DE JURE

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Redaksioneel

In the recent judgement of *Print Media South Africa v Minister of Home Affairs* 2012 6 SA 443 (CC) the Constitutional Court had to decide on a difficult question of the constitutionality of certain provisions in the Films and Publications Act 65 of 1996 (the Act), which were inserted by the Films and Publications Amendment Act 3 of 2009. The Act would have required publishers to submit certain publications for prior approval to the Film and Publication Board, failing which they could incur criminal liability. In a majority judgement delivered by Skweyiya J the court came to the conclusion that these provisions, requiring this type of prior submittal of material, would indeed unlawfully limit the constitutional right to freedom of expression guaranteed in section 16 of the Constitution of the Republic of South Africa, 1996, which is such an important part of democracy. The minority judgment delivered by Van der Westhuizen J, dissented on one aspect relating to the role of the Film and Publication Board, but concurred with the majority that the impugned provisions of the Act are unconstitutional.

Hierdie uitspraak is van groot belang, nie alleen vir diegene wat direk by die saak betrokke was nie, maar ook vir enige ander uitgewer en redaksie. Dit herbevestig die belang van vryheid van uitdrukking in enige demokratiese bestel. Artikel 16 waarborg nie alleen die reg op vryheid van uitdrukking nie, maar verwys ook uitdruklik na vryheid van die pers en ander media, asook akademiese vryheid en vryheid van wetenskaplike navorsing. Uit die aard van die saak is die uitspraak in *Print Media* dus ook vir akademiese vaktydskrifte van groot belang, veral omdat die doel van akademiese regspublikasies is om met 'n kritiese oog deel te neem aan 'n debat aangaande ons samelewing en die vraag of die reg voldoen aan die verwagtinge en behoeftes van daardie samelwing.

The provisions of the Act on which the Constitutional Court had to adjudicate, could also have impacted on academic law journals and in some cases have required that academic journals be submitted to the Film and Publication Board for approval prior to publication, which could have severely impacted on academic freedom. The Constitutional Court held that the exemptions which applied in respect of *bona fide* newspapers, should also apply to magazines, but the court declined to define what kind of publication would be considered to be a magazine for the purposes of the exemptions. The *Oxford Dictionary* defines "magazine" as "a periodical publication containing articles and illustrations, often on a particular subject or aimed at a particular readership". If one accepts this definition, academic journals should also be included in the scope of the judgment and therefore the same exemptions should also apply to academic journals.

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Criminal liability and policy considerations in the context of high speed pursuits

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OPSOMMING

Strafregtelike aanspreeklikheid en beleidsoorwegings ten opsigte van hoëspoed-agtervolgings

Artikels 58(3) en 60 van die Nasionale Padverkeerswet 93 van 1996 maak voorsiening daarvoor dat die bestuurders van sekere voertuie onder bepaalde omstandighede die padreëls mag verontagsaam of die spoedgrens mag oorskry. Hierdie vrystellings geld ook vir verkeersbeamptes of 'n persoon aangestel ingevolge die Wet op die Suid-Afrikaanse Polisiediens 68 van 1995 wat 'n voertuig in die uitvoering van sy of haar pligte bestuur. Hierdie artikel ondersoek die moontlike strafregtelike aanspreeklikheid van polisie- en verkeerspolisiebeamptes wat betrokke is by insidente waar ander padgebruikers in die loop van hoëspoed-agtervolgings gedood of beseer is. Die doel is om vas te stel of hulle onder hierdie omstandighede "immuniteit" geniet. 'n Oorsig oor die toepaslike padverkeerswetgewing en vrystellings word gegee. Die moontlike aanspreeklikheid van polisie- en verkeerspolisiebeamptes word ondersoek met verwysing na die algemene beginsels van strafregtelike aanspreeklikheid en die waardes wat in die Grondwet verskans is. Laastens word ondersoek ingestel na die posisie in die VSA vir die ontwerp van moontlike riglyne waar daar spesifiek gekyk word na die benadering gevolg in grondwetlike en privaatregtelike sake waar derdepartypad-gebruikers beseer of gedood is.

1 Introduction

Police vehicles engaged in high speed pursuits pose a serious danger to the lives of road users.[1] A number of concomitant consequences could arise from a high speed pursuit. A possible collision could be caused by either the pursued vehicle or the police vehicle, causing serious injury or death to innocent bystanders such as pedestrians, other motorists and their passengers, or damage to their property.[2] This is evidenced in cases

1 In fact, the patrol car has been likened to "the deadliest weapon in the police arsenal" causing more deaths than the use of firearms. See Shuman & Kennedy "Police Pursuit Policies: What is missing?" 1989 *American J of Police* 21. See also King "*Robinson v City of Detroit*: When does Liability attach in Police Pursuits?" 2001 *Thomas M Cooley LR* 409; Palmer "Hot pursuit: law enforcement practice and the public interest" 2003 *Alternative LJ* 32.

2 See Alpert & Anderson "The Most Deadly Force: Police Pursuits" 1986 *Justice Quarterly* 1 3. In another study undertaken by Alpert it was found that 34% of high speed chases result in an accident; Alpert & Dunham "Policing Hot Pursuits: The Discovery of Aleatory Elements" 1989 *J of Criminal Law and Criminology* 521 528; Picker "Police Liability in High

involving excessive speeds, reckless overtaking, and accidents.[3] The seriousness of the situation is given compelling consideration in a study of collisions, involving police vehicles, undertaken by the Proactive Research Unit (Independent Complaints Directorate) in South Africa.[4] It was found that in 2007/8, 69 incidents were reported, 12 were related to suspects being pursued, and 38 were pedestrians who were knocked down.[5] A lack of advanced driver training and over-speeding were the salient issues identified as causes of the accidents.[6] In a study conducted abroad in 2003, it was estimated that of the 35 000 police pursuits in the United States, 40% resulted in accidents, and of these about 50% resulted in injuries, and 350 fatalities ensued.[7]

This article addresses the issue of possible criminal liability of police officers engaged in high speed pursuits, where accidents involving third party road users occur as a result of such in-pursuit-driving. The first part will firstly provide an expository overview of the road traffic regulations. Secondly, the exemptions available to privileged vehicles will be discussed. Thirdly, the general principles of criminal liability will be investigated with a specific focus on the problems with proving the elements of causation and culpability, especially where charges are laid as a result of third party fatalities resulting from high speed pursuits. Constitutional aspects will also be briefly discussed in the context of the

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Speed Chases: Federal Constitution or State Tort Law; Why the Supreme Court's New Standard leaves the Burden on the State and what this might mean for Maryland" 1999 *Baltimore LR* 143; Senese and Lucadamo "To Pursue or Not to Pursue – That Is the Question: Modeling Police Vehicular Pursuits" 1996 *American J of Police* 55 55-78; Kennedy, Homant & Kennedy "A Comparative Analysis of Police Vehicle Pursuit Policies" 1992 *Justice Quarterly* 227 227-246.

3 For example, *S v Groep* 2002 1 SACR 538 (C) where the officer was found to be negligent despite the use of lights and sirens as no due regard to the safety of other road users was given (540-541); *S v Kwadira* 1982 4 SA 291 (ZS) 294D; *Clark v South Carolina Department of Public Safety* 608 SE 2d 573; *Feist v Simonson* 222 F3d 455; *Bublitz v Cottey* 327 F.3d 485; *Suwanski v Village of Lombard* 341 Ill App 3d 248; *County of Sacramento v Lewis* 523 U.S. 833 (1998) 118 S Ct 1708. In a news report six people were killed when suspected robbers in a high speed chase were involved in a collision with another vehicle and pedestrians ("High-Speed Crash Horror" *Pretoria News* 2012-07-14).

4 The Independent Complaints Directorate – Proactive Research Unit "A study of vehicle accidents involving police vehicles" (2009) available at http://www.icd.gov.za (accessed 2011-10-13) 3.

5 *Ibid.* The number of reported cases involving police accidents is on the increase. In 2004/5 the number of cases was set at 23, in 2005/6 at 30 and in 2006/7 at 44.

6 The Independent Complaints Directorate – Proactive Research Unit available at http://www.icd.gov.za (accessed 2011-10-31) iii.

7 O'Connor & Norse "Police Pursuits: A comprehensive look at the broad spectrum of Police Pursuit Liability and Law" 2006 *Mercer LR* 511. In a study conducted in Miami, 33% of pursuits resulted in accidents and 54% were related to traffic violations, and in yet another study of 286 pursuits in Illinois, 41% ended in accidents. See Charles & Auten "In Development of Pursuit Guidelines for the State of Illinois: A Case Study" 1994 *Police Stud Int Rev Police D*ev 43 45.

various conflicting interests which need to be measured against each other. Lastly, the mechanisms and policies adopted with regard to in pursuit driving in the United States will be examined in order to provide a paradigm for the possible development of future policies and guidelines.

2 A Brief Overview of the National Road Traffic Act

The National Road Traffic Act[8] (NRTA) and National Road Traffic Regulations 2000 apply to members of the South African Police Service (SAPS).[9] The NRTA makes it an offence for any person to disobey road traffic signs or to exceed the speed limit.[10] The NRTA furthermore stipulates that it is an offence for any person to drive a vehicle recklessly or negligently upon a road.[11] Section 63(2) of the NRTA provides that a person will be deemed to have driven recklessly if such person drives "in wilful and wanton disregard for the safety of persons or property".

As Burchell explains reckless driving includes "inconsiderate" or "careless" driving where there might be the creation of a "risk of harm" to others.[12] The implication of this is that should a person drive inconsiderately, such driving could be considered to be reckless in that there is a disregard for the safety of other road users.

3 The Exemptions Applicable to SAPS Members

In terms of section 58(3) and section 60 of the NRTA exemptions are provided to the drivers of fire-fighting vehicles, rescue vehicles, ambulances, traffic officers carrying out their duties, or persons engaged in civil protection, who may disregard road rules or exceed the speed

8 93 of 1996.

9 A traffic officer is defined in s 1 NRTA as being "appointed in terms of s 3A and any member of the service, and any member of a municipal police service, both as defined in s 1 of the South African Police Services Act 68 of 1996". According to the SAPS Act a "member" means: "any member of the Service referred to in s 5 (2), and including- (a) except for the purposes of any provision of this Act in respect of which the National Commissioner may otherwise prescribe, any member of the Reserve while such member is on duty in the Service; (b) any temporary member while employed in the Service; (c) any person appointed in terms of any other law to serve in the Service and in respect of whom the Minister has prescribed that he or she be deemed to be a member of the Service for the purposes of this Act; and (d) any person designated under s 29 as a member."

10 Ss 58, 59 NRTA.

11 S 63(1) NRTA; s 58(3) NRTA provides that the safety of other road users must be taken into account. See Burchell *Principles of Criminal Law* (2008) 904 for a discussion on the distinction between recklessness and negligence. Recklessness is the grosser form of negligence. See also the discussion in Hoctor *Coopers Motor Law* (2009) B11-1.

12 Burchell 904.

limit under certain circumstances. Notwithstanding, the safety of other road users must be taken into account, and the driver of the privileged vehicle must be satisfied that other road users are aware of him.[13] The vehicle must be equipped with a device which emits sound as well as a lamp which must be used when the speed limit is exceeded.[14] What is important to note is that it is clear that the exemptions embodied in s 58(3) and s 60 of the NRTA will not apply where there is a disregard to the safety of other road users. In such cases, it is therefore evident that s 63(2) of the NRTA will apply to SAPS members, who can then be charged with reckless or negligent driving.

In *S v Groep*[15] the appellant was a police officer who was convicted of negligent driving of a police vehicle, when, after responding to an emergency in Port Elizabeth, the appellant had driven through a traffic light controlled section while the traffic lights were against her, causing a collision. The lights of the vehicle were flashing and the sirens were operational. She sought to rely on the exemption in section 84(3) of the Road Traffic Act[16] which allows drivers of emergency vehicles to disregard the provisions of a road traffic sign. The defence provided in section 84(3) was subject to the fact that due regard to the safety of other traffic had to be displayed.[17] Her appeal was dismissed as it was held that she had not in fact driven with due regard for the safety of other traffic.[18]

Therefore where the police vehicle is directly involved in an accident with a third party road user and the requirements of liability are met, and no due regard to the safety of the person is taken into account as required by the definitional elements of the offence, the situation is relatively straightforward. The SAPS member may be charged and convicted of reckless or negligent driving or of other crimes.[19] However, the problem gains a nuance of complexity where it is not the police vehicle which is directly involved in a collision with another road user, but the vehicle of the alleged transgressor who is being pursued. Specific problematic aspects relating to the requirements of criminal liability that need to be proven in order to hold SAPS members who are engaged in high speed pursuits liable for crimes such as murder and culpable homicide, will now be critically discussed.

13 S 60 (a) NRTA; Hoctor B9-6 – B9-6A; *S v Groep* 2002 1 SACR 538 (E) 539B.
14 S 60 (b) NRTA; *R v Evans* 1962 3 SA 358 (SR); *S v Groep supra* 539 H-I.
15 *S v Groep supra* 538 C-D.
16 29 of 1989.
17 539B. See also *Rondalia Assurance Corporation of SA Ltd v Collins NO* 1969 4 SA 345 (T) 346H - 347G; *S v Kwadira supra* 294D.
18 539 H-I. Jones, J states that the driver of the privileged vehicle must "be satisfied that all cross-traffic is aware of his presence"; see *S v Grobler* 1992 1 SACR 184 (C) 185D where a young constable was found guilty of reckless driving.
19 See *S v Groep supra* (negligent driving); *S v Grobler supra* (reckless driving).

4 Criminal Liability of SAPS Members Where the Pursued Vehicle Collides With a Third Party

It is clear that an SAPS member, who drives recklessly or negligently while being involved in a high speed pursuit, can be charged in terms of traffic offences where they themselves are involved in a collision. But what of the situation where Miss Y is on her way home in a car with friends when they are involved in a fatal car accident, with an alleged criminal in a pursued vehicle, who skips a traffic light in an attempt to evade the police in a high speed police car chase?[20] The question that necessarily arises is whether the police officers engaged in the high speed pursuit may also be held criminally liable if their vehicle is not the one which is directly involved in a collision with such third party road user? This issue is somewhat more complex and the next part examines the possible criminal liability of SAPS members where the pursued vehicle is involved in a collision with a third party in an attempt to answer this question.

4 1 Investigating Criminal Liability in the Context of in Pursuit Driving

In high speed pursuit situations where innocent third parties are killed on the roads, the charges of murder or culpable homicide would inevitably be laid against the driver of the pursued vehicle who directly causes the accident, but the question is whether the same charges may also be successfully brought against the police officers engaged in the same high speed pursuit? In terms of the principles of general criminal liability, the requirements of legality, conduct, compliance with the definitional elements of a crime, unlawfulness and culpability must be met.[21]

4 1 1 The Crimes of Murder and Culpable Homicide and the Requirements for Criminal Liability

There must be conduct in the form of an act, or an omission.[22] The definitional requirements must be met and the issue of causation plays a

20 *S v Groep supra*; *S v Grobler supra*; *Bublitz v Cottey supra*; *County of Sacramento v Lewis* 523 US 833.

21 Snyman *Criminal law* (2008) 30 – 33.

22 Snyman 51. See *S v Trickett* 1973 3 SA 526 (T) 533, 537 and *S v Henry* 1999 1 SACR 13 (SCA) 19 on the issue of when an act will be deemed to be voluntary or not. For cases dealing with omissions and the instances where a duty to act positively arises, see *Minister of Polisie v Ewels* 1975 3 SA 590 (A) 596 and in general *Minister of Safety and Security v Hamilton* 2004 2 SA 216 (SCA), *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC), *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) which deals the duty which rests on the state to protect citizens from violent crime.

role in the case of materially-defined crimes.[23]

In materially-defined crimes the issue of causation becomes relevant in the determination of whether a prohibited result is "caused" by certain conduct.[24] Both murder and culpable homicide are materially-defined crimes. Culpable homicide is the "unlawful and negligent causing of the death of another human being and murder is the "unlawful and intentional causing of the death of another human being".[25]

23 Snyman 79-80. Crimes can be divided into two groups known as formally and materially-defined crimes. In terms of formally-defined crimes, certain types of conduct are prohibited ("conduct crimes") irrespective of the result attained through such conduct. Reckless or negligent driving are examples of formally-defined crimes. On the other hand, materially-defined crimes do not prohibit specific types of conduct but any conduct which causes a specific condition ("result crimes"). Murder and culpable homicide are examples of materially-defined crimes as the prohibited result is the unlawful "causing" of another's death.

24 Where the police vehicle is directly involved in the accident with another road user, the ordinary principles of criminal liability would normally be applied to hold him or her criminally liable. Where the police vehicle is not directly involved in the accident with another road user but an alleged criminal is and it cannot be determined with certainty who caused the forbidden result, the question is whether the doctrine of common purpose could perhaps be utilised as a possible tool to assist in finding the police members also liable? The doctrine of common purpose entails that where two or more people act together with a common purpose in mind, the act of each of them is imputed to the others which includes the causing of the result – Snyman 264; *S v Safatsa* 1988 1 SA 868 (A); *S v Mambo* 2006 2 SACR 563 (SCA). The doctrine of common purpose has been declared constitutional in the case of *Thebus* 2003 2 SACR 319 (CC). Common purpose is usually applied in the case of murder but there have been cases where common purpose has been applied to other crimes – *R v Mashotonga* 1962 2 SA 321 (R) (Public violence); *S v A* 1993 1 SACR 600(A) (assault). If applied to the above-mentioned situation, it will appear as if the doctrine of common purpose is rendered futile for the following reasons. The doctrine of common purpose is not applicable to "autographic crimes". See Snyman 169 where he states that: "Autographic crimes are crimes that can be committed only through the instrumentality of a person's own body". Traffic offences are autographic offences and are furthermore formally-defined crimes and not materially-defined crimes where the issue of causation and common purpose would play a role. In other words a finding of reckless or negligent driving in terms of the National Traffic Act 1996 will be precluded on the basis of common purpose. Furthermore according to section 1 of the Administrative Adjudication of Road Traffic Offences Act 46 of 1998 (AARTO) an infringer refers to "a person" in the singular and as there can only be one driver of a vehicle at a time, it is submitted that the doctrine of common purpose cannot be applicable to a police official and an alleged criminal who in the high speed pursuit contravene traffic regulations. The question that remains then is whether the doctrine of common purpose could still be applied to such persons if they are charged in their individual or professional capacity of other materially-defined crimes such as culpable homicide, murder or assault? If common purpose is proved, the act of the alleged criminal could be imputed to the police officer. It is highly doubtful though whether active association and consequently common purpose is present under these circumstances, as the police are pursuing the individual as a result of the latter's crime and are not consciously co-operating to commit a crime with the alleged criminal (Snyman 268).

The requirement of unlawfulness must also be complied with which means there must not be a ground of justification such as, for example, necessity, private defence[26] or official capacity present.[27] Necessity may be raised when a person is in an emergency situation and can be utilised in the protection of one's own or another's life or other legally recognised interests and may be applicable to a situation where the interests of an innocent third party are infringed.[28] There are, however, two points of importance which need to be considered in the context of necessity being applied to a high speed pursuit situation. Firstly, the necessity must be necessary and secondly, where there are two conflicting interests, such interests need to be weighed up against each other, and the interest which is of lesser importance according to the *boni mores,* may be sacrificed for the interest deemed to be of greater importance.[29] The implication is thus that if there are other means of apprehending a criminal such as the use of a helicopter or another patrol car in the vicinity towards which the criminal is heading, it is doubtful whether this defence will succeed as it could be argued that the high speed pursuit was unnecessary. Furthermore, it would have to be shown that the legal convictions of society regard the administration of justice as being of greater value then another person's life which could be fraught with difficulties. The *boni mores* of society and the Constitution[30] will

25 Snyman 451, 447.

26 Private defence can be raised where a person uses force to repel an unlawful attack which has commenced or which is imminently threatening, and can be applied to situations where another person's life or property is threatened, as long as it is necessary to protect the threatened interest, is aimed at the attacker and is reasonably proportionate to the attack. It can therefore not be raised as a defence against the innocent road user as the latter would not qualify as the attacker but rather the alleged criminal being pursued. Snyman 103; Burchell *South African Criminal Law and Procedure: General Principles of Criminal Law* (2011) 121.

27 An act is not unnecessarily unlawful if such act complies with the definitional elements of a crime. See Snyman 95*ff*. For examples of cases dealing with these various grounds of justification see *S v Fourie* 2001 2 SACR 674 (C); *S v Mostert* 2006 1 SACR 560 (N) 564; *Maimela v Makhado Municipality* 2011 2 SACR 339; *S v Goliath* 1972 3 SA 1 (A); *R v Patel* 1959 3 SA 121 (A).

28 See Snyman 115*ff* for a comprehensive discussion of the requirements of necessity. It is doubtful whether this defence may be successfully raised in a high speed pursuit situation, not only for reasons set out in the text, but also for *inter alia* the following reasons: In order to raise a defence of necessity, a person who finds him- or herself in a situation of emergency should usually be faced with a choice of either breaking the law or suffering personal harm (116), and furthermore it should be noted that where a person is legally compelled to endure the danger by virtue of their profession, necessity may not be raised (120). See in general *S v Goliath* 1972 3 SA 1 (A); *S v Kibi* 1978 4 SA 173 (E).

29 *S v Fourie supra* 678. Snyman 117. There are circumstances where the sacrificing of one person's life for another will not qualify as a ground of justification, but may operate instead as a ground excluding culpability (117, 122-123).

30 Constitution of the Republic of South Africa, 1996.

therefore play a key role in the weighing up of conflicting values in the context of a high speed pursuit situation.[31]

Official capacity may be raised as a ground of justification where a police member performs an act which he or she is entitled to perform due to the position held in the execution of his or her duties.[32] An act which may have been unlawful may however be lawful if the police member who is involved in the high speed pursuit can justify that the act was performed under official capacity, and more specifically in the execution of his duties.[33] A police officer may use reasonable force or even deadly force to overcome resistance against an alleged criminal who is resisting arrest or attempting to flee under certain circumstances.[34] However, Snyman mentions that the force must be proportional and necessary in that "X's conduct should be the *only* way in which she (X) can affect Y's arrest".[35] Furthermore and for reasons set out later, it is questionable whether a high speed pursuit is always necessary or whether limitations could be imposed on in pursuit driving.

Where the officer for instance claims that he was acting in the interests of the administration of justice, the case of *S v Fourie*[36] is relevant. In this case a regional magistrate raised a defence of official capacity as a ground of justification when he was charged with exceeding the speed limit and claimed he was acting in the interests of the administration of justice.[37] The court held that the respondent's actions were unlawful as the interest protected by road safety legislation is "the physical safety of the members of the public" and that the respondent should have considered alternate measures whereby the speed limit would not be exceeded.[38] If applied to high speed situations, this ground of justification might not succeed if the safety of the general public is not considered and if alternate measures could be adopted.

Lastly the requirement of culpability must be met.[39] Proving culpability and causation could be problematic and therefore merit closer investigation.

31 This issue is explored in more detail under par 4 2.
32 Snyman 129.
33 Snyman 120-130.
34 S 49 (2) Criminal Procedure Act 51 of 1977. See also *Ex parte Minister of Safety and Security: in re S v Walters* 2002 2 SACR 105 (CC).
35 Snyman 131.
36 2001 2 SACR 674 (C).
37 *S v Fourie supra* 679.
38 679.
39 Snyman 149*ff*. *S v Laubscher* 1988 1 SA 163 (A) 166 (criminal capacity); *S v Sigwahla* 1967 4 SA 566 (A) 570; *S v Mtshiza* 1970 3 SA 747 (A) 751 (intention and negligence); *S v Steyn* 2010 1 SACR 411 (SCA) for the distinction drawn between unlawfulness and negligence.

4 1 2 The Crimes of Murder and Culpable Homicide and Problematic Aspects Relating Specifically to Causation and Culpability

In materially-defined crimes such as murder or culpable homicide, both factual and legal causation must be proved.[40] Factual causation is proved using the *conditio sine qua non* formula or "but for" test.[41] One would need to thus establish whether, "but for" the police official's conduct in engaging in a high speed pursuit, would the road user have died or not? Legal causation can be determined according to a number of theories.[42]

(a) The individualisation theory examines whether the conduct was the "proximate" cause of the prohibited situation; or

(b) the theory of adequate causation regards an act as the legal cause of the situation if according to human experience and in the normal course of events such act has the tendency to bring about the cause of the situation; and

(c) there is an absence of a *novus actus interveniens* which is where an act breaks the chain of causation between the initial act and the result.

On a charge of culpable homicide the state must prove that the negligent driving was the proximate cause which means that if it was not for the negligent driving of the accused, the victim would not have died ("but for" test) and no *novus actus interveniens* (new intervening event) must sever the chain of causation.[43] In applying the issue of causation to situations involving a high speed pursuit, a number of aspects need to be considered. Firstly, if one thinks away the high speed pursuit initiated by the police, would the accident have occurred? In such a situation, although it is apparent that the alleged criminal caused the accident, should the police officer not also be held liable? Secondly, is the individual act of the police officer the cause of the accident, for legal causation purposes, or is the act of the alleged criminal a *novus actus interveniens* which breaks the chain of causation? Some might even contend that it would be an application of the rejected *versari in re illicita* doctrine if the police officer is held liable for all the consequences flowing from the high speed pursuit.[44] A compelling argument could also be raised that it is foreseeable that other road users may be killed in a high speed pursuit. Thirdly in a similar vein, if the theory of adequate

40 Snyman 80-81.

41 Snyman 81. See *R v Makali* 1950 1 SA 340 (N); *Minister van Polisie v Skosana* 1977 1 SA 31 (A) 34; *S v Daniels supra* 324-325, 331.

42 Snyman 84-88. See *S v Daniels supra* 314 333 for criticism of the individualisation theory and a discussion of a *novus actus interveniens* at 325, 331; *R v Loubser* 1953 (2) PH H 190 (W); *S v Tembani* 2007 1 SACR 355 (SCA); *S v Van Heerden* 2010 1 SACR 529 (ECPR); *S v Mokgethi* 1990 1 SA 32 (A).

43 Hoctor C1-6. See also *S v Jantjies* 1991 1 SACR 74 (C) 78A-B. See Snyman 87 – 88 for an explanation of a *novus actus interveniens*.

44 See Snyman 153-154 for the meaning of the *versari in re illicita* doctrine. In *S v Bernardus* 1965 3 SA 287 (A) the court rejected this doctrine.

causation is applied, it could be argued that in the normal course of events, it could be expected that should a police officer be engaged in a high speed pursuit of an alleged criminal, such act could result in a collision, causing injury or death to another road user.

Therefore in a situation where the pursued vehicle is involved in a collision with a third party, it could perhaps be argued that while the alleged criminal's act may be the proximate cause of the accident, the police chase is the adequate cause. This is in line with the reasoning in the decision of *S v Daniëls*[45] where it was in fact held by Botha JA that "om beleidsoorwegings 'n oorsaak wat nie 'proximate' is nie nogtans as basis van aanspreeklikheid kon dien".

The remaining issue which will play an important role, and possibly be problematic in finding police officers liable for murder in a high speed chase, is the element of culpability. Can it really be said that the policeman intended to kill an innocent road user?[46]

A possibility that exists is that where a police member is engaged in a high speed pursuit, he or she may be found to have intention in the form of *dolus eventualis*.[47] *Dolus eventualis* is a form of intention which may be found to be present where the "unlawful act or the causing of the

45 1983 3 SA 275 (A) 314.

46 This problem can be illustrated with reference to the US case of *Bublitz v Cottey* 327 F 3d 485. Mr Bublitz claimed damages under the Fourth Amendment that his family's rights were violated because their car was also stopped or "seized" together with the alleged criminal's vehicle as a result of spikes placed on the road by the police officers involved in the high speed pursuit, which resulted in the death of his wife and child. This case dealt with a situation of *aberratio ictus* (where the blow aimed at one person misses and someone else is struck) and transferred intent was argued. Transferred intent means that the intent to harm Mr X is transferred to Mr Y where a definition requires for example the causing of the death of "a person". If a different person such as Mr Y is killed the intent to kill is present as Mr Y is also "a person". In contrast, the concrete approach means that the intention was aimed at a specific person or "concrete figure". This argument of transferred intent was rejected as it could not be said that by intending to stop the alleged criminal's vehicle they intended to stop or seize the Bublitz's vehicle as well. This is in accordance with the position under South African law where the concrete approach is the preferred approach as a subjective test is used to prove intention. This position must be distinguished from the present case as it deals with *aberratio ictus*, but it nevertheless illustrates the problem with intention. As far as a charge of murder is concerned it may be possible that the SAPS member could be held liable if intention in the form of the requirement of *dolus eventualis* is present. If negligence is present, they could of course be charged with culpable homicide. See Snyman 197-199 for a detailed explanation and criticism of the transferred intent approach. See *S v Mtshiza* 1970 3 SA 747 (A) 751; *S v Matle* 1984 3 SA 748 (NC) 751.

47 Hoctor B11-7, B11-12. As Hoctor states: "The reason is that recklessness in its ordinary usage includes an appreciation of risk and those cases in which it was stated that 'recklessly' means no more than a gross or aggravated form of negligence were concerned only with the problem whether gross negligence could constitute recklessness" (B11-7); see also s 63(2) NRTA; *S v van Zyl* 1969 1 SA 553(A) 557 B-D.

unlawful result is not the main aim but: (a) he subjectively foresees the possibility that in striving towards his main aim, the unlawful act may be committed or the unlawful result may be caused and (b) he reconciles himself to the possibility."[48] The second leg of this definition may be equated with recklessness.[49] From an analysis of the aforementioned general principles of criminal liability, an SAPS member engaged in a high speed pursuit may therefore conceivably be found guilty of the crime of murder in an instance of reckless driving if intention in the form of *dolus eventualis* exists, that is if there is a subjective foresight that death of another road user might ensue as a result of being involved in a high speed pursuit, and if there is reckless acceptance of the risk.[50] In contrast, the test for negligence is objective and based on foreseeability which means that one will need to establish whether the reasonable person would have foreseen the possibility that someone may be killed as a result of the driving, whether the reasonable person would have taken preventative steps and whether the accused's conduct differs from that of the reasonable person.[51]

Gross negligence may be established if an "obvious or real danger to persons or property is caused".[52] As Hoctor states: "gross negligence

48 Snyman 184. One also sits with a rather peculiar situation whereby, if the alleged criminal is intoxicated and is involved in a collision as a result of the high speed pursuit, it might result in liability for a lesser charge of culpable homicide for the alleged criminal. On the other hand, the police officer engaged in the chase might be found guilty of murder should it be proven that *dolus eventualis* was present. It is a well-known fact that intoxication has an impact in terms of establishing culpability. Culpability consists of criminal capacity and either intention or negligence. The test for criminal capacity consists of: (1) The ability to appreciate the wrongfulness of his actions (cognitive function) and (2) The ability to act in accordance with such appreciation (conative function). In *S v Chretien* 1981 1 SA 1097 (A), X could not be found guilty of murder as intention was lacking. He was found guilty of culpable homicide instead. As a result of this, a crime was created in section 1 Criminal Law Amendment Act 1 of 1988. The effect of this legislation is that if the alleged criminal (X) is a drunken driver and is so intoxicated that he is unable to commit a voluntary act or lacks criminal capacity such person will be found not guilty of the crime which requires intention but he will be found guilty of contravening section 1 Criminal Law Amendment Act 1 of 1988 and be liable to the same punishment which would have been imposed as the original crime (s 1(1) & (2). See also *Chretien* 1104E, 1106E, 1106 B-C, 1105). If X is intoxicated to the extent that he lacks intention then he will be found not guilty of the crime which requires intention as is the position in *Chretien* and will also not be guilty of a contravention of s 1 Criminal Law Amendment Act 1 of 1988. (See Snyman 225-233 for discussion and criticism; Burchell 408 – 416). Such intoxicated person can be charged with culpable homicide if he has criminal capacity as the test for negligence is objective (Snyman 227). Applied to the situation of a high speed pursuit one sits with the anomaly that a police officer could possibly be charged with murder based on *dolus eventualis* or of culpable homicide if intention is not proved, and in the same situation, the drunken driver might only be convicted of culpable homicide.

