human rights in general, but is often found to have a direct impact on a person's health status.[83] The proscription of discrimination does not mean that differentiation should not be recognised, only that the failure to treat equal cases equally ought to be based on an objective and rational standard aimed at correcting disparities within society.[84]

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79 *Minister of Health v Treatment Action Campaign supra* 26.

80 *Ibid*

81 *Ibid*.

82 Durojaye "Realising Equality in Access to HIV Treatment for Vulnerable and Marginalised Groups in Africa" 2012 15(1) *Potchefstroom Electronic Law Journal* 214 218.

83 Durojaye 2012 *PELJ* 214. The Preamble and art 1 of the Convention on the Rights of Persons With Disabilities (UNGA (2007) A/RES/61/106. Adopted: 24/01/2007) affirms the social construction of disability by stating that the definition of disability ought to be advanced from the social perspectives that generate attitudinal and physical barriers preventing persons with disabilities from effectively contributing to society, and not from the viewpoint of the supposed medical condition of such individuals. The Convention looks beyond the question of "access to the physical environment" and tackles concerns of equality and the elimination of legal, social and attitudinal obstructions to the involvement of people with disabilities. In other words, the social approach to disability shifts the focus from individuals and their physical or mental deficits to the manner in which society embraces or rejects them. Instead of disability being seen as unavoidable, it is viewed as a product of social arrangements that can be reduced or perhaps even eliminated. The Convention accepts that impairment and the environment interact to produce the experience of disability when people with impairments cannot participate in society on an equal basis. This more inclusive understanding of disability offers a more realistic framework for addressing the common loss suffered by persons living with albinism. Because persons living with albinism have a lifelong physical impairment, they are continuously required to navigate circumstances arising from their distinctiveness. The social model advances disability rights by removing obstructions in society. Signatories to the Convention on the Rights of Persons with Disabilities are mandated to observe the provisions of the Convention by using them to drive domestic law and policy reforms. Among other things, the Convention requires that states undertake to adopt immediate, effective and appropriate measures: to combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life.

84 Macklem *Indigenous Indifference and the Constitution of Canada* (2001) 1 212; Van Reenen "Equality, Discrimination and Affirmative Action: An Analysis of Section 9 of the Constitution of the Republic of South Africa" 1997 12 *SA Public Law* 151 153.

With respect to health and health care, the foundation for non-discrimination has been developed and can be summarised as prohibiting

> "any discrimination in access to health care and the underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental stability, health status (including HIV/AIDS), sexual orientation, civil, political, social or other status, which has the purpose of nullifying the equal satisfaction or exercise of the right to health."[85]

The question of whether persons with albinism are adequately protected in the present South African legal framework is explored next.

3 3 The right to health care services in the context of albinism

Owing to an absence of melanin in their skin, persons living with albinism are prone to a number of lifelong physical health problems – in particular, skin damage caused by sensitivity to the ultraviolet rays of the sun, and visual impairment. As seen from the previous discussion, skin cancer is common among persons living with albinism. Regular visits to a dermatologist for skin check-ups are imperative. It is equally important to have skilled eye assessments and examinations from a very young age.

Several governments have failed to guarantee "access and affordability" of essential items and services.[86] In South Africa, interviews with and campaigns led by the Chairperson of the Albinism Society of South Africa[87]

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[85] Art 12(18) of the CESCR General Comment No 14 on the Right to the Highest Attainable Standard of Health (Art 12) E/C.12/2000/4 (11 August 2000).

[86] Thuku "Myths, Discrimination, and the Call for Special Rights for Persons Living with Albinism in Sub-Saharan Africa" 2011 *Amnesty International Editorial Review on Special Programme on Africa* 1 11. Thuku writes within the sub-Saharan context. Despite mentioning that several governments have failed to guarantee "access and affordability" in terms of essential items, the author does not list examples of such countries. The current study presents South Africa as an example. An investigation into other countries cites Zimbabwe as an example, where the implementation of effective health interventions to meet the health needs of people with albinism remains a challenge due to the current economic and political situation. See Taylor and Lund "Experiences of a Feasibility Study of Children with Albinism in Zimbabwe: A Discussion Paper" 2008 45(8) *International Journal of Nursing Studies* 1247. Somalia is yet another example where prolonged conflict and the challenges stemming from the lack of a strong central government affect its population and generate barriers to socio-economic progress. This has major implications for the most vulnerable members of society, including people with albinism. No organisation or government has tried to support people with albinism in Somalia and they do not have access to health care – see Mohamud "What Do You Know about Persons with Albinism in Somalia" (2014) http://aphad.org/maxaad-kala-socotaa-xaalka-dadka-albinoga-ah-ee-soomaaliyeed/ (accessed 2020-06-13) 1. In a report on albinism compiled by the United Nations Office of the High Commissioner for Human Rights, it is evident that people with albinism in Burundi require government-sponsored specialised medical care – see United Nations Office of the High Commissioner for Human Rights "Situation of People Living with Albinism in Burundi" (2016) www.ohchr.org/.../albinism/situation_of_people_living_with_albinism_in_burundi-inputs_from_binuca.docx (accessed 2020-06-13) 4.

[87] Fazel "Albinos' Lonely Call for Recognition" (2012) http://mg.co.za/article/2012-05-17-albinos-lonely-call-for-recognition (accessed 2020-06-13) 1.

have revealed that the national health system has failed adequately to consider and take into account the health needs of PWA. The failure of the government to take into account the health concerns of this vulnerable group is perhaps due to the fact that albinism is not viewed as an actual health concern in South Africa because the condition is surrounded by so many myths, stereotypes and false notions.

The connection between albinism, sunlight and skin cancer, and the extreme importance of a prevention programme in this regard, has been explained above. Currently, the government does not provide PWA with protective sunscreen lotion. Very few PWA have access to sunglasses with a high UV protection screen to relieve light sensitivity, or to preventative services such as dermatological skin checks, eye checks and eye corrections. As mentioned earlier on, the vulnerability of PWA means that they need specific types of health protection, including visual aids, eye surgery, regular skin cancer check-ups and sunglasses offering high UV protection. Government has failed to take into account the health concerns of PWA, despite the submission of several petitions in this regard.[88]

The recognition of the right of access to health care services in the South African Constitution[89] affords PWA the right to challenge the government's failure to provide skin protection for the prevention of skin cancer, or sunglasses and low vision aids. Under the South African Constitution, the right of access to health care services is a fundamental human right and this right applies equally to all persons, including those living with albinism. Where resources are available, PWA ought to be provided with sunscreen at no cost and in cases where the government does not have the resources to do so, it should subsidise the provision of sunscreen, sunglasses and low vision aids for PWA.

Drawing from the clinical discussion above, if not assisted, PWA face a shortened life span. It is therefore submitted that the State has a specific duty towards this very unique and vulnerable group in society. Resources should be progressively made available to address the needs of PWA.

As acknowledged by the Cancer Association of South Africa (CANSA), many PWA face the highest risk of developing skin cancer but are unaware of the health hazards associated with their condition, especially those living

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88 Mazibuko, the founder of the Albinism Society of South Africa, has been an advocate for the needs of persons living with albinism and has pushed the South African government and medical aid firms to subsidise sunscreen lotions and eye care for people with albinism since the Albinism Society of South Africa was founded in 1991. See IRIN News "Southern Africa: Too White to be Black: The Challenge of Albinism" (2016) http://www.irinnews.org/Report/58169/southern-africa-too-white-to-be-black-the-challenge-of-albinism (accessed 2020-01-05) 1, where Mazibuko talks about her concerns regarding the accessibility as well as affordability of sunscreen lotion and the government's failure to provide this to persons living with albinism. Also see Mecaomere "Public-To-Learn-About-Albinism" (2011) http://www.sowetanlive.co.za/news/2011/09/02/public-to-learn-about-albinism (accessed 2020-01-05) 1.

89 S 27(1) of the Constitution of 1996 provides as follows: "Everyone has the right to have access to– (a) health care services, including reproductive health care; (b) sufficient food and water; and (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance."

in rural areas of South Africa. It is therefore imperative that the government also introduce health education programmes aimed at educating PWA about the health risks associated with their condition. An awareness of the causes of albinism and the measures that can be taken to prevent skin cancer, for example, will certainly enhance the health of PWA and reduce the risk of complications associated with the condition. Not only are basic health awareness education programmes for PWA crucial, but programmes to educate people on clinical aspects of albinism will undeniably influence the way in which society perceives persons affected by this condition. These programmes could begin by targeting schools and hospitals.

Depending on the availability of resources, public health programmes, such as open days to educate the public on albinism, are another possibility. The Albinism Society of South Africa has been active in this regard.[90] The month of September has been dedicated to albinism awareness.[91]

Such programmes may assist in dispelling myths such as that sex with a young woman with albinism may cure HIV/AIDS. This is a myth that perpetuates gender-based violence towards vulnerable young women. Lack of knowledge about albinism affects the position of young women with albinism who live in fear of being raped and of the danger of becoming infected with HIV.

Public health programmes need to take into account the diverse challenges facing PWA. At present, there are some programmes ready to deal with the health concerns of PWA in certain parts of Africa.[92] For example, the Regional Dermatological Training Centre (RDTC) in Moshi, Tanzania, runs a mobile skin care clinic where a doctor and nurse frequently visit villages to ensure that the skin of people living with albinism is protected against radiation and to educate them on the relevant measures to protect themselves from the sun.[93] South Africa does not have such a facility specifically catering for people with albinism, but the Cancer Association of South Africa (CANSA) has a few Mobile Health Clinics for the general public, which travel to all provinces in South Africa in a bid to reach those without access to cancer screening.[94]

Counselling and trauma centres for this specific segment of society should be established in order to assist PWA who have escaped murder or fallen victim to assault, discrimination, rape, amputation of limbs and cancer, to mention but a few of the challenges they face.[95]

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90 The Albinism Society of South Africa "Albinism" (2015) http://www.albinism.org.za/ (accessed 2020-06-13) 1.

91 Albinism Society of South Africa (2014) http://www.gov.za/albinism-awareness-month-2014 (accessed 2020-06-13) 1.

92 Hong "Albinism in Africa as a Public Health Issue" 2006 6(212) BMC Public Health 1 6.

93 *Ibid*.

94 Cancer Association of South Africa "Advocacy Knowledge into Action" (2014) http://www.cansa.org.za/files/2014/10/CANSA-Annual-Report-2013-to-2014-Part-2.pdf (accessed 2020-06-13) 1.

95 Thuku 2011 *Amnesty International Editorial Review on Special Programme on Africa* 17.

Discrimination against PWA impedes their right of access to health care services, and the government should adopt a comprehensive approach to ensuring that health care services specifically cater for the unique needs of this group of people. In the *Grootboom* case, the court held that reasonableness entails the "design, adoption and implementation" of certain measures to achieve the realisation of socio-economic rights that are inclusive. These measures should specifically include those in dire need of protection.[96]

South Africa signed the International Covenant on Economic, Social and Cultural Rights in 1994, and ratified this important international covenant in January 2015.[97] The eventual ratification of this Covenant was a timely tribute to former President Nelson Mandela, who originally signed the International Covenant on Economic, Social and Cultural Rights on his first visit to the United Nations in New York in 1994; ratification was a courageous step, demonstrating South Africa's intention to join the rest of the world in upholding socio-economic rights.[98] The resolution to ratify the International Covenant on Economic, Social and Cultural Rights is commendable as it ensures that South Africa is finally able to honour its international duties and to consolidate its commitment to alleviate poverty and guarantee social justice for everyone.[99]

The International Covenant on Economic, Social and Cultural Rights affords the most comprehensive provisions in terms of the right to the enjoyment of the highest attainable standard of health.[100] Advocacy for the highest possible attainable standard of health of vulnerable members of society entails recognising the obstacles that stand in the way of good health care for vulnerable and disadvantaged persons.[101]

The Covenant recognises the health needs of the vulnerable and defenceless members of society and recommends steps that signatory states have to take in order to achieve health care goals.[102] This naturally

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96 *Government of the Republic of South Africa v Grootboom supra* 54.

97 South African Human Rights Commission "SAHRC Welcomes Government's Decision to Ratify the International Covenant on Economic, Social and Cultural Rights (ICESCR)" http://www.sahrc.org.za/home/index.php?ipkArticleID=318 (accessed 2020-06-13) 1.

98 South African Human Rights Commission http://www.sahrc.org.za/home/index.php?ipkArticleID=318 1.

99 South African Human Rights Commission http://www.sahrc.org.za/home/index.php?ipkArticleID=318 1.

100 Art 12(1) of the International Covenant on Economic, Social and Cultural Rights reads as follows:

"1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."

101 Chatrejee and Sheoran *Vulnerable Groups in India, Centre for Enquiry into Health and Allied Themes* (2007) 25.

102 Art 12(2) of the International Covenant on Economic, Social and Cultural Rights reads as follows:

"2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(a) The provision for the reduction of the still birth-rate and of infant mortality and for the healthy development of the child;

has implications for the health of the general population, as well as that of particular vulnerable groups, including PWA.[103]

In 1990, the African Charter on the Rights and Welfare of the Child (ACRWC) was adopted by the Organisation of the African Union (OAU).[104] Just like the United Nations Convention on the Rights of the Child, the ACRWC is a comprehensive document stating the human rights, global principles and standards applicable to the status of children.[105] The ACRWC was initiated for the reason that the member states of the OAU, now known as the African Union (AU), alleged that the Convention on the Rights of the Child overlooked vital socio-cultural and economic issues specific to Africa.[106]

According to the ACRWC, a child is a human being below the age of 18 years.[107] The Charter acknowledges the child's distinctive and honoured position in African society and that children require protection against abuse and must be granted special care.[108]

African children are notoriously exposed to various forms of maltreatment and deprivation such as economic and sexual abuse, gender discrimination within the educational system, the health care system and involvement in armed conflict.[109] Additional issues affecting African children include child

(b) The improvement of all aspects of environmental and industrial hygiene;
(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness."

103 Chatrejee and Sheoran *Vulnerable Groups in India, Centre for Enquiry into Health and Allied Themes* 25.

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

105 United Nations Children's Emergency Fund "The African Charter on the Rights and Welfare of the Child" http://www.unicef.org/esaro/children_youth_5930.html (accessed 2015-10-10) 1.

106 Ekundayo "Does the African Charter on the Rights and Welfare of the Child (ACRWC) only Underlines and Repeats the Convention on the Rights of the Child (CRC)'s Provisions?: Examining the Similarities and the Differences between the ACRWC and the CRC" 2015 5(7) 1 *International Journal of Humanities and Social Sciences* 143 143.

107 Art 2 of the ACRWC reads as follows:
"Definition of a Child: For the purposes of this Charter, a child means every human being below the age of 18 years."

108 Ekundayo (2015 *International Journal of Humanities and Social Sciences* 147) writes: "One of the reasons for having an Africa Children's Charter was the feeling that Africa had been underrepresented during the drafting process of the CRC (only Algeria, Morocco, Senegal and Egypt participated meaningfully in the drafting process). A second reason was the thinking that Africa needed to have a charter for children which reflected the specifics of the African context."

109 The Preamble of the ACRWC reads as follows:
"The African Member States of the Organization of African Unity, Parties to the present Charter entitled 'African Charter on the Rights and Welfare of the Child', CONSIDERING that the Charter of the Organization of African Unity recognizes the paramountcy of Human Rights and the African Charter on Human and People's Rights proclaimed and agreed that everyone is entitled to all the rights and freedoms recognized and guaranteed therein, without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status,

prostitution, migration, early marriages, child-headed households, street children and extreme poverty.[110]

Earlier, this article addressed briefly how persons with albinism, including children with albinism, are victims of violence in the form of sexual exploitation, murder and being targeted for their body parts. An escalating number of children do not attend school or medical check-ups for fear of violence and discrimination. The ACRWC is an important instrument for the protection of the rights of children with albinism, as it emphasises the protection of children from violence, discrimination, ill-treatment, and negative social and cultural practices, including all forms of exploitation or sexual abuse and the kidnapping of and trafficking in children.

RECALLING the Declaration on the Rights and Welfare of the African Child (AHG/ST.4 Rev.l) adopted by the Assembly of Heads of State and Government of the Organization of African Unity, at its Sixteenth Ordinary Session in Monrovia, Liberia from 17 to 20 July 1979, recognized the need to take appropriate measures to promote and protect the rights and welfare of the African Child, NOTING WITH CONCERN that the situation of most African children, remains critical due to the unique factors of their socio-economic, cultural, traditional and developmental circumstances, natural disasters, armed conflicts, exploitation and hunger, and on account of the child's physical and mental immaturity he/she needs special safeguards and care, RECOGNIZING that the child occupies a unique and privileged position in the African society and that for the full and harmonious development of his personality. the child should grow up in a family environment in an atmosphere of happiness, love and understanding, RECOGNIZING that the child, due to the needs of his physical and mental development requires particular care with regard to health, physical, mental, moral and social development, and requires legal protection in conditions of freedom, dignity and security, TAKING INTO CONSIDERATION the virtues of their cultural heritage, historical background and the values of the African civilization which should inspire and characterize their reflection on the concept of the rights and welfare of the child, CONSIDERING that the promotion and protection of the rights and welfare of the child also implies the performance of duties on the part of everyone, REAFFIRMING ADHERENCE to the principles of the rights and welfare of the child contained in the declaration, conventions and other instruments of the Organization of African Unity and in the United Nations and in particular the United Nations Convention on the Rights of the Child; and the OAU Heads of State and Government's Declaration on the Rights and Welfare of the African Child."

[110] See the Preamble of the ACRWC. Art 27 of the Charter reads as follows:

Sexual Exploitation

"1. States Parties to the present Charter shall undertake to protect the child from all forms of sexual exploitation and sexual abuse and shall in particular take measures to prevent:
   (a) the inducement, coercion or encouragement of a child to engage in any sexual activity;
   (b) the use of children in prostitution or other sexual practices;
   (c) the use of children in pornographic activities, performances and materials."

Art 27 of the Charter reads as follows:

Protection against Harmful Social and Cultural Practices

"1. States Parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular:
   (a) those customs and practices prejudicial to the health or life of the child; and
   (b) those customs and practices discriminatory to the child on the grounds of sex or other status.
2. Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory."

Article 14 of the ACRWC states that every child has the right to enjoy the best attainable state of physical, mental and spiritual health. This includes the provision of nutritious food and safe drinking water, as well as adequate health care. Children with albinism's right to health is infringed when they are attacked physically and when they endure mental torture because of the consequences of the fear they undergo following an actual attack or an anticipated attack, as their safety is always at risk. Mental torture is also seen stemming from discrimination and persecution, which have harmful emotional and mental effects. Persons with albinism are noted as being either depressed, anxious, or experiencing other forms of psychological stress, from time to time.

Children with albinism are subjected to cultural and traditional practices that are harmful to their health and the ACRWC under article 24(3) provides that States Parties have to take appropriate measures to eliminate traditional practices that are harmful to the health of children, and this extends to children with albinism. The measures that should be taken by the South African government regarding the realisation of the right to health of children with albinism should be directed towards eliminating harmful practices against children with albinism, since such practices are detrimental to their health.

The adoption and coming into force of the Convention on the Rights of the Child (CRC) was an important historic event.[111] The philosophy underpinning the CRC derives from resistance to the nineteenth-century view of children as mere property, entirely submissive to their fathers and treasured only in economic terms.[112]

Before the adoption of this Convention, a number of international instruments and organisations expressed the need for an instrument that would regulate the rights of the child, which culminated in the drafting of the CRC.[113] One of these was the International Labour Organisation (ILO), which deals with issues such as minimum employment age, working hours and other conditions of employment for children and the protection of children who work under very dangerous conditions.[114] Various other multilateral agreements also protect the rights of children.[115]

The protection provided by the CRC applies to children *per se* and not children as constituent members of a family or other social group.[116] The rights referred to are not assumed to be held by any other person.[117] Under the Convention, a child is recognised as an independent person separate

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111 UNGA Convention on the Rights of the Child 1577 UNTS 3 (1989). Adopted: 20/11/1989; EIF: 02/09/1990; and Verhellen *Convention on the Rights of the Child: Background, Motivation and Strategies* (2006) at back cover page.

112 Mower *The Convention on the Rights of the Child: International Law Support for Children* (1997) 11.

113 Mower *The Convention on the Rights of the Child: International Law Support for Children* 12.

114 *Ibid*.

115 *Ibid*.

116 Verhellen *Convention on the Rights of the Child: Background, Motivation and Strategies* 4.

117 *Ibid*.

from all other persons or groups of persons.[118] A child is not only recognised as possessing such rights but as having the capacity to assert such rights in national judicial and administrative proceedings.[119]

A self-governing body of experts monitors the CRC by assessing state reports, and in turn, compiling recommendations.[120] The CRC does not have an individual complaint mechanism.[121] The political will of the state party as reviewed by the committee of the CRC determines the enforcement of the Convention.[122]

Many children with albinism are victims of discrimination, as they are the most fragile and vulnerable.[123] Article 24 of the CRC explicitly mentions primary health care for children. Primary health care underlines the need to eliminate exclusion as well as social disparities in health, which involves organising health-related services around the needs as well as expectations of children.[124] So as to fully realise the right to health for all children, governments have a duty to ensure that the health of children is not undermined as a result of discrimination, which is a significant factor contributing to vulnerability.[125]

According to the CRC, children have a right to health and to be free from violence, abuse and neglect; yet many children with albinism are victims of violence, abuse, and neglect, and this has proven to cause far-reaching harm to their physical and mental health and development.

In November 2007, South Africa ratified the United Nations Convention on the Rights of Persons with Disabilities (CRPWD)[126] The CPRWD is the most recent significant international human rights instrument relating to disability. The CRPWD came into force on 3 May 2008 with the purpose of protecting the fundamental rights and integrity of persons living with disabilities.

The CRPWD marked the beginning of a new era in disability rights and was the culmination of a 30-year struggle by people in the disability rights movement and advocates of human rights to gain acknowledgment that everyone, regardless of impairment, must enjoy all human rights and fundamental freedoms.[127] It altered the playing field for people universally by

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118 *Ibid*.

119 *Ibid*.

120 Alum, Gomez and Ruiz, "Hocus Pocus, Witchcraft, and Murder: The Plight of Tanzanian Albinos" 2009 *International Team Project* 1 42–44.

121 Alum *et al* 2009 *International Team Project* 42–44.

122 *Ibid*.

123 Bukulupi "Child Sacrifice, Myth or Reality" 2014 30(1) *International Letters of Social and Humanistic Sciences* 1 2.

124 UN CRC. General Comment No 15 on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (Art 24) CRC/C/GC/15 (17 April 2013) page 3.

125 General Comment No 15 on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (Art 24) page 4

126 UNGA Convention on the Rights of Persons with Disabilities (2007) 2515 UNTS 3; A/RES/61/106. Adopted: 24/01/2007; EIF: 03/05/2008.

127 Rioux "Disability Rights and Change in a Global Perspective" 2011 14(9) *Sport in Society* 1094 1094.

giving official acknowledgment that disability is a rights issue[128] on the one hand, and a social development issue on the other.[129]

The CRPWD covers most aspects relating to the daily lives of children and adults with disabilities, such as the rights of children and adults to attend schools and to receive inclusive education. The Convention also requires that the State provide disabled children and adults with vocational education, rehabilitation, and the same range, quality and standard of free or affordable health services provided to other persons.

The CRPWD appears to take a middle road between the individual impairment model and the social model,[130] and it reflects a flexible and inclusive definition of disability.[131] The definition recognises that, while there might be myriad interpretations of disability, a juridical definition of disability for equality and non-discrimination purposes must at least imply impairment as a point of departure.[132] At the same time, the definition must be responsive to socio-economic barriers as constituent elements of disability.[133] The Convention accepts that impairment and the environment interact to produce the experience of disability when people with impairments cannot participate in society on an equal basis.

In order for disabled people to exercise their human rights, it is essential that there be constant dialogue and consensus about disability rights among the public, government and the private sector as well as a commitment to implement the spirit and moral intent of the CRPWD.[134] This dialogue has to accept how conventional philosophies around disability focused on individuals and their impairments as well as how this has fundamentally disadvantaged persons with disabilities. It must express solidarity with people who have been marginalised in their social participation.[135]

The CRPWD obliges states to take positive action to promote an extensive disability rights-based agenda.

The question whether PWA ought to contest their health-related discrimination on the basis of disability is a question that should be founded on a clear understanding of what disability is.

South Africa has no centralised disability legislation since it is generally assumed that the range of diverse statutes and state department policies regulating disability matters are sufficient. Our courts have interpreted disability by adopting an excessively narrow guiding principle in terms of who qualifies as disabled. It is clear that this definition of disability is centered on the existence of an actual impairment and on the degree of impairment. To

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128 Rioux 2011 *Sport in Society* 1094.

129 *Ibid*.

130 Dupper and Garbers *Equality in the Workplace: Reflections From South Africa and Beyond* (2009) 94.

131 *Ibid*.

132 Dupper and Garbers *Equality in the Workplace: Reflections From South Africa and Beyond* 195.

133 *Ibid*.

134 Rioux 2011 *Sport in Society* 90.

135 *Ibid*.

qualify under the protected class, such impairment must significantly restrict a person's ability to conduct normal activities. Such proof involves a detailed medical inquiry. The key enquiry is then how intensely a person is affected by albinism.

The current working definition of disability stems from the case of *IMATU v City of Cape Town.*[136] South Africa's narrow approach to disability, as pointed out, excludes many disabled people from protection on the grounds that their impairment is not severe enough in itself, or that they are coping so satisfactorily with the impairment that they no longer require protection from discrimination.

South Africa's narrow approach to disability excludes several PWA from protection on the grounds that their impairment is not severe enough in itself, or that they are coping so satisfactorily with the impairment that they no longer require protection from discrimination. This position stands irrespective of the merits of the victim's claim of discrimination. This has had the adverse effect that persons who can mitigate their disabilities and evidently are capable of working are unable to rely, for example, on the Employment Equity Act[137] or Social Assistance Act.[138]

The Convention asserts the social construction of disability by stipulating that the definition of disability ought to be advanced not from the viewpoint of the supposed medical condition of an individual, but from those perspectives of society that disable persons by generating attitudinal and physical barriers preventing them from effectively contributing to society. The Convention thus goes beyond the question of "access to the physical environment" and tackles the broader concerns of equality and elimination of legal, social and attitudinal obstructions to the participation of people with disabilities. An employee with albinism should therefore be protected from discrimination emanating from misconceptions, myths and stereotypes about their condition.

Article 25 of the CRPWD specifies that "persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability". The measures taken by the South African government regarding the realisation of the right to health of children with albinism should be directed towards maximum inclusion in the receiving of health services. It is also vital that persons with albinism are aware of their human rights as provided in article 25 of the CRPWD when accessing health care services. In addition, it is correspondingly important for health care professionals to comprehend their responsibilities in terms of the CRPWD.

4 CONCLUSION

The Department of Health's Strategic Plan 2020/21–2024/25 is determinedly grounded on strengthening the South African health system. Twelve of the

136 2005 (11) BLLR 1084 (LC) 1091.
137 55 of 1998.
138 13 of 2004.

eighteen outcomes prioritised by the Department of Health are geared towards strengthening the health system, as well as improving quality of care, with the remaining five outcomes responding to the quadruple burden of disease in South Africa. The Department of Health's Strategic Plan for 2020/21–2024/25 covers a range of critical health issues, including developing the national health insurance scheme, ending the epidemics of AIDS, malaria and neglected tropical diseases, combating hepatitis and making access to universal sexual reproductive health a reality.[139] The study recommends that the health concerns of PWA be added to the list of critical health issues.

Against the backdrop of the right to health care services enshrined in the South African Constitution, this article proposes that lobby groups should take the first step and approach the court to challenge the government's failure to progressively realise their right of access to health care services by neglecting to provide preventative services such as dermatological skin checks, eye checks and protective sunscreen lotion, as well as vision aids, and eye correction surgery, within its available resources. Although one can argue that PWA are no different from other classes of persons with health risks, such as diabetics or persons with hypertension, this article submits that none of these other health conditions cause their sufferers to be targeted in the very unique way that PWA are. The stigmatisation of and discrimination against HIV-positive persons is severe but not as dangerous as those relating to PWA who have special needs, such as for focused trauma counselling for victims of assault, discrimination, rape and amputation in addition to cancer.

Over the years, we have seen several noteworthy policy achievements at national level, in for example, public health, where the outcome of advocacy was by lobby groups. To mention but one example, the Treatment Action Campaign (TAC) advocated for the right to a prevention-of-mother-to-child (PMTCT) programme, demanded a national antiretroviral treatment plan and went further than just demanding that government comply with abstract legal obligations.[140] The TAC was launched in South Africa on 10 December 1998, on International Human Rights Day, by a small group of political activists.[141] The fundamental consensus within the group was that equitable access to health care, particularly medicines for HIV, is a human right.[142] By doing this, the TAC assimilated moral and legal strength from the South African Constitution, which embeds rights to equality, life and dignity.[143] The goal of the founders of the TAC was to popularise and enforce what was lightly described as "the right of access to treatment" through an

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139 The Department of Health, National Strategic Plan for 2020/21–2024/25 https://www.health.gov.za/wp-content/uploads/2020/11/depthealthstrategicplanfinal2020-21 to 2024-25-1.pdf (accessed 2021-10-10).

140 The Humanitarian "A Timeline of HIV/AIDS Activism" https://www.thenewhumanitarian.org/report/93877/south-africa-timeline-hivaids-activism (accessed 2021-08-10).

141 Heywood "South Africa's Treatment Action Campaign: Combining Law and Social Mobilization to Realize the Right to Health" 2009 1 *Journal of Human Rights Practice* 14.

142 *Ibid*.

143 *Ibid*.

amalgamation of protest, mobilisation, and legal action.[144] The TAC also worked with scientists and researchers to develop plans as well as policy proposals with which the government was supposed to comply.[145]

The successes of the TAC exemplify how this can be done effectively. The same is proposed for the health concerns of PWA. It is important for lobby groups to ensure that PWA are included visibly in promoting and protecting their rights, benefits and common welfare. Such lobby groups should be officially launched to raise political consciousness and put emphasis on the health-related barriers facing PWA. Strategies for advocacy at the national level must consider proposing policies that influence governmental budgets to prioritise albinism-related spending priorities. Such advocacy should particularly propose that policymakers must reframe health-spending priorities to include albinism-related needs.

Although we have seen albinism-related campaigns, several of these efforts have not thrived, as the fairly recent passage of protests and action initiatives by PWA proves.[146] By speaking out for PWA, lobby groups can keep the health issues facing PWA alive in the media and increase or create public consciousness at a time when their needs are being overlooked in the political arena. Legislative lobbying can serve diverse purposes beyond influencing or obstructing a particular Bill. It can complement the service-delivery objectives of participating organisations by providing increased funding for health-related programmes.

The South African government must understand the variations in human genetics and find effective solutions towards the health problems that stem from mutated heredities.

144 *Ibid*.

145 *Ibid*.

146 SABC News "People With Albinism Still Face Many Forms of Discrimination" https://www.sabcnews.com/sabcnews/people-with-albinism-still-face-many-forms-of-discrimination/ (accessed 2021-09-28).

THE DISAPPEARANCE OF REFUGEE RIGHTS IN SOUTH AFRICA

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SUMMARY

This article critically examines the nature and scope of the type of refugee protection offered by South Africa to people fleeing their home countries. It offers an analytical demonstration of how South Africa has gradually developed conflicted and ambivalent attitudes towards the protection of refugees and asylum seekers. South Africa's conflicted and ambivalent attitudes towards refugee protection are evident in several amendments made to the refugee regime, to restrict the enjoyment of refugees' socio-economic protection. The purpose of this article is therefore to demonstrate that the ongoing amendments to the refugee legal framework – without harmonisation with socio-economic laws – increasingly result in the disappearance of refugee rights. This, in turn, results in the creation of disgruntled refugees; through protests, they express their dissatisfaction with ineffective protection, and consequently demand to be resettled or relocated to other countries for better and effective protection.

1 INTRODUCTION

Refugee laws and regulations were adopted to control and govern the admission of persons (refugees) attempting to escape persecution and seeking asylum in South Africa, on the one hand, and to extend constitutionally based rights to them, on the other. The first refugee laws and regulations came into operation in 2000. For a long time, several domestic and international organisations, including the United Nations High Commissioner for Refugees, praised these laws and regulations as the most progressive in the world.[1] However, these laws and regulations were not without weaknesses, gaps and shortcomings, as demonstrated in previous

[1] Rulashe "UNHCR Chief Commends Pretoria's Refugee Policy, Pledges Cooperation" (27 August 2007) http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&skip=36&docid=46cf10634&query=%22south%20africa%22 (accessed 2021-09-18); Khan *Patterns and Policies of Migration in South Africa: Changing Patterns and the Need for a Comprehensive Approach* Paper drafted for discussion at Meeting on Migration, Loreto, Italy (3 October 2007) and James "Seeking Refuge in South Africa: The Victimization of Vulnerable Persons" 2017 20 *Temida* 170 179.

papers and research projects.[2] The gaps and shortcomings of the initial refugee regime (and subsequent amendments) render it difficult, if not impossible, for individuals escaping persecution and seeking asylum to enjoy the refugee rights that are – owing to their universal nature – entrenched in the Bill of Rights. Difficulties arising from attempts to enjoy these rights were described in submissions to lawmakers by civil society organisations, lobbying and advocating for the plight of foreign nationals – particularly, refugees, asylum seekers and other vulnerable migrants.[3]

Against this background, this article discusses the shrinking of the refugee protection that South Africa has committed to offer asylum seekers escaping from repressive governments, political violence, civil war, or other events disrupting public order. The discussion is approached from the standpoint of social legal theory, which is based upon the notion that:

> "[l]aw is a social historical growth – or more precisely, a complex variety of growths – tied to social intercourse and complexity. Certain of these legal manifestations develop and evolve, while others wither or are absorbed or supplanted. Law has roots planted in the history of a society, develops in social soil alongside other social and legal growth, tied to and interacting with surrounding conditions."[4]

With reference to social legal theory, it is argued that the protection of refugees has become infinitely complex and contested. As a result, an interdisciplinary approach to the protection of refugees and asylum seekers is not followed. The gradual disappearance of refugee protection appears to emerge and evolve within the established institution of the post-1994 reconstruction and development agenda[5] and its procedural legal, political framework, which is morally informed by South Africa's history of discrimination, racism, repression and xenophobia. The post-1994 reconstruction and development agenda is also informed by section 9(2) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and is known as "substantive, remedial or restitutionary equality".[6] Within these

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2 Kavuro "Refugees and Asylum-Seekers: Barriers to Accessing South Africa's Labour Market" 2015 19 *Law, Democracy and Development* 232 232–260; Kavuro "Exploring the Full Legal Protection of Refugees and its Limitations with Reference to Natural and Positive Law" 2018 39 *Obiter* 17 17–44 and Kavuro ***Refugees' Access to Socio-Economic Rights: Favourable Treatment for the Protection of Human Dignity*** (doctoral thesis, Stellenbosch University) 2018.

3 Parliamentary Monitoring Group (PMG) "Issues That Affect Migrants and Citizens: Engagement with NGOs & Stakeholders" (29 October 2019) https://pmg.org.za/committee-meeting/29180/ (accessed 2020-03-25).

4 Calnan "Systematising Social Legal Theory" (2018) Academia.edu https://www.academia.edu/37158991/SYSTEMATIZING_SOCIAL_LEGAL_THEORY (accessed 2020-06-10).

5 ANC *The Reconstruction and Development Programme* (1994) 2 notes that the reconstruction and development agenda is needed because South African history "has been a bitter one characterised by colonialism, racism, apartheid, sexism and repressive labour policies… [and that South Africa's] income distribution is racially distorted and ranks as one of the most unequal in the world – lavish wealth and abject poverty characterise our society."

6 S 9(2) provides that "[e]quality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination must be taken." For the meaning of substantive equality, see Currie and De

contexts, refugee protection is shrinking and disappearing as the rights and interests of refugees and asylum seekers have not been given due consideration in transformative, remedial or restitutionary measures in the form of affirmative action or black economic empowerment approaches to improvement in the quality of life of citizens or redressing past injustices. This has culminated in the government's reluctance to include refugees and asylum seekers in the social welfare system, including the current emergency COVID-19 relief packages.[7] Exclusion from the social welfare system is usually justified by the State on the premise that it relies on the asylum management system to manage the influx of economic migrants and to regularise their stay in the country.[8] However, this justification is not supported by research findings, which, on the contrary, hold that exclusion and discrimination are embedded in the history of South African society.[9] Exclusion of others develops in the South African social soil, which is characterised by institutionalised ill sentiments and xenophobic tendencies towards fellow African foreign nationals.

Due regard is given to Lalbahadur's argument that there is "a history of institutionalised xenophobia that prevents refugees and asylum seekers from accessing state resources, securing the right to live and work in the country".[10] Institutionalised xenophobia is evident in political statements that describe both refugees and asylum seekers as bogus refugees who are in the country to benefit from the fruits of democracy.[11] Based on such political views and understanding, they are therefore not considered in efforts to address socio-economic problems affecting the South African society in which they live. As a result, socio-economic laws – adopted for remedial purposes – do not speak to refugee law. Moreover, it appears that the more the refugee regime is amended, the more measures are introduced to restrict access to social welfare, resulting in institutionalised exclusion, and not in addressing the gaps and shortcomings in the initial refugee system.

Waal *The Bill of Rights Handbook* (2017) 213–214 and *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) par 41 and *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) par 60–61.

7 Kavuro "South Africa Excludes Refugees and Asylum Seekers from Covid-19 Aid" (2020-05-29) *Mail & Guardian*.

8 African National Congress (ANC) "Peace and Stability: Policy Discussion Document" (March 2012) 5; Department of Home Affairs "White Paper on International Migration for South Africa" (July 2017) in *GG* 41009 of 2017-07-28 59; and Department of Home Affairs "White Paper on Home Affairs" (August 2019) in *GG* 42162 of 2019-06-18 35.

9 Nyamnjoh *Insiders and Outsiders: Citizenship and Xenophobia in Contemporary Southern Africa* (2006) 38; Comaroff and Comaroff "Naturing the Nation: Aliens, Apocalypse and the Postcolonial State" 2001 7 *Social Identities* 252 and Ukwandu "Reflections on Xenophobic Violence in South Africa: What Happens to a Dream Deferred?" 2017 7 *African Journal of Public Affairs* 43 43–62.

10 Tamanaha "Law's Evolving Emergent Phenomena: From Rules of Social Intercourse to Rule of Law Society" 2018 95 *Washington University Law Review* 1 5.

11 Kavuro "Reflecting on Refugees and Asylum-Seekers Tertiary Education in South Africa: Tension Between Refugee Protection and Education Transformation Policies" 2013 4 *Global Education Magazine* 22 23–24.

2 DIFFICULTIES IN THE DIFFERENTIATION OF LEGAL PROTECTION

Legal indicators of a shrinking refugee protection regime in South Africa have developed or evolved through a number of issues including socio-economic transformation aspirations ingrained in historical racism, hatred, and discrimination. One cannot, however, ignore difficulties in the differentiation of legal positions of different categories of foreign national. An inability to differentiate between categories of foreign national renders the principle of international refugee protection opaque. Such inability is tied to the rules of conduct of South African society, which it has constructed for its own progress and prosperity. Tamanaha argues that there are certain fundamental rules of social intercourse that guide a particular society or community or group to viability or survival.[12] These fundamental rules of social intercourse are said to be tied to human nature and the need for self-preservation. They evolve or emerge from the fact that human beings are self-interested and also altruistic towards others and develop in such context.[13] Because members of the community or group understand that there are limited resources to meet their basic needs, they become unfriendly towards outsiders. Hence, they are not willing to compete with others.[14] As Tamanaha succinctly puts it, these self-interested desires ignite or motivate the need to protect personal, community or national resources.[15]

The viability or sustainability of South African society is accordingly centred on both self-interest and altruism as fundamental rules of social intercourse that seek to uplift the poor from inherited poverty, in particular, and the society from deep social inequalities, in general. Self-interest and altruism evolved into hate, discrimination and xenophobia against foreign nationals. This has developed into blurring the legal distinctions and positions of different categories of foreign national and thus viewing them collectively as economic migrants who are in the country to take over "jobs and resources [and to] foster crime, prostitution and disease".[16]

With these misconceptions in the public domain, there is a lack of clear legal distinction between four often-confused concepts – namely, asylum seekers and refugees, on the one hand, and temporary residents and permanent residents, on the other. Asylum seekers are usually viewed as economic migrants. It is important to point out at this stage that the immigration law makes distinctions between foreign nationals with temporary resident status and foreign nationals with permanent resident status. On the other hand, refugee law distinguishes between foreign nationals with refugee status and foreign nationals with asylum-seeker status. The term economic migrant cannot be found in immigration or refugee law. The framework of foreign nationals with temporary resident status is too broad to include refugees and asylum seekers. Other foreign nationals who were admitted in the country to sojourn temporarily include, but are not limited to, tourists,

12 Tamanaha 2018 *Washington University Law Review* 5.
13 *Ibid*.
14 *Ibid*.
15 Tamanaha 2018 *Washington University Law Review* 6.
16 Nyamnjoh *Insiders and Outsiders* 38

investors, international students, labour migrants and members of diplomatic corps. Pursuant to immigration law, economic migrants can be classified as *illegal foreigners*. They are temporary residents who sojourn in the country in contravention of the provisions of the Immigration Act 13 of 2002, as amended (Immigration Act), as the article turns to explain.

2 1 Temporary residents

2 1 1 Economic migrants

Emerging tendencies in which state officials view refugees and asylum seekers as either economic migrants or illegal migrants are tied to South Africa's history of institutionalised xenophobia, which motivates the desire to exclude refugees and asylum seekers from the post-1994 reconstruction and development agenda. The exclusion is driven by the conviction that South Africa is the largest economy in the Southern African Development Community region and the African continent and thus attracts a high number of economic migrants who use the asylum management system as an entry point.[17] Indeed, owing to gaps in the asylum regime, it cannot be denied that economic migrants use the loose asylum management system to enter, stay and work in the country on a ticket of asylum seeking. They do so simply because economic migrants do not meet the conditions and terms set by the twin principles of exclusion and self-sufficiency on which immigration law is constructed, as discussed later.

Legally speaking, economic migrants are illegal foreigners in the country and thus "undesirable persons". The term "undesirable person" is defined in the Immigration Act to include a foreign national who is in the country, but who cannot fend for him or herself and who is or is likely to become a public charge.[18] The meaning of being a public charge is implied or conceived in the notion of receiving and enjoying state support if they are unable to support themselves. Section 42(1)(*a*) of the Immigration Act prohibits anyone from aiding, abetting, or assisting economic migrants, except for necessary humanitarian reasons. This implies that even though economic migrants are socially vulnerable, they should support themselves unless for necessary humanitarian reasons. The Immigration Act does not define what may be *necessary* reasons to offer humanitarian aid to vulnerable economic migrants.

In principle, economic migrants must be detected and arrested for expulsion or deportation. It is, however, crucial at this point to note that South Africa offers, from time to time, exemption permits to certain categories of economic migrant from neighbouring or certain countries in order to allow them to work, study or conduct business.[19] These economic migrants are simply exempted from the requirement of self-sufficiency, but they are still not allowed to have access to state-funded public goods. The Immigration Act, not the Refugees Act 130 of 1998 (Refugees Act),

17 Dept of Home Affairs "White Paper on International Migration for South Africa" (July 2017) 59.

18 S 30 of the Immigration Act.

19 For e.g., the Exemption Permit Visa for citizens of Lesotho, Zimbabwe and Angola.

regulates the treatment of economic migrants with special permits – such as Angolan, Lesotho or Zimbabwean Exemption Permit Visas. Economic migrants with exemption permit visas – issued in terms of section 31 of the Immigration Act – must fend for themselves and should not seek state support to meet their basic needs. Based on the immigration rule of self-sufficiency, they are excluded from the social welfare system, including the emergency COVID-19 relief packages.[20] However, drawing on the principles of humanitarian emergencies contained in social assistance law, the Scalabrini Centre approached the court for review of their exclusion from, in particular, the COVID-19-based Unemployment Relief Fund.[21] The Scalabrini Centre argued that the exclusion of special permit holders, along with asylum seekers from the Fund was inconsistent with regulation 9(5) of the regulations in terms of the Social Assistance Act 13 of 2000.[22] As a result, the court agreed that the exclusion violated their constitutional rights to equality, dignity and access to social security,[23] as they ought to be included as beneficiaries in the social grant scheme in the event of a declared or undeclared disaster.[24] Based on this premise, economic migrants can only have access to social welfare if they are affected by a disaster on South African territory.

2 1 2 Asylum seekers

Until the decision of the Supreme Court of Appeal in the 2004 case of *Minister of Home Affairs v Watchenuka*[25] and the adoption of the Refugees Amendment Act 33 of 2008, asylum seekers were partially treated as people who can fend for themselves. Prior to these developments, they could not assert their right to have access to subsidised socio-economic services. While the *Watchenuka* decision demanded that the State allow asylum seekers to enjoy the rights to work and education, the 2008 Refugees Amendment Act stipulates duties, obligations and rights of asylum seekers. Section 27A(d) of the Refugees Act, as amended, provides that asylum seekers are entitled to the rights in the Bill of Rights, insofar as those rights apply to asylum seekers. The formulation of this provision creates legal uncertainties and raises interpretive difficulties. In fact, section 27A(d) sounds like a tautology: asylum seekers are entitled to the rights that apply to them. There is no expression of specific rights in the Constitution that apply to asylum seekers in particular. Rather, there are constitutional rights that apply to everyone. The Constitution vests universal rights in everyone;

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20 Kiconko "COVID-19 Pandemic and Racialized Risk Narrative in South Africa" (2020) COVID-19 ODA Rapid Response Research Report, University of Liverpool, https://www.liverpool.ac.uk/media/livacuk/research/heroimages/The,COVID-19,Pandemic,and,Racialised,Risk,Narratives,in,South,Africa.pdf (accessed 2021-09-25).

21 *Scalabrini Centre v Department of Social Development* 2021 (1) SA 553 (GP).

22 GN R162 in *GG* 8165 of 2005-02-22.

23 *Scalabrini Centre v Department of Social Development supra* par 7.

24 *Scalabrini Centre v Department of Social Development supra* par 5.

25 [2004] 1 All SA 21 (SCA).

these include socio-economic rights and benefits,[26] except for the right to land.[27]

It has been noted that law is rooted in the history of society and is a product of social influences. South Africa is a country that historically experienced racism, discrimination and oppression and xenophobic sentiments pervade South African society. Consequently, these ill sentiments influence the parameters within which refugees and asylum seekers seek protection. Against this background, the State displays conflicted and ambivalent attitudes towards the protection of asylum seekers. These conflicted attitudes manifest themselves in uncertainties on the part of the State on the question of whether asylum seekers should be included in the post-1994 reconstruction and development programmes that seek to mobilise national resources towards the eradication of the ravages of apartheid. The State is seen adopting (and is applauded for adopting) laws promoting the socio-economic inclusion of asylum seekers in the social welfare system (such as the Refugees Amendment Act 33 of 2008) but, at the same time, it shows no political will to implement those laws. The State is evidently willing to go to court to present reasons for non-implementation; to substantiate this arbitrary social exclusion; and, in return, to adopt anti-refugee policies that allow it to avoid obligations created by its own laws. These emerging legal conflicts and divergences are shaped by the behaviour, spirit and morals of South African society, which favours distributing or mobilising national resources for the benefit of citizens who struggled against the apartheid system.

Socially and economically, law is used as a social institution that constitutionally transforms South African society from an unequal to an egalitarian society. This ethos shapes the South African legal system in such a way that it focuses on or prioritises the improvement of the lives of the historically disadvantaged. This is evident in the case of *Watchenuka*, where the State justified the exclusion of asylum seekers from employment on the main ground that it deprived citizens of employment opportunities.[28] To ensure the protection of such opportunities, asylum seekers should therefore be prevented from developing their potential through education and training.[29] Exclusion from the right to undertake education and training is further politically justified on the premise that a large number of asylum seekers are bogus in that they do not deserve to enjoy constitutional rights that are accorded to *genuine* asylum seekers. Bogus asylum seekers are defined by the 2017 White Paper on International Migration for South Africa as an influx of economic migrants who abuse the asylum management system to regularise their stay and to get access to state resources and livelihoods.[30] However, the Supreme Court of Appeal rejected a general exclusion from the livelihood sphere on the ground that such exclusion will inevitably adversely affect genuine asylum seekers "who have no

[26] Ss 26, 27, 28(1)(*c*) and 29 of the Constitution.