49 Snyman 184.

50 Hoctor C1-9.

51 Hoctor C1-3. *S v van Zyl* 1969 1 SA 553 (A) 557B-D.

52 *S v Sweigers* 1969 1 PH H110 (A). See also Hoctor B11-12, B11-16-17.

implies conduct in which there is a marked departure from the standards by which responsible and competent drivers habitually govern themselves".[53] Some of the factors mentioned in section 63(3) which will be considered in the determination of whether section 63(1) has been contravened, is the nature and condition of the road, the amount of traffic reasonably expected on the road at that specific time and the manner and speed in which the vehicle was driven.

4 2 Constitutional Aspects Relating to Conflicting Interests Inherent in High Speed Pursuits

As pointed out earlier in the discussion dealing with the grounds of justification available, one should not lose sight of the role which the Constitution plays in the weighing up of conflicting interests which need to be considered in the context of high speed pursuits. One should bear in mind that some of the objectives of the police service include the prevention, combating and investigation of crime, the maintaining of public order and the protection and the securing of (all) the inhabitants of the Republic as well as their property.[54] A fundamental question is whose interests are greater? The Constitution provides in section 199(5) that security services (defence force, police service and intelligence services) must teach and require their members to act in accordance with the constitution and the law.[55] Section 205(3) of the Constitution further provides that the objectives of the SAPS are to "prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law." A balancing act needs to be undertaken between the two juxtaposed issues of law enforcement and the protection of society, which includes the safety of road users.[56] Such boundaries are not necessarily clear cut in determining the exact scope and limits of liability for police officers as they may be subject to variables such as pursuit policy considerations, exemptions from certain road traffic provisions, the enforcement of rules and regulations, responsibilities and immunity

53 Hoctor B11-8.

54 S 205 Constitution. Ss 9(1), 11 Constitution also provide for the right to equality before the law and the right to life.

55 For an example from case law where this has actually been required, see *S v Grobler supra* 185A where the constable who was convicted of reckless driving was required to attend a full course at the Cape Town Traffic Department's Road Safety School as part of his sentence.

56 Alpert & Anderson 1986 *Justice Q*uarterly 1 5; Senese & Lucadamo 1996 *American J of Police* 55; Carlin "High-Speed Pursuits: Police Officer and Municipal Liability for Accidents Involving the Pursued and an Innocent Third Party" 1986 *Seton Hall LR* 101 102; King 2001 *Thomas M Cooley LR* 409 410; Hoffman & Mazerolle "Police Pursuits in Queensland: research, review and reform" 2005 *Policing: An Int J of Police Strategies and Management* 530.

of such police officers and the lack of guidelines relating to aggressive pursuits.[57]

Arguably a high speed chase does not necessarily protect and secure road users and their property. In fact it has the potential to have the opposite effect. Constitutional rights may in fact be violated should there be a collision under such circumstances. While it is not by any means advocated that high speed pursuits should be eliminated, it is suggested that there should be strict monitoring of such activities and that liability should ensue where there is unreasonable dangerous driving. The next part examines the position in the United States to establish what mechanisms have been utilised with in-pursuit driving as a possible useful paradigm in the development of policy and guidelines in high speed pursuits.

5 Policy and Mechanisms Utilised in the United States for In-Pursuit Driving

The Civil Rights Act[58] has been one of the preferred mechanisms for instituting civil suits for claiming redress for police misconduct and the infringements of constitutional rights in the United States.[59] In the case of *County of Sacramento v Lewis,*[60] a high speed police chase led to a motor cycle accident and the death of Lewis. An action was brought under the Fourteenth Amendment that he was deprived of his due process to life. The Court of Appeals held that for liability to ensue in high speed police chases there must be a "reckless disregard" or "deliberate indifference" to a person's right to life.[61] It was then held that the deliberate indifference test is not applicable to high-speed police chases.[62] Negligence was also held to be insufficient in finding that there had been a constitutional violation under the Fourteenth Amendment. It was held that no constitutional rights were violated in this case and judgment was given in favour of the defendants.[63]

57 See Alpert & Anderson 1986 *Justice Quarterly* 1 5*ff* for a general discussion on the types of problems experienced; Shuman & Kennedy 1989 *American J of Police* 21.

58 42 USC 1983.

59 Alpert & Anderson 1986 *Justice Quarterly* 1. See also Shuman & Kennedy 1989 *American J of Police* 21.

60 523 US 833.

61 *Lewis v Sacramento County* 98 F 3d 434 441.

62 *County of Sacramento v Lewis supra* 853-854. In the later case of *Feist v Simonson supra* it was held that the deliberate indifference test is applicable if there was sufficient time in which to make a decision, but there was instead "a deliberate decision to continue the chase and to be indifferent to the dangers" (464).

63 *County of Sacramento v Lewis supra* 837 – 838. See further Krstulic "America's Most Shocking Standard: When Innocent Parties are Injured or Killed in High Speed Pursuits, What Police Conduct Sufficiently 'Shocks the Conscience' to Allow Recovery? *Meals v City of Memphis* 493 F.3D 720 (6th

In order to be a constitutional violation it has been accepted that there must be an act of deliberate indifference which shocks the conscience.[64] There must be actual deliberation to qualify as deliberate indifference.[65] It would therefore appear as if the US courts are hesitant to view negligence as grounds for a constitutional violation and that only intentional deliberate action which shocks the conscience will be sufficient.[66]

In the state of New Jersey, the decision in *Smith v Nieves*[67] held that police officers could be held accountable for the injuries of innocent third parties which were caused by the driver of the pursued vehicle. In this case, the police officers suspected that Nieves was intoxicated due to the manner in which he was driving. A high speed chase ensued and Nieves collided with another vehicle driven by Smith who was killed. The family instituted action based on negligence. What is noteworthy is that this decision also held that a municipality could be vicarious liable where police negligence is involved, and directly accountable, where there was a failure to properly train police officers who would be engaged in such high speed pursuits.[68] The municipality was charged with failing to train the police officers who would be engaged in high speed pursuits. It was stated in the *Smith* case that insofar as municipality liability is concerned, they would usually need to illustrate that their exercise of discretion was not "palpably unreasonable" in the allocation of resources to other projects which were more important than training officers in high speed pursuits, in circumstances where these officers are not trained and are involved in resultant accidents.[69] As far as other US decisions are concerned, the position seems to vary in that: [70]

(a) The actions of the police officials can never be the "proximate cause" of the injuries caused to an innocent third party.

(b) Total immunity can be granted.[71]

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63 Cir.2007)" 2008 *Washburn LJ* 785 787. As Krstulic states: "*Liability would only be imposed on police officers who are aware that their conduct creates unreasonable risks of harm yet do nothing to prevent that harm"* (812).

64 *Schaefer v Goch* 153 F 3d 793, 797; *County of Sacramento v Lewis supra* 852; *Rochin v California* 342 US 165 172; see also discussion and criticism by Krstulic 2008 *Washburn LJ* 785.

65 *Whitley v Albers* 475 US 312, 320 n 11; Finarelli "High-speed Police Chases and Section 1983: Why a Definitive Liability Standard May Not Matter" 1999 *Defense Counsel J* 238 238-247; see also McGue & Barker "Emergency Response and Pursuit Issues in Alabama" 1996 *American J of Police* 79.

66 See Krstulic 2008 (49) *Washburn LJ* 785 808 and *Bublitz v Cottey supra* 33.

67 197 NJ Super 609 612 – 613; *Roll v Timberman* 94 NJ Super 530.

68 197 NJ Super 609 613-614; Carlin "High-Speed Pursuits: Police Officer and Municipal Liability for Accidents Involving the Pursued and an Innocent Third Party" 1986 *Seton Hall LR* 101.

69 *Smith v Nieves supra* 197 NJ Super 614.

70 Carlin 1986 *Seton Hall LR* 101 110.

71 In the case of *Robinson v City of Detroit* 613 NW 2d 307 Henderson was a passenger of the vehicle which was being pursued due to a traffic violation and which vehicle collided with another vehicle. The Michigan court held that police officers do not owe a duty of care to passengers of the vehicle

(c) Immunity can be granted unless the officer is grossly negligent.[72]

(d) A municipality can be held liable.

To regulate the position, some departments in the United States have policies which allow pursuing police officers to abandon a chase if it poses a "grave danger" to their own lives or that of the general public.[73] One of the key advantages is that if a pursuit policy exists, the conduct of the officer could of course be measured against the policy, and he or she could then raise a defence that there was compliance with the policy and that negligence was therefore not present.[74]

In the determination of whether an officer is negligent or not, one would need to establish whether the officer acted as a reasonable person, foresaw that his conduct could cause the accident, should have taken steps to prevent such accident and his conduct differed from that of a reasonable person.[75] One should also bear in mind that it has been held that negligence is in fact sufficient to hold the state liable.[76]

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which is being pursued but that a duty is owed to innocent third parties (313, 322). This case also mentions that proximate cause is usually determined if the pursued car is forced off the road or if there is impact (322); see also *Rogers v City of Detroit* 579 NW 2d 840 where it was held that a duty of reasonable care must be exercised and the speed limit may only be exceeded if there is no creation of danger to life or property (843).

72 See Pickus "Torts – Government Immunity – Police Officer Pursuing Suspect owes Duty of Care to Third Parties injured by the Fleeing Suspect; Injured Plaintiff can Recover from State and Political Subdivisions if Officer was Negligent in Commencing and Maintaining Pursuit. *Boyer v State* 323 Md.558, 594 A.2d 121 (1991)" 1992 *Baltimore LR* 363.

73 Hackett "Substantive Traffic Offenses" 1977 *Police LQ* 31 35. For further discussion on the creation of pursuit policies see Alpert & Smith "Beyond City Limits and Into the Woods: A brief look at the Policy Impact of *City of Canton v Harris* and *Wood v Ostrander*" 1991 *Am J Police* 19 33; Charles & Auten 1994 *Police Studies Int R Police Dev* 43. Some policy guidelines suggested by Carlin to consider, include the nature of the offence; weather and traffic conditions, the area involved and whether there are pedestrians; whether the officer has driving experience; if the suspect could be apprehended in a different place or point in time; the weighing up of interests of the danger to innocent third parties against the necessity of apprehending the alleged criminal immediately and limiting the number of vehicles involved in the pursuit. See Carlin 1986 *Seton Hall LR* 101 113-114.

74 See Carlin 1986 *Seton Hall LR* 101 119.

75 See Snyman 209-210 for the test for negligence. If a pursuit policy exists, the conduct of the officer could of course be measured against the policy, and he or she could then raise a defence that there was compliance with the policy and was therefore not negligent. See Carlin 1986 *Seton Hall LR* 101 119.

76 In the case of *Carmichele v Minister of Safety and Security supra* the plaintiff claimed that the state negligently failed to protect her from being assaulted by a dangerous criminal. See also *Minister of Safety and Security v Van Duivenboden supra*.

6 Conclusion

The development of policies or more extensive legislative guidelines will provide a useful tool against which in pursuit driving can be measured. What is clear from the discourse above is that the physical safety of the public remains paramount. Limitations could be placed on in pursuit driving that could perhaps restrict in pursuit car chases so that they are not utilised for pursuits based on traffic violations or lesser crimes.[77] Alternative means of pursuing alleged criminals could perhaps be adopted as a high speed pursuit is arguably not the *only* manner in which to apprehend an alleged criminal. There are far less dangerous methods to apprehend alleged criminals *inter alia* the noting down of the licence plates, the use of video cameras on the dashboard, utilising the StarChase system which is mounted on a vehicle's grid and which shoots tracking devices onto other vehicles, the use of helicopters or other SAPS vehicles could be alerted who are patrolling the area towards which the vehicle is travelling.[78] It is therefore clear that there could be a proclivity towards holding police officials, involved in dangerous high speed pursuit situations, criminally liable where third party road users are injured or killed. As Carlin qualifies:[79]

> Police officers and municipalities should be liable when their negligent actions in high-speed pursuits contribute to the injuries or deaths of innocent persons. This is not a criticism of all high-speed pursuits, but a condemnation of current policies and practices, which allow unreasonably dangerous chases to occur. Just as a police officer should not be allowed to carry a gun unless he is properly trained and certified, a police officer should not be allowed to operate a police vehicle unless he is properly trained.

77 Krstulic 2008 *Washburn L J* 785 810 – 811.

78 *Idem* 813. Further limitations could include regulating the speed, time or distance or the going down of one ways. See Alpert & Dunham 1989 *J of Criminal Law and Criminology* 521 and Williams "Manslaughter and Dangerous Driving" 1992 (56) *J of Criminal Law* 302 302-307. While s 63 (2) NRTA already prescribes that in the case of charges of reckless or negligent driving the court may consider the speed and manner in which a vehicle is being driven and the amount of traffic on the road, it is nevertheless a section of general application and is not a specific pursuit regulation. Vicarious liability is a possibility as far as holding the state liable is concerned, but it should be borne in mind that this is only applicable in the case of statutory crimes. See Snyman 250-251.

79 Carlin 1986 *Seton Hall L R* 101 125. See also Krstulic 2008 *Washburn LJ* 785 815 who is of a similar view.

The influence of the Consumer Protection Act 68 of 2008 on the warranty against latent defects, *voetstoots* clauses and liability for damages

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OPSOMMING

Die invloed van die Wet op Verbruikersbeskerming 68 van 2008[1] op die waarborg teen verborge gerbreke, voetstootsklousules en aanspreeklikheid vir skade

Die bespreking fokus op die invloed van die Wet op Verbruikersbeskerming 68 van 2008 op die gemeenregtelike waarborg teen verborge gebreke en die gemeenregtelike remedies tot die koper se beskikking waar die waarborg nie nagekom word nie. Die verbruiker se regte op veilige, goeie gehalte goedere ingevolge artikel 55 sowel as die versweë waarborg van gehalte ingevolge artikel 56 word krities bespreek. Die voortbestaan van voetstootsklousules ingevolge die Wet word bespreek asook die posisie waar eiendomsagente betrokke is by die verkoop van onroerende eiendom en die posisie ten opsigte van tweedehandse goedere. Ten laaste word die aanspreeklikheid vir skade deur goedere veroorsaak soos beoog in artikel 61 van die Wet bespreek.

1 Introduction

The Consumer Protection Act[2] (CPA) brought about significant changes to the commercial arena. It provides eight core fundamental consumer rights to consumers and also has a significant impact on the manner in which parties do business. More particularly it impacts on contracts of sale. The focus of this discussion will be on the effect of the CPA on the common law warranty against latent defects given by the seller as well as the effect of the CPA on the exclusion of the seller's warranty in terms of a *voetstoots* clause. The consumer's right to fair value, goods quality and safety (section 55) as well as the consumer's implied warranty of quality (section 56) is discussed critically. The situation where an estate agent is involved in a sale of immovable property as well as the sale of second-hand goods are also included in the discussion. A brief overview of the claim for damages caused by goods in terms of section 61 of the CPA is given as part of the remedies available to consumers for defective goods.

1 'n Nie-amptelike vertaling van die *Consumer Protection Act 69 of 2008* is beskikbaar by http://www.vra.co.za/index.php?option = com_content&view = category&layout = blog&id = 3&Itemid = 3 (red).

2 68 of 2008. Hereinafter referred to as "the CPA".

2 Legal Position Where the CPA is Not Applicable (Common Law Position)

2 1 Introduction

The common law position has been amended by the CPA but because of the scope of its application,[3] many sale agreements will fall outside the ambit of the CPA. In such instances the common law position prior the commencement of the CPA will remain. The warranty against latent defects may be given *ex lege* (as part of the *naturalia* of the contract of sale) or contractually (as part of the *incidentalia*). The manner in which the warranty is given will also determine the remedies available to the purchaser should a latent defect be present in the thing sold (aedilitian remedies and the *actio empti*). The warranty may also be excluded by agreement and the *merx* is then sold "as is" or *voetstoots*. Much has been written about the common law warranty against latent defects, its application and development (from its inception in Roman law, its rediscovery in Roman-Dutch law and finally its application in modern South African law).[4] Of particular importance is the situation where the seller is also a merchant seller (dealer) or a manufacturer. As will be shown, the common law position has been amended where the CPA is applicable. With regard to liability the whole concept of strict liability is also introduced in terms of section 61 of the CPA and deserves discussion.

2 2 Meaning of Latent Defect

A latent defect constitutes an impairment of the usefulness of the thing sold and is not discoverable upon reasonable inspection by an ordinary person (not an expert).[5] The defect renders the *merx* unfit for the purpose for which it is bought or for which it is normally used and this must be determined objectively. In *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd*[6] a latent defect is defined as an abnormal quality or attribute which destroys or substantially impairs the utility or

3 See paragraph 3 1 of this discussion.

4 Mostert, Joubert & Viljoen *Die Koopkontrak* (1972) 185-238; Kerr *The Law of Sale and Lease* (2004) 106-136, 205-219; Zimmerman *The Law of Obligations, Roman Foundations of the Civilian Tradition* (1990) 305-337; Zimmermann & Visser *Civil Law and Common Law in South Africa* (1996) 77-383, O' Donovan *MacKeurtan's Sale of Goods in South Africa* (1972) 238-265; Kahn *Principles of the Law of Sale and Lease* (2010) 26-40; Lötz "Verborge gebreke, gevolgskade, handelaar, fabrikant en Siener van Rensburg" 2001 *De Jure* 219 219-246; Lötz "Die koopkontrak: 'n Historiese terugblik" (Deel 2) 1992 *De Jure* 143 148-155; Nagel *et al Commercial Law* 4 ed (2011) 223-224.

5 *MacKeurtans* 338-240; Nagel *et al* 223.

6 1977 3 SA 670 (A) 680. See also Mostert *et al* 185; *Dibley v Furter* 1951 4 SA 76 (C) 81; *Truman v Leonard* 1994 4 SA 371 (SE); *Van der Merwe v Meades* 1991 2 SA 1 (A); *De Vries v Wholesale Cars* 1986 3 SA 22 (O); *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd* 2002 2 SA 447 (AD) 48.

effectiveness of the *merx.* To establish the abovementioned, the court asked whether the defect was easily visible and reasonably discoverable by an ordinary purchaser and whether or not the purchaser was aware of the defect at the time of conclusion of the contract. The test is an objective one and is attached to the usefulness of the thing sold and not dependant on the specialist knowledge of the purchaser.[7] The defect must be material and substantial to qualify as a latent defect and affect the utility of the *merx.* The defect must have existed at time of conclusion of the contract and the purchaser must not have been aware of the defect at that time. The onus is on the purchaser to prove the latter. Although case law[8] have found a concealed servitude to be a latent defect it has been criticised with merit. Because a concealed servitude affects the use, enjoyment and disposal of the thing sold it is a form of eviction rather than a latent defect.[9] A patent defect will be noticed by a diligent person. The nature of the defect will determine whether it is latent or patent.[10] Although case law[11] have found a concealed servitude to be a latent defect it is has been criticised with merit.[12]

2 3 Warranty Against Latent Defects

The warranty against latent defects applies automatically by operation of law or *ex lege* and forms part of every contract of sale as a *naturalium.* Where the warranty is given *ex lege* the remedies available to the purchaser will be the aedilitian remedies (*actio quanti minoris* and the *actio redhibitoria*). It is also possible that a seller may give an express or tacit contractual warranty. This warranty may include the absence of bad or the presence of good qualities in the *merx.* Where the warranty is given contractually the remedy available to the purchaser is the *actio empti.* The purchaser is entitled to cancel the contract and claim damages in terms of the *actio empti.* In terms our common law the purchaser will always be able to use the aedilitian remedies even if a contractual remedy is present.[13] A claim for damages would however not be available to the purchaser in terms of the aedilitian actions.

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7 Nagel *et al* 223.

8 *Southern Life Assoc v Segall* 1925 OPD 11; *Overdale Estates (Pty) Ltd v Harvey Greenacre & Co Ltd* 1962 3 SA 767 (D); *Glaston House (Pty) Ltd v Inag (Pty) Ltd* 1977 2 SA 846 (A).

9 De Wet & Van Wyk *Die Suid-Afrikaanse Kontrakte en Handelsreg* (1978) 330.

10 *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1964 3 SA 561 (A) 677; *Waller v Pienaar* 2004 6 SA 303 (C) 308.

11 *Southern Life Assoc v Segall* 1925 OPD 11, *Overdale Estates (Pty) Ltd v Harvey Greenacre & Co Ltd* 1962 3 SA 767 (D), *Glaston House (Pty) Ltd v Inag (Pty) Ltd* 1977 2 SA 846 (A).

12 De Wet & Van Wyk 330.

13 Kerr 108 n 22 states that the case of *Hackett v G & G Radio & Refrigerator Corporation* 1949 3 SA 664 (A) would be authority for the proposition that during the course of history the *actio redhibitoria* absorbed some of the characteristics of the *actio empti.*

2 4 Aedilitian Remedies

The aedilitian actions or remedies will be available where there is a breach of warranty against latent defects and no express or tacit guarantee is present in terms of the contract, nor is the warranty expressly excluded. It can also be instituted where the seller fraudulently conceals the defect, guarantees the presence of good or absence of bad characteristics and were a *dictum et promissum*[14] was made.[15]

Liability under the aedilitian actions presupposes that the defect is not insignificant, that it is latent, that the purchaser is unaware of it and that the defect existed at time of conclusion of the contract.[16] Kerr declares that the motive for these actions is to assist buyers whenever they are cheated by sellers.[17] According to Kerr the extension of the aedilitian actions to cases in which the seller was unaware of the disease or defect is the main reason for the survival of the actions in modern times.[18]

The purpose of the *actio redhibitoria* is to put the parties in the position they were before conclusion of the contract by way of restitution. The onus is on the purchaser to prove that a reasonable person would not have bought the thing sold had he been aware of the latent defect. Kerr is of the opinion that the buyer does not have to prove that the disease or defect was apparent at the time of the sale; only that the thing sold had within it the beginnings of what is later seen to be a disease or defect.[19] This would seem to be consistent with the definition of a defect going to the root or nature of the particular *merx.* The test would be whether or not the latent defect is serious enough to render the *merx* unfit for the purpose for which it was bought.[20]

A *pro rata* reduction in the purchase price may be claimed with the *actio quanti minoris.* It may also be instituted more than once for every latent defect that existed at time of conclusion of the contract.[21] A purchaser may institute action for a reduction in the purchaser price either where the *dictum et promissum*[22] or the defect is not material or

14 In *Phame (Pty) Ltd v Paizes* 1973 3 SA 397 (A) a *dictum et promissum* was defined as a declaration made during negotiations with regard to the quality of the *merx* that turns out to be false. Something more than mere praising of the thing sold.
15 Nagel *et al* 226-227.
16 Zimmermann & Visser 379-380.
17 Kerr 107. "It is however, to be understood that a seller, even though he was unaware of the existence of faults, liability for which is ordained by the aediles, must nevertheless be held liable. Nor is this unfair; for the seller was in a position to inform him on these matters, while to the buyer it makes no difference whether his deception is due to the seller's ignorance or to his guile."
18 Kerr 124.
19 Kerr 115.
20 *De Vries v Wholesale Cars (Pty) Ltd* 1986 2 SA 22 (O) 24. See also *Janse van Rensburg v Grieve Trust CC* 2000 1 SA 315 (C).
21 Nagel *et al* 226-227.
22 Kerr 135.

where the purchaser chooses to retain the property.[23] The *actio quanti minoris* allows the purchaser to claim a reduction in the purchase price while retaining the thing sold. The amount of the reduction is the difference between the purchase price and the value of the defective goods.[24] In the *Sarembock v Medical Leasing Services (Pty) Ltd & another*[25] the court held that the value of the property sold in its defective state is evidenced by its market value.[26] If there is no market for the property, other methods of determining its value will be considered like subtracting the costs of repair from the purchase price paid at time of conclusion of the contract.[27] The *actio quanti minoris* may also be instituted in the alternative to the *actio redhibitoria* provided it is based on different factual averments. The same applies to the institution of the *actio quanti minoris* in the alternative to the *actio empti.*[28]

The aedilitian actions or remedies are not available to the purchaser where the latent defect did not exist at time of conclusion of the contract, the defect was patent not latent, the sale was *voetstoots*, the latent defect was corrected, there was a waiver of the warranty or prescription occurred.[29] It would further not be applicable to goods bought at an auction or a sale by order of the court.[30] Where the whole contract of sale is subject to a suspensive condition, the aedilitian actions will only be available after the condition has been fulfilled.[31]

2 5 The *Actio Empti*

The purchaser may institute the *actio empti* where there is either an express or tacit warranty given in terms of the agreement. Other grounds[32] for institution include the warranty by the seller of the presence of good or the absence of bad characteristics in the thing sold; where the seller concealed the defect[33] and where the seller is a merchant seller or manufacturer. The *actio empti* may also be excluded by way of a *voetstoots* clause in an agreement. The purchaser may cancel the agreement and claim damages in terms of the *actio empti.* The claim for damages is based on breach of contract and the breach must be sufficiently serious to warrant cancellation.[34]

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23 Kahn 37.
24 Zimmermann & Visser 380.
25 1991 1 SA 344 (A).
26 215.
27 352. See also Kerr 129-130.
28 *Le Roux v Autovend (Pty) Ltd* 1981 4 SA (N) 890-894.
29 Nagel *et al* 228.
30 Kerr 135.
31 *Idem.*
32 For a summary of grounds for institution see Nagel *et al* 224-226.
33 In *Van der Merwe v Meades* 1991 2 SA 1 (A) 3 the court held that the purchaser had to prove that the seller was aware of the existence of a latent defect at time of conclusion of the contract and concealed it *dolo malo* (with the intention to defraud). The purchaser will in these instances be entitled to use the *actio empti* even if a *voetstoots* clause is present.
34 378.

2 6 *Voetstoots* Sales and Non-disclosure

Where the *voetstoots* clause is present the *merx* is sold and delivered as is. The word *voetstoots* is derived from the custom in terms of Roman-Dutch law to "*stoten*" or push the thing sold (for example a barrel of grain) with ones foot to indicate the delivery and sale of the property without coming with complaints later.[35] Kerr describes a *voetstoots* clause as a clause which stipulates that the seller is not to be held responsible for diseases or defects and goods are sold "as it stands" or "with all its faults".[36] The effect of such a clause is that the seller does not take the risk of the presence of any diseases or defects, but is liable for misrepresentations of any kind.[37] Even if the word *voetstoots* is not expressly used in the clause which excludes liability, it is still referred to as such.[38] In general the parties exclude the aedilitian actions as well as the *actio empti* where a *voetstoots* clause is present.

Where contracting parties contradicted themselves (where for example a warranty was given by the seller that the thing sold is free from diseases but the contract also contains a *voetstoots* clause) the courts should not approach the question mechanically, but should ask which clause more reflects the true intentions of the parties.[39] In principle a *voetstoots* clause may be express or implied but the courts will not likely be persuaded that parties entered into an implied *voetstoots* clause.[40] Moreover there is a presumption against *voetstoots* sales.[41]

In the case of *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd & another*[42] the court held that where an indemnity clause excluded liability on an implied warranty of quality it may also exclude a warranty against latent defects. The court held that a warranty against latent defects was not dependent on contractual consensus but rather imposed by law and it would be inappropriate to talk about an implied warranty.[43]

The question may be asked whether a seller can "hide" behind a *voetstoots* clause where the seller concealed the latent defect. In *Orban v Stead*[44] the court confirmed the common law principle that there is no general duty on a seller to disclose. The court held that there are three situations when the silence of the seller will give rise to an action based

35 *Nederlandse spreekwoorden, spreuken en zegswijsen* (2009) 362. See also Otto "Verborge gebreke, *voetstoots*verkope, die Consumer Protection Act en die National Credit Act" 2011 *THRHR* 525 525-545, 530.
36 Kerr 150.
37 *Ibid*.
38 *Ibid*.
39 Kerr 151.
40 *Ibid* 152.
41 *Schwarzer v John Roderick's Motors (Pty) Ltd* 1940 OPD 176 per Van den Heever J.
42 2002 6 SA 256 (C).
43 276-278.
44 1978 2 SA 713 (W) 717.

on non-disclosure, namely where there is concealment, where there is a designed concealment or where there is a simple non-disclosure.[45] There is however no duty on a seller to disclose where the seller does not know that the purchaser acted under an erroneous belief.[46] Where the seller intentionally concealed the defect he will be guilty of misrepresentation and the *actio empti* may be instituted.[47] This will also be the case where the purpose of the concealment was to mislead. The seller will not be protected by a *voetstoots* clause where he had knowledge of the latent defect at time of conclusion of the contract and fraudulently concealed it. This was confirmed in the case of *Truman v Leonard*[48] where the court held that where a contractual undertaking came about through fraud it is against public policy. A seller may only rely on a *voetstoots* clause where he was honest.[49] The court held that where there was a deliberate (fraudulent) concealment of latent defects by the seller which caused damage to the purchaser, the cause of action may be based on either the aedilitian actions or on delict on the grounds of fraudulent misrepresentation.[50]

In the case of *Waller v Pienaar*[51] the aedilitian actions were instituted because of a latent defect (the foundations of the property had not been compacted properly). The court referred to the "honesty requirement" as laid down in the *ABSA Bank Ltd v Fouche*[52] case and found that the defect was within the seller's exclusive knowledge and that the seller was aware of the fact that the purchaser did not know about the defect. The court held that intentional or negligent breach of the duty to disclose will automatically attract delictual liability based on public policy. The judgment is criticised by Lötz and Nagel[53], firstly because the court found the defect to be latent. Lötz and Nagel refer to the definition of a latent defect as laid down in the *Holmdene Brickworks* case[54] and argue that the defect was patent rather than latent and that the purchaser was not discharged from his duty to do proper reasonable inspection of the property.[55] It is argued that the court ignored both the *caveat emptor* rule and the fact that there is no general duty to disclose on the seller. The latter was confirmed in the same case to which the court referred (*ABSA v Fouche*).[56] According to Lötz and Nagel the seller would only have a duty to disclose where such information does not fall within the scope of the purchaser; there is no possibility that the purchaser could obtain such knowledge on his own and the information within the exclusive

45 717-718.
46 719-720.
47 Nagel *et al* 225.
48 1994 4 SA 371 (C).
49 377.
50 378.
51 2004 6 SA 303 (C).
52 2003 1 SA 176 (SCA) 180-181.
53 "*Waller v Pienaar* 2004 6 SA 303 (K), Openbaringsplig van die Verkoper" 2005 *De Jure* 188 188–194.
54 1977 3 SA 670 (A) 680.
55 192-193.
56 193-194.

knowledge of the seller results in unequal bargaining positions.[57] In *Odendaal v Ferraris*[58] the court went as far as to determine that a failure to obtain statutory approval for a building was a latent defect and that a *voetstoots* clause would protect a seller in such a situation.

2 7 Merchant Sellers, Manufacturers and Grounds for Liability

Many judgments have been handed down regarding the issue of liability of merchant sellers and manufacturers for damages caused by latent defects.[59] Where a seller is also a merchant seller or dealer the seller will be liable for damages (including consequential damages)[60] in respect of latent defects in the *merx.* The merchant seller (dealer) had to profess in public to have been a dealer at time of conclusion of the contract and have expert knowledge and skill of the *merx* sold (the so-called Pothier rule). There have been conflicting viewpoints regarding the interpretation of the Pothier rule as well as the liability towards damages of the merchant seller.[61] Recent authority[62] is to the effect that the remedy of a purchaser against a merchant seller is a general contractual remedy based on the breach of a sale contract (the *actio empti*).

The manufacturer is liable for all damages (including consequential damages) and does not have to profess in public to have special knowledge with regard to the thing sold.[63] Negligence or ignorance of the defect is no defence against liability.[64] There are three cases of importance leading up to the promulgation of the CPA and will forthwith be discussed.

In *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd,*[65] the court referred to the manufacturer's liability as product liability and explained that a *nexus* between the manufacturer and consumer is not a requirement. A manufacturer who distributes a product commercially, which, in the course of its intended use, and as a result of the defect, caused damage to the consumer thereof, acts wrongly and thus unlawfully according to

57 194.
58 2008 4 All SA 529 (A).
59 *Erasmus v Russell's Executers* 1904 TS 365; *Marais v Commercial General Agencies Ltd* 1922 TPD 440; *Young's Provision Stores (Pty) Ltd v Van Ryneveld* 1936 CPD 87; *Lockie v Wightman and Company* 1950 1 SA 361 (SR); *Odenaal v Bethlehem Romery Bpk* 1954 3 SA 370 (OPD); *Kroonstad Westelike Ko-Operatiewe Vereniging Bpk v Botha* 1964 3 SA 561 (A); *Langeberg Voedsel Bpk v Sarculum Boerdery* 1996 2 SA 565 (A).
60 Consequential damages or loss that flows from direct damages.
61 *Langeberg Voedsel Bpk v Sarculum Boerdery* 1996 2 SA 565 (A). See also Zimmermann *Obligations* 335.
62 *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd & another* 2003 2 ALL SA 167 (SCA); *Ciba-Geigy (Pty) Ltd v Lushof Farms* 2002 2 SA 447 (SCA).
63 *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 3 SA 670 (A) 680; *Langeberg Voedsel Bpk v Sarculum Boerdery* 1996 2 SA 565 (A); *Sentrachem Bpk v Prinsloo* 1997 2 SA 1 (A).
64 *D & H Piping Systems (Pty) Ltd v Trans Hex Group Ltd* 2006 3 SA 593 (SCA)
65 2002 2 SA 447 (SCA).

the legal convictions of the community.[66] The result was that both the merchant seller and the manufacturer were held to be jointly and severally liable. (The merchant seller's liability was based on a contractual warranty whereas the manufacturer's liability was based on delict).[67] Neethling and Potgieter[68] support the court's decision to move towards product liability for manufacturers and voice their hope that courts will apply the same in future judgments.[69] Lötz *et al*[70] question whether the Pothier rule is still juridically relevant and workable in a modern trade environment. It is argued that the true implication is that the rule transforms a general question of fact into an absolute legal principle.[71] An argument is made in favour of the foreseeability test in terms of our Law of Damages to determine consequential damages rather than applying the Pothier rule.[72]

Although the cause of action in the case of *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd*[73] was based on a claim for personal injury caused by a delict, the case is of importance with regard to product liability. The court held that there could be reasons for imposing strict liability on manufacturers but that it was not appropriate for the courts to address the issue. The court commented that the legislature was in a far better position to do so and for the court to attempt to alter the law judicially would raise more questions than it would answers.[74] (Prophetic words with regard to the CPA even though the CPA only came into operation seven years after the judgment). Van Eeden argues that despite the court's remarks to the effect that the *Aquilian* liability was really satisfactory, it provided only that the onus of proof was on the manufacturer and that an extended rule of *re ipsa loquitur*[75] was brought to include product liability.[76]

In the related case of *AB Ventures Ltd v Siemens Ltd*[77] the court confirmed the liability of manufacturers based on product liability.[78] The court held that there was a legal duty on the manufacturer to make sure that any product it manufactured and supplied complied with South African and international legislation which had as its aim ensuring that the product was fit for human consumption. Because of the manufacturers negligence in this regard, the court held it to be liable for

66 470.
67 475.
68 "Die Hoogste Hof van Appel laat die deur oop vir strikte vervaardigers-aanspreeklikheid" 2002 *TSAR* 582 – 586.
69 586.
70 Lötz *et al Specific Contracts in Court* (2009) 56-57.
71 *Ibid*.
72 *Ibid*.
73 2003 2 ALL SA 167 (SCA).
74 177-178.
75 The facts speak for themselves.
76 Van Eeden *A guide to the Consumer Protection Act* (2009) 66.
77 2011 4 SA 614 (SCA).
78 26.

consequential damages.[79] The *voetstoots* clause protecting a seller who is also a manufacturer from claims based on latent defects will be of no effect where the seller delivered goods other than those contracted for.[80]

3 Influence of the CPA on the Common Law Position

3 1 Introduction

Section 2 Part H of the CPA[81] deals with the consumer's fundamental right to fair value, good quality and safety. As will be shown, the CPA has a fundamental influence on the common law warranty against latent defects. It is extremely important however to keep in mind that the CPA is not applicable to once-off transactions[82] or where the consumer is a juristic person[83] with an asset value or annual turnover, at the time of the transaction that equals or exceeds the threshold value as determined by the Minister of Trade and Industry.[84] The CPA will also not be applicable where goods and services are not supplied in the ordinary course of business. Where a home owner for example wants to sell his residential property or even vacation property and sells it once-off or not in the ordinary course of his business, the common law position discussed above will be applicable. (The same of course applies where the *merx* is movable property, for instance a motorcar). Typical examples where the CPA will apply to the sale of immovable property would be where the seller is a property developer and investors who buy, renovate and sell houses as a business. The CPA is also applicable where members of a home owners' association are involved.[85]

The position of merchant sellers and manufacturers deserves discussion. It is clear that goods and services are supplied in the ordinary course of their business. Where a merchant seller or manufacturer falls under the definition of the CPA and supplies goods and services in the ordinary course of business to a consumer (purchaser) for consideration, the CPA will apply. The CPA therefore regulates the marketing, relationships, transactions and agreements between producers,

79 27.
80 22.
81 Ss 53 – 61 CPA.
82 S 5 CPA.
83 See s 1 CPA: definition of "juristic person" includes a body corporate, trust and partnership.
84 Ito GN 294 *GG* 34181 (01-04-2011) the threshold amount is R2 million.
85 S 5(6)(a) CPA provides that the CPA will be applicable where there is a supply of any goods or services in the ordinary course of business to any of its members by a club, trade union, association, society or other collective, whether corporate or unincorporated, of persons voluntarily associated and organised for a common purpose or purposes, whether for fair value consideration or otherwise, irrespective of whether there is a charge or economic contribution demanded or expected in order to become or remain a member of that entity.

suppliers, distributors, importers, retailers, service providers and intermediaries, on the one hand, and consumers on the other.[86]

Although Chapter 2 Part H of the CPA also deals with various other consumer rights related to the right to fair value, good quality and safety (ie the consumer's right to demand quality service, warranty on repaired goods, safety monitoring and recall etcetera) the focus of this discussion will be on the definition of a defect, the consumer's rights to safe, good quality goods, the implied warranty of quality and the liability for damages caused by goods.

3 2 Definition of "Defect" in Terms of the CPA

Section 53 of the CPA provides certain definitions relevant to the right to fair value, good quality and safety (in other words applicable to the whole of Part H). "Defect" means a defect in goods, which is any material imperfection in the manufacture of goods or components that renders the goods less acceptable, including any characteristic of the goods or components that caused it to be less useful, practicable or safe, in circumstances that persons, generally, would be reasonably entitled to expect.[87] The definition in section 53 seems to be a confirmation of the definition given to "latent defects" in *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd*.[88] Perhaps the legislature should also have included the proviso in terms of section 55(5)(a) for greater certainty from the outset as part of the definition of "defect".[89]

Van Eeden[90] is of the opinion that the definitions in terms of section 53 of the CPA and more specifically the definition of "defect" would require proof of the imperfection or characteristic, as well as proof of the state of the goods without the imperfection or characteristic. Proof also needs to be given about what people would reasonably be entitled to expect in the circumstances. In their comments on the Consumer Protection Bill,[91] Loubser and Reid[92] argue that the wording of what a consumer is "entitled" to expect is in contrast with actual consumer expectations and would lead back to a standard of reasonableness.[93] It is further argued that the consumer expectations test should be done away with in favour of a general standard of reasonableness assessed with hindsight.[94] Though Van Eeden acknowledges the merit of the

86 See s 1 CPA for the appropriate definitions.
87 Ss 53(1)(a)(i), 53(1)(a)(ii) CPA.
88 1977 3 SA 670 (A).
89 In other words also including that it is irrelevant whether the defect is latent or patent.
90 245.
91 The wording of s 53 CPA remained unchanged in the final CPA.
92 "Liability for products in the Consumer Protection Bill 2006: A Comparative Critique" 2006 *Stell LR* 413 427. Take note that the writers comment on the Bill not the CPA. The arguments and interpretations are still relevant.
93 *Supra* 428.
94 *Ibid*.

argument of Loubser and Reid,[95] he argues that the wording is more closely related to language used in international instruments.[96] Van Eeden comments that the CPA has introduced a modified negligence liability regime.[97] At first glance the wording in section 53 (1)(a)(i) and (ii) "than persons generally would be reasonably entitled to expect" seems to entail the so called abortive legitimate expectations approach. It is however argued by Botha and Joubert to be excluded in the CPA.[98] One of the arguments against the legitimate expectations (consumer expectations) test is that it relates to design defects and that it is impossible for an ordinary consumer to define what he expects of such technical characteristics of a product.[99] This followed the line of criticism introduced by Loubser and Reid.[100] Jacobs, Stoop and Van Niekerk warns however that the exact extent of the test for defective goods or services will have to be determined based on the facts of each case when interpreted by our courts, taking all the relevant circumstances into account.[101]

3 3 Section 55: The Right to Safe, Good Quality Goods

Section 55 of the CPA deals with a consumer's right to safe, good quality goods and is not applicable to goods bought at an auction.[102] Section 55(2) stipulates that all goods must be reasonably suitable for the purposes for which they are generally intended, of good quality, in good working order and free of any (not only material) defects. The goods must be useable and durable for a reasonable period of time, having regard to the use to which they would normally be put and to all the surrounding circumstances of their supply.[103] The goods also need to be in compliance with any applicable standards set under the Standards Act,[104] or any other public regulation (keeping in mind that it is irrelevant whether the defect is latent or patent in terms of section 55(5) of the CPA). In addition, if a consumer has specifically informed a supplier of the particular purpose for which he or she wishes to use or acquire the goods and the supplier ordinarily offers to supply such goods, or acts

95 Van Eeden 245.
96 Such as s 3 United Kingdom Consumer Protection Act 1987.
97 Which is broadly based on the European Union Product Liability Directive 85/374/EEC and the UK Consumer Protection Act 1987.
98 "Does the Consumer Protection Act 68 of 2008 provide for strict liability? – A comparative analysis." 2011 *THRHR* 305 216.
99 *Ibid*.
100 2006 *Stell LR* 412 425.
101 Jacobs, Stoop & Van Niekerk "Fundamental consumer rights under the Consumer Protection Act 68 of 2008: A critical overview and analysis" 2010 *PER* 302 363.
102 S 55(1).
103 S 55(4) CPA which include; the manner in which the goods were marketed, packaged and displayed, the use of any trade description or mark, any instructions for, or warnings about the use of the goods, the range of things that might reasonably be anticipated to be done with the goods and the time when the goods were produced and supplied.
104 29 of 1993.

knowledgeable about the use of those goods, a consumer may forthright expect that such goods are reasonably suitable for the indicated purpose.[105] I am in agreement with Naudé that a consumer would not have to prove that the goods were unfit for the purpose at time of conclusion of the contract as is the case under the common law.[106]

In determining whether goods are in line with the requirements of sections 55(2) and 55(3) of the CPA, the use to which they would normally be put must be considered, which seems to be an indication that normal wear and tear may be taken into account. It is irrelevant whether a product failure or defect was latent or patent, or whether it could have been detected by a consumer before taking delivery of the goods.[107]

It is however a defence if a consumer was informed of the specific condition of the goods and he or she expressly accepted the goods on that basis or knowingly acted in a way compatible with accepting the goods in that condition.[108] When dealing with immovable property for example a description of the property in terms of section 55(6) would include the history (age or repairs affected) of the property and the current defects known to the seller. It could also include a general statement that the seller is not aware of any defects other than those disclosed, but that the property may or may not have additional defects (listing things like dampness or a leaky roof to the property's history and location). Lastly a statement that the property is offered for sale on the conditions described above could also be included in terms of section 55(6).

3 4 Section 56: The Implied Warranty of Quality

The above right to quality of goods has been safeguarded by an implied contractual warranty.[109] If the goods do not comply with the requirements and standards contemplated in section 55(2) of the CPA, a consumer may return the goods within six months to the supplier (without penalty) at the supplier's risk and expense. If the goods are returned, a supplier must, at the direction of the consumer, either repair or replace the defective goods, or refund the purchase price,[110] provided that if a supplier repairs any goods unsuccessfully he must, within three months of such failed repair, replace it or refund the purchase price.[111] It is uncertain whether this six month limitation has reference to the life span of the implied warranty (in which instance a *voetstoots* clause may

105 S 55(3) CPA.
106 Naudé "The Consumer's Right of Safe, Good Quality Goods and the Implied Warranty of Quality Under Sections 55 and 56 of the Consumer Protection Act 68 of 2008" 2011 *SA Merc LJ* 336 339.
107 S 55(5)(a) CPA.
108 S 55(6) CPA.
109 S 56(1) CPA.
110 S 56(2) CPA.
111 S 56(3) CPA.

become operational after six months from conclusion of an agreement but it would seem unlikely), or execution of the remedies (in which scenario the implied warranty will exist indefinitely and the normal prescription rules regarding the institution of a claim will prevail). It is submitted that the latter approach is more acceptable and more in line with the purposes of the CPA.[112]

In terms of section 56(1) any transaction or agreement is subject to an implied warranty by the supplier to the effect that any supplied goods comply with the quality requirements and standards contemplated in section 55. However, this implied warranty is not applicable if the goods fail to meet the necessary standard because they were tampered with in some way after leaving the control of the supplier,[113] or if a consumer was informed of the specific condition of the goods and he or she expressly accepted the goods on that basis or knowingly acted in a way compatible with accepting the goods in that condition.[114] Furthermore, this implied warranty is in addition to any other implied (not tacit) warranty or condition imposed by the common law, the CPA itself, any public regulation or express contractual warranty or condition.[115]

3 4 1 Remedies Available to the Consumer in Terms of Section 56

Jacobs, Stoop and Van Niekerk argue that section 56 poses many interpretational problems and is one of the most controversial sections in the CPA.[116] It also has a potential extensive impact on the common law because even where a consumer examined goods and detected a defect prior to delivery but still accepted delivery, the consumer will still be entitled to rely on the remedies in terms of section 56 as a wider interpretation gives more protection to the consumer.[117]

The consumer has the choice of a refund, replacement or repair of the goods in terms of section 56. Jacobs, Stoop and Van Niekerk are of the opinion that the implied warranty under section 56(1) is more extensive than the implied warranties under the common law.[118] The writers also argue that the use of the word "or" between producer and importer means that the warranty is either given by the producer or the importer and cannot pertain to both simultaneously.[119]

112 Jacobs, Stoop & Van Niekerk 2010 *PER* 302 373.
113 S 56(1) CPA.
114 S 55(6) CPA.
115 S 56(4) CPA.
116 Jacobs, Stoop & Van Niekerk 2010 *PER* 302 373.
117 *Ibid*.
118 The common law warranties include the warranty against latent defects, the warranty of fitness for purpose, the warranty of reasonable merchantable quality and the warranty of the skill of art.
119 Jacobs, Stoop & Van Niekerk 2010 *PER* 302 371. See also fn 479 where the writers confirm the extensive application of the CPA.

This remedy may pose a practical problem where the goods are immovable property and transfer thereof into the name of the consumer and registration of a bond over it has been affected. Though Jacobs, Stoop and Van Niekerk[120] are uncertain whether or not the implied warranty of quality would apply to immovable property, it is submitted that the warranty will always apply to goods[121] (including immovable property) supplied in the ordinary course of business to a consumer for consideration. The writers correctly state that the courts or the legislature would have to clarify the application of section 56 to immovable property.[122]

Because the consumer has a choice between replace, refund or repair it would be problematic where the consumer chooses a refund or a replacement of immovable property. Delivery of immovable property is on the date of registration thereof in the Deeds Office (also being the date when ownership is transferred).[123] South Africa follows an abstract system of ownership and it would be very time-consuming, inconvenient and costly to "deregister" the property or even refund the purchase price, especially where a bond is also registered. It is difficult to imagine a court making such an order and the costs related thereto would be excessive.

3 5 May a Consumer Institute Common Law Remedies where the CPA is Applicable?

The question may be asked whether the common law remedies (*actio quanti minoris, actio redhibitoria* and *actio empti*) are still available to the consumer where the CPA is applicable or whether these actions have been substituted by legislative remedies. The answer is contained in sections 2(10) and 56(4) of the CPA. Section 2(10) provides that no provision of the CPA may be interpreted so as to preclude a consumer from any rights afforded in terms of the common law. Section 56(4) provides that the implied warranty of quality and the right to replace, refund or repair goods are *in addition*[124] to any implied warranty or condition imposed by the common law, the CPA or other public regulation[125] and any express warranty or condition stipulated by a retailer, producer, importer, distributor as the case may be.[126] It would seem therefore that the common law remedies will still be available to the consumer (purchaser). Practically speaking there would be no sense in instituting the *actio redhibitoria* because the defect would have to be of a material nature and relying on the implied warranty would be much less cumbersome. Nothing prevents a consumer from instituting the

120 Jacobs, Stoop & Van Niekerk 2010 *PER* 302 375.
121 Definition of "goods" in s 1 CPA includes an interest in land.
122 *Ibid*.
123 Nagel *et al* 213. See also Schutte "The characteristics of an abstract system for the transfer of property in South African law as distinguished from a causal system" 2012(3) 120 120-151.
124 Own emphasis.
125 S 56(4)(a) CPA.
126 S 56(4)(b) CPA.

actio quanti minoris but it would be much simpler to rely on the implied warranty of quality in terms of section 56. Jacobs, Stoop and Van Niekerk argue that a consumer would only have the common law remedies at his disposal where the consumer discovers the defect or a breach of the implied warranty occurred six months or longer after delivery of the goods.[127] This is not a correct interpretation taking into account section 2(10) and 56(4).

It can be argued that "harm" as defined in the CPA[128] is not synonymous to damages in a contractual sense or damages that can be claimed in terms of the *actio empti*. The rationale for instituting the *actio empti* over and above section 56 would be the additional claim for damages. (If the damages claimed in terms of the *actio empti* also fall within "harm" as contemplated in section 61(5), this will be taken into account).

3 6 The Pothier Rule

Though the wording of section 55(3) of the CPA looks similar to that of the Pothier rule, it is not and should not be regarded as a confirmation thereof. Section 55(3) is not applicable to the supply of any or all goods but only relates to goods where the consumer *specifically*[129] informed the supplier of the *particular*[130] purpose for which the consumer wishes to acquire or use the goods. The supplier will therefore only be "measured" by the requirements contained in sections 55(3)(a) and (b) where goods were sold (supplied) for a particular purpose or use and where the purchaser (consumer) specifically informed the supplier thereof. The Pothier rule (as it has been applied in terms of our positive law) has two requirements, both of which must be present. The seller must be a merchant seller *and*[131] must have professed in public to have expert knowledge and skill. Section 55(3) does not call for both of these requirements to be present and clearly states that the supplier must either ordinarily offer to supply such goods[132] *or*[133] act in a manner consistent with being knowledgeable about the use of the goods. Before a consumer therefore has a right to expect that goods are reasonably suitable for the specific purpose that the consumer has indicated the following requirements need to be met: firstly the consumer must inform the supplier of the particular purpose or use and secondly the supplier must either ordinarily offer to supply such goods *or*[134] act in a manner consistent with being knowledgeable about the use of the goods.

127 Jacobs, Stoop & Van Niekerk 2010 *PER* 302 373.
128 S 61(5) CPA.
129 Own emphasis.
130 *Ibid*.
131 *Ibid*.
132 Goods for a particular purpose or use.
133 Own emphasis.
134 *Ibid*.

3 7 Did *Voetstoots* Sales Survive the CPA?

3 7 1 The Argument in Favour of Survival of the Voetstoots Clause

As mentioned earlier[135] the right of the consumer to receive goods that are suitable for the purpose for which they are generally intended, of good quality, in good working order and free of any defects[136] will not apply where the seller sells goods in a particular condition and the consumer has been expressly informed that the goods were offered in a specific condition *and*[137] has expressly agreed to accept the goods in that condition (or knowingly acted in a manner consistent with accepting the goods in that condition).[138]

It could be argued that section 55(6) allows suppliers to sell goods *voetstoots* provided that a consumer is informed of the particular condition of the goods and accepts or acts in a manner compatible with accepting the goods in that condition.[139] Morrissey and Coetzee[140] goes as far as to argue that a *voetstoots* clause (and inadvertently a *voetstoots* sale) also forms part of the surrounding circumstances of the supply of goods which must then be taken into account when determining whether the goods were useable and durable for a reasonable period of time.[141]

Sharrock argues that a supplier may contract out of the liability for the implied undertakings as to suitability and quality, but not those as to durability and compliance with statutory standards and an agreement on a "defects disclaimer" must be based on actual consensus.[142] The writer further argues that a "defects disclaimer" in terms of section 55(6) is an exemption clause and must also comply with the requirements of section 49 of the CPA.[143] Jacobs, Stoop and Van Niekerk is also of the opinion that a *voetstoots* clause will only apply where the provisions of section 55(6) are met.[144]

The CPA does not prohibit the seller from including clauses in consumer agreements that limit or exclude the seller's liability, or clauses where the purchaser's rights are waived or limited. Two sections in the

135 See par 3 3 above.
136 S 55(2)(a), (b) CPA.
137 Own emphasis.
138 S 55(6) CPA.
139 Van Eeden 225; Meiring "Warranties and what they mean" 2011 *Without Prejudice* 14 14-15; Morrissey & Coetzee "Does this mean voetsek *voetstoots*?" 2010 *Without Prejudice* 12 12-13.
140 Morrissey & Coetzee 2010 *Without Prejudice* 12 13.
141 S 55(2)(c) CPA.
142 Sharrock *Business Transaction Law* 8th ed (2011) 611.
143 *Ibid*. S 49 CPA provides *inter alia* that any notice that purports to limit the suppliers liability must be drawn to the attention of the consumer in writing and in plain language, in a conspicuous manner at the earliest possible time and the consumer must be given an adequate opportunity to comprehend such a notice.
144 Jacobs, Stoop & Van Niekerk 2010 *PER* 302 368.

CPA can be used to substantiate this argument. Section 4(4)(b) provides that any contract or document prepared or drafted by the supplier must be interpreted to the benefit of the consumer so that any restriction, limitation, exclusion or deprivation of a consumer's legal rights set out in such a document is limited to the extent that a reasonable person would ordinarily contemplate or expect.[145] Section 48(1)(c) provides that a supplier must not request a consumer to waive any of his rights, or waive the liability of a supplier, or assume any obligations *on terms*[146] that are unfair, unreasonable or unjust. The CPA therefore does not prohibit a *voetstoots* clause but simply provides that such a clause may not be on terms that are unfair, unreasonable or unjust and must be interpreted against the seller taking into account what a reasonable person would expect.

3 7 2 The Argument Against Survival of the Voetstoots Clause (Preferred Viewpoint)

Although there are provisions in the CPA that seem to support the survival of the *voetstoots* clause in terms of consumer sales,[147] there are also provisions that would support the exclusion thereof where the CPA is applicable. As mentioned earlier,[148] section 2(10) provides that no provision of the CPA (such as section 55(6)) may be interpreted so as to preclude a right that a consumer would have in terms of the common law (like the warrant against latent defects). Section 56(4) provides that the implied warranty of quality is in addition to any other warranty in terms of the common law. A fortification of the exclusion of *voetstoots* sales is also contained in section 51(1)(b)(i) which provides that a supplier must not make a transaction or agreement subject to any term or condition if it directly or indirectly purports to waive or deprive a consumer of a right in terms of the CPA. Such a transaction, agreement, provision, term or condition will be void.[149] Selling goods in terms of a general "umbrella" *voetstoots* clause is a clear waiver and deprivation of a consumer's right. Whether a *voetstoots* clause is worded as a condition or term or if it boils down to a waiver or deprivation, it will still be invalid. The fact that goods should not only be free of any defects but also useable and durable and comply with any publically regulated standard makes the reliance on a *voetstoots* clause even more difficult.

It seems therefore, that section 55(6) can be construed to have more than one meaning. Section 4(3) provides that in such an instance, the Tribunal[150] or court must prefer the meaning that best promotes the spirit and purposes of the CPA, and will best improve the realisation and

145 Having regard to the content of the document, the manner and form in which the document was prepared and presented; and the circumstances of the transaction or agreement in terms of s 4(4)(b)(i)-(iii) CPA.
146 Own emphasis.
147 See par 3 7 2 above.
148 See par 3 5.
149 S 51(3) CPA.
150 National Consumer Tribunal.

enjoyment of consumer rights. Section 4(4)(a) further provides that any ambiguity that allows for more than one reasonable interpretation of a part of a document is resolved to the benefit of the consumer.

The argument by Morrissey and Coetzee[151] that a *voetstoots* sale may be included as part of the surrounding circumstances, is not thought through. A latent defect will, by its mere definition in terms of the CPA, render the goods less useful, practicable or safe in the circumstances. A *voetstoots* clause will fail the test of section 55(2)(c) not only because of the nature of a latent defect but also because of the common law definition of a latent defect and moreover because the CPA specifically provides that it is irrelevant whether the defect is latent or patent.[152]

The approach more in line with the purposes of the CPA argues that the effect of section 55(3) is that the use of a *voetstoots* clause is excluded and suppliers will generally have a duty to disclose all attributes of the *merx*. In this regard, the rule *caveat emptor*[153] seems to be abolished and there seems to be a general duty to disclose in terms of the CPA (even in the absence of fraud) and the test (to determine whether or not the seller has a duty to disclose) laid down in *Waller v Pienaar*[154] will no longer apply.

Nothing prevents a supplier (seller) however from selling goods in a particular condition.[155] (The sale of second-hand goods and goods sold by pawn brokers are good examples). This would mean describing the quality of the goods as well as the defects in detail and also proving that the consumer was informed and accepted goods on that basis. A clause that for example determines that the seller does not guarantee that the roof does not leak will no longer be enforceable.[156] A clause that however informs the consumer (purchaser) of a roof that leaks from time to time during heavy rains, will probably withstand the test of section 55(6).[157] The "loophole" for shrewd suppliers will most likely be to argue that even though the consumer did not expressly accept the goods in that particular condition they did act in a way compatible with accepting the goods.[158] The supplier still needs to keep a sales record of the transaction which must also include proof that the consumer was in fact informed and accepted the goods or acted in a way compatible with accepting the goods.[159]

151 See par 3 7 1 above.
152 S 55(5) CPA.
153 Let the purchaser beware.
154 2004 6 SA 308 (C).
155 S 55(6) CPA.
156 Also referred to as an "umbrella" or "all inclusive *voetstoots* clause".
157 Otto 2011 *THRHR* 525 539.
158 S 55(6)(b) CPA.
159 S 26 CPA.

3 8 Where an Estate Agent is Involved

Estate agents are regarded as intermediaries in terms of the CPA. An intermediary is defined as "a person who in the ordinary course of business and for remuneration or gain, engages in the business of representing another person with respect to the actual or potential supply of any goods or services; accepting possession of any goods or other property from a person for the purpose of offering the property for sale; or offering to sell to a consumer any goods or property that belongs to a third person".[160] Section 1 of the CPA further provides that a person whose activities as an intermediary are regulated in terms of any other national legislation is not included in the definition of an intermediary. Though it can be argued that estate agents are already regulated by the Estate Agency Affairs Act[161] and the Estate Agents Board, estate agents are (and should be) included under the definition of intermediaries in terms of the CPA.

It is clear from the definition of "intermediary" that the CPA will apply to the Mandate Agreement between the seller and the estate agent. The CPA will also apply to the marketing practices[162] of the estate agent and should amount to responsible marketing.[163] The agent should be honest in his dealings[164] and have regard to the consumer's fundamental rights of equality[165] and privacy[166] in terms of the CPA. Finally section 27 of the CPA and regulation 9 of the regulations made under the CPA require full disclosure of certain prescribed information.