[27] S 25(5) of the Constitution.

[28] *Minister of Home Affairs v Watchenuka supra* par 33.

[29] *Ibid*.

[30] Dept of Home Affairs "White Paper on International Migration for South Africa" (July 2017) 59.

reasonable means of support other than through employment".[31] A general prohibition against employment in such circumstances will amount to "a material invasion of human dignity that is not justifiable in terms of [section] 36 of the Constitution".[32]

The *Watchenuka* decision did not deter the State from its continued exclusion of asylum seekers (along with refugees) from accessing state resources and securing rights to lead a dignified life. This is given credence by the 2015 case of *Somali Association of South Africa v Limpopo Department of Economic Development Environment and Tourism,*[33] in which asylum seekers and refugees successfully challenged their exclusion from engaging in business and trading. The State sought to protect national interests on the ground that the right to self-employment in the form of running businesses was reserved for citizens. The State justified this argument based on section 22 of the Constitution and concluded that only citizens "have the right to engage in self-employment, and that there is thus a blanket prohibition against foreign nationals who are asylum seekers and refugees engaging in self-employment – which in this case would amount to a prohibition on trading."[34] Again, the court rejected this argument on the moral ground that the State was myopic concerning the real problems experienced by asylum seekers and refugees and that the prohibition of refugees and asylum seekers from trading has the effect of diminishing their status.[35] The court opined that section 22 of the Constitution does not prevent refugees from working.[36] Neither does it place a blanket prohibition on asylum seekers from working.[37]

Considering its earlier legal opinion in the decision of *Watchenuka*, the Supreme Court of Appeal in *Somali Association of South Africa*, therefore, concluded:

> "if, because of circumstances, a refugee or asylum-seeker is unable to obtain wage-earning employment and is on the brink of starvation, which brings with it humiliation and degradation, and that person can only sustain him- or herself by engaging in trade, that such a person ought to be able to rely on the constitutional right to dignity in order to advance a case for the granting of a licence to trade as aforesaid."[38]

The court is seen to underline that asylum seekers should not be restricted from employment or self-employment in the form of trading if this is the only option available to leading a dignified life. Notwithstanding these judicial decisions, it should be noted that societal ill sentiments towards foreign

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31 *Minister of Home Affairs v Watchenuka supra* par 33.

32 *Ibid*.

33 2015 (1) SA 151 (SCA).

34 *Somali Association of South Africa v Limpopo Department of Economic Development Environment and Tourism supra* par 31.

35 *Somali Association of South Africa v Limpopo Department of Economic Development Environment and Tourism supra* par 33.

36 *Somali Association of South Africa v Limpopo Department of Economic Development Environment and Tourism supra* par 38.

37 *Somali Association of South Africa v Limpopo Department of Economic Development Environment and Tourism supra* par 40 43.

38 *Somali Association of South Africa v Limpopo Department of Economic Development Environment and Tourism supra* par 43.

nationals always influence the actions of the State, which disregards both refugee-law principles and judicial reviews.

When the State sought to develop and bring refugee protection in line with these two decisions of the Supreme Court of Appeal through the 2017 amendments, the law evolved into a more restrictive form. Without deep analysis, one might think that the State moved away from the general prohibition of employment, self-employment and education for asylum seekers. However, the 2017 amendments allow asylum seekers to undertake these opportunities in very restricted circumstances, meaning that such opportunities can be enjoyed by asylum seekers only if such enjoyment is endorsed by the Standing Committee for Refugees Affairs.[39] For example, it comes as no surprise that the State emphasised that the right to work can only be endorsed by the Standing Committee on the condition that an asylum seeker must *not* be staying in an asylum processing centre (expected to be funded by humanitarian organisations).[40] The disappearance of the right to work and study is therefore more evident in the new approach to confine asylum seekers to asylum processing centres to be established close to the northern border posts.

What is implied in the endorsement condition is a reluctance to allow self-sufficient asylum seekers to undertake education and training. It appears that exemption from staying in an asylum processing centre will be afforded asylum seekers who can support themselves or who can be supported by their relatives.[41] This suggests that indigent asylum seekers, who will be accommodated in the asylum processing centres, are not entitled to the right to study or work. The gist of the 2017 amendments is to ensure that indigent asylum seekers are no longer integrated into communities. In other words, the 2017 amendments are aligned with the twin immigration principles of exclusion and self-sufficiency; the confinement of asylum seekers to asylum processing centres seeks to avoid competition between them and citizens. The removal of asylum seekers from the community and its economy is further underlined in the 2017 White Paper on International Migration for South Africa[42] and is applauded by the 2019 White Paper on Home Affairs, which stresses that such an approach will remove the need to allow asylum seekers to work.[43] Economic opportunities and national resources can clearly be safer if it is made difficult for asylum seekers to integrate themselves into South African society. In this regard, the 2017 amendments are indicative of the social and legal conditions in which the refugee protection system has evolved and developed.

Social and legal conditions surrounding the development of the refugee regime can be summarised as follows: first, asylum seekers are admitted

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39 The SCRA must endorse the right to work or study and further "determine the period and conditions in terms of which such asylum-seeker may work or study whilst awaiting the outcome of their application for asylum". See s 9C(1)(*b*) of the Refugees Act, as amended by the Refugees Amendment Act 11 of 2017.

40 S 22(7) of the Refugees Act as amended by s 18 of the Refugees Amendment Act of 2017.

41 See s 22(6) of the Refugees Act as amended by s 18 of the Refugees Amendment Act of 2017.

42 Dept of Home Affairs "White Paper on International Migration for South Africa" (July 2017) 61.

43 Dept of Home Affairs "White Paper on Home Affairs" (June 2019) 19–20.

into the country to process their asylum application and, secondly, they may be refused asylum if their applications are found to be fraudulent, abusive, or unfounded[44] or if they are disqualified from refugee status in terms of section 4 or 5 of the Refugees Act. Considering these grounds, the 2017 White Paper noted with concern that 90 per cent of claims of asylum made between 2012 and 2017 were merely abusive and did not deserve refugee protection.[45] In 2012, the ANC Document on Security and Stability also emphasised that 95 per cent of asylum claims were lodged by economic migrants. Both these documents classified these individuals who lodge abusive claims as *high-risk profiles* who must be deported to reduce the risk of threats to national security and stability. These abusive claims are detected using the risk-based approach. Based on the risk-based approach, rejection of applications is connected with or can be linked to national concerns that asylum seekers will first place a significant strain on the social welfare system and service delivery and, secondly, may engage in illicit activities for survival.[46] The inability to control the influx of economic migrants has been used by the government as a scapegoat for its failure to meet promises made to citizens to deliver core services for a better life. Municipal governments argue that they are faced with an inability to provide services and jobs for a burgeoning population.[47] In line with this concern, the refugee law evolves and develops in such a way that asylum seekers should not disturb the State's efforts to advance its citizens, in particular, the previously disadvantaged groups. From a socio-legal theory perspective, the protection of asylum seekers is not a burden South African society is willing to take on. National security is therefore an emerging socio-legal trend that is used by the South African government to close its borders to prevent asylum seekers from gaining access to the country and to arrest and deport them if they do gain access.[48] National security issues are further relied on to limit their access to the labour market and socio-economic programmes, even if they are granted refugee status.[49]

2 1 3 Refugees

In South Africa, the term "refugee" is used to refer to those asylum seekers who have formally been recognised as genuine refugees and thus granted refugee status. Unlike asylum seekers, refugees are fully protected by the Refugees Act, which accords to them full legal protection of the rights in the Bill of Rights that the Constitution vests in everyone.[50] This entails that refugees should be beneficiaries of subsidised economic programmes for the protection of their dignity and restoration of normalcy to their lives. This is in line with international refugee law, which provides that refugees, if admitted to a country, must have their situations improved and dignity

44 S 22(6) of the Refugees Act, as amended by the Refugees Amendment Act of 2017.
45 Dept of Home Affairs "White Paper on Home Affairs" (2019) 45.
46 James 2017 *Temida* 168.
47 PMG https://pmg.org.za/committee-meeting/29125/.
48 Moyo, Ronald and Zanker "Who Is Watching? Refugee Protection During a Pandemic: Responses from Uganda and South Africa" 2021 9 *Comparative Migration Studies* 1 5–7.
49 Moyo *et al* 2021 *Comparative Migration Studies* 14–17.
50 S 27(*b*) of the Refugees Act.

restored.[51] They must not simply be given humanitarian assistance such as food parcels; rather they must be enabled to be self-sufficient to become the master of their lives.[52] To become self-sufficient, their refugee rights must be harmonised with socio-economic, labour, and trade legislation.

Owing to the aforementioned reasons surrounding and shaping the evolution of the South African legal system, the Refugees Act is not harmonised with the legislation that gives effect to constitutional rights, such as the Housing Act,[53] the Healthcare Act,[54] and the National Student Financial Aid Scheme Act.[55] Of further concern is that the Refugees Act is not harmonised with the municipal laws (that is, by-laws) that are aimed at promoting socio-economic development at a local level or ensuring that socio-economic services are accessed by people at grassroots. The failure to harmonise the Refugees Act with socio-economic laws at national, provincial and local levels is rooted in and tied to laws that are adopted for various purposes to address inherited social inequality and economic disparities that had (and still have) a greater impact on the lives of historically disadvantaged communities. In this regard, legislation has been enacted to ensure that the national wealth of South Africa be restored to deserving citizens. Worth mentioning are the Broad-Based Black Economic Empowerment Act,[56] the Public Service Act[57] the Employment Equity Act,[58] the Competition Act,[59] and the Preferential Procurement Policy Framework Act.[60] Such laws and policies are adopted as remedial measures that give effect to the realisation of the visions of the post-1994 reconstruction and development agenda.

Whereas immigration law principles restrict the employment of foreign nationals in positions that can be filled by South Africans, refugees are hardly employed in these positions, when the question of addressing the past discrimination in the labour industry is raised. Low-skilled and semi-skilled refugees therefore struggle to find employment. Neither are they assisted in starting their own small business. The Department of Small Business Development does not consider them in its programmes. On top of this, financial institutions are reluctant to offer financial loans to refugees on the ground that they are temporary residents who can return home anytime. They are further excluded from student financial aid at higher learning institutions, as such aid was designed to redress unequal representivity of South Africans in education and training.[61] Based on the idea that they are economic migrants, refugees were excluded from the COVID-19 economic

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51 Art 2(b)–(c) of the Statute of the Office of the United Nations High Commissioner for Refugees of 1950.

52 Dryden-Peterson "Education of Refugees in Uganda: Relationship between Setting and Access" 2003 *Refugee Law Project, Working Paper No. 9* 14.

53 107 of 1997.

54 61 of 2008.

55 56 of 1999.

56 53 of 2003.

57 103 of 1994.

58 55 of 1998.

59 89 of 1998.

60 5 of 2000.

61 Preamble and s 4(*a*) of the National Students Financial Aid Scheme Act 56 of 1999.

relief packages. These include the debt relief finance scheme, the business growth/resilience facility, the tourism relief fund for small, medium and micro enterprises, the relief funding for distressed businesses, the employer relief fund or the national empowerment fund support.[62] Access to these funds relied either on compliance with black economic empowerment conditions[63] or on condition that a business or company was owned 100 per cent by citizens whose employees were 70 per cent citizens.[64] The development of these conditions for qualifications of COVID-19 relief packages were shaped and guided by emerging South Africa's post-1994 socio-legal theory that seeks to avoid any competition with non-citizens, on the one hand, and with previously advantaged citizens, on the other.

Politically, refugees are not viewed as members of the South African political community. They are consequently excluded from political platforms through which participatory democracy in the decision-making process takes place. As a result, policies that override the interests of refugees are taken. Rawls describes this exclusion in the context that participatory democracy in a constitutional transformation is always arranged in a manner that satisfies and advances the needs of citizens or is aligned to the will and desires of citizens.[65] As noted, the will of citizens is fundamentally shaped and guided by their history. In South Africa, socio-economic laws are engineered so as to address the socio-economic hardships experienced by historically disadvantaged people to the exclusion of previously advantaged people and vulnerable non-citizens. It is within this context that the interests of refugees and asylum seekers, whose voices are missing in political domains, are flouted. The State's desire to preserve national resources for citizens has gradually caused, shaped, and developed feelings of self-centredness, hatred and anger towards asylum seekers; this has eroded human nature and its capacity to share the painful feelings and distressful situation of refugees.

2 2 Permanent residents

Refugees, who are temporary residents, can apply to become permanent residents to enjoy more rights. However, this article intends to highlight the difficulties in distinguishing between the legal positions of a refugee and a permanent resident (which negatively impact on refugee protection) or in distinguishing between those rights they enjoy as foreign nationals with temporary resident status and those rights they enjoy as foreign nationals with permanent resident status. These difficulties arise from the provisions of section 27(*b*) of the Refugees Act and section 25(1) of the Immigration Act, respectively. Section 27(*b*) of the Refugees Act provides:

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62 Kavuro "South Africa Excludes Refugees and Asylum Seekers from Covid-19 Aid" (2020-05-29) *Mail & Guardian* https://mg.co.za/coronavirus-essentials/2020-05-29-south-africa-refugees-coronavrus-exclude-law/ (accessed on 18 June 2020).

63 Criteria to access relief for SMMEs within tourism sector.

64 Criteria to access the Debt Relief for Distressed Business, Business Growth/Resilience Facility and Spaza Support Scheme. Citizenship was a condition to have access to food aid parcels.

65 Rawls *A Theory of Justice* (1999) 195.

> "[a] refugee enjoys full legal protection, which includes the rights set out in Chapter 2 of the Constitution … except those rights that only apply to citizens."

On the other hand, section 25(1) of the Immigration Act provides that a permanent resident is granted the right to enjoy

> "all the rights, privileges, duties and obligations of a citizen, save for those rights, privileges, duties and obligations which law or the Constitution explicitly ascribes to citizenship."

It appears challenging to make a clear distinction between those immigration rights conferred on permanent residents under the Immigration Act and those refugee rights conferred on refugees under the Refugees Act.

The differences between these two provisions start with the vesting of certain rights, privileges, duties and obligations of a citizen in foreign nationals with permanent resident status. The provisions of the Refugees Act vest the same duties and obligations in refugees, but not the privileges. It is then difficult to define the meaning, scope and ambit of "privileges". Such difficulties create confusion in judicial review of the question as to what extent the rights in the Bill of Rights and other legislated rights apply to permanent residents as opposed to refugees, or the question of what privileges permanent residents have in the entitlement and enjoyment of constitutional and legislated rights. Defining the scope and ambit of basic rights in the context of the immigration law framework and the context of the refugee law framework becomes extremely problematic and is of concern.

Difficulties arising from defining the scope and ambit of constitutional and statutory rights and privileges of permanent residents as opposed to refugees were not, in clear terms, addressed by the Constitutional Court in the 2007 case of *Union of Refugee Women v Director, Private Security Industry Regulatory Authority.*[66] The Constitutional Court simply disagreed with the contention that refugees should be treated similarly to permanent residents but gave no clear guideline on what constitutional rights should be enjoyed by refugees as opposed to permanent residents.[67] Because refugees are temporary residents, they should, in the view of the Constitutional Court, not enjoy the same socio-economic rights, privileges and benefits as permanent residents.[68] The salient question left unanswered is what the rights, privileges and benefits are that refugees are not entitled to. This question appears to reveal that in disputes on what refugees are entitled to, disputants have to approach a court for constitutional solutions.

The absence of clarity as to which socio-economic rights accrue to permanent residents to the exclusion of refugees has a deleterious impact on determining which socio-economic schemes will be extended to apply to refugees in actual situations. Refugees are denied access to certain rights on the ground that they are not permanent residents. However, in law and policy, there is no clear justification for why certain socio-economic rights, benefits and opportunities should be limited to permanent residents.

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66 2007 (4) BCLR 339 (CC).

67 *Union of Refugee Women v Director, Private Security Industry Regulatory Authority supra* par 64–65.

68 *Ibid*.

Nonetheless, they enjoy limited rights concerning employment, business and trade, and related social security. When it is emphasised that refugees are temporary residents in the country, they are excluded from a large number of opportunities that could have contributed to their improvement and development at individual and community levels. As temporary residents, they do not enjoy the same access as permanent residents to socio-economic schemes designed to uplift the poor from poverty, or to economically empower historically vulnerable citizens,[69] or to address the national economic distress caused by the national lockdown and efforts to curb transmission of COVID-19.[70] Such exclusion is strengthened by the political belief that inclusion of refugees in the said schemes would act as a bar to the realisation of the spirit, object and purport of the post-1994 reconstruction and development agenda.[71] This belief of the most powerful group within South African society disregards the rights of refugees.

The spirit to exclude refugees from national benefits and privileges accorded to permanent residents can further be tied to Tamanaha's view that the law is not static, but changes to reflect the views and interests of the most powerful groups within society.[72] In this way, the law governing foreign nationals, in general, and refugees and asylum seekers in particular, changes from time to time to reflect the wishes and will of citizens, resulting in the institutionalisation of social exclusion and denial of social justice for refugees. Refugees are continuously stigmatised as undesirable people. This perceived undesirability can be better understood when viewing the attempts made by the State to deny refugees the possibility of becoming permanent residents.

Prior to the revision of the refugee law in 2017, refugees could apply for permanent residence status after five years of continuous residence in South Africa from the date on which they were granted asylum.[73] This period was however extended to 10 years by the 2017 Refugees Amendment Act. The extension of the period is intended to exclude refugees from access to those socio-economic benefits, privileges, and opportunities available to foreign nationals with permanent resident status. The government's intention to exclude refugees from permanent resident positions can further be inferred from the condition that such status can only be granted to a refugee after, and if, the South African government is satisfied that there is no peace, security and stability in the country of origin of that refugee.[74] Refugee applicants for permanent residency, whose home countries are relatively peaceful, will not qualify for permanent residency. This disqualifying ground for individuals seeking permanent residency is justified on the premise that refugees are inherently expected to return to their home countries once conditions exist to allow them to return safely.[75] In this regard, refugee

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69 Kavuro 2015 *Law, Democracy and Development* 249–255.

70 Kavuro https://mg.co.za/coronavirus-essentials/2020-05-29-south-africa-refugees-coronavrus-exclude-law/.

71 Kavuro 2013 *Global Education Magazine* 22 24.

72 Bix "A New Historical Jurisprudence" 2018 95 *Wash UL Rev* 1035 1039.

73 S 27(*c*) of the Refugees Act.

74 S 27(*c*) of the Refugees Act, as amended by the Refugees Amendment Act of 2017.

75 Dept of Home Affairs "White Paper on International Migration for South Africa" (July 2017) 42.

conditions are understood by South African society to be temporary and not permanent. This approach has a negative impact by excluding refugees from permanent residency on the ground that their countries of origin are politically stable. The stability and security approach does not apply to other foreign nationals who apply and qualify for permanent residency in terms of sections 26 and 27 of the Immigration Act.[76] Other foreign nationals are not subjected to a qualification period of 10 years. The period of 5 years applied to them. Refugees are, therefore, deliberately discriminated against, thus defeating the principle of favourable treatment.

3 CONCEPTUALISING ASYLUM PROTECTION

3 1 Meaning of the concept of asylum

To arrest the disappearance of the rights of refugees and asylum seekers, there is a need to understand that a segment of foreign nationals in South Africa have come to the country seeking asylum and that offering them such asylum comes with the responsibilities to take care of their socio-economic needs. Such responsibilities include an emergency response to their human suffering and assisting them to become self-reliant. To see mere economic reasons for staying in South Africa in a negative light impacts the principle of refugee protection and thus shapes the disappearance of essential socio-economic rights. The negative impact of such an approach potentially and gradually shrinks the protection of refugees so that it becomes meaningless. For this reason, it is important to conceptualise the term "asylum". To begin with, the term is contained in article 14 of the Universal Declaration of Human Rights, adopted in 1948, which stipulates that "[e]veryone has the right to seek and enjoy in other countries asylum from persecution". It is further entrenched in article 12(3) of the African Charter on Human and Peoples' Rights, adopted in 1981. Article 12(3) of the African Charter stipulates:

> "[e]very individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions".

These provisions are adopted by the Refugees Act and are particularly underlined in section 1A of the Act, as amended by the Refugees Amendment Act 33 of 2008. Section 1A of the Act stipulates that international refugee protection in South Africa must be understood, interpreted and applied with due regard to international refugee law and international human rights law. It is within this context that asylum offered by the South African government should be understood by lawmakers and service providers and, ultimately, that refugees or asylum seekers should be

[76] These two provisions provide for various types of permanent resident permit that may be granted to foreign nationals. They are s 26(*a*) holder of a general work visa; s 26(*b*) spouse of South African citizen or PRP holder; s 26(*c*) child of South African citizen or PRP holder under 21 years; s 26(*d*) child of South African citizen; s 27(*a*) holder of a quota work visa; s 27(*b*) holder of critical skills visa; s 27(*c*) holder of a business visa; s 27(*d*) refugee; s 27(*e*) retired person; s 27(*f*) financially independent person; and s 27(*g*) relative of South African citizen or PRP holder within the first step of kinship.

entitled to enjoy asylum. Against this backdrop, this article critically analyses the treatment accorded to refugees and asylum seekers.

Bachrach defines asylum as "an inviolable refuge ... a sanctuary, or … a place where one is safe and secure".[77] Central to asylum is the idea of a safe haven, coupled with the safety and security of the person. Accordingly, individuals seeking asylum will be expecting the safety, security and social protection given by or flowing from a sanctuary or refuge. In the context of a safe haven, the term "asylum" is defined to refer to "something that may be provided within an asylum, a place where protection is offered".[78] In this regard, offering asylum comes with obligations to treat those seeking asylum (that is, asylum seekers) or granted asylum (that is, refugees) according to internationally accepted human rights standards – whether or not entrenched in the Constitution.[79] Human security is, therefore, key to asylum. In the refugee domain, human security is not only constituted by freedom from fear of political persecution, but also freedom from fear of destitution (or economic distress), victimisation, or other socio-economic vulnerabilities.[80] Refugee law should be expected to evolve and develop in the context of ensuring human security against physical insecurity, traumatic stress disorders, deprivation and destitution.

There is a radical need to develop a law governing refugees and asylum seekers at national level anchored in and informed by foundations of asylum, which can better be described with reference to the baseline principles of international refugee protection as emerged, evolved and developed under international refugee law. These principles are as follows:

(i) *Humanitarian*. Welcoming individuals escaping persecution and seeking asylum as well as responding to their problems is a social and humanitarian act, and therefore should not become a cause of tension between states.[81]

(ii) *Social justice*. A host state should refrain from taking re-distributive or remedial measures that may compel refugees or asylum seekers to return to a place where they will face persecution (*non-refoulement*). Causes that may compel refugees and asylum seekers to return to their persecutors include their exclusion from life-saving programmes or economic activities.[82]

(iii) *Socio-economic*. Humanitarian and socio-economic rights and benefits must be extended beyond citizens to include refugees and

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77 Bachrach "Asylum and Chronically Ill Psychiatric Patients" 1984 141 *Am J Psychiatry* 975 976.

78 *Ibid*.

79 In the case of *S v Makwanyane* 1995 (6) BCLR 665 par 35, the Constitutional Court held that public international law includes binding and non-binding law and that "[t]hey may both be used as tools of interpretation of the rights in the Bill of Rights".

80 This view was affirmed by the Supreme Court of Appeal in *Somali Association of South Africa v Limpopo Department of Economic Development Environment and Tourism supra* par 44 when it opined that deprivation of economic opportunities will induce refugees and asylum seekers to leave South African shores.

81 Feller "The Evolution of the International Refugee Protection Regime" 2001 5 *Journal of Law & Policy* 129 131–132.

82 Pursuant to the Convention Relating to the Status of Refugees, refugee rights must – in the most essential respects – be enjoyed on the basis of favourable treatment.

asylum seekers, based on the idea of equality in rights and dignity.[83] Unlike citizens who are equally entitled to all rights, benefits and privileges, refugees must be accorded full legal protection with respect to socio-economic rights and benefits they are entitled to. On the other hand, asylum seekers must be accorded favourable access with respect to life-saving or basic socio-economic rights and benefits. Unfair discrimination will give rise to the violation of the principle of favourable treatment.

(iv) *International cooperation*. Considering that socio-economic protection may place unduly heavy burdens on host countries, effective protection of refugees and asylum seekers can therefore be achieved through international cooperation and African solidarity.[84]

(v) *Non-punitive*. Inability to meet immigration law requirements cannot, in principle, be invoked to penalise individuals escaping from persecution, as they are not expected to leave their home countries and enter countries of asylum in a regular fashion.[85] Accordingly, asylum seekers cannot be classified as illegal foreigners or illegal (or irregular) immigrants or undesirable people based on contravention of rules and principles of the Immigration Act.

(vi) *Exceptional circumstances*. Exempting asylum seekers/refugees from immigration law requirements is however not absolute. Those seeking or granted asylum can be expelled by host countries "in exceptional circumstances directly impacting national security or public order".[86] National security cannot generally be used to exclude them from the social welfare system.

Rights flowing from these asylum principles demand special and differentiated treatment from those accorded to other foreign nationals generally. It is within this context that the Refugees Act was initially engineered. It was engineered to exempt refugees and asylum seekers from the emphasis, in immigration law, on self-reliance, and thus to afford them special and favourable inclusion in socio-economic and development programmes. Such exemption is based on recognition of their existing conditions of deprivation and human suffering. Special inclusion is, under the Refugees Act, grounded in a favourable or differentiated treatment in the sense of equal treatment with citizens concerning public goods and services for the protection, promotion and fulfilment of international refugee protection and for a better life for refugees and asylum seekers.[87] For that reason, equal treatment with citizens should be prioritised in legislation distributing social, economic and labour rights and benefits and in legislation promoting business and trade in informal and formal sectors. Such prioritisation, which could have a positive impact on refugee situations (such as their health and social conditions), was later deviated from. The dignity of refugees and asylum seekers can only be effectively protected if they are assisted to

83 Feller 2001 *Journal of Law & Policy* 131–132.

84 *Ibid*.

85 *Ibid*.

86 *Ibid*.

87 Refugees and asylum-seekers are accorded all rights in the Bill of Rights that apply to everyone.

become self-reliant through socio-economic laws. The evolution of refugee law protection has, however, taken a new turn in which the government appears to take measures, not aimed at improving the quality of life of refugees and asylum seekers, but rather ones that exacerbate their distressful situations through exclusion and victimisation.[88] Political willingness to implement the Refugees Act is severely lacking.

3 2 Denialism and non-compliance related issues

The implementation of refugee rights has, for over a decade, become highly problematic. The commitment to implement the refugee regime is gradually being abandoned, despite governmental commitment to offering refugees humane treatment as envisaged by the Refugees Act. Issues relating to non-compliance with principles of international refugee protection have been submitted to Parliament by civil society organisations. While briefing Parliament on issues affecting refugees, asylum seekers and vulnerable migrants, organisations presented a wide variety of examples illustrating the political unwillingness to observe refugee rights protection; some suggested concrete proposals for the amelioration of refugee protection, while others blamed politicians for the continual disappearance of such protection.[89] These organisations argued that refugees and asylum seekers are denied access to a number of the constitutional rights in the Bill of Rights to which the Refugees Act refers. They are denied access to the basic necessities of life despite the fact that (i) post-apartheid South Africa is built on a culture of inclusiveness, *ubuntu*, tolerance, and human rights norms (such as equality, human dignity and freedom) and (ii) the said culture informs the Refugees Act.[90] Favourable access to national resources is denied even though in post-apartheid transformative constitutionalism, South Africa is known as a rainbow nation (owing to its diverse communities) committed to the promotion of equal and humane treatment of all inhabitants of South Africa and to establishing social justice for all who live within South African boundaries.[91]

Denial of rights for asylum seekers and refugees is implied in various legal aspects. Worth mentioning is the closure of the Refugee Reception Offices in 2011 and 2012 by the government. The closure was aimed at barring asylum seekers from lodging new applications for asylum and at allowing only asylum seekers and refugees who had previously applied at these offices to renew their permits there. Three offices – Cape Town, Port Elizabeth, and Johannesburg – were closed for new applications or renewal

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88 James 2017 *Temida* 169; Khan & Lee "Policy Shifts in the Asylum Process in South Africa Resulting in Hidden Refugees and Asylum Seekers" 2018 4 *African Human Mobility Review* 1205 1209.

89 PMG https://pmg.org.za/committee-meeting/29180/.

90 *Ibid*.

91 The Preamble of the Constitution proclaims, "South Africa belongs to all who live in it, united in our diversity". In the new nation, established in 1994, "unity has replaced segregation, equality has replaced legislated racism, and democracy has replaced apartheid". See James 2017 *Temida* 167.

of permits issued by another office.[92] If an asylum seeker is in Cape Town and their permit was, for example, issued by the Durban office, they must travel to Durban, along with their family, to renew their permits. The closure of these offices has implications for the lives of asylum seekers, who in many cases must stay in limbo as many were compelled to stay in the country illegally or with expired documents.[93] The closure was conceived in tandem with denying asylum seekers' entry into the country; and if they managed to enter, denying them access to documentation.[94] During the national lockdown, all refugee reception offices remained closed and no service was offered to refugees or asylum seekers. When online services were introduced for the extension and renewal of permits on 15 April 2021, these offices remained closed for new asylum applications and renewal of already-expired permits prior to the declaration of the national lockdown in March 2020. The exclusion of refugees and asylum seekers from these crucial public services augmented their anxieties and, in particular, their feelings that they are not welcome in South Africa.

Documentation is key to the legal protection of refugees and asylum seekers simply because documentation is the only enabling legal mechanism that determines the legal status of the holder.[95] Without clarity in the legal status of refugees and asylum seekers, their access to essential public and private services becomes impossible. Without a legal and valid document identifying them, refugees and asylum seekers become invisible in the host communities. Their stay becomes illegal and, based on the unlawfulness of the stay, they can be arrested. In fact, owing to their ambiguous legal status, they become victims of arrests, detention, and deportation.[96] This is done in contravention of the principle of *non-refoulement*. Denial of documentation means the denial of access to critical basic socio-economic services such as healthcare, schools/education, employment, drivers' licences, trade/business, social assistance, social security, accommodation, and banking.[97] Without access to these core aspects of human security and economic development, they do not find the asylum they were looking for in the first place; instead, they find themselves in a prison without walls.

In addition to making access to documentation difficult, there is evidence to suggest that the government is introducing changes in immigration and refugee law with intent to limit access to welfare programmes. Civil society organisations described these changes as "anti-immigrant and anti-refugee

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92 Zikhali and Keller "Understanding the Implications of the Closure of Refugee Reception Offices for the Lives of Women Asylum Seekers: 3 Case Studies" Sonke Gender Justice: Case Studies (June 2019) 2.

93 *Ibid*.

94 PMG https://pmg.org.za/committee-meeting/29180/ and James 2017 *Temida* 174–175.

95 In *Kiliko v Minister of Home Affairs* 2006 (4) SA 114 (C) par 28, Van Reenen J appropriately defined the significance and importance of documenting asylum-seekers as follows: "[…] until an asylum seeker obtains an asylum-seeker permit in terms of […] the Refugees Act, he or she remains an illegal foreigner and, as such [this] impact[s] upon […] his or her human dignity and the freedom and security of his or her person."

96 James 2017 *Temida* 176.

97 PMG https://pmg.org.za/committee-meeting/29180/.

policies".[98] Difficulties arising from the denial of access to welfare is further linked to the gradual development of refusal to engage with civil society organisations that advocate for refugee and migrants rights, the State's intentional ignorance of and disrespect for the rule of law and the State's loss of interest in debating migration and its characteristics.[99] The totality of denials has motivated refugees and asylum seekers to rely on illegal mechanisms to survive. These illegal mechanisms obviously amount to crimes. Even though refugees and asylum seekers are compelled to find alternative means to survive, they rarely engage in crimes in the ordinary sense of the word.[100] Rather, in their vulnerability, they submit themselves to labour exploitation. Labour exploitation of refugees and asylum seekers is one of the contributory factors encouraging hatred, racism and xenophobic violence.[101] It is trite to state that acceptance of cheap labour frustrates citizens' fight to be treated with dignity, respect and fairness in the workplace and for improved working conditions, and decent wages.

Nonetheless, relying on the right to protest under section 17 of the Bill of Rights, refugees and asylum seekers carried out protests in Pretoria and Cape Town at the offices of the UNHCR in which they denounced their continual victimisation and persecution. They protested to request the UNHCR to resettle them in third countries where they would not face the same denial of, exclusion from, or unfair discrimination in the human rights-based humanitarian, social, and economic protection to which they should be entitled.[102] To this request, the UNHCR responded that it could not offer group resettlement and relocation, as resettlement in another country was a remote possibility. Alternatively, the UNHCR encouraged voluntary repatriation and local re-integration.[103]

Local re-integration was prioritised even though, in their engagements with government, refugees and asylum seekers emphasised the point that they are denied effective refugee protection in the sense that they are denied legal documents such as identity documents, travel documents (or passports), and birth certificates for children born in South Africa.[104] Yet, children born, bred and grown in South Africa hardly access permanent resident permits and are thus denied the opportunity to be naturalised as citizens.

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98 *Ibid*.

99 *Ibid*.

100 Ngwato *Policy Shifts in the South African Asylum System: Evidence and Implications* (2013) 17 reaffirms that "[t]here is also little evidence to suggest that a disproportionate number of asylum seekers are convicted of crimes".

101 Xenophobic violence is encouraged by assumptions that refugees and asylum seekers are placing a significant strain on service delivery and employment, see Ngwato *Policy Shifts in the South African Asylum System: Evidence and Implications* 46.

102 Staff Reporter "UN Refugee Agency Wants Asylum Seekers to Respect SA Laws" (30 October 2019) https://www.iol.co.za/news/south-africa/western-cape/un-refugee-agency-wants-asylum-seekers-to-respect-sa-laws-36325607 (accessed 2021-09-18).

103 PMG "Refugee Situation in Cape Town: Stakeholder Engagement; With the Minister" (10 March 2020) https://pmg.org.za/committee-meeting/29992/ (accessed 15 May 2020).

104 Whereas refugees face challenges in extending or renewing their documents or applying for Refugee Identity Documents (IDs) and travel documents, both refugee and asylum-seeker children born in South Africa are denied birth certificates. See PMG https://pmg.org.za/committee-meeting/29180/.

The government has indeed been reluctant to implement section 4(3) of the Citizenship Amendment Act.[105] Section 4(3) states that children born in South Africa of parents who are foreign nationals (either with or without permanent resident status) qualify to apply for citizenship upon becoming majors, provided that (i) they have lived in the country from the date of their birth to the date of becoming majors, and (ii) they have been registered in accordance with the provisions of the Births and Deaths Registration Act.[106] The reluctance to naturalise foreign children has led to litigation, which was heard by the High Court and confirmed by the Supreme Court of Appeal in the 2018 case of *Minister of Home Affairs v Ali*.[107] The court turned down government arguments and thus ordered it to accept applications for naturalisation as citizens by foreign children who were born and grew up in South Africa.[108] However, it appears that the State is not willing to implement this decision as it has been making arguments that there are no regulations facilitating the implementation of the Citizenship Amendment Act.[109] These arguments date back to 2010 when the Citizenship Amendment Act was promulgated. However, draft regulations on Citizenship were, finally published for public comment on 24 July 2020.[110]

Issues motivating the protests by refugees and asylum seekers can be grouped in four categories: (i) closure of the refugee reception offices; (ii) denial of documents or their extension; (iii) xenophobic violence; and (iv) restriction of access to welfare, trading and employment systems. On xenophobic violence, protesting refugees and asylum seekers maintain that no efforts have been made on the side of the State to eradicate xenophobic violence. Xenophobic violence is rampant in the country and has a severe impact on their livelihoods. During xenophobic violence, businesses established by refugees and asylum seekers are looted. In the process, lives are lost, and some are left injured or maimed. However, little or nothing is done to compensate refugees and asylum seekers who are injured or have lost their businesses or loved ones. There are misconceptions among refugees and asylum seekers that the absence of criminal accountability is motivated by politicians' xenophobia. They believe that political statements are sources of xenophobic violence, which is incited to drive refugees and asylum seekers out of South Africa.[111] Violence against foreign nationals is believed to be politically motivated since refugees and asylum seekers cannot be expelled through legal procedures as they are protected by the

105 17 of 2010.

106 51 of 1991.

107 2019 (2) SA 396 (SCA).

108 The SCA rejected the Minister of Home Affairs' argument that s 4(3) of the Citizenship Amendment Act of 2010 must be interpreted to mean that it only applied to foreign children born in South Africa after the adoption of the amendment on 1 January 2013 (par 11, 16–17, 25–26).

109 After this contention was rejected by the SCA, the DHA appealed to the Constitutional Court, which dismissed the appeal. Commenting on this dismissal, the Minister of Home Affairs stressed that there was a need for regulations for the amendment Act to be implemented. These comments were made on 3 March 2020 while briefing the Portfolio Committee on Home Affairs on budget for the 2020/21 financial year.

110 Draft regulations on the Citizenship Act, 1995 for Comment, GN R815 in *GG* 43551 of 2020-07-24.

111 PMG https://pmg.org.za/committee-meeting/29180/.

non-refoulement principle. The socio-economic vulnerabilities of refugees and asylum seekers are politically viewed as an impediment to socio-economic transformation as they place an unduly heavy burden on the state purse. Accordingly, they are a threat to national security and public order. The issue of protecting national security and preserving national resources and opportunities for historically indigent citizens are invoked to victimise refugees and asylum seekers – particularly, denying them entry into the country or access to national resources.[112] The development of refugee law, as a result, evolves in social soil replete with hatred, racism and xenophobia against vulnerable foreign nationals, which is reflected in the State's attempts to eliminate any competition between citizens and undesirable people.

3 3 Impact of the twin principles of exclusivity and self-sufficiency

The negative impact on refugee protection of the twin principles of exclusivity and self-sufficiency cannot be ignored. It is important to note that self-sufficiency is the ground norm on which immigration law is constituted. The norm prohibits the entry of those foreign nationals who will negatively affect the economy and allows the admission of those foreign nationals who will contribute to economic growth. On the other hand, the exclusion norm denotes that, since foreign nationals are admitted on the condition that they are self-reliant, they should be excluded from any state support or access to social welfare. Exemption from these norms is largely based on the principle of international refugee protection, which requires sovereign nations to exempt asylum seekers from the immigration law requirements to be self-reliant and economically independent as conditions to be admitted and stay in the country of asylum.[113] The principle, therefore, imposes an obligation on the countries of asylum to include asylum seekers (if admitted) in socio-economic, business and employment programmes designed to respond or address their humanitarian, social and economic vulnerabilities.[114] In the South African context, asylum seekers must be precluded from application of the twin immigration law principles, which hold that foreign nationals must be admitted in the country on condition that they are self-sufficient and, therefore, that such foreign nationals cannot have access to subsidised socio-economic programmes until such time as they are granted permanent resident status.[115] It is crucial to note that an asylum seeker remains a temporary resident even upon being granted refugee status.

South African authorities have shown a tendency not to apply this exemption rule. The tendency is reflected in the denial of entry of asylum seekers into the country on the ground of poverty. It is further reflected in the

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[112] Crush, Skinner and Stulgaitis "Rendering South Africa Undesirable: A Critique of the Refugee and Informal Sector" (2017) *SAMP Migration Policy Series* No. 79. South African Migration Programme.

[113] Feller 2001 *Journal of Law & Policy* 131–132.

[114] UNHCR *Convention Relating to the Status of Refugees* 189 UNTS 137 (1951) Adopted: 28/7/1951; EIF: 22/4/1954.

[115] S 25(1) of the Immigration Act.

move to adopt restrictive policies that ensure their exclusion from eligibility for state-funded programmes. Critical basic services that would alleviate them from human suffering, caused by forced and unexpected displacement, become unattainable. They are therefore left to their own fates in desperate attempts to integrate into their host communities and, at the same time, satisfy their basic needs.

Since the adoption of the refugee regime in 1998, South Africa has shown no intention whatsoever to distribute basic constitutional rights to refugees, and asylum seekers, in particular. This places into legal question the nature of refugee protection afforded to them if their basic socio-economic rights remain vague. Except for legal protection in the form of providing legal and valid documents allowing them to stay in the country lawfully, asylum seekers – before being recognised as genuine refugees – are accorded the same treatment as other foreign nationals coming to South Africa for various purposes such as visiting, economic, labour, studying and diplomatic reasons. Equal treatment with other foreign nationals creates a conceptual confusion as to whether such treatment should also apply to formally recognised refugees. In reality, there is an undeniable conceptual confusion related to the question of when the Refugees Act applies in refugee situations or what the Act really means for asylum seekers. This question was dealt with in the 2012 case of *Bula v Minister of Home Affairs*[116] in which the Supreme Court of Appeal, after careful consideration, responded that the Refugees Act kicks in once a foreign national expresses his intention or desire to apply for asylum.[117] The granting of an asylum seeker permit in terms of section 22 of the Refugees Act allows the holder to live and move freely in the country, subject to the conditions determined by the Standing Committee for Refugees Affairs and not in conflict with the Bill of Rights and international law.[118] The condition of expression of intention to apply for asylum is what the 2000 regulations to the Refugees Act actually sets out.[119]

As noted, the desire to exclude refugees and asylum seekers is inherently connected to the shortcoming found in the Refugees Act. The shortcoming is that the Act neither differentiates between economic migrants and asylum seekers nor restricts economic migrants from being admitted into the country as asylum seekers. Immigrants gain access to South Africa through the asylum management system. In terms of the Refugees Act, read in tandem with the Immigration Act, every foreigner who expresses a desire to apply for asylum in the country must be recognised and be treated as "an asylum seeker". Being aware of the legal difficulties in rejecting an individual who is

116 2012 (4) SA 560 (SCA).

117 The SCA stated that "where a foreign national indicates an intention to apply for asylum, the regulatory framework of the [Refugees Act] kicks in, ultimately to ensure that genuine asylum seekers are not turned away" (par 72).

118 *Kiliko v Minister of Home Affairs supra* par 5.

119 Reg 2 of the Refugee regulations (Forms and Procedure) 2000 GN R366 of 2000-04-06 states: "An application for asylum in terms of s 21 of the Act must be lodged by the applicant in person at a designated Refugee Reception Office without delay … [and] any person who entered the Republic and is encountered in violation of the [Immigration Act], who has not submitted an application pursuant to reg 2(1), but indicates an intention to apply for asylum shall be issued with an appropriate permit valid for 14 days within which they must approach a [RRO] to complete an asylum application."

abusing the asylum management system for personal gain, economic migrants apply for asylum. What is problematic is that no one can object to the intention of foreign nationals to apply for asylum, even if it is clear – on the face of it – that an individual is an economic migrant. The Refugee Status Determination Officer (RSDO) is the only person mandated to determine the genuineness of the claim. If the RSDO rejects their application, they have, a right to appeal to the Standing Committee. If the Standing Committee affirms the decision of the RSDO, they have a right to appeal to the Refugee Appeal Authority of South Africa. The appeal remedies can then still go through the High Court, all the way to the Constitutional Court. While the matter is before these judicial institutions, "bogus" asylum seekers are untouchable for deportation.

Legal difficulties relating to expelling economic migrants who abuse the asylum management system encourage government to victimise and marginalise both genuine asylum seekers and refugees by offering them inadequate protection. In the 2015 case of *Somali Association of South Africa v Limpopo Department of Economic Development Environment and Tourism*,[120] the Supreme Court of Appeal noted these legal problems and opined that it is incumbent on government to facilitate and expedite asylum applications to ensure genuine asylum seekers are formally recognised as refugees.[121] The court further stated that the frustration experienced by government officials as they deal with a huge influx of fake asylum seekers "must not blind them to their constitutional and international obligations".[122] It is not the fault of genuine asylum seekers and refugees that the refugee system is accessible to every foreigner who wishes to use it for their own benefit.

4 IMPACT OF LEGAL STATUS ON PROTECTION

4 1 Contested legal status

It has been noted that there are different legal statuses and positions applicable to a refugee. In an analysis of the legal position of different categories of refugee, the disappearance of their rights becomes clearer. There are refugees classified as "undocumented asylum seekers", "documented asylum seekers", "recognised refugees" and "refugees with permanent residence status". There are also refugees naturalised as "citizens." This section's emphasis on the disappearance of refugee rights lies in the introduction of strict conditions that must be met to move from the status of undocumented asylum seeker to the status of documented asylum seeker. It is therefore not clear what rights are enjoyed by undocumented asylum seekers, who in terms of the provisions of immigration law are classified as "illegal foreigners."

In principle, after being physically present in the country and having expressed a desire to apply for asylum, undocumented asylum seekers are

120 *Supra*.
121 Par 44.
122 Par 44.

granted the legal status of "documented" asylum seekers, if they are issued with the asylum-seeker permit in terms of section 22 of the Refugees Act. Undocumented asylum seekers include those individuals who were previously documented but whom the State assumes have now abandoned the asylum route if or because they did not renew their permits after a period of one month from the date of expiry of their permit.[123] Civil society organisations have contended that the State itself has taken measures that compel documented asylum seekers to become undocumented or illegal. Furthermore, any deprivation of opportunity to pursue their asylum claim will amount to a violation of the principles of asylum.[124] Irrespective of the State's attempt to push asylum seekers outside the refugee protection parameters, the legal status of documented asylum seekers requires that if they have resided in the country for a period of six months, they should be exempted from the twin principles of self-sufficiency and socio-economic exclusion. The 2000 regulations to the Refugees Act envisioned that asylum applications would have been finalised within this period. The 2018 regulations to the Refugees Act repealed the period of six months. As a result, it is not clear how long an individual can sojourn in the country as a documented asylum seeker without state support. This approach adopted by South Africa is not in line with international refugee protection; it rather points in the direction of denying refugees access to national resources. In other countries, the legal status of asylum seekers allows individuals to have access to emergency humanitarian assistance, which is not clearly offered by the South African government. The legal status of asylum seekers and the rights attached thereto (or which flow from that status) appear to be highly contested and controversial.

Traditionally, asylum seekers are viewed as individuals who are in the greatest need of humanitarian assistance upon arrival in the country of asylum – whether documented or not. Responding to their humanitarian needs usually requires a strong state commitment to emergency preparedness and response.[125] The Emergency Handbook notes that asylum seekers are among individuals in need of international refugee protection as asylum seeking is "the first step towards being formally recognised as refugees".[126] In situations such as this, the handbook says the international refugee protection should

> "include a range of concrete activities that ensure that all [asylum seekers] have equal access to and enjoyment of their rights in accordance with international law. The ultimate goal of these activities is to help them in permanently rebuilding their lives within a reasonable amount of time."[127]

The absence of humanitarian assistance, coupled with the denial of documentation and restriction on seeking employment, has a great impact on the lives of asylum seekers. It worsens their living conditions and compels them to find other means of survival. The Supreme Court of Appeal in the *Watchenuka* case opined that because no state support is offered to

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123 S 22(11)–(12) of the Refugees Act.

124 Zikhali and Keller case studies for Sonke Gender Justice 2.

125 UNHCR *Handbook for Emergencies* 3ed (2007) viii.

126 UNHCR *Handbook* 17.

127 *Ibid.*

asylum seekers (whether documented or undocumented), they should not be prohibited from engaging in productive activities. The general prohibition severely restricts their ability to support themselves and their families and exposes them to living with humiliation and degradation. According to 2017 amendments and the 2018 regulations to the Refugees Act as well as the 2017 White Paper, the State has emphasised that asylum seekers must stay in asylum processing centres where they will be cared for by humanitarian organisations. The introduction of asylum processing centres is, therefore, a way of erecting a physical and legal barrier to accessing social welfare, employment and trade.[128] This approach cements the idea that asylum seekers are unwanted in South Africa as was the case during the apartheid era.

4 2 Reinforcement of exclusion through political exclusion

South Africa's history is characterised by a reluctance to admit foreign nationals who are asylum seekers into the country. During the apartheid era, asylum seekers lived in the country as illegal or economic migrants. They were not accorded the legal status of asylum seeker or refugee. In the post-1994 democratic and human rights era, the State appears to be shifting towards confining asylum seekers to asylum processing centres. Although refugees are integrated into society, Polzer argues that they are also placed in detention, albeit without walls.[129] It is contended that without engaging in the democratic process and without political and economic participation, refugees become more vulnerable as they lack a political voice in decision-making processes. This situation, in which refugees are deprived of their right to participate in political platforms, is seen as a deprivation of precious liberties to act freely.[130] Without political engagement, refugees cannot voice their grievances about victimisation, exclusion and marginalisation in their host communities. Silencing the voices of refugees on political platforms is what the 2018 regulations to the Refugees Act aim to achieve. These regulations were adopted to restrict refugees and asylum seekers from any political engagement. Political restrictions negatively impact refugees' ability to engage in democratic processes or participatory democracy.