The question that arises is whether the involvement of an estate agent in the sale of property where the sale is not in the seller's ordinary course of business, will make any difference to the transaction and the inclusion of a *voetstoots* clause. The involvement of an estate agent in the sale of immovable property gives rise to two transactions namely the mandate agreement, and the resultant sale agreement. The service the agent provides to its client (the seller) is the marketing and advertising of the property in the hope of procuring a willing and able purchaser for the property for which the estate agent will then receive consideration.[167] The estate agent receives no consideration for his services in advertising and marketing the property unless those services are successful and result in the production of a purchaser for the property. The agreement that results from the estate agents marketing efforts does not fall under the scope of the CPA. The contractual relationship that is the result of the

160 Definition s 1 CPA.
161 112 of 1976.
162 Part E: The right to Fair and Responsible Marketing.
163 *Ibid*.
164 Part F: Right to Fair and Honest Dealing.
165 Part A: Right of Equality in Consumer Market.
166 Part B: Right to Privacy.
167 Snyman "National – News: The Consumer Protection Act 68 of 2008" http://bit.ly/MneOp9 (visited 2012-03-08). See also Nagel *et al* 170-172.

agent's marketing efforts is a once-off transaction between the seller and the purchaser.[168]

Because of uncertainty with regards to whether or not property may still be sold *voetstoots* where an estate agent is involved in a once-off transaction, estate agents have begun to have sellers forfeit their right to sell their property *voetstoots* and are attaching a copy of a so-called "Property Condition Report" as a disclosure of the defects in the property and including a warranty by the seller to the effect that these are in fact the only defects in the property.[169] This approach by estate agents is unfair towards their clients.

There may however be reasons for estate agents taking such extreme causes of action. Section 4(1)(1) of the Estate Agents Code of Conduct provides that an estate agent who has a mandate to sell a property shall convey to a purchaser all facts concerning the property that are (or should reasonably in the circumstances be) within the agent's personal knowledge and which could be material to a prospective purchaser. Regulation 9(2)(*m*) of the regulations made under the CPA also provides that an estate agent must disclose any other[170] information which may be relevant and which the estate agent may reasonably be expected to be aware of.

I am in agreement with Davey that the estate agent should not take over the responsibility of disclosing any patent or latent defects which are known to the seller.[171] In order to avoid any arguments between the seller and the estate agent after conclusion of a sale with regards to what was and was not disclosed by the seller to the estate agent, it is suggested that it be recorded in the Mandate Agreement that the seller accepts and acknowledges that it is his (the seller's) duty and responsibility to disclose any latent defects that he is aware of as well as any issue regarding the property which may be of relevance to the purchaser.[172] It is further suggested that the purchaser should initial (and thereby acknowledge) a *voetstoots* clause in the agreement of sale.[173] Having thus clearly advised the seller of his obligations and the purchaser of his acknowledgements with regards to the condition of the property, the estate agent will have taken adequate care of both parties ensuring that they know exactly what their rights and obligations are.[174]

168 Snyman *op cit*.
169 Davey IEASA National – News "Section 4.1.1 of the Code of Conduct + CPA = Questions about the appropriateness of the '*Voetstoots*' clause = the 'birth' of the 'Property Condition Report' = CONFUSION" http://bit.ly/RnMbV5 (visited 2012-03-08).
170 Aside from the other prescribed information in terms of Reg 9 as to the intermediaries' identification, relevant personal and professional details, consideration or commission.
171 Davey *op cit*.
172 *Ibid*.
173 *Ibid*.
174 *Ibid*.

Davey correctly warns that if an estate agent is going to take on the responsibility of disclosing defects, he will need to be adequately informed of the nature and extent of the defect.[175] Having taken on the responsibility of disclosing a defect from the seller and having passed on the information regarding the defect to the purchaser, arguments will arise regarding representations made as to the severity or extent of the defect at a later date.[176]

3 9 Second-hand Goods

Naudé correctly states that the interpretation and application of section 55(6) should be less stringent on suppliers of, for example, second-hand cars by the mere nature of the goods sold.[177] The writer does however advise dealers of immovable property or second-hand goods to recommend that the purchaser consult an independent expert to inspect the goods before the purchaser buys.[178] Naudé states that sellers would not easily get away with exclusion clauses (in terms of section 55(6)) in the case of new products.[179] It is clear that the wording of section 55 has a serious impact on sellers of second-hand goods, including pawn- or consignment stores. Though I agree with Morrissey and Coetzee[180] that a second-hand car dealer is seldom in a position to point out to a customer the exact wear and tear of every car part as well as every other defect, I do not agree that such dealerships will still be able to sell second-hand cars (or pre-owned cars as the popular term seems to be) *voetstoots*. Their argument is that a *voetstoots* sale could form part of the surrounding circumstances of the supply of the goods which must then be taken into account when determining whether the car was usable and durable for a reasonable period of time.[181] A *voetstoots* clause is a clear exclusion of the supplier's liability. It would therefore seem problematic to sell second-hand goods "as is" and a *voetstoots* clause would not be enforceable as part of the surrounding circumstances in the sale of the goods.

One possible exception to the above position deserves discussion. Second-hand car dealers also sell cars on behalf of owners rather than buying and reselling it themselves. The second-hand car dealership only acts as an agent in the selling of the car. In other words the dealership only provides space for the second-hand car on its selling floor and it is sold on behalf of the seller. Usually the seller would be a natural person and the sale would be a once-off transaction in which case the CPA will not apply. Even if the seller mandates the dealership to sell second-hand cars in the ordinary course of the seller's business, the dealership would still only act as an agent and section 55 may not be enforced against the

175 *Ibid*.
176 *Ibid*.
177 Naudé 2011 *SA Merc LJ* 336 344.
178 *Ibid*.
179 *Ibid*.
180 Morrissey & Coetzee 2010 *Without Prejudice* 12.
181 *Ibid* 13.

dealership. It would seem that the position with regards to estate agents as discussed above[182] would apply. It is clear that these kinds of arrangements between a sellers and second-hand car dealers would regrettably increase in an attempt to avoid the repercussions of the CPA.

One might think that the Second-Hand Goods Act[183] sheds some light on the issue but the main purpose and aim of the Act is to prevent the trade in stolen goods and promote ethics in the trade of second-hand goods and therefore of no help.[184]

It is a realistic fact that the standard or condition of second-hand (or pawned goods) will differ from the condition of newly manufactured goods. It is worth mentioning that courts and the Tribunal[185] will probably refer to the interpretations that crystallised through case law. Kerr refers to *Addison v Harris*[186] where De Wet AJ states that the condition of new motorcars cannot be compared with the condition of second-hand cars. To say that a second-hand car is in good condition means that the car is in good condition *for what it is*[187] being an old, used car adding that temporary breakdowns are to be expected and might even be caused by ordinary wear and tear.[188] There can be no doubt that the fact that goods are supplied or sold second-hand will be part of the surrounding circumstances as described in section 55. (The situation however, still does not allow for a *voetstoots* sale). There can also be no doubt that the majority of second-hand car dealerships are exploiting consumers in this regard (using the condition of the car and wear and tear of the car as an excuse). I am of the opinion that the relevant industries might be more cautious when dealing with vulnerable consumers[189] as provided for in terms of the CPA. Authority given to the Minister of Trade and Industry to publish Industry Codes will also help to clarify the situation surrounding the sale of second-hand cars.[190]

182 See par 3 8 above.
183 6 of 2009.
184 Preamble of the Second-Hand Goods Act 6 of 2009.
185 National Consumer Tribunal.
186 1945 NPD 444.
187 Italics in original.
188 Kerr 118-119.
189 S 3(1)(b) CPA: low-income, illiterate and vulnerable consumers to be protected in particular by the CPA.
190 S 82 CPA.

3 10 Liability for Damage Caused by Goods in Terms of Section 61 of the CPA

3 10 1 Introduction

Section 61 of the CPA has been discussed by many authors.[191] The scope of section 61 within the current discussion is however limited to a broad general overview of the section, where suppliers are liable and damages claimable in terms of section 61 in light of the damage that may be caused by defective goods.

Section 61 provides that a producer, importer, distributor or retailer of any goods is liable for any harm, without proof of negligence on his part, caused as a consequence of supplying any unsafe goods, or a product failure of whatever nature, or inadequate instructions or warnings provided to a person (not only consumers) for the use of such goods.[192] For the purpose of section 61, a "supplier" of services who, in conjunction with the performance of those services, applies, supplies, installs or provides access to any goods, must be regarded as a "supplier" of those goods to a consumer.[193]

Harm for which a person may be held liable includes the death, illness or injury to any natural person, any loss or physical damage to any property and any economic loss that results from the aforementioned.[194] If more than one person is liable, their liability is joint and several.[195] Liability in terms of this section cannot be circumvented by a contractual indemnity or waiver.[196] It is a defence if the above envisaged harm is wholly attributable to the compliance with any public regulation, or if the alleged unsafe product characteristic, failure, defect or hazard did not exist in the goods at the time it was supplied, or arose from complying with the instructions provided to the supplier, or if it is unreasonable to expect the distributor or retailer to have discovered the shortcomings in the goods, taking into account that person's role in marketing the goods to consumers.[197]

The requirements established in terms of our positive law[198] for the liability of merchant sellers (liability on a contractual basis) and manufacturers (liability on a delictual basis) for latent defects remain

191 Van Eeden 242-249; Melville 98-100; Sharrock 279-299; Loubser & Reid 2006 *Stell LR* 413 413–452; Botha & Joubert 2011 *THRHR* 305 305-318; Otto 2011 *THRHR* 525 525-554; Jacobs, Stoop & Van Niekerk 2010 *PER* 302 363.
192 S 61(1) CPA.
193 S 61(2) CPA.
194 S 61(5) CPA.
195 S 61(3) CPA.
196 S 51 CPA.
197 S 61(4)(a)-(c) CPA.
198 *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd* 2002 2 SA 447 (SCA) 451, 456.

intact where the CPA is not applicable. Ironically in cases such as *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd,*[199] and *Consol Ltd T/A Consol Glass v Twee Jonge Gezellen (Pty) Ltd*[200] the CPA would not have made any difference to the requirements for liability. The reason being that the purchasers (consumers) in these cases were juristic persons with an annual turnover or asset value which exceeds the threshold value determined by the Minister of Trade and Industry[201] and therefore not protected by the CPA. It is submitted that the reason for the exclusion coincides with the preamble and purposes of the CPA being the protection of the vulnerable consumer.

Van Eeden is correct in stating that, in terms of our common law relating to product liability, it consisted of the law of delict subject to contractual variation.[202] The purchaser (in terms of our common law) has to prove that the manufacturer acted wrongfully and negligently, that the harm was caused by the manufacturer's negligence, and that there existed a causal *nexus* between the conduct of the manufacturer and the harm suffered by the consumer.[203] Whereas the common law requires proof of negligence, section 61 of the CPA states that a manufacturer will be liable for harm irrespective of whether such harm was caused as a result of negligence. Proving negligence on the part of a manufacturer has been notoriously difficult, very costly and time consuming. Litigation in this regard is likely to culminate in a judgment only after many years of litigation.[204] The average consumer usually does not have the financial means or time to go through with such a lengthy litigation process whereas the manufacturer (in contrast) can better afford litigation and will probably delay the outcome of such proceedings as long as possible.[205] Van Eeden argues that the *Aquilian* or fault liability system is not too far removed from the no-fault liability or strict liability system.[206] Van Eeden correctly agrees with Loubser and Reid that prior to the introduction of some form of strict liability in terms of the CPA, South African law was lagging behind developments internationally.[207] Van Eeden refers to the liability in terms of section 61 as "some form of 'modified strict liability'"[208] which is broadly based on the European model.[209] The model which the CPA introduces is however not an unqualified strict liability model but rather a model that attempts to strike a balance between fault and no-fault liability.[210]

199 2002 2 SA 447 (SCA) 451, 456.
200 2002 6 SA 256 (C).
201 S 5(2)(b) CPA read with s 6 CPA. The annual threshold is R2 million.
202 Van Eeden 64-65.
203 *Ibid*.
204 Van Eeden 64.
205 *Ibid*.
206 Van Eeden 66.
207 Van Eeden 242; Loubser & Reid 2006 *Stell LR* 413.
208 *Ibid*.
209 Van Eeden 246.
210 *Ibid*.

According to Van Eeden,[211] fault-based and strict liability-based product liability regimes may impact in different ways on production costs and management culture relating to product safety and product defect issues. Product safety law has fallen largely into the domain of statutory intervention, establishing regulation to be administered by means of bureaucratic and criminal measures, whereas arrangement on distribution, scope and probability of liability has been the domain of the common law.[212] Though Van Eeden confirms the need for product liability (whether it be fault-based or strict liability-based) it is argued that the social and economic cost of an inappropriate product liability regime can be substantial.[213] I am in agreement with Van Eeden and Loubser and Reid[214] that the product liability regime under the common law fault rule is not strict enough and as a result both suppliers and manufacturers often escape their apposite share of the liability.[215] On the other hand Van Eeden cautions that producer liability should also not be so strict that it encourages excessive amounts of care and pushes prices up to an unreachable level for consumers.[216]

It is interesting to note that Loubser and Reid[217] are of the opinion that section 61 sets contractual rights between suppliers and consumers rather than create general rules for strict liability outside the contractual relationship. The opinion of Jacobs, Stoop and Van Niekerk[218] is supported, in which it is argued that section 61 does not require a contractual *nexus* between the supplier and the consumer. Section 61(3) confirms this argument by providing that suppliers are jointly and severally liable.

3 10 2 Sellers Liable in terms of Section 61 of the CPA

Melville[219] states that section 61 of the CPA does not require fault on the part of a manufacturer or *supplier*[220] to be proven in a claim for damages. (It does, however seem that wrongfulness is still a requirement). It also extends the type of damages claimable beyond what is normally the case in common law.[221] It would seem that Melville regards a supplier to be included in the application of section 61 and also that the harm described in the section includes damages claimable under the common law. Van Eeden[222] is of the opinion that the CPA holds importers, distributors and *suppliers*[223] of goods strictly liable for

211 Van Eeden 239.
212 *Ibid*.
213 Van Eeden 240.
214 Van Eeden 240.
215 Loubser & Reid 2006 *Stell LR* 413 416.
216 Van Eeden 241.
217 Loubser & Reid 2006 *Stell LR* 413 424.
218 Jacobs, Stoop & Van Niekerk 2010 *PER* 302 370.
219 Melville 26.
220 Own emphasis.
221 Melville 26.
222 Van Eeden 64.
223 Own emphasis.

damages[224] arising from the supply of any unsafe goods, product failure, defect or hazard. His interpretation of section 61(2)[225] is that a supplier of services must also be regarded as a supplier of those goods to the consumer. It would seem therefore that both Van Eeden and Melville regard suppliers of goods to be included rather than excluded from liability in terms of section 61. Van Eeden further substantiates this argument by referring to the provisions of section 51 and declares that a supplier would not be able to circumvent the modified product liability regime introduced by the CPA.[226]

Jacobs, Stoop and Van Niekerk[227] follow a different approach. It is argued that section 61(2) attempts to impose strict product liability on, for example, an electrician who installs a defective geyser or a surgeon who implants a defective pacemaker or a defective prosthetic. The purpose of section 61(2) according to these writers, is to protect customers against defective and inferior goods installed by suppliers, as they often do not have a choice from amongst goods and have to rely on the supplier's choices. However, it is argued that an amendment by the legislature may be necessary owing to the omission of the word "supplier" in section 61(1). Such an amendment is also needed where strict product liability as contemplated in section 61(2) may be imposed on service providers. It appears however that section 61(1) does not extend to service providers because it only refers to producers, importers, distributors and retailers. Alternatively, the legislature may have intended that service providers should be treated as retailers under section 61(1).[228] It is also noteworthy that the word supplier was included in the Consumer Protection Bill under the provisions pertaining to strict liability[229] but omitted in the final Act. In their comparative analysis Loubser and Reid refer to other jurisdictions all of which include suppliers of goods and services as liable in terms of strict liability.[230]

Botha and Joubert[231] refer to the defences against product liability contained in section 61(4) and more specifically section 61(4)(c).[232] It is argued that the wording of section 61(4)(c) provides some form of strict liability for manufacturers and importers but not for distributors and

224 Van Eeden 64, 246, 249.

225 Section 51 CPA deals with prohibited transactions and agreements and provides that a supplier may not waive or deprive a consumer of rights in terms of the CPA (s 51(1)(b)(i)), avoid a supplier's obligation or duty in terms of the CPA (s 51(1)(b)(ii)) or set aside or override the effect of any provision of the CPA (s 51(b)(iii)).

226 Van Eeden 249.

227 Jacobs, Stoop & Van Niekerk 2010 *PER* 302 384.

228 *Ibid*.

229 S 71(1) CPA.

230 Loubser & Reid 2006 *Stell LR* 413 431-433.

231 Botha & Joubert 2011 *THRHR* 305 318. See also Jacobs, Stoop & Van Niekerk 2010 *PER* 302 388-389; Loubser & Reid 2006 *Stell LR* 413 451-452.

232 S 61(4)(c) CPA provides that liability of a particular product does not arise if it is unreasonable to expect the distributor or retailer to have discovered the unsafe product characteristic, failure, defect or hazard, having regard to that person's role in marketing the goods to consumers.

retailers.[233] It is argued that distributors and retailers can escape liability by proving that "it is unreasonable to expect the distributor or retailer to have discovered the unsafe product characteristic, failure, defect or hazard, having regard to that person's role in marketing goods to consumers".[234] They argue that the liability of distributors and retailers are still fault-based where reference is made to reasonableness.[235] What makes matters even more difficult is that a distributor of products is only liable under common law where there was a legal duty on him to inspect a product and he failed to do so. It is agreed that this defeats the purposes of the CPA and will result in ineffective redress for the most vulnerable consumers.[236]

Before retailers and distributors escape strict liability based on reasonableness, their marketing of the goods will also be taken into account.[237] Should "market" be used as verb it would include "to promote or supply any goods or services" and also include the sale of goods.[238] Cases such as *Kroonstad Westelike Boere-Ko-operatiewe Vereniging Bpk v Botha*[239] and *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd*[240] will be relevant when dealing with a supplier who is also an expert seller (merchant seller). Such a seller plays an important role in the marketing and supply of goods which have to be considered in terms of section 61(4)(c). It is submitted that a retailer or distributor will be strictly liable where he played a significant role in the marketing of the goods (which by the mere definition of retailer and distributor in terms of the CPA they seem to do) but it would seem that they would still need to comply with the Pothier rule and therefore "publicly professed to have attributes of skill and expert knowledge in relation to the kind of goods sold".[241] The advantage of this is of course that consequential damages over and above the harm caused in terms of section 61(5) will be claimable.

3 10 3 Damages, Loss and Harm

Van Eeden describes consequential damages as damages caused by the defective product, as distinguished from the cost of the defect itself.[242] Van Eeden makes a distinction between the provisions relating to the supply of unsafe goods in terms of section 61(1)(a) and (b) of the CPA. In

233 Otto 2011 *THRHR* 525 542: The application of the interpretation rule *unius inclusio est alterius exclusio* will have the effect that the producer and importer (in contrast with the distributor and retailer) will still be liable even if it would be unreasonable to expect them to have discovered the defect.
234 S 61(4)(c) CPA.
235 Botha & Joubert 2011 *THRHR* 305 318.
236 *Ibid.*
237 S 61(4)(c) cpa.
238 See definition of "supply" s 1 CPA.
239 1964 3 SA 561 (A).
240 2002 2 SA 447 (SCA).
241 *Kroonstad Westelike Boere-Ko-operatiewe Vereniging Bpk v Botha* 1964 3 SA 561 (A) 571.
242 Van Eeden 238.

the former[243] the activity of supplying unsafe goods is required whereas supply is not a requirement for liability in the latter.[244] Loubser and Reid[245] state that the wording of the statute offers the owner significant additional opportunity for compensation over and above the contractual remedies already available when the product does not conform to the contract description.[246] Section 61 also opens up an important and potentially vast area of liability.[247]

Otto[248] argues correctly that if we were to look at the literal meaning given by the legislature in section 61(5), not all economic consequential damages will be claimable under section 61(5)(d) but only to the extent that such damage was caused by "harm" as set out in subsection (a) to (c).[249] In *Minister van Landbou-Tegniese Dienste v Scholtz*[250] damages were claimed on the grounds of a breach of a tacit warranty. A bull was bought for breeding purposes but was later found to be impotent. The plaintiff succeeded in a claim for damages which included the potential loss for the calves he would have had based on the tacit warranty.[251] Otto argues that although the damages claimed in the *Scholtz*-case was not based on a claim for consequential damages, it would theoretically be claimable on that basis. Unfortunately this type of consequential damage would not be claimable under the CPA unless "loss of any property" in section 61(5)(c) was given a far reaching meaning.[252] The purchaser may still be able to claim this type of consequential damage in terms of the breach of a tacit warranty even if liability under a tacit warranty is not mentioned in section 61(5).[253] It is submitted that Otto's argument that this is a gross oversight on the part of the legislature and should have been included, is correct.[254] One could also argue that even where the CPA is applicable consequential damages would be claimable because the goods where unfit for the purpose for which it was bought and (or) not of reasonable merchantable quality. Naudé points out that if "harm" as defined in terms of section 61(5) was caused by goods, there will be a claim for damages regardless of a section 55(6) clause.[255]

243 S 61(1)(a) CPA.
244 Van Eeden 246.
245 Loubser & Reid 2006 *Stell LR* 413 439-440.
246 *Ibid*.
247 Loubser & Reid 2006 *Stell LR* 413 440: for example a small business might suffer loss of profits or loss of business reputation when a defective product was used in its undertaking and has caused an accident.
248 Otto 2011 *THRHR* 525 541.
249 In other words damages caused due to the death, injury or illness of any natural person or the loss or damage due to the movable or immovable property.
250 1971 3 SA 188 (A).
251 Otto 2011 *THRHR* 525 541-542.
252 *Ibid*.
253 *Ibid*.
254 Otto 2011 *THRHR* 525 541.
255 Naudé 2011 *SA Merc LJ* 336 345.

4 Conclusion

It is clear that the CPA is not the Armageddon many thought it to be. Many agreements of sale will fall outside the ambit of the CPA and in such situations the common law position will remain in tact. It would also seem that consumers who are purchasers will always have the common law remedies at their disposal over and above the legislative remedies provided for in terms of the CPA. This being said however, possible oversights, interpretational as well as practical problems need to be corrected to provide more certainty. Consumers and suppliers need to understand the practical application of Part H of the CPA. Not only the implied warranty of quality (section 55), the remedies available to the consumer in terms of section 56 but also the implications of section 55(6) on the supplier's liability. Though the liability of the supplier may be reduced in terms of section 55(6), a *voetstoots* clause will no longer hold water where the CPA is applicable. Industry Codes with regard to second-hand goods are of paramount importance. Such Codes might even provide a life-line to prevent these types of industries from going under. The liability in terms of section 61 has its own interpretational problems and the true effect of the section remains to be seen. It is hoped that the interpretation thereof by the courts will shed some light on the questions raised. Some of the uncertainties seem to be solved by applying the following rule of thumb: What is most beneficial to the consumer?

Reflections on finality in arbitration*

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OPSOMMING

Ondersoek na die Finaliteit van 'n Arbitrasiebevel

Hierdie artikel oorweeg die *Telcordia-* en *Lufuno*-sake vanuit die oogpunt van die finaliteit van 'n arbitrasiebevel. Die vraag wat te berde kom, is wanneer 'n arbitrasiebevel finaliteit bereik waar 'n saak voor meer as een forum (arbitrasie en staatlike howe), in meer as een jurisdiksie gevoer word. Die prosedurele meganismes wat Amerikaanse en Suid-Afrikaanse howe tydens die *Telcordia*-dispuut toegepas het asook hul onderskeie benaderings tot *res iudicata*, het 'n groot mate van ooreenstemming getoon.

Dit is te verstane dat die afhandeling van 'n internasionale proses vertraag kan word deur bepaalde grondwetlike regte wat die spoed van die afhandeling van 'n saak kan beïnvloed. Nietemin, indien die reg op 'n billike verhoor op enige stadium in die verrigtinge gepleit mag word, word 'n geleentheid geskep vir die dispuut om vryelik te eskaleer gedurende die verhoor. Dit kan die hofproses oopstel vir misbruik en die afhandeling van die geskil vertraag. Die minderheidsbeslissing in *Lufuno* skenk 'n mate van oorweging aan die potensiële negatiewe implikasies hiervan. Die finaliteit van die geskilbeslegtingsproses kan na behore bestuur word aan die hand van 'n wyer interpretasie van *res iudicata* in internasionale dispute en 'n meer geredelike ondersoek hierna, op die hof se inisiatief.

Die moontlikheid dat die *Telcordia*-dispuut verder bespoedig sou kon word, word ondersoek met verwysing na die New York Konvensie op die Erkenning en Afdwing van Arbitrasiebevele van 1958, en aan die hand van aanbevelings wat deur ander gerekende internasionale liggame uitgereik is.

1 Introduction

It is untenable to differentiate sharply between national and international law in the context of international commercial arbitration. Transactions that are international in some respect may fall squarely within the ambit of a domestic body of law; and the quality of the domestic implementation of the international obligations imposed by the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the NYC),[1] may largely determine whether a

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1 Concluded 1958-06-10; 9 USCA §§ 201–8. Compare Art 8 UNCITRAL Model Law on International Commercial Arbitration, first adopted on 1985-06-21

state court or an arbitral tribunal will be competent to rule on the matter. Domestic law has a role in respect of the right of access to justice, due process of law, and "who decides" (the doctrine and practice of *compétence-compétence*). Domestically, the policy goal may be to centralise judicial review of arbitral proceedings; respect arbitral autonomy; or to optimise the relationship between arbitral tribunals and courts. In the case of a regional grouping such as the European Union, the policy goal is different, because the Internal Market must be safeguarded.[2] The international context and consequences of parallel or sequential proceedings in multiple fora remain relevant to both the domestic and regional contexts, on account of considerations of procedural efficiency and public policy.

Under Article II(3) of the NYC, state courts (in the states party) are obliged to refer the parties who entered into an arbitration agreement, to arbitration and to decline jurisdiction, if the court is seized with a claim on the same subject matter, unless the arbitration agreement is null and void, inoperative or incapable of being performed. The international duty imposed by the NYC is intended to prevent parties to an arbitration agreement from resorting to dilatory tactics in the form of parallel court proceedings. The wording of the provision leaves little room for judicial discretion so as to avoid an unjustified exercise of jurisdiction, except perhaps for an anti-suit injunction in support of an arbitration agreement. Article II(3) of the NYC effectively removes the weighing of factors associated with a referral. Court proceedings brought in violation of the arbitration agreement are to be stayed in order to "allow arbitration to be determinative",[3] provided only that basic prerequisites are met. The prerequisites are that parties agreed to arbitrate, the arbitration agreement falls under the NYC, a dispute exists, the dispute is arguably within the scope of the arbitration agreement, the arbitration agreement is in writing, and the subject-matter is capable of being settled by arbitration. While the interpretation of the text of the NYC is subject to different positions adopted by national courts,[4] and Article II(3) fails to take account of jurisdictions that never "refer" parties to arbitration, the construction of the arbitration agreement is intended to be harmonised among the Contracting States. To this end, the terms "null and void, inoperable or incapable of being performed" are to be construed

(*UN doc A/40/17 Annex I*), and amended in 2006 by UNCITRAL's report on the work of its 39th session (*UN Doc A/61/17 Annex I*).

2 Roodt "Border Skirmishes Between Courts and Arbitral Tribunals in the EU: Finality in Conflicts of Competence" 2011 *Yearbook of Priv Int L* 91.

3 Van den Berg *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (1981) 128–31; Huang "Which Treaties Reign Supreme? The Dormant Supremacy Clause Effect of Implemented Non-Self-Executing Treaties" 2011 *Fordham LR* 2211 2236.

4 Interpretation can be directed by (a) Arts 31 and 32 of the 1969 Vienna Convention on the Law of Treaties; or (b) constitutional or other sources of domestic law; or (c) domestic and foreign precedent; or (d) the *travaux préparatoires* of the NYC.

narrowly.[5] By and large, a uniform standard in Article II(3) is what safeguards many of the time and cost benefits of arbitration and underpins the parties' trust in this form of dispute resolution.[6]

When an arbitral award holder approaches a court abroad to enforce an award that had been set aside or vacated by the court of the seat, questions may arise as to conflicts of competence and of legal standards and substantive rules. Several procedural devices are potentially relevant to the allocation and exercise of adjudicatory competence by courts and arbitral tribunals. These devices are intended for managing proceedings in front of courts in different jurisdictions. *Forum non conveniens* informs the decision of a court to decline or stay jurisdiction and *lis pendens* considers where the suit was first filed when there is the possibility of parallel adjudication in multiple forums. In England and Scotland a *forum non conveniens* analysis is the result of an inherent jurisdiction of a court to stay its own proceedings, in the interests of justice.[7] The discretionary nature of *forum non conveniens* and its susceptibility to judicial review do not support finality in parallel adjudication in multiple forums. From a national perspective, an international obligation may be met through a discretionary test, but such a test falls short of the standard associated with the duty in international law terms.[8] This device introduces unpredictability in conflicts between courts.[9] Ultimately, judicial discretion to stay proceedings could obscure the limits on the regulatory authority of states imposed by international law. In conflicts that involve arbitral tribunals, it potentially becomes even less helpful. Which forum should make the discretionary determination: the state court or the arbitral tribunal? An application to stay proceedings in more complex conflicts involving arbitration on the basis of a court's international duty is quite unlike a discretionary power to stay proceedings where two judicial proceedings are related.[10]

Civil Law courts are averse to judicial discretion in conflicts between

5 Van den Berg "The New York Convention of 1958: An Overview" 2008 *International Council for Commercial Arbitration* available at http://www.arbitration-icca.org/media/0/12125884227980/ new_york_convention_of_1958_overview.pdf (accessed 2012-02-13).

6 Roodt 130*ff*.

7 Eg *Reichhold Norway ASA v Goldman Sachs International* [2000] 1 WLR 173 (CA).

8 Mills *The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law* (2009) 238.

9 International Commercial Arbitration Committee ILA "Interim Report on Res Judicata and Arbitration, Seventy-First Conference, Berlin, 2004" par 4.6.

10 Eg *JP Morgan Chase Bank NA v Berliner Verkehrsbetriebe (BVG) Anstalt des öffentlichen Recht* [2009] 2 All ER (Comm) 1167.

courts.[11] They manage parallel litigation in an international setting by the application of *lis pendens*. The credentials and legitimacy of this mechanism has come under increasing attack when used to deal with parallel adjudication that involves courts and arbitral tribunals.[12] These adjudicatory bodies are neither equal nor comparable in status. Some jurisdictions have had the foresight to adapt and condition the *lis pendens* rule for more complex contexts,[13] placing more emphasis on finality as an aspect of public policy.[14]

Estoppel by *res judicata* is a potentially significant factor in the recognition or enforcement of conflicting rulings. Without a clear-cut rule for finality, there is the risk of relitigation of claims or issues. Delays and increased cost then become unavoidable. One of the crucial questions is whether the notions of *res judicata* in different Common Law and hybrid jurisdictions are sufficiently similar to constructively manage parallel adjudication in multiple forums, or whether these approaches are so far apart that they require coordination by conflict rules. The International Law Association (ILA) raised the issue in its *Interim Report on* Res Judicata *and Arbitration* of 2004.[15]

However, relevant recent South African cases do not attach much significance to finality and the point at which it is supposed to be reached. *Telkom v Boswood*[16] represented the very first instance of review and setting aside of an arbitral award by a seat court in South Africa. The parties had excluded in the Integrated Agreement the right to rely on estoppel.[17] The arbitral award had been issued by Boswood who sat as a sole arbitrator. Contestation followed in courts in the US and South Africa in *Telcordia Technologies Inc v Telkom SA Ltd*.[18] The proceedings ended relatively quickly, within four years after legal action

11 Courts in the EU Member States owe this duty to the legal systems and judicial institutions of other EU Member States in conflicts of competence between courts, which prevents them from standing in judgment of another court's competency to decide a case. Case C-281/02 *Owusu v Jackson* [2005] ECR I-1383.