In the post-2018 refugee regulation era, refugees and asylum seekers are mandated to seek permission from the Minister of Home Affairs in a situation where they would like to engage in political activities or campaigns related to their countries of origin or nationality.[131] This prohibition is in line with the African Union Convention Governing the Specific Aspects of Refugee Problems in Africa, which prohibits refugees/asylum seekers from engaging in activities that may lead to diplomatic discord or fermenting subversion from outside their home country.[132] What may amount to unfair

[128] James 2017 20 *Temida* 189.

[129] Polzer "Negotiating Rights: The Politics of Local Integration" 2009 26 *Refugee* 92 94–95.

[130] *Ibid*.

[131] Regulation 4(1)(*i*) of the Refugee Regulations, 2018, GN R1707 of 2019-12-27.

[132] OAU Convention Governing the Specific Aspects of Refugee Problems in Africa 1001 UNTS 45 (1969) Preamble par 4–5, read in tandem with art 3.

discrimination is the deprivation of all political rights for the sole purpose of excluding them from South African democracy. In its founding provisions, the Constitution underscores that South Africa is a democratic state founded on the values, among others, of human dignity, equality, human rights and freedoms.[133] As a free and democratic nation, the State should promote the active participation of people in politics and civic life. In this regard, the State should create political space for direct participatory democracy in which all people of South Africa are given direct and active participation in the decision-making process concerning matters that may adversely affect them.[134] Democracy is not only implemented through universal adult suffrage or national elections of leaders and representation, but also through securing liberties and freedoms of individuals, which are typically protected by the Constitution.[135]

The exclusion of refugees from political activities of the host country will result in denying them the opportunity to engage in active participatory democracy. At this point, it is crucial to analyse the impact of regulation 4(2) of the 2018 regulations to the Refugees Act on international refugee protection. Regulation 4(2) prohibits any refugee or asylum seeker from participating in any political activity or campaign in furtherance of any political party or political interests in South Africa. Political activity, political campaign and political interest are core elements of active participatory democracy; these are worth analysing.

Whereas political activity or campaigning in furtherance of a political party can be associated with political rights as set forth under section 19 of the Constitution, it is not clear what political interest entails. Refugees and asylum seekers are constitutionally entitled to political rights to which everyone is entitled. The only political rights restricted to citizens are the rights to stand for political office and to vote in any national, provincial, or municipal election in which political parties have to campaign and compete. The general prohibition against engaging in an activity that furthers political interests acts as a barrier to enjoyment of other constitutionally based political rights such as freedom of association, freedom of expression and freedom of demonstration or protest. The exclusion of recognised refugees and asylum seekers from political platforms renders them invisible in the South African political community and is intended to silence their voices. Voices of refugees and asylum seekers are consequently always missing in political platforms where concerns of people are communicated to the government through debates and discussions; or where the government accounts or is held accountable; or where people participate in the decision-making processes concerning the improvement of their well-being.

The exclusion of all refugees from political platforms led the Women and Children at Concern (a refugee-based organisation), in its 30 April 2019 Memorandum, handed to the Portfolio Committee on Home Affairs, to demand that Parliament consider the involvement and engagement of refugees in all decision making and discussions affecting them. They argued

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133 S 1(*a*) of the Constitution.

134 Nwogu "Democracy: Its Meaning and Dissenting Opinions of the Political Class in Nigeria: A Philosophical Approach" 2015 6 *Journal of Education and Practice* 131 131–132.

135 *Ibid*.

that because they were the ones facing problems, civil society organisations should not speak on their behalf as they do not fully grasp the challenges that refugees, asylum seekers and other vulnerable migrants are facing in South Africa.[136]

Women and Children at Concern claimed the right to participatory democracy. It has become evident that the lack of political voice of refugees and asylum seekers in participatory democracy works to aggravate their existing vulnerable situation as no one is there to speak on their behalf and claim or defend their humanitarian, social and economic rights and interests when state measures affecting them are proposed.[137] In light of this, one cannot hesitate to conclude that the constitutional objective of advancing and fulfilling human rights and freedoms are usually claimed and discussed through participatory democracy in which the voices of refugees and asylum seekers are completely excluded. The exclusion of these vulnerable voices in political dialogue or activities gives credence to arguments that refugees do not belong and do not form part of South African society. Their blanket exclusion from political engagement sends a clear message that recognised refugees and asylum seekers are not entitled to the rights and freedoms extended to them in terms of the Refugees Act. It nullifies refugee rights and renders them valueless and meaningless as they cannot engage in debates on transformative constitutionalism relating to their rights. The denial of political rights places them in the same position as minors since their interests and well-being are decided upon by others. This is the legal position that this article throws into the fray for discussion; it is fundamentally shaped by the socio-legal theory on the relationship between refugee protection and a constitutionally based transformative order. It is on this basis that the different layers and dimensions of institutionalised exclusion continue to evolve, emerge and become amplified, tested and contested.

5 CONCLUDING REMARKS

As has been demonstrated, a range of measures to redress past injustices stands in the way of implementation of the Refugees Act. These measures prioritise historically disadvantaged communities and overlook the protection of rights and interests of refugees and asylum seekers. In socio-economic development spheres, substantive, remedial or restitutionary measures throw their weight behind the need to advance these historically disadvantaged communities to liberate them from poverty, social inequality and economic disparities caused by apartheid. Such an approach to socio-economic transformation threatens to worsen the existing vulnerable positions of refugees and asylum seekers, respectively, in South African society. This threat manifests itself in the South African government's xenophobic attitude embedded in its political unwillingness to stretch its arm of authority to distribute national resources for the protection of refugees and asylum seekers. It is therefore deviating from its initial desire and commitment to offer refugees protection in the way the initial refugee regime envisaged. Over the past decade, the South African government has shifted

[136] PMG https://pmg.org.za/committee-meeting/29180/.

[137] Kavuro 2018 *Obiter* 35.

its laws and policies to exclude refugees from social, economic, labour and employment, and business and trade programmes. There have been several amendments to immigration and refugee legislation and regulations that have not been intended to improve or enhance constitutionally based inclusive refugee protection; instead they have decreased or shrunk the existing protection space for refugees and asylum seekers.[138] In doing so, measures have been taken to deny asylum seekers entry into the country and grounds have been introduced to deny asylum seekers opportunities to be protected as genuine refugees or to disqualify genuine asylum seekers from refugee protection. Existing grounds for disqualification from refugee protection were therefore extended.[139] As demonstrated, restrictive measures were also adopted to exclude refugees from becoming co-beneficiaries of social welfare and protection. As noted, the refugee regime was initially constructed on the provision of equal treatment with citizens. The State has deviated from such treatment by refusing to harmonise the Refugees Act with laws and policies that give effect to socio-economic rights in the Bill of Rights. The shrinking of the protection space for refugees and asylum seekers is more evident in the government's deliberate tactic of delaying the issuing of valid documents within a reasonable time. The delay in the provision of documents is justified on the premise that the State has insufficient human resource capacity to adjudicate applications, resulting in a backlog in processing asylum applications and appeals.[140] Although this might be true, this situation is worsened by the fact that the South African government's ill sentiment towards migrants is expressed in the adoption of restrictive and exclusionary policies that create a mass population of hidden or undocumented refugees and asylum seekers, which compels them to remain in the country as irregular immigrants without protection. If they are undocumented or in possession of invalid or expired documents or their documents are withdrawn, both refugees and asylum seekers cannot access public or private services.[141] If they feel insecure and unprotected, they will be compelled to leave South African shores.

The shrinking of refugee protection is also implied in the silencing of their political voice and the disregarding or disrespecting of different court orders. This is inimical to the ratification of international refugee agreements or conventions. In ratifying them, South Africa accepted responsibilities to protect refugees' dignity and moral worth by affording them a humanitarian-

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138 Ngwato *Policy Shifts in the South African Asylum System: Evidence and Implications* 20–27, 33–36; Khan & Lee 2018 *African Human Mobility Review* 1205–1225.

139 Kavuro "South Africa's Refugee Policy: New Grounds to Exclude Refugees from Refugee Protection" (1 April 2017) *Rights in Exile Newsletter* http://rightsinexile.tumblr.com/post/159067508272/south-africas-refugee-policy-newgrounds-to (accessed 2021-09-18).

140 Postman "Home Affairs Asks United Nations for Help with Refugee Backlog" (19 May 2019) *Daily Maverick* https://www.dailymaverick.co.za/article/2019-05-19-home-affairs-asks-united-nations-for-help-with-refugee-backlog/ (accessed 2021-09-18).

141 In certain instances, permits are arbitrarily withdrawn, and persons are arrested and treated as illegal foreigners to be deported in terms of the Immigration Act; see *Director-General: The Department of Home Affairs v Dekoba* 2014 (5) SA 206 (SCA). For exclusion from access to services, see Legal Resource Centre (LRC) "A Practical Guide for Refugees: The Asylum Process in South Africa" (20 June 2013) http://lrc.org.za/lrcarchive/publications/booklets/item/a-practical-guide-for-refugees-the-asylum-process-in-south-africa (accessed 2021-09-18) 2.

based favourable treatment that would allow them to regain self-respect and self-esteem by restoring normalcy to their lives. Court orders, through judicial review, have set out guidance on the treatment of refugees and asylum seekers that is consistent with constitutional and human rights standards.

More worryingly, the restrictive and exclusionary policies cannot meet the international obligations to protect individuals who find themselves in a distressful situation. International obligations can be achieved through the constitutionally based inclusive approach. Such an inclusive approach can be implemented through the harmonisation of the rights recognised and protected by the Refugees Act with core socio-economic and development laws and policies aimed at promoting an equal and free society in which human dignity prevails. The State's efforts to promote much-needed socio-economic transformation in the post-apartheid constitutional order should not marginalise the most vulnerable people who look to it for relief from limbo and distressful situations caused by the tyranny, oppression and persecution perpetrated by their home governments. The gradual shrinking of their protection space is intrinsically linked to the current situation in which refugees and asylum seekers are protesting and requesting to be relocated to a third country that can offer them better protection. Without access to legal documentation, social welfare and gainful employment or business, the vulnerability of refugees and asylum seekers to human suffering is amplified and sustained. Consequently, they cannot restore normalcy to their lives or revive their dreams to realise their potential through human activities. Persecution becomes perpetual in their lives.

AN EVALUATION OF LESOTHO'S RIGHT TO "EXPROPRIATE" THE WATER IN THE TREATY ON THE LESOTHO HIGHLANDS WATER PROJECT IN A "CONFLICT OF USES"*

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SUMMARY

This article explores the contemporary spectre of "expropriation" within the framework of the Treaty on the Lesotho Highlands Water Project (LHWP). The LHWP is an enigma in both its scope and practical application since it is governed by two apparently complementary treaties, and it seemingly incorporates the domestic laws of both South Africa and Lesotho. This is compounded by the contradictory legislation that has been promulgated by Lesotho that prioritises its domestic water uses despite the entrenched provisions of the LHWP regime that prioritises the supply of water to South Africa. This uncertainty has significant implications for a "conflict of uses" in the LHWP that may trigger an expropriation bid by Lesotho. This article unmasks the possible response of the LHWP legal framework to Lesotho's right to "expropriate" the water in the LHWP in light of this ambiguous and confounding legal framework.

1 INTRODUCTION

The Treaty on the Lesotho Highlands Water Project between the Government of the Kingdom of Lesotho and the Government of the Republic of South Africa (LHWP) guarantees the supply of predetermined water quantities from the Orange River in Lesotho to the Vaal River in South Africa. In return, Lesotho receives royalties which it employs to build hydroelectric dams. This project is divided into four phases, of which Phase 1 comprised Phases 1A and 1B. In essence, Phase I comprised the construction of the Katse, Muela, and Mohale Dams. Phase 1 was then

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completed in 1997, with the supply of water to South Africa commencing in 1998. Recently, the Agreement on Phase II of the Lesotho Highlands Water Project between the Government of the Kingdom of Lesotho and the Government of the Republic of South Africa (Phase II Agreement) has been concluded, which regulates the supply of water to South Africa during Phase II of the project and the maintenance of Phase I of the Project. If there is a conflict with the LHWP on the object of a term, the meaning stipulated in the Phase II Agreement prevails only in respect of this agreement.[1] However, the provisions of the LHWP are binding unless altered by the Phase II Agreement.[2] Consequently, the LHWP is the framework treaty regulating the project, and the Phase II Agreement constitutes a protocol to the LHWP. Thus, in this article, all references to the "LHWP" refer to the treaty as the regulatory regime for all the "Phases" of the water project. This means that any inferences made about the LHWP provisions also apply to the Phase II Agreement, to the extent that they are not amended by the Phase II Agreement. Phase II is projected to begin providing water to South Africa by 2022.[3]

To this end, it is the author's view that Articles 4.1, 5.2, 6.8, and 7 of the LHWP and, more specifically, Annexure V of the Phase II Agreement prohibit the signatories from unilaterally altering or disturbing the supply of water to South Africa and regards the supply of water to Lesotho as "ancillary" to the supply of adequate water to South Africa. This means that the LHWP prioritises water supply to South Africa. Contrary to the LHWP, the Lesotho Water Act provides that in the case of conflicting water uses and if water is inadequate to cater for other uses, "domestic use" i.e., *including* the "taking" or "impounding" of water from a watercourse to satisfy "personal and household needs", must prevail and be accorded first preference over other uses and it also establishes the "reserve" that also prioritises water for "domestic water uses".[4] This means that the LWA and the LHWP could be found to be incompatible. Thus, if there is inadequate water in the Orange River to cater to the needs of both countries, Lesotho will be compelled to either comply with its obligations under the LHWP to supply adequate water to South Africa or to supply water to the residents of Lesotho. This is termed a "conflict of uses", which occurs when there is inadequate water in terms of quantity and quality to meet the needs of all transboundary water States.[5] This projected conflict of uses may prompt Lesotho to expropriate the water in the LHWP. Consequently, this article seeks to evaluate Lesotho's right to

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1 Article 1.3 of the Phase II Agreement, entered into force 11 August 2011.

2 Article 3 of the Phase II Agreement.

3 Department of Water and Sanitation "Development of Reconciliation Strategies for Large Bulk Water Supply Systems: Orange River – Current and Future Water Requirements Urban/Industrial Water Requirements" (2013) (accessed 2020-08-20) 28.

4 See ss 1, 13, 5(2) and 6 of Lesotho Water Act 15 of 2008 (LWA) https://www.water.org.ls/download/lesotho-water-act-no-15-of-2008/ (accessed 2020-08-23).

5 Rieu-Clarke, Moynihan and Magsig "United Nations Watercourses User's Guide" (2012) http://www.unece.org/fileadmin/DAM/env/water/meetings/Water_Convention/2016/10Oct_From_Practitioner_to_Practitioner/UN_Watercourses_Convention_-_User_s_Guide.pdf (accessed 2020-08-20) 109. See further here, Vinti "The Treaty on the Lesotho Highlands Water Project and the Principle of "Equitable and Reasonable Utilization" 2021 54 *De Jure* 328–346.

expropriate the water in the LHWP in the event of a conflict of uses. This inquiry is particularly significant in that the LHWP is cardinal to the supply of water to the Gauteng province, which is the economic hub of South Africa.

It bears mention that in Lesotho, the LHWP is managed through the Lesotho Highlands Development Authority (LHDA). The LHDA has the primary duty to supply predetermined quantities of water to South Africa.[6] The Trans-Caledon Tunnel Authority (TCTA) administers aspects of the project located in South Africa.[7] It is estimated that the LHWP has provided 10 000 million cubic metres of high-quality water, and it has enhanced water supply and materially lowered water treatment expenses.[8] Water is Lesotho's largest source of non-tax revenue, contributing 10 per cent to the overall Gross Domestic Product.[9] The project created at least 16 000 jobs in Lesotho during Phase I and also provided good quality roads.[10]

At the outset, it must also be noted that the regulatory regime of the LHWP is fraught with uncertainty on the exact international legal obligations of the signatories to this agreement.[11] This is compounded by the fact that Lesotho and South Africa regard their domestic legislation as part of the regulatory regime of the LHWP.[12] In this regard, Article 5.1 of the Phase II Agreement stipulates that parties must ensure that their domestic legislation is consistent with their obligations under the agreement and the LHWP, either through amendment of existing legislation or enactment of new legislation to that effect. This implies that the LHWP and the Phase II Agreement supersede the domestic laws of Lesotho concerning the water in the LHWP. Yet, Lesotho has promulgated legislation subsequent to the advent of the LHWP such as the LWA, which patently contradicts the LHWP in respect of a conflict of uses. It is with these considerations in mind that Lesotho's right to expropriate the water in the LHWP during a conflict of uses is considered.

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6 Article 7.1 read with Article 7.2 of the LHWP and Article 3 of the Protocol VI System of Governance to the Treaty on the Lesotho Highlands Water Project: Supplementary Arrangements Regarding the Systems of Governance for the Project, entered into force 4 June 1999 (Protocol VI). See also, s 20 of the Lesotho Highlands Development Authority Order, 1986 https://www.ecolex.org/details/legislation/lesotho-highlands-development-authority-order-no-23-of-1986-lex-faoc128641/ (accessed 2020-08-20).

7 See Article 8.1 and Article 8.2 of the LHWP; Article 4 read with Article 8 and Article 8A of Protocol VI. The work of the LHDA and TCTA is monitored by the Lesotho Highlands Water Commission as provided by Article 5 of Protocol VI and Article 9 of LHWP. The "Joint Permanent Technical Commission" was renamed as the "Lesotho Highlands Water Commission" as provided by Article 2 of Protocol VI.

8 Parliamentary Monitoring Group "Lesotho Highlands Water Project Phase 2: Progress Report with the Minister" (26 October 2016) https://pmg.org.za/committee-meeting/23524/ (accessed 2020-09-24) 1.

9 The Kingdom of Lesotho National Climate Change Policy 2017–2027 (6 July 2018) https://www.gov.ls/documents/national-climate-change-policy/ (accessed 2020-09-24) 15.

10 Parliamentary Monitoring Group https://pmg.org.za/committee-meeting/23524 2.

11 Orange Senqu River Basin Preliminary Transboundary Diagnostic Analysis (2008) http://www.orasecom.org/_system/writable/DMSStorage/651orange-senqu-river-basin-preliminary-transboundary-diagnostic-analysis.pdf (accessed 2020-07-20) 175.

12 Department of Water and Sanitation "Development of Reconciliation Strategies for Large Bulk Water Supply Systems: Orange River – International Obligations" (2014) http://www.dwaf.gov.za (2020-08-22) 8–9.

2 "EXPROPRIATION"

It is apposite to commence this discussion by defining the term "expropriation". The terms "expropriation" and "nationalisation" have often been used as synonyms: "expropriation" refers to autonomous meddling by the State with the property or similar rights of a proprietor in general.[13] More specifically, "expropriations" denote "property-specific or enterprise-specific takings where the property rights remain with the State or are transferred by the State to other economic operators".[14] In this regard, "nationalisation" represents the relocation of an economic enterprise to the public sector as a facet of a programme of socio-economic restructuring.[15] "Nationalisation" typically refers to the huge or large-scale acquisition of private equity in all economic sectors.[16] Thus, "nationalisation" is a species of "expropriation".[17] Formerly colonised countries regarded nationalisations as a core facet of their decolonisation imperative in the period after the end of the Second World War.[18] Consequently, it is accepted for purposes of this article that "expropriation" and "nationalisation" are the same.[19] The focus of this article is on "expropriation".

It must also be borne in mind that expropriation can either be direct or indirect. Direct expropriation refers to the "transfer of title and/or outright physical seizure of the property".[20] However, some measures may not involve the "physical taking" but may also permanently eviscerate the economic value of the investment or deny the owner of its right to "manage, use or control its property in a meaningful way".[21] These measures are called "indirect expropriations".[22] State practice, doctrine, and arbitral award have established that "indirect expropriation" has the following accumulative elements:

(a) An act attributable to the State;
(b) Interference with property rights or other protected legal interests;
(c) Of such degree that the relevant rights or interests lose all or most of their value or the owner is deprived of control over the investment;

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13 Schrijver *Sovereignty Over Natural Resources: Balancing Rights and Duties in an Interdependent World* (doctoral thesis, University of Groningen) 1995 270.

14 United Nations Conference on Trade Development "Expropriation. UNCTAD Series on Issues in International Investment Agreements II" (2012) https://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf (accessed 2020-08-12) 5–6.

15 Schrijver *Sovereignty Over Natural Resources* 270; *Iran-US Claims Tribunal, Amoco Int'l Finance Corp v Iran*, 15 IRAN-US CTR 189 ff par 114.

16 United Nations Conference on Trade Development https://unctad.org/en/Docs/unctaddiaeia 2011d7_en.pdf 5.

17 Harris *Cases and Materials on International Law* 6ed (2004) 577.

18 *Ibid*.

19 United Nations Conference on Trade Development https://unctad.org/en/Docs/unctaddiaeia 2011d7_en.pdf 1.

20 United Nations Conference on Trade Development https://unctad.org/en/Docs/unctaddiaeia 2011d7_en.pdf 6.

21 *Ibid*.

22 *Ibid*.

(d) Even though the owner retains the legal title or remains in physical possession.[23]

A tribunal that must adjudicate on an expropriation claim must verify that the respondent State committed the acts in question.[24] This is usually not difficult because takings are usually conducted through, among other things, statutes, and executive decrees.[25] The conduct of a State is regarded as an act of that State according to international law "whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organisation of the State, and whatever its characterisation as an organ of the central Government or a territorial unit of the State".[26] Finally, there are also regulatory measures, which do not usually demand compensation, but they may have the same consequences as indirect expropriation.[27]

It must also be noted that nationalisation or expropriation in international law can occur through a court decision, a statute, or an executive act.[28] If a court decision in giving effect to legislation denies a foreigner their right to property, then the court order will be regarded as an act of expropriation.[29] This is seen by way of taking of property, the obliteration of a right, or any act which annihilates a right even if no corporeal property has been taken.[30] Thus, expropriation can occur through various modes.

States also have a sovereign right under international law to nationalise property owned by foreigners for socio-economic, political, social, and other reasons.[31] Diplomatic precedents confirm this right.[32] It is accepted internationally that there is no problem with a State that nationalises property if it is provided for by its own domestic law.[33] This matter would then be resolved through municipal law.[34] The only limit to the right to nationalise emanates from international obligations.[35] It is also argued that a State may nationalise to pursue national security policy.[36] Ultimately, a State does not have the latitude to unilaterally determine its rationale and framework for

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23 United Nations Conference on Trade Development https://unctad.org/en/Docs/unctaddiaeia 2011d7_en.pdf 12.

24 United Nations Conference on Trade Development https://unctad.org/en/Docs/unctaddiaeia 2011d7_en.pdf 14.

25 United Nations Conference on Trade Development https://unctad.org/en/Docs/unctaddiaeia 2011d7_en.pdf 15.

26 *Ibid*.

27 United Nations Conference on Trade Development https://unctad.org/en/Docs/unctaddiaeia 2011d7_en.pdf 6.

28 *Van Zyl v Government of the Republic of South Africa* (20320/02) [2005] ZAGPHC 70 (20 July 2005) par 38.

29 *Ibid*.

30 *Ibid*.

31 United Nations Conference on Trade Development https://unctad.org/en/Docs/unctaddiaeia 2011d7_en.pdf 1.

32 *Texaco Overseas Petroleum Co v Libya* 17 ILM 556 par 60.

33 *Texaco Overseas Petroleum Co v Libya supra* par 61.

34 *Ibid*.

35 *Texaco Overseas Petroleum Co v Libya supra* par 62.

36 Schrijver *Sovereignty Over Natural Resources* 275.

nationalisation, but it is liable to international law.[37] However, in practice, States have extensive discretion.[38]

There have been three distinct periods of the metamorphosis of the right to expropriate. The first significant period of expropriations occurred through revolutionary groups in Russia and Mexico;[39] the second phase of expropriations occurred after the period of decolonisation that occurred after the Second World War.[40] The discussion then shifted to the States' right to economic self-determination, which included the right to expropriate without "full" compensation, but instead to pay "appropriate" compensation.[41]

The *Chorzow Factory* case is, in certain instances, cited as one of the first decisions that recognised a State's right to take foreign property under narrow grounds.[42] This court held that "expropriation" is a valid but unusual mechanism if the law provides for it.[43] The court further held that expropriation would ordinarily be a contravention of international law and contrary to how foreign property is treated.[44] Thus, this judgment established the right to "expropriate" foreign property. Similarly, in the *Anglo Iranian Oil Company* case, one of the issues before the ICJ was to decide whether the promulgation of these laws violated international law.[45] Unfortunately, the court held that it had no jurisdiction to hear this matter and thus, the "nationalisation" could not be revoked.[46] This meant that the nationalisation was accepted by default.

United Nations General Assembly Resolution 1803 triggered the creation and strengthened the unassailable sovereignty of States over their natural resources.[47] Resolution 1803 provides that nationalisation or expropriation must be based on the grounds of public or national or security interests.[48] These are regarded as superseding individual interests, both domestic and foreign.[49] The free and beneficial implementation of the right to sovereignty of countries over natural resources must be facilitated by the "mutual respect of States based on their sovereign equality".[50] Thus, Resolution 1803

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37 *Ibid*.

38 *Ibid*.

39 United Nations Conference on Trade Development https://unctad.org/en/Docs/unctaddiaeia 2011d7_en.pdf 1.

40 *Ibid*.

41 *Ibid*.

42 *Factory at Chorzow (Germ v Pol)* 1928 PCIJ (ser A) No 17 (Sept 13) 15.

42 United Nations Conference on Trade Development https://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf 111; Schrijver *Sovereignty Over Natural Resources* 271–272.

43 *Factory at Chorzow (Germ v Pol) supra* 27.

44 *Ibid*.

45 *Anglo-Iranian Oil Co UK v Iran* Judgment 1952 ICJ 93 (July 22) 95.

46 *Anglo-Iranian Oil Co UK v Iran supra* 115.

47 United Nations General Assembly Resolution 1803 (XVII) of 14 December 1962: Permanent Sovereignty Over Natural Resources and United Nations General Assembly Resolution 1514 (XV): Declaration on the Granting of Independence to Colonial Countries and Peoples of 14 December 1960 http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/1514(XV) (Resolution 1803) (accessed 2020-08-12).

48 Resolution 1803 par 4.

49 *Ibid*.

50 Resolution 1803 par 5.

authoritatively provides for the right to expropriate based on the right to permanent sovereignty over natural resources.

In the *Texaco* case, it was held that Resolution 1803 encapsulates the customary law of "nationalisation".[51] It was then held that the right of a State to "nationalise" is universally accepted.[52] It is a consequence of international customary law.[53] This exercise of the right to national sovereignty is regarded as an incidence of the State's territorial sovereignty.[54] Territorial sovereignty affords the State an exclusive power to reorganise its economic policies.[55] It is an essential right of sovereignty for national governments to freely construct an economic and social system.[56] The significance of such a right is, in fact, confirmed by the fact that, in practice, a decision to nationalise is usually made at the highest echelons of government.[57] Thus, the *Texaco* decision explicitly established Resolution 1803 as evincing customary international law.

Resolution 1803 was then affirmed in various judicial pronouncements.[58] First, Resolution 1803 was emphatically endorsed as encapsulating customary international law in the *Sedco* Case.[59] Similarly, in *Aminoil*, the arbitrator held that the legal regime for lawful nationalisation is contained in Resolution 1803.[60] It was then held that Resolution 1803 had received unanimous acceptance by the General Assembly.[61] Similarly, the *Amoco Arbitration* held that Resolution 1803 constitutes customary international law.[62] Thus, Resolution 1803 enjoys support from developing and developed States, and it recognises the right to expropriate foreign property.[63] Overall, there is no doubt that Resolution 1803 and the right to expropriate foreign property enjoy universal judicial support.

Expropriation has also been accepted by various international agreements. To this end, the UDHR provides that people have the right to own property and not to be "arbitrarily deprived" of their property.[64] Similarly, the African Charter protects the right to property and that this right may only be derogated from in the public interest and under the law.[65] The provisions

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51 *Texaco Overseas Petroleum Co v Libya supra* par 59.

52 *Ibid*.

53 *Ibid*.

54 *Ibid*.

55 *Ibid*.

56 *Ibid*.

57 *Ibid*.

58 Harris *Cases and Materials* 578.

59 *Sedco (second Interlocutory Award)* (1986)10 Iran-US CTR 634.

60 *The Government of the State of Kuwait v The American Independent Oil Company (AMINOIL)* YCA 1984 71 ff par 143.

61 *Ibid*.

62 *Ibid*; *US Claims Tribunal, Amoco Int'l Finance Corp v Iran supra* par 116.

63 Harris *Cases and Materials* 579.

64 Article 17 of the Universal Declaration of Human Rights. Adopted: 10/12/1948.

65 Article 14 of the African Charter on Human Peoples Rights. Adopted: 1/6/1981. EIF: 21/10/1986. Article 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms. Adopted: 20/03/1952. EIF: 18/5/1954; Article 21 of the American Convention on Human Rights. Adopted: 22/11/1969. EIF: 18/7/1978; Article 17 of the Charter of Fundamental Rights of the European Union. Adopted: 2/10/2000. EIF:

of the UDHR and the African Charter bind both South Africa and Lesotho because they have ratified these pertinent instruments.[66] Therefore, there is no doubt that international law prohibits the deprivation of property except according to the rules of property law.[67] These pertinent instruments envisage the deprivation of property in the public interest.[68]

To this end, the Charter of Economic Rights and Duties of States (CERDS) provides that in the application of the right to permanent sovereignty over natural resources, States have the right to expropriate subject to the payment of "appropriate compensation" taking into account its relevant law.[69] In this regard, the United Nations General Assembly Resolution 3201 provides that the States have the right to expropriate or nationalise as an "expression" of the right to full permanent sovereignty over natural resources.[70]

In the water context, the United Nations Convention on the Law of Non-navigational Uses of International Watercourses (UN Watercourses Convention) provides for the payment of compensation in instances whereby the rights of a State have been infringed through "significant harm" in respect of Articles 5 and 6, which provide for equitable and reasonable utilisation.[71] The same provision is made in the Revised Protocol on Shared Watercourses in the Southern African Development Community (Revised Protocol) for compensation to be paid in respect of "significant harm" as a last resort when negotiation and mitigation have failed to alleviate the harm.[72] The Revised Protocol in Article 1 defines "significant harm" as palpable harm that can be established through probative material, which is material. The UN Watercourses Convention does not proffer a definition of the term "significant harm". For purposes of this discussion, it is the author's view that both the UN Watercourses Convention and the Revised Protocol regard compensation as a mechanism of last resort and is not the first option when there has been significant harm as that would have happened in the context of expropriation. By analogy, it can then be argued that international freshwater law recognises the right to compensation in respect of expropriation.

7/12/2000; Article 14.1 of the Association of Southeast Asian Nations Comprehensive Investment Agreement. Adopted: 26/2/2009. EIF: 24/2/2012.

66 *Van Zyl v Government of the Republic of South Africa supra* par 37.

67 *Van Zyl v Government of the Republic of South Africa supra* par 38.

68 *Ibid*.

69 Article 2.2(c) of the Charter of Economic Rights and Duties of States: United Nations General Assembly Resolution 3281 (XXIX), 12 December 1974 (CERDS); Article IV.1 of the World Bank Guidelines on the Treatment of Foreign Direct Investment, 1993.

70 United Nations General Assembly 3201 (S-VI): Declaration on the Establishment of a New International Economic Order UNGA Res 3201 (S-VI) (1974) http://legal.un.org/avl/pdf/ha/ga_3201/ga_3201_ph_e.pdf (accessed 2020-08-12) par 4(e).

71 Kiss and Shelton *International Environmental Law* 3ed (2004) 252; See Article 7 of the United Nations Convention on the Law of Non-navigational Uses of International Watercourses. Adopted: 21/5/1997. EIF: 17/8/2014.

72 Article 3.10(b) of the Revised Protocol on Shared Watercourses in the Southern African Development Community, 2000. The Revised Protocol in Article 1 defines "significant harm" as non-trivial harm capable of being established by objective evidence without necessarily rising to the level of being substantial.

Overall, for expropriation to be lawful under international law, the exercise of this sovereign right must comply with the following conditions:

(a) Property has to be taken for a public purpose;
(b) On a non-discriminatory basis;
(c) In accordance with due process of law;
(d) Accompanied by compensation.[73]

Consequently, there is no doubt that the right to expropriate foreign property enjoys universal support. However, this right to expropriation would need to be conducted through the medium of the domestic law of Lesotho. This then requires an inquiry on the law of Lesotho in this regard. Since it would be the property of South Africa that could be "expropriated", this also necessitates a comparative discussion on the law of expropriation in South Africa.

3 EXPROPRIATION IN THE LHWP

In this regard, the Constitution of Lesotho guarantees the right to "freedom from arbitrary seizure of property" provided this right does not deny the rights of others.[74] More specifically, section 17 of the Constitution of Lesotho provides that there are three conditions for a valid expropriation under Lesotho law: first, the expropriation must be for "public benefit"; secondly, the "hardship" caused must be reasonably justifiable and lastly, it is subject to the payment of full compensation. However, it has been held that freedom from arbitrary seizure of property is not an absolute right.[75] In short, expropriation is allowed in Lesotho law.

The right to "expropriate" under the Constitution of Lesotho is entrenched by the right that every person who has an "interest" or "right" over property that has been expropriated, has the right of direct access to the High Court for–

(a) the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right and the amount of any compensation to which he is entitled; and
(b) the purpose of obtaining prompt payment of that compensation.[76]

This provides for the right of judicial review on the "legality" of an expropriation, which augments the requirement that the expropriation must be through "applicable" law.

In this regard, the LWA provides for the expropriation of water rights.[77] In such an instance, the LWA requires that the government negotiate with the affected parties on the terms of such acquisition and compensation.[78] Similarly, section 5 of the LWA permits the diversion of water from any water

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73 United Nations Conference on Trade Development https://unctad.org/en/Docs/unctaddiaeia 2011d7_en.pdf 1.
74 S 4(1)(*m*) of the Constitution of Lesotho 1993.
75 *Tsenoli v Lesotho Revenue Authority* (CC5/2009) [2011] LSHC 51 (20 April 2011) 14–18.
76 S 17(1) and s 17(2) of the Constitution of Lesotho.
77 S 30(2) of the LWA.
78 *Ibid*.

source to satisfy "domestic use" needs if there is a conflict of use. This should also be regarded as an expropriation as it could permanently extinguish the interest or rights of South Africa over that water in the LHWP.

The LWA further provides that if expropriation of land under the Land Act results in a "loss of the right to use water", then the holder of such right to use water can negotiate the terms of that "acquisition" and the compensation.[79] This means that the LWA recognises that expropriation of land can also result in the expropriation of water rights. The phrase "loss of right" read in tandem with the term "acquisition" mirrors the definition of "expropriation" which is the loss of property or rights to property that takes away the substance of the property or the right in the manner contemplated by section 17 of the Constitution of Lesotho. This means that South Africa's water rights in the LHWP can be "compulsorily acquired" or "expropriated" according to the LWA. For purposes of this article, this means that sections 5 and 6 of the LWA permit the expropriation of the water in the LHWP in times of a conflict of use or "emergency". This would be in the interests of public health and, ultimately, public benefit as required by section 17 of the Constitution of Lesotho. There is no doubt that a conflict of uses in the LHWP would justify the "hardship" of South Africa losing its right or interests in the LHWP. This means that Lesotho would be justified to expropriate the LHWP in a conflict of uses subject to the payment of compensation.

Alternatively, expropriation of the water in LHWP could occur through the expropriation of land. According to the Land Act of Lesotho, land can be expropriated if it is not held under a lease for "public purposes".[80] The Land Act further provides that one of the reasons for expropriation based on a public purpose is for "water reservoirs".[81] This would permit the expropriation of the Orange River in times of a conflict of uses. The Minister is also entitled, after consulting with the relevant allocating body, to expropriate land if it is in the "public interest" that land is required for purposes of development.[82] This land could invariably have water. Land can be expropriated in the "public interest" for the development of agriculture by modern farming methods, construction or development of a new residential, commercial or industrial precinct, or development or reconstruction of existing built-up area.[83] In this way, the *Moletsane* case provides that the Land Act demands that the expropriation must specify a purpose; otherwise, it will be deemed arbitrary.[84] Therefore, the Lesotho Land Act goes further than the Constitution of Lesotho in that it provides for expropriation both for "public purposes" and in the "public interest". Significantly, the Lesotho Land Act could be used to subtly expropriate water from the LHWP.

It bears mention that "expropriation" under the Lesotho Land Act is premised on the following principles:

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79 S 30(3) of LWA.

80 S 49(1) of the Lesotho Land Act 8 of 2010 https://lesotholii.org/ls/legislation/num-act/2010/8 (accessed 2020-01-20).

81 S 50(1)(*c*) of the Lesotho Land Act.

82 S 51(1) of the Lesotho Land Act.

83 S 51(2) of the Lesotho Land Act.

84 *Moletsane v Attorney General* (CIV/APN/163/2001) (CIV/APN/163/2001) [2004] LSHC 123 (18 October 2004) 64.

(a) the Government shall first negotiate with the holder of land rights, which are the subject of potential expropriation and resort to expropriation only upon failure of the negotiations due to the unreasonableness of the holder of the rights to the land;
(b) prior adjudication of the land proposed for expropriation and other lands, whether adjoining or not as may be affected by the expropriation;
(c) payment or settlement of compensation as provided for in Part X of the Land Act and under the regulations;
(d) a party whose land rights are the subject of expropriation by the Government shall have the right to seek review from the Land Court against any decision of the Government in this regard.[85]

It follows then that there is a right to expropriate foreign property under Lesotho law. In fact, expropriations have been occurring under the LWA and the Lesotho Land Act in the LHWP. Thus, there is a huge possibility Lesotho could expropriate the entire LHWP joint venture. It is imperative then, to have a peek at South African law to predict the points of dispute between South Africa and Lesotho if the latter decides to expropriate the LHWP. This approach is also sound in that the LHWP is regulated by the LHWP together with the domestic legislation of both countries.

In this respect, when considering any expropriation under South African law, section 25(1) of the Constitution of the Republic of South Africa, 1996 (Constitution) is the point of departure.[86] Section 25 of the Constitution reads:

"(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
(2) Property may be expropriated only in terms of law of general application–
(a) for a public purpose or in the public interest; and
(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court."

The construal of this section must uphold the values that inform an "open and democratic society based on human dignity, equality, and freedom".[87] International law should be considered and foreign law may be consulted.[88] The object of section 25 should be to protect current private property rights and to promote the public interest.[89] These are potentially conflicting imperatives and will be difficult to achieve, particularly concerning natural resources such as water and land.

The word "expropriate" in South African law generally refers to the process whereby a State organ takes property for a public purpose and this

85 S 52 of the Lesotho Land Act.
86 *Haffejee NO v eThekwini Municipality* 2011 (12) BCLR 1225 (CC) (25 August 2011) par 29; *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (*FNB*) par 60.
87 *Haffejee NO v eThekwini Municipality supra* par 29.
88 *Ibid*; s 39 of the Constitution.
89 *Haffejee NO v eThekwini Municipality supra* par 31.

is normally accompanied by the payment of compensation.[90] To prove "expropriation", a litigant must prove that the State has acquired the essence of what it was deprived of.[91] Expropriation occurs through State compulsion and without the authority of the affected owner.[92] A legislative intention to permit expropriation without compensation will not be construed without explicit words or plain suggestion or in accordance with section 25(2) of the Constitution.[93] The nub of expropriation is regulated by subsections 25(2) and 25(3) of the Constitution.[94] Furthermore, the rights acquired by the State do not have to be identical to the rights lost.[95] However, there must be an adequate connection or material similarity between what has been lost and what will be taken.[96] A mutual exchange is not a *sine qua non* of this process.[97]

In essence, "expropriation" requires "deprivation" which causes the property to be taken by the State.[98] In the same breath, in *Msiza v Director-General for the Department of Rural Development and Land Reform* it was held that for section 25 of the Constitution to apply, it must first be found that such "deprivation" amounts to an act of "expropriation".[99] "Deprivation" refers to the "sacrifices that holders of private property rights may have to make without compensation", whereas "expropriation" refers to the State taking property in the public interest subject to the payment of compensation.[100] Thus, "deprivation" in terms of section 25 includes expunging a right enjoyed in the past, and "expropriation" is an element of this.[101] This "deprivation" always occurs when property or rights in this regard are acquired or materially impaired, but this is not the case with "expropriation".[102] If the

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90 *Harksen v Lane NO* 1998 (1) SA 300 (7 October 1997) par 31; see Van der Walt "Striving for the Better Interpretation – A Critical Reflection on the Constitutional Court's *Harksen* and *FNB* Decisions on the Property Clause" 2004 121 *SALJ* 854 862.

91 *Minister of Minerals and Energy v Agri South Africa* 2012 (9) BCLR 958 (SCA) (31 May 2012) par 58.

92 *Arun Property Development (Pty) Ltd v City of Cape Town* [2014] ZACC 37 par 58; see Slade "The Effect of Avoiding the *FNB* Methodology in Section 25 Disputes" 2019 40 *Obiter* 36 44, where it is argued that the *FNB* case approach can be avoided in certain instances; Van der Walt 2004 *SALJ* 875.

93 *Arun Property Development (Pty) Ltd v City of Cape Town supra* par 59; see Marais "Common-Law Presumption, Statutory Interpretation and Section 25(2) of the Constitution – A Tale of Three Fallacies. A Critical Analysis of the Constitutional Court's Arun Judgment" 2016 3 *SALJ* 629 642–645.

94 Dugard and Seme "Property Rights in Court: An Examination of Judicial Attempts to Settle Section 25's Balancing Act Re Restitution and Expropriation" 2018 34 *SAJHR* 33 34.

95 *Minister of Minerals and Energy v Agri South Africa supra* par 58.

96 *Ibid*.

97 *Ibid*.

98 *Minister of Minerals and Energy v Agri South Africa supra* par 59. For further discussion in this regard, see Van der Walt 2004 *SALJ* 867; Van der Walt and Botha "Coming to Grips With the New Constitutional Order: Critical Comments on *Harksen v Lane NO*" 1998 13 *SAPL* 17–41; Mostert "The Distinction Between Deprivations and Expropriations and the Future of the 'Doctrine' of Constructive Expropriation in South Africa" 2003 19 *SAJHR* 567–592.

99 2016 (5) SA 513 (LCC) (5 July 2016) par 6.

100 *Minister of Minerals and Energy v Agri South Africa supra* par 48.

101 *Ibid*.

102 *Ibid*; Marais "When does State Interference with Property (Now) Amount to Expropriation? An Analysis of the Agri SA Court's State Acquisition Requirement (Part II)" 2015 7 *PER/PELJ* 3033 3033; Marais "When does State Interference with Property (Now) Amount

"deprivation" constitutes an "expropriation", then it must comply with the inquiry under section 25(2)(*a*) and provide for compensation under section 25(2)(*b*).[103] Section 25(2)(*a*) of the Constitution provides that expropriation must either be done in the "public interest" or for a "public purpose" whereas section 25(2)(*b*) provides that the expropriation requires the payment of compensation. This means that a clear distinction between "expropriation" and "deprivation" is crucial because the former requires compensation, whereas the latter does not.

Furthermore, the *FNB* case confirms that alleged violations of section 25 of the Constitution must first be in accordance with section 25(1) prior to triggering sections 25(2) and (3).[104] Infringement contemplated in section 25(1) of the Constitution is restricted to establishing whether the deprivation of property is "arbitrary", within the meaning of that concept as employed in section 25(1).[105] A deprivation is "arbitrary" within the confines of section 25 when section 25(1) does not avail "sufficient reason" for that specific deprivation or is procedurally unfair.[106] "Sufficient reason" is to be established as follows:

> (a) It is to be determined by evaluating the relationship between means employed, namely the deprivation in question, and ends sought to be achieved, namely the purpose of the law in question;
> (b) A complexity of relationships has to be considered;
> (c) In evaluating the deprivation in question, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected;
> (d) In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property;
> (e) Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially;
> (f) Depending on such interplay between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by section 36(1) of the Constitution;
> (g) Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case, always

to Expropriation? An Analysis of the Agri SA Court's State Acquisition Requirement (Part I)" 2015 3 *PER/PELJ* 2983 2983; Swemmer "Muddying The Waters – The Lack of Clarity Around the Use of s 25(1) of the Constitution: *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism: Eastern Cape"* 2017 33 *SAJHR* 286 294.

[103] *FNB supra* par 59; see Dugard and Seme 2018 *SAJHR* 43, who criticise the Constitutional court's approach on amongst other reasons, the basis that it may justify arbitrary derivation of property and they question the relevance of s 36 of the Constitution in light of the internal limitation in s 25(1).

[104] Boggenpoel "Compliance with Section 25(2)(*b*) of the Constitution: When Should Compensation for Expropriation Be Determined?" 2012 129 *SALJ* 605 611.

[105] *FNB supra* par 61.

[106] *FNB supra* par 100.

> bearing in mind that the enquiry is concerned with "arbitrary" in relation to the deprivation of property under section 25.[107]

It can be seen that these listed factors presumably elaborate on the "public purpose" or "public interest" requirement of section 25(2)(*a*) of the Constitution. This is because, in the language of the Constitution, an "expropriation" would be "arbitrary" if it was not in the "public interest" or "public purpose". However, these factors must not be seen as a "check-list" since the courts are required to "balance" the rights in question.[108]

This discussion invariably posits the question as to the meaning of the terms "public interest" and "public purpose" within the scope of section 25 of the Constitution. The "public purpose" requirement for expropriation is endorsed as a rule of international law.[109] It has been held that international law provides for expropriation for public purposes.[110] Under international law, "public purpose" connotes that the reason for the expropriation must be based on a licit welfare objective and not private or unlawful gains.[111] The "public purpose" requirement is determined according to the law when the expropriation occurred.[112] It is immaterial whether or not the purport of the measure is successfully achieved.[113] Equally, an expropriation that was not designed for a "public purpose" will not become lawful if the property that has been taken starts serving a "public purpose" in the future.[114] To this end, the Constitution does not define the term "public purpose". This gap is plugged by the Expropriation Act, which provides that "public purposes" include all objectives related to the implementation of any law by a State organ.[115] It is argued that this wide formulation is meant to give government flexibility.[116] Regard must also be had to the fact that this illuminates the duty imposed by section 25 not to elevate private property rights over the State's

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[107] *Ibid*; *Staufen Investments (Pty) Ltd v Minister of Public Works* (756/2017) [2018] ZAECPEHC 51 (25 September 2018) par 37; see Marais 2015 *PER/PELJ* 2983–3031; see Hoops "The Alternative-Project Argument in the Context of Expropriation Law (Part 2)" 2017 1 *TSAR* 70 83.

[108] Kruger "Arbitrary Deprivation of Property: An Argument for the Payment of Compensation by the State in Certain Cases of Unlawful Occupation" 2014 131 *SALJ* 328 339.

[109] United Nations Conference on Trade Development https://unctad.org/en/Docs/unctaddiaeia 2011d7_en.pdf 28.

[110] *Van Zyl v Government of the Republic of South Africa supra* par 39.

[111] United Nations Conference on Trade Development https://unctad.org/en/Docs/unctaddiaeia 2011d7_en.pdf 28–29.

[112] United Nations Conference on Trade Development https://unctad.org/en/Docs/unctaddiaeia 2011d7_en.pdf 31.

[113] *Ibid*.

[114] *Ibid*; see Viljoen "Substantive Adjudication of the Decision to Expropriate Property" 2017 2 *STELL LR* 444 454.

[115] S 1 of the Expropriation Act 63 of 1975; Hoops "Specificity of Expropriation Statutes as a Safeguard Against Third-Party Transfers For Economic Development: Lessons From German Law For New Expropriation Legislation in South Africa?" 2016 4 *SALJ* 788 789–792.