12 Eg Roodt 125. In general Cuniberti "Parallel Litigation and Foreign Investment Dispute Settlement" 2006 *ICSID Review - Foreign Investment LJ* 381.

13 Art 9 Swiss Federal Act on Private International Law Act of 1987-12-18; see also arts 7, 186. Roodt "Autonomy and Due Process in Arbitration: Recalibrating the Balance" 2011 *CILSA* 311 335-337.

14 In the context of the Swiss Federal Act on Private International Law, see Swiss Federal Supreme Court, First Civil Chamber, 4A_490/2009 of 2009-04-13, published 2010-07-02; and Arbitration CAS 2010/A/2058 *British Equestrian Federation (BEF) v Fédération Équestre Internationale*, award of 2010-07-13.

15 International Commercial Arbitration Committee ILA "Interim Report on Res Judicata and Arbitration, Seventy-First Conference, Berlin, 2004" *ILA* (www.ila-hq.org (accessed 2012-02-13)) 26.

16 *Telkom SA Limited v Anthony Boswood QC* case no 26/05 (unreported) 2005 TPD.

17 *Telcordia Technologies Inc v Telkom SA Ltd* 2007 3 SA 266 (SCA) *par* 11.

18 *Telcordia Technologies v Telkom SA Ltd* 458 F 3d 172; *Telcordia Technologies Inc v Telkom SA Ltd* 2007 3 SA 266 (SCA).

commenced.[19] The rulings did not conflict at any point. The United States Court of Appeals reversed the ruling of the District Court of New Jersey on the basis of the freedom which party autonomy accords to a plaintiff to choose the forum.[20] The case did not reach the Supreme Court of the US. Nevertheless, the question prompted by considerations of procedural efficiency remains, and it has public policy implications. Did the arbitral award have any *res judicata* effect before the Supreme Court of Appeal (SCA) issued its ruling to overturn the set-aside?

To determine the point of finality of a ruling in a dispute that was subject to arbitration, it is necessary to consider what *res judicata* means, what effect appeals have and whether a choice to exclude estoppel deserves the respect of a court in practice. The possibility that the dispute may have been settled with even greater celerity on the basis of the finality of the arbitral award, is explored with reference to the constitutional context of private arbitration, the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards and recommendations issued by the International Law Association.

2 The *Telcordia Technologies* Dispute

A Delaware corporation, D, contracted with a South African company, K, for the supply and installation of telecommunications software in 1999, for which K undertook to pay D $249 million. The transaction was riddled with disputes over the specifications from the start. The International Chamber of Commerce appointed an arbitrator in London. He commenced the arbitration in March 2002. He issued a partial award in favour of D in September 2002. Shortly thereafter, D sought to have the arbitral award confirmed in the District Court for the District of Columbia. K filed proceedings in the High Court in South Africa to have the award set aside in November 2002. K claimed that the arbitrator had committed a material error of law, and was guilty of misconduct or a reviewable irregularity under section 33(1) of the Arbitration Act.[21] The case started to wend its way through the South African appeals process.

In July 2003 the District Court for the District of Columbia dismissed D's petition without prejudice on the basis that it lacked jurisdiction over K. It granted a stay of the action on *forum non conveniens* grounds,[22] a decision that is open to evaluation on appeal with reference to the

19 *Telcordia Technologies v Telkom SA Ltd* 95 F App'x 361, 362–63; *Telcordia Technologies v Telkom SA Ltd* 458 F 3d 172; *Telcordia Technologies Inc v Telkom SA Ltd* 2007 3 SA 266 (SCA).

20 *Telcordia Technologies v Telkom SA Ltd* 458 F 3d 172.

21 42 of 1965. S 33(1) sets out limited grounds for review.

22 *Telcordia Technologies v Telkom SA Ltd* 458 F 3d 172 par 9. The origins of the doctrine are found in Scots law. It was received into English law by virtue of *Spiliada Maritime Co v Cansulex* 1987 AC 460 and *RTZ v Connolly* 1998 AC 854.

standard of abuse of discretion.[23] The case went on appeal in the District of Columbia Circuit.[24]

In November 2003 the South African High Court set aside the arbitral award[25] and ordered a new arbitration. Three retired South African judges were appointed as the new arbitrators in disregard of International Chamber of Commerce appointment procedure that requires arbitrators to have a neutral nationality. The court concluded that the errors of law committed by the arbitrator were tantamount to gross irregularity resulting in an unfair trial, which was clearly a reviewable error. A taint of impropriety accompanied the ruling, due to the breach of ICC standards.[26]

In April 2004 D again sought enforcement of the award in the Circuit Court of Appeals in the District of Columbia. The court upheld the dismissal of the petition without prejudice, and the merits of the case were not argued. The basis of the ruling was Article VI of the NYC, which enables the court at first instance to stay (adjourn) the decision on the enforcement of the arbitral award if an application for the setting aside or suspension thereof has been made. Technically, a set aside application was pending in an appropriate jurisdiction and so a stay or adjournment of the decision on enforcement appears reasonable enough. The complication was that the neutrality rule had been dishonoured; a discretionary stay that is susceptible to judicial review all but supports finality in disputes in which both state courts and arbitral tribunals are competent. Also, while a stay may be justifiable in the enforcement stage, courts should remain conscious of the delay caused in that stage.[27]

K petitioned the District Court of New Jersey to dismiss D's petition to confirm the arbitral award. The District Court of New Jersey did so in two separate orders. The first order granted K's motion to dismiss D's petition. Later that month, it dismissed D's petition *with* prejudice because the previous decision by the District of Columbia Circuit Court of Appeals gave rise to issue preclusion. The District Court of New Jersey desisted from enforcing the award at that point.[28]

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23 *Paramedics Electronmedicina Commercial Ltda v GE Medical System Information Technologies Inc* 369 F 3d 645. Compare Principle 2.5 Committee on International Civil and Commercial Litigation ILA "Third Interim Report on Declining & Referring Jurisdiction in International Litigation" available at www.ila-hq.org/en/committees/index.cfm/cid/18 (accessed 2012-02-13).

24 *Telcordia Technologies v Telkom SA Ltd* 458 F 3d 172.

25 *Telkom SA Limited v Anthony Boswood QC* case no 26/05 (unreported) 2005 TPD.

26 Park & Yanos "Treaty Obligations and National Law" 2006 *Hastings LR* 251 266.

27 Eg *Monagasque de Reassurances SAM (Monde Re)* v *NAK Naftogaz of Ukraine and State of Ukraine* 311 F 3d 488 (affirmed dismissal of action to enforce award on *forum non conveniens* grounds); 42 *ILM* (2003) 384, 386.

28 *Telcordia Technologies v Telkom SA Ltd* 458 F 3d 172. The right to rely on estoppel (not issue estoppel) was excluded in the non-variation clause of the

In November 2004, the Supreme Court of Appeal in South Africa (SCA) agreed to hear D's petition to get the High Court's previous decision to set the award aside, overturned. Both technically and functionally, D's application was pending before the SCA when K petitioned the District Court of New Jersey to dismiss D's petition to confirm the arbitral award.

On appeal in the US Court of Appeals 3rd Circuit in August 2006, the first order issued by the District Court of New Jersey was affirmed but the dismissal with prejudice was reversed.[29] The reversal had more to do with K's right to choose the forum and the decision pending in South Africa at the time, than with the exclusion of the right to rely on estoppel.[30] In a section of the judgment bearing the heading "B. Issue preclusion", the court indicated that a decision on the merits by the District Court for the District of Columbia would have been given preclusive effect.

The Court of Appeals 3rd Circuit recognised the competence of the High Court in South Africa and reviewed the issues that came before the District Court of New Jersey as well as its two orders for abuse of discretion. Summing up its ruling, it held:

(a) The District Court of New Jersey had jurisdiction over K because the "minimum contacts test" was satisfied as K purposefully directed activities at D.[31]

(b) K could not argue that the dismissal in the court *a quo* was "with prejudice".

(c) K was free to argue that the action in South Africa was still pending (*lis pendens*), further to which the Circuit Court of Appeals in the District of Columbia could conceivably exercise its discretion not to enforce. This discretionary determination would be left undisturbed.[32]

(d) Its own ruling did not have preclusive effects against D.[33]

(e) D could refile in New Jersey[34] once the SCA in South Africa had issued a judgment in the case.[35]

D therefore remained able to file action in the US throughout. It was not made clear whether having excluded the right to rely on estoppel in the agreement had any relevance in this regard.

In November 2006, the SCA set aside the order of the High Court and reinstated the arbitral award to the satisfaction of D. The SCA ruled that

28 Integrated Agreement; *Telcordia Technologies Inc v Telkom SA Ltd* 2007 3 SA 266 (SCA) *parr* 11, 28.
29 *Telcordia Technologies v Telkom SA Ltd* 458 F 3d 172 par 36.
30 *Telcordia Technologies v Telkom SA Ltd* 458 F 3d 172 parr 30-36.
31 The test requires that a court may assert jurisdiction over a party if that party can "reasonably expect to be haled into court in that state". *Telcordia Technologies v Telkom SA Ltd* 458 F 3d 172 parr 17-29.
32 *Ibid parr* 33, 43.
33 *Idem.*
34 *Ibid par* 34.
35 *Ibid par* 44.

the arbitral award favouring Telcordia was not reviewable, for even if the arbitrator had committed a material error of law, no gross irregularity had been committed. Consequently, the full *res judicata* effect of the arbitral award was confirmed and K's liability was clear. The question is whether the arbitral award had any *res judicata* effect prior to the ruling issued by the SCA, given the rule against appeals contained in the Arbitration Act[36] and the breach of international arbitration regulations committed by the High Court. Discretionary decisions (see points (c) to (e) above) precluded D from proceedings in the US at that point. Had the final order issued in the SCA gone against D, there could have been a skirmish over the competence to decide the case. As things turned out, however, no conflict of competence arose, but opposing rulings were issued in respect of the same case by courts in the seat of the arbitration. The "conflict" concerned legal standards.

This ruling can be better understood in the light of constitutional standards of fairness in arbitration, the meaning of *res judicata* in national and international law, and the implications of showing respect for international private rights.

3 The Constitutional Standard of Fairness in Arbitration

Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews[37] is the first consideration of the constitutional standard of fairness in private arbitrations since the inception of the Constitutional Court. The facts of the case did not present a constitutional issue, but concerned a "matter connected to a decision on a constitutional issue which it is in the interests of justice to decide".[38] The constitutional issue referred to, concerned the application of section 34 of the Constitution[39] to private arbitration. Significantly, the case had already proceeded from the court of first instance upwards and it was quite late into the subsequent proceedings before the SCA when the losing party objected that the arbitrator's irregular behaviour had compromised its constitutional right to a fair trial. There was no international element to the arbitration that formed the subject matter of the case, but the treatment given to *res judicata* here may well be followed in international cases.

36 42 of 1965. "S 28 Award to be binding: Unless the arbitration agreement provides otherwise, an award shall, subject to the provisions of this Act, be final and not subject to appeal ... ".

37 *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* (CCT 97/07) [2009] ZACC 6 (2009-03-20).

38 Par 238.

39 Constitution of the Republic of South Africa, 1996: "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

The case concerned an application that was made for leave to appeal to the Constitutional Court against a decision of the SCA. The SCA upheld a judgment of the High Court in Pretoria dismissing an application for the review and set aside of the arbitral award issued by a quantity surveyor. The award fixed the amount owed by the respondent for services rendered to the applicant. The application for the review of the arbitrator's award was based on his alleged commission of an error of law or fact on procedural grounds pursuant to section 33 of the Arbitration Act.[40] The grounds for setting aside an arbitration award are confined to (a) misconduct by an arbitrator; (b) gross irregularity in the conduct of the proceedings; and (c) obtaining an award improperly. The alleged error arose because the arbitrator held secret meetings with the respondent, did not provide the applicant access to correspondence between himself and the respondent, and awarded more than the amount claimed in the pleadings.

The arbitration agreement did not provide for appeal. Nonetheless, the Constitutional Court ruled that the interests of justice would be served by granting leave to appeal.[41] The appeal failed.

The majority ruling indicated that constitutional values permit parties to seek a quicker and cheaper alternative to litigation in the ordinary courts to resolve disputes,[42] but how these values impact on the question of finality of the arbitral award, was not considered. No mention was made of issue preclusion, constructive *res judicata* or its effect on the right to a fair trial. Considerations of procedural efficiency and public policy prompt the question of how broadly *res judicata* is defined in respect of arbitral awards in South African law. In a dissenting judgment,[43] Justice Ngcobo (as he then was) discerned a duty to raise objections at the earliest opportunity in circumstances where it would be tantamount to abuse of procedure not do so.[44] He stated that where a party had ample time and opportunity to raise objections either before or during the proceedings, late objections that are nothing but "an afterthought in order to get the ear of this court" ought to be barred.[45]

The minority judgment shows a keen awareness of the need for state courts to be able to scrutinise arbitral awards without enabling unscrupulous litigants to use the courts in order to delay justice.[46]

40 42 of 1965.
41 Par 238.
42 Par 197.
43 Parr 281-308.
44 Parr 286, 292.
45 Par 293.
46 Parr 196, 222-232.

4 Procedural Efficiency and the Public Policy Implications of Concept of *Res Judicata*

Procedural efficiency requires that adjudicatory institutions demonstrate judicial comity or respect for the capacity of foreign institutions to resolve disputes. The interests of both the parties and the public are served by efficient procedures in dispute resolution.[47] Resources (judicial and otherwise) will be wasted if claims are duplicated and relitigated, or when issues are ventilated twice.[48]

Two well-known maxims are relevant in this regard.[49] First, the public interest requires that litigation or dispute resolution must be final and not be allowed to continue (*interest reipublicae ut sit finis litium*). This tenet describes the positive, conclusive and formal effect of the decisions contained in an award in other proceedings (whether between the same or other parties). In Common Law jurisdictions, issue estoppel is a particular application of the general rule of public policy that there should be finality in litigation; as a matter of public policy, few exceptions ought to be permitted. If the award disposes of all the issues raised in the new proceedings, it puts an end to the new proceedings, as the matters in issue between the parties have already been decided. If the award disposes of only some of the issues raised in the new proceedings, recognition is necessary to prevent the issues that have already been dealt with from being raised again. The award is not enforced, but its issue estoppel effect is recognised.[50]

The second maxim serves the interests of private justice, to the effect that a party should not be twice vexed in the same manner for the same cause (*nemo debet bis vexari pro una et eadem causa*). This tenet describes the negative, preclusive and material effect of the doctrine (*ne bis in idem*) that forecloses further litigation between the same parties on a matter that has formed the subject of a prior arbitral award.[51] The finality of litigation or *res judicata* reflects a public policy interest in its own right.

Res judicata is part of the general principles of law recognised by civilised nations within the meaning of Article 38 of the Statute of the

47 *Johnson v Gore Wood* [2002] 2 AC 1 31A-D *per* Lord Bingham, quoted with approval in *Lanes Group Plc v Galliford Try Infrastructure Ltd* [2011] EWHC 1679 (TCC) par 45.

48 McLachlan *Lis Pendens in International Litigation* (2009) 461-467.

49 Cremades & Madalena "Parallel Proceedings in International Arbitration" 2008 *Arbitration Int* 3 12.

50 Blackaby & Partasides *Redfern and Hunter on International Commercial Arbitration* (2009) par 11-21.

51 In the German Constitution, this idea is expressed in the rule that debtors should be confronted only with a single enforceable instrument claiming a debt, since to allow the creditor several different avenues for recovering the amount owed would be unreasonable. *Bundesgerichtshof*, judgment dated 2009-07-02, IX ZR 152/06 2009 *NJW* 2826.

International Court of Justice,[52] but its basic constituting elements are not based on uniform concepts that enjoy application across different legal families. In fact, the tag "*res judicata*" hides a wonderful diversity in terms of scope and effect, ranging from finality to just stopping short of the non-finality of judgments.[53]

Common Law courts rely on an inherent judicial discretion to manage parallel adjudication in multiple forums. A court would allow actions to proceed simultaneously "until a judgment is reached in one which can be pled as *res judicata* in the other".[54] It makes use of a broad-based concept of *res judicata* that does not always depend on whether the parallel proceedings are between the same parties and/or concern the same cause of action.[55] A court may ignore former judgments if no one complains of being vexed or harassed by the reventilation of the same claim (or issue).[56]

Civil Law courts rely on a rule-based system. *Res judicata* has a narrow scope that renders it applicable only when the same dispute between the same parties and regarding the same subject-matter or relief (*petitum*) and the same legal grounds (*causa petendi*) is brought before another forum.[57] Most civilian legal systems apply the test of identity of action in an earlier and final judgment or arbitral award in a strict fashion.[58] The Civil Law conception that *res judicata* concerns the public interest has led to stricter statutory requirements, by which courts are duty-bound to take account of former judgments on their own initiative.[59]

On the stricter end of the Civil Law continuum is German civil procedure. Parties would be entitled to have any case tried *de novo* until the highest authority has spoken, except within the narrow confines of *res judicata*.[60] On the liberal end of the continuum is the French model, which follows a non-formalistic approach to *res judicata*.[61] The arbitral

52 See Radicati Di Brozolo "*Res Judicata* and International Arbitral Awards" (http://ssrn.com/abstract = 1842685 (due for publication in *ASA Special Series* 2011)) 3.

53 Andrews *The Three Paths of Justice: Court Proceedings, Arbitration, and Mediation in England* (2012) 228-235, 251; Sinai "Reconsidering *Res Judicata*: A Comparative Perspective" 21 *Duke J of Comp and Int L* 2011 353*ff*.

54 *Laker Airways Ltd v Sabena Belgian World Airlines* 731 F 2d 909 926-7.

55 International Law Association "Final Report on Lis Pendens and Arbitration, Report of the Seventy-Second Conference, Toronto, 2006" parr 2.13, 2.5-2.7, 2.12-2.13.

56 Sinai 363.

57 Cremades & Madalena 3.

58 McLachlan 112-130.

59 Sinai 385.

60 Sinai 384 386.

61 Supreme Court, Plenary Section, 2006-07-07, *Césaréo v Césaréo* 04-10.627 in *Juris-Classeur Périodique* 2007 II 10070; Supreme Court, First Civil Section, 2008-05-28, *Société Prodim v Société G et A Distribution* 07-13266; Kleiman "Supreme Court Broadens Scope of Res Judicata" (www.Internationallawoffice.com/newsletters/detail.aspx?g = 2daf6213-8023-4bfa-bf44-141a1016548f (accessed 2012-06-08)).

award has the authority of *res judicata* in relation to the dispute which it has determined from the moment it is given, regardless of whether it was made in France or abroad. Arbitral autonomy is sufficiently able to resolve a dispute with finality.[62] Further classification is possible in accordance with the conception of finality or *res judicata.* For instance, the *res judicata* doctrine applies only to preclude claims; in most of the civilian jurisdictions issue preclusion is unfamiliar terrain.[63] A small sub-category of Common Law jurisdictions rely on a unique and particularly broad conception of *res judicata* to counter the negative effects of parallelism and multiplicity of litigation.[64]

India's civil procedure allows the unconditional application of the widest possible form of *res judicata*,[65] coupled with a distinct preference for the resolution of disputes by arbitration.[66] Valid arbitral awards give rise to *res judicata.* Any foreign award that would be enforceable can be relied upon and is to be treated as binding.[67] Indian law recognises the doctrine of constructive *res judicata* as a sub-set of the doctrine of *res judicata.*[68] Constructive *res judicata* functions as a rule of prudence that seeks to bar determination and enforcement of claims which have not been raised at an appropriate point in earlier judicial proceedings.[69] If the earlier award did not dispose of all the issues raised, and some issues[70] remain undecided, recognition of the award would mean that issues decided and issues not dealt with, are also prevented from being raised later. Any matter which might and ought to have been raised, or raised as a defence or attack in a previous proceeding, but was not so made, is deemed to have been constructively in issue and is taken as decided.[71] Recognition of an arbitral award under the Foreign Awards

62 Art 1476 French *Nouveau Code de Procédure Civile* (NCPC); Art 1500 NCPC; Delvolvé, Rouche & Pointon *French Arbitration Law and Practice* (2004) 194-196.

63 International Commercial Arbitration Committee ILA "Interim Report on Res Judicata and Arbitration, Seventy-First Conference, Berlin, 2004" 14; Radicati Di Brozolo 21; Sinai 384.

64 International Commercial Arbitration Committee ILA, *Interim Report on Res Judicata and Arbitration*, Seventy-First Conference, Berlin, 2004 (www.ila-hq.org (accessed 2012-06-08)) 3.

65 See eg *Hope Plantation Ltd v Taluk Land Board* (1999) 5 SCC 590 (Sup Ct).

66 This is by virtue of a constitutional imperative in Article 51 of the Constitution of India (1950) to the effect that the State has to encourage settlement of international disputes by arbitration.

67 S 46 Arbitration and Conciliation Act 1996.

68 S 11 Code of Civil Procedure.

69 *Ramchandra Dagdu Sonavane (Dead) by LRs v Vithu Hira Mahar (Dead) by LRs* AIR 2010 SC 818.

70 *Amalgamated Coal Fields Ltd v Janapada Sabha* AIR 1964 SC 1013 (Assertion of fact or of the legal consequences of facts must be an essential element in the cause of action or defence, and must be directly and substantially in issue).

71 *The Workmen of Cochin Port Trust v The Board of Trustees of the Cochin Port Trust* AIR 1978 SC 1283.

(Recognition and Enforcement) Act of 1961 can be used as a shield against re-agitation in court of issues that the award deals with.[72]

A pragmatic Common Law conception of *res judicata* has been shown to be more cost-effective than the Continental counterpart.[73]

Anglo-Welsh law presents an influential model in the light of which other models can be better understood. Because English common law tends to view *res judicata* as a species of estoppel that confers force equivalent to *res judicata* onto awards, courts in England are more likely to call it "estoppel".[74] Pleas of cause of action estoppel and issue estoppel are both recognised.[75] The "cause of action" refers to the claim whereas the "issue" can be explained as a point of fact or law, a finding that is necessary for the court's final determination of the claim, or one of the "conditions for establishing a cause of action".[76] Cause of action estoppel operates as an evidential or procedural bar, preventing contradiction of the earlier decision. In general terms, it precludes a party from relitigating a cause or claim that has been considered by a court and finally determined. It is justified where the very right or cause of action claimed or put in suit has, in the former proceedings, passed into or merged into judgment and no longer has an independent existence. Issue estoppel precludes a party from relitigating an issue previously decided in other proceedings, even if the cause of action is not identical. It is justified where a state of fact or law is alleged or denied when its existence was a matter necessarily decided by the prior judgment, decree or order.[77] How a court defines an "issue" will inform how broadly or narrowly issue preclusion is applied in the subsequent action. It depends whether the court extends the doctrine to prevent a party raising issues in subsequent proceedings that could have been raised in earlier proceedings, but were not.

Abuse of process is intimately related to *res judicata* in the Common Law world, but can be considerably wider than its Civil Law counterpart. In *Henderson v Henderson*,[78] the court precluded a party in subsequent litigation from raising subject matter (a claim or an issue) which the

72 *Brace Transport Corporation of Monrovia Bermuda v Orient Middle East Lines Ltd Saudi Arabia* AIR 1994 SC 1715 par 13.

73 *Commings v Heard* (1869) LRQB 4 669. "When once a matter has been decided between parties, the parties ought to be concluded by the adjudication" per Lush J (673). Sinai 385.

74 There are exceptions, such as Barnett; Handley.

75 Collins (general ed) *Dicey, Morris and Collins on the Conflict of Laws Vol 1* 14 ed (2006) Rule 14-021, Rule 14-112; Clarkson & Hill *The Conflict of Laws* (2011) 178-180.

76 British Institute of International and Comparative Law *Comparative Report on the Effect in the European Community of Judgments in Civil and Commercial Matters: Recognition, Res Judicata and Abuse of Process* (Van de Velden & Stefanelli) (2008) 28.

77 *Blair v Curran* [1939] 62 CLR 464 532; *Yukos Capital SarL v OJSC Rosnef Oil Company* [2011] EWHC 1461 (Comm).

78 (1843) 3 Hare 100 114-115.

party, by the exercise of due diligence, could and should have brought before the court in the earlier proceedings:

> … res judicata … is not confined to the issues which the Court is actually asked to decide, but … covers issues … which are so clearly part of the subject matter of the litigation, so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.[79]

There has been a long line of English decisions since, but *Johnson v Gore Wood & Co*[80] was a confirmation by the House of Lords that the *Henderson* rule is considered to be a category of the "abuse of process" doctrine rather than an extension of the principles of estoppel.[81] Courts may remain passive until a party complains of being harassed or vexed.

For arbitral awards, English law requires a final award on the merits pronounced by a tribunal of competent jurisdiction and binding the same parties.[82]

The rulings issued by different fora in the *Telcordia* example raise a number of issues. By ruling "without prejudice", the Circuit Court of Appeals in the District of Columbia held any conclusive and preclusive effects for D at bay. *Res judicata* was put on ice. Not having considered *res judicata* in *Telcordia Technologies Inc v Telkom SA Ltd*[83] it may be asked if the Common Law and civilian features of *res judicata* are compatible. No real conflict of competence arose, but can the court entertain this defence *sua sponte* or only when a party raises it? What form does *res judicata* assume in South African and US law?

4 1 Conceptions of *Res Judicata* in South African Law

South African law has long-standing historical ties with English law.[84] This influence is still evident in the area of the recognition and

79 Also *Greenhalgh v Mallard* [1947] 2 All ER 255 (CA) *per* Somervell LJ. In general Barnett *Res Judicata, Estoppel, and Foreign Judgments* 288*ff*; Handley *Spencer Bower and Handley Res Judicata* (2009) 307.

80 *Johnson v Gore Wood* [2002] 2 AC 1, recently confirmed in *Lanes Group Plc v Galliford Try Infrastructure Ltd* [2011] EWHC 1679 (TCC).

81 1967 2 All ER 100 104.

82 S 58 Arbitration Act 1996. At common law, a foreign judgment has to be "final and conclusive" before it will be recognised or enforced in England. "International jurisdiction" implies that a judgment from a foreign court should be recognised by the receiving court as rendering the issue between the parties *res judicata* if the foreign court had jurisdiction in the international sense in the eye of the receiving court. Briggs "Crossing the River by Feeling the Stones: Rethinking the Law on Foreign Judgments" 8 *SYBIL* 2004 1 3.

83 *Telcordia Technologies Inc v Telkom SA Ltd* 2007 3 SA 266 (SCA) (set aside of order of court *a quo* in *Telkom SA Ltd v Boswood* Case No 26/05 unreported (TPD)).

84 The English common law was received into South African law when the British occupied the Cape from 1795-1803; and then again from 1806-1910. The infiltration and reception of English law continued after the Southern African colonies formed the Union of South Africa in 1910.

enforcement of foreign judgments, where considerations of public policy and fairness inform relevant doctrines. If the same defences on the facts and issues already disposed of in a judgment could be raised in a subsequent case, there would be a risk that conflicting judicial decisions may be granted. A plea of *res judicata* aims to prevent the repetition of lawsuits.[85] It avoids an unfair multiplicity of actions or a situation in which a defendant could raise the same defence in a number of actions instituted against it, having relied on that defence in litigation to which the litigating parties or their privies were parties.

The requisites of a valid defence of *res judicata* in Roman Dutch Law are that the matter adjudicated upon, on which the defence relies in both cases, must have been for the same cause, between the same parties and the same relief must have been claimed.[86] The judgment or order must be a final and definitive judgment or order on the merits of the matter and the judgment must have been issued by a competent court.[87]

Although there is no doctrine of issue estoppel in Roman Dutch law, a plea of *res judicata* is regarded as the romanistic equivalent of the English concept "estoppel by judgment" or "estoppel by record".[88] It has never been formally incorporated into South African law, but has taken root and could succeed as a defence.[89] The question whether issue estoppel can be recognised in addition to the romanistic conception or applied to Roman Dutch principles, has been confronted more than once.[90]

The defence of *res judicata* prevents a party to previous litigation from relying upon the same cause of action. *Res judicata* necessarily involves a judicial determination of some question of law or issue of fact that could not have been legitimately or rationally pronounced without necessarily determining that question or issue in a particular way. Such determination is deemed to constitute an integral part of that decision as

85 Rabie & Sonnekus *The Law of Estoppel in South Africa* (2000) 18.

86 *Union Wine Ltd v E Snell and Co Ltd* 19902 SA 189 (C) 195E-196A on the "once and for all rule"; *Horowitz v Brock* 1988 2 SA 160 (A) 178H-179C; *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 3 SA 462 (D) 472; *Mitford's Executor v Ebden's Executors* 1917 AD 682 686; *Bertram v Wood* 189310 SC 177 181. Voet *Commentarius ad Pandectas* 44 2 3; Salant "Distinguishing *Res Judicata* and Issue Estoppel" (http://salantattorneys.co.za/articles/ARTICLE%20RES%20JUDICATA.doc (accessed 2012-06-08)).

87 *Kommissaris van Binnelandse Inkomste v ABSA Bank Bpk* 1995 1 SA 653 (A); *Liley v Johannesburg Turf Club* 1983 4 SA 548 (W); *Boshoff v Union Government* 1932 TPD 345.

88 Rabie & Sonnekus 19; De Wet "*Estoppel by Representation*" *in die Suid-Afrikaanse Reg* (proefskrif Universiteit van Stellenbosch (1939)).

89 *Richtersveld Community v Alexkor Ltd* 2000 1 SA 337 (LCC) 342C; *Horowitz v Brock* 1988 2 SA 160 (A) 178-179.

90 *Kommissaris van Binnelandse Inkomste v ABSA Bank Bpk* 1995 1 SA 653 (A) 664-669; *Le Roux v Le Roux* 1967 1 SA 446 (A) 463.

if it had been declared in express terms on the face of the recorded decision.[91]

The same test is used for issue estoppel and the *exceptio res judicata*, but while issue estoppel prevents such a party from disputing an issue decided by the previous court, it does not require the same cause for the same relief. The lesser requirements of issue estoppel can be permissible. Where a court in a final judgment on a cause has determined an issue involved in the cause of action in a certain way, and the same issue is again involved and would determine the right to reclaim, the determination in the prior action may be advanced as an estoppel in a subsequent action between the same parties, even if that action is then founded on a different cause of action.[92] In practice, both the judgment and the pleadings are examined before issue estoppel is sustained. A judgment would create an issue estoppel only if the determination of that issue had formed an essential part of the *ratio decidendi.*[93] Every case must be decided on its own facts.[94]

Arguably, the relaxation of the strict requirements associated with the defence of *res judicata* in certain cases allows South African law to fit the small subcategory of ideal jurisdictions identified in the ILA Report.[95] This classification is confirmed by the fact that the due diligence rule in *Henderson* also applies in South African law.[96] Exceptional cases apart, the principle of *res judicata* applies not only to points upon which the court was required by the parties to pronounce judgment, but to every point which properly belonged to the subject of litigation and which the parties might have brought forward at the time had they exercised reasonable diligence. Points omitted through negligence, inadvertence or accident cannot be raised in subsequent proceedings.[97] The cost- and time saving rule of *Henderson* broadens the concept of *res judicata.*

Arbitration is not the preferred method of resolving disputes in commercial transactions in South Africa. Domestically, there is no constitutional imperative to resort to arbitration. The system based on the 1958 NYC[98] is supposed to apply but the implementation of this

91 *Liley v Johannesburg Turf Club* 1983 4 SA 548 (W); *Horowitz v Brock* 1988 (2) SA 160 (A); *Boland Bank v Steel* 1994 1 SA 259 (T); *Kommisaris van Binnelandse Inkomste v Absa Bank Bpk* 1995 1 SA 653 (A). Also Salant.

92 *Bafokeng Tribe v Impala Platinum Ltd* 1999 3 SA 517 (B) 566F; *Kommissaris van Binnelandse Inkomste v ABSA Bank Bpk* 1995 1 SA 653 (A) 664F-671C; *Horowitz v Brock* 1988 2 SA 160 (A) 178H-179A. Also Salant.

93 *Ex parte Viviers et Uxor* 2001 3 SA 240 (T).

94 *Kommisaris van Binnelandse Inkomste v Absa Bank Bpk* 1995 1 SA 653 (A) 699G-I.

95 International Commercial Arbitration Committee ILA, *Interim Report on Res Judicata and Arbitration*, Seventy-First Conference, Berlin, 2004 (www.ila-hq.org (accessed 2012-06-08)) 3.

96 *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd (2)* 2005 6 SA 23 (C) *per* Blignaut J.

97 Par 50 (46G-47B); par 52 (47E-F).

98 South Africa acceded on 1976-05-03; entry into force 1976-07-01.

instrument is ambiguous and ineffective.[99] The facts of the *Lufuno* case did not render it necessary to consider the proper incorporation of the state's obligations under the NYC.

Judicial discretion to stay proceedings is subject to exceedingly lax controls in the Arbitration Act.[100] State courts have discretion to stay their proceedings on the basis of factors that water down the legal effect of the parties' choice in favour of arbitration. The legislative framework is dated and the powers of courts and arbitral tribunals are out of balance, but an overhaul is not on the cards. In the meantime, judicial policy has to fill the void that has formed in legislative policy. *Aveng (Africa) Ltd v Midros Investments (Pty) Ltd*[101] shows that the judiciary is willing to limit its own discretion.

The cost- and time saving rule of *Henderson* deserves more visibility in international arbitration cases in South Africa. International arbitration cases may also benefit from the dissenting judgment in the *Lufuno* case in future, because of its reliance on the *res judicata* effects of arbitral awards even when not specifically pleaded. This approach combines the strongest features of the different legal traditions from the viewpoint of finality. It also resonates with an interesting arbitration in France[102] that held that the right to a fair trial does not entitle a party to pursue an opponent twice on the same cause. The scope of the *res judicata* effect of arbitral awards was widened in a domestic arbitration that may well provide guidance in international arbitration proceedings in future.

Unlike the continental models that assume that appeal remains possible until the highest court has spoken, the conception of finality in South African law does not concern whether a case may be taken on appeal or not. In South African law, the requirement of finality of the judgment relates to the form and effect of the judgment.[103] The arbitration process itself is not necessarily open to proper appeal.[104] Less formal modes of dispute resolution tend to restrict appeals to the courts. This is the case in the South African legislative framework for arbitration. Section 28 of the Arbitration Act[105] provides that:

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99 Ss 3, 6 Arbitration Act 42 of 1965. Roodt 315.

100 42 of 1965.

101 *Aveng (Africa) Ltd v Midros Investments (Pty) Ltd* 2011 3 SA 631 (KZD) par 14.

102 *Société G et A Distribution v Prodim* 2008 *Rev arb* 461, note L Weiller; App. Paris, 2010-03-18, *Prodim v Société G et A Distribution*, 2010 *Rev arb* 388 on remand. Also Supreme Court, First Civil Section, 2008-05-28, *Prodim v Société G et A Distribution* 07-13266.

103 *CTP Limited v Independent Newspapers Holdings Ltd* 1999 (1) SA 542 (W); *Liley v Johannesburg Turf Club* 1983 4 SA 548 (W) 552F; *Le Roux v Le Roux* 1967 1 SA 446 (A) 462G-463G.

104 Dundas "The Finality of Arbitration Awards and the Jurisdiction of the Court of Appeal" 2007 *Arbitration* 127; Roodt "Autonomy and Due Process in Arbitration" 2011 *European J of L Ref* 413 424; 2011 *CILSA* 323-324.

105 42 of 1965.

> Unless the arbitration agreement provides otherwise, an award shall, subject to the provisions of this Act, be final and not subject to appeal and each party to the reference shall abide by and comply with the award in accordance with its terms.[106]

In both the *Telcordia* and *Lufuno* disputes, appeals were permitted. The *Lufuno* ruling illustrates that the constitutional standard of fairness in arbitration is likely to prevail over the statutory framework, even if the challenge of arbitral awards on the merits is precluded in principle. In general terms, the SCA may, on appeal, overrule a court order in violation of procedural fairness. It may also review a decision to allow an appeal. In principle these issues may be vented in the Constitutional Court if connected to a decision on a constitutional issue.

4 2 Conceptions of *Res Judicata* in US Law

In the US, the "*res judicata*" tag is often used to refer to the entire topic of former adjudication, including both claim and issue preclusion. Doctrine does not confine *res judicata* to claims "between the same parties" but extends also to third parties.[107] US courts apply *res judicata* to prevent a claimant bringing the same claim or seeking further relief; prevent a respondent from denying rulings made against it in earlier proceedings;[108] stop parties from litigating a claim that has already been settled in arbitration; and stop them from litigating claims that could have been, but were not, arbitrated in a prior proceeding.[109] If an arbitral tribunal has determined an issue of fact or law necessary to the final award, the decision on the issue may preclude re-litigation or re-arbitration of the issue as part of a different claim.[110] Parties are deemed to have waived an objection if they fail to raise it in earlier judicial proceedings.[111]

Because issue estoppel does not require for its application that the same thing must have been demanded as *res judicata* does, some cases and commentators differentiate between claim preclusion (*res judicata*) and issue preclusion or collateral estoppel.[112] Issue preclusion may not be applied if the award does not set out the reasons, since it may be

106 S 28 Arbitration Act 42 of 1965.

107 See *Restatement (Second) of Judgments* Ch 3 parr 13-33; International Commercial Arbitration Committee ILA "Interim Report on Res Judicata and Arbitration, Seventy-First Conference, Berlin, 2004" 11.

108 International Commercial Arbitration Committee ILA "Interim Report on Res Judicata and Arbitration, Seventy-First Conference, Berlin, 2004" 3.

109 Moses *The Principles and Practice of International Commercial Arbitration* (2008) 188.

110 *Bryson v Gere* 268 F Supp 2d 46; *Telcordia Technologies v Telkom SA Ltd* 95 F App'x 361, 362–63; *Telcordia Technologies v Telkom SA Ltd* 458 F 3d 172; Moses 189.

111 *Cobec Brazilian Trading & Warehousing Corp v Isbrandtsen* 524 F Supp 7, 9.

112 International Commercial Arbitration Committee ILA "Interim Report on Res Judicata and Arbitration, Seventy-First Conference, Berlin, 2004" 11. Moses 189 describes the doctrine of collateral estoppel as precluding issues that have been previously determined by arbitration from being determined

unclear which issues disposed of the claim and which did not.[113] This approach is narrower than the radical Indian model, but it is still firmly part of the sub-set of jurisdictions that have extended *res judicata* to issues that could have been raised but were not. This ideal and broad-based approach is confirmed in the *Restatement (Second) of Judgments* § 27, which declares:

> When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination of that issue is conclusive in a subsequent action, whether on the same or a different claim.

Comment "e" of the *Restatement (Second)* refers to a number of reasons why a party might have chosen not to raise an issue. Conserving judicial resources, maintaining consistency, and avoiding harassment of the adverse party are specifically mentioned. There is no reference to abuse of process, however. The first tentative draft of the *Restatement Third, The US Law of International Commercial Arbitration* was approved in 2010, and work on this project is still ongoing.[114]

4 3 When is Finality Reached Under the NYC?

The South African and US concepts and practice in respect of *res judicata* have been shown to belong to the same ILA category of jurisdictions. As such, they are highly compatible. Courts would be justified to apply issue estoppel even without D having to raise it if such an approach is permitted under the NYC. The NYC does not address *res judicata* expressly. It confers a duty on states to "recognise arbitral awards as binding" in which case they can be enforced as domestic judgments.[115] The words "final" and "finality" were deleted from the text of the NYC because they consistently caused problems.[116] The "autonomous" interpretation theory has long won the day on the point of whether an award is binding.[117] National legal systems tend to contain mirroring provisions. For instance, under English law the formula "final, conclusive and binding" in an arbitration clause indicates that the award would be final as a matter of *res judicata*, that findings of fact would be binding but that the award is not open for appeal on a point of law.[118]

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in a subsequent action that is not between the same parties, or does not involve the same cause of action.

113 International Commercial Arbitration Committee ILA "Interim Report on Res Judicata and Arbitration, Seventy-First Conference, Berlin, 2004" 25.

114 Bermann "The American Law Institute Goes Global: The Restatement of International Commercial Arbitration" 2008 *Willamette J of Int L and Disp Res* 300.

115 Article III NYC.

116 Harnik "Recognition and Enforcement of Foreign Arbitral Awards" 1983 *American J of Comp L* 703 708.

117 *Dowans Holding SA and another v Tanzania Electric Supply Co Ltd* [2011] EWHC 1957 (Comm).

118 Andrews 239.

Because the basic constituting elements of *res judicata* are so diverse across different legal systems, they work out for themselves which part of an award is binding, when abuse of process is evident, or whether a claim based in right to a fair trial can constitute abuse of process. Nonetheless, the finality question should not be answered by reference to the local law (of the home jurisdiction), but is best decided by reference to an international interpretation of the NYC, bearing in mind:

(a) the features of an ideal model which the ILA has identified, and

(b) the need for cost-effectiveness in parallel proceedings.

The confirmation of a court is generally required before an arbitral award displays *res judicata* effects.[119] Article III of the NYC provides that Contracting States shall recognise arbitral awards "in accordance with the rules of procedure of the territory where the award is relied upon". While this can be taken to depict administrative formalities in the US for an application to confirm or enforce an award, it also highlights the opportunity the US court had to recognise the award given the breach of international commercial arbitration rules by the High Court in South Africa. This aspect is discussed in more detail under 5 below.

4 4 A Liberal Approach to Finality: ILA Recommendations

In 2000 the ILA stressed the need for a provision that would enable a court to decline jurisdiction when the pursuit of a case would constitute an abuse of procedure. The domestic rules of civil procedure in the relevant state might not enable a court to determine jurisdiction before the litigant pleads on the merits,[120] but it was considered important to enable courts to prevent abuse of process. Subsequently, the ILA *Interim Report* referred to the application of collateral estoppel in arbitral tribunals, but denied that they could apply any principle akin to abuse of process.[121] The *Report* quotes an ICC award handed down by a tribunal sitting in France but applying New York law. The ILA *Report* sought the answer in the applicable law, but managed to avoid falling into the choice of law "trap" by finding that the claimant had a full and fair opportunity to assert its present claim by way of counterclaim or defence in earlier ICC proceedings, but had failed. As such, it was barred from bringing a second action seeking relief inconsistent with the earlier award. The US principle of claim preclusion was applied in that instance. Nonetheless, the ruling had all the markings of abuse of process.

119 *West Tankers Inc v Allianz Spa & Another* [2011] 2 Lloyd's Rep 117 (CA); McLachlan 60.

120 Committee on International Civil and Commercial Litigation ILA "Third Interim Report on Declining & Referring Jurisdiction in International Litigation" available at www.ila-hq.org/en/committees/index.cfm/cid/18 (accessed 2012-06-08) 4.

121 *Ibid* 12; Moses 189.

With regard to finality, the ILA's *Resolution No. 1/2006, Recommendation No 5 Annex 2* took cognisance of the sub-category of Common Law jurisdictions:

> [a]n arbitral award has preclusive effects in the further arbitral proceedings as to a claim, cause of action or issue of fact or law, which could have been raised, but was not, in the proceedings resulting in that award, provided that the raising of any such new claim, cause of action or new issue of fact or law amounts to procedural unfairness or abuse.

The ILA *Recommendation No 3.1* of the same *Resolution*[122] requires that an award must have become "final and binding in the country of origin", facing no impediment to recognition in the country of the seat of the subsequent arbitration.

On the basis of *Recommendation No 1*, US courts could have noted the procedural unfairness of K approaching the SCA when the original arbitral award is incontestable, rather than proceeding on the basis of *forum non conveniens* and *lis pendens*. The relatively short duration of the concurrent proceedings can be attributed to the vital corrective action adopted by the SCA in respect of the illegal treatment of the arbitral award by the court at first instance. However, a more plausible explanation is that the US and South Africa subscribe to similar concepts and mechanisms in parallel proceedings. The fact that no conflict of mechanisms was provoked, meant that the proceedings could be brought to an end within a short time span.

On the basis of *Recommendation No 3*, the pending appeal could possibly be interpreted as an impediment to recognition. The hierarchy of application of legal norms at the horisontal and vertical levels would also need to be taken into account.[123] This aspect is considered next.

5 Respect for International Private Rights

Private international law functions as an integral part of the international system and operates by national courts through national law.[124] Operating thus, it limits the overlap in jurisdiction of national courts and avoids the need to relitigate disputes before enforcing them in other states in the form of a foreign judgment or arbitral award.[125] In international commercial arbitration, states act as agents for the implementation of an international law duty. Just as national courts take

122 *Resolution No 1/2006 Annex 2*; ILA "Final Report on Lis Pendens and Arbitration, Reports of the Seventy-Second Conference, Toronto, 2006" par 2.13. Kleiman "Supreme Court Broadens Scope of Res Judicata", available at www.Internationallawoffice.com/newsletters/detail.aspx?g = 2daf6213-8023-4bfa-bf44-141a1016548f (accessed 2012-06-08).

123 Mills 224.

124 Mills 112; Sterio "Clash of the Titans: Collisions of Economic Regulations and the Need to Harmonise Prescriptive Jurisdiction Rules" 2007 *UC Davis J of Int L and Pcy* 95.

125 Mills 206.

responsibility under the NYC to oversee the integrity of the international system designed for the recognition and enforcement of arbitral awards, national courts have a general international law responsibility to allocate regulatory authority by means of private regulatory mechanisms. In this regard, state law is both a prerequisite for the functioning of these mechanisms and a safety net in the event of their failure.[126]

National courts lend vital support to an arbitral tribunal, but may not deliberately overstep the boundaries of their supervisory jurisdiction over international arbitration.[127] Interference with the autonomy of the arbitral tribunal is justifiable only for the sake of safeguarding due process standards – the "universally accepted standards of justice observed by civilised nations which observe the rule of law".[128] In such circumstances, interference is necessary as well as appropriate.

The "international law of coexistence" offers distinct domestic legal systems a framework in support of their orderly co-existence.[129] A horizontal relationship between the courts of different states, wherever they may be seated, requires the allocation of regulatory authority and the structural coordination that this would imply. When arbitral tribunals are involved, the NYC plays a part in this allocation. A methodology that counters abuse of process is more appropriate than one that fails to do so. The vertical aspect to the relationship between courts and arbitral tribunals has implications for the protection of international private rights that manifest in accordance with the hierarchy of legal norms. If a state fails to accord respect for rights established under international law (international private rights), it also foregoes pluralist respect since its conduct is linked to international public policy. Other states and their institutions have a choice not to accord its law respect. The decisions of its judicial institutions run the risk of being denied mutual recognition.[130]

The implications of private international law in this context extend beyond *lis pendens* and *forum non conveniens* to comity. Comity requires state courts to be quick to restore respect for international private rights, including rights won by means of an agreement to arbitrate. This argument applies in every jurisdiction, including in the US

126 *Saipem v Bangladesh* ICSID Case No ARB/05/07 award of 2009-03-21 and 2209-06-30; Rühl "The Problem of International Transactions: Conflict of Laws Revisited" 2010 *J of Priv Int L* 59 86.

127 State courts interfered with or disrupted the arbitration in *Himpurna California Energy Ltd v The Republic of Indonesia*, Interim Award of 26 September 1999, vol xxv (2000) *Yearbook Commercial Arbitration* 109; *Salini Costruttori Energy Ltd v The Federal Republic of Ethiopia* (ICC Case No 10623/AER/ACS) award regarding the suspension of the proceedings and jurisdiction of 2001-12-07 ASA Bull 1/2003 82; *Saipem v Bangladesh* ICSID Case No ARB/05/07 award of 2009-03-21 and 2009-06-30.

128 *Thomas Baptiste* [2000] 2 AC 1.

129 Batiffol *Aspects Philosophiques du Droit International Privé* (1956) 311-335; American Law Institute *Restatement of the Conflict of Laws (Second)* (1971) par 6, 13.

130 Mills 276.

where courts presume the NYC to be non-self executing and implemented by national or federal legislation.[131] A final arbitral award that is respectful of the international law duties imposed by the NYC and of international private rights ought to have *res judicata* effect. If a state's judicial institutions fail to accord respect for rights established under international law, their judicial decisions cannot demand pluralist respect. In a recent investment arbitration, for instance, the resulting award was declared inexistent under the law of the seat, or annulled, but it remained fully amenable to recognition and enforcement by courts in countries other than the seat and it circulated internationally.[132] Arguably, this is an important way in which the comparative advantages of arbitration can be secured.

This point is contentious, but the argument is firmly based in international law. Article V of the NYC resolves any inconsistency between an arbitral award and a foreign judgment by allowing the state in which the award holder seeks enforcement thereof to decide whether to follow the arbitrator's award or the foreign court's judgment. Recognition or enforcement of an award may be refused if it was annulled by the court of the country who made the award,[133] while foreign arbitral awards are enforceable to the full extent of the laws of the country in which enforcement is sought.[134] The NYC does not make a firm choice between the territorial view that puts the country of origin or seat in the special juridical position to determine the validity of arbitral awards and the denationalised view of arbitration that does not put the seat in a special position. The NYC also remains silent regarding the standards for annulling an arbitration award or when annulments should have extraterritorial effect.[135]

Nothing in the NYC prevents a reviewing nation from enforcing an award. The grounds for refusal are permissive rather than mandatory.[136]

Cohen maintains that the interplay between Article V and Article VII creates opportunities for disparate national rules of enforcement and for conflicting decisions in the same dispute if an award that has been set aside in the place of arbitration, is enforced.[137] However, Mourre and

131 Huang 54.

132 Eg *Saipem v Bangladesh* ICSID Case No ARB/05/07 award of 2009-03-21 and 2009-06-30 (illegal expropriation ordered by courts of the seat). Radicati di Brozolo "Interference by National Courts with International Arbitration: The Situation after *Saipem v Bangladesh*" in *New Developments in International Commercial Arbitration* (eds Müller & Rigozzi) (2009) 1 27.

133 Art V(i)(e) NYC.

134 Art VII NYC.

135 Cohen "The New York Convention at Age 50: A Primer on the International Regime for Enforcement of Foreign Arbitral Awards" 2008 *NY Disp Res Lawyer* 47 49.

136 Davis "Unconventional Wisdom: A New Look at Articles V and VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards" 2002 *Texas Int LJ* 43 58-62. See *In re Chromalloy Aeroservices v Arab Republic of Egypt* 939 F Supp 907 912-913 (DDC 1996).

137 Cohen 49.

Vagenheim posit that Article V(i)(e) is a mere faculty for the courts of the requested country to refuse recognition of awards annulled at the seat while Article VII allows contracting states to apply more favourable domestic law that allows the recognition of awards that have been annulled in their country of origin.[138]

Several US decisions, among which the controversial *Chromalloy* decision,[139] dealt with facts that highlighted the tension existing between these two provisions in the NYC.[140] The District Court of Columbia invoked Article VII to enforce an award made in Egypt that had been annulled by another Egyptian court, because US domestic arbitration law would not have annulled the award. Since then, several foreign judgments annulling awards have been accorded comity. In *TermoRio SA ESP v Electranta SP*[141] this approach was confirmed except in respect of awards given where there is evidence that the foreign court proceedings were fatally flawed procedurally or the judgment lacked authenticity. US case law in respect of the enforcement of annulled awards is not uniform, but the arbitral award issued in the *Telcordia* dispute is similar in many respects to the award on which *Chromalloy* was based. A fatal flaw attached to the High Court ruling to set aside the arbitral award.

One of the limited grounds for refusing recognition and enforcement of an arbitral award under the NYC is triggered when a competent authority in the rendering state sets aside the award. K applied to have the award set aside on this basis. In the *Telcordia* dispute, the award which had been vacated could be treated as *res judicata* in practice, circulate internationally and be recognised by courts in countries other than seat without infringing international comity. Even a South African court that exercises its discretion in an international arbitration ought to take into account that South Africa is in breach of its obligations under international law.[142] The fact that there is no proper counterpart for the duty contained in Article II(3) of the NYC in the South African legislative framework, should not impose burdens on other jurisdictions.

The possibility of enforcing an award that has been annulled in the seat has profound theoretical implications for the nature of international commercial arbitration. The draft Restatement subscribes to the view

138 Mourre & Vagenheim "The Arbitration Exclusion in Regulation 44/2001 after West Tankers" 2009 *Int Arb LR* 75, 82.

139 *In re Chromalloy Aeroservices v Arab Republic of Egypt* 939 F Supp 907 912-913 (Article VII of the NYC justifies enforcing an award that had been set aside by Egyptian courts at the seat of the arbitration).

140 Davis 48.

141 *TermoRio SA ESP v Electranta SP* 487 F 3d 928 941.

142 Butler "The Desirability of a Common Arbitration Statute for International Commercial Arbitration in SADC Jurisdictions: A Comparison Between the UNCITRAL Model Law and the OHADA Uniform Act" 12 (copy on file with author) makes this point with reference to s 233 of the Constitution, which obliges courts to interpret legislation in a manner consistent with international law.

that Article VII does not permit a foreign Convention award to be confirmed or vacated under the Federal Arbitration Act Chapter 1.[143] The NYC accommodates such an approach alongside progressive and denationalised approaches to international commercial arbitration.

The international legal order remains fragmented, but the NYC effects an international ordering which is not *ad hoc*. Given the general terms in which the duty imposed by the NYC has been couched, national courts are continually tempted by ideology and by legal argument from lawyers to use domestic notions when the arbitration agreement is interpreted and when the effects of international awards need to be determined. If the attachment to national interests is too intense, interpretive approaches easily turn arbitration-hostile. Legal systems that permit a wide view of *res judicata* and a clear approach to the protection of private international rights will have less of an issue with the enforcement of an annulled award. If the seat court disrupts the international arbitration illegally, oversteps its supervisory powers or breaches its international obligations, the set aside of the arbitral award cannot be treated as absolute. In the circumstances of the *Telcordia* dispute, the annulled award could have been enforced against K in a court in the US even before the SCA reinstated arbitral award. The award disposed of all the issues raised in the new proceedings. The *res judicata* effect of the award commenced when it was made.

6 Conclusion

This analysis has taken a bold look at the finality of the arbitral award granted in recent South African cases and at the management of parallel proceedings in multiple forums. In the *Telcordia* dispute, the compatibility of the devices used in the course of parallel proceedings in South Africa and the US prevented the case from becoming excessively protracted. However, the protection of international private rights and procedural efficiency supported even greater celerity. The *Lufuno* ruling indicates that the likelihood exists that this kind of speed and efficiency could hit a speed bump if a litigant raises his or her constitutional right to a fair trial. Allowing this right to be raised at any point in the proceedings creates opportunities for using recourse to court as a mere dilatory tactic. It is necessary for the court to keep a check on the tendency of disputes to evolve freely during arbitral proceedings. Article II(3) of the NYC forms part of a single, broadly defined international system of law interested in preventing such manipulative tactics. Treating this global instrument as an example of *ad hoc* coordination invites national interests to take precedence. A discretionary national approach in respect of referral to arbitration is a highly inappropriate means by which to facilitate parallel exercises of adjudicatory authority where there is identity of action. A wide construction of *res judicata* is appropriate, because it provides the

143 *The Restatement of the Law (Third): The US Law of International Commercial Arbitration Tentative Draft No 1* (May 2010) *parr* 5-12.

court with the means by which to control dilatory tactics, safeguards international private rights and helps to counter abuses of the judicial process. Its use is in line with the arbitral rules emanating from the ICC, the *ILA Resolution No. 1/2006* and practice in jurisdictions that make the most of cost-efficient mechanisms. The wider the interpretation given to *res judicata* in international disputes, the easier it is to resolve conflicts in the standards and the competence of courts and arbitrators.

Sustainable Development and the Culture of *uBuntu*

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OPSOMMING

Volhoubare ontwikkeling en die kultuur van uBuntu

Volhoubare ontwikkeling en die bewaring van die omgewing is nie een en dieselfde begrip nie. In die lig van die historiese agtergrond van die ontwikkeling van die begrip, word dit verstaan dat dit ten minste die sentrale elemente van "*intergenerational and intragenerational*" ekwiteit beliggaam en behels die integrasie van die drie pilare van volhoubare ontwikkeling, naamlik ekonomiese groei, die bewaring van die omgewing en sosiale ekwiteit.

Hierdie artikel doen aan die hand dat kultuur as 'n vierde pilaar in die volhoubare ontwikkeling vergelyking bygevoeg moet word en kennis moet hiervan geneem word in enige poging om volhoubare ontwikkeling teweeg te bring. Die inheemse reg kultuur is in die konteks van 'n multikulturele samelewing in Suid-Afrika verseker, en moet daarom in ag geneem word in die volhoubare ontwikkeling-dialoog. Daar word voorgestel dat omdat *ubuntu* die kern inheemse waarde-sisteem beliggaam, dit 'n betekenisvolle rol in die bereiking van volhoubare ontwikkeling kan speel.

Die idee van *ubuntu* word bespreek sowel as die rol wat dit alreeds in die ontwikkeling van die reg in Suid-Afrika vertolk het. Omdat kultuur sosiale gedrag inlig, moet strategieë om volhoubare ontwikkeling te implementeer in lyn wees met die heersende waardes van die betrokke gemeenskap. Terwyl dit kan werk in 'n homogene samelewing, kan daar moontlik probleme ontstaan waar daar 'n multikulturele samelewing is soos die van Suid-Afrika en hier word dit voorgestel dat harmonisering 'n oplossing mag bied.

Die konsep van volhoubare ontwikkeling soos wat dit ontwikkel het moet nie geneer word nie maar moet ingelig en verryk word deur die inheemse filosofie van *ubuntu*. Nie alleen sou dit in die belang van volhoubare ontwikkeling dien nie, maar dit sou ook polities dienstig wees indien volhoubare ontwikkeling die Westerse sowel as die Afrika etos reflekteer en dit sou in lyn wees met die visie wat in die aanhef tot die Grondwet van die Republiek van Suid-Afrika, 1996 vervat is: 'Ons, die mense van Suid-Afrika, ... Glo dat Suid-Afrika behoort aan almal wat daarin woon, verenig in ons verskeidenheid.'

1 Introduction

"People, planet and prosperity", the catchphrase used by the then Minister of Environmental Affairs and Tourism in the recently published

National Framework for Sustainable Development,[1] suggests the idea of an interrelationship between a vulnerable planet, its peoples and their well-being. In the context of sustainable development this is seen as development that protects the environment while enhancing the quality of life for all, more particularly for those who are most affected by poverty and inequality.

Historically the concept has evolved to recognise the interconnectedness and interdependence[2] of three dimensions often referred to as the three E's: protection of Environment, development of the Economy and the realisation of social Equity. In other words, sustainable development involves sustaining the natural resource base while growing the economy, and at the same time, meeting basic social and human needs in the interest of both present and future generations;[3] a paradigm also regarded as integral to the South African vision for future development.[4] In what follows the evolution of the concept of sustainable development and the notion of interdependency is outlined. It is argued that culture should be seen as a fourth dimension. This being so, the significance of *ubuntu, a* philosophy widely recognised as being part of the indigenous culture in South Africa should be considered. In what follows, this will be discussed and the reference to it in South African jurisprudence[5] set out.

1 *National Framework for Sustainable Development* (July 2008) available at http://www.environment.gov.za/?q = content/documents/strategic_docs/national_framework_sustainable_development (accessed on 2012-09-16).

2 See in general *National Framework for Sustainable Development* (2008).

3 In the United Nations Secretary-General's High-level Panel on Global Sustainability (2012) *Resilient People, Resilient Planet: A future worth choosing* New York: United Nations it is stressed that "sustainable development is not a synonym for 'environmental protection'".

4 In the words of the Director General of the Department of Environmental Affairs and Tourism Nosipho Jezile-Ngcaba it defines the "social, economic, environmental and governance parameters and explicitly recognises the constraints that decision-makers must take into account when policies aimed at growing the economy, sustaining our natural resource base and meeting basic social and human needs are adopted"; Department of Environmental Affairs and Tourism "National Framework for Sustainable Development (NFSD) announced" 10 July 2008 available at http://www.info.gov.za/speeches/2008/08071111451001.htm (accessed on 2012-10-30).

5 Jurisprudence here is used in the wide sense to include not only writings on legal philosophy and other legal literature but also judicial decisions. Reference to judicial decisions is by way of example and not comprehensive. In this regard a recent publication by Cornell & Muvangua *Ubuntu and the Law* (2012) is notable. As stated in the blurb "this is the first comprehensive casebook to address the relationship of *ubuntu* to law. It also provides the most critical articles on the use of u*buntu,* both by the Constitutional Court and by other levels of the judiciary in South Africa".