[116] Slade "Public Purpose or Public Interest and Third-Party Transfers" 2014 17 *PER/PELJ* 167 180.

social responsibilities.[117] It has been cautioned that this public purpose must survive the act of expropriation to be valid.[118]

It must be borne in mind that the history of South Africa does not permit the elevation of individual property rights at the expense of the paramount duty to ensure equitable access to natural resources.[119] There is no doubt that expropriation by the State that is carried out in the private interest is unlawful.[120] However, section 25(4) of the Constitution confirms that expropriation for the benefits of a private individual is allowed in respect of land reform.[121] This is because the purpose of the expropriation supersedes the interests of an individual as it is for public benefit.[122] This approach is in line with the public interest to ensure redistribution of resources, which is the essence of section 25 of the Constitution.[123] Thus it has been opined that "expropriation" is a necessary instrument in a modern democratic society in that it ensures organised development.[124]

In respect of "public interest", the Constitution provides that the "public interest" includes the pursuit of land reform and equitable access to all South Africa's natural resources.[125] Aside from land reform, this implies that to prove that expropriation is in the "public interest", one must prove that the measure ensures fair access to natural resources. In this regard, the National Environmental Management Act (NEMA) provides that the Minister of Environmental Affairs may, expropriate any property, subject to compensation, for any purpose under this Act, if that purpose is a "public purpose" or is in the "public interest".[126] The compensation contemplated in the NEMA must be done according to section 25(3) of the Constitution.[127] More directly, section 81(1) of the Water Services Act 108 of 1997 (WSA), and section 64(1) of the National Water Act 36 of 1998 (NWA), provide for expropriation of "property", i.e. including water and water rights, with the latter statute demanding that it must be in the "public interest" or "public purpose".[128] Both the NWA and WSA require that these expropriations be in line with the Expropriation Act. This would permit expropriation in a conflict of uses to ensure that there is enough water for "domestic uses", i.e.,

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117 *Minister of Minerals and Energy v Agri South Africa supra* par 62.

118 Van der Walt and Slade "Public Purpose and Changing Circumstances: *Harvey v Umhlatuze Municipality & Others*" 2012 129 *SALJ* 219 233.

119 *Minister of Minerals and Energy v Agri South Africa supra* par 62.

120 *Msiza v Director-General for the Department of Rural Development and Land Reform supra* par 15.

121 *Msiza v Director-General for the Department of Rural Development and Land Reform supra* par 14.

122 *Msiza v Director-General for the Department of Rural Development and Land Reform supra* par 15; Boggenpoel 2012 *SALJ* 613.

123 *Msiza v Director-General for the Department of Rural Development and Land Reform supra* par 15.

124 Gray "Human Property Rights: The Politics of Expropriation" 2005 16 *STELL LR* 398 399; *Waters v Welsh Development Agency* 2004 1 WLR 1304 par 1.

125 S 25(4)(*a*) of the Constitution; see Du Plessis "The (Shelved) Expropriation Bill b16–2008: An Unconstitutional Souvenir or an Alarmist Memento?" 2011 22 *STELL LR* 352 359.

126 S 36(1) of the Act 107 of 1998.

127 S 36(3) of the NEMA.

128 See further, Couzens "Expropriation as a Weapon For Environmental Protection in South Africa" 2010 127 *SALJ* 18 22–24.

including water that is diverted or taken from a watercourse for personal and household needs, as is contemplated by sections 1, 5, and 6 of the LWA. Overall, it can be argued that the "public purpose" denotes government purposes while "public interest" refers to purposes that are to the advantage of the public.[129] It is conceivable to argue then, that the purposes of government and the public should coincide, and thus, these terms are the same.

Furthermore, if expropriation is "arbitrary", the consequent limitation or deprivation must be evaluated in terms of section 36 of the Constitution.[130] The availability of less restrictive means to achieve the same purpose is relevant to this inquiry.[131] This means that more is required to prove "expropriation" even though there is a correlation and no clear line of separation between sections 25(1) and 25(2).[132] Consequently, section 25 of the Constitution prohibits the "arbitrary deprivation" of property and it allows for the expropriation of property under the following conditions: First, the expropriation must be according to a "law of general application" and secondly, it must be implemented for a "public purpose" or in the "public interest".[133] Thirdly, the time and manner of the compensation that must be paid must either be agreed to by those affected or must be decided on by a court and must also be "just and equitable".[134] The question of whether expropriation has indeed occurred must be done on a case-by-case basis.[135] This is so because the acquisition is likely to occur in different ways.[136]

The provisions of the Protection of Investment Act 22 of 2015 (PIA) must be considered concerning nationalisation/expropriation. This is because the PIA provides that investors have the right to property as provided by section 25 of the Constitution.[137] This means that their property may not be expropriated without the safeguards and conditions provided for by section 25 of the Constitution. Significantly, the PIA provides that foreign investors and their investments must be treated the same as South African investors in "like circumstances".[138] This means that any privilege, advantage, or benefit accorded to South African investors must be given to all foreign investors in "like circumstances". For purposes of the PIA, "like circumstances" include the following factors amongst others:

(*a*) effect of the foreign investment on the Republic, and the cumulative effects of all investments;
(*b*) sector that the foreign investments are in;
(*c*) aim of any measure relating to foreign investments;

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129 Slade "Public Purpose or Public Interest and Third-Party Transfers" 2014 17 *PER/PELJ* 167 187.

130 *Staufen Investments (Pty) Ltd v Minister of Public Works supra* par 37.

131 *Staufen Investments (Pty) Ltd v Minister of Public Works supra* par 39.

132 *Minister of Minerals and Energy v Agri South Africa supra* par 48 and 67; *Ethekwini Municipality v Haffejee NO; Haffejee NO v eThekwini Municipality* [2010] 2 All SA 358 (KZD) par 22.

133 *Ethekwini Municipality v Haffejee NO; Haffejee NO v eThekwini Municipality supra* par 22.

134 *Ibid*.

135 *Minister of Minerals and Energy v Agri South Africa supra* par 64.

136 *Ibid*.

137 S 10 of the PIA.

138 S 8 of the PIA.

(*d*) direct and indirect effect on the environment.[139]

This list is obviously not exhaustive as seen by the use of the word "including". Each factor is given equal weight in this assessment.[140] This provision is particularly significant for the LHWP. First, the PIA provides that an "investment" for purposes of this Act, includes "any lawful enterprise established, acquired or expanded by an investor in accordance with the laws of the Republic, committing resources of economic value over a reasonable period of time, in anticipation of profit".[141] This would include the LHWP venture. In respect of the notion of amending the Constitution to provide for expropriation without compensation or even that the Constitution could indeed provide for this, it is the author's submission that the national treatment provision could be employed to argue for discriminatory treatment of foreign nationals. The factors listed as implicitly disqualifying one from equal treatment under the "like circumstances" criteria are extensive and ambiguous such that they could be manipulated to justify a reason why the government decided not to grant due compensation for expropriation. It is argued that this provision has the effect of negating the national treatment clause in section 8 of the PIA, which accords equal treatment for foreign investors and domestic investors.[142] This is compounded by the inadequate "physical protection" that is afforded by section 9 of the PIA that makes such protection subject to the "availability of resources" and "capacity".[143] It is noteworthy that the PIA also analyses the effect of the "investment" on the environment. This is ambiguous. However, it is presumed that if an "investment" irreparably harms the environment, then it will not be treated like other investments.

It is poignant that there is a widely held view that the PIA was prompted by the *Foresti* case, which despite not making any findings on the merits of the case, exposed South Africa to the jurisdiction of an international tribunal on its natural resources.[144] Thus, many commentators have opined that the PIA was promulgated to negate the unpalatable prospect of subjugating South Africa's control of its natural resources to an international tribunal.[145]

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139 S 8(2) of the PIA.

140 S 8(3) of the PIA.

141 S 2(1)(*a*) of the PIA.

142 Qumba "Safeguarding Foreign Direct Investment in South Africa: Does the Protection of Investments Act Live Up to its Name?" 2018 25 *South African Journal of International Affairs* 341 347.

143 Qumba 2018 *South African Journal of International Affairs* 349.

144 *Piero Foresti, Laura de Carli v Republic of South Africa* ICSID Case No ARB(AF)/07/1.

145 Qumba "South Africa's Move Away From International Investor-State Dispute: A Breakthrough or Bad Omen For Investment in the Developing World?" 2019 52 *De Jure* 358 360; Ngobeni "The African Justice Scoreboard: A Proposal to Address Rule of Law Challenges in the Resolution of Investor-state Disputes in the Southern African Development" 2019 LII *CILSA* 1–21; Kondo "A Comparison with Analysis of the SADC FIP Before and After its Amendment" 2017 20 *PER/PELJ* 1 17; Mhlongo "A Critical Analysis of the Protection of Investment Act 22 of 2015" 2019 34 *SAPL* 1 3; Picker "Legal Protection of Property under the Protection of Investment Act 22 of 2015" 2018 17 *Acta Juridica* 17–42; Schlemmer "Dispute Settlement in Investment-Related Matters: South Africa and the BRICS" 2018 112 *American Journal of International Law Unbound* 212 213; Government of the Republic of South Africa "Bilateral Investment Treaty Policy Framework Review:

The last requirement for an expropriation to be valid is that it must be coupled with "compensation".[146] Different approaches to valuation may be used to establish the amount of compensation.[147] There is no proof in treaty law that States can refuse to pay compensation or freely establish the amount of compensation.[148] It actually requires the payment of compensation and prescribes the amount of compensation.[149] International law provides that where the property of a foreigner has been expropriated, then "prompt, adequate and effective" compensation should be made in the case of expropriation of a specific property.[150] This means that nationalisation/expropriation requires compensation for the affected persons. To this end, section 17(*c*) of the Constitution of Lesotho provides that expropriation requires prompt payment of "full" compensation. In this regard, the LWA provides that where the compulsory acquisition of land is required, compensation must be made according to the Land Act.[151] On this score, the Lesotho Land Act provides that in instances where land is expropriated, the affected person must be paid compensation at "market value".[152] This further highlights the notion that the expropriation of land will sometimes also entail the expropriation of water and water rights.

In the same breath, the Lesotho Land Act provides that in evaluating compensation, regard must be had–

> (a) to the value of the property as certified by an odd number of valuers one of whom shall be the Government valuer, having regard to the present and replacement value; and
> (b) to the expenses incidental to any necessary change of residence or of place of business.[153]

This means that "market value" under the Land Act takes precedence in the determination of compensation.

On the contrary, the Constitution takes a different approach to the issue of "market value" and its place in determining compensation. The Constitution provides that the "amount of the compensation and the time and manner of payment should be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected".[154] "Relevant circumstances" in this regard include amongst others:

> (i) the current use of the property;
> (ii) the history of the acquisition and use of the property;
> (iii) the market value of the property;

Government Position Paper" (2009) http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/090626trade-bi-lateralpolicy.pdf (accessed 2020-08-22).

146 United Nations Conference on Trade Development https://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf 40.

147 *Ibid*.

148 Schrijver *Sovereignty Over Natural Resources* 278.

149 *Ibid*.

150 *Van Zyl v Government of the Republic of South Africa supra* par 39.

151 S 30(1) of the LWA.

152 S 56 of the Lesotho Land Act.

153 S 58(2) of the Lesotho Land Act.

154 S 25(3) of the Constitution; *Haffejee NO v eThekwini Municipality supra* par 38.

(iv) and the purpose of the expropriation.[155]

These factors identified in section 25(3) are not hierarchical.[156] Market value is usually considered as the point of departure to the analysis because it is the most concrete factor in all of the elements specified in section 25(3).[157] This does not mean that market value is the most significant factor in the evaluation of just and equitable compensation; the goal is to ascertain compensation that is "just and equitable", not to establish the market value of the property.[158] Thus, market value acts variable, which would achieve an equitable balance between the public and private interest.[159]

Consequently, it has been held that there is a two-leg process to determining compensation: first, establishing the market value of the property and secondly, deducting from or increasing the amount of the market value, as the context requires.[160] The ethos for this two-leg approach is that there is no specific method for calculating elements that hinge on equity.[161] This marks a departure from the Lesotho approach. In practice, South African law uses "market value" as the "starting point" of the compensation determination, but it is not on its own, dispositive of the amount of compensation to be paid.[162]

In this regard, the Expropriation Act, which was promulgated during the apartheid era, provides that market value is the formula for establishing compensation payable to an individual whose property has been expropriated by the State.[163] However, the Expropriation Act does say that the amount of compensation must reflect the aggregate of the market value of the expropriated property and the actual financial loss caused by the expropriation and if it is a right, the amount lost by the expropriation of the right.[164] It bears mention here that the Expropriation Act is regarded as in conflict with the Constitution in that it emphasises the "willing seller to a willing buyer" principle, which disavows this principle.[165]

Furthermore, the obligation to compensate requires that the owner of the expropriated property "may not be in a better or worse plight as a result of

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155 *Haffejee NO v eThekwini Municipality supra* par 38.

156 *Msiza v Director-General for the Department of Rural Development and Land Reform supra* par 33.

157 *Ibid*.

158 *Ibid*; see in this regard, Van der Walt "The State's Duty to Pay 'Just and Equitable' Compensation for Expropriation: Reflections on the *Du Toit* Case" 2005 122 *SALJ* 765 772–776.

159 *Msiza v Director-General for the Department of Rural Development and Land Reform supra* par 35.

160 *Msiza v Director-General for the Department of Rural Development and Land Reform supra* par 34.

161 *Msiza v Director-General for the Department of Rural Development and Land Reform supra* par 36.

162 Van Wyk "Compensation For Land Reform Expropriation" 2017 1 *TSAR* 21 26.

163 *Msiza v Director-General for the Department of Rural Development and Land Reform supra* par 32.

164 S 12(1) of the Expropriation Act; *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) par 33; see further, Van Wyk 2017 *TSAR* 23.

165 Dugard and Seme 2018 *SAJHR* 41.

the act of expropriation".[166] The affected person must be returned to the same position they were prior to the expropriation through a financial award and the equivalent in value should be given to cover the property lost.[167] Thus, courts are of the view that the value of a property "is its value in the owner's hands and not in the hands of the expropriator".[168] In a similar domain, the PIA provides that expropriation of foreign property must be determined according to section 25 of the Constitution.[169] Qumba submits that this greatly compromises the protection afforded to foreign investments.[170] Overall, the Constitution rejects the market-driven method of compensation in cases of expropriation.[171] Market value is merely one of the factors under deliberation in this regard.[172] Thus, compensation, which is less than the market value, may be in accordance with the Constitution if it is "just and equitable".[173] This could open the door for the expropriation of foreign investments without compensation.[174] This would have significant implications for South Africa's rights under the LHWP.

The Lesotho Land Act also provides that compensation must in all instances of compulsory acquisition, be paid before the expropriation is concluded.[175] The Constitution of Lesotho does not explicitly provide for compensation prior to expropriation as it requires a "prompt" payment of compensation.[176] This is vague, and it is unclear whether this refers to "prompt" payment before or after the expropriation. In this regard, section 25 of the Constitution allows for compensation prior to a valid expropriation, but the opposite is equally conceivable.[177] Thus, it has been held that section 25 of the Constitution permits the interpretation that compensation must occur before expropriation.[178] In the same vein, it has been held that the Expropriation Act does not require that the amount of compensation and the time and manner of payment be established before expropriation takes effect.[179] However, the transfer of ownership and possession of the affected

166 *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2007 (1) SA 1 (SCA) par 21.

167 *Ibid*.

168 *Ibid*.

169 S 10 of the PIA.

170 Qumba 2018 *South African Journal of International Affairs* 352.

171 *Msiza v Director-General for the Department of Rural Development and Land Reform supra* par 32.

172 *Ibid*.

173 *Ibid*.

174 See further, Sibanda "Amending Section 25 of the South African Constitution to Allow For Expropriation of Land Without Compensation: Some Theoretical Considerations of the Social-Obligation Norm of Ownership" 2019 35 *SAJHR* 129–146; Van der Schyff "Constructive Appropriation – The Key to Constructive Expropriation? Guidelines From Canada" 2007 XL *CILSA* 306 320; Thabo Mbeki Foundation "What Then About Land Expropriation Without Compensation? The National Democratic Revolution Must Resolve the Intimately Inter-Connected Land and National Questions!" 2018 53 *Journal of Public Administration* 285–309; Viljoen "Expropriation Without Compensation: Principled Decision-Making Instead of Arbitrariness in the Land Reform Context (Part 1)" 2020 1 *TSAR* 35–48; Viljoen "Expropriation Without Compensation: Principled Decision-Making Instead of Arbitrariness in the Land Reform Context (Part 2)" 2020 2 *TSAR* 259–270.

175 S 60 of the Lesotho Land Act.

176 S 17(1)(*c*) of the Constitution of Lesotho.

177 *Haffejee NO v eThekwini Municipality supra* par 35.

178 *Ibid*.

179 *Haffejee NO v eThekwini Municipality supra* par 14.

property may occur prior to that determination.[180] The duty to pay compensation is a requirement for expropriation, but not a prerequisite for its implementation.[181] Thus in South African law, compensation can be paid before or after the "expropriation".

In this regard, international law provides that an act of expropriation complying with the requirements established by international law "constitutes a lawful act of the State, and the duty to pay compensation is the consequence of the legal exercise of a recognised sovereign right of a State".[182] This requirement may be complied with from the beginning or after litigation when expropriation is determined.[183] Failure to pay any compensation for a direct expropriation can be fatal to the legality of an expropriation.[184] However, this is not the case when a measure in question is an "indirect expropriation".[185] The duty to pay compensation should only occur as a result of a finding of expropriation.[186] The obligation to compensate is conferred on the entity conducting the expropriation.[187] Thus, under Lesotho law, compensation should be paid prior to expropriation, which is in line with international law and South African law.

Furthermore, the standards of compensation differ for both countries. South African law provides for "just and equitable" compensation, whereas Lesotho and the LHWP provide for "full" compensation.[188] To this end, Article 7.18 of the LHWP provides that the LHDA must ensure that all the local communities in Lesotho that are "affected" by the project, be enabled to maintain a standard of living not inferior to that which existed at the time of the first disturbance and if such measures are not adequate, compensation must be provided.[189] In the same breath, the Phase II Agreement provides that compensation in the LHWP must be paid according to Article 7.18 and the principles in Article 15 of the LHWP Treaty.

Article 7.18 of the LHWP bears due consideration. The term "affected" in Article 7.18 of the LHWP refers to those people that are impacted by "expropriation". Secondly, this provision requires the maintenance of a standard of living of a person at least similar to the time before the project commenced. Thirdly, this provision implies that "compensation" is secondary to other "measures" that could be used to address the diminution in the standard of living. Thus, the other "measures" are the primary instrument of restitution for the affected parties, and "compensation" need not be paid unless the "measures" are deemed "inadequate". This is in line with the *Chorzow Factory* case, which provides that in the case of expropriation, the first mechanism is the restitution of property, but if this is not possible,

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180 *Ibid*.

181 *Ibid*.

182 United Nations Conference on Trade Development https://unctad.org/en/Docs/unctaddiaeia 2011d7_en.pdf 44.

183 *Ibid*.

184 *Ibid*.

185 *Ibid*.

186 *Ibid*.

187 S 57 of the Lesotho Land Act.

188 See s 25(3) of the Constitution and s 17(1)(*c*) of the Constitution of Lesotho.

189 Article 7.18 of the LHWP.

payment of the value of the expropriated property plus compensation of any incidental losses is the probable remedy.[190] In this regard Article 15 of the LHWP requires the maintenance of the welfare of the persons immediately affected by the project. In the same breath, section 44(2)(*a*) of the LHDA Order states that "as far as reasonably possible, the standard of living and the income of persons displaced by the construction of an approved scheme shall not be reduced from the standard of living and the income existing prior to the displacement of such persons". This means that the LHDA Order goes further than the Phase II Agreement and the LHWP as well as the Constitution in that they provide that "income of persons" is also another factor that deserves compensation. Therefore, the LHWP seeks to maintain the "welfare" or "standard of living" as the object of the compensation of affected communities.

To this end, the Phase II Agreement provides for the payment of compensation in cash or in-kind for the loss of "benefits" caused by the LHWP.[191] This could mean that Lesotho could pay South Africa in kind through, say, electricity, for the expropriation of the Orange River. Interestingly, this provision implies the payment of compensation for the loss of "benefits", which is a wide ground for claiming compensation. In this regard, the newly minted LHWP Phase II Compensation Regulations defines "compensation" as payment in cash or kind or other legal payment tendered for the property or resource that is acquired or affected by the project.[192] Thus, these regulations include a broad compensation paradigm as it provides for "other legal payment". This approach mimics the LHWP, which provides for other "measures" in lieu of compensation.

The Phase II Agreement also provides that compensation must be made according to the Phase II Compensation Policy and in a "fair" and "prompt" manner.[193] More specifically, the Phase II Compensation Policy provides that where the expropriation is permanent, the affected parties are entitled to "full" compensation.[194] If there is a "temporary acquisition", the Compensation Policy provides that the LHWP will, as far as possible, reinstate the resource to its prior condition.[195] This implies that under the LHWP, "acquisition" can be either "temporary" or "permanent". This could be a reference to "deprivation" as opposed to "expropriation" because "temporary expropriation" requires restoring the resource to its previous condition. A "temporary acquisition" falls short of an "expropriation" and does not give rise to "full compensation". This provision is significant in that Lesotho could allege that the acquisition of water under sections 5 and 6 of the LWA could be seen as "temporary" acquisitions of the water in the Orange River and could simply be restored by returning the quantity of water lost by South Africa. This would not require any compensation to South Africa.

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190 *Factory at Chorzow (Germ v Pol) supra* 47; United Nations Conference on Trade Development https://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf 113.

191 Article 7.2(c) of the Phase II Agreement.

192 S 2 of the Lesotho Highlands Water Project Compensation Regulations 2017 http://www.lhda.org.ls/lhdaweb/documents/documents (accessed 2020-08-12).

193 Article 15.4 of the Phase II Agreement.

194 LHWP Phase II Compensation Policy par 3.2.

195 LHWP Phase II Compensation Policy par 3.3.

The legal regime in international law for ascertaining the type and extent of the compensation to be paid and the circumstances of its payment are not well established.[196] In the latest international investment agreements, there is an emerging consensus concerning the standard of compensation that must be paid to make an expropriation lawful.[197] One of the fundamental trends among these agreements is that most of them accept the "standard of prompt, adequate and effective compensation", also called the "Hull standard".[198] In this regard, compensation is regarded to be "prompt" if paid without undue delay, "adequate", if it has a "reasonable relationship with the market value of the investment concerned"; and "effective", if made in "convertible or freely useable currency".[199] The determination of what amounts to an "adequate" compensation involves consideration of the "investment's fair market value, market value, just price, real value, and genuine value or real economic value".[200] However, the Hull standard does not enjoy the required State support.[201]

It must be noted that full compensation reflecting the market value of the property is not the only available threshold of compensation.[202] The standard mostly cited in the 1960s and 1970s is that of "appropriate" compensation, located in United Nations General Assembly Resolutions, and could still encapsulate the standard of customary international law.[203] The *Texaco Award*, the *Aminoil Award*, and the *Ebrahimi Award* affirm the "appropriate" compensation standard in Resolution 1803.[204] There is no explanation as to the meaning of the term "appropriate" compensation.[205] However, these norms have been impugned by developing States who replace the compensation standard with their domestic standards.[206] Hence, in South Africa, where Resolution 1803 is part of the legislative framework, "appropriate" compensation has been replaced with "just and equitable" compensation, whereas Lesotho provides for "full" compensation.

Similarly, the CERDS provides that "appropriate" compensation must be paid in line with the law of the State implementing such measures in the

196 *Iran-US Claims Tribunal, Amoco Int'l Finance Corp v Iran supra* par 117; see further, Cotula "International Law and Negotiating Power in Foreign Investment Projects: Comparing Property Rights Protection Under Human Rights and Investment Law in Africa" 2008 33 *SAYIL* 62 86–88.

197 United Nations Conference on Trade Development https://unctad.org/en/Docs/unctaddiaeia 2011d7_en.pdf 40.

198 *Ibid*.

199 *Ibid*.

200 *Ibid.*

201 Harris *Cases and Materials* 598.

202 United Nations Conference on Trade Development https://unctad.org/en/Docs/unctaddiaeia 2011d7_en.pdf 41.

203 *Ibid*; see Resolution 1803 par 4; Article IV.1 of the World Bank Guidelines on the Treatment of Foreign Direct Investment.

204 *Ebrahimi v Iran* (1994), Iran-US Claims Tribunal, 12 October 1994, The Hague, par 88 and 95; *The Government of the State of Kuwait v The American Independent Oil Company (AMINOIL) supra* par 143; *Texaco Overseas Petroleum Co v Libya supra* par 87–88.

205 Harris *Cases and Materials* 598.

206 *Van Zyl v Government of the Republic of South Africa supra* par 36.

exercise of sovereignty and international law.[207] The CERDS further provides that where the question of compensation is a contentious matter, it should be resolved according to the municipal law of the nationalising State and by its courts; unless it is freely agreed on other "peaceful" alternatives.[208] It is then opined that Article 2 of the CERDS highlighted rising Third World discord about the international principle propagated by Resolution 1803.[209] While it permits the "appropriate" compensation, it uses the term "should", subject to the relevant legislation and the relevant circumstances.[210] It does not mention international law standards and procedures.[211] However, it has been argued that the standards contained in Article 2.2(c) have not been universally accepted by States.[212] Reasons for advancing the grounds of Article 2.2(c) of CERDS are based on the notion that current law consistently ignores the interests of the indigent, and that there is no way to disturb this status *quo* except by dismantling the legal framework of that order.[213] It is conceivable that this standard permits less than full compensation where this is equitable in the circumstances in question.[214]

In this regard, the ASEAN Comprehensive Investment Agreement provides for payment of "adequate" compensation, which is defined as compensation that reflects the "fair market value" upon expropriation.[215] Alternatively, the Charter of Fundamental Rights of the European Union and the United Nations Declaration on the Rights of Indigenous Peoples provides that expropriation must be accompanied by "fair" compensation.[216] It has already been established that in respect of transboundary water law, States have a right to compensation, but the UN Watercourses Convention and the Revised Protocol are silent as to the standard of compensation. In the absence of direction, the applicable approach will be the one proffered by international law, which itself is plagued by uncertainty. Thus, international law is undecided on the standard of compensation as it vacillates between "full", "fair" "adequate" and "appropriate" compensation standards. It must be noted here that the Phase II Agreement provides that in the event of a dispute, the adjudicator must apply the provisions of that agreement together with the rules of international law that are not in conflict with this agreement and the LHWP.[217] This approach is in line with the Constitution, which

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[207] Article 2.2(c) of the CERDS; *The Government of the State of Kuwait v. The American Independent Oil Company (AMINOIL) supra* par 143–144; Article IV.2 of the World Bank Guidelines on the Treatment of Foreign Direct Investment.

[208] Article of the 2.2(c) of the CERDS.

[209] Visser "The Principle of Permanent Sovereignty Over Natural Resources and the Nationalization of Foreign Interests" 1988 XXI *CILSA* 76 83.

[210] *Ibid*.

[211] *Ibid*.

[212] Visser 1988 *CILSA* 87.

[213] Visser 1988 *CILSA* 88.

[214] United Nations Conference on Trade Development https://unctad.org/en/Docs/unctaddiaeia 2011d7_en.pdf 41.

[215] Article 14.1(c) of the Association of Southeast Asian Nations Comprehensive Investment Agreement. Adopted: 26/02/2009. EIF: 24/02/2012.

[216] Article 17 of the Charter of Fundamental Rights of the European Union; Articles 10 and 28.1 of the United Nations Declaration on the Rights of Indigenous Peoples, 2007.

[217] Article 18.9 of the Phase II Agreement.

provides that "customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament".[218] In this way, the Phase II Agreement and section 232 of the Constitution could be used to exempt the LHWP treaty and its protocols from the rules of customary international law that are in conflict with these treaties. However, the Constitution provides that when reading any statute, every court must accept any "reasonable interpretation" of the statute that is in accordance with international law over any "alternative interpretation" that is in conflict with international law.[219]

4 CONCLUSION

On the whole, there is no doubt that Lesotho has the right to expropriate the water in the LHWP for "public benefit" in the manner contemplated by sections 5 and 6 of the LWA and the Land Act because this is an incidence of the right to permanent sovereignty over natural resources. The right to expropriate foreign property is universally endorsed and is also provided for by the laws of South Africa and Lesotho. In light of the above, it is the author's view that the expropriation of the water in the LHWP by Lesotho would require "full" compensation as provided by the LHWP: Phase II Compensation Policy and the Constitution of Lesotho. This approach finds favour with international law, which endorses the payment of "full" compensation for expropriation. However, it must be noted that the LHWP regime does not favour compensation as the first form of redress and rather, would countenance the restoration or restitution of the water that is lost. Consequently, South Africa may not receive financial compensation. This approach could conceivably be justified under the "just and equitable" standard of the Constitution.

[218] S 232 of the Constitution.
[219] S 233 and s 39(1)(*a*)–(*b*) of the Constitution.

ACHIEVING GENDER NEUTRALITY IN CONTRACTS*

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> "The unfortunate truth is that the words and phrases which we use by habit may become the masters of our thoughts as much as they are its servants. We fall under their spell. We entangle our thinking in our own verbal net, becoming the slaves to our own vocabulary which needs regularly to be examined and reassessed."[1]

SUMMARY

Written contracts are expressed through language, which has legal consequences. Language is reflective of preconceptions and misconceptions of a particular matter or circumstance and language usage, being of a personal nature, may also impact a person's dignity. This can be illustrated in the use of gendered language, which has historically been perfectly acceptable but have fallen in disfavour due to the potential preconceptions, presumptions, and biases that are inherent in stereotypical male-dominated language terms. The approach to replace the male term with a female equivalent still retains gendered language and fails in using gender-neutral language in a world where gender is not as simple as being classified as either male or female. Against this background, this article considers the existing gender-based framework, legal framework, and language framework to assess gender-based language found in written contracts and proposes a contract language framework in order to achieve gender neutrality in contracts.

1 INTRODUCTION

Contracting parties often express themselves through language,[2] and such language usage is a reflection of a party's contractual obligations, which cannot be viewed or interpreted in isolation.[3] The meaning and consequences attached to the language in contracts are linked to the accepted standards, norms, and values of society,[4] the legal framework of

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* Inspiration for this article was drawn from the author's presentation at the 6th annual Quiltbag Seminar under the theme "Safe Spaces" (2019) held at the University of South Africa.

1 Barker *The Drafting of Wills* (1993) 4.

2 Cornelius *Principles of the Interpretation of Contract in South Africa* 3ed (2016) 3.

3 Burger *A Guide to Legislative Drafting in South Africa* (2009) 1, describes "language [as] the chief medium of communication and thought".

4 For example, the Bill of Rights reflects the values of South African society.

the country, as well as the set of rules that have been established to guide the interpretation of contracts.[5]

In this sense, language plays an important role not only in achieving certainty within a contractual engagement but may also be a reflection of the thoughts of the drafter and the contracting parties themselves. After all, language forms the basis of the expression of ideas and thoughts within a wide variety of legal instruments, which consequently impacts individual lives in some way, shape, or form.[6] For example, the written contract may impact the lives of the parties to the contract, and even third-party beneficiaries in instances where the contract contains a *stipulatio alteri*.[7] This can be described as operating at a horizontal level.[8] The influence of the written words in statutes has a much wider application influencing and impacting the lives of the people of a country,[9] and this can be described as operating at a vertical level.[10] In fact, Cornelius describes all forms of legal instruments as "indispensable sources, not only for creating but also for ascertaining modern law and legal relations".[11] Yet, language is also of a personal nature, as the written word is a reflection of an individual's thoughts, feelings, and attitudes.[12] It can even be said that the use of language in addressing a person is integral to a person's sense of dignity and respect.[13] Burger perhaps best describes it as follows:[14]

> "Language is a tool that gives expression to our very way of life. There is not an aspect of our lives which is unaffected by language. We order our society through expressions of language – be they oral, written, gesticulated, or otherwise. Every aspect of our thought processes is facilitated by language. Language is the magical instrument of communication."

Language can also be indicative of an individual's preconceptions and misconceptions of a particular matter or circumstance. Take for instance gendered language usages in which the masculine language terms are used to express seemingly generic or objective terms. Such gendered language usages have historically been embedded in written discourse,[15] and have

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5 See, for e.g., Cornelius *Principles of the Interpretation of Contract*, which discusses the rules of interpretation applicable to South African contracts.

6 See general discussion on legal discourse in Cornelius "The Complexity of Legal Drafting" 2004 *TSAR* 693–699.

7 Cornelius *Principles of the Interpretation of Contract* 34, describes this as falling within the scope of private law.

8 Cornelius *Principles of the Interpretation of Contract* 34.

9 Cornelius *Principles of the Interpretation of Contract* 34, describes this as falling within the scope of public law.

10 Cornelius *Principles of the Interpretation of Contract* 34.

11 Cornelius 2004 *TSAR* 693.

12 See also Barker *The Drafting of Wills* 4.

13 Take, for example, *S v Madigage* 1999 (2) SACR 420 (W) where it was unacceptable to address a person in a court setting in Afrikaans as "jy" and that one should use the Afrikaans pronoun "u". See also *S v Malatji* 1998 (2) SACR 622 (W) 624 where the Afrikaans pronoun "jy" and "jou" in a formal setting towards an accused was described as being both discourteous but also "inconsistent with the dignity and propriety which is required of a judicial officer".

14 Burger *A Guide to Legislative Drafting in South Africa* 67.

15 See discussion in heading 2.2 (below).

been found in legal instruments. In the past, gendered language usages were perfectly acceptable but have fallen in disfavour due to the potential preconceptions, presumptions, and biases that are inherent in such stereotypical male-dominated language terms.[16] To address this, the written discourse has mostly exchanged male-dominated language with its female equal. Yet, replacing the male language with the female equivalent is a limiting and narrow approach, as such language terms are still not fully gender-neutral in a world where gender is not as simple as being classified as either male or female.

Traditionally, the concepts of "gender" and "sex" have been considered synonymous terms, and such a classification has been described as binary.[17] The binary classification essentially groups a person's gender as either being male or female, which is ultimately linked to a persons' biological disposition at birth.[18] The general understanding of these terms has evolved in that it is now understood that the concepts of gender and sex are not always the same. Gender can be described as the internal disposition with what a person identifies,[19] or could even be described as a "cultural construction".[20] Sex, on the other hand, can be described as the biological characteristics that group a person as either male or female at birth,[21] and has also been described as a "natural distinction".[22] Our sophistication in understanding these terms has been driven by, amongst other things, the feminist discourse,[23] the equality jurisprudence under the legal reform of the South African Constitution,[24] as well as various specific pieces of legislation geared towards advancing the equal recognition of all people and groups of society.[25] Yet, language usage and recognition of marginalised groups in verbal and written discourse extend much further than this; the use of language can strike at the core of a person's identity, dignity, and, even sometimes, a person's self-worth. Herpolsheimer

16 *Ibid*.

17 See discussion in heading 2 (below).

18 See Sloth-Nielsen "Gender Normalisation Surgery and the Best Interest of the Child in South Africa" 2018 *Stell LR* 48 49. This is referred to as "primary sexual characteristics" in s 1 Alteration of Sex Description and Sex Status Act 49 of 2009.

19 This is referred to as "secondary sexual characteristics" in s 1 of Act 49 of 2009.

20 Van Marle "Gender Mainstreaming – An Ethical Feminist Consideration" 2005 *Obiter* 642 644–645. See also the definition of "gender characteristics" in s 1 of Act 49 of 2009, describing this as "the ways in which a person expresses his or her social identity as a member of a particular sex by using style of dressing, the wearing of prostheses or other means".

21 Clarke "They, Them, and Theirs" 2019 132(3) *Harvard Law Review* 894 897.

22 Van Marle 2005 *Obiter* 642 644.

23 See, for e.g., Van Marle 2005 *Obiter* 644–645 and Bonthuys "The Personal and the Fiducial: Sex, Gender and Impartiality" 2008 24 *SAJHR* 239–262.

24 See Albertyn "Substantive Equality and Transformation in South Africa" 2007 23 *SAJHR* 253 270–271. See also s 9 of the Bill of Rights of the Constitution of the Republic of South Africa, 1996 (Constitution), which affords all people the right not to unfairly discriminate based on a person's gender, sex or sexuality.

25 See heading 2 (below).

summarises the impact of language on the issue of gender and sex as follows:[26]

> "Gender, sex, sexual orientation, and sexuality are distinct characteristics distinguishable from one another in varying degrees–but central to each is the relation to one's own personal identity. Beyond the intimate relationship these terms have for the individual, society has historically used them as tools to identify and describe, but also to persecute and stereotype. By using the characteristics gender, sex, sexual orientation, and sexuality as tools to identify and describe, persons are inadvertently but inherently persecuted and stereotyped."

Several themes emerge from Herpolsheimer's comments that have a direct bearing on gender-based language in verbal and written discourse. The first is the centrality of a person's association with their identity, which naturally leads to the individual's sense of self (or dignity) and even the right to equality.[27] The second theme is how language can be used as a tool to liberate but can also simultaneously function as a tool to discriminate against marginalised groups within society.[28] Drafters of legal instruments, and particularly contract drafters (for the purposes of this article), must then take into account the potential role language plays within the legal discourse and private contractual engagements concerning individual gender preferences. It is against this background that this article intends to analyse how gender-based language is typically used in contracts,[29] and thereby establish a framework to achieve gender-neutrality in contracts generally.

2 GENDER-BASED FRAMEWORK IN SOUTH AFRICA

2 1 Background

It is conceivable that bias and discriminatory conduct will have an adverse impact on individual lives,[30] yet one must not lose sight of the impact originating from discriminatory conduct in the form of language usage in

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[26] Herpolsheimer "Third Option: Identity Documents, Gender Non-Conformity and the Law" 2017 39(1) *Women's Rights Law Reporter* 46 46.

[27] Botha "Equality, Plurality and Structural Power" 2009 25 *SAJHR* 1 8, describes the potential discrimination as follows: "A complex understanding of equality recognises, then, that different forms of discrimination may require different types of analysis. Discrimination on the grounds of sexual orientation can usually be expressed powerfully in the language of dignity, as discrimination against gays and lesbians is rooted in moral disapproval and results directly in an affront to their dignity and identity". See, for e.g., Cowen "Can Dignity Guide South Africa's Equality Jurisprudence" 2001 17(1) *SAJHR* 34 34. See also Liebenberg and Goldblatt "The Interrelationship Between Equality and Socio-Economic Rights Under South Africa's Transformative Constitution" 2007 23 *SAJHR* 335 343, as well as *September v Subramoney NO* [2019] 4 ALL SA 927 (WCC) 951.

[28] Clarke 2019 *Harvard Law Review* 912, describes some of the reactions to non-binary individuals as being de-humanising.

[29] Cornelius *Principles of the Interpretation of Contract* 35, notes that language is used to convey the message of a contract.

[30] See, for e.g., Van Marle 2005 *Obiter* 647 that notes the importance of such personal experiences, specifically from a female perspective.

addressing a person.[31] Take, for instance, the case of *September v Subramoney*,[32] where the applicant was born a male but identified as a female. The applicant expressed this by dressing as a woman, having long hair, wearing make-up, and also referring to herself as a woman (which was done through using the female pronoun).[33] The applicant, being convicted and incarcerated for several crimes, felt that she was not able to express her gender identity,[34] which included not being addressed as a female and other people failing to use the female pronoun when referring to her.[35] She brought a claim of unfair discrimination based on the alleged contravention of section 8 of the Promotion of Equality and Prevention of Unfair Discrimination Act.[36] For the purposes of this discussion, it is useful to highlight the court's commentary that the prohibition of expressing one's gender could have an impact on the applicant's dignity, and was best summarised as follows:[37]

> "It is common cause that all people in our country, including the applicant, are entitled to their constitutionally enshrined human rights. Yet the applicant is not being afforded that recognition, protection and respect. She is prevented from expressing her identity. Conduct which is part of her experience of being human is being condemned. She is being denied the personal freedom to develop and express her true nature, therefore her dignity is being impacted on severely by the conduct of the respondents."

Language usage played an important role in *September v Subramoney*, with particular reference being made to how the applicant was addressed, and the particular pronouns used when addressing her. Two further examples can be found in the United States cases of *Whitaker v Kenosha Unified School District*,[38] and *Prescott v Rady Children's Hospital-San Diego*.[39] In both cases, a person's request to be addressed as a male was ignored.[40] In the one matter, the individual was born a biological girl but related to, and identified as, a transgendered boy, whilst in the other case, the individual was transitioning from female to male.[41] However, in both instances, the request to be referred to as a male and to use masculine descriptors were simply ignored.[42] What is of interest is that the court in *Prescott v Rady Children's Hospital-San Diego* had stressed the importance of the correct use of gender-based language for an individual's identification, noting that "[f]or a transgender person with gender dysphoria, being referred to by the wrong gender pronoun is often incredibly distressing."[43]

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31 See, for e.g., supra 13.
32 *September v Subramoney NO supra*.
33 *September v Subramoney NO supra* 931–932.
34 *September v Subramoney NO supra* 930.
35 *September v Subramoney NO supra* 931.
36 4 of 2000.
37 *September v Subramoney NO supra* 958.
38 858 F 3d 1034 – Court of Appeals, 7th Circuit 2017, 1041.
39 265 F Supp 3d 1090 – Dist. Court, SD California 2017, 1097.
40 *Ibid*.
41 *Ibid*.
42 *Ibid*.
43 *Prescott v Rady Children's Hospital-San Diego supra* 1097.

These examples are indicative of how the concepts of language and gender are interconnected,[44] and illustrate the importance of language when referring to a person's gender as well as the potentially destructive effect language can have when used incorrectly to refer to an individual. If language is then of such importance to an individual's sense of self, the question is posed as to what extent gender preferences are being used in legal discourse? To analyse this, both the legal and language frameworks are considered in relation to gender's role in written legal discourse.

2 2 Legal framework

The promulgation of the Constitution marked a distinct break from the past and sparked a revolutionary approach to recognising equal protection of all people within the boundaries of South Africa.[45] Of particular importance, in this context, is section 9 of the Constitution, which provides that all people have the right to be treated equally and should not be unfairly discriminated against on grounds of, amongst other things, gender, sexuality, and sexual orientation.[46] Although these rights are independent, they are to some extent also interdependent of each other,[47] and consequently gender equality, the rights of equality and dignity generally,[48] and even discrimination based on disabilities share certain commonalities.[49]

In addition to the Constitution, several pieces of legislation exist dealing with gender, sex, and sexual orientation in some way, shape, or form, including those statutes that have been promulgated to give effect to the rights in the Constitution.[50] It is not the intention of this discussion to provide an exhaustive list of these pieces of legislation; however, key statutes have been selected to highlight the approach of the legislature concerning the concepts of gender, sex, and sexual orientation within South Africa. These include, for example:

(i) Births and Deaths Registration Act.[51] In terms of the Act, births must be registered in the population register and must include the child's sex.[52] At this time only binary sexes are recognised in South Africa as a choice under the Act, being male or female.[53]

(ii) Identification Act.[54] The Act requires that an identity number be assigned to every person that is included in the population register[55]

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44 Also alluded to in DiRusso "He Says, She Asks: Gender, Language, and the Law of Precatory Words in Wills" 2007 22(1) *Wisconsin Women's Law Journal* 1 4.

45 See Liebenberg and Goldblatt 2007*SAJHR* 338.

46 See s 9(4).

47 Liebenberg and Goldblatt 2007*SAJHR* 338.

48 Liebenberg and Goldblatt 2007*SAJHR* 335 341–342.

49 See, for e.g., Ngwena "Developing Juridical Method for Overcoming Status Subordination in Disablism: The Place of Transformative Epistemologies" 2014 30 *SAJHR* 275 281.

50 See s 9(4) of the Constitution.

51 Act 51 of 1992.

52 *September v Subramoney NO supra* 940.

53 *Ibid*.

54 Act 68 of 1997.

55 S 7(1) of Act 68 of 1997.

and must include every person's sex.[56] The number that is assigned to a person under the Act then represents certain information, including a person's date of birth and their gender.[57] As gender relates to an individual's preference and not necessarily their biological disposition, it would have been better for the Act to use the term "sex" rather than "gender".[58]

(iii) Promotion of Equality and Prevention of Unfair Discrimination Act.[59] This Act can be viewed as giving effect to the Constitutional right to equality,[60] and that no person may be discriminated against based on the prohibited grounds listed in the Act. Such prohibited grounds include sex, sexual orientation, and any ground that may impact a person's dignity,[61] as well as the concept of gender.[62] However, the Act permits certain forms of discrimination if it can be demonstrated that such discrimination is fair.

(iv) Alteration of Sex Description and Sex Status.[63] The Act allows for the amendment of a person's sex in the country's population (or birth) register, if a person has surgically amended their sex, there has been a natural reassignment of gender or a person that is intersexed.[64] The Act provides four definitions that become applicable to the concept of sex and gender, being gender characteristics,[65] primary sexual characteristics,[66] secondary sexual characteristics,[67] and sexual characteristics.[68]

These statutes highlight that the legislature has, in some respects, recognised the distinction between the concepts of "sex" and "gender", which is most recognisable when considering these statutes as a cohesive whole.

How society acts (and even reacts) towards people plays a significant role in how the spirit of the Constitution and subsequent language usages are practically imported into the interaction between individuals. Consequently, how language is used within discourse should be reflective of inclusivity,

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56 *Ibid*.

57 S 8(*b*) of Act 68 of 1997.

58 See discussion in heading 1 (above).

59 Act 4 of 2000.

60 *September v Subramoney NO supra* 944.

61 S 1 of Act 4 of 2000.

62 S 8 of Act 4 of 2000.

63 Act 49 of 2003.

64 S 2 of Act 49 of 2003.

65 S 1 of Act 49 of 2003, which reads "means the ways in which a person expresses his or her social identity as a member of a particular sex by using style of dressing, the wearing of prostheses or other means".

66 S 1 of Act 49 of 2003, which reads "means the form of the genitalia at birth".

67 S 1 of Act 49 of 2003, which reads "means those which develop throughout life, and which are dependent upon the hormonal base of the individual person".

68 S 1 of Act 49 of 2003, which reads "means primary or secondary sexual characteristics or gender characteristics."

tolerance, and acceptance, especially when the interaction between law and language can be said to be part of the social fabric of society.[69]

2 3 Language framework

Historically, the English language used male words in discourse when the gender was uncertain or unclear.[70] It was believed that the masculine term in the English language was generic and included, by default, the female equivalent.[71] These language usages changed over time as there was a growing awareness that male-dominated language terms may not adequately reflect their female counterparts.[72] The modern development in understanding these issues, as highlighted by Foertsch and Gernsbacher, has illustrated that the so-called generic "he" can be a form of bias towards the female gender.[73] This use of male-dominated language terms has been described as a "false generic" term,[74] and that "[t]his convention is rooted in discriminatory ideologies of the nineteenth century".[75] The use of male-dominated language could then be described as gender-biased language.[76] In some respects, language usage has matured and has shifted from a predominantly male-dominated language usage into being more inclusive of the female gender equivalent.[77] Yet, this is not always the case, and two extreme modern approaches have emerged.

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69 Sarkisov and Kude "Pronoun Power the Standard for Gender Neutrality" 2017 *The Bar Association of San Francisco San Francisco Attorney* 40. See also Cornelius *Principles of the Interpretation of Contract in South Africa* 4, which notes that the way in which contracts are interpreted will be influenced by society and social changes at the time.

70 See, for e.g., the US case of *Stearns v Veterans of Foreign Wars* 353 F Supp 473 – Dist. Court, Dist. of Columbia 1972, 476 which notes that "[t]he use of the pronoun 'he' and the words 'enlisted man' cannot reasonably be construed to be anything more than grammatical imprecision in drafting the clause. Masculine pronouns are often used to refer to antecedents of indefinite or mixed gender without modifying the meaning of the antecedents".

71 Fischer "Framing Gender: Federal Appellate Judges' Choices About Gender-Neutral Language" 2009 43(3) *University of San Francisco Law Review* 473 474.

72 Adapted from The South African Law Reform Commission https://www.justice.gov.za/Salrc/dpapers/dp112_interpretation.pdf (accessed 2021-01-11) par 6.27, noted that this the language used could be reflective of the view that it is "acceptable for woman to be subsumed within men linguistically".