2 The Concept of Sustainable Development: Historical Progression

Sustainable development has increasingly gained international recognition as a conceptual framework for national development and, as is clear from the following historical overview, while there has been progression in determining the content of the concept and its implementation, the sustainable development discourse is ongoing. Nonetheless it is generally agreed that the concept encapsulates the core elements of intergenerational[6] and intragenerational equity[7] and involves the integration[8] and the interdependencies of economic growth, social equity and environmental integrity, sometimes termed the three pillars[9] of sustainable development.

The idea of "integration" is not the same as that of "interdependency".[10] Here "interdependent" is used in the sense that the three pillars of sustainable development are aspects of sustainability which are distinct but mutually reinforcing or dependent on each other. It is suggested that integration should be seen as a process to ensure sustainability. Seen in this way, it follows that "integration" serves to bring about equilibrium. While environment, economic development

6 Ie "the need to preserve natural resources for the benefit of future generations"; Sands *Principles of International Environmental Law* 2ed (2003) 253.

7 Intragenerational equity "is concerned with the equitable distribution of environmental costs and benefits from developmental activities. In this sense intragenerational equity attempts to achieve justice between nations. In particular, intragenerational equity attempts to achieve justice between rich and poor nations. It requires that there be an equitable distribution of resources and burdens among the world population". See Tladi "Intergenerational equity: A new name for international justice" 2003 *Fundamina* 197 198.

8 Integration is widely recognised as the core element of or central to sustainable development see for example ILA *New Delhi Declaration of Principles of International Law Relating to Sustainable Development*, 2002-04-02 available at http://cisdl.org/tribunals/pdf/NewDelhiDeclaration.pdf (accessed on 2012-10-10); Field "Sustainable Development Versus Environmentalism" 2006 *SALJ* 409 413.

9 There are those who hold that culture should be regarded as a fourth pillar as is discussed below. Although the list is not exhaustive the following authors are of this opinion: Hawkes "The Fourth Pillar of Sustainability: Culture's Essential Role in Public Planning" (2001) available at http://community.culturaldevelopment.net.au//Downloads/Hawkeson (2001) The FourthPillarOf Sustainability.pdf (accessed on 2012-08-10); Nurse "Culture as the Fourth Pillar of Sustainable Development" document prepared for the Commonwealth Secretariat London 2006 available at www.fao.org/SARD/common/ecg/2785/ en/Cultureas4thPillarSD.pdf (accessed on 2012-08-10); Du Plessis & Feris "The dissident Sachs J: a rebellious step in the right direction" 2008 *SA J Environmental Law and Policy* 157; Du Plessis & Rautenbach "Legal perspectives on the role of culture in sustainable development" 2010 *PER* 27.

10 See generally Feris "The role of good environmental governance in the sustainable development of South Africa" 2010 *PER* 1; Field 2006 *SALJ* 409.

and equity retain their integrity, at the same time the boundary of each is determined by that of the other two. Thus sustainable development should not be seen as merely a combination or amalgamation of the three recognised "pillars". Rather it should be seen in the form of a "*gestalt*" that results from viewing issues or situations through the lens of integration. As Kidd[11] puts it (albeit in a different context):

> By combining concerns with the environment with concerns relating to social upliftment and economic progress, the concept of sustainable development will be much more difficult to sideline. This is why it is critical that ... people ... must remove ... their green-tinted spectacles and respect the three pillars of sustainable development in a way that ensures that there is equilibrium.

Historically, notions of an interrelationship between humankind and the environment are not new and existed in ancient times particularly in the context of religion and culture.[12] However, the concept of sustainable development as denoting such interrelationship is of recent origin. The term was coined in the *Brundtland Report*[13] in 1987, and the statement that "[e]cology and economy are becoming ever more interwoven locally, regionally, nationally, and globally into a seamless net of causes and effects"[14] is noteworthy.

In principle the notion of integration was already suggested in 1962, when the United Nations General Assembly passed a resolution[15] that governments should not determine their economic development plans in isolation but at the same time should consider natural resource protection measures.[16] However, it was the Stockholm Conference[17] of

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11 Kidd "Removing the green-tinted spectacles: The three pillars of sustainable development in South African environmental law" 2008 *SA J of Environmental Law and Policy* 83 101-102.

12 This was reflected in the ancient culture of many indigenous peoples in various countries, evidenced for example in the agricultural practices of the ancient tribes in Sri-Lanka and certain tribes in Eastern Africa, America and Europe, and in Islamic legal traditions; see Marong "From Rio to Johannesburg: Reflections on the Role of International Legal Norms in Sustainable Development" 2003-2004 *The Georgetown Int Environmental LR* 21 23. More particularly, and closer to home, the notion of interrelationships is embodied in the traditional indigenous culture of *ubuntu* that is also referred to in a modern context. This will be discussed below in the context of culture; see too Church 2009 "Societal Responsibility and the balancing of interests: Economic, Environmental and Social: A South African Perspective" *JALTA* 65 69.

13 "Sustainable development" was defined as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs"; The Report of the World Commission on Environment and Development: *Our Common Future* 1987. The Brundtland Commission's Report (hereafter the *Brundtland Report*) is annexed to UN A/42/427 and available at www.un-documents.net (accessed on 2012-09-02).

14 *Ibid* 21.

15 *Economic Development and the Conservation of Nature* G.A. Res. 1831(XVII) available at http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/193/39/IMG/NR019339.pdf?OpenElement (accessed on 2012-09-10).

16 See further Marong 2003-2004 *The Georgetown Int Environmental LR* 21.

17 Ie the United Nations Conference on the Human Environment, held from 5

1972 that laid the foundation for the consideration of environment and development as related issues. The main focus of the conference was on environmental problems of industrialisation.[18] Since the focus of developing countries would have been on development rather than on environmental problems, initially the conference did not generally enjoy the support of these countries. To allay their fears, a conference seminar in their interest, was held in 1971 in Founex, Switzerland. The subsequent report[19] highlighted the interrelationship between environment and development and concluded, among other things, that economic development was the answer to environmental problems in developing countries. While the Stockholm Conference laid the foundation for an integrated approach, it was the 1987 *Brundtland Report*[20] that placed these issues firmly on the political agenda and highlighted various problem areas, including population and human resources, food security, species and ecosystems, energy, industry and urbanisation.

Five years later, in 1992, the second global conference[21] was held in Rio de Janeiro. Here the theme was sustainable development and the focus was on the protection of the environment together with development. Principle 4 of the resultant declaration[22] for example reflects an integrated approach and advocates the integration of environmental and developmental concerns and determines that to achieve sustainable development, the protection of the environment must form an integral part of the developmental process.[23]

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to 16 June 1972 in Stockholm which some thirty years later was referred to as the "linchpin of modern environment and development thinking" by Töpfer at the time the United Nations Under-Secretary General and Executive Director, United Nations Environment Program; Global Environmental Outlook 3 Preface available at http://www.unep.org/geo/GEO3/english/008.htm (accessed on 2012-09-02).

18 What is commonly referred to as a "North-first" approach the focus would have been on environmental problems of the industrialised nations of the North.

19 The *Founex Report on Development and Environment* of 1971, available at http://www.stakeholderforum.org/fileadmin/files/Earth%20Summit%202012new/Publications%20and%20Reports/founex%20report%201972.pdf (accessed on 2012-09-02).

20 The *Brundtland Report* 1987.

21 The United Nations Conference on Environment and Development (UNCED, also known as the 'Earth Summit)

22 Report of The United Nations Conference on Environment and Development, UN Doc A/CONF 151 26 1992 available at http://www.un.org/documents/ga/conf151/aconf15126-1.html (accessed on 2012-09-02) (hereafter "the Rio Declaration"). The Rio Declaration embodies twenty-seven principles with the goal of "establishing a new and equitable global partnership through the creation of new levels of cooperation among States, key sectors of societies and people".

23 The accompanying document to the Declaration, Agenda 21, UN Doc A/CONF 151 26 (1992) available at http://www.un.org/esa/dsd/ agenda21/ res_ agenda21 _ 00.shtml (accessed on 2012-09-02) contains the "road-map" for a global partnership with the aim of achieving sustainable development.

While the need for an integrated approach had been recognised earlier,[24] it was in 2002, at the World Summit on Sustainable Development (WSSD) held in Johannesburg[25] and in the context of globalisation that integration was emphasised. Here consensus was reached that there are three interdependent and mutually reinforcing pillars of sustainable development – economic development, social development and environmental protection.[26] Challenges in all three these areas must be addressed in order for the new "global community" to last.[27]

Furthermore, it was determined that for globalisation to be sustainable it must be equitable as well as being environmentally sound and the WSSD sought to address social, environmental and economic problems globally in an integrated way. To this end, it was agreed that countries would individually and collectively advance sustainable development locally, regionally and globally.[28]

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24 Ie already in the *Brundtland Report* 1987.

25 The *Johannesburg Declaration on Sustainable Development* (2002) available at http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POI_PD.htm (accessed on 2012-09-01) and the *Johannesburg Plan of Implementation of the World Summit on Sustainable Development (JPOI)* available at http://www.un.org/esa/sustdev/documents/ WSSD_POI_ PD/ English/POI Chapter1.html (accessed on 2012-09-01) were the two main documents adopted at the summit and the focus was on implementation of the relevant principles of sustainable development. Klaus Töpfer, the then Executive Director of the United Nations Environment Programme, declared that the World Summit on Sustainable Development is a "Summit of implementation, the Summit of accountability and of partnership ... represents a defining moment in the efforts of the international community to put our planet on a sustainable path for the future"; *Report of the World Summit on Sustainable Development,* Johannesburg, South Africa, 2002-09-04, UN Doc A/CONF 199/20 at 162 available at http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIToc.htm. (accessed on 2012-09-01). The objects of the summit were to review UNCED and to reiterate a global commitment to sustainable development. See *Johannesburg Plan of Implementation* and the *Report of the World Summit on Sustainable Development*.

26 Paragraph 5 of the *Johannesburg Declaration on Sustainable Development* (2002) reads: "Accordingly, we assume a collective responsibility to advance and strengthen the interdependent and mutually reinforcing pillars of sustainable development – economic development, social development and environmental protection – at the local, national, regional and global levels". The *Johannesburg Plan of Implementation,* which aims to implement the outcomes of the WSSD, also embraces the integrated approach. See for example paragraph 2 which reads: "... These efforts will also promote the integration of the three components of sustainable development – economic development, social development and environmental protection as interdependent and mutually reinforcing pillars ...". Here, globalisation, a phenomenon which had barely registered on political agendas in 1992, is dealt with in a separate section.

27 See *Johannesburg Plan of Implementation* (Introduction).

28 This objective was embraced by the New Partnership for Africa's Development (NEPAD) some two years later. NEPAD sought to provide a broad policy framework for addressing challenges in Africa, including sustainable development, eradication of poverty and integration into the

Recently, and with the objectives, *inter alia,* of the securing of renewed political commitment for sustainable development and of addressing new challenges such as climate change, the United Nations Conference on Sustainable Development (UNCSD)[29] was held in Brazil. In order to advance the global sustainable development agenda the two themes of the conference were the institutional framework for sustainable development and a green economy in the context of sustainable development and poverty eradication. The notion of integration of the three pillars also permeate the recently published[30] outcome document of the conference entitled "*The future we want*".[31]

According to the *National Framework for Sustainable Development*[32] the globally accepted definition of sustainable development as provided by the Brundtland Commission has influenced the understanding of sustainable development in South Africa.[33] The National Framework suggests "a systems approach to sustainability" where:

> the economic system, socio-political system and ecosystem are seen as embedded within each other, and then integrated via the governance system that holds all the other systems together within a legitimate regulatory framework.

28 global economy. In this regard the African Union adopted the *Action Plan* in July 2003. Accordingly, the *Action Plan* integrates economic, environmental and social issues; United Nations Environmental Programme *Manual on Compliance with and Enforcement of Multilateral Environmental Agreements* available at http://www.unep.org/dec/onlinemanual/Compliance/InternationalCooperation/RegionalActionPlans/Resource/tabid/713/Default.aspx. See too Glazewski *Environmental Law in South Africa* 2ed (2005) 33.

29 Also known as the Earth Summit or 'Rio + 20'

30 Ie 2012-09-11.

31 See for example paragraph 3 which reads "We therefore acknowledge the need to further mainstream sustainable development at all levels, integrating economic, social and environmental aspects and recognising their interlinkages, so as to achieve sustainable development in all its dimensions", and paragraph 40 which reads: "We call for holistic and integrated approaches to sustainable development that will guide humanity to live in harmony with nature and lead to efforts to restore the health and integrity of the Earth's ecosystem". UNCSD *The future we want* 2012 available at http://sustainabledevelopment.un.org/futurewewant.html (accessed on 2012-10-10).

32 *National Framework for Sustainable Development* 2008 14.

33 Sustainable development is also entrenched in s 24 Constitution of the Republic of South Africa; 1996. The National Environmental Management Act 107 of 1998 (NEMA) defines sustainable development as "the integration of social, economic and environmental factors into planning, implementation and decision-making so as to ensure that development serves present and future generations". While culture is not referred to in the definition of sustainable development, it is referred to in the definition of "environment" in NEMA, albeit to "cultural resources"; see too Du Plessis & Rautenbach 2010 *PER* 27 41. Culture as a fourth pillar will be discussed below.

This is reflected by the following diagram in the document, set out in Figure 1.[34]

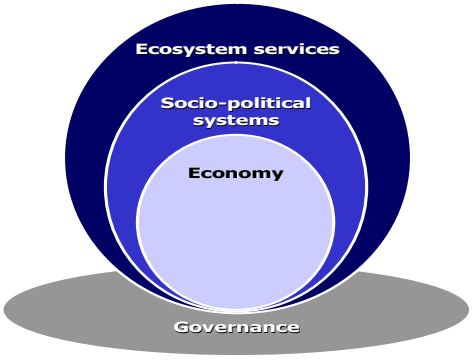

Figure 1[35]

3 The Pillars or Dimensions of Sustainable Development

Although contemporary notions of sustainable development see it as a tri-dimensional concept, with an interface between environment, economic and social sustainability, originally the focus was on an environmentalism framework that highlighted the need to prevent ecological degradation.[36] However, as outlined in the text above, the concept has evolved to recognise the interdependency of the three dimensions of sustainable development with integration as a core element. On the one hand, the economic dimension reflects the need for a perspective that shapes economic activity, including benefits and costs thereof, in line with the limited carrying capacity of the environment and with regard to the preservation of natural resources in order to meet present and future needs.[37] On the other hand, the dimension of social sustainability involves meeting social needs equitably. This is not limited to satisfying material or physical needs such as the provision of clean water, food and shelter but would include, for example, spiritual and emotional needs that would give one a subjective sense of life satisfaction.[38] Thus not only would the equitable distribution of resources be of importance, ideally with a view to the alleviation of poverty, but also the preservation of political and community values. However, in this regard, since societies differ, strategies, geared to the

34 *National Framework for Sustainable Development* 2008 15.
35 As the figure shows, each of the systems though inter-connected are equally important.
36 See Nurse 34.
37 *Ibid.*
38 *Ibid.*

realisation of social sustainability in a particular society, in order to be successful, should accord with the culture[39] of that society. This would include that which would serve to enhance the well-being of the people concerned. Not only does the Constitution of the Republic of South Africa,[40] protect cultural rights[41] but, as will be discussed below, in the framing of the environmental right in section 24, one's "well-being", is explicitly protected.

The three-dimensional sustainable development paradigm, while accepted in mainstream thinking, is not free from criticism. For example, as Nurse[42] points out, particularly with regard to the concept of development, conceptions have been in line with Western models. So too notions of sustainable development have, in his words, accorded with:

> theories of development which prioritises an image and vision of development scripted in the tenets of Western technological civilisation that is often promoted as the 'universal' and the 'obvious'.

Arguing from the methodological standpoint he holds that the central concern with regard to sustainable development is the meaning of sustainability in the different contexts to which it is being applied. He suggests that culture, seen as a total way of life of a community or society,[43] including not only the arts and artefacts of such society but also the attitudes, legal and societal institutions as well as the general value system of the particular society, should be regarded as central to sustainable development.

While the three-pillar idea of sustainable development has been recognised as a "bedrock principle of South African law"[44] there are also those in this country who convincingly argue that a cultural dimension

39 Here "culture" is used in its broad sense to mean the total way of life of a community including for example the political and community value system of such community. See generally Church & Church "The Constitutional right to culture and the judicial development of indigenous law: a comparative analysis of cases" 2007 *Anthropology SA* 56. Culture and sustainable development are discussed more fully below.

40 Constitution of the Republic of South Africa, 1996.

41 For example: s 9 prohibits unfair discrimination on the ground of culture; people have the right to participate in the cultural life of their choice in terms of s 30; people have the right to enjoy their culture with other members of the community and to form, join and maintain cultural, religious and linguistic associations in terms of s 31; a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities is to be established in terms of s 181(1)(c).

42 Nurse 34. The relevant research paper was drafted within the international law context and with regard to the problems experienced in the Small Island Developing States (SIDS).

43 Although the terms "community" and "society" have been used interchangeably, "society" here is used in the sense of the larger group.

44 Kidd 2008 *SA J of Environmental Law and Policy* 85 88.

should be added as a fourth autonomous pillar.[45] In line with this Du Plessis and Feris[46] depict sustainability as follows in Figure 2:

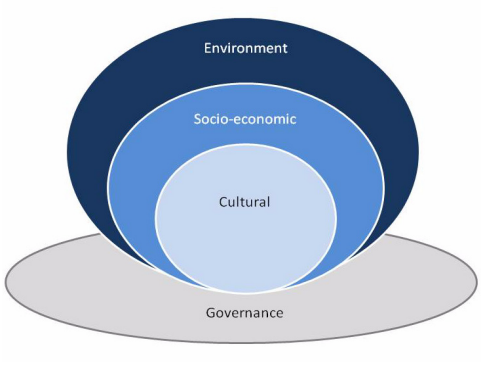

Figure 2[47]

Moreover, in March 2011, during the preparation of the future Earth Summit,[48] the World Secretariat of the United Cities and Local Governments Committee (UNCL) announced that one of its key messages would be on "culture as the fourth pillar of sustainable development".[49] However, it seems that this intention has not yet been realised.[50]

Nonetheless, whether culture is regarded as subsumed by the three pillars of sustainable development,[51] or as a central pillar[52] or as Du Plessis and Feris[53] and others have suggested, a fourth autonomous pillar of sustainable development, there is no doubt that culture must play an integral part in sustainable development.

4 Culture and Sustainable Development and the Significance of *uBuntu*

Culture has been defined and explained in many different ways by

45 Although the list is not exhaustive the following authors are also of this opinion: Du Plessis & Feris 2008 *SA J of Environmental Law and Policy* 157 167; Du Plessis & Rautenbach 2010 *PER* 27.
46 Du Plessis & Feris 2008 *SA J of Environmental Law and Policy* 157 169.
47 *Ibid.*
48 Also known as Rio +20, held in Rio de Janeiro during June 2012.
49 Available at http://agenda21culture.net/index.php (accessed on 2012-05-06).
50 Ie the three pillar idea still features prominently in the outcome document of the conference: *The future we want* 2012.
51 Du Plessis & Rautenbach 2010 *PER* 27 43.
52 Nurse *op cit.*
53 Hawkes *op cit.* See too generally Du Plessis & Feris 2008 *SA J of Environmental Law and Policy* 157; Du Plessis & Rautenbach 2010 *PER* 27.

various scholars and in varying disciplines.[54] Already included within sustainable development dialogues,[55] culture should be seen at least to encompass a set of attitudes, beliefs, mores customs, values and practices which are common to or shared by a group.[56] As already indicated it should be regarded as a total way of life of a community.[57]

The issue of culture[58] is presently recognised in international law[59] as evidenced for example in the Universal Declaration on Cultural Diversity of 2001[60] of the United Nations Educational Scientific and Cultural Organisation (UNESCO), of which South Africa is a member. For example cultural diversity is recognised as a factor in economic and social development,[61] to be preserved, enhanced and handed on to future generations.[62] Furthermore, traditional knowledge, in particular that of indigenous peoples, must be respected as making a valuable contribution with regard to the protection of the environment and the management of natural resources.[63] The Convention for the Safeguarding of the Intangible Cultural Heritage 2003[64] recognises the importance of an intangible cultural heritage as the mainspring of cultural diversity and a guarantee of sustainable development. Similarly, the Convention on the Protection and Promotion of the Diversity of Cultural Expressions of

54 See generally Du Plessis & Rautenbach 2010 *PER* 27.

55 For example at the Mauritius International Meeting for Small Island Developing States (SIDS) (also known as "Barbados + 10") held in Mauritius in January 2005, the importance of culture in advancing sustainable development was formally recognised in Paragraph 82 Chapter XIX of the *Mauritius Strategy* available at http://portal.unesco.org/en/ev.phpURL_ID = 31094&URL_DO = DO_TOPIC&URL_SECTION = 201.html (accessed on 2012-05-10). See too generally Du Plessis & Rautenbach 2010 *PER* 27.

56 See generally Throsby "Culture in sustainable development: insights for the future implementation of Art 13" 143 (2008-01-14 UNESCO Sydney) available at http://unesdoc.unesco.org/ images/ 0015/ 001572/157287E.pdf (accessed on 2012-10-10); Du Plessis & Rautenbach 2010 *PER* 27 36.

57 According to Nurse 5 for example, because culture informs inter alia people's underlying belief systems, values and outlook that moulds the way people interact with the environment as well as shaping international relations, it should be seen as a "whole way of life" when discussing sustainable development.

58 For a discussion on the meaning of culture in the context of sustainable development see generally Du Plessis & Rautenbach 2010 *PER* 27.

59 For a comprehensive discussion in this regard see generally Du Plessis & Rautenbach 2010 *PER* 27.

60 Available at http://portal.unesco.org/en/ev.php-URL_ID = 13179 &URLDO = DOTOPIC&URL_ SECTION = 201.html (accessed on 2012 -10-10).

61 Article 3 of the Declaration reads: "Cultural diversity widens the range of options open to everyone; it is one of the roots of development, understood not simply in terms of economic growth, but also as a means to achieve a more satisfactory intellectual, emotional, moral and spiritual existence".

62 Art 7.

63 Art 14. See too the *United Nations Declaration on the Rights of Indigenous Peoples* 2008 available at http://www.un.org/esa/socdev/unpfii/documents/ DRIPS_en.pdf (accessed on 2012-10-20), which recognises that "respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment".

64 Available at http://portal.unesco.org/en/ev.php-URL_ID = 17716&URL_DO = DO_TOPIC&URL_SECTION = 201.html (accessed on 2012 -10-10).

2005[65] acknowledges the important role that culture can play in the achievement of sustainable development[66] and article 13 provides that:

> Parties shall endeavour to integrate culture in their development policies at all levels for the creation of conditions conducive to sustainable development and, within this framework, foster aspects relating to the protection and promotion of the diversity of cultural expressions.

As Throsby[67] explains, because both developing and developed countries were overlooking opportunities to link cultural and economic development within the framework of sustainable development, article 13 was specifically included in the Convention with the purpose of focusing attention:

> on the need to take a holistic view of the development process, bringing the cultural dimensions of development together with economic and environmental objectives within a sustainability framework.

On a regional level, the African Charter on Human and Peoples' Rights (the African Charter)[68] may inform "a broad understanding of what is necessary from a rights-based perspective to balance the sustainability scale within African countries".[69] Article 24 entrenches an environmental right as a human right and states that: "[a]ll peoples shall have the right to a general satisfactory environment favourable to their

65 Also known as the Cultural Diversity Convention. The text of the Convention can be found under UNESCO 1995 unesdoc.unesco.org. Increased global awareness and recognition of cultural diversity can be attributed to UNESCO. For example in Jan 1988, Paris, UNESCO launched the World Decade for Cultural Development. The decade was proclaimed in order to encourage countries to reflect, adopt policies and undertake activities to ensure the integrated development of their societies. See http://portal.unesco.org/en/ev.php-URLID = 32449&URL DO = DO_TOPIC&URL_SECTION = 201.html (accessed on 2012-10-10). Ratified in South Africa on 2006-12-21 and came into force on 2007-03-18.

66 The preamble to the convention provides "that cultural diversity creates a rich and varied world, which increases the range of choices and nurtures human capacities and values, and therefore is a mainspring for sustainable development for communities, peoples and nations".

67 Throsby 2008 UNESCO 143. In 2009, the Intergovernmental Committee of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions approved operational guidelines for Art 13. Eight measures related to integrating a diversity of cultural expressions into sustainable development were outlined, The guidelines are available at http://unesdoc.unesco.org (accessed on 2012-05-05). Although not clear to what extent, this document already seems to be playing a role in South Africa, albeit in the context of cultural diversity, see further Du Plessis & Rautenbach 2010 *PER* 27 51.

68 The African Charter entered into force on 1986-10-21 and South Africa ratified it on 2002-07-03; available at http://www.hrcr.org/docs/Banjul/afrhr.html (accessed on 2012-10-10). For a discussion of the African Charter in the context of sustainable development see Du Plessis "The balance of sustainability interests from the perspective of the African Charter on Human and Peoples' Rights" in *The balancing of interests in environmental law in Africa* (eds Faure & Du Plessis) (2011) 35.

69 *Ibid* 35.

development". As Du Plessis explains in a recent publication[70] article 24 is broadly framed and protection of the environment should be in a way that is favourable to peoples' development. This means that account would have to be taken of environmental factors as well as other factors which would be favourable to people's development. Culture would be one of these factors. Other provisions in the Charter underpin the importance of culture in this regard. Article 29 for example states *inter alia* that the individual shall have the duty to:

> preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of society.

In South Africa, the link between culture and sustainable development lies *inter alia* in the broad way in which the environmental right is framed in the Constitution.[71] Section 24 determines that "Everyone has the right to an environment[72] that is not harmful to their health or well-being". Here the environment could include *inter alia* one's relationship with natural resources as well as cultural heritage.[73] The specific reference to "well-being" makes it clear that culture should play a role in the sustainable development equation.[74] This being so, it would be necessary to look at the specific culture involved.

5 The Significance of *uBuntu*

The South African legal culture[75] is mixed.[76] Prior to the advent of a new

70 *Ibid* 38, 39.
71 Constitution of the Republic of South Africa, 1996.
72 "Environment" is not defined in the Constitution. NEMA defines "environment" as: "the surroundings within which humans exist and that are made up of –
(i) the land, water and atmosphere of the earth;
(ii) micro-organisms, plant and animal life;
(iii) any part or combination of (i) and (ii) and the inter-relationships among and between them; and
the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being".
73 See in general Glazewski *op cit*.
74 See too generally Glazewski *op cit*; Du Plessis & Feris 2008 *SA J of Environmental Law and Policy* 157; Du Plessis & Rautenbach 2010 *PER* 27. Sustainable development is embodied in s 24(b) Constitution.
75 Legal culture has been described as a "genetic term for attitudes and ideas held by some part of the public, and which are affected by events and situations in the society as a whole and which in turn lead to actions that have an impact on the legal system itself". Church, Schulze & Strydom *Human Rights from a Comparative and International Law Perspective* 2007 26.
76 This is trite but see generally Church & Church "The Constitutional imperative and harmonisation in a multicultural society: A South African perspective on the development of indigenous law" 2008 *Fundamina* 1.

constitutional dispensation, the mix was Euro-centric,[77] and the system often compared to that of a "three-tiered cake", with the Roman, Dutch and English law being its layers.[78] However, the place of indigenous law in the legal system has now been secured[79] and it may be referred to as the third of "three graces of South African law".[80] Widely recognised as central to African philosophy, the notion of *ubuntu*[81] underscores the indigenous value system, which, as will be shown, is part of South African legal culture and for this reason one needs to take account of *ubuntu* in the sustainable development dialogue.

In determining the essence and significance of *ubuntu* I refer as a point of departure, to the groundbreaking work *I am because we are – Readings in Black philosophy.* Here the central theme is that in African tradition personal identity cannot be separated from the environment as a whole which encompass the natural, socio-cultural, physical and spiritual environment. The traditional view was that the universe was "a spiritual whole" in which all beings were interrelated and interdependent existing in reciprocal relationship to one another: for example one could not take without giving. Accordingly, instead of Descartes's "I think therefore I am" in this tradition the maxim is "I am because we are; and since we are, therefore I am".[82]

In the South African context, this idea is reflected in the concept of *ubuntu* often expressed by the maxim "*Umuntu ngumuntu ngabantuu*" (in Zulu), and translated as "a person is a person through other persons", thus reflecting a holistic rather than a narrow perspective of human relationships. There are those who hold that the question as to the

77 Here Euro-centric is used to reflect a "western" as opposed to an "indigenous" approach.

78 This was so for various reasons and despite the fact that indigenous law played an intrinsic role in the majority of the lives of South Africans. Indigenous law was recognised only as a special and a personal law that operated outside of and as determined by general law; see Church & Church 2008 *Fundamina* 1.

79 See ss 8(1), 30, 31, 39, 211 Constitution of the Republic of South Africa, 1996; see generally Church & Church 2007 *Anthropology SA* 56; see Church & Church 2008 *Fundamina* 1.

80 Ie the third component of South African law, apart from civil law and common law; see Church Schulze & Strydom chap 4.

81 Although *ubuntu* is not specifically mentioned in the African Charter on Human and Peoples' Rights which entered into force on 1986-10-21, available at http://www.hrcr.org/docs/Banjul/afrhr.html, aspects of this philosophy are reflected in the Charter. For example not only are human and people's rights embodied in the Charter (arts 1-26), but so too their duties (arts 27-29). Not only is the African value system recognised and by implication the philosophy of *ubuntu* particularly in the preamble but art 17(3) enjoins the "promotion and protection of morals and traditional values recognised by the community" by the State. Be that as it may, the discussion of *ubuntu* in this article is confined to the South African context.

82 Hord & Lee "Introduction" in *I am because we are Readings in Black philosophy* (eds Hord & Lee) (1995) 8.

meaning of *ubuntu* is unanswerable[83] and those who warn against a too "rosy portrayal of African jurisprudence".[84] There is always a danger of "romanticising" and to defend ideals such as *ubuntu* "might be a risky business".[85] Nonetheless, with this *caveat*, *ubuntu* is generally accepted as the foundation of sound human relations in African communities, where as explained in the words of Mokgoro J it embodies the:

> [k]ey values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation.[86]

The importance of group solidarity in the indigenous legal culture is reflected both in the spheres of what may be termed Public Law[87] and Private Law,[88] where shared accountability and group participation play important roles. This is sometimes held to imply that the individual is always subordinate to the group but this is not so. The dignity or self-worth of the individual is not negated but is always recognised. As Cornell and Van Marle[89] explain *ubuntu* is not a "simple form" of communitarianism. In other words, in terms of *ubuntu* the self-worth and dignity of the individual, lies in the fact that how a human being "is and is becoming",[90] is shaped by interaction and interdependence with another. In the process of self-realisation through others, the self-

83 Praeg "An answer to the Question: What is [*ubuntu*]?" 2008 *SA J of Philosophy* 367.

84 Van der Walt "Vertical Sovereignty and Horizontal Plurality: Normative and existential reflections on the capital punishment jurisprudence articulated in *S v Makwanyane*" 2005 *SAPL* 253.