73 Foertsch and Gernsbacher "In Search of Gender Neutrality: Is Singular 'They' a Cognitively Efficient Substitute for Generic 'He'?" 1997 8(2) *Psychological Science* 106 106; *Rahube v Rahube* [2018] ZACC 42, par 2.

74 Fischer *University of San Francisco Law Review* 475.

75 Schweikart "The Gender-Neutral Pronoun Redefined" 1998 20(2) *Women's Rights Law Reporter* 1 2; Fischer *University of San Francisco Law Review* 475, describes this as being a form of demeaning women.

76 Fischer *University of San Francisco Law Review* 475, which also describes it as exclusionary and sexist language.

77 Hord "Bucking the Linguistic Binary: Gender Neutral Language in English, Swedish, French, and German" 2016 3(4) *Western Papers in Linguistics/Cahiers linguistiques de Western* 1 (obtained from https://ir.lib.uwo.ca/wpl_clw/vol3/iss1/4).

At the one end of the spectrum, a stubborn persistence remains in using inherently male-dominated stereotypical language terms.[78] Many languages have gendered references embedded in their language structures,[79] but as legal instruments (particularly contracts) predominantly find themselves expressed in English in South Africa, the English language is focused upon herein. Fischer highlights that the English language uses gender-specific language in three broad instances, being:

(i) Pseudo-generic male-linked words.[80] Take, for example, nouns that refer to both male and female but use a predominantly male-orientated word, such as man or mankind.[81] Another example is generic male third-person pronouns, such as "he", "him" or "his".[82]

(ii) Gender-marked terminology.[83] This is found in the use of nouns to reflect gender in a specific role that a person occupies, such as chairman.[84] Or, even the distinction between Miss and Misses that distinguishes and identifies a female's marital status.[85]

(iii) Formalistic and habitual language usage may also be a form of gendered language.[86] This can often take the form of patronising or belittling an individual based on their gender (often female).[87] Take for example referring to a woman as "girl", "goose", "honey" or "bird".[88]

At the other end of the spectrum, language usage could also falsely be perceived as being objective or neutral. This false sense of objectivity can take different forms,[89] but if the work of Van Marle is adapted and extended in its application to that of language usage in legal instruments then one could categorise a false sense of gender objectivity occurring in the following instances:[90]

(i) Complete exclusion.[91] This describes an approach that completely excludes females (or other genders) from written discourse and only uses the male equivalent.[92] In contracts, a complete exclusion could conceivably be present where definitions have not been used within

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78 This is not only an occurrence in language. Bonthuys 2008 24 *SAJHR* 250–253, explains that even the position of female judges still experience inequality within the South African judicial system.

79 Take for instance the romans languages, such as German and French.

80 Fischer *University of San Francisco Law Review* 476–477. See also Burger *A Guide to Legislative Drafting in South Africa* 71, which describes such language as being sexist and should be avoided in legislative drafting.

81 Fischer *University of San Francisco Law Review* 476–477.

82 *Ibid.*

83 Fischer *University of San Francisco Law Review* 478.

84 *Ibid.*

85 *Ibid*.

86 Fischer *University of San Francisco Law Review* 479.

87 *Ibid.*

88 *Ibid.*

89 Van Marle 2005 *Obiter* 647.

90 *Ibid*.

91 *Ibid*.

92 *Ibid*.

the contractual document and the document only refers to masculine language terms.

(ii) Pseudo inclusions.[93] This type of approach would *prima facie* include females (or other genders) but actually has the substantive effect of marginalising such gender groups.[94] This could include, for example, the use of pseudo-generic male-linked words or even gender-marked terminology within the text of the contract, which was discussed earlier in this article.[95]

(iii) Alienations.[96] Although this approach does include the female (or other genders) in written discourse, a person's individual experiences are not considered authentic or taken into account when preparing and drafting the document.[97] Although this may, at first, seem irrelevant to the discipline of contract drafting, should the drafter ignore gender groups within the drafting process, it could be considered a form of alienation.

In both extreme instances, there remains the use of gender-based language in some way, shape, or form. The recognition of gender within any form of discourse, cannot be, and should not be limited to the binary categorisation of masculine and feminine.[98] After all, not all members of society identify or neatly fit within such binary gender roles.[99] Take, for example, a person could identify as being non-binary,[100] gender non-conforming,[101] genderqueer,[102] trans,[103] transgender,[104] or even pangender, and certainly other categorisations which have not all necessarily been listed herein. In addition to this, there may also be instances where a person, from a biological perspective, is born with both sets of reproductive organs.[105] With so many different possible ways in which a person may identify with their gender, it seems necessary that language must also be used to ensure

93 *Ibid*.

94 *Ibid*.

95 Fischer *University of San Francisco Law Review* 476–479.

96 Van Marle 2005 *Obiter* 647.

97 *Ibid*.

98 Kabba "Gender-Neutral Language: An Essential Language Tool to Serve Precision, Clarity And Unambiguity?" 2011 37(3) *Commonwealth Law Bulletin* 427 429, suggests that gender-neutral language does not distinguish between male and female, however, to truly achieve gender-neutral language the non-binary nature of gender must also be taken into account.

99 Darr and Kibbey "Pronouns and Thoughts on Neutrality: Gender Concerns in Modern Grammar" 2016 7(1) *Pursuit – The Journal of Undergraduate Research at the University of Tennessee* 71 73.

100 Hanssen "Beyond Male or Female: Using Nonbinary Gender Identity to Confront Outdated Notions of Sex and Gender in the Law" 2017 96 *Oregon Law Review* 283 287.

101 *Ibid*.

102 *Ibid*.

103 *Ibid*.

104 United Nations Department of Economic and Social Affairs Statistics Division "Gender Identity – Developing a Statistical Standard" (18 March 2015) https://unstats.un.org/unsd/classifications/expertgroup/egm2015/ac289-Bk2.PDF (accessed 2019-02-16) 42, "someone whose gender identity differs from their sex recorded at birth".

105 Sloth-Nielsen 2018 *Stell LR* 48–272.

the inclusion of all forms of gender identification within verbal and written discourse.

In legal discourse, there has already been some progress in this area. The avoidance of stereotypical and discriminatory practices has been recognised in some local and foreign judgments where the courts have attempted to use gender-neutral language when referring to a person in judgments,[106] and in some instances, the courts have specifically used the personal pronoun that correlates with the gender identified by the transgendered person.[107] If progress has already been made in order to address a person correctly based on their gender preference in the courts, the questions that follow are: to what extent do written contracts use gender-based language and whether more gender-neutral options are available in the contract drafting process.

3 GENDER-BASED LANGUAGE IN THE DRAFTING OF CONTRACTS

3 1 Background

Interpreting is the first step to the drafting of contracts, and the process of interpreting legal instruments such as contracts, wills, and statutes have many similarities.[108] So too, the process and practice of drafting contracts often borrow from other drafting disciplines, which can result in some similarities between the drafting practices of contracts and legislation.[109] In fact, contracts and legislation have much in common, as contracts have

[106] See, for e.g., *September v Subramoney NO supra* and *Attorney General of Canada and Attorney General of Ontario v Terri Jean Bedford, Amy Lebovitch and Valerie Scott* [2012] 256 CRR (2d) 143, ft referred to in par 17, the court recognises the reference to the female pronoun and explains its use in the judgment by stating "[t]hroughout these reasons, we use feminine pronouns when referring to prostitutes because the evidence establishes that the majority of prostitutes are women. However, we recognize that, as some of the interveners point out, there are also a significant number of men, and transgendered and transsexual persons working as prostitutes". See also *Taschner v Freeman Decorating Services*, Dist. Court, MD Florida 2014 ft 2, which the court noted that "[a]s [the] Plaintiff has not specified a pronoun preference, the Court refers to Plaintiff as 'she' or 'her' as that appears to be the gender Plaintiff is presenting". Further examples can be found in *Soneeya v Spencer* 851 F Supp 2d 228 – Dist. Court, D. Massachusetts 2012 ft 1; *Her Majesty the Queen v Shan Latif, Rubina Latif and Mohammad Latif* [2016] 351 CRR (2d) 202 par 4, and *Her Majesty the Queen v David Daley, Kevin Benons and Kevin Griffith* [2014] 302 CRR (2d) 240 par 6.

[107] See, for e.g., *Parents for Privacy v Dallas School District* NO. 2, Dist. Court, D. Oregon 2018 ft 3, "when referring to a transgender person, the Court uses the pronoun consistent with that person's gender identity"; *Schwenk v. Hartford*, 204 F 3d 1187 – Court of Appeals, 9th Circuit 2000 1206 ft 1), noted that "[i]n using the feminine rather than the masculine designation when referring to Schwenk, we follow the convention of other judicial decisions involving male-to-female transsexuals which refer to the transsexual individual by the female pronoun"; *Matter of Outman v Annucci* 49 Misc 3d 1129 – NY: Supreme Court, Albany 2015 1135 ft 1 "[t]he court will honor petitioner's preference to be referred to by the female pronoun"; *League of Women Voters of Florida, Inc v Detzner* 314 F Supp 3d 1205 – Dist. Court, ND Florida 20 1225 ft 4 noted that the "Plaintiff Roy identifies as gender-queer and prefers the use of the gender-neutral pronoun 'they'".

[108] Cornelius *Principles of the Interpretation of Contract* 33.

[109] Cornelius 2004 *TSAR* 693.

been described as a form of self-regulation, which creates *ad hoc* legislation between the contracting parties.[110] Therefore, contracts can be viewed as a form of personal and individualised legislation between contracting parties.[111] Considering the similarities between the legal instruments of statutes and that of contracts, it seems natural that, at least some aspects of contract drafting will find similarity with the legislative drafting approach. It is on this basis that certain answers in the gender-neutral approaches within contractual documents may be found in considering the equivalent legislative approach.

Legislation, like many other forms of written discourse, has in the past suffered from gendered language usage. Yet, with the introduction of the Constitution, there have been positive steps towards inclusive legal language used both within the Constitution itself and various other statutes.[112] Take, for instance, the interim Constitution has been the forerunner in changing old drafting approaches, as highlighted in the *President of the Republic of South Africa v Hugo*.[113]

The court highlighted that historically legislative drafting styles used that of masculine gender.[114] Moreover, section 6(*a*) of the Interpretation Act of 1957 gave effect to such gender-based drafting approaches.[115] In fact, the need for more inclusive language usage was recognised by the South African Law Reform Commission, in their discussion paper on the revision of the Interpretation Act of 1957.[116] What is of interest is that the South African Law Reform Commission recognised that male-dominated language could be regarded as sexist and that gender-neutral language should recognise both the male and female genders.[117]

On the other hand, the written contract may use both the binary genders as well as a non-binary gender, however, such non-binary gender usage often refers to a juristic person or legal entities that hold no gender.[118] Non-binary genders in this context are generally referred to as "it" in the singular, or "they" in the plural in the contractual setting. Yet, this does not, in itself, satisfactorily address the possible wider gender identification of non-binaries

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110 Cornelius *Principles of the Interpretation of Contract* 35; Cornelius 2004 *TSAR* 693.

111 Cornelius 2004 *TSAR* 693, notes that contracts (as well as other legal instruments) "are indispensable sources, not only for creating, but also for ascertaining modern law and legal relations".

112 See, for e.g., s 9 of the Bill of Rights.

113 *President of the Republic of South Africa v Hugo* 1997 (1) SACR 567 (CC) 597F–G.

114 *Ibid*.

115 *Ibid*.

116 See The South African Law Reform Commission "Review of the Interpretation Act 33 of 1957" Discussion Paper 12 Project 25 https://www.justice.gov.za/Salrc/dpapers/dp112_ interpretation.pdf (accessed 2021-01-11). See also Hofman "Comments on the South African Law Reform Commission's Draft Interpretation of Legislation Bill" 2007 124 *SALJ* 479.

117 The South African Law Reform Commission "interpretation.pdf par 30.

118 LAWSA Vol 10(2) 2ed (2005) 392. Take for e.g., *Barclays Zimbabwe Nominees (Pvt) Ltd v Black* 1990 (4) SA 720 (A), where the court noted "[t]he use of the pronoun 'his' again suggests a natural person" when assessing the concept of private person under s 7 of the Criminal Procedure Act 51 of 1977.

within the written contract. Other than for formalities required for certain specific contracts, there exist no legislative interventions that would regulate how contracts are drafted. The closest link to non-gendered language appears in the use of plain language in consumer contracts, but even in such instances little to no guidelines have been provided to draft contracts in gender-neutral language.[119] Yet, gendered language is still used within contracts and can generally be found either in the interpretation clause, citing the parties, or the use of definitions. These aspects are discussed in the sections that follow and, where necessary, draw the comparative position of legislative and other legal instruments to highlight gendered-language practices that persist within the drafting of contracts.

3 2 Interpretation clauses

The correct use of gendered language terms when drafting a legal instrument was illustrated in the case of *Absa Bank Ltd v Botha*,[120] where the incorrect use of a gendered pronoun had serious consequences in a summary judgment application. The affidavit used in the application referred to a female deponent, whilst the commissioner of oaths stamp referred to a male deponent (in having used a masculine pronoun). The court found that this discrepancy was inconsistent with the requirements of the Uniform Rules of court.[121] This case highlights a relatively common occurrence in legal instruments, and although it is not possible in affidavits, other legal instruments, such as contracts, wills, and even statutes, may attempt to avoid pronoun errors through an interpretation clause.

The process of interpretation between legal instruments such as contracts and statutes have some similarity in this regard[122] and often incorporate an interpretation clause. Many contractual interpretation clauses may mirror the wording found in section 6 of the Interpretation Act of 1957, which reads:[123]

> "Gender and Number
>
> In every law, unless the contrary intention appears–
> (a) words importing the masculine gender include females; and
> (b) words in the singular number include the plural, and words in the plural number include the singular."

The Interpretation Act provides that should a statute refer to a male word then such a word would include a female equivalent.[124] Yet, the specific words used in section 6(*a*) may, in itself, be indicative of male-dominated language as highlighted in *President of the Republic of South Africa v*

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119 See, for e.g., s 22 of the Consumer Protection Act 68 of 2008.

120 *Absa Bank Ltd v Botha NO* [2016] JOL 37101 (GNP).

121 Rule 32(2). See also a similar case of *Oosthuizen v Steyn* 2020 JDR 0867 (GP).

122 Cornelius *Principles of the Interpretation of Contract* 33; Cornelius 2004 *TSAR* 693.

123 33 of 1957.

124 See, for e.g., *Her Majesty the Queen v Jason Michael Cornell* [2009] 192 CRR (2d) 41 par 35.

Hugo.[125] The words "masculine gender" in section 6(*a*) can generally be defined as "having qualities appropriate to or normally associated with men".[126] This could also mean that it is the male form of the word "of, relating to, or constituting the gender that ordinarily includes most words or grammatical forms referring to males".[127] However, the words that follow in section 6(*a*) refer to "females", and one would have expected to find the equivalent of "feminine gender" rather than "females" in the Interpretation Act. Notwithstanding the incorrect language used to denote the female gender, it does appear that the legislature intended to equalise the differences in language usage of both males and females,[128] but in doing so failed to recognise non-binary genders. Therefore, in its current form, section 6(*a*) only recognises the traditional binary classification of male and female. The South African Law Reform Commission noted that "the enactment of legislation in masculine language has been perceived as contributing to the perpetuation of a male-oriented society in which women are seen as having a lower status and value".[129]

In September 2006 the South African Law Reform Commission embarked on a statutory review of the Interpretation Act.[130] The purpose was to consider whether there was a need to update the Act to align with the Constitution and to avoid unintentionally discriminating based on gender. Although there has been some criticism raised in the proposed approach of the South African Law Reform Commission (being formalistic and adopting an approach of codifying the process of interpretation),[131] there are certainly elements of the Interpretation of Legislation Bill of 2006 that is conducive to more inclusive language and interpretation of legislation. Take, for instance, the South African Law Reform Commission recommended that section 6(*a*) of the Interpretation Act would be updated and incorporated into section 28 of the Interpretation of Legislation Bill which would read as follows: "In any legislation a word denoting the masculine, feminine or neuter gender includes the other genders".[132] This amendment would then recognise that gender is not limited to binary gender classification but references neuter gender classifications as well. Until promulgated, the binary classification in section 6(*a*) of the Interpretation Act remains.

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125 *Supra* 597F–G.

126 Merriam-Webster Dictionary "Definition of Masculine" (undated) https://www.merriam-webster.com/dictionary/masculine (accessed 2019-02-15).

127 *Ibid*.

128 The South African Law Reform Commission https://www.justice.gov.za/Salrc/dpapers/dp112_interpretation.pdf par 6.27, noted that the language used could be reflective of the view that it is "acceptable for woman to be subsumed within men linguistically. See also Burger *A Guide to Legislative Drafting in South Africa* 71.

129 The South African Law Reform Commission https://www.justice.gov.za/Salrc/dpapers/dp112_interpretation.pdf par 6.27.

130 The South African Law Reform Commission https://www.justice.gov.za/Salrc/dpapers/dp112_interpretation.pdf.

131 See, for e.g., Le Roux "The Law Reform Commission's Proposed Interpretation of Legislation Bill: Critical Comments" 2007 22 *SA Public Law* 520–531.

132 The South African Law Reform Commission https://www.justice.gov.za/Salrc/dpapers/dp112_interpretation.pdf par 6.40.

Notwithstanding the proposed amendments made through the Interpretation of Legislation Bill, an argument can still be made that, irrespective of the amendments, such changes may not have the consequence of altering the drafting methodology employed in legislation.[133] One could still argue that should the drafting of statutes remain the same without considering the use of gendered language in the legislation itself, the interpretation provisions found in section 6(*a*) of the Interpretation Act and section 28 of the Interpretation of Legislation Bill could serve as a convenient "way out" for drafters to justify the continued use of exclusionary language and thereby creating a false form of gender-neutrality.[134] Therefore, the statute itself should ideally use gender-neutral language, as seen in examples like *S v Jordan,*[135] where the court found that the language of the Sexual Offences Act was set in a gender-neutral manner, therefore there was no unfair discrimination based on gender.[136] Other examples of gender-neutral legislation can be found in the words "spouse" in the Intestate Succession Act,[137] and the word "survivor" in the Maintenance of Surviving Spouses Act.[138] Having said this, the use of language in legislation in a gender-neutral manner does not in itself mean that there is no discrimination. The circumstances of every particular matter must be assessed to ascertain whether discrimination does indeed exist.[139]

The legislative interpretation and drafting principles can be extrapolated to apply to contracts. After all, contracts are considered to be a form of *ad hoc* legislation between the contracting parties,[140] and thereby bear some resemblance in their drafting and interpretative approaches. In fact, many contracts already include similar language characteristics as found in section 6(*a*) of the Interpretation Act. However, the proposed wording in section 28 of the Interpretation of Legislation Bill may serve as a better guide to contract drafters to address both binary and non-binary genders in the expressed terms of written contracts. Hutchison and Pretorius, albeit a wordier alternative, provides for a similar gist to section 28 of the Interpretation of Legislation Bill and uses the following interpretation clause:[141]

> "In this Agreement, unless expressly stated otherwise or where the context indicates otherwise, words in the singular shall also mean the plural and vice versa, words in the masculine also mean the feminine and the neuter and vice

133 Constanza "Gender Neutral Drafting: Gender Equality or an Unnecessary Burden" 2018 5(1) *IALS Student Law Review* 34 34.

134 Constanza 2018 *IALS Student Law Review* 34. See also the example in Burger *A Guide to Legislative Drafting in South Africa* 71, in which the author highlights the argument that the use of "he" would consequently also mean the female gender. Therefore, some may argue that there is no need to change in the usage of the masculine pronoun in legislative drafting.

135 2002 (6) SA 642 (CC).

136 See also Jagwanth "Expanding Equality" 2005 *Acta Juridica* 131 135, which notes that the nature of the sex trade is of such a nature that it is likely that indirect discrimination could be prevalent.

137 81 of 1987.

138 27 of 1990.

139 *Daniels v Campbell* 2004 (7) BCLR 735 (CC) par 21–22; Jagwanth 2005 *Acta Juridica* 135.

140 Cornelius *Principles of the Interpretation of Contract* 35.

141 Hutchison and Pretorius *The Law of Contract in South Africa* (2017) 415.

> versa, and words referring to a natural person shall include a reference to a body corporate and vice versa."

Both the Interpretation of Legislation Bill and Hutchison and Pretorius still persist in referring to males and females. To achieve true gender neutrality, reference to binary-gender roles could be removed completely, and likely the most gender-neutral alternatives to the interpretation clause in contracts could read "unless the context shows otherwise, an expression which represents any gender includes the other genders".[142]

3 3 Citing parties and the use of definitions

The citation of the contracting parties is another element of a contract where gender-specific language may be used. One drafting technique to identify the contracting parties is not only to cite the contracting party but also to define the contracting parties, which may be generally useful for referring to a term or even the contracting party within a contract. In some instances, drafters, especially in older precedence, may mirror citation practices in court documents and processes when referring to a contracting party. This should be avoided, as it serves little purpose in a contract where the main purpose of referring to a party is the identification of a contracting party. The citation of parties in the content of pleadings are different and are regulated by rule 5(4) of the Magistrate Courts Act Rule and rule 17(4) of the High Court Uniform Rules, which are nearly identical in substance. In essence, both rules require the full name, gender, occupation, place of residence or business, and capacity to be included in the pleading.[143]

As such, court pleadings require the use of an individual's gender to be included in such documents.[144] This approach is sometimes adopted in contracts to describe the contracting parties. However, there is no need to include a person's gender in a contract at all, as only the identity of the contracting parties needs to be included in a contract. As the inclusion of a person's gender in contracts is not a requirement, nor does it add any further value in identifying the contracting party, it serves no purpose to include gender as part of the party descriptor in a contract. Therefore, it is submitted that the use of gender in referring to a party in a contract may, in most instances, be excluded to achieve a more gender-neutral language approach in the drafting of contracts.

4 CONTRACTUAL LANGUAGE FRAMEWORK

Drafting styles in written discourse are inherently subjective.[145] Yet, there are sometimes better ways of approaching drafting.[146] The plain language movement is renowned for best drafting practices in achieving effective

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142 Clause obtained LexisNexis Online Forms and Precedence *Sale of Business – Precedent 1* (accessed 2021-02-05).

143 Harms *Amler's Precedents of Pleadings* 9ed (2018).

144 See, for e.g., Van Blerk *Legal Drafting Civil Proceedings* (2014) 12.

145 See, for e.g., Hofman 2007 *SALJ* 485.

146 Adapted from SJ Cornelius' saying used in his drafting of contract lectures.

communication. The use of readability indexes will often indicate how easy or hard a text is to read as well as the appropriateness of the language in relation to the intended audience.[147] To achieve gender-neutral language in the drafting of contracts, specific mechanisms concerning language usage within the contract construction should be considered.

As a starting point, the contract drafter should establish the contracting party's gender preference and reflect such a preference in the contract. Without first establishing the individual party's personal preferences, the correct use of the personal pronoun and other gendered terms is near impossible.[148] Some contracts employ other more inclusive approaches in using the male and female alternatives such as "his or her" or "his/her" in contracts.[149] Unfortunately, such an approach only recognises binary genders and all but ignores the non-binary gender classification. Therefore, it is recommended that such language be avoided and rather consider the actual gender preferences of the contracting parties.

The use of correct gender-based language could be adapted in bespoke contracts, however, in instances of standard contracts it may be best to employ gender-neutral language and techniques to ensure inclusivity of all members of society and consumer groups. To achieve such gender-neutrality in contracts the following mechanisms could be adopted:

(i) The contract drafter should not blindly use precedence (whether that be for a contract or a specific clause) without first consciously considering the language usage.[150] Any gender-based language should be amended to gender-neutral language, alternatively, the individual's gender preference should be established before embarking on the changes to the contract.

(ii) The interpretation clause within a contract should employ such language to be inclusive of all genders and must not be limited to binary genders only. In this regard, the language suggested by the South African Law Reform Commission relating to section 28 of the Interpretation of Legislation Bill model for contractual interpretation clauses could be adopted in the contract, or even more generic, neutral alternatives.[151]

(iii) The contract drafters should avoid following the approach used in civil litigation in citing a person's gender when describing contracting parties. There is no legal requirement for contracts to identify whether a contracting party is male or female and omitting a person's gender will not impact the validity of the contract.[152]

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147 Hofman 2017 *SALJ* 485.

148 In Barker *The Drafting of Wills* 19–20, the process of understanding the client in the process of drafting a will is highlighted. Similarly, the process of understanding the contracting of the parties involved is important to address any gender preferences.

149 The court in *Petersen v Master of the High Court, Cape Town* [2006] JOL 17358 (C), noted that the use of "his or her" in a will could indicate the use of pre-printed or pre-prepared documents.

150 Van Blerk *Legal Drafting Civil Proceedings* 1.

151 See heading 3.1 (above).

152 See heading 3.2 (above).

(iv) In instances where a standard contract is used, gender-neutrality can be achieved by using second-person personal pronouns as advocated by the plain language movement which uses words such as "you", "your" or "their" and "our" to speak directly to the reader of the contract.[153]

Notwithstanding point (iv) above, there may be instances where the second personal pronoun is simply inappropriate to use in a contract. In such an instance certain alternative techniques could be employed to achieve gender-neutral language within a contract, these being:

(i) Instead of using gender-based language, the contract drafter could use "they" (and other grammatical forms such as "them", "themselves", and "their") to refer to indefinite pronouns and singular nouns.[154]

(ii) The contract drafter could also replace the masculine pronoun with an article.[155]

(iii) Instead of using one of the genders exclusively, the contract drafter could use both pronouns "he" and "she" at the same time within the document, such as "s/he".[156] Although this seems to be an elegant solution, it would not accommodate all members of the transgender community who simply do not identify with binary genders. On this basis, this approach is limiting and still is, at its core, the use of exclusionary language.

(iv) Neutral words or phrases such as "person", "any person", "every person" or "no person" could be used to ensure that focus is not placed on a specific gender.[157] In some instances, it is suggested that the word "it" be used as a gender-neutral pronoun.[158]

(v) In some instances, the sentence could be rewritten to completely eliminate the pronoun.[159]

(vi) Although discouraged in the plain language movement, the use of the passive voice could in certain instances eliminate the need for a gendered pronoun.[160]

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153 The use of such pronouns can often result in ambiguity as to whether the pronoun refers to the singular or plural, as was mentioned in passing in the case of *Rex v Rautenbach* 1949 (1) SA 135 (A) 147.

154 Canadian Department of Justice on Legastics "Gender Neutral Language" (undated) https://canada.justice.gc.ca/eng/rp-pr/csj-sjc/legis-redact/legistics/p1p15.html (accessed 2019-02-16). See also Benatar "Sexist Language: Alternatives to the Alternatives" 2005 19(1) *Public Affairs Quarterly* 1 5.

155 *Ibid*.

156 Foertsch and Gernsbacher 1997 *Psychological Science* 106; Canadian Department of Justice on Legastics https://canada.justice.gc.ca/eng/rp-pr/csj-sjc/legis-redact/legistics/p1p15.html. See also (author unknown) "More Ways to Write in Sex-Neutral Language" (October) 1986 12(4) *Commonwealth Law Bulletin* 1102 1103.

157 Canadian Department of Justice on Legastics https://canada.justice.gc.ca/eng/rp-pr/csj-sjc/legis-redact/legistics/p1p15.html.

158 Schweikart 1998 *Women's Rights Law Reporter* 8. See also "More Ways to Write in Sex-Neutral Language" *Commonwealth Law Bulletin* 1103.

159 Canadian Department of Justice on Legastics https://canada.justice.gc.ca/eng/rp-pr/csj-sjc/legis-redact/legistics/p1p15.html; Fischer *University of San Francisco Law Review* 491.

(vii) A drafter could use a synonym to avoid the need for a gendered pronoun.[161] This is often achieved with the use of definitions and defined terms within the written contract.

As language is fluid and evolving there cannot be a single set of language rules that are applicable in the drafting of contracts. Although there is no right or wrong way of drafting a contract, there are better ways of approaching it.[162] One could, therefore, state that a better way of drafting a contract is to recognise the dignity of all members of society and approach the drafting of a contract with gender-neutral language. Thereby, the legal space created by individual contractual engagements could be considered safe and dignified for all members of society regardless of their sexual orientation or their individual gender identification.

5 CONCLUSION

Society has, only fairly recently, seen another transformative shift in recognising non-binary genders. The legal framework, inclusive of the advent of the Constitution, has guaranteed equal treatment and rights to all members of society irrespective of their gender identification, sex, or sexual orientation.[163] Notwithstanding this, the language adopted in verbal and written discourse has, in many respects, yet to catch up with these developments to ensure a gender-neutral and inclusionary language usage that recognises all members of society.

A person's gender identification can be linked to their very identity and consequently their dignity.[164] Dignity can then be described as conduct that supports "the recognition of and respect for the unique identity and expression of each individual".[165] The opportunity exists to ensure that all members of society are afforded a safe legal space to co-exist, which can only be achieved by the inclusionary language employed for both binary and non-binary genders. This can be accomplished by abandoning the historical practices of gender-based language and employing different contractual approaches and drafting techniques to achieve gender-neutrality within private contractual engagements.[166] After all, language usage is one of the tools of the legal profession,[167] and the contract drafter has a responsibility to ensure that the language used in a contract is clear and accurate, but also inclusionary.

The reason for using exclusionary language in contracts could be summed up in the words of Barker who states that "the fundamental reason

160 Fischer 2009 *University of San Francisco Law Review* 491–492. See also (author unknown) *Commonwealth Law Bulletin* 1103.

161 Fischer 2009 *University of San Francisco Law Review* 491–492.

162 A saying that Prof SJ Cornelius has used in his drafting of contracting lectures.

163 See s 9 of the Constitution.

164 See Botha 2009 25 *SAJHR* 1 2, which describes that a person's dignity is central to that of the right to equality.

165 *September v Subramoney NO supra* 952.

166 See heading 4 (above).

167 Burger *A Guide to Legislative Drafting in South Africa* 1.

is that most of us develop bad habits in the use of language and these result in bad habits of thought."[168] Perhaps when it relates to gender neutrality in the drafting of contracts, it is not necessarily bad habits of thought (as suggested by Barker) but rather an awareness of matters relating to gender to ensure contracts are drafted in more appropriate and inclusionary language within South Africa's constitutional democratic context. In doing so, the account of both the feminist method and individual experiences within society should be imported within written discourse,[169] but equally so, it is important to take into account the personal experiences and perceptions of those individuals that identify as non-binary. After all, individuals, groups, and the collective society's perceptions, values, and prejudices are often reflected in the use of language, irrespective of whether such language is found in verbal or written discourse. It is on this basis that the maturity and tolerance of a society can be said to be linked to how language is employed within a country's legal framework and even private contractual engagements.

Both the law and language are intertwined and are expressions of the societal fabric of a country.[170] One must look to the not-so-distant past to find legally oppressed female rights and, consequently, language's parallel path in male-orientated and male-dominated language usage during a time in history. Largely through the efforts of the feminist movement and advocates of women's rights, both locally and internationally, social structures shifted and began recognising the equality of both males and females in the legal framework, private engagements, and language usages.[171] So too, it is necessary to now also recognise other genders within the written context, and thereby (adapted from the words of the South African Law Reform Commission) ensure that that gender-neutral language "should become the general rule",[172] and thereby employ drafting practices to achieve gender-neutral language in contracts.

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168 Barker *The Drafting of Wills* 4.

169 Van Marle 2005 *Obiter* 647–648.

170 See, for e.g., Cornelius *Principles of the Interpretation of Contract* 4, highlighting the manner in which social change may influence the interpretation of words.

171 Fischer 2009 *University of San Francisco Law Review* 473. See also the discussion in Clarke 2019 *Harvard Law Review* 915–918,

172 The South African Law Reform Commission //www.justice.gov.za/Salrc/dpapers/dp112_interpretation.pdf par 6.31, referencing Thornton.

THE ETHOS OF TOLERANCE OF DIVERSITY IN POST-APARTHEID JURISPRUDENCE*

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SUMMARY

This article examines the South African judiciary's understanding, interpretation, and application of the ethos of tolerance of diversity. The case law analysis shows that the courts treat tolerance of diversity as a constitutional value that derives from the Preamble and founding values of the Constitution of the Republic of South Africa, 1996. It also reveals that the courts moreover deduce the ethos of tolerance of diversity from the Bill of Rights, which entrenches rights and protects freedoms that could be classified as the building blocks of tolerance and diversity. Four major themes emerge from the analysis of the judiciary's conceptualisation of the ethos of tolerance of diversity. These are the principles of reasonable accommodation; the right to be different; racial sensitivity; and transformation.

1 INTRODUCTION

The adoption of the Constitution of the Republic of South Africa, 1996, has cemented the democratic transition from apartheid to constitutional democracy. It lays the foundation to "heal the divisions of the past"[1] in a South Africa that "belongs to all who live in it, united in our diversity".[2] Given South Africa's complex history, the Constitution has emerged as the most critical aspect of transformation in the post-1996 era. Notwithstanding centuries of colonialism and decades of apartheid intolerance, the Constitution represents a compromise that, ideally, enables South Africans to work together towards putting the past behind them and building a constitutional democracy.[3] Thus, the promotion of diversity is one of the

* This paper is based on research conducted with the financial support of the National Research Foundation (grant no 115581). All views and errors are the author's own.

1 Preamble to the Constitution.

2 *Ibid*.

3 Moseneke *All Rise: A Judicial Memoir* (2020) 61.

most important objectives of the post-apartheid constitutional project. However, intolerance is on the rise in South Africa as a result of the exploitation of racial, ethnic, religious, cultural, and language differences, among other factors, which define contemporary South Africa.[4] The law reports are awash with cases in which judges have expressed their concern against increasing expressions of intolerance such as xenophobia, racism, hate speech, and hurtful commentary in the public discourse.

The judicial understanding, interpretation, and application of the ethos of tolerance of diversity in post-apartheid South Africa are crucial not only because the drafters of the Constitution opted to use the judiciary, headed by the Constitutional Court, to safeguard human rights, support social reconstruction and act as a bridge from apartheid to constitutional democracy,[5] but also because they recognised the desirability of entrusting the courts to guide the fledgling democracy towards long-lasting peace and justice. This trust, expressed in the wide constitutional powers given to the judiciary in Chapter 8 of the Constitution, makes the judiciary a very powerful branch of government. As such, it is not surprising that in contemporary South Africa, the law is what judges say is the law (or should be the law).[6] Several cases illustrate this immense judicial power. For instance, post-apartheid judges have struck down entire sections from statutes for unconstitutionality and have inserted provisions into legislation through the reading-in of words into statutes. They have also ordered Parliament to enact specific laws within specific periods to cure what they term constitutional defects in legislation.[7]

This article examines the ethos of tolerance of diversity in post-apartheid jurisprudence to illustrate that South African courts treat tolerance of diversity as a constitutional value. The discussion shows that the courts deduce the ethos of tolerance of diversity from the Preamble, the founding values, and the Bill of Rights in the Constitution. In the first part, after this introduction, the article discusses the meaning of tolerance and diversity to determine whether the definitions found in the literature fit the post-apartheid South African context; and, if so, how and to what extent. The second part is a synopsis of the historical origins of intolerance in colonial and apartheid South Africa. It lays the foundation for the third part, which presents the constitutional aspiration for tolerance of diversity. It also analyses the expression of the ethos of tolerance of diversity in the Bill of Rights by

4 *S v Bresler* [2002] JOL 9580 (C) 13–14.

5 See Van der Schyff *Judicial Review of Legislation: A Comparative Study of the United Kingdom, the Netherlands and South Africa* (2010) 45.

6 See Dube "Separation of Powers and the Institutional Supremacy of the Constitutional Court over Parliament and the Executive" 2020 36(4) *SAJHR* 293, 294, for a discussion of the finality of judicial interpretation of law.

7 See, for instance, *Minister of Justice and Constitutional Development v Prince; National Director of Public Prosecutions v Rubin; National Director of Public Prosecutions v Acton* 2018 (6) SA 393 (CC) par 103. For a discussion of how the legislature and cabinet can cure constitutional defects and the underlying principles and considerations that must inform their actions in this regard, see *Minister of Agriculture, Forestry and Fisheries v National Society for the Prevention of Cruelty Against Animals* [2015] ZACC 27.

considering the rights from which the ethos could be deduced, such as the right to equality. The fourth part critiques the four major themes that emerge from post-apartheid judicial understanding, interpretation, and application of the ethos of tolerance of diversity. These themes are the principle of reasonable accommodation; the right to be different; racial sensitivity; and transformation.

2 UNDERSTANDING TOLERANCE AND DIVERSITY

Admittedly, tolerance of diversity is hard to define with precision in the legal context because of the vagueness of its composite terms – tolerance and diversity. Diversity is an ambiguous noun.[8] However, there is some acceptance that diversity fosters tolerance and multiculturalism.[9] Witenberg argues that tolerance, like diversity, is also prone to ambiguity and to many interpretations, which include "tolerance of forbearance, putting up with [and] full or indiscriminate acceptance".[10] The susceptibility of tolerance to many interpretations means that the term is bound to cause confusion and misunderstanding, particularly since the different versions of tolerance do not reveal a clear sequence. For instance, "tolerance of forbearance" and "full or indiscriminate acceptance" appear to be on the opposite ends of the spectrum. Wittenberg appreciates this and says, "that this is not a continuum but different ways to conceptualise tolerance to human diversity".[11] Witenberg settles for tolerance as "a moral virtue, reciprocity and respect."[12]

Linked to diversity, tolerance catalyses peaceful co-existence between different groups by making acceptance of their differences possible.[13] Acceptance implies the elimination of unfair discrimination on the basis of difference, making equality a symbol of tolerance. Based on this argument, the right to equality and statutory prohibitions against intolerance in South Africa illustrates the constitutionalisation of diversity as a founding value. It could be for this reason that the inscriptions on the steps of Parliament tie equality with diversity.[14] It also articulates the political and normative nature of tolerance of diversity as a social norm which is enforceable through the exercise of state authority within a broader context of the transformation of society.

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8 Vertovec "Introduction: Formulating Diversity Studies" in Vertovec (ed) *Routledge International Handbook of Diversity Studies* (2014) 1 4.

9 See Gerapetritis *Affirmative Action Policies and Judicial Review Worldwide* (2016) 63.

10 Witenberg *Tolerance: The Glue that Binds Us: Empathy, Fairness and Reasons* (2016) 34.

11 *Ibid*.

12 *Ibid*.

13 See Walzer *On Toleration* (1997) xii on the necessity of difference in the discourse on tolerance.

14 The inscriptions on the steps of Parliament represent the values and principles that inform the post-apartheid constitutional project to build a united democratic South Africa that embraces diversity, tolerance, human rights and accountability, among other ethos. For a full exposition of their meaning, see Ramaphosa "Unveiling of Parliamentary inscriptions" *Government of the Republic of South Africa* https://www.gov.za/speeches/president-cyril-ramaphosa-unveiling-parliamentary-inscriptions-19-mar-2019-0000 (accessed 2021-11-30).

Witenberg also defines tolerance as "putting up with something we dislike or even abhor"[15] in the interest of maintaining peace and harmony. In the context of a fractured society like post-apartheid South Africa, the level of endurance (and tolerance) proposed by Witenberg might provide the answer against social implosion since tolerance of diversity is critical to the maintenance of peace.[16] However, endurance implies that what is tolerated is undesirable, inferior, wrong, threatening, or evil.[17] In this light, the endurance proposed by Witenberg also implies a compromise (under duress) for something that one would, given a choice, reject out of hand. Witenberg justifies this view by presenting tolerance as having a prejudice against someone, a group of people, or something, but restraining oneself from acting on that prejudice since doing so would upset the balance of norms established by society.[18] As such, Witenberg's view of tolerance does not mean extinguishing bias and prejudice against those who are different from us but merely suppressing oneself from acting on that bias and prejudice.

However, Wittenberg's view seems to reinforce tolerance as a manifestation of superiority and power. This view is supported by Walzer, who says that inequality between groups, those groups that are tolerating and those groups being tolerated, puts the individuals in the latter group in an inferior position, since "to tolerate someone else is an act of power; to be tolerated is an acceptance of weakness".[19] After some reflection on Walzer's proposition, one might understand why tolerance could be regarded as a manifestation of superiority and power. The essence, it appears, is not so much on the "superior" person's (misguidedly perceived) power but their prejudicial beliefs. Evidently, society has an interest in restraining expressions of prejudicial beliefs as such expressions are, in fact, acts of intolerance that do more harm than good to support peace and harmony in divided societies. The following section provides a synopsis of the origins of intolerance in colonial and apartheid South Africa to contextualise the high levels of intolerance in contemporary times and to appreciate why society has an interest to protect diversity.

3 A CURSORY GLANCE AT THE HISTORICAL ORIGINS OF INTOLERANCE IN SOUTH AFRICA

The discussion of the origins of intolerance in this section also intends to enhance the understanding and appreciation of the tolerance of diversity as a constitutional value. The analysis only goes as far as history impinges on

15 Witenberg *Tolerance: The Glue that Binds Us: Empathy, Fairness and Reasons* 36.

16 Walzer *On Toleration* 15.

17 Witenberg *Tolerance: The Glue that Binds Us: Empathy, Fairness and Reasons* 38 lists "race, culture, nationality, religious practices, beliefs, attitudes and colour" as some of those which are to be tolerated.

18 Witenberg *Tolerance: The Glue that Binds Us: Empathy, Fairness and Reasons* 36.

19 Walzer *On Toleration* 52.

the constitutional injunctions for tolerance and diversity. Sachs J said that an understanding and appreciation of South Africa's history is important because "if we allow bitter division and opposition to continue, even in terms of memories of the past, our future will be based on separation and mistrust".[20] As such, the discussion of the painful aspects of South Africa's history in this section and the article in general (as far as tolerance and diversity are concerned), is undertaken for genuine analytical and contextual purposes. It has no political motivation and should be understood as no more than a scholarly dissection of a very complex past. The author hopes that the understanding of this history might give South Africans something to think about in the broad discussion of tolerance and diversity.

The historical analysis reveals that intolerance of diversity emanated from skewed feelings of racial superiority held by European colonial settlers (mainly Dutch and English) when they arrived in South Africa. The settlers gave themselves the moral justification to reject, with utter contempt and often with brutal force, the humanity, culture, languages, beliefs, and other aspects of African life.[21] The apartheid government, for its part, exploited racial and ethnic differences for its selfish political ends. In the end, apartheid became an embodiment of intolerance of diversity.[22] As such, the struggle against apartheid was one for tolerance of diversity and the inclusion of the marginalised communities in the political and economic affairs of the state.

The social divisions created by the codification of intolerance of diversity under the apartheid system were so deep that the largely peaceful transition from apartheid to constitutional democracy was viewed as a miracle.[23] In a state in which intolerance was a creature of statute and in which race was perversely exploited for political ends, it is not surprising that the post-apartheid democratic government inherited a fractured society.[24] Although the democratic transition of the early 1990s marked the end of codified intolerance and ushered in a new era of unity in diversity, the problems created by the apartheid system still plague South Africans. The only antidote to a lapse into intolerance is respect for the Constitution, which is an enduring commitment to the protection, promotion, and celebration of

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20 Sachs *We, the People: Insights of an Activist Judge* (2016) 55.

21 Meierhenrich *The Legacies of Law: Long-Run Consequences of Legal Development in South Africa, 1652–2000* (2008) 23 notes that in 19th Century South Africa, "colonisation remained wedded to brutal exploitation of the conquered population".

22 Gibson and Gouws *Overcoming Intolerance in South Africa: Experiments in Democratic Persuasion* (2003) 29 opine that apartheid was a synoym for intolerance.

23 See Klug *Constituting Democracy: Law Globalism, and South Africa's Political Reconstruction* (2000) 69. Some of the most notorius statutes which codified intolerance in apartheid South Africa were the Group Areas Act 41 of 1950 (which created different residential areas for different races) and the Immorality Amendment Act 21 of 1950 (which criminalised interracial relations and marriages)

24 See Wafer "Diversity, Xenophobia and the Limits of the Post-Apartheid State" in Vertovec (ed) *Routledge International Handbook of Diversity Studies* (2014) 184 166.

diversity against the background of a long history of exclusion and intolerance.[25]

4 THE CONSTITUTIONAL ASPIRATION FOR TOLERANCE OF DIVERSITY

It has been noted that one of the most important objectives of the post-apartheid constitutional project is to promote diversity.[26] In *Prince v President of the Law Society of the Cape of Good Hope*, the Court declared that tolerance and respect for diversity are constitutional values.[27] This declaration is significant as it effectively places tolerance of diversity among constitutional norms. The Court's observation emanated from the fact that the Constitution articulates, in detail, the shared aspirations of South Africans, the values which bind them, and the direction for their future.[28] Through historical reflections, the Constitution commits the state to build a stable foundation for the future.[29] Such a foundation is only possible in a state which values tolerance of diversity, and which gives every individual the opportunity to free their potential.[30]

The Constitution premises the aspirations for tolerance of diversity on the urgency to "heal the divisions of the past"[31] and to charter a new path for peaceful co-existence guided by the recognition that "South Africa belongs to all who live in it, united in our diversity".[32] The Constitution also establishes a post-apartheid democratic state founded on the achievement of equality, human dignity, and other rights and tenets of constitutionalism that enables democracy to thrive in South Africa. The Preamble of the Constitution is an expression of the constitutional commitment to building a nation that is united in diversity and in which reconciliation, understanding, mutual respect, and care inform individual and state conduct. The underlying constitutional spirit is that the mistrust, acrimony, and racial divisions created by the apartheid ideology and its brutal enforcement could only be overcome by a legal order built on the foundations of tolerance, diversity, and inclusion. In the uniquely South African situation, tolerance, diversity, and inclusion are essential prerequisites for long-lasting peace and justice.

Although the constitutional aspiration for tolerance of diversity is uncontested, the exact point in history at which South Africa embraced the

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25 See *MEC for Education: KwaZulu-Natal v Pillay* 2008 (2) BCLR 99 (CC) par 65.

26 *Gumede v President of the Republic of South Africa* 2009 (3) SA 152 (CC) par 22.

27 *Prince v President of the Law Society of the Cape of Good Hope* 2002 (3) BCLR 231 (CC) par 150.

28 See *S v Makwanyane* 1995 (6) BCLR 665 (CC) par 262.

29 *Ibid*.

30 For a discussion, see *AB v Minister of Social Development* 2017 (3) BCLR 267 (CC) par 52.

31 See the preamble to the Constitution.

32 *Ibid*.

ethos of tolerance and diversity has not been clear. In *Amod v Commission for Gender Equality*,[33] the court narrowed down the period as follows:

> "[T]he new ethos of tolerance, pluralism and religious freedom … had consolidated itself in the community even before the formal adoption of the interim Constitution on 22 December 1993. The new ethos had already begun in 1989 with the publication of the report on Group and Human Rights by the South African Law Commission, recommending the repeal of all legislation inconsistent with a negotiated bill of fundamental rights; it accelerated with the speech of the former State President on 2 February 1990 and the unbanning and the visibility of the previously prohibited political movements and it finally became irreversible with the commencement and conclusion of negotiations at CODESA from 1991 until 1993. The new ethos was firmly in place when the cause of action in the present matter arose on 25 July 1993."

In *Ryland v Edros*,[34] a judgment delivered under the constitutional setting of the transitional Constitution, the court eloquently articulated and comprehensively listed the constitutional principles and provisions which require tolerance of diversity.[35] Notably, the Court identified tolerance of diversity as a constitutional value that stands at the same level as equality, which, under the 1996 Constitution, is both a founding value and a standalone right.[36] The Court recognised the bundle of equality, tolerance, and diversity as one of the cornerstones of the pluralistic South African society founded on constitutional democracy. The Court treated tolerance, diversity, and equality as the constitutional values against which it could test whether there was a divergence with public policy. The Court further observed that the principles of equality, tolerance, and reasonable accommodation underlie the Bill of Rights and are manifest in the Constitution in the following terms:[37]

a) Equality, social justice, and human dignity.
b) The prohibition against discrimination.
c) The non-derogability of the right to human dignity.
d) The right to freedom of conscience, religion, thought, belief and opinion.
e) Protection of language rights and cultural diversity.
f) Racial and gender equality.
g) National unity.

In addition to the above, *ubuntu*[38] is also considered as one of the building blocks of a democratic society founded on human dignity, equality, and

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33 *Amod v Commission for Gender Equality* 1999 (4) SA 1319 (SCA) par 20.

34 [1996] 4 All SA 557 (C) 573.

35 The constitutional principles were listed in Schedule 4 of the transitional Constitution and were incorporated into the current Constitution, as certified by the Court in *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (1) BCLR 1 (CC).

36 See also *Cloete v Maritz* [2013] JOL 30337 (WCC) par 44. Equality is found in s 1 of the Constitution as a founding value and in s 9 of the Constitution as a human right.

37 *Ryland v Edros supra* 572.

38 *Ubuntu* is defined as humanness of heart and feeling for others. It is rooted in social justice and care – Bryant *A Zulu-English Dictionary* (1905) 455.

freedom.[39] Although its application in contemporary South Africa is subject to debate,[40] it is not difficult to accept that its invocation in judicial reasoning represents its appeal in the constitutional project of building a just and equitable society that is committed to the tolerance of diversity. It is very difficult to imagine a serious engagement of human rights, such as the right to equality and dignity, that does not include references to *ubuntu*. This is because the Constitutional Court embraced *ubuntu* as an embodiment of the Constitution's protective layer that guards human rights and protects the worth and well-being of every individual. In *Makwanyane*, Mohammed DJP declared that indigenous value systems (such as *ubuntu*) are the "premise from which we need to proceed and are not wholly unrelated to our goal of a society based on freedom and equality".[41] He proceeded, with other judges of the Constitutional Court, to declare the death penalty unconstitutional for, *inter alia*, contradicting the spirit of *ubuntu.* In his view, indigenous values such as *ubuntu*, which had been historically disregarded, could be injected into judicial adjudication to create an inclusive South African jurisprudence.[42] This approach indicates his view and wishes for the judiciary to not only foster tolerance of diversity for all people but also for the acceptance of the cultures and values of historically marginalised people.

Returning to the Bill of Rights and its application to the advancement of the post-apartheid constitutional project, it is noted that the fulfilment of the rights which it enshrines advances the constitutional aspiration for tolerance of diversity. For instance, fostering human dignity requires tolerance of racial, religious, and cultural diversity since the senses of self-worth and acceptance of individuals are linked to the respect accorded by society to the groups to which the individuals belong.[43] One could agree with Bonfiglio, who views the protection of rights and freedoms in multicultural societies as basic ingredients for tolerance of diversity.[44] This view is reflected in several cases decided in post-apartheid South Africa, as discussed below.

In *Kotzé v Kotzé*,[45] the court recognised the importance of the envisaged constitutional values of tolerance and diversity. It concluded that without tolerance of diversity, the rights in the Bill of Rights would not be fulfilled and that the Bill of Rights will remain a hollow promise to all persons whom it

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39 *S v Makwanyane supra* par 304.

40 For some discussions of *ubuntu* and its relevance to human dignity, equality and freedom, among other constitutional values and rights, see, in general, Praeg "An Answer to the Question: What is [ubuntu]" 2008 27(4) *South African Journal of Philosophy* 367; Hutchison "From Bona Fides to Ubuntu: The Quest for Fairness in the South African Law of Contract" 2019 1 *Acta Juridica* 99; Himonga, Taylor and Pope "Reflections on Judicial Views of Ubuntu" 2013 16(5) *PER/PELJ* 369; Chibvongodze "*Ubuntu* is Not Only About the Human! An Analysis of the Role of African Philosophy and Ethics in Environment Management" 2016 53(2) *Journal of Human Ecology* 157.

41 *S v Makwanyane supra* par 304.

42 *S v Makwanyane supra* par 306.

43 See *R v Keegstra* (1990) 3 CRR (2d) 193 (SCC) par 227–228.

44 Bonfiglio *Intercultural Constitutionalism: From Human Rights Colonialism to a New Constitutional Theory of Fundamental Rights* (2019) i.

45 *Kotzé v Kotzé* [2003] JOL 11479 (T) 5–6.

promises the prospect of living in a society that values human dignity, equality, and freedom. Thus, it is not difficult to grasp that the adoption of the final Constitution was one of the first steps towards the establishment of a legal order that champions the ethos of diversity and tolerance of difference in society towards the promotion and protection of rights enshrined in the Bill of Rights.[46]

The right to equality, entrenched in section 9 of the Constitution, applies to the discourse on tolerance of diversity, as it requires the elimination of all forms of unfair discrimination, which are driven by bias, prejudice, and false feelings of racial and ethnic superiority. Within the constitutional context of the right to equality, tolerance of diversity requires more than self-restraint against acting in a biased and prejudicial manner but also embracing differences in race, colour, culture, language, and other criteria based on which discrimination is perpetuated in society. This, in turn, requires legislative action to redress the effects of past discrimination. The Promotion of Equality and Prevention of Unfair Discrimination Act is the main legislation enacted by Parliament to foster tolerance of diversity by building

> "a democratic society, united in its diversity, marked by human relations that are caring and compassionate, and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom".[47]

The right to equality also entails preferential treatment for previously disadvantaged groups through affirmative action. Giving a group preferential treatment to compensate for a discriminatory past enhances diversity by enabling previously disadvantaged groups to participate in governance, in the economy, and in social settings.[48] Levelling the playing field fosters equality and eliminates perceptions of racial and ethnic superiority in society. However, tolerance of diversity should not be confused with affirmative action since affirmative action is a means to achieve diversity in society. Treating affirmative action as the euphemism for diversity distorts the proper understanding of tolerance of diversity.[49]

5 MAJOR THEMES IN THE JURISPRUDENCE ON TOLERANCE OF DIVERSITY

In several cases, South African judicial officers have remarked on tolerance and diversity, thereby inserting their (judicial) opinions and other interpretations of the law in the discourse. The jurisprudence developed by the courts on tolerance of diversity is interesting, particularly when

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46 See *Volks v Robinson* [2005] 2 BCLR 101 (CC) par 181.

47 See the Preamble to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

48 See Gerapetritis *Affirmative Action Policies and Judicial Review Worldwide* 2 7.

49 Cohen and Sterba *Affirmative Action and Racial Preference: A Debate* (2003) 38 view affirmative action as the euphemism for tolerance. For criticisms of diversity in relation to affirmative action, see Vertovec in Vertovec (ed) *Routledge International Handbook of Diversity Studies* 1 3.

examining decisions in which the Constitutional Court pronounced on some of the most contested issues, such as lawful discrimination,[50] the renaming of streets,[51] and tuition language in institutions of higher learning.[52] In addition to its position at the apex of the judiciary, the Constitutional Court is an institutional embodiment of the promotion of the aspirations for South Africans united in their diversity.[53] Whereas South Africans have an equal claim to the Constitution and have a moral and legal obligation to fulfil its vision,[54] the Constitutional Court is the highest institution through which the ethos of tolerance of diversity could be given binding judicial meaning. The Court has the final say on the meaning and interpretation of the Constitution, including its ethos, such as tolerance of diversity. This section identifies the major themes in the jurisprudence developed by the courts on tolerance of diversity. The selected themes include reasonable accommodation, the right to be different, the need for racial sensitivity, and transformation. It is noted that there is no evidence that this list is exhaustive.

5 1 Reasonable accommodation

In *Makwanyane*, one of its most celebrated judgments, the Constitutional Court linked the accommodation of others, transformation, equality, and tolerance as follows:

> "Constitutionalism in our country also arrives simultaneously with the achievement of equality and freedom, and of openness, accommodation and *tolerance*. When reviewing the past, the framers of our Constitution rejected not only the laws and practices that imposed domination and kept people apart, but those that prevented free discourse and rational debate, and those that brutalised us as people and diminished our respect for life."[55]

Sachs J, one of the judges who decided *Makwanyane*, further developed the Court's jurisprudence on reasonable accommodation in his extra-curial writings. In his book, *We, the People: Insights of an Activist Judge*, he argues that accommodation is a matter of principle meant to enable the people of a diverse society to live together in dignity, dialogue, and difference.[56] Sachs J is correct in arguing that in a diverse society, accommodation entails "finding the means of living together" [57] for everyone

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50 See, for instance, *President of the Republic of South Africa v Hugo* 1997 (6) BCLR 708 (CC); *Solidarity obo Pretorius v City of Tshwane Metropolitan Municipality* [2016] 7 BLLR 685 (LC); and *South African Police Service v Solidarity obo Barnard* 2014 (10) BCLR 1195 (CC).

51 *City of Tshwane Metropolitan Municipality v Afriforum* 2016 (9) BCLR 1133 (CC).

52 *AfriForum v University of the Free State* 2018 (4) BCLR 387 (CC); *Gelyke Kanse v Chairperson of the Senate of the University of Stellenbosch* 2019 (12) BCLR 1479 (CC); *Chairperson of the Council of UNISA v AfriForum* [2021] ZACC 32.

53 Sachs *We, the People: Insights of an Activist Judge* 142.

54 Sachs *We, the People: Insights of an Activist Judge* 6.

55 *S v Makwanyane supra* par 391.

56 Sachs *We, the People: Insights of an Activist Judge* 142.

57 *Ibid*.

to feel a sense of belonging in "South Africa [which] belongs to all who live in it."[58] Expressing the vision for diversity in the Constitution, he contextualises the need for tolerance and accommodation as follows:

> "We struggled for the right to be the same, to be equal. But to be the same did not mean that we had to be identical. It did not require suppressing our own characteristics to fit into the mould created by the dominant minority. It meant the right to be treated equally, as you were, whoever you were."[59]

Sachs J stretched the reasonable accommodation test very wide and said that from a Bill of Rights perspective, the test of tolerance "comes not in accepting what is familiar and easily accommodated, but in giving reasonable space to what is "unusual, bizarre or even threatening".[60] In the South African historical context, accepting what is "unusual, bizarre or even threatening" might mean many things, which include embracing affirmative action and its transformative agenda. It also means accepting religions that evangelise in different ways, such as requiring and permitting the smoking of cannabis for religious purposes. In *Prince v President of the Law Society of the Cape of Good Hope*,[61] the Constitutional Court dealt with the tolerance of diversity of religious faiths. First, the Court acknowledged that the Constitution commits South Africans to the tolerance of diversity through reasonable accommodation of all that is perceived to be different from the "mainstream".[62] Secondly, the Court observed that reasonable accommodation of difference entails the employment of less restrictive measures to accommodate that which is different.[63] Thirdly, the Court expressed its displeasure at intolerance, the various forms through which it manifests, and its destructiveness when propelled by state power to aggressively target "the alternative".[64] Notwithstanding this approach, the majority of the Court ultimately found that the failure to accommodate the Rastafarian religious practices of smoking cannabis was constitutionally valid largely because it would be difficult to police. This was a temporary setback for the Rastafari, as the Court accepted, almost two decades later, that the prohibition on the personal possession and use of cannabis is inconsistent with the constitutional right to privacy.[65]

The essence of diversity is inclusion and tolerance. In certain circumstances, diversity requires individuals to endure a limited form of discomfort and loss of convenience to accommodate others.[66] Several cases

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58 See the preamble to the Constitution.

59 Sachs *We, the People: Insights of an Activist Judge* 170.

60 *Prince v President of the Law Society of the Cape of Good Hope supra* par 172.

61 *Ibid*.

62 *Prince v President of the Law Society of the Cape of Good Hope supra* par 79.

63 *Ibid*.

64 *Prince v President of the Law Society of the Cape of Good Hope supra* par 145 (per Sachs J).

65 *Minister of Justice and Constitutional Development v Prince; National Director of Public Prosecutions v Rubin; National Director of Public Prosecutions v Acton supra* par 129.

66 Cameron *Justice: A Personal Account* (2014) 226.

have come before the courts in which diversity had to be considered as a trade-off for comfort and convenience. The first two language cases decided by the Constitutional Court – *Afriforum v University of Free State* and *Gelyke Kanse* – are some of the examples of the application of the ethos of inclusion, tolerance, and reasonable accommodation in case law. In these two cases, the underlying message from the Court is that the convenience of Afrikaans-speakers to learn in their mother tongue must be traded-off for the broader interests of society to eliminate appearances of linguistic privilege and prejudice in higher education. In a separate contribution elsewhere, the desirability of this approach and its implications for linguistic tolerance is examined.

In addition to reasonable accommodation through inclusiveness and tolerance, the jurisprudence of the Constitutional Court seems to point to the celebration of diversity as a constitutional value. In *MEC for Education: KwaZulu-Natal v Pillay*,[67] the Court had to decide on the reasonable accommodation of the wearing of nose studs by learners in schools. Addressing the argument that permitting learners to wear nose studs would encourage other learners to "come to school with dreadlocks, body piercings, tattoos and loincloths",[68] Langa CJ said that the expression of diverse cultures in schools is a cause for celebration, not fear. The judgment by Langa CJ shows the serious commitment of the Constitutional Court to inclusiveness and the protection of diversity through tolerance. It also championed the right to be different.

5 2 The right to be different

The principle of reasonable accommodation is built on the foundation of the right to be different. Reflecting on South Africa's history of dictatorial segregation, the Court alluded to "the right to be different", which has arisen as one of the most precious qualities of the constitutional dispensation.[69] The Court further reiterated that when faced with a case in which it had to decide on the reasonable accommodation of a minority, it would summon its "astute jurisprudential technique" to facilitate the resolution of the dispute in a manner which is not only central to the constitutional order but which also heeds "the clarion call of tolerance"[70] which should resonate in society with force.

In *Christian Education v Minister of Education*,[71] the Court also examined the right to be different in language, culture, and religion, among other characteristics, and noted that in a constitutional democracy, minorities often have to rely on the judicial, rather than the legislative process, to protect

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67 *MEC for Education: KwaZulu-Natal v Pillay supra* par 107.

68 *Ibid*.

69 *Prince v President of the Law Society of the Cape of Good Hope supra* par 170 (per Sachs J).

70 *Prince v President of the Law Society of the Cape of Good Hope supra* par 171.

71 *Christian Education South Africa v Minister of Education* 2000 (10) BCLR 1051 (CC).

their right from majoritarian encroachment. The Court reiterated that the protection of minorities requires "a qualitative [approach] based on respect for diversity."[72] Echoing his remarks in *Prince v President of the Law Society of the Cape of Good Hope*, Sachs J noted that minorities would better be protected by the judiciary when they "express their beliefs in a way that the majority regard as unusual, bizarre or even threatening".[73] In *ANC v Sparrow*, the court emphasised the need for the protection, promotion, and restoration of human dignity under the Constitution, whose underlying values prescribe the celebration of difference, as opposed to intolerance.[74] Like other courts, the Court contextualised its analysis on the Preamble and the historical setting of injustice which informed the adoption of the Constitution. The celebration of differences was also reiterated in *Commission of Staff Association obo Roeber-Maduba*, in which the CCMA alluded to the need for diversity training in the workplace as part of the first steps towards building inclusive workplaces.[75] It was hoped that diversity training would sensitise employees against racial prejudice and bias, thereby building inclusive workplaces by fostering racial sensitivity.

5 3 Racial sensitivity

In *City of Tshwane Metropolitan Municipality v Afriforum*,[76] Mogoeng CJ said that the achievement of the constitutional aspirations for unity in diversity requires a complete rejection of racial intolerance and racial insensitivity. The reasoning was followed by the Equality Court (also sitting as the High Court of South Africa) in *Nelson Mandela Foundation v Afriforum*,[77] when the Court took issue with Afriforum's attempts to defend the gratuitous display of the old flag because of the hurtful colonial and apartheid past which the flag symbolises. Afriforum's position should be understood in the context that its leaders deny that apartheid was a crime against humanity and have squarely laid the blame for apartheid at the feet of Africans,[78] whose human dignity was ravaged by the apartheid regime.[79] The Court interpreted the use of the old flag in gatherings organised by Afriforum as a reflection of the indifference of Afriforum, its supporters, and funders to the atrocities of apartheid.

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72 *Christian Education South Africa v Minister of Education supra* par 25.

73 *Ibid*.

74 *ANC v Sparrow* [2016] ZAEQC 1 37–38.

75 *Commission Staff Association obo Roeber-Madubanya v Commission for Conciliation, Mediation and Arbitration* [2018] 4 BALR 359 (CCMA) par 35.

76 *Supra* par 11.

77 *Nelson Mandela Foundation Trust v Afriforum NPC* 2019 (10) BCLR 1245 (EqC) par 74.

78 De Vos "Afriforum Will Never Forgive Black People For Apartheid" https://constitutionallyspeaking.co.za/afriforum-will-never-forgive-black-people-for-apartheid/ (accessed 2020-02-28).

79 See *Merafong Demarcation Forum v President of the Republic of South Africa* 2008 (10) BCLR 968 (CC) par 208.

The fact that it took an order of the Equality Court to stop Afriforum from gratuitously associating itself with the apartheid regime says a lot about the organisation and all persons who subscribe to its ideology. This is because the old South African flag, like its Confederate counterpart in the United States, is not just an artefact from the past; it is a symbol of certain ideas. In the South African context, the old flag is a symbol of the discriminatory and oppressive colonial and apartheid epochs.[80] In the United States, the following is said about the Confederate flag:

> "Today, the use of the Confederate flag is often controversial. While a number of non-extremists still use the flag as a symbol of Southern heritage or pride, there is growing recognition, especially outside the South, that the symbol is offensive to many Americans. However, because of the continued use of the flag by non-extremists, one should not automatically assume that display of the flag is racist or white supremacist in nature. The symbol should only be judged in context."[81]

When looking at the utterances of Afriforum, particularly the defence of the gratuitous display of the old flag, a balancing act must be struck between freedom of expression and, on the other hand, pluralism, and tolerance of diversity. A careful balancing act is important since the democratic South African society is built on freedom (including freedom of expression)[82] and tolerance of diversity.[83] In the light of the ethos of tolerance of diversity, all forward-thinking South Africans have an obligation to honour the legitimate commitment to building a united South Africa. This moral obligation entails disassociating with and speaking against the actions of those who stoke the fires of intolerance for selfish political ends. Apartheid denialism is not only insensitive to those who suffered under it and to those who continue to bear the brunt of its many injustices – it is also an insult to many South Africans who have tried to build a united and diverse South Africa.

The denialism of apartheid atrocities disturbs many South Africans and will do so for many years. It could also backfire against those who believe that such denialism absolves them from being implicated in apartheid directly or as beneficiaries of its laws and policies. In *Daniels v Scribante*, Cameron J contextualised this reality by saying that "the past is not done with us … it is not past … it will not leave us in peace until we have reckoned with its claims to justice".[84] The underlying tone in Cameron J's powerful judgment is that some of the current and future generations of South Africans will have to take the fall for apartheid and bear the brunt of transformative efforts aimed at correcting the injustices of the apartheid system. The Constitutional Court endorses the concept of lawful discrimination and has held that although the current generation of some

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80 See, in general, *Nelson Mandela Foundation Trust v Afriforum supra*.

81 Fighting Hate for Good "Confederate Flag" https://www.adl.org/education/references/hate-symbols/confederate-flag (accessed 2020-06-06).

82 See s 1(*d*) of the Constitution.

83 See the Preamble to the Constitution and the various cases discussed above.

84 *Daniels v Scribante* 2017 (8) BCLR 949 (CC) par 154.

South Africans did not partake in the apartheid system, they must accept transformation, which is aimed at correcting the injustices of the apartheid order.[85]

5 4 Transformation

Post-apartheid South Africa adopted transformation to overcome the legacies of the past. Transformation symbolises the unprecedented, and yet peaceful, drive towards the achievement of equality and the diversity and tolerance that equality requires. Venter submits that South Africa adopted transformation because of "the need for change, adaptation and the creation of a modified society", which champions reconciliation, unity and social reconstruction.[86] Langa CJ, described as "a transformative justice" and "a man who knew the meaning of transformation";[87] remarked as follows:

> "Transformation is a permanent ideal, a way of looking at the world that creates a space in which dialogue and contestation are truly possible, in which new ways of being are constantly explored and created, accepted and rejected and in which change is unpredictable but the idea of change is constant. This is perhaps the ultimate vision of a transformative, rather than a transitional Constitution. This is a perspective that sees the Constitution as not transformative because of its peculiar historical position or its particular socio-economic goals but because it envisions a society that will always be open to change and contestation, a society that will always be defined by transformation."[88]

In the context of this work, tolerance of diversity requires individuals to embrace transformation so that their attitudes, utterances, and acts reflect the spirit of unity in diversity. However, the law cannot compel individuals to change their beliefs, no matter how abhorrent such beliefs may be – it can only go so far as to suppress and punish the expression of beliefs that manifest intolerance. However, transformation requires some groups in society to make or accept uncomfortable sacrifices. Such sacrifices often go against individual desires, particularly when equality is involved and where one either must lose a privilege or where one must endure "fair" discrimination in correcting a past injustice. This is often the case in workplace appointments and state procurement.

The Constitution and the transformative spirit which it embodies do not self-execute. It is the people of South Africa, in their diversity, who can translate the constitutional aspirations into real change using the instruments

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85 See *Bato Star Fishing v Minister of Environmental Affairs* 2004 7 BCLR 687 (CC) par 74.

86 Venter "The Limits of Transformation in South Africa's Constitutional Democracy" 2018 34(2) *SAJHR* 143, 144, 151.

87 See De Vos "Pius Langa: A Man Who Knew the Meaning of Transformation" https://constitutionallyspeaking.co.za/pius-langa-a-man-who-knew-the-meaning-of-transformation/ (accessed 2020-03-11).

88 *Ibid*.

provided by the Constitution.[89] Hence, the realisation of the ethos of tolerance of diversity depends on the implementation of the founding constitutional values and principles. Progressive judicial interpretation in the last two decades has shown that robust litigation plays a critical role in transformation. As a result of litigation, the courts have had opportunities to pronounce on transformation in pursuit of the fulfilment of the rights and freedoms embodied in the Bill of Rights. The law has further played a critical role in fostering tolerance of diversity by discouraging and punishing hate speech,[90] hurtful speech, racism, and unlawful discrimination, among several other manifestations of intolerance. The central role played by the courts in this regard is part of the promotion of nation-building.[91]

The courts have been driven by the reality that the fulfilment of the promises of the Constitution, its values, and ideals are wholly dependent on addressing the injustices of the past through transformative judgments. The courts are committed to building a just, free and equal South Africa that not only dismantles the ugly legacy of a discriminatory past but also places *ubuntu* at the epicentre of transformation.[92] This vision of tolerance of diversity is unprecedented in the history of South Africa. It is further reinforced with executive policies and legislation. Affirmative action legislation, such as the Employment Equity Act,[93] and the proposed National Strategy on Social Cohesion and Nation Building,[94] stand as two examples of the fulfilment of the constitutional spirit of a just, free and equal South Africa.

Post-apartheid South Africa has achieved several milestones towards fostering tolerance through the creation of conducive spaces for inclusion by dismantling the legacies of historical barriers through transformation. In this regard, the adoption of a justiciable Bill of Rights is viewed in this work as the most critical aspect of the constitutional project towards an inclusive and tolerant society. The Bill of Rights is more relevant in that it is informed by the reality that the Constitution belongs to all the people of South Africa, "united in diversity" and that every South African has an equal but undivided claim to the Constitution.[95] Thus, Sachs J is correct when he metaphorically

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89 See Fowkes "The People, the Court and Langa Constitutionalism" 2015 *Acta Juridica* 75 76–77 for an analysis of the extra-curial writings of Langa CJ on the role of the people in executing the Constitution for the betterment of their lives.

90 On hate speech, see *Qwelane v South African Human Rights Commission* 2021 (6) SA 579 (CC).

91 Le Roux and Davis *Lawfare: Judging Politics in South Africa* (2019) (forward).

92 Le Roux and Davis *Lawfare: Judging Politics in South Africa* (preface).

93 Employment Equity Act 55 of 1998.

94 Government of the Republic of South Africa "Creating a Caring and Proud Society: A National Strategy for Developing an Inclusive and Cohesive South African Society" http://www.dac.gov.za/sites/default/files/NATIONAL-STRATEGY-SOCIAL-COHESION-2012.pdf (accessed 2020-11-29). This proposed national strategy seeks to put the need for social cohesion and nation-building into perspective, to identify threats to social cohesion and to propose strategies and programmes for increasing social cohesion and nation-building (see page 8).

95 See Sachs *We, the People: Insights of an Activist Judge* 1.

describes the Constitution as "a glittering shield in which we all see our faces reflected".[96] While protecting the poor from the excesses of the rich and powerful, the Constitution also provides a defence for the rich to claim equal rights,[97] although the jurisprudence of the Constitutional Court has established that when competing interests are weighed at a constitutional level, the scales of justice ought to weigh in favour of those who have little resources to defend themselves against the high and mighty. This is transformative judicial reasoning.

The courts bring the ideals of transformation into reality through transformative constitutionalism.[98] The Constitutional Court refers to transformative constitutionalism as one of its guiding founding values and principles.[99] The Court has adopted the view that its approach to constitutional interpretation will ultimately deliver on transformative constitutionalism.[100] Since it is within the province of the Court to "articulate the fundamental sense of justice and rights shared by the whole nation as expressed in the text of the Constitution",[101] it could be argued that transformative constitutionalism (as applied by the Court) might prove critical in understanding the ethos of tolerance of diversity. The essence of transformative constitutionalism – as understood and applied by the courts – is that the founding constitutional values inform the judicial assessment of the prevailing legal convictions of contemporary South African society within the context of tolerance, diversity, and pluralism.[102]

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96 *Ibid*.

97 *Ibid*.

98 Klare "Legal Culture and Transformative Constitutionalism" 1998 *SAJHR* 146, 150 defines transformative constitutionalism as nation-wide change in society through political processes grounded on peace and anchored on the law. Frankenberg *Comparative Constitutional Studies: Between Magic and Deceit* (2018) 101 views transformative constitutionalism as a radical and "unwavering commitment to social transformation that is expressed in the aspirational rhetoric calling for the 'realisation' of certain [constitutional] commitments". Identifying the South African Constitution as the global model for transformative constitutionalism, Frankenberg highlights the importance of emancipatory constitutional values and the role which a judiciary which is "politically and morally engaged" (102) can play on delivering the ideals of transformative constitutionalism.

99 See *S v Mhlungu* 1995 (7) BCLR 793 (CC) par 8; *Minister of Finance v Van Heerden* 2004 (11) BCLR 1125 (CC) par 147; *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (8) BCLR 872 (CC) par 232; *Print Media South Africa v Minister of Home Affair* 2012 (12) BCLR 1346 (CC) par 97. Extra-curial writings on transformative constitutionalism have also shown the allure of transformative constitutionalism to Constitutional Court judges. See, for instance, Langa "Transformative Constitutionalism" 2006 3 *Stell LR* 351 and Moseneke "Transformative Constitutionalism: Its Implications for the Law of Contract" 2009 20(1) *Stell LR* 3.

100 *Hassam v Jacobs* 2009 11 BCLR 1148 (CC) par 28.

101 *S v Makwanyane supra* par 363.

102 See *Hassam v Jacobs supra* par 28.

6 CONCLUSION

The adoption of the Constitution marked the end of the codification of intolerance and guaranteed a South Africa which promises tolerance of diversity. The Constitution, which is a pivotal instrument for managing diversity and fostering tolerance, embodies the ideal of a South Africa that belongs to all its people, united in their diversity. Thus, tolerance of diversity is a constitutional value that requires South Africans to aspire to fulfil the principle of reasonable accommodation, to recognise the right to be different, and to be sensitive to groups that suffered under the colonial and apartheid regimes. Although South Africa thrives to overcome historical injustices to create social harmony in which diversity is tolerated, it can never be overemphasised that inclusiveness requires more than legislation but also the entrenchment of tolerance of diversity into the fabric of the nation through transformation and transformative constitutionalism. Besides mitigating and trying to correct the injustices inherited from the past, transformation holds a promise for South Africans to unite in their diversity in confronting contemporary challenges.

It has become clear in contemporary times that any attempt to realise the constitutional aspirations for healing the continuing divisions of the past should be anchored on enhancing inclusion through tolerance of diversity. Consequent to extra-curial writings and the jurisprudence of the Constitutional Court, it is evident that issues of tolerance of diversity will always be contested within a democratic space in which the same things mean different things to different people, depending on one's background, circumstances, and ability to fit in a state defined by a transformative Constitution. It is also clear that fostering tolerance of diversity requires more than nurturing social conditions for peaceful co-existence but also entails the elimination of all forms of inequality, prejudice, and all other manifestations of exclusion that defined the past and still linger in the contemporary era. However, the post-apartheid state has failed to adequately address historical intolerance and its injustices. The legacies of apartheid reverberate in contemporary South Africa, making it inevitable that the gap between South Africans will widen. This should concern everyone because intolerance poses a potent threat to the pursuit of long-lasting peace and justice in a state which is struggling to put a difficult part of its history behind it. As such, the discourse on tolerance of diversity symbolises efforts to overcome a past that is not only uncomfortable and disgraceful but whose ramifications potentially endanger a peaceful future.

ONLINE LEARNING: SHAPING THE FUTURE OF LAW SCHOOLS

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SUMMARY

The Covid-19 pandemic has wreaked havoc globally and has forced people to change their outlook and do things differently. The pandemic has also affected the education sector. It has brought classes to a halt and forced universities to shut down at times. Significantly, the pandemic has also forced law schools to move away from traditional methods and practices and look for creative ways in which to save the academic year. Inadvertently, it has provided an opportunity to revolutionise and revitalise legal education. As technology becomes ever-present and user-friendly, law schools should embrace the potential of online learning to enhance the value of teaching, expand the learning potential of students and, most importantly, equip students for the challenge of lawyering in the twenty-first century. There are risks and rewards to online learning, but key to education in the new millennium is for law schools to adapt to and embrace online learning with all its challenges. The article provides a cursory general overview of online learning in law schools with specific focus on how law schools have been adapting to online education in recent times. Crucially, the article explores ways in which law schools can overcome key challenges in transitioning to online learning. Going forward, the article looks at how law schools can design and implement online education in a manner that takes advantage of the new modality's potential.

1 INTRODUCTION

> "The world that twentieth century law professors know is no more. Fortunately, we stand at a crossroad where we have an opportunity to build a new one."[1]

December 2019 saw the emergence of the Covid-19 pandemic that would change the world and humanity forever. The pandemic, which started in Wuhan, China, transcended borders, boundaries and bodies at breakneck speed. The world was not ready for this contagion that affected all areas of life. Education is just one of many areas that has been impacted radically. As the pandemic spread at an alarming rate, governments worldwide were left with little option but to introduce lockdown regulations. The Ministry of Higher Education took drastic and immediate measures to contain the

[1] Binford "Envisioning a Twenty-First Century Legal Education" 2013 *Wash UJL and Policy* 157 180.

spread of the virus by suspending academic activity across the country.[2] Many institutions, in an effort to save the academic year, resorted to online education to continue with the learning process in a safe and secure environment.[3] It was no different for law schools as learners and educators had to adapt to online learning within a short period.[4] The pressing need to implement and adapt to a contemporary modality of learning deprived many law schools of the opportunity to shape and assess effective online learning strategies.[5] The speed at which the pandemic spread and the expectation placed on digital platforms to save the academic year left very little time for schools to validate their efficacy. Going forward, there is an urgent need to evaluate the effectiveness of online learning in law schools, more so in light of their traditional or unchanging approach to education. Issues of educational equity, achievement gaps, preparedness, instructional design, communication lines, accessibility and resources are just some of the issues that need to be explored when assessing the effectiveness of online education – even beyond the pandemic. The article examines some of the key challenges in transitioning to online education and explores ways in which law schools can overcome them.

2 ONLINE LEARNING

Unlike wealthier countries, low and middle-income countries like South Africa faced added afflictions in dealing with the sudden changed scenario of education, as fractured technical infrastructure, academic incompetence and lack of resources existed long before the pandemic.[6] However, in light of the pandemic, the pedagogical shift from traditional mode to the modernised approach to teaching, namely online education, was inevitable. The urgent need to rethink, revamp and redesign a traditional formal education system, in addition to mending a fractured education system, created unforeseen challenges but also exciting opportunities. In the past, online education (also commonly referred to as e-learning or digital learning) was seen as part of non-formal education, but current circumstances have seen it gradually take its place in the formal system.[7] Online learning is learning that takes place

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2 On 30 April 2020, Dr Blade Nzimande, Minister of Higher Education, Science and Innovation, delivered a wide-ranging statement on the state of higher education in the context of the Covid-19 pandemic. In an effort to slow down the spread of the virus, save lives and possibly save the 2020 academic year, he announced that all campus-based academic activity throughout the PSET sector be suspended during the level-4 lockdown period.

3 Khalil, Mansour and Fadda "The Sudden Transition to Synchronized Online Learning During the COVID-19 Pandemic in Saudi Arabia: A Qualitative Study Exploring Medical Students' Perspectives" 2020 *BMC Med Educ* 285.

4 *Ibid*.

5 Behbehani "Moving Education out of the Industrial Era: How the Pandemic is Reshaping Global Learning" (10 November 2020) http://insights.samsung.com/2020/11/10/how-the-pandemic-is-reshaping-global-learning/ (accessed 2021-02-10).

6 Thomas "Coronavirus and Challenging Times for Education in Developing Countries" 2020 *Brookings* 13.

7 Mishra, Gupta and Shree "Online Teaching-Learning in Higher Education During Lockdown Period of COVID-19 Pandemic" 2020 *International Journal of Educational Research Open* 5.

over the Internet and across distance rather than in a traditional classroom.[8] Online education can be classified as synchronous or asynchronous.[9] The former allows for "live" interactions between parties while the latter also involves the use of technology but in a delayed form of transmission.[10] The benefits of synchronous and asynchronous learning are limitless. Synchronous online learning allows lecturers to simulate a classroom environment with live interactions in the form of lectures, meetings, study groups and consultations taking place between lecturer and student.[11] Asynchronous online learning allows for different teaching techniques to achieve different learning outcomes; benefits include that students can access presentations from all over the world, lecturers can produce pre-recorded material for students, and students can interact among themselves and their lecturers through discussion forums, wikis and other online technologies.[12] Online instructional methods have generally been regarded as effective tools for learning.[13] There is no disputing that law schools have always been rich in tradition and have prided themselves on a conventional way of doing things but the pandemic and ongoing difficulties have inadvertently provided the ideal platform for online learning to flourish.[14]

3 OVERCOMING THE CHALLENGES OF ONLINE LEARNING

The Covid-19 pandemic has emphasised the digital rift among South African students as many of them come from remote areas or disadvantaged backgrounds, where internet access is limited.[15] Access to the Internet and technology is greater in developed American and European countries than in South Africa where the digital divide has been noticeable in recent years.[16] The digital divide goes beyond just being technological in nature as social, economic, cultural and political factors also play a key role.[17] What is required is that key role players such as the community, businesses and relevant stakeholders come together to address the digital divide.[18] While such challenges may hinder the e-learning process, exploring pathways such as the provision of free data bandwidth, free online resources and the

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8 Mpungose "Emergent Transition From Face-To-Face to Online Learning in a South African University in the Context of the Coronavirus Pandemic" 2020 *Humanit Soc Sci Commun* 113.

9 Khalil *et al* 2020 *BMC Med Educ* 285.

10 *Ibid*.

11 Pistone "Law Schools and Technology: Where We Are and Where We Are Heading" 2015 *Journal of Legal Education* 587.

12 *Ibid*.

13 Khalil *et al* 2020 *BMC Med Educ* 285.

14 *Ibid*.

15 Davids "Maybe the Coronavirus Will Set SA on a Path to a More Equitable Education System" (27 March 2020) https://m.news24.com/Columnists/GuestColumn/opinion-maybe-the-coronavirus-will-set-south-africa-on-the-path-to-a-more-equitable-education-system-20200327 (accessed 2020-11-08).

16 Van Deursen and Van Dijk "The First-Level Digital Divide Shifts From Inequalities in Physical Access to Inequalities in Material Access" 2019 *New Media Soc* 354–375.

17 Selwyn "Minding Our Language: Why Education and Technology Is Full of Bullshit … And What Might Be Done About It" 2016 41(3) *Learning, Media and Technology* 437–443

18 Mpungose 2020 *Humanit Soc Sci Commun* 113.

use of an information centre can assist in realising effective online learning.[19] In a recent study involving medical students who had transitioned from face-to-face to online learning, it emerged that although online education worked for the majority of students, in adopting the new system, many of them encountered challenges such as technical deficits, poor internet connection and lack of basic computer skills.[20] Many of the participants' experiences were also influenced by different learning styles, their characteristics, and uncertainty in adapting to a new learning modality, quality assurance issues and levels of engagement in online classes.[21] Competence in online learning varies from student to student and so it is important that universities cater for capacity building in respect of the use of software and learning management systems.[22] It can be a daunting task for students to adapt to new methods of teaching and assessment, and the loss of social contact and a supportive environment can create anxiety and panic. Fear of the unknown can affect some students negatively, causing them to be more conservative and resistant to change.[23] The challenge for any law school in fully transitioning to online learning is to ensure that students' feelings of isolation and fear of the unknown are minimised.[24]

Students who are shy or unobtrusive tend to battle in expressing themselves in a classroom setting. Online education has the potential to create an environment where students with different personalities and from diverse backgrounds can flourish.[25] In this regard, introverts who find it difficult to participate in the classroom may find it easier to express themselves in online forums.[26] Students who are hampered by communication difficulties in the classroom can seek clarity and supplement their basic understanding of content at their own pace and in their own time using technology. Technological tools provide the platform to enhance communication and facilitate feedback.[27] Online streaming allows for more personal, one-on-one interactions with lecturers if required and greater flexibility in terms of time management, as well as constant and instantaneous feedback and clarification when required. The option of uploading recorded lessons can be beneficial if a student has missed a class or just wishes to recap or prepare for an assessment. Online learning allows students to construct and manage their own learning, which in turn develops critical thinking skills and more importantly, research skills required for tertiary readiness.[28]

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19 *Ibid*.

20 Khalil *et al* 2020 *BMC Med Educ* 285.

21 *Ibid*.

22 *Ibid*.

23 Watts "Synchronous and Asynchronous Communication in Distance Learning: A Review of the Literature" 2016 *Quarterly Review of Distance Education* 23–32.

24 McCrimmon, Vickers and Parish "Online Clinical Legal Education: Challenging the Traditional Model" 2016 *International Journal of Clinical Legal Education* 565.

25 Kerr "Why We All Want to Work: Towards a Culturally Based Model For Educational Change" 2005 36(6) *British Journal of Educational Technology* 1005–1016.

26 Cloete "Technology and Education: Challenges and Opportunities" 2017 *HTS Theological Studies* 3.

27 *Ibid*.

28 *Ibid*.

As technology has the potential to provide students with a new learning environment, the workplace can also be brought to the classroom and simulate real-life experiences. Breakthrough technology such as virtual and augmented reality (VR/AR) has the potential to transform online learning in significant ways.[29] AR and VR are three-dimensional immersive technologies that encourage creativity, discovery and interaction in the learning process.[30] VR allows a simulated environment to come alive and the use of headsets allows users to immerse themselves in a computer-generated environment.[31] Augmented reality, which is more advanced, allows computer images to be superimposed onto the user's view of the real world, and combines real-world scenarios with other relevant information to create a truly immersive experience.[32] Students can use their senses such as sight and hearing to connect their learning to the real world.[33] VR can be used to simulate working in different environments without some of the risks attached to a real-life situation while AR relays information directly to the user.[34] For law students, VR and AR can deliver rich experiential learning. It can allow them to explore the practical side through a safe, user-friendly environment. Even in instances where clinical and practical legal training is not possible at law clinics, VR and AR allow students to complete practical tasks in a simulated environment without losing the importance of skill training in a legal environment. Students can explore any location on the map and a trip to the Constitutional Court or legal firm is possible without spending time making arrangements or incurring the usual costs of transport and accommodation. Using sight and sound in a real experience provides an unforgettable journey that can never be achieved in a classroom setting. A virtual learning environment can be a welcome change to the traditional setting and instructional form and can provide fun, entertainment and enthusiasm, taking learning to the next level.[35]

It is understandable that some students may be unwilling to embrace online learning as a result of their commitments and a fear of the unknown. However, many students juggle different commitments and prefer to study at a time and place that suits them.[36] Students living in remote or rural areas where universities are some distance away, sometimes find it more opportune and financially viable to study online.[37] Surprisingly, Africa has now become the fastest e-leaning market in the world with internet users increasing by 20 per cent between 2017 and 2018.[38] With more and more students being unable to access traditional campuses owing to finances, distance and family commitments, online education has become the solution

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29 Marr "The 5 Biggest Virtual and Augmented Reality Trends in 2020 Everyone Should Know About" 2020 *Enterprise Tech* 10.

30 *Ibid*.

31 *Ibid*.

32 Marr 2020 *Enterprise Tech* 10.

33 *Ibid*.

34 *Ibid*.

35 *Ibid*.

36 McCrimmon *et al* 2016 *International Journal of Clinical Legal Education* 565.

37 *Ibid*.

38 See article by Texila American University "Growth Online Education in Africa is on the Rise" (undated) http://zm.tauedu.org/growth-of-online-education-in-africa-is-on-the-rise/ (accessed 2021-02-10).

for students who want higher education but face difficulties.[39] Because laptop ownership is lower in Africa than in other parts of the world, and broadband infrastructure is still marginal, online learning can continue mostly on mobile devices in years to come.[40] The increased processor speeds of mobile devices makes the use of applications just as accessible as from desktop or laptop computers. Mobile development in African countries coupled with affordable smartphones and mobile data plans will now enable Africans, especially those living in remote areas, to overcome the issue of poor landline infrastructure.[41] Circumstances may have provided the ideal opportunity for universities to concentrate on the design of teaching materials and technological solutions for use on cellular phones/mobile devices and other technological instruments.[42] Government also has a key role to play in addressing the spectrum shortfall as together with service providers they can fast-track the resolution of uninterrupted, stable and fast internet connectivity, including the mass roll-out of 4G and 5G connectivity, which is critical for students interfacing with online learning.[43] The unequal socio-economic fabric of South Africa furthermore demands that higher education institutions continue to address demands that reverberate around curriculum reform, equality of access, africanisation and decolonisation of knowledge, funding, racism, demographic representation and responsiveness to the industry, among others. The transition to online learning must be addressed in conjunction with other key areas that require attention. It is thus crucial to understand the complex nature of technology and how it is linked to other socio-economic spheres before integrating it effectively into quality education.[44]

A successful transition to online education requires law schools to review their e-learning or online learning policies constantly to keep abreast of changes and address the needs of the student and lecturer.[45] A transition to online learning and use of technology requires not only a focus on the delivery mode but also the incorporation of technology into the curriculum, offering specialist law and technology courses and arranging access to various software programs.[46]

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39 *Ibid*.

40 Trines "Educating the Masses: The Rise of Online Education in Sub-Saharan Africa and South Asia" (14 August 2018) *World Education News & Reviews* http://wenr.wes.org/2018/08/educating-the-masses-the-rise-of-online-education (accessed 2020-11-10).

41 See article by Texila American University http://zm.tauedu.org/growth-of-online-education-in-africa-is-on-the-rise/.

42 See UNESCO Global Education Monitoring Report, 2020 https://en.unesco.org/gem-report/report/2020/inclusion (accessed 2020-11-10).

43 Vermeulen "ICASA Sets Date for 4G and 5G Spectrum Auction in South Africa" (3 September 2020) https://mybroadband.co.za/news/cellular/366146-icasa-sets-date-for-4g-and-5g-spectrum-auction-in-south-africa.html (accessed 2020-11-11).

44 Cloete 2017 *HTS Theological Studies* 3.

45 Swartz, Ivancheva, Czerniewicz and Morris "Between a Rock and a Hard Place: Dilemmas Regarding the Purpose of Public Universities in South Africa" 2019 *High Education* 567–583. Also see Mpungose 2020 *Humanit Soc Sci Commun* 113.

46 Goodenough "Developing an E-Curriculum: Reflections on the Future of Legal Education and on the Importance of Digital Expertise" 2013 *Chicago-Kent Law Review Paper* https://ssrn.com/abstract=2255005 (accessed 2020-11-12) 13–13.

4 THE WAY FORWARD FOR LAW SCHOOLS

The pandemic has forced the hand of law schools worldwide into rethinking and reimagining the old ways of transmitting knowledge. The sudden change has forced most places of learning to take education beyond the four walls of the classroom as the demand continues to grow for immediate digital transformation, modification of processes and innovation as well as flexible teaching and assessment methods.[47]

Anthony Salcito, Vice-President of Education at Microsoft stated that "the classroom, as we know it for centuries, will be re-imagined".[48] He said that technology has changed the world and students want to learn in a way that suits them.[49]

> "I think we will see a shift where schools will create a foundation of inclusive, flexible, data driven buildings and spaces that will enable students to learn beyond those walls."[50]

He asked that governments shift their thinking away from the traditional testing and curriculums to a more modernised personal approach where each student's personal needs, passion and talent is unleashed. The new breed of students are called "digital natives"; they have been born or raised in a world of technology so making the transition at university level may not be as difficult for them as some critics may think.[51]

The demand for core skill sets such as creativity and innovation in the digital age now requires a re-evaluation of the traditional approaches to educating future lawyers.[52] In the past, many professional bodies in South Africa have highlighted the disjuncture between legal education and professional demands. There has been a clarion call for more well-rounded graduates who display readiness for practice in the twenty-first century.[53] The national LLB review, which was mandated by the Council of Higher Education in 2012, highlighted a key challenge in the standards document, which was the need for LLB programmes to be responsive to ever-evolving technology. The issue of technological competence is now seen as an integral component of any LLB programme and law students are expected to be able to solve legal problems at the click of a button. The progress made in respect of online learning, as a result of the pandemic, should be seen as

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47 See UNESCO https://en.unesco.org/gem-report/report/2020/inclusion.

48 See Yates-Roberts "Technology Will Personalize Education, Says Anthony Salcito" (23 January 2020) Discussing the keynote address by the vice-president of Microsoft at the 2020 Bett Show https://news.microsoft.com/en-gb/2020/01/23/bett-2020-students-will-use-tech-to-embrace-seamless-learning-says-microsofts-anthony-salcito/ (accessed 2021-01-28).

49 *Ibid*.

50 *Ibid*.

51 Pistone 2015 *Journal of Legal Education* 587.

52 Fenwick, Kaal, Wulf, Vermeulen and Erik "Legal Education in the Blockchain Revolution" 2017 Legal Studies Research Paper No 17–05 https://ssrn.com/abstract=2939127 (accessed 2020-11-08).

53 Van Niekerk "The Four Year Undergraduate LLB: Where to From Here?" 2013 34(3) *Obiter* 533.

the kick-start that was needed to prepare law students for the twenty-first-century technology-based employment.

A transition to online learning and use of technology requires not only a focus on the delivery mode but also the incorporation of technology into the curriculum, offering specialist law and technology courses and arranging access to various software programs.[54] From a practical perspective, technology can be infused into the curriculum in many ways. Assignments and post-graduate study topics can focus on new-age lawyering areas such as data security, digital drafting, e-discovery and legal analytics; and students should be urged to submit their work via online platforms rather than in hardcopy. Technology competence can also be integrated into the curriculum by linking it to course electives, upper-level technology courses or stand-alone modules such as Legal Skills or Legal Practice, where it can form part of an ethical requirement or professional skill.[55] Online education has benefits in terms of time allocation and management, as it allows lecturers to spend less time on the normal day-to-day tasks that they traditionally engage in, such as marking, setting assessments, tracking progress, and preparing reports, among others.[56] Lecturers and students can take their teaching and learning out of the physical classroom and onto an online classroom platform where they can collaborate with others in different locations, places and contexts.[57] The New York Bar Association Task Force, in its report on the future of the legal profession, focused extensively on the role of technology in practice and recommended that law schools and firms commence or increase the training of lawyers in the use of technology.[58] The report went on to recommend that law schools increase their offerings on technology and incorporate crucial areas such as online legal research, e-discovery, document management technology, technology in the courtroom and project management into the curriculum.[59] Crucially, the report highlighted the importance of technology in helping lawyers work faster, more efficiently, find better solutions to legal problems, compete more effectively in the marketplace and work consistently.[60] Law schools need to become creative and innovative by redesigning their curriculums to include technology in their course offerings, offer training programmes that create opportunities for student activities and look at the benefits of a "cyber clinic" to facilitate live-client clinical experience.[61]

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54 Goodenough 2013 *Chicago-Kent Law Review Paper* https://ssrn.com/abstract=2255005 13–13.

55 O'Leary "Smart Lawyering: Integrating Technology Competence Into the Legal Practice Curriculum" 2021 *University of New Hampshire Law Review* 201.