85 See Bohler-Müller "Some thoughts on the *Ubuntu* jurisprudence of the Constitutional Court" 2007 *Obiter* 590.

86 Mokgoro J in *S v Makwanyane* 1995 6 BCLR 665 (CC) par 308. In the *Makwanyane* case this was applied to the interpretation of the Bill of Rights in the South African Interim Constitution Act 200 of 1993.

87 See Mahao "*O se re ho morwa 'morwa towe!'* African jurisprudence exhumed" 2010 *CILSA* 317 321. As the author shows shared authority was the "*leitmotif*" and the chief governed in conjunction with his Council. In the author's own words "Democratic accountability in African jurisprudence was embedded in the constitutional principle *morena ke morena ka batho*" which "speaks to the participatory nature of governance which renders it inherently democratic and accountable to the governed".

88 An example here would be the social responsibility that all homesteads in the community have to assist one another in the planting at the beginning of the summer season. Lovemore, Nyaumwe & Mkabela "Revisiting the traditional African cultural framework of *Ubuntuism*: A theoretical perspective" 2007 *Indlinga – African J of indigenous Knowledge Systems* 152 155. Another example is the participation of groups in marriage negotiations; see generally Church, Schulze & Strydom chap 4.

89 Cornell & Van Marle "Exploring *ubuntu*: Tentative reflections" 2005 *African Human Rights LJ* 195 205.

90 As Louw explains, this accords with the 'grammar' of *ubuntu* denoting a state of being and one of becoming. In the process of self-realisation *through* others, the self-realisation of others is enhanced. Aug 1998 "20th WCP: *Ubuntu*: An African Assessment of the Religious Other". Par 3 available at http://www.bu.edu/wcp/Papers/Afri/AfriLouw.htm (accessed on 2011-08-18).

realisation of others is enhanced. It may be difficult for one who is steeped in a Western way of thinking to move to this idea of individuality since, as one writer has aptly put it, the move is from "solitary to solidarity, from independence to interdependence, from individuality *vis-a–vis* community to individuality *à la* community".[91] However, since indigenous law is part of the South African mixed legal system[92] and *ubuntu* is central to indigenous law, it is argued that the culture of *ubuntu* forms part of South African legal culture.

To my mind, *ubuntu* has already become a justiciable principle.[93] Mokgoro J[94] considered it important to recognise indigenous South African values, more particularly those of *ubuntu*, in constitutional interpretation and decision-making. Referring to the Interim Constitution she opined:[95]

> Section 35 seems to acknowledge the paucity of home-grown judicial precedent upholding human rights, which is not surprising considering the repressive nature of the past legal order. It requires courts to proceed to public international law and foreign case law for guidance in constitutional interpretation, thereby promoting the ideal and internationally accepted values in the cultivation of a human rights jurisprudence for South Africa. However, I am of the view that our own (ideal) indigenous value systems are a premise from which we need to proceed and are not wholly unrelated to our goal of a society based on freedom and equality.

91 *Ibid*.

92 Indigenous law is recognised as such in ss 8(1), 30, 31, 39, 211 Constitution of the Republic of South Africa, 1996; see too Church & Church 2008 *Fundamina* 1; Church & Church 2007 *Anthropology SA* 56. See footnote 79 above.

93 Although discussion of whether this is so is beyond the scope of this article, Cornell & Van Marle 2005 *African Human Rights LJ* 195 present persuasive arguments that this is the case. For example, in the case of *Tshabalala-Msimang v Makhanya* 2008 3 BCLR 338 (W) Jajbhay J stated (par 2) that "[i]n South Africa *ubuntu* must become a notion with particular resonance in the building of our constitutional democracy". Although reference to *ubuntu* in South African case law may at times have been superficial and perhaps the concept not analysed, the fact that *ubuntu* has pervaded various court decisions and has been referred to in order to settle legal disputes is clear. The following may serve as examples: *Port Elizabeth Municipality v Various Occupiers* 2004 12 BCLR 1268 (CC); *Bhe v Magistrate, Khayelitsha; Shibi v Sithole; SA Human Rights Commission v President of the RSA* 2005 1 BCLR 1 (CC); *City of Johannesburg v Rand Properties (Pty) Ltd* 2006 6 BCLR 728 (W); *Dikoko v Mokhatla* 2007 1 BCLR 1 (CC); *Tshabalala-Msimang v Makhanya* 2008 3 BCLR 338 (W); *Masetlha v the President of the Republic of South Africa* 2008 1 BCLR 1 (CC); *The Citizen 1978 (Pty) Ltd v McBride* 2011 8 BCLR 816 (CC); *Le Roux v Dey* 2011 6 BCLR 577 (CC). At an *uButnu* workshop, held at the University of Pretoria on 2011-08-02 (proceedings on file with author) former Justices Mogoro and Sachs and Justice O' Reagan agreed that *ubuntu* is a constitutional value.

94 See *S v Makwanyane* 1995 6 BCLR 665 (CC) par 304.

95 Here with reference to s 35 Interim Constitution; now s 39 Constitution of the Republic of South Africa, 1996.

The value system embodied in *ubuntu* has also been used in legal development[96] in fields other than public law. In the private law sphere for example *ubuntu* played a significant role in the determination of the quantum of damages in an action based on defamation. In determining whether the Roman-Dutch remedy of *amende honorable* (apology by the defendant) is still part of South African law, Justice Mokoro,[97] stated that:

> Whether the *amende honorable* is part of our law or not, our law in this area should be developed in the light of the values of *ubuntu* emphasising restorative rather than retributive justice.

Justice Sachs also relied on the values of *ubuntu* and stated that courts should "explore the wide and creative possibilities afforded by restorative justice as contemplated by the indigenous values of ubuntu or botho".[98]

Policies in other fields of law have also been informed by it. In the context of corporate law for example the culture of *ubuntu* was highlighted in the King Report,[99] more specifically in the context of corporate governance and the protection of the environment. In this context it was stated, that *ubuntu* provides a "cultural hot-bed" for important values such as "creative co-operation, empathetic communication and team-work" and serves as a basis for "corporate culture on African soil". In the context of corporate governance, good corporate citizenship was held to include corporate responsibility with regard to social issues. This meant *inter alia* making business decisions linked to ethical values, legal compliance and respect for communities and the environment.[100]

If as argued culture is a fourth pillar of sustainable development, the notion of *ubuntu* will have to be considered in the implementation of

96 See generally Bennett "An African equity" 2011 *PER* 30.

97 *Dikoko v Mokhatla* 2006 6 SA 235 (CC) par 69. Mokoro J and Sachs J, were in the minority in the determination of quantum. Moseneke J, writing for the majority on quantum recognises the "persuasive ... line of reasoning" advanced by Mokgoro J and Sachs J in their separate but concurring dissenting judgments on quantum. However, he opines that as issues that were not confronted by the trial court were raised, they did not properly arise before the court. In this case there was no attempt at apology.

98 *Dikoko v Mokhatla* 2006 6 SA 235 (CC) par 86.

99 King Committee *King II Report on Corporate Governance* 2002 (hereafter *King II*).

100 *King II* 129. King II was followed by the third report on corporate governance in 2009, *King III Report on Corporate Governance* 2009 (hereafter *King III*). In consequence of the *King Reports* and significant changes to the Companies Act 71 of 2008 and particularly with regard to sustainable development, directors could be held liable if they fail to discharge their duties in terms of the code as laid down by the *King Report*. *King II*, (and the author submits by implication *King III)* may not merely be a voluntary code but a legal injunction. See too the discussion in Esser & Delport "The duty of care, skill and diligence: The King Report and the 2008 Companies Act" 2011 *THRHR* 449.

sustainable development. It is also of interest to note that parallels do exist between the notions of sustainable development and *ubuntu*.

For example in both the notion of inter-dependence plays an important role. The philosophy of *ubuntu* encompasses an holistic rather than an individual approach while sustainable development also requires an holistic approach[101] as integration is a core element.

Sustainable development encapsulates both inter[102] and intra-generational equity,[103] natural resources must be used and allocated equitably and must be preserved for the benefit of present and future generations. Inter-generational equity, intrinsic to the notion of sustainable development, involves looking from the interest of the present to that of the future, in other words forward looking from the self to the other. Similarly, intrinsic to the notion of *ubuntu* is looking away from the self without negating the self. Like sustainable development the culture of *ubuntu* encapsulates both inter-generational and intra-generational equity. Analagous to intra-generational equity *ubuntu* as a social ethic prescribes that members of a community should care for one another and where one suffers all suffer. Instead of only serving the advancement of the self, there is a preference for co-operation or group work[104] which serves the advancement of all as well as the empowering of the other in order to "become". Because of this relational focus there would be less tolerance for economic inequality. As put by Metz and Gaie[105] "a sense of togetherness is difficult to foster when some have much greater wealth than others". The culture of *ubuntu* also recognises

101 Throsby 2008 UNESCO 3 for example refers to the principle of interconnectedness as one of the principles that underlies sustainable development. In terms of this principle "economic, social, cultural and environmental systems should not be seen in isolation; rather, a holistic approach is required". This as outlined in this article is in line with the concept of ubuntu. Furthermore he opines that "in terms of the principle of intergenerational equity: development must take a long-term view and not be such as to compromise the capacities of future generations to access cultural resources and meet their cultural needs; this requires particular concern for protecting and enhancing a nation's tangible and intangible cultural capital".

102 Principle 3 of the *Rio Declaration* 1992 embodies the idea of inter-generational equity and reads: "The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations". This has already been effected in South African legislation and jurisprudence: For example s 4 World Heritage Act 49 of 1999; Church & Church "Heritage" in *LAWSA* (ed Kühne) 10(2) (2005) par 582; *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation and Land Affairs* [2004] 3 All SA 201 (W) 218-219; Church 2009 *JALTA* 65 71.

103 Principle 5 *Brundtland Report* 1987 provides that "All States and all people shall cooperate in the essential task of eradicating poverty as an indispensable requirement for sustainable development, in order to decrease the disparities in standards of living and better meet the needs of the majority of the people of the world".

104 Louw 4.

105 Metz & Gaie "The African ethic of *Ubuntu/Botho*: implications for research on morality" 2010 *J of Moral Ed* 273 277.

the important link between the past, present and future generations where all three levels of existence are recognised and the present living, the living dead and future unborn are all equally important stakeholders.[106]

To return to the main argument, as culture is important to sustainable development, this would mean that: First, account should be had of the culture of the relevant community involved prior to taking any decision regarding sustainable development; secondly it should be determined how culture might serve to further the process of sustainable development. By taking cognisance of the cultural ethic of a particular community, strategies to implement sustainable development could be facilitated.

There are concrete examples of how this might be and is being done. For example *ubuntu* was taken into account with regard to corporate governance.[107] So too this has been done in the "Working for Wetlands" programme.[108] The culture of the people living at the wetland is taken into account and strategies are developed to protect the environment as well as the culture and economic survival of the people. For example women from two craft groups – Ikhowe and Thubaleth'elihle – have been assisted to sustainably harvest wetland reeds which are used to produce crafts which are then sold. While the culture of *ubuntu* may not specifically include the protection of the environment, taking cognisance of this culture may well assist in environmental governance[109] and in the implementation of strategies to achieve sustainable development.

6 Conclusion

In South Africa, in the interest of "people planet and prosperity", cognisance should be taken of the indigenous culture of u*buntu,* both in theory and when determining sustainable development strategies in this country. Furthermore ideally, since culture informs social behaviour,

106 Edozien "Cultural Divergence and Education towards Sustainable Development – An African Viewpoint" 2007 *Bildung für nachhaltige Entwicklung Journal BNE-Journa* available at http://62.50.45.117/coremedia/generator/pm/de/Ausgabe__002/01__Beitr_C3_A4ge/Edozien_3A_20Cultural_20Divergence_20and_20Education_20towards_20Sustainable_20Development_20_E2_80_93_20An_20African_20Viewpoint.html; Louw (1998) par 1: For example, at a "*calabash*", a ritual involving the drinking of beer, when a little bit of beer is poured on the ground for consumption of ancestors.

107 See discussion above.

108 This is a government programme dedicated to the rehabilitation, protection and sustainable use of South Africa's wetlands.

109 That is with regard to strategic planning for sustainable development. As already outlined the philosophy of *ubuntu* encompasses co-operation, partnership and sharing and participation. These values as informed by *ubuntu* could play a role in the implementation of sustainable development, for example participation by the community in the case of impact assessments or community involvement which is typical of the culture of *ubuntu*, as in the case of the Wetlands project.

these strategies should be in line with the prevailing value system of a particular community within the South African society. While this would hold true where the society is culturally homogeneous, there might be problems where a society is multi-cultural as in South Africa. However, here harmonisation[110] may be a solution. In this context, for example, in the case of *S v Makwanyane,*[111] *ubuntu* was used in the interpretation of the western-oriented concept of the human right to dignity and in a process of what has been termed harmonisation[112] greater content was given was given to it. Here *ubuntu* that focuses on the commonality and interdependence of members of the community was held to converge with the constitutional right to dignity where the focus is on the individual's status as a human being.[113] This is not to say that the notion of sustainable development, as it has evolved over the last decades and more particularly within a western context, should be negated. Rather it should be informed and enriched by the indigenous philosophy of *ubuntu a*s has happened in the case of *S v Makwanyane*[114] and *Dikoko v Mokhatla*.[115]

It is trite that South Africa has a mixed legal culture and that the African Customary Law component is constitutionally entrenched.[116] Moreover, there is reference to *ubuntu*, the central tenet of indigenous law in the jurisprudence of the courts in various fields. It has, at least in the view of some, been recognised as a constitutional value and, notably in the words of Sachs J,[117] *ubuntu* is "intrinsic to and constitutive of our constitutional culture" and it "feeds pervasively into and enriches the fundamental rights enshrined in the Constitution".[118]

As already indicated *ubuntu* could be used to inform and implement environment policies and strategies in various fields. It has been shown that moves in this direction have already been made. Interaction with and respect for the environment in the process of sustainable development would be in line with *ubuntu* as would community participation in development projects which, managed intelligently, could serve to alleviate poverty.[119]

110 See in general Church & Church 2008 *Fundamina* 1 2.
111 *S v Makwanyane* 1995 6 BCLR 665 (CC). Here the court had to determine whether or not the death penalty was unconstitutional.
112 Church & Church 2008 *Fundamina* 1 *4*.
113 *Idem* 5.
114 In *S v Makwanyane* 1995 6 BCLR 665 (CC) par 364 Sachs J states that "[t]he secure and progressive development of our legal system demands that it draws the best from all the streams of justice in our country' (emphasis added).
115 *Dikoko v Mokhatla* 2006 6 SA 235 (CC).
116 See generally Church, Schulze & Strydom chap 4.
117 *Dikoko v Mokhatla* 2006 6 SA 235 (CC) par 113.
118 *Ibid*.
119 Such as the "Working for Wetlands" programme which as shown above would serve not only environmental protection but also economic growth and social equity.

Finally it would be politically expedient if sustainable development reflected both the Western and the African ethos. Where the value system of a community is respected and incorporated in policies and strategies and social needs are met, there would be a greater likelihood that they would be embraced by the people concerned. This would be in line with the vision as stated in the preamble to the Constitution:[120] "We, the people of South Africa, ... Believe that South Africa belongs to all who live in it, united in our diversity".

120 Constitution of the Republic of South Africa, 1996.

Judicial oversight for sales in execution of residential property and the National Credit Act*

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OPSOMMING

Geregtelike toesig by eksekusieverkope van residensiële eiendom en die Nasionale Kredietwet

Praktiese uitvoering word gegee aan 'n hofbevel wanneer 'n huis in eksekusie verkoop word. Verkope in eksekusie stel 'n party in staat om 'n hofbevel teen 'n skuldenaar af te dwing. So 'n afdwinging is belangrik vir regswerking. Die Nasionale Kredietwet 34 van 2005** is uitgevaardig om (meestal) prosedurele beskerming te bied aan skuldenaars, terwyl sake soos *Jaftha v Schoeman* en *Gundwana v Steko Development* verg dat howe geregtelike toesig het by bevele wat lei tot verkope van huise in eksekusie. Die pad tot hier was lank en soms deurmekaar. Howe het geworstel met die vraag of 'n bevel om 'n huis te verkoop in eksekusie sonder 'n hofbevel inbreuk maak op die grondwetlike reg tot toegang tot genoegsame behuising. Verskillende howe het tot verskillende gevolgtrekkings gekom. Alhoewel die probleem meestal opgelos is deur die *Jaftha* en *Gundwana* beslissings, is die sake waarin die howe met die vraagstuk geworstel het steeds belangrik om in die toekoms die howe te help om 'n balans te vind tussen die regte van die skuldeiser om haar hofbevel af te dwing, en die skuldenaar se grondwetlike regte.

In die artikel word die impak van die Nasionale Kredietwet op die skuldeiser se vermoë om 'n hofbevel te bekom teen 'n skuldenaar, sowel as die mees belangrike sake tot *Gundwana* wat handel oor die skuldeiser se vermoë om so 'n bevel af te dwing, bespreek. Die fokus is op hoe die hof die mededingende regte moet opweeg.

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** 'n Nie-amptelike vertaling van die Nasionale Kredietwet 34 van 2005 is beskikbaar by http://www.vra.co.za/index.php?option = com_content&view = category&layout = blog&id = 3&Itemid = 3 (red).

1 Introduction

Practical effect is given to the terms of a court order through the process of execution. When property is sold in execution, there must be a preceding judgment and an attachment in execution of that judgment.[1] Execution is therefore the procedure whereby a successful litigant (called the judgment creditor) can follow to enforce a judgment against the judgment debtor, and is regarded as crucial to the legal process.

During the past decade, this process has become more intricate with the introduction of the National Credit Act[2] (NCA) and the judgements of *Jaftha v Schoeman; Van Rooyen v Stoltz*[3] and *Gundwana v Steko Development CC*.[4] This article will start by highlighting the procedural and substantive protection a debtor receives in terms of the NCA when a home is sold in execution, after which the process before the *Jaftha* judgment will be explained. A chronological discussion of the cases from *Jaftha* to *Gundwana* will follow. In conclusion the interaction between the NCA, *Gundwana* or *Jaftha* will be explained.

The purpose of this article is to discuss the most important cases in chronological order and to highlight what each case added to the issue.[5] Even though most of the uncertainties surrounding execution in terms of the high court rules were mooted by *Gundwana v Steko Development CC*,[6] the cases leading up to *Gundwana* would serve as guidelines as to when a court can declare immovable property executable.

2 The National Credit Act

The NCA was enacted:

> [t]o promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient,

1 *Campbell v Botha* 2008 ZASCA 126.
2 34 of 2005.
3 2005 2 SA 140 (CC).
4 2011 8 BCLR 792 (CC).
5 This article will not discuss the possible theoretical explanations or validations for the courts' decisions. This has been done elsewhere. See Van der Walt "Property, social justice and citizenship: property law in post-apartheid South Africa" 2008 *Stell LR* 325 (drawing on Fox's study on the "home interest of occupiers", where, in terms of a new organising framework in property theory, it should be possible to balance the home interest of occupiers with the commercial interest of the creditors); Davis & Klare "Transformative constitutionalism and the common and customary law" 2010 *SAJHR* 403 (on the fundamental changes that *Jaftha* made to common-law understandings).
6 2011 8 BCLR 792 (CC).

> effective and accessible credit market and industry, and to protect consumers.[7]

The NCA covers various credit agreements and their contents, including a mortgage agreement,[8] and aims to prevent over-indebtedness of consumers.[9] This is done by forcing credit providers to evaluate the creditworthiness of a prospective consumer before extending credit. If credit was granted, and the consumer is unable to pay her debts, the NCA further provides that such a consumer may apply for debt review and a rescheduling of debts.[10]

Section 86 of the NCA provides for instances where a consumer may apply for debt review before a notice of default was given to her by the credit provider. The debt councillor then does an extensive review and evaluation of the consumer's obligations to determine whether she is over-indebted.[11] In terms of section 86 such a counsellor can come one of to three conclusions.[12] Firstly, the counsellor can reject the application because the consumer is not over-indebted.[13] Secondly, the counsellor can find that although the consumer is not over-indebted, she is experiencing problems in paying her debts punctually.[14] In this case the counsellor can recommend a voluntary agreement between the parties to reschedule the debt or, if that fails, make a recommendation to the magistrate's court.[15] The court can then either declare the agreement reckless or order rearrangements of the debts. Thirdly, if the counsellor finds that the consumer is over-indebted, the counsellor can either recommend to the magistrate's court[16] that one or more of the

7 S 3 NCA. Although the NCA was assented to by the President in 2006, it came into operation in bits and pieces. The sections relevant to this paper came into operation on 2006-06-01. In *Firstrand Bank v Seyffert* 2010 6 SA 429 the court made it clear that the NCA does not create a "debtor's paradise" (par 10). In *Firstrand Bank Limited v Maleke; Firstrand Bank Limited v Motingoe; Peoples Mortgage Ltd v Mofokeng; Firstrand Bank Limited v Mudlaudzi* 2010 1 SA 143 (GSJ) the court made it clear that consumer legislation introduced new forms of protection for debtors in South Africa. This should help to balance the inequalities in bargaining power between large credit providers and credit seekers. The NCA further provides assistance and protection for previously disadvantaged individuals in the property market by trying to level the playing field.

8 S 1 NCA.

9 Otto & Otto *The National Credit Act Explained* (2010).

10 Otto & Otto 11.

11 According to *National Credit Regulator v Nedbank Ltd* 2009 6 SA 295 (GNP) the credit counsellors fulfils a statutory function and must therefore answer all the court's questions. See Otto "Die oorbelaste skuldverbruiker: die Nasionale Kredietwet verleen geensins onbeperkte vrydom van skulde nie" 2010 *TSAR* 399 402.

12 Otto & Otto ed 61.

13 S 86(7)(a) NCA.

14 S 86(7)(b) NCA.

15 S 87 NCA. See Otto & Otto 62 for a discussion on the section.

16 The magistrates' courts' jurisdiction is unlimited in this instance. See *National Credit Regulator v Nedbank Ltd* 2009 6 SA 295 (GNP).

agreements be declared reckless,[17] or that one or more of the consumer's obligations be rescheduled.[18]

If the consumer is in arrear and a credit provider wishes to enforce the agreement, the consumer must first be notified of her default and informed that she should seek advice. Only after the lapse of a certain period, will the credit provider be allowed to take legal steps.[19] If the credit provider takes legal steps and ends up in court, one of three things can happen. Firstly, the contract may be cancelled due to the consumer's breach and the goods will be sold and the outstanding debt be paid with the proceeds. Secondly, the court can find that reckless credit was granted and either suspend the agreement or part of the agreement or set aside the consumer's obligations. And lastly, the court may find that the consumer is over-indebted and may make an order to reschedule the debt.[20]

Over-indebtedness occurs when a consumer is unable to fulfil her obligations in terms of all her credit agreements on time, with regard to her financial means, prospects, obligations and history of debt repayment.[21] Debt review can be initiated either by the court in any court proceedings where it is alleged that the consumer is over-indebted,[22] or by the consumer herself.[23]

A section 86 application may not be made once the credit provider takes steps to enforce the credit agreement in terms of section 129 of the NCA.[24] Once the credit provider notifies the consumer of her default in terms of a section 129 notification, the credit provider must wait 10

17 S 86(8)(b) NCA.
18 S 86(7)(c)(ii) NCA.
19 S 129; Otto & Otto 12.
20 For a discussion on over-indebtness see Otto 2010 *TSAR* 399.
21 S 79 NCA. See Otto & Otto 59.
22 S 85 NCA. See Otto & Otto 59 for a discussion on the section.
23 S 86 NCA. See Otto & Otto 59 for a discussion on the section.
24 S 86(2) NCA. There was an initial dispute whether the debtor's application for debt review in terms of s 86 NCA was stayed at the moment when the credit provider informs the debtor of her default in terms of s 129(1)(a) NCA or when summons is issued in terms of s 129(1)(b) NCA. See Otto *National Credit Act Explained* (2006) 85 fn 25; Boraine & Renke "Some practical and comparative aspects of the cancellation of instalment agreements in terms of the National Credit Act 34 of 2005: (Part 2)" 2008 *De Jure* 9; Otto "Over-Indebtedness and Applications for Debt Review in Terms of the National Credit Act: Consumers Beware – Firstrand Bank Ltd v Olivier Case" 2009 *SA Merc LJ* 272 277; Coetzee The impact of the National Credit Act on Civil Procedural Aspects relating to Debt Enforcement (LLM dissertation 2009 UP) 85-88; Roestoff *et al* "The Debt Counselling Process – Closing the Loopholes in the National Credit Act 34 of 2005" 2009 *PER* 247 260; *Firstrand Bank Ltd v Olivier* 2009 3 SA 353 (SEC). For a different opinion, see *Standard Bank of South Africa Ltd v Hales* 2009 3 SA 315 (D). The matter was however settled in *Nedbank v National Credit Regulator* 2011 3 SA 581 (SCA) where the court ruled that once a s 129(1)(a) NCA notice was delivered in terms of a specific credit agreement, the consumer cannot apply for debt review for that specific agreement anymore, due to s 86(2) NCA.

business days before it can enforce the agreement (provided that the consumer was in default for more than 20 days).[25]

In terms of section 129(1)(a) a credit provider may[26] inform the consumer of her default before it can enforce[27] the agreement. The mode of service of such a notice can be elected by the consumer.[28] The constitutional court ruled that section 129(1) requires that such a notice must be properly delivered to the consumer (for example with registered mail and proof that it was delivered at the relevant post office for collection).[29]

Once at least 10 business days have lapsed[30] and the consumer has not responded to the notice or responded to the notice by rejecting it and the consumer has not surrendered the goods herself,[31] the credit

25 S 130(1)(a) NCA. See Otto & Otto 103 for a more in-depth discussion. If the consumer applied for review in terms of s 86 NCA, the credit provider can only apply for the termination of such debt review after 60 days. If, after such termination, the credit provider seeks to enforce the agreement in terms of ss 129-133 NCA, the magistrate's court hearing the matter may order for the review to resume on the conditions that the court deems just in the circumstances in terms of s 85(10) NCA. In *Collett v Firstrand Bank Ltd* 2001 4 SA 508 the court ruled that if an application was made for a debt review in terms of s 86 NCA, a credit provider may only terminate the debt review in terms of s 86(10) NCA if the consumer is in default. In this case the credit provider can also not enforce the agreement, because the consumer is not in default. Should the consumer be in default, the credit provider can enforce the agreement by complying with ss 129, 130 NCA, provided that the consumer did not make application for debt review in terms of s 86(1) NCA.

If you are confused by now, you are in good company. Willis J in *Firstrand bank v Seyffert supra* stated that "[a] court is forced to go round and round in loops from subsection to subsection, much like a dog chasing its tail".

26 See Otto & Otto 103 for a discussion of the word "may" in s 129(1)(a) NCA. The court in *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 2 SA 512 (D) par 35 stated that the notice was a prerequisite before legal proceedings could be instituted. See also *Standard Bank v SA Ltd v Van Vuuren* 2009 5 SA 557 (T).

27 For a discussion of the word "enforce" see Otto & Otto 103. For purposes of this paper "enforce" would refer to the credit provider enforcing *any* of its remedies and not just payment of money or an obligation in terms of the agreement. In *ABSA Bank Ltd v De Villiers* 2009 3 SA 421 (SEC) the court held that s129(1)(b) NCA only gives the credit provider the right to commence with legal proceedings to enforce an agreement unless it complied with the notice requirement of s 129(1)(a) NCA and the requirements of s 130 NCA.

28 S 65(2) NCA provides that in the absence of a prescribed mode of delivery, the consumer can choose. It can either be in person at the credit provider's business premises; at any other place designated by the consumer; by ordinary mail (R 1 GN 489 *GG* 28864, 2006-05-31 provides for delivery by registered mail – see Otto & Otto 103, 105.); by fax; by email; by printable web-page.

29 *Sebola v The Standard Bank of South Africa* CCT 98/11 Date of Hearing: 2012-02-14,

30 Provided that it is more than 20 days after the consumer defaulted.

31 This refers to goods sold in terms of an instalment sale, secured loan or lease.

provider may approach the court.[32] Unlike the case of an instalment agreement, secured loan or a lease, if a credit provider wishes to enforce its rights in terms of a mortgage agreement, the credit provider may approach the court for an order to enforce the remaining obligations if the net proceeds from the sale did not discharge the consumer of all her financial obligations.[33]

The NCA therefore added some procedural guards before a consumer's house can be sold in execution, in that a credit provider must first notify the consumer of her default and her right to consult with a debt counsellor. It also provides that an over-indebted consumer herself can apply for debt review to possibly ward off any legal action a bank may otherwise have. This may well, in some situations, prevent the house from being sold in execution, giving the consumer a second chance. A councillor can declare a consumer over-indebted if the information available at the time indicates that the consumer will be unable to satisfy (in a timely manner) the obligations under all her credit agreements. Whether this is the case is determined by reference to the consumer's financial means, prospects and obligations as well as the consumer's tendency to pay her debts under all her credit agreements as indicated by her history of debt repayment.[34] This is a substantial inquiry.[35]

When the debtor is not successful in terms of the NCA the creditor can ask that the agreement be enforced and the house sold in execution. This is done in either a magistrate's court or a high court.

3 Executions Before *Jaftha* and *Gundwana*[36]

Section 66(1) of the Magistrates' Courts Act[37] provides that when a magistrate's court gives judgment, and that judgment has not been complied with, then a warrant of execution may be issued for the delivery of property or the payment of money, or for ejectment.[38] When the order is for the payment of money, there are several remedies available to the judgment creditor.[39] This article will focus on the remedy of property attached and sold in execution, more specifically, immovable property.[40] Section 66(1)(a) of the Magistrates' Courts Act[41] provides that

32 S 130(1) NCA.
33 Van Heerden in *Guide to the National Credit Act* (ed Scholtz) (2008) 12-29.
34 S 79(1) NCA.
35 See Otto 2010 *TSAR* 399 for cases on over-indebtness before 2009.
36 *Gundwana v Steko Development CC* 2011 8 BCLR 792 (CC).
37 32 of 1944
38 R 36(1) Magistrates' Courts Rules.
39 See in general chapter IX Magistrates' Court Act 32 of 1944.
40 S 66(1) NCA. Certain categories of property are protected from such a sale, such as necessary beds and furniture, food for one month etc. "Property" in terms of s 65J, 72 Magistrates' Courts Act 32 of 1944 (MCA) includes certain incorporeals.
41 32 of 1944

a warrant of execution may be issued against movable property and in certain circumstances against immovable property of the judgment debtor that may in turn be sold in execution.

In terms of section 66(1)(a)[42] of the Magistrates' Courts Act