56 Levin and Schrum "Using Systems Thinking to Leverage Technology for School Improvement: Lessons Learned From Award-Winning Secondary Schools/Districts" 2013 *Journal of Research on Technology in Education* 29–51.

57 McKnight, O'Malley, Ruzic, Horsley, Franey and Bassett "Teaching in a Digital Age: How Educators Use Technology to Improve Student Learning" 2016 *Journal of Research on Technology in Education* 194–211.

58 See New York State Bar Association "Report of the Task Force on the Future of the Legal Profession" (2 April 2011) https://archive.nysba.org/futurereport/ (accessed 2022-02-27) 2.

59 New York State Bar Association https://archive.nysba.org/futurereport/ 9.

60 New York State Bar Association https://archive.nysba.org/futurereport/ 13.

61 New York State Bar Association https://archive.nysba.org/futurereport/ 35.

Going forward, a number of technological initiatives can be undertaken by law schools for a smoother and more effective transition to online learning. A one-size-fits-all approach to instructional design should be avoided at all costs.[62] The unique needs and characteristics of each student must be considered.[63] The urgent need to facilitate access to financial aid as well as technological equipment cannot be ignored.[64] Content material should be provided in multiple formats, and tools should include accessibility features such as text-to-speech, keyboard shortcuts and alternative text.[65] Lectures should be recorded, and video and audio content should be captioned.[66] Online learning requires a flexible approach and the lecturer should prioritise project-based assignments, asynchronous participation and flexi-time for student assessment, lectures, tutorials and consultations.[67] Tracking a student's progress is extremely important but can be time-consuming for any lecturer. However, major advancements in technology now allow adaptive learning programmes to track a student's answers to questions, pick up areas of concern and then use an algorithm to adapt material to meet the specific need of each student.[68] Popular social networking sites such as Google, Google Drive and Google Plus can be used to facilitate collaboration virtually between students, mentors, legal professionals and others with discussion points around current trends, new innovations in law, new cases and legislation, practical skills and any area of study or research.[69] The arena for learning, exploring, conducting research and collaborating with others knows no boundaries and the click of a button now allows any student to transcend the confines of a lecture hall or library.

5 CONCLUSION

There is no doubt that online education is here to stay and most of our higher education institutions have already embraced it into their teaching and learning landscape. Despite the many problems, shortcomings and challenges highlighted in the transition process, online teaching is the only mode that can secure teaching continuity in these uncertain times. It is true that the technological competence of both students and lecturers, as well as the systemic and contextual factors that impede access, cannot be ignored.[70] However, the new digital age requires critical thinkers and

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62 The research project conducted by Naffi, Davidson, Patino, Beatty, Gbetoglo and Duponsel met remotely with staff from 19 centres in Canada, the United States, the United Kingdom, France and Lebanon and published their findings in an article titled "Online Learning During Covid-19: 8 Ways Universities Can Improve Equity and Access" (30 September 2020) http://theconversation.com/online-learning-during-covid-19-8-ways-universities-can-improve-equity-and-access-145286 (accessed 2021-01-10).

63 *Ibid*.

64 *Ibid*.

65 *Ibid*.

66 *Ibid*.

67 *Ibid*.

68 Pistone 2015 *Journal of Legal Education* 587.

69 *Ibid*.

70 Kimmons, Miller, Amador, Desjardins and Hall "Technology Integration Coursework and Finding Meaning in Pre-Service Teachers' Reflective Practice" 2015 *Education Tech Research Dev* 809.

technologically advanced graduates who possess the skill set to deal with futuristic legal work such as smart contracts, big data, blockchain technology, artificial intelligence, cryptocurrencies and numerous legal and non-legal tasks.[71] As technology becomes ever-present and user-friendly, law schools must embrace the potential of online learning to enhance the value of teaching, expand the learning potential of students and, most importantly, equip students for the challenge of lawyering in the twenty-first century.[72] The onus is on law schools to design and implement online education in a manner that takes advantage of the new modality's potential.[73] A transition to online learning may just be the solution to bridging the gap between employers' needs and student skills, as well as revitalising legal education in a way that is untethered by the bounds of the classroom.

71 *Ibid*.

72 Rosenberg "Confronting Cliches in Online Instruction: Using a Hybrid Model to Teach Lawyering Skills" 2008 *SMU SCI and Tech L Rev* 82.

73 Kohn "Online Learning and the Future of Legal Education" 2020 *Syracuse L Rev* 70.

CONSTITUTIONALISM AND PUBLIC HEALTH EMERGENCIES: COVID-19 REGULATIONS IN SOUTH AFRICA AND THE CONSTITUTIONAL AND HUMAN RIGHTS SLIPPERY SLOPE*

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SUMMARY

This article provides a theoretical and factual-legal analysis of South Africa's response to the COVID-19. The state of disaster and its related COVID-19 regulations are interrogated from a constitutional and human rights perspective. It is conceded that public health emergencies call for a limitation of certain rights to control or curb the spread of the pandemic. However, the measures adopted by the South African government were in some respects disproportional and violated the constitutional and human rights principles. This article carefully examines the South African approach in instances where the constitutional and human rights of its people were brought into contention. For purposes of clarity, the focus is on documented accounts of the violations of fundamental human rights during the declaration and the operation of Lockdown Regulations in terms of the Disaster Management Act 2002.

1 INTRODUCTION

In what has turned out to be the most difficult time of the century, the world has been faced with a novel coronavirus (COVID-19) pandemic.[1] The COVID-19 pandemic has posed many constitutional and human rights challenges for many governments across the world.[2] Following the World

* This article is intended to mark the year that South Africans were subjected to the Lockdown Regulations of the Disaster Management Act 2002 and is dedicated to all the people who lost their lives during this time.

1 The official name of the virus, as given by the International Committee on Taxonomy of Viruses, is SARS-CoV-2.

2 Zarifi and Powers "Human Rights in the Time of COVID-19: Front and Centre. International Commission of Jurists" (6 April 2020) https://www.icj.org/human-rights-in-the-time-of-covid-19- front-and-centre/ (accessed 2020-04-17).

Health Organisation's recommendations, various governments adopted multi-pronged measures to curb the spread of the virus. At the beginning of the pandemic, the World Health Organisation (WHO) Director-General Dr Tedros Ghebreyesus called for solidarity and not stigma related to the virus. However, no substantial guidelines on how countries could adopt public health measures to protect the public while respecting human rights were provided.[3] This resulted in various states invoking their emergency powers that include nationwide lockdowns, travel restrictions, and curfews among others.[4] These declarations have been accompanied by regulations that limit people's freedom of movement, freedom of assembly, freedom of association, and freedom of expression among others.[5] Restrictions imposed by governments have various constitutional and human rights implications and, in some cases, have resulted in constitutional challenges in one form or another. This calls for a critical examination of the implications of public health emergencies on constitutionalism and human rights which forms the context of this article. According to Odigbo "during the 2019–20 coronavirus pandemic, human rights violations including censorship, discrimination, arbitrary detention and xenophobia have been the reported atrocities in different parts of the world".[6] Some of these derogations were a blatant violation of human rights norms and principles.

Richardson and Devine have cautioned that "well-meaning but poorly considered restrictions in the name of combatting COVID-19 threaten to undermine hard-won human rights protections […]".[7] It is conceded that in times of public health emergencies, it may be necessary to limit certain rights to achieve public health objectives. Both South African law and international law provide for permissible limitations of rights. The permissible limitation requirement entails that it is not sufficient for any government to merely pronounce that its actions are necessary but that they should also be necessary, proportionate, and reasonable.[8] There is, thus, an obligation on the government to provide adequate and transparent justification for the measures taken.[9] Culture of justification is one cardinal principle of

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3 Yamim and Habibi "Human Rights and Coronavirus: What's at Stake for Truth, Trust, and Democracy?" https://www.hhrjournal.org/2020/03/human-rights-and-coronavirus-whats-at-stake-for-truth-trust-and-democracy/ (accessed 2020-05-25).

4 Thomson and Ip "COVID-19 Emergency Measures and the Impending Authoritarian Pandemic" 2020 *Journal of Law and the Biosciences*.

5 Gonese, Shivamba and Meerkotter "A Legal Overview of the Impact of COVID-19 on Justice and Rights in Southern Africa" SALC Policy Brief 1 (May 2020) https://www.southernafricalitigationcentre.org/wp-content/uploads/2020/05/Policy-brief-1-of-2020-COVID-laws.pdf (accessed 2020-07-2020).

6 Odigbo, Eze and Odigbo "COVID-19 Lockdown Controls and Human Rights Abuses: The Social Marketing Implications" 2020 2(45) *Emerald Open Research* 3.

7 Richardson and Devine "Emergencies End Eventually: How to Better Analyze Human Rights Restrictions Sparked by the COVID-19 Pandemic Under the International Covenant on Civil and Political Rights" 2020 42 *Michigan Journal of International Law.*

8 Rautenbach "Proportionality and the Limitation Clauses of the South African Bill of Rights" 2014 17(6) *Potchefstroom Electronic Law Journal 2*229–2267.

9 See Quinot "Regulatory Justification and Coordination in South Africa" (29 April 2020) The Regulatory Review https://www.theregreview.org/2020/04/29/quinot-regulatory-justification-coordination-south-africa/ (accessed 2020-11-27).

democracy which the government cannot abrogate from.[10] Labuschagne notes:

> "The regulations promulgated under the state of disaster, which include the criminalisation of those not adhering to these regulations, have been criticised for being disproportionate and more akin to those promulgated under a state of emergency."[11]

In dealing with the pandemic, it is essential that democratic principles are adhered to legitimise government action, not only in the eyes of the law but also in the eyes of the public as they are a major stakeholder in curbing the spread of the virus. In the following sections, through an analysis of the theoretical and factual legal challenges, we scrutinise South Africa's response to the COVID-19 pandemic and analyse the constitutional validity of some of the measures adopted to curb the spread of the pandemic during the period from 18 March 2020 to 31 December 2020. It is submitted that certain restrictions on human rights imposed by the South African government were too invasive and cannot pass the constitutional muster.

2 THEORETICAL ASSUMPTIONS OF PUBLIC HEALTH EMERGENCIES' LEGAL RESPONSE

Public health emergencies place enormous challenges on governments tasked to combat the spread and minimise the effects of the disease on the health system as well as the economy.[12] Public health emergencies invoke the powers of the state to make pronouncements that seek to ensure people's health as well as "to constrain the autonomy, privacy, liberty, proprietary, or other legally protected interests of individuals for the common good".[13] As a result, these powers create fundamental constitutional and legal challenges and can pose a serious threat to the current constitutional order. According to Fombad and Abdulrauf:

> "Because the legal framework regulating the conduct of governments during states of emergency was often weak, countries generally experienced high levels of repression and human rights abuses."[14]

Villareal argues that public health emergency powers may result in one or more of the following possibilities: the first possibility involves "the rule of

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10 Klaaren "Human Rights & South African Constitutionalism: An Interdisciplinary Perspective on Debates over the Past Twenty Years" 2014 38(1) *Ufahamu: A Journal of African Studies*.

11 Labuschaigne "Ethicolegal Issues Relating to the South African Government's Response to COVID-19" 2020 13(1) *South African Journal of Bioethics and Law* 26.

12 Centre for Democracy and Law "Maintaining Human Rights During Health Emergencies. Brief on Standards Regarding the Right to Information" (May 2020) https://www.argentina.gob.ar/sites/default/files/rti-and-covid-19-briefing.20-05-27.final_.pdf (accessed 2020-07-17).

13 Gostin "A Theory and Definition of Public Health Law" 2007 10 *Journal of Health Care Law and Policy* 1.

14 Fombad and Abdulrauf "Comparative Overview of the Constitutional Framework for Controlling the Exercise of Emergency Powers in Africa" 2020 10(2) *African Human Rights Law Journal* 376–411.

law" or "business as usual" model archetype.[15] In this model, the response to the emergence is framed within the existing or current ordinary legal framework.[16] This means that existing legislation is relied on to contain the public health emergence. In this model, the government does not enact new legislation, regulations, or decrees, and does not adopt other extraordinary measures "since they are provided for in a predetermined framework also available during times of normalcy".[17] It should be noted that emergencies in this model generally do not lead to an upset of the existing legal framework.

The second is the "the constitutional dictatorship" model-archetype, "in which emergencies lead to exceptional and temporary regimes wherein ordinary norms no longer apply".[18] This basically involves a subliminal suspension of the rule of law but this is done within the confines of a predetermined legal framework that operates on a temporary basis and does not apply during a period of normalcy.[19] This framework is guarded against abuse by a host of substantive and procedural requirements. The third and final is the "extra-legal" model-archetype, in which the government action is justified not by law but by necessity. The culture of legal justification does not exist in this model. There is little to no legal regulation of the emergency.[20] The emergency situation may very well be open to abuse. This supposition is supported by Thompson and Ip:

> "The COVID-19 pandemic has nevertheless sparked authoritarian political behavior worldwide, not merely in regimes already considered to be disciplinarian or tyrannical but also in well-established liberal democracies with robust constitutional protections of fundamental rights. Authoritarian governance in the name of public health intervention is understood in the present context as being characterized by diverse combinations of governmental and administrative overreach, the adoption of excessive and disproportionate emergency measures, override of civil liberties and fundamental freedoms, failure to engage in properly deliberative and transparent decision-making, highly centralized decision-making, and even the suspension of effective democratic control."[21]

As such, health emergencies burden states with regulatory measures that pose a serious challenge to the very existence and sustenance of human rights and constitutionalism. If unchecked, the measures instituted can degenerate the entire political system into totalitarianism.

3 SOUTH AFRICA'S RESPONSE TO COVID-19

The COVID-19 pandemic was declared as a public health emergency by the World Health Organisation.[22] On the 27 of January 2020, South Africa's

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15 Villarreal "Public Health Emergencies and Constitutionalism Before COVID-19: Between the National and the International" in Albert and Roznai *Constitutionalism Under Extreme Conditions* (2020) 217–238.

16 *Ibid.*

17 *Ibid.*

18 *Ibid.*

19 *Ibid.*

20 *Ibid.*

21 Thomson and Ip 2020 *Journal of Law and the Biosciences*.

22 World Health Organisation, 2020. Statement on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV).

National Institute for Communicable Diseases (NICD) published a statement that assured the nation that the country was prepared to deal with the possibility of detection of the virus in the country. The statement by NICD read:

> "We would like to assure South Africans that South Africa is prepared to deal with the eventuality of a possible imported case as we have put in place systems to rapidly identify, detect and respond to any cases that may reach our borders."[23]

On 30 January 2020, the World Health Organisation announced COVID-19 as a "public health emergence of international concern".[24] This was a key point in the international as well domestic response to the pandemic. On 5 March 2020, South Africa announced its first case.[25] On 11 March 2020 COVID-19 was declared a pandemic by the World Health Organisation. This was followed by President Cyril Ramaphosa announcing a series of measures that were aimed at fighting the spread of the virus. These measures affected travel, social interactions, and gatherings of more than the specified number of people.[26] A state of national disaster was declared.[27] In response thereto, on 23 of March 2020, South Africa announced a nationwide lockdown.[28]

To curb the spread of the virus, the government of South Africa, acting in terms of section 27(2) of the Disaster Management Act of 2002 declared a State of National Disaster in the country and published accompanying regulations.[29] These regulations had the effect of shutting the economy, disrupting social lives as people were confined to their homes essentially limiting their civil rights and liberties.[30] According to Labuschagne, the government promulgated a series of regulations restricting, among other things, the movement of persons. Thomas and Ip submit:

> "Considering the almost total limitation on the right of assembly (with the exception of a funeral) and the severe limitations on the freedom of movement, the effect of these measures is indeed more akin to a State of Emergency in the context of these rights."[31]

To enforce the lockdown restrictions, the government deployed the South African National Defence Force (SANDF) into various cities across the

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23 National Institute of Communicable Disease (NICD) "Increasing Cases of Novel Coronavirus (2019-Ncov): Update on South Africa's Preparedness" (27 January 2020) https://www.nicd.ac.za/increasing-cases-of-novel-coronavirus-2019-ncov-update-on-south-africas-preparedness/ (accessed 2020-09-26).

24 World Health Organisation "WHO Director-General's Statement on IHR Emergency Committee on Novel Coronavirus (2019-nCoV)" (30 January 2020) https://www.who.int/dg/speeches/detail/who-director-general-s-statement-on-ihr-emergency-committee-on-novel-coronavirus-(2019-ncov) (accessed 2020-09-27).

25 Abdool-Karim "The South African Response to the Pandemic" 2020 382(24) *New England Journal of Medicine* 95.

26 GN 313 in *GG* 43096 of 2020-03-15.

27 GN 318 in *GG* 43107 of 2020-03-18.

28 GN 398 in *GG* 43148 of 2020-03-25.

29 GN 318 in *GG* 43107 of 2020-03-18.

30 Staunton, Swanepoel and Labuschagne "Between a Rock and a Hard Place: COVID-19 and South Africa's Response" 2020 *Journal of Law and the Biosciences.*

31 Thomson and Ip 2020 *Journal of Law and the Biosciences*.

country.[32] It should be noted that, in South Africa, as well as other countries, allegations of violations of rights have been made and courts have been called upon to make pronouncements on the constitutionality of state action. The deployment of the army to enforce the lockdown in South Africa was criticised from a human rights perspective and fears of brutality were compounded by evidence from across the country.[33] Images and videos went viral on social media and grabbed national attention. Scholars have cautioned that governments have previously used public emergencies, including health emergencies, to justify "discrimination, repression of political opponents or to enhance marginalization of minorities or other vulnerable populations".[34]

The restrictions on fundamental rights such as the right to freedom of movement and freedom of assembly coupled with brutal policing by soldiers were apartheid-like. More aptly, the brutality stirred a strenuous sense of *déjà vu* for those who survived apartheid, and a bitter taste of it for those who were born free. Given this, it is important to ascertain how the South African government balanced the need to protect lives from the pandemic and the need to preserve the hard-won rights and freedoms of the people.

4 CONSTITUTIONAL AND LEGAL FRAMEWORK FOR A LIMITATION OF RIGHTS IN SOUTH AFRICA

South Africa is a constitutional democracy whose Constitution speaks to its aspirations as a nation and the values which bind its people.[35] A fundamental feature of the Constitution of South Africa was aptly summed up by the former Chief Justice Ismail Mahomed in *S v Makwanyane*:

> "it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of that part of the past which is disgracefully racist, authoritarian, insular and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic".[36]

The inequalities that existed in South Africa in the pre-1994 era inflicted undesired pain on the majority of the population. These inequalities were anchored on the system of apartheid which had a blatant disregard for human rights and fundamental freedoms. The post-apartheid era birthed a new constitution whose values were founded on the humane principles of

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[32] Kiewit "Three-month Covid-19 Deployment of SANDF Planned" (27 March 2020) https://mg.co.za/coronavirus-essentials/2020-03-27-three-month-covid-19-deployment-of-sandf-planned/ (accessed 2020-11-27).

[33] See Seekings and Nattrass "Covid vs. Democracy: South Africa's Lockdown Misfire" 2020 31(4) *Journal of Democracy* 106–121.

[34] Richardson and Devine 2020 *Michigan Journal of International Law* 17.

[35] O'Regan "Text Matters: Some Reflections on the Forging of a New Constitutional Jurisprudence in South Africa" 2012 75(1) *The Modern Law Review* 1–32.

[36] *S v Makwanyane* 1995 (3) SA 391 (CC) 262.

democracy and the respect for human rights and fundamental freedom.[37] The Constitution, therefore, affirms human rights but also allows for a derogation of these within its parameters. Unlike during a state of emergency where rights are suspended, during a state of disaster, the government can only limit rights in terms of section 36 of the Constitution.[38]

The constitutional design places a general standard of "reasonable and justifiable" in an open democratic society, based on human dignity, equality, and freedom. Section 36 of the Constitution provides the guidelines for limitations of rights. In terms of this provision:

> "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including–
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose."[39]

Van Staden observes that section 36(1) is not designed to be an invitation for the limitation of rights by the state, rather it is a limitation of how the state may do so. Therefore, section 36 should be read as part of the protection of the rights and not the infringement of the rights.[40] Section 36 provides that a right may be limited if it is reasonable and justifiable to do so in an open and democratic society based on the principles of freedom, dignity, and equality. To determine whether this standard has been satisfied by the state, "the courts must conduct an analysis of the nature, extent, and purpose of the right and its limitation, and ascertain the limitation's rationality and proportionality".[41] A further enquiry that courts make is to consider whether there were other less restrictive means to achieve the purpose of the limitation.[42]

> "Because the unmolested exercise (rather than the limitation) of guaranteed rights is the default position, government must 'restrain itself when regulating' such exercise – freedom is the general rule, and limitation is the exception. Such exceptional limitations must be for valid, constitutional, public purposes, rather than purposes not contemplated by the Constitution. Purposes that are unconstitutional, or simply extra-constitutional, are insufficient to justify rights limitations."[43]

Under international law, the limitation of rights cannot go beyond what is permissible as per various international conventions and protocols. In terms of international law, the widely accepted notion is that such measures or

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37 Tambe-Endoh "Democratic Constitutionalism in Post-apartheid South Africa: The Interim Constitution Revisited" 2015 7(1) *Africa Review* 7.

38 Brickhill "Constitutional Implications of Covid-19" 2020 *Talking Points* https://juta.co.za/documents/678/Issue_1_-_Talking_Points__Constitutional_Implications_of_Covid-19.pdf (accessed 2021-01-02).

39 S 36 of the Constitution of the Republic of South Africa, 1996.

40 Van Staden "Constitutional Rights and their Limitations: A Critical Appraisal of the COVID-19 Lockdown in South Africa" 2020 20(2) *African Human Rights Law Journal* 484–511.

41 *Ibid.*

42 *Ibid.*

43 Van Staden 2020 *African Human Rights Law Journal* 492.

limitations must be necessary, proportionate, and reasonably related to legitimate public ends.[44] Scholars have however pointed out that "the possibility to derogate in times of emergency does not substitute itself to permissible limitations of human rights, and if states can attain their public policy objectives without using derogatory measures, they should do it".[45]

While it is conceded that states have an obligation to institute measures, including limiting certain rights, to contain a public emergency or disaster, the derogations should not be disproportionate. The International Covenant on Civil and Political Rights (ICCPR) provides for permissible limitations during a state of a public health emergency. These act as safeguards against states over-exercising their powers to limit human rights beyond what is proportionate. The General Comment No. 31 [80] of the Covenant on Civil and Political Rights of May 2004 provides:

> "States Parties must refrain from violation of the rights recognized by the Covenant, and any restrictions on any of those rights must be permissible under the relevant provisions of the Covenant. Where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right."[46]

The least invasive measures should always be the first option. According to Lebret strict necessity implies the need to show a close relationship between the emergency and the measures being taken and that less invasive measures would be inefficient.[47] International law imposes derogable and non-derogable rights in a public disaster or public emergency. Non-derogable rights include the prevention of all forms of torture[48] and the right to life[49] among others. In an address on COVID-19, the Inter-American Commission warned:

> "even in the most extreme and exceptional cases in which suspension of certain rights may become necessary, international law lays down a series of requirements such as legality, necessity, proportionality and timeliness, which are designed to prevent measures such a state of emergency from being used illegally or in an abusive or disproportionate way, causing human rights violations or harm to the democratic system of government".[50]

It cannot be disputed that emergency powers give wide discretionary powers to governments to institute measures they deem necessary for the containment of the disaster. Measures or safeguards taken should be

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44 Articles 17 and Article 19 of the Imternational Covenant on Civil and Political Rights and United Nations Declaration of Human Rights respectively.

45 Lebret "COVID-19 Pandemic and Derogation to Human Rights" 2020 7(1) *Journal of Law and the Biosciences* 3–4.

46 UN Human Rights Committee (HRC) General Comment No 31 [80] *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (26 May 2004) CCPR/C/21/Rev.1/Add.13 https://www.refworld.org/docid/478b26ae2.html (accessed 2020-10-4).

47 Lebret 2020 *Journal of Law and the Biosciences* 6.

48 Article 7 of ICCPR; Article 5 of the ACHR.

49 Article 6 of the ICCPR; Article 4 of ACHR.

50 IACHR "Pandemic and Human Rights in the Americas, Resolution 1/2020" (10 April 2020) https://www.oas.org/en/iachr/decisions/pdf/Resolution-1-20-en.pdf (accessed 2020-10-24).

necessary in terms of both the law and human rights.[51] Palmer and Martin note that "a paradigm shift away from rights protection focusing on the individual to wider protective concerns during the pandemic can be justified in some circumstances".[52] The effect of this is that these powers can be abused by states and human rights suspended or diverted to protect a more pressing public health emergency. The approaches adopted by states tend to overlook the importance of human rights in general, especially the rights that permeate the framing of lockdown restrictions.

5 THE STATE OF DISASTER AND ITS CONSTITUTIONAL AND HUMAN RIGHTS IMPLICATIONS IN SOUTH AFRICA

South Africa has so far opted for a less radical measure to curb the spread of COVID- 19 by declaring a state of disaster instead of a state of emergency.[53] Acting in terms of section 27 of the Disaster Management Act,[54] the Minister of Co-operative Governance and Traditional Affairs,

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[51] Moodley, Obasa and London "Isolation and Quarantine in South Africa During COVID-19: Draconian Measures or Proportional Response?" 2020 110(6) *South African Medical Journal* 1–2.

[52] Palmer and Martin "Public Health Emergencies and Human Rights: Problematic Jurisprudence Arising from the COVID-19 Pandemic" 2020 *Forthcoming, European Human Rights Law Review*.

[53] *GG* 43096 of 2020-03-15.

[54] 27. Declaration of national state of disaster

(1) In the event of a national disaster, the Minister may, by notice in the Gazette, declare a national state of disaster if–
  (a) existing legislation and contingency arrangements do not adequately provide for the national executive to deal effectively with the disaster; or
  (b) other special circumstances warrant the declaration of a national state of disaster.

(2) If a national state of disaster has been declared in terms of subsection (1), the Minister may, subject to subsection (3), and after consulting the responsible Cabinet member, make regulations or issue directions or authorise the issue of directions concerning–
  (a) the release of any available resources of the national government, including stores, equipment, vehicles and facilities;
  (b) the release of personnel of a national organ of state for the rendering of emergency services;
  (c) the implementation of all or any of the provisions of a national disaster management plan that are applicable in the circumstances;
  (d) the evacuation to temporary shelters of all or part of the population from the disaster-stricken or threatened area if such action is necessary for the preservation of life;
  (e) the regulation of traffic to, from or within the disaster-stricken or threatened area;
  (f) the regulation of the movement of persons and goods to, from or within the disaster-stricken or threatened area;
  (g) the control and occupancy of premises in the disaster-stricken or threatened area;
  (h) the provision, control or use of temporary emergency accommodation;
  (i) the suspension or limiting of the sale, dispensing or transportation of alcoholic beverages in the disaster-stricken or threatened area;
  (j) the maintenance or installation of temporary lines of communication to, from or within the disaster area;

Nkosazana Dlamini-Zuma cited the "magnitude and severity of the COVID-19 outbreak which has been declared a global pandemic …" and "the need to augment the existing measures undertaken by organs of state to deal with the pandemic".[55] In terms of this the Disaster Management Act, "disasters" are defined as:

> "[A] progressive or sudden, widespread or localised, natural or human-caused occurrence which (a) causes or threatens to cause (i) death, injury or disease; (ii) damage to property, infrastructure or the environment; or (iii) significant disruption of the life of a community; and (b) is of a magnitude that exceeds the ability of those affected by the disaster to cope with its effects using only their own resources".[56]

This declaration was accompanied by extensive Disaster Management Regulations[57] described as "steps necessary to prevent an escalation of the disaster or to alleviate, contain and minimise the effects of the disaster".[58] Section 3 of the Regulations "Prevention and Prohibition of Gatherings" states:

> "3. (1) In order to contain the spread of COVID-19, a gathering is prohibited. (2) An enforcement officer must, where a gathering takes place– (a) order the persons at the gathering to disperse immediately; and (b) if they refuse to disperse, take appropriate action, which may, subject to the Criminal Procedure Act, include arrest and detention. (3) The assembly of more than 50 persons at premises where liquor is sold and consumed is prohibited."[59]

These regulations did not enforce a lockdown but simply regulated the permissible size of gatherings. However, after the announcement of a nationwide lockdown by the government, the Regulations were amended to

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(k) the dissemination of information required for dealing with the disaster;
(l) emergency procurement procedures;
(m) the facilitation of response and post-disaster recovery and rehabilitation;
(n) other steps that may be necessary to prevent an escalation of the disaster, or to alleviate, contain and minimise the effects of the disaster; or
(o) steps to facilitate international assistance.

(3) The powers referred to in subsection (2) may be exercised only to the extent that this is necessary for the purpose of–
(a) assisting and protecting the public;
(b) providing relief to the public;
(c) protecting property;
(d) preventing or combating disruption; or
(e) dealing with the destructive and other effects of the disaster.

(4) Regulations made in terms of subsection (2) may include regulations prescribing penalties for any contravention of the regulations.

(5) A national state of disaster that has been declared in terms of subsection (1)–
(a) lapses three months after it has been declared;
(b) may be terminated by the Minister by notice in the Gazette before it lapses in terms of paragraph (a); and
(c) may be extended by the Minister by notice in the Gazette for one month at a time before it lapses in terms of paragraph (a) or the existing extension is due to expire."

55 *GG* 43096 of 2020-03-15.
56 Disaster Management Act 57 of 2002.
57 *GG* 43107 of 2020-03-18.
58 *Ibid.*
59 *Ibid.*

include various other measures on, but not limited to, the sale of liquor, religious gatherings, and funeral gatherings.[60] The most relevant provision for purposes of this article is the amendment of Regulation 11B of the Regulations:

> "(b) During the lockdown, all businesses and other entities shall cease operations, except for any business or entity involved in the manufacturing, supply, or provision of an essential good or service, save where operations are provided from outside of the Republic or can be provided remotely by a person from their normal place of residence."[61]

In an urgent application of *De Beer v The Minister of Cooperative Governance and Traditional Affairs*,[62] the South African High Court, on the 2nd of June 2020, ruled that the regulations issued in terms of section 27 of the Disaster Management Act[63] were unconstitutional and invalid. This decision was deeply flawed in many respects,[64] however, it made some interesting observations. Relevant to the scope of this article is the expression by the learned judge that the blanket ban imposed on all gatherings (except religious gatherings under strict conditions), including under alert level 3 is tantamount to reverting to the pre-constitution era of blanket bans. The High Court held:

> "no recognition has been given to any section 17 rights nor has any consideration been given to the infringement thereof or whether a blanket ban could be justifiable as opposed to a limited·and regulated 'allowance' of the exercise of those rights. The reversion to a blanket ban harks back to a pre-Constitutional era and restrictive State of emergency regulations".[65]

The importance of demonstrations cannot be understated. At a time when the government and government officials are being accused of looting COVID-19 related funds and gross irregularities in the awarding of COVID-19 related tenders, this type of ban stifles any form of demonstration and picketing against corruption.[66] Demonstrations and other forms of protests are important to hold the government to account.[67] COVID-19 pandemic has laid bare "the weaknesses of our systems of governance, including the abusive culture of security institutions in the name of upholding law and order and the appetite of some in government to pocket public resources meant for fighting the pandemic".[68] Widespread corruption, as well as human

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60 Disaster Management Act, 2002: Amendment of Regulations Issued in Terms of Section 27(2).

61 Act 57 of 2002.

62 *De Beer v The Minister of Cooperative Governance and Traditional Affairs* (21542/2020) [2020] ZAGPPHC 184.

63 *GG* 43258.

64 Brickhill "The Striking Down of Lockdown Regulations: Constitutional Implications of Covid-19" 2020 14 *Talking Points*.

65 *De Beer v The Minister of Cooperative Governance and Traditional Affairs supra* 8.

66 Heywood "Scandal of the Year: Covid-19 Corruption" https://www.dailymaverick.co.za/article/2020-12-27-scandal-of-the-year-covid-19-corruption/ (accessed 2021-02-27).

67 Omar "A Legal Analysis in Context: The Regulation of Gatherings Act – A Hindrance to the Right to Protest?" 2017 62 *South African Crime Quarterly* 21–31.

68 Dersso "The Impact of COVID-19 on Human and Peoples' Rights in Africa" ACCORD (20 September 2020) https://www.accord.org.za/analysis/the-impact-of-COVID-19-on-human-and-peoples-rights-in-africa/ (accessed 2020-10-17).

rights abuses, have taken place under the cover of COVID-19 lockdowns and the regulations have not helped matters as the public cannot hold the government to account.[69] The closing down of the spaces to exercise the rights to demonstrate and picket government in terms of section 17 of the Constitution has been synonymous with dictatorships elsewhere in Africa and beyond.[70]

The Wisconsin Supreme Court, in the United States of America, in a COVID-19 related case, made a very instructive argument about the respect of constitutional rights during states of emergencies. The Court held:

> "[T]here is no pandemic exception […] to the fundamental liberties the Constitution safeguards. Indeed, individual rights secured by the Constitution do not disappear during a public health crisis. These individual rights, including the protections in the Bill of Rights … are always in force and restrain government action".[71]

According to Staunton, Swanepoel, and Labuschagne, the restrictions on freedom of movement and assembly in South Africa are worse than those imposed during apartheid. They argue that even though the restrictions on freedom of movement during the lockdown were imposed in a different context to those imposed during apartheid, they have been met with the same apprehension.[72]

Given that the various restrictions under scrutiny here were imposed under a state of national disaster to deal with a national crisis, people are likely to be forgiving of the associated violations. However, the deployment of armed forces to enforce the national lockdown led to some reprehensible consequences.[73] While it was conceivable that the deployment of soldiers was going to cause despondency, no one could imagine that this would lead to a *déjà vu* of the apartheid era. The deployment of soldiers was announced on national television by President Ramaphosa dressed in full military regalia. Scholars have criticised this as a show of force and militarised response to the coronavirus pandemic.[74] Soon after the deployment of the army, there were allegations of the army and police discharging rubber bullets, and videos of abuse and torture circulated on social media. 11 lockdown enforcement-related deaths had been recorded as of 1 June 2020.[75] According to Staunton *et al*:

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69 Fakane "Regulating Freedom of Expression Amidst the Covid-19 Response in South Africa" https://cipesa.org/2020/11/regulating-freedom-of-association-amidst-the-covid-19-response-in-south-africa/ (accessed 2021-02-12).

70 James and Alihodzic "When is it Democratic to Postpone an Election? Elections During Natural Disasters, Covid-19, and Emergency Situations" 2020 19(3) *Election Law Journal: Rules, Politics, and Policy* 344–362.

71 *Wisconsin Legislature v Secretary-Designee Palm* 2020AP65 – OA.

72 Staunton, Swanepoel and Labuschagne 2020 *Journal of Law and the Biosciences* 6.

73 On 25 March 2020, the President of the Republic of South Africa, Cyril Ramaphosa deployed the members of the South African National Defence Forces in terms of s 201(2)(*a*) of the Constitution of the Republic of South Africa, 1996, read with s 18(1) of the Defence Act (Act 42 of 2002).

74 Staunton, Swanepoel and Labuschagne 2020 *Journal of Law and the Biosciences* 6.

75 Labuschaigne 2020 *South African Journal of Bioethics and Law*.

> "Eight people were reported to have been killed by the police during the first week of the lockdown in enforcing the COVID-19 regulations, which at that time was more than the number of deaths related to the virus."[76]

Torture is prohibited in terms of both domestic and international law. In terms of section 4(4) of the Prevention and Combating of Torture of Persons Act,[77] not even a state of emergency can warrant the exercise of torture or inhumane degrading treatment of persons. Article 2(1) of the United Nations Convention Against Torture and other Inhumane or Degrading Punishment places an obligation on the state to take legislative and other measures to prevent torture.[78] The right to life and the right to freedom from torture is peremptory in nature.[79] They cannot be derogated from. Article 2(2) of the Convention against torture and Other Cruel, Inhumane and Degrading Treatment or Punishment further provides that; "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture".[80] The deployment of the armed forces to enforce lockdown measures resulted in an imminent violation of both the Constitution of South Africa and international law. As of 1 June 2020, just three months into the lockdown a staggering 230 000 people had been arrested for violating regulations.[81]

The death of one Collins Khosa at the hands of the armed forces drew the nation's attention to issues of torture, inhuman and degrading punishments associated with lockdown enforcement. Khosa's death resulted in a court application, *Khosa v Minister of Defence and Military Veterans* for, *inter alia*, a declaration that members of the public are still entitled to having their fundamental rights upheld and protected by members of the security forces during the lockdown and the declared State of Disaster. The Court declared:

> "[N]otwithstanding the Declaration of the State of Disaster and the Lockdown under the Disaster Management Act 57 of 2002, all persons present within the territory of the Republic are entitled to (among others), […] the right to human dignity, right to life, right not to be tortured in any way, right not to be or punished in a cruel, inhuman, or degrading way".[82]

This judgment was widely celebrated as it affirmed the rights of persons during a state of national disaster. With regards to permissible limitations of rights the court also held that "the least restrictive measures must be sought, applied and communicated to the public".[83] According to Brickhill, "[t]he [Khosa] matter has laid bare the abuse of arrest powers and the use of force by the police and the military to enforce the lockdown and ordered the

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76 Staunton, Swanepoel and Labuschagne 2020 *Journal of Law and the Biosciences* 6.

77 A13 of 2013.

78 UN General Assembly "Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" (10 December 1984) United Nations, Treaty Series https://www.refworld.org/docid/3ae6b3a94.html (accessed 2020-10-12) vol 1465 85.

79 United Nations "Office of the High Commissioner for Human Rights and International Bar Association" 2003 9 *Human Rights in the Administration of Justice: A Manual on Human Rights For Judges, Prosecutors and Lawyers.*

80 Article 2(2).

81 Labuschaigne 2020 *South African Journal of Bioethics and Law*.

82 *Khosa v Minister of Defence and Military Veterans* [2020] ZAGPPHC 147 46.

83 *Khosa v Minister of Defence and Military Veterans supra* 7.

imposition of vital accountability mechanisms, reasserting Bill of Rights guarantees".[84] Fears of abuse of powers by authorities during lockdown are widespread. Durojaye and Nanima note that commentators have raised concerns over the potential abuse of the lockdown regulations. They further stress that "under no circumstance should human rights be compromised for the sake of protecting public health".[85] South African police also used physical punishment such as water cannons and rubber bullets on people caught violating lockdown regulations.[86] As such, in this work, we call for there to be checks on executive powers and for the judiciary to exercise its judicial review powers to curb the potential abuse of state power by the executive during a lockdown.

The courts in South Africa have ruled that there are certain regulations imposed by the state to limit human rights which are neither irrational nor unproportionate. In the case of *Mohamed v President of South Africa,*[87] an urgent application was heard in the High Court wherein the Applicants sought to challenge the constitutionality of some of the regulations made in terms of section 27 of the Disaster Management Act. The Applicants contended that the regulations limited their right to exercise their right to religion, their daily prayers to be exact. In addition to this, it was also contended that the regulations limit their right to freedom of assembly, liberty, dignity, and association.[88] It was further contended that Regulations 11(B)(i) and (ii) as read with the definition of "gathering" was too broad and was an excessive limit on fundamental rights and should be declared unconstitutional. In dismissing the application Neukircher J held:

> "[I]n South Africa right now, every citizen is called upon to make sacrifices to their fundamental rights entrenched in the Constitution. They are called upon to do so in the name of 'the greater good', the spirit of 'ubuntu' (sic) and they are called upon to do so in ways that impact on their livelihoods, their way of life and their economic security and freedom. Every citizen of this country needs to play his/her part in stemming the tide of what can only be regarded as an insidious and relentless pandemic."[89]

In as much as the pandemic generally places an obligation on every citizen to play their part to minimise the spread of the virus, government action should not be seen to be arbitrary. A pandemic does not detract from the government's responsibility to act within the bounds of the law and respect for fundamental rights. The way the lockdown was handled as well as the implementation of some of the regulations posed a serious legal challenge

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84 Brickhill "Constitutional Implications of COVID-19: Arrests and the Use of Force to Enforce Lockdown" https://www.researchgate.net/publication/341670838_Constitutional_implications_of_COVID-19_Arrests_and_the_use_of_force_to_enforce_lockdown (2021-02-12).

85 Durojaye and Nanima "From Muhammed and Others to De Beer and Others: Striking the Balance Between Public Health Measures and Human Rights During COVID-19 Era in South Africa" 2020 *Commonwealth Law Bulletin* 15.

86 Delvac "Human Rights Abuses in the Enforcement of Coronavirus Security Measures" 2020 X(289) *National Law Review*; Muri Assuncao "Hefty Fines, Jail Time, Expulsion: How Governments Around the World are Dealing with People who Ignore Quarantine Orders" (2020-03-21) New York Daily News https://www.nydailynews.com/coronavirus/ny-coronavirus-hefty-fines-jail-.... (accessed 2020-07-23).

87 *Mohamed v President of South Africa* 2020 (5) SA 553 (GP).

88 *Ibid.*

89 *Mohamed v President of South Africa supra* 75.

for South Africa. De Vos has argued that when regulations are enforced arbitrarily, it erodes the support for the government's efforts to curb the spread of the virus.[90] The National Peace Commission criticised the implementation of the regulations arguing that they were procedurally irregular and unconstitutional.[91]

6 CONCLUSION

It is common and rational for certain rights to be limited in a public health emergency. In South Africa, this was done in the public interest to minimise or curb the spread of the COVID-19. While this was in the public interest, some of the limitations, as well as enforcement of the regulations thereof, were disproportional. It has also been cautioned that disproportional derogations, in particular, the use of force by law enforcement agencies may have a paradoxical effect of increasing the number of deaths and hospitalisations. The blanket bans imposed by the government during Level 5 of the Lockdown Regulations as illustrated in this article, are a cause for concern as they clearly lacked rationality and proportionality. As the COVID-19 pandemic is still prevalent, it is essential that the government adhere to the constitutional and human rights principles on which the South African democracy is founded. It is submitted that conforming to these democratic principles is not only necessary for compliance with the law but also ensures a definite buy-in from the citizens who are undoubtedly the biggest stakeholder in the fight against the pandemic.

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[90] De Vos "Why the Management of the Covid-19 Lockdown Threatens Respect for the Rule of Law'' IACL-AIDC Blog (23 April 2020) https://blog-iacl-aidc.org/2020-posts/2020/4/23/why-the-management-of-the-covid-19-lockdown-threatens-respect-for-the-rule-of-law (accessed 2021-02-27).

[91] Comins "Peace Commission Warns of Constitutional Court Battle Unless Lockdown is Lifted" (2020-05-4) Mercury https://www.iol.co.za/mercury/news/ peace-commission-warns-of-constitutional-court-battle-unless-lockdown-is-lifted-47517383 (accessed 2021-02-12).

NOTES / AANTEKENINGE

SHOULD WE ABOLISH THE DELICT OF SEDUCTION IN CUSTOMARY LAW: *QUO VADIS* SOUTH AFRICA?

1 Introduction

Consensual sexual intercourse between a male and a virgin is not universally forbidden in Southern Africa because it constitutes a wrongful act for some cultural groups, and it is not a wrongful act for others. On the contrary, the impregnation of a non-virgin with her consent outside the confines of lawful marriage is a wrongful act and is forbidden by many indigenous cultures, if not all of them, in the Southern African Development Community (SADC) (Gluckman "Zulu Women in Hoe Cultural Ritual" 1935 *Bantu Studies* 255–271; May *Virginity Testing: Towards Outlawing the Cultural Practice that Violates Our Daughters* (LLM Theses, University of Western Cape) 2003 7–11). This disapproval of pre-marital sexual intercourse is reflected in the customary practice of *ukusoma* (this is thigh sex that does not involve penetration; it is also referred to as *ukuhlobonga* in Zulu) and virginity testing. The latter mentioned cultural practices serve the purpose of safeguarding against seduction.

The defloration of a virgin and the impregnation of an unmarried non-virgin is a delict and actionable under customary law. Notably, it is not easy or practical to institute legal action against the seducer when defloration is not followed by pregnancy. Moreover, common sense dictates that it is highly unlikely for a woman to reveal her private sexual life just because her father or guardian has to claim seduction damages (Dlamini "Seduction in Zulu Law" 1984 47 *THRHR* 28).

Because under customary law sexual delicts are not only limited to the defloration of a virgin but also the impregnation of an unmarried non-virgin, any male person who impregnates a virgin or non-virgin will be expected to pay seduction damages that normally comprise an *inquthu* beast, an *imvimba* beast, and an *ingezamagceke* beast (Himonga, Nhlapo, Maithufi, Weeks, Mofokeng and Ndima *African Customary Law in South Africa*: *Post-Apartheid and Living Law Perspectives* (2014) 203–205). An *inquthu* beast is received by the mother of the impregnated unmarried woman. It serves as compensation to the mother for all the pain and suffering that she incurred during her own pregnancy and childbirth. For this reason, it is often referred to as *inkomo yesifociya* (the beast of the pregnancy belt). It is also referred to as *inkomo kanina* (mother's beast) as it also aims to compensate the mother for protecting her daughter's virginity.

Besides an *inquthu* beast*,* an *imvimba* beast is payable for each pregnancy thereafter (Himonga *et al African Customary Law in South Africa*: *Post-Apartheid and Living Law Perspectives* 203). The father or guardian of the impregnated unmarried woman receives the *imvimba* beast because each child that is born out of wedlock diminishes the social value of the girl and thus the amount of *lobolo.* The *imvimba* beast, therefore, compensates him for prospective loss of *lobolo*. Moreover, another beast called *ingezamagceke* (purification or cleansing of the homestead) is slaughtered outside the homestead for ritual purification of the homestead (Dlamini 1984 *THRHR* 28). In fear of contagious ill-luck, the slaughtered beast is only eaten by elderly women and men. This practice is rooted in the belief that, should young maidens eat it, they could suffer the same fate as the seduced girl. Given the sacred element behind the delict of seduction, it goes without saying that it would not be an easy exercise to abandon it for fear of supernatural punishment by ancestors.

Although some people still practice and enforce the customary delict of seduction, some scholars such as Bohler-Muller, advocate for its abolition. Bohler-Muller argues that the delict of seduction contravenes the woman's right to equality and that it places a monetary value on her virginity and prospects of marriage. Bohler-Muller expresses this view as follows:

> "The presence or absence of virginity would define a woman and her value to a man and this would be a stereotype which oppresses women because the continuation of this stereotype would amount to cultural imperialism where the value of women would be more likely to be exploited, and even be abused if they are not virgins. Therefore, the answer would be upholding the right to gender equality at the expense of such delicts." (Bohler-Muller "Cultural Practices and Social Justice in a Constitutional Dispensation: Some (more) Thoughts on Gender Equality in South Africa" 2001 22(1) *Obiter* 142–152; Bohler-Muller "Of Victims: Seduction Law in South Africa" 2000 *CODICILLUS*)

In view of the above argument, this note investigates whether or not the time is ripe for South Africa to abolish the delict of seduction. The legislature has not yet abolished the delict of seduction in customary law. In addition, there are a growing number of academic commentators who are in full support of Bohler-Muller's recommendation for the abolition of the delict of seduction in customary law. (Knoetze "Fathers Responsible for the Sins of their Children? Notes of the Accessory Liability of a Family Head in the Customary Law of Delict" 2012 2 *Speculum Juris* 48–49; Himonga *et al African Customary Law in South Africa*: *Post-Apartheid and Living Law Perspectives* 206). In investigating whether it is ripe for South Africa to abolish the delict of seduction under customary law, the first part of the note discusses the existing problems in customary law governing the delict of seduction. The second part discusses four challenges that might be created by its abolition under the following sub-topics, namely (a) social advantages for prohibiting pre-marital sexual intercourse; (b) religious consequences of pre-marital sexual intercourse and advantages for discouraging pre-marital sexual intercourse; (c) the link between the delict of seduction under customary law and the payment of *lobolo*; and (d) the relationship between the customary law delict of seduction and the value of gender equality. The third part of the note discusses the possible solutions to the problems.

2 Problems of the delict of seduction in Customary Law

Two problems plague the customary law delict of seduction. First, for the claim of seduction to succeed "there must be a physical defloration of a girl and the defloration must have occurred as a result of the seductive conduct of the man" (Bohler-Muller 2001 *Obiter* 142–152). This poses a problem in the country's new constitutional dispensation because the current application of the delict of seduction perceives that only men are capable of seducing or leading a girl astray. It is also possible, however, for a woman to seduce a man. For example, nowadays there are reported instances where a much older woman seduces a younger partner, called a "Ben Ten". This raises the question of whether this very young boy would be entitled to legal redress or protection in terms of the law of seduction. It is submitted that in light of the demands of the Constitution young boys too should be entitled to equal legal protection against predatory women.

Finally, should a girl decide to personally institute legal action against her seducer in terms of the common law, nothing prevents her father or guardian from claiming seduction damages under customary law. The authors argue that this situation can result in the problem of double jeopardy on the part of the seducer (See also Himonga *et al African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* 203). This problem of double jeopardy is visible in the decisions of the Native Appeal Court below.

2 1 Booi v Xozwa

In this case, the plaintiff sued the defendant for £25 on the summons wherein he alleged that in or about the winter season of 1920 the defendant seduced and impregnated the plaintiff's sister (Amelia Xozwa). The defendant admitted that in or about July 1920 he seduced and impregnated Amelia and that in or about March 1921, Amelia claimed damages for seduction from him and that thereupon it was settled between the defendant and Amelia that she accepts the sum of £25 that would be paid in instalments of 30 cents per month. The defendant submitted that he had regularly paid such instalments and denied being liable in any way to the plaintiff. The Magistrate, after referring to the case of *Cebisa v Gwebu* (4 NAC 330), gave judgment for the plaintiff as prayed for in the particulars of the claim. It is noted by the authors that the case of *Booi v Xozwa* quoted above was incorrectly cited by the Native Appeal Court in the case of *Cebim v Gwebu* and therefore the correct citation of the case is *Cebisa v Gwebu* (*supra*).

The Native Appeal Court "admitted that no case similar to the one now under discussion has previously been before this court and no analogous case of any tribunal has been brought to the notice of the court" (*Booi v Xozwa* 4 NAC 310). The question before the Native Appeal Court to decide was "whether, when [a] woman has fully exercised her personal rights, the seducer is also liable to pay her guardian the damages otherwise claimable by him according to custom" (*Booi v Xozwa supra*). The Native Appeal Court acknowledged that the basic principle for the guardian's claim for seduction

damages is that his ward's or family inmate's marriageable value for dowry purposes has depreciated and that appears to be the ground upon which the magistrate based his decision in favour of the plaintiff. The Court made it clear that the plaintiff had well-defined rights under native custom to the property that is acquired or accumulated by his family inmates and if he has failed in his duty to exercise his rights, he has himself to blame. The Court further held that

> "[t]o compel the defendant to pay him [the] full damage claimable when [these] have already been paid to his ward who apparently does not recognize the authority which a native guardian exercises would be placing the Plaintiff in an unduly privileged [position] on which on this court's opinion, was not contemplated, and could well lead to consequences which would be contrary to the principles of justice".

The above extract makes it clear that the reason for the failure of the plaintiff's claim for seduction damages is that according to native custom he has rights over the property accrued or accumulated by the family inmates. This power of the guardian or family head to the control of the family property is illustrated in the case of *Mlanjeni v Macala* (1947 NAH 1 (C & O) 1–2), where the court held:

> "The basic principles of Native Law in general regard the family as a collective unit with joint responsibilities and assets. All property accruing to members of the family goes into a common pool and is administered by the kraal head; liabilities incurred by members of the kraal are satisfied from such property. The family unit thus resembles a partnership of which the head of the kraal is the manager. The difference is that in a partnership the relationship between the partners is based upon agreement, whereas in the family unit the relationship is based on native custom."

However, in our modern society, children and family inmates no longer constitute parts of the wealth of the group (Bennett and Peart *A Sourcebook of African Customary Law for Southern Africa* (1991) 345–346). In terms of section 6 of the Recognition of Customary Marriages Act (120 of 1998), spouses in a customary marriage have equal status and capacity to enter into contracts, acquire assets and dispose of them, and to be delictually liable. Therefore, it is argued that a wife who commits a delict should be personally liable. This also applies to all family inmates who obtain majority status in terms of section 9 of the Recognition Act which provides for the application of the Age of Majority Act (57 of 1972), which initially fixed the age of majority to 21 years. Subsequently, section 313 set the age of majority at 18 years of age (38 of 2005). Therefore, a family inmate would obtain proprietary capacity at the age of 18, which implies the power to acquire and to dispose of it (Bennett *Customary Law in South Africa* (2004) 322). In view of the latter developments, it is argued that the case of *Booi v Xozwa* (*supra*) is not relevant in solving a problem of double jeopardy today. This is so because the guardian or family head is no longer in control of property that is owned by family inmates that have reached the majority age.

2 2 Vilapi v Molebatsi (*1951 NAC* (*C & D*))

The plaintiff sued the defendant for £100 as damages for breach of promise to marry, £100 as seduction damages, a monthly instalment of £4 as

maintenance and support of the child born to the plaintiff. The defendant admitted the paternity of the child born to the plaintiff and pleaded that the plaintiff and her father had, through an attorney, demanded payment from him of £200 as damages for seduction and pregnancy of, and breach of promise to marry the plaintiff; that it was agreed that he should pay an amount of £50 in instalments of £2 and 10 cents per month; that he had paid an amount of £42 and 10 cents and was willing to pay the balance of £7 and 10 cents in accordance with the agreement. After hearing the evidence, the Native Commissioner gave judgment for the plaintiff for £20 as damages for breach of promise to marry and £40 as seduction damages.

The defendant appealed the judgment of the Native Commissioner on the following grounds: (a) the judicial officer made an error by ignoring the fact that the action was first initiated in terms of native law and a settlement was arrived at and carried out by the defendant; and (b) that having regard to the previous settlement and the benefit received by the father of the plaintiff under native law, the damages awarded to the plaintiff in the action was excessive. On appeal, the Native Appeal Court relied on the case of *Booi v Xozwa* (*supra*) and held that the "[p]laintiff is entitled to bring an action against defendant under the common law although her father has received a fine under native custom, but the amount received by her father must be taken into consideration when awarding damages to her" (*Vilapi v Molebatsi supra* 11). The court considered the fact that the defendant had already paid £42 to the plaintiff's father and concluded that was equivalent to a substantial amount of *lobolo*. At the time of judgment, a cow had a value of £3. Under these circumstances, the Court held that damages in the sum of £5 would be sufficient and the decision of the Native Commissioner was set aside.

3 Possible solutions

In view of the above-mentioned problems, the authors note that according to the present position there lurks a lacuna in the field of the law relating to seduction law in South Africa as there is no legislation or case law that adequately addresses the problems identified above. The note advances two possible solutions to the problems confronting the law of seduction in South Africa. The first option begs the challenge of developing the delict of seduction to streamline and refine areas of uncertainty as indicated above. The second option would be to abolish the law relating to seduction in customary practice only in the (unlikely) failure of the first development.

3 1 Development of Customary Law

The Constitution protects the right to culture in many provisions, which refer to cultural diversity in the South African population. The Preamble to the Constitution, for instance, clearly stipulates that we, the people of South Africa, "believe that South Africa belongs to all who live in it, united in our diversity" (Preamble to the Constitution of the Republic of South Africa, 1996). It goes without saying that the Constitution recognises and protects the right to culture. It is also clear that no one person or group ought to be unfairly discriminated against on the grounds of, *inter alia*, culture.

Furthermore, the Constitution goes on to protect the right to culture in section 30, which stipulates that "everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights." In a similar vein, section 31 also protects the right to culture. A study of sections 30 and 31 indicate that the sections contain internal limitation clauses which make it clear that the practice of the right to culture may not be exercised in a manner that is inconsistent with the Bill of Rights. Moreover, the Constitution also provides for the establishment of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (s 185 and 186 of the Constitution). The functions of the Commission include, *inter alia*, the advancement of respect, tolerance, and national unity among cultural, religious, and linguistic communities-based equality; it also has the authority to conduct research and report on matters regarding the rights of cultural, religious, and linguistic communities. Moreover, it may report any issue within its jurisdiction to the South African Human Rights Commission (SAHRC) for investigation. For such rights, protecting cultures, to have meaning and genuine protection it is necessary to start by developing customary-law and/or common-law rules under the Constitution whenever possible to nudge towards abolition only as a last resort.

Section 39 of the Constitution stipulates that when interpreting the Bill of Rights and legislation, and when developing the common law or customary law, a court, tribunal or forum must promote the constitutional values, must consider international law, and may consider foreign law.

In terms of the latter section, the court emphasised in the case of *Carmichele v Minister of Safety and Security* (2001 (4) SA 938 (CC) par 39) that the responsibility to develop common law is not purely discretionary and when common law is not in line with the spirit, purport and objects of the Bill of Rights, the courts have a general responsibility to develop it appropriately. In the case of *Bhe v Magistrate*, *Khayelitsha* (*Bhe v Magistrate*, *Khayelitsha*; *Shibi v Sithole*; *SA Human Rights Commission v President of RSA* 2005 (1) BCLR 1 (CC)) the Constitutional Court held that the development of customary law is significant because "once a rule is struck down, that is the end of that particular rule, yet there may be many people who observe the rule."

The lessons learnt in the *Carmichele* case apply equally to the development of customary law. Whenever a rule of customary law deviates from the spirit, purport, and objects of the Bill of Rights, the courts must develop it to remove deviation (*Bhe v Magistrate*, *Khayelitsha*; *Shibi v Sithole*; *SA Human Rights Commission v President of the RSA supra* par 215). The authors consider it necessary to develop customary law for two reasons. Once a provision is struck down, that marks the end of it. The second reason is that there may be many people who are still practising it (*Bhe v Magistrate*, *Khayelitsha*; *Shibi v Sithole*; *SA Human Rights Commission v President of the RSA supra* par 215). In other words, the authors submit that the delict of seduction may still be widely observed in many communities of South Africa. Therefore, as a result, the authors suggest that it would be better to consider developing it.

The suggested development of the delict of seduction is as follows:

(a) A delict can be developed to permit men to claim from a seducer whenever there is an instance of seduction by elderly predatory women or young predatory women;

(b) Women who are subject to customary law should be able to personally institute legal actions against heir seducers to enjoy equal benefits as their common-law counterparts; and

(c) once a woman starts personally instituting actions in terms of the common law against her seducer, then the customary-law action should become redundant. Similarly, if a father or guardian of a girl institutes legal action in terms of customary law, by the same token the customary-law seduction action against her seducer should prevail.

3 2 Considering abolition

It is argued here that if the courts decide to choose the path of abolition the following arguments can be made against the option of abolition:

(a) There are social advantages to discouraging pre-marital sexual intercourse for men and women, the community, and the government at large. These social advantages are discussed in detail in the next section of this note. Therefore, abolishing the delict of seduction that is aimed at discouraging sexual intercourse and pre-marital pregnancy without providing an alternative, does not appear to be a viable option.

(b) In the traditional African world view, the prohibition against the practice of seduction was always not undermined because of the fear of punishment by the ancestral spirits. According to this world view, the spirit of the ancestors was believed not to be isolated from the daily activities of the living family lineage (*Ndaba An African Philosophy for a Dialogue With Western Philosophy – A Hermeneutic Project* (doctoral thesis, University of Fort Hare) 2004 12). Therefore, to turn a blind eye to this reality might lead to “paper law” because the sacral element of practice contributes a lot to its continuation and enforcement for fear of punishment by the ancestral spirits.

(c) A strong link exists between the delict of seduction under customary law and the custom of *lobolo*. As long as the custom of *lobolo* survives, it will not be easy to abolish the delict of seduction.

(d) The practice of the delict of seduction under customary law is intended to preserve the woman’s dignity rather than to compromise or attenuate it.

4 Social advantages for discouraging pre-marital sexual intercourse

In traditional Zulu society, a virgin was regarded as *intombi nto* or *intombi egcwele* (a full virgin maiden) who thereby earned her respect and dignity. A full maiden did not only enjoy respect from her family but also other maidens in her age group and the community at large. The status of full maidenhood entitled her parents to receive full payment of *lobolo* (Ashton *The Basuto*

(1952) 62–263; *Phefe v Raikana* 1942 NAC (N&T) 16; *Tsweu v Nqakala* 1940 NAC (C&O) 72; Bennett, Mills and Munnick "The Anomalies of Seduction: A Statutory Crime or an Obsolete, Unconstitutional Delict" 2009 25 *SAJHR* 332). This shows the value that is placed on virginity in an African society. Consequently, it is a disgrace for a woman to fall pregnant outside wedlock. This disapproval does not attach merely to the impregnated woman but is believed to even affect her offspring (Holleman *Shona Customary Law* (1952) 216). This belief explains why the customary delict of seduction is still deeply embedded in the mindset of many South African cultures and widely practised (Marwick *The Swazi an Ethnographic Account of the Natives of the Swaziland Protectorate* (1940) 87). However, it is noted that the chastity of a virgin is on the wane, owing to the influence of western morality and laws (Dlamini 1984 *THRHR* 28). This tendency has led to a trend where many seducers of unmarried women continue to perpetuate the delict of seduction with impunity. Nevertheless, the prevalent impunity does not take away the fact that the customary delict of seduction is still widely practised in South Africa. As a result, the authors conclude that it will not be easy for people to abandon cultural sanctions against the practice of seduction and impregnation of unmarried women. Given the current practice and widespread social acceptance of the delict of seduction in customary law, any attempt to abrogate it would amount to paper law that will be largely ignored by the very target community whose behaviour the lawmakers would be intending to change in the first place.

The social disapproval of pre-marital intercourse has numerous advantages. These social advantages include, *inter alia*, efforts to discourage the spread of HIV/AIDS, unplanned pregnancies, and early detection of child sexual abuse. It is an indisputable fact that HIV/AIDS can be transmitted through unprotected sexual intercourse and other sexual behaviours that involve an exchange of bodily fluids. Therefore, sexual activity among younger adults will continue to have devastating consequences for them, their families, and the government. Moreover, the early sexual activity of young people has led to unwanted teenage pregnancies, promiscuity, and immorality.

It is noted that in a traditional Zulu society a maiden who lost her virginity before marriage was ostracised by her age group or even ill-treated (Dlamini 1984 *THRHR* 19). This culturally embedded sanction shows beyond any doubt the value that society places on virginity.

In ensuring virginity before marriage the traditional Zulu society observed certain safeguards against seduction. Virgins (*amatshitshi* in Zulu) were under strict surveillance by their elder counterparts (*amaqhikiza*). In addition to this, the traditional communities permitted *ukusoma* (Van Tromp *Xhosa Law of Persons A Treatise on the Legal Principles of Family Relations Among the AmaXhosa* (1948) 18) as a cultural practice aimed at safeguarding the chastity of virginity and alleviating social and moral ills associated with premarital penetration. Be that as it may, for the purposes of this note the authors retain the meaning of *ukusoma* as a traditional practice of thigh sex. As indicated above, it was tolerated as a preferred option compared to pre-marital sexual intercourse which was regarded as a taboo. However, *ukusoma* is no longer widely practised in our modern society,

notwithstanding evidence that it allowed for safer sexual experimentation (Eppreett "Unnatural Rise in South Africa: The 1907 Commission of Enquiry" 2000 34 The *International Journal of African Historical Studies* 121–140). Moreover, *ukusoma* was used successfully to curb sexually transmitted diseases because it does not involve an exchange of bodily fluids (Price "Conserving (not preserving) Culture: Avoiding the Damage to Culture of Veiled Moralism in HIV Education" 2009 *The South African Journal of HIV Medicine* 14).

In safeguarding against seduction, the custom of virginity testing (*ukuhlolwa kobuntombi*) was used. However, this custom has tended to fall into disuse owing to the influence of western morality and individualism (Dlamini 1984 *THRHR* 19). In response to the escalating statistics of people dying as a result of HIV/AIDS, the late King Goodwill Zwelithini revived the reed dance ceremony in 1984. In the latter ceremony, virgin girls dance before the King himself who may at times exercise the prerogative to choose one of the virgin girls and make her one of his wives. It is noted that the revival of virginity testing gained more prominence in the early 1990s when some concerned women such as Nomagugu Ngobese (Patience Nomagugu Ngobese decided to revive the Nomkhubulwane festival when she was an honours student in Drama at the University of Natal in 1996. The idea had come to her in a dream, and she has now left the teaching profession and become a *sangoma* (traditional healer). As the maidens who participate in the festival must be virgins, according to ancient custom, the custom of virginity testing was also revived, as part of the festival) emphasised the importance of reviving virginity testing as a weapon against the escalating number of people dying as a result of AIDS-related illnesses (See generally Bennett, Mills and Munnick "The Anomalies of Seduction: A Statutory Crime or An Obsolete, Unconstitutional Delict?" 2010 2 *TSAR* 254). Virginity testing enjoys legal protection in South Africa and is regulated in terms of section 12 of the Children's Act (34 of 2005). The above-mentioned section of the Children's Act is aimed at ameliorating harmful effects that might be caused by the practice of virginity testing and stipulates:

> "12 (4) Virginity testing of children under the age of 16 is prohibited.
> (5) Virginity testing of children older than 16 may only be performed–
> (a) if the child has given consent to the testing in the prescribed manner;
> (b) after proper counseling of the child; and
> (c) in the manner prescribed.
> (6) The results of the virginity test may not be disclosed without the consent of the child.
> (7) The body of the child who has undergone virginity testing may not be marked."

However, some scholars, such as Mubangizi, are unhappy about the current regulation of virginity testing in South Africa. They maintain that virginity testing violates the equality provision and assails a maidens' sense of dignity (Mubangizi "A South African Perspective on the Clash between Culture and Human Rights, with Particular Reference to Gender Related Cultural Practices and Traditions" 2012 13(3) *Journal of International Women's*

Studies 39; see also Mswela "Cultural Practices and HIV in South Africa" 2009 12(4) *Potchefstroom Electronic Law Journal* 171–213).

5 Religious consequences

In cultural communities which place a high value on virginity, the loss of a maiden's virginity has religious consequences. In such communities, there is a strong belief that the seduction of an unmarried woman constitutes an insult to the ancestral spirits. Because of the fear of ancestral spirits, it would not be easy for communities that still observe the delict of seduction to countenance its abolition.

Appeasement of Nomkhubulwane (Nomkhubulwane is the goddess of rain, nature and fertility. There is a belief among the Zulus that the goddess never married, and she never bore children, but she considers all Zulu virgin girls as her daughters. A festival in honour of the goddess was held annually over 200 years ago, but with the emergence of Christianity, the worship of the female aspects of the gods waned) is one of the factors that led Africans to value virginity and to do everything possible to safeguard virgin girls against seduction. Nomkhubulwane is an almost forgotten deity or goddess who was regarded as an immortal mother and the protector of Zulu girls. Nomkhubulwane does show herself to virgin girls and may be directly contacted through virgin girls only. Therefore, in ancient times, a group of Zulu virgin girls wearing *umutsha* or *izigege* (small, beaded aprons that cover the pubic area only) would depart to the mountain to request rain from Nomkhubulwane during times of drought. In doing so, they had to perform a ritual of sowing seeds in a garden that was specifically reserved for the deity as a form of appeasement (Mkhize *Umsamo African Institute* (2011) 36; Kriege "Girls, Puberty Songs and their Relation to Fertility, Health, Morality and Religion among the Zulu" 1968 *Africa* 175–198; Gluckman 1935 *Bantu Studies* 255–271). As mentioned earlier, only virgin girls can appease the Zulu goddess by performing necessary rituals and this necessitates the safeguarding of girls' virginity. Therefore, to turn a blind eye to this reality might lead to paper law because the sacral element of a practice contributes a lot to its continuation and enforcement for fear of punishment by the ancestral spirits. The following section intends to discuss the connection between the delict of seduction in customary law and the custom of *lobolo*. It is argued that as long as *lobolo* exists it would be difficult to abolish this delict in the South African legal order.

6 Link between the delict of seduction in customary law and *lobolo*

It is appropriate to begin by clarifying that the practice of the custom of *lobolo* has a strong link with the delict of seduction in customary law. Any male person who impregnates a virgin or non-virgin out of wedlock is expected to pay seduction damages that normally comprise an *inquthu* beast (mother' beast), an *imvimba* beast (beast paid for each subsequent pregnancy) and an *ingezamagceke* beast (the beast for the cleansing or purification of the homestead). Besides the *inquthu* and *ingezamagceke*

beasts, the *imvimba* beast is payable for each pregnancy thereafter. The father or guardian of the impregnated unmarried woman receives an *imvimba* beast because each child that is born out of wedlock is not only regarded as an abomination, but as diminishing the amount of *lobolo*. In light of this observation, the authors argue that the person who stands to be the legitimate beneficiary of compensation for the seduction delict is the father or guardian of the seduced woman for the prospective diminution of *lobolo*. Hence *lobolo* is still recognised and widely practised in the Southern African Development Community (SADC) in particular, and Africa, in general. This is so because it has been argued that Africans, in general, are unable to recognise a relationship as a valid marriage if there was no agreement that *lobolo* or part of it will be delivered (Dlamini *Juridical Analysis and Critical Evaluation of Ilobolo in a Changing Zulu Society* (doctoral thesis, University of Zululand) 1983; see also Dlamini "The Modern Legal Significance of Ilobolo in Zulu Society" 1984 *De Jure* 148–166). In addition to this, the manner in which the process of marriage is conducted makes it difficult to evade the payment of *lobolo* even if a person may want to. During marriage negotiations, it is usually not possible to determine whether a prospective marriage will be a civil or a customary marriage because the agreement to pay *lobolo* is a norm in negotiations of both civil and customary marriages (Dlamini 1984 *De Jure* 148–166).

7 Delict of seduction under customary law versus equality rights

For a start, it would be appropriate to analyse the equality provision which provides that every person is equal before the law and has a right to the same safeguard and benefit of the law (s 9 (equality clause) of the Constitution of the Republic of South Africa, 1996). The Constitution does not necessarily prohibit all forms of differentiation or discrimination. It prohibits only unfair discrimination. The question is whether or not the delict of seduction in customary law constitutes an infringement of the right of women to equality. It would infringe the right to equality if it unfairly discriminated against women.

In the case of *Prinsloo v Van der Linde* (1997 (3) SA 1012 (CC)) the Constitutional Court held that discrimination in South Africa means "treating people differently in a way which impairs their fundamental dignity as human beings" (*Prinsloo v Van der Linde supra* par 31). The delict of seduction in customary law constitutes a differentiation on a specified ground of discrimination (that is discrimination based on sex and gender) because the delict of seduction is only males and not from females. This is so even if they practised consensual sex. Males are the ones who incur all the blame for making unmarried females pregnant. This raises the question of whether South African equality jurisprudence is based on the liberal perception of equality that is based on sameness and similar treatment. In departing from that view, in the case of the *President of the RSA v Hugo* (1997 (6) BCLR 708 (CC)) Goldstone J indicated that "although a society which affords each human being equal treatment based on equal worth and freedom is our goal; we cannot achieve that goal by insisting on identical treatment in all circumstances before the goal is achieved" (*President of the RSA v Hugo*

supra par 729). The court held that there must be an examination of an impact of an alleged infringement of the right to equality concerning the prevailing economic, cultural, and social circumstances in the country (1996 (6) BCLR 752 (CC) par 768 ; see also *President of the RSA v Hugo supra* par 729).

As already mentioned earlier, the delict of seduction in customary law constitutes a differentiation on one of the specified grounds of discrimination. This means that discrimination has been established (*Prinsloo v Van der Linde supra* par 31). However, it is submitted that this form of discrimination is not unfair because it does not infringe the right of women to equality and dignity. The case of *Harksen v Lane* (1997 (11) BCLR 1489 (CC) par 50–51) provided some guidelines for assessing what constitutes unfair discrimination. It was held that the impact of discrimination on the complainant or the victim is a determining factor. Goldstone J held that in assessing the impact of the discrimination on the complainant, the following factors must be considered:

1) The position of the complainant in the society and whether they have suffered from past patterns of discrimination;
2) The nature of the provision or power and purpose sought to be achieved by it. An important consideration would be whether the primary purpose is to achieve a worthy and important societal goal and an attendant consequence of that was an infringement of the applicant's rights; and
3) The context to which the rights of the complainant have been impaired and whether there has been an impairment of his or her fundamental dignity (*Harksen v Lane supra* par 50–51).

It has been argued that the delict of seduction in customary law does not violate the right of women to equality and human dignity- on the contrary; it compensates a woman together with her family for the loss of dignity. This is because in a traditional society a virgin was regarded as a full maiden and that earned her the respect and dignity of other maidens in her age group and the community at large.

The importance of human dignity in the South African equality jurisprudence also appears in the words of the former Chief Justice of the Constitutional Court, Chaskalson. When delivering the third Bram Fischer Memorial Lecture, he indicated:

> "As an abstract value, common to the core values of our Constitution, dignity informs the content of all the concrete rights and plays a role in the balancing process necessary to bring different rights and values into harmony. It too, however, must find its place in the constitutional order. Nowhere is this apparent than in the application of the social and economic rights entrenched in the Constitution. These rights are rooted in respect for human dignity, for how can there be dignity in a life lived without access to housing, health care, food, water or in the case of person unable to support themselves, without appropriate assistance. In the light of our history the recognition and realization of the evolving demands of human dignity in our society – a society under transformation – is of particular importance for the type of society we have in the future." (Chaskalson "Human Dignity as a Foundational Value of Our Constitutional Order" 2000 16 *SAJHR* 193)

The above quotation supports the equality jurisprudence of the Constitutional Court which views equality as a value that does not stand independently. If equality stands alone, it is not easy to explain exactly what it is that we seek to protect or achieve (Cowen "Can 'Dignity' Guide South Africa's Equality Jurisprudence?" 2001 *SAJHR* 40). The Constitutional Court responds that we seek to protect human dignity. So far, nothing is proving that the delict of seduction in customary constitutes an affront to a woman's right to dignity.

8 Conclusion

This note concludes by arguing that it is not yet ripe for South Africa to abolish the delict of seduction in customary law because that has the possibility of creating paper law that would be largely ignored by the cultural communities practising it. First, seduction has both cultural and religious relevance. As already argued above, there is a general belief among those practising the delict of seduction that if it is not paid for a female that was impregnated out of wedlock, that would attract the anger of the ancestral spirits. There is still a widespread belief in ancestral spirits in South Africa amongst the traditionalists, westernised and semi-westernised black South Africans. Therefore, many Africans are not likely to abandon the recognition of the delict of seduction even if the legislature may attempt to abolish it.

Secondly, in a traditional societal setting, it appears that a full maiden or a female who does not get pregnant out of wedlock enjoys respect and dignity by the maidens in her age group and the community at large. It is a disgrace for a female to be impregnated out of wedlock and that reduces her chances of getting married. Therefore, if the legal system allows seduction with impunity, that would be an affront to the seduced's dignity and that of their families.

Lastly, the customary delict of seduction has a strong link with the custom of *lobolo*. In customary law each pregnancy that occurs outside marriage is punishable and a male is expected to pay some damages in the form of a beast. As long as the custom of *lobolo* exists in South Africa, it would be difficult to get rid of the delict of seduction in customary law. It is submitted in this note that the abolition would be a mere paper law.

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CASES / VONNISSE

SCA CLARIFIES THE TERM "MOTOR VEHICLE" IN ROAD ACCIDENT FUND ACT 56 OF 1996:

The Road Accident Fund v Mbele [2020] ZASCA 72

1 Introduction

The Supreme Court of Appeal (SCA) in *The Road Accident Fund v Mbele* [2020] ZASCA 72 (SCA judgment) had to decide whether a large industrial vehicle called a Reach Stacker was a motor vehicle as contemplated in section 1 of the Road Accident Fund Act 56 of 1996 (the Act). This judgment is important, not only because it paves the way for the respondent and others like the respondent to claim compensation from the Road Accident Fund in cases of injury or death, but also, because it provides clarity on the test that the court uses to determine whether a vehicle in question is a motor vehicle as contemplated in the Act. The features, purpose and intended use of the vehicle in question play a pivotal role in the determination of whether a vehicle is a motor vehicle. The SCA indicated that the Reach Stacker in question was equipped with full road-going lighting, including tail lights, indicators, brake lights and reverse lights. Furthermore, it was fitted with windscreen wipers and washers, a hooter, and a handbrake. According to the court, it was clear from its features that the Reach Sacker fitted the description of a "motor vehicle" as defined in the Act.

2 Facts

In February 2010, Mr Simphiwe Robert Makutoana (the deceased) was employed as a stevedore in the Cape Town harbour. On 20 February 2010, the deceased was a pedestrian at the Multipurpose Terminal at Cape Town Harbour and was knocked over by a large industrial vehicle known as a "Reach Stacker" while he was going about his work (*Mbele v Road Accident Fund* [2019] ZAWCHC 5; 2019 (4) SA 65 (WCC) (High Court judgment) par 1–2). The Reach Stacker was operated by one Eugene Andrea when the accident occurred. The deceased succumbed to his injuries the following day and his widow, Thandiswa Linah Mbele (the respondent) instituted an action for loss of support in the Western Cape High Court against the Road Accident Fund (RAF) for the payment of damages for the loss of support

suffered by herself personally and her three children as a result of the death of the deceased (High Court judgment par 2).

The respondent's claim was based on the provisions of section 17(1) of the Act. The respondent alleged that the deceased had died as a consequence of the conduct of Eugene Andrea who operated the Reach Stacker in a negligent manner at or near the Multipurpose Terminal in the harbour (High Court judgment par 2).

The RAF disputed liability and alleged, *inter alia*, that the Reach Stacker was not a motor vehicle as defined in the Act. The RAF asserted that the incident in which the deceased died did not fall within the parameters of the Act. The matter came before Desai J in the court *a quo* and the parties agreed that, in terms of Rule 33(4), the court would first determine whether the Reach Stacker was a vehicle as defined in the Act. All other issues were held in abeyance pending such determination (High Court judgment par 3).

Desai J found that the Reach Stacker was not a motor vehicle as defined under section 1 of the Act and ordered Ms Mbele to pay the RAF's costs in the proceedings before him (High Court judgment par 4). She was granted leave by Desai J to appeal to the full bench of the same division. A full bench (Gamble, Le Grange JJ and Sievers AJ concurring) upheld the appeal. The court concluded that the Reach Stacker with registration number CA825213, which had collided with the deceased, was a motor vehicle as defined in section 1 of the Act. The court further held that the appeal should succeed with costs and the order of the court *a quo* be set aside. The court ordered the RAF to pay Ms Mbele's costs, including the qualifying expenses of her expert witness, Mr Barry Grobbelaar (High Court judgment par 33).

3 Issue

The issue before the SCA was whether a large industrial vehicle called a Reach Stacker is a motor vehicle as contemplated in section 1 of the Act. The appellant (the RAF) contended that a Reach Stacker is not a motor vehicle, and that the respondent's claim was not competent under the Act. The precise nature of a Reach Stacker was important because it determines the competence of a claim under the Act by a person who alleges that he or she has suffered damage or loss resulting from a collision with a Reach Stacker (SCA judgment par 1).

4 SCA Judgment

Zondi JA (Maya P, Plasket and Nicholls JJA and Eksteen AJA concurring) held that the definition of a motor vehicle in the Act lays down three requirements: (a) the vehicle must be propelled by fuel, electricity or gas, and (b) must be designed for propulsion (c) on a road. Regarding the first requirement, the SCA held that it was clear from its features that the Reach Stacker was propelled by means of diesel fuel; and the evidence was that it transported containers on roads within the port premises (par 5).

Zondi JA held that the test as to whether a vehicle is designed for use on a road is objective (par 12). The test is whether a reasonable person viewing the vehicle in question would come to the conclusion that the vehicle, when

used on a road, will not create a danger to other road users (par 12). In this regard, design features such as lights, indicators, field of vision, hooter, maximum speed and engine output are all considerations that will be relevant in deciding whether or not there is compliance with the definition (par 12).

Zondi JA held that, objectively viewed (regarding the second and third requirement) and despite its imposing and gigantic size in terms of mass, width, length, height and low speed limitation, it could not be said that driving the Reach Stacker on a road used by pedestrians and other vehicles would be extraordinarily difficult and hazardous (par 25). This is on the basis that it was fitted with all the controls and features required to be fitted to a motor vehicle so as to enable it to be used with safety on a road outside the container yard and port terminal where it primarily operated (par 26). The Reach Stacker also had a number of features of a motor vehicle and was driven in a manner similar to a motor vehicle. Moreover, because of its operation on terminal premises, the Reach Stacker was required to be registered and was registered for use on public roads in terms of road traffic legislation (par 27).

The SCA accordingly held that the Reach Stacker was a motor vehicle as defined in section 1 of the Act, and the appeal was accordingly dismissed with costs, including the costs of two counsel employed (par 29).

5 Discussion

The court had to determine whether the Reach Stacker was a vehicle as defined under section 1 of the Act.

Section 1 of the Act is the definitions clause and a "motor vehicle" is there defined as:

> "any vehicle designed or adapted for propulsion or haulage on a road by means of fuel, gas or electricity, including a trailer, a caravan, an agricultural or any other implement designed or adapted to be drawn by such motor vehicle."

The definition lays down three requirements for a vehicle to qualify as a motor vehicle for purposes of the RAF Act. The vehicle (a) must be propelled by fuel, electricity or gas, and (b) must be designed for propulsion (c) on a road. Such a vehicle includes a trailer, caravan or implements designed to be drawn by a motor vehicle as defined (par 5).

5 1 The vehicle must be propelled by fuel, electricity or gas

The Reach Stacker in question was designed primarily for lifting, manoeuvring and stacking containers in the container yards of small terminals or medium-sized ports. The Reach Stacker is able to transport containers for short distances relatively quickly and stack them. It is also able to operate in tight spaces. The Reach Stacker consists of a boom capable of being extended and raised hydraulically (par 6). The vehicle has six wheels. It has rear-view mirrors and is equipped with full road-going lighting, including high-beam and low-beam headlights, tail lights, indicators,

brake lights, reverse lights and position lights. It is fitted with windscreen wipers and washers, a hooter and a handbrake (par 7). The Reach Stacker is fitted with a four-speed automatic gearbox with four forward and four reverse gears. The Reach Stacker is registered for use on public roads and has the registration number CA825213. It is fitted with a Scania six-cylinder, four-stroke diesel engine with a 12-litre capacity (par 8).

It is evident from the characteristics and features of the Reach Stacker described above that the vehicle is self-propelled. It is not pulled (or hauled) by any other vehicle. The question that then arises is whether the Reach Stacker is a "vehicle designed or adapted for propulsion … on a road" (par 9).

5 2 On a road

The term "road" is not defined in the Act. Therefore, the term "road" must be given its ordinary meaning, which is: "a line of communication, especially a specially prepared track between places for use by pedestrians, riders and vehicles" (see *Chauke v Santam Ltd* 1997 (1) SA 178 (A) 181G; *Bell v Road Accident Fund* 2007 (6) SA 48 (SCA) par 10).

The legislature has not restricted the meaning of "road" to a "public road". In *Road Accident Fund v Mbendera* 2004 (4) All SA 25 (SCA), the court held conclusively that the Act applies throughout the Republic of South Africa and not just on public roads (*RAF v Mbendera supra* par 13). To this extent, it can therefore be said that the Reach Stacker meets two of the requirements of the definition section – that is, "propulsion by diesel on a road".

5 3 The vehicle must be designed for propulsion

There are a number of cases decided at appellate level that have dealt with the definition of "motor vehicle" in the Act, all with particular reference to the size and nature of the vehicle (*Chauke v Santam Ltd supra; Mutual and Federal Insurance Co Ltd v Day* 2001 (3) SA 775 (SCA); *RAF v Mbendera supra*; *Road Accident Fund v Vogel* [2004] ZASCA 6; 2004 (5) SA 1 (SCA); *Road Accident Fund v Van den Berg* 2006 (2) SA 250 (SCA) and *Bell v RAF supra*). As the case law has developed, the focus has shifted from the nature of the vehicle in question, and its utility, to the areas of operation and whether these are to be construed as public roads, roads generally or otherwise (High Court judgment par 8).

In *Chauke v Santam Ltd* (*supra*), a case that concerned whether a forklift was a motor vehicle, the learned Judge Olivier JA conducted a detailed assessment of the relevant statutory provisions and applicable case law since 1942, the year in which compulsory third-party insurance was introduced into South Africa through legislation. The learned Judge stated that while there was some initial statutory disharmony in relation to the definition of a "motor vehicle", this was clarified under the Compulsory Motor Vehicle Insurance Act 56 of 1972, in which the definition was formulated in the same terms as one finds today in section 1 of the Act (High Court judgment par 9).

Olivier JA in *Chauke v Santam Ltd* (*supra*) considered South African and foreign case law and stated: "just because a vehicle can be used on a road by no means implies that it was 'designed for propulsion on a road'". The learned Olivier JA concluded that the test to be applied to determine whether a vehicle is a motor vehicle as defined in the Act is as follows:

> "The correct approach to the interpretation of the legislative phrase quoted above is to take it as a whole and to apply to it an objective, common sense meaning. The word 'designed' in the present context conveys the notion of the ordinary, everyday and general purpose for which the vehicle in question was conceived and constructed and how the reasonable person would see its ordinary, and not some fanciful, use on a road. If the ordinary, reasonable person would perceive that the driving of the vehicle in question on a road used by pedestrians and other vehicles would be extraordinarily difficult and hazardous unless special precautions or adaptation were effected, the vehicle would not be regarded as a 'motor vehicle' for the purposes of the Act. If so adapted such vehicle would fall within the ambit of the definition not by virtue of being intended for use on a road but because it had been adapted for such use." (*Chauke v Santam Ltd supra* par 183 A–D).

According to Zondi JA, whether a vehicle is designed for use on a road is an objective test (*Chauke v Santam Ltd supra).* The question, therefore, is whether a reasonable person viewing the vehicle in question would consider that such a vehicle when used on a road would not create a danger to other road users. Consequently, the design features of the vehicle in question (the Reach Stacker) – such as the lights, indicators, field of vision, hooter, maximum speed and engine output – are all considerations that apply in deciding whether or not there is compliance with the Act (SCA judgment par 12).

The courts have been consistent in their interpretation and application of the test established by the court in *Chauke v Santam Ltd* (*supra*), which concerned a forklift that was not used on a road. It was used in and out of the warehouse and in the yard. Outside the warehouse, it was not required to move along demarcated lines or lanes. The evidence was also that when the need arose to transport the forklift from one locality to another, this was done with a trailer. It could not be registered in terms of the statutory licensing rules unless modified. The forklift drivers were not allowed to drive out of the premises. If a forklift is driven on a public road, according to the witness, "[y]ou could knock somebody over". Olivier JA confirmed the finding of the trial court in that matter – namely that the forklift in question was not a motor vehicle as defined under the applicable Act (*Chauke v Santam Ltd supra* par 183 A–D).

In *RAF v Vogel* (*supra*), Marais JA expressed doubt about the soundness of the suggestion in *Chauke v Santam Ltd* (*supra*) that the words "designed for" have a less subjective connotation than the words "intended for". Marais JA stated:

> "Indeed, when Olivier JA ultimately formulated his own interpretation (*Chauke v Santam Ltd supra* 183B) of what the word 'designed', in the context of the Act, conveyed, he posited both a subjective and an objective test. To say that the word 'conveys the ordinary, everyday and general purpose for *which the vehicle was conceived and constructed*' [court's own emphasis] is to postulate a subjective test. To add 'and how the reasonable person would see its

> ordinary, and not some fanciful, use on a road' postulates an objective test." (*RAF v Vogel supra* par 10)

Marais JA stated that it was clear from the *Chauke* court's interpretation of section 1 of the Act that the road referred to in the definition was not just any kind of road but a road that the public at large and other vehicles are entitled to use and do use, and which may be considered to be a public road. Marais JA concluded that the mere fact that an item is capable of being driven on a public road is not *per se* sufficient to bring it within the definition (*RAF v Vogel supra* par 3–4).

Marais JA pointed out that the appropriate test is whether general use on public roads is contemplated. The learned Judge stated:

> "If, objectively regarded, the use of the item on a public road would be more than ordinarily difficult and inherently potentially hazardous to its operator and other users of the road, it cannot be said to be a motor vehicle within the meaning of the definition (*Chauke v Santam Ltd supra* 183C). (I infer that this is because it then cannot reasonably be said to have been designed for ordinary and general use on public roads." (*RAF v Vogel supra* par 6)

He went on to add:

> "That an item may have been designed primarily for a purpose not covered by the definition of motor vehicle in the Act does not necessarily disqualify it from being regarded as a motor vehicle as defined. If it was also designed to enable it to be used on public roads in the usual manner in which motor vehicles are used and if it can be so used without the attendant difficulties and hazards referred to in para [6], it would qualify as a motor vehicle as defined. In short, such latter use need not be the only or even the primary use for which it was designed." (*RAF v Vogel supra* par 8; see also *Mutual and Federal Insurance Co Ltd v Day supra* par 14)

In *Bell v RAF* (*supra*), the plaintiff (a baggage controller at Cape Town International Airport) was injured when knocked over by a "flatbed transporter" operating on the airport apron – by definition, an area with restricted access to the public. The court held that a "flatbed transporter" operating on the airside area of the airport was a motor vehicle. It was used at the airport to "transport baggage cargo from its place of origin within the confines of the terminal to next to an aircraft, on the airside of the airport" (*Bell v RAF supra* par 6). The flatbed transporter was described by Theron AJA as follows:

> "According to the manufacturer's brochure admitted in evidence, it is a self-propelled vehicle designed for the transportation of baggage and cargo. It is used at airports to transport baggage and cargo from its place of origin within the confines of the terminal to next to an aircraft on the airside of the airport (the tarmac and runway area where the planes arrive and take off). The flatbed transporter operates only within the confines of the airport." (*Bell v RAF* par 6)

In *Mutual and Federal Insurance Co Ltd v Day* (*supra*), a "Komatsu forklift" was held not to be a motor vehicle as it posed a hazard to other road users and steering it in traffic was considered extraordinarily difficult and hazardous (par 14).

In *RAF v Van den Berg* (*supra*), the court had to consider a claim under the Act for damages arising out of a collision involving a piece of heavy-duty

road building equipment called a "pneumatic tyre roller*"* (or PTR), which, like a steam-roller, is used to compact the road surface in the construction phase of road-building. Streicher JA stated his understanding of the comments made by the court in *Chauke v Santam Ltd* (*supra*). He disagreed with the interpretation by Marais JA in *RAF v Vogel* (*supra*). Streicher JA stated that Olivier JA in *Chauke v Santam Ltd* (*supra*) made it clear that he was of the view that "an objective, common sense meaning" should be applied to the phrase "designed for". According to Streicher JA, when Olivier JA immediately thereafter said that the word "designed" in the present context conveys the notion of the ordinary, everyday and general purpose for which the vehicle in question was conceived and constructed, he was, in Streicher JA's view, referring to the general purpose for which the vehicle, objectively determined, was conceived and constructed (*RAF v Van den Berg* par 7). Streicher JA went on to add that in *RAF v Van den Berg* (*supra*) it was common cause that the PTR (pneumatic tyre roller) was used to compact road surfaces. According to Streicher JA, it did not follow that it was not designed to be used for other purposes as well. If one of those other purposes for which it was designed is to travel on a road, it falls within the definition and qualifies as a motor vehicle as defined (*RAF v Van den Berg* par 8). Streicher JA concluded that in light of the fact that the PTR was in fact generally used for travelling on a public road from one construction site to another and that its design was such that it can safely be done, it was possible to conclude that it was designed for that purpose, whatever other purposes it may have been designed for (*RAF v Van den Berg* par 17).

The full bench in the High Court in the present case applied the reasoning by the court in *RAF v Van den Berg* (*supra*). The court held that it was clear that the Reach Stacker was designed and equipped to be self-propelled around the harbour along roads and over areas such as parking and storage lots adjacent thereto, in the ordinary course of its work (High Court judgment par 29). The fact that it may need to be escorted along certain of those routes does not, in the court's view, detract from the fact that this is part and parcel of its everyday work, just as an abnormal load, low-bed trailer transporting a large piece of heavy equipment such as an electrical transformer would similarly be required to be escorted along a public road owing to the fact that it exceeds the permissible width for travel without an escort (High Court judgment par 29).

The appellant raised two criticisms with regard to the reasoning of the full bench in the High Court. According to the appellant, the full bench in the High Court had erred in its application of the law by basing its conclusions on the judgment in *RAF v Van den Berg* (*supra*). The appellant argued that *RAF v Van den Berg* (*supra*) was distinguishable from *Chauke v Santam Ltd* (*supra*). The appellant argued that when Streicher JA in *RAF v Van den Berg* (*supra*) applied the reasonable person test, he did so from the point of view that the PTR was designed for road use, and that the only design limitation, being the maximum speed, did not constitute a danger of such magnitude as to "conclude that the vehicle was not designed for use on a road" (SCA judgment par 21).

The second criticism raised by the appellant against the reasoning of the full bench was that the court had incorrectly applied the test enunciated in

Chauke v Santam Ltd (*supra*) in its determination of the features, purpose and intended use of the Reach Stacker (SCA judgment par 23). The appellant argued that, in relying on *RAF v Van den Berg supra*, the full bench ignored the fact that the design features and limitations of the vehicles were distinguishable in *Chauke v Santam Ltd* (*supra*) and *RAF v Van den Berg* (*supra*) respectively. The appellant argued further that in *RAF v Van den Berg* (*supra*) the court did not consider the second leg of the *Chauke* test – that is, the "ordinary use" as perceived by a reasonable person – because the court, at the outset, had determined that the PTR had been designed to travel on roads, and safely so, from the time it was "conceived and constructed" (SCA judgment par 23). It was accordingly submitted by the appellant that, had the full bench properly applied the *Chauke* test to the vehicle under consideration, as was applied in *Mutual and Federal Insurance Co Ltd v Day* (*supra*) and *RAF v Vogel* (*supra*), it should have found that the "ordinary, everyday and general purpose" of the Reach Stacker and its "ordinary use" on the road, did not render it a "motor vehicle" in terms of the Act (SCA judgment par 23).

According to Zondi JA, the criticism of the full bench's reasoning was unjustified. Zondi JA stated that the full bench of the High Court had made it clear that

> "[o]bjectively viewed, the designers of the Reach Stacker would have contemplated that it would be required to be propelled along such roads in the harbour." (High Court judgment par 32)

It reached this conclusion after the court had analysed evidence regarding the Reach Stacker's area of operation as well as its design features. The intended utility of the Reach Stacker is wholly different to the vehicles in *Mutual and Federal Insurance Co Ltd v Day* (*supra*) (a Clark forklift) and in *RAF v Vogel* (*supra*) (a mobile Hobart ground power unit, whose primary function was to supply power to stationary aircraft). The vehicle under consideration is designed and suitable for travelling on a road within the port. Zondi JA stated that the SCA in *RAF v Mbendera* (*supra*) made it clear that the purposes of forklifts, cranes, lawnmowers and mobile power units are very different (SCA judgment par 24).

Zondi JA held that he was of the view that the Reach Stacker was a motor vehicle as defined in section 1 of the Act. This was so despite the vehicle's imposing and gigantic size in terms of mass, width and speed limitation. According to the learned Judge, objectively viewed, it could not be said that driving it on a road used by pedestrians and other vehicle would be extraordinarily difficult and hazardous. The Reach Stacker is fitted with all the controls and features that are fitted on a motor vehicle so as to enable it to be safely used on a road outside the container yard and port terminal. The Reach Stacker was used on Transnet premises and had also been adapted for use on public roads and, because of this, the Reach Stacker was duly registered for use on public roads in terms of the National Road Traffic Act (SCA judgment par 27).

6 Conclusion

The SCA was satisfied that the three requirements set out in the definition of the Act had been met. The court indicated that the Reach Stacker was designed and equipped to be self-propelled around the port along roads and over parking and storage spaces. Furthermore, the SCA confirmed that, viewed objectively, the Reach Stacker was designed to be required to be propelled along roads within the port (par 24). The SCA concluded that the Reach Stacker was fitted with all the controls and features that are required to be fitted to a motor vehicle so as to enable it to be used with safety on a road outside the container yard and port terminal where it primarily operates. As a result, the SCA concluded that because of its operation on Transnet premises, the Reach Stacker was required to be registered and was registered for use on public roads in terms of the Act (par 26–27). The primary purpose of the Act is to provide appropriate cover to all road users within the borders of South Africa, to rehabilitate persons injured, and to compensate for injuries or death (Millard and Smit "Employees, Occupational Injuries and the Road Accident Fund" 2008 3 *TSAR* 600). This must always be the main consideration by the courts when interpreting the provisions of the Act. This judgment was important because adequate compensation will now be provided and expanded to incidents involving a Reach Stacker.

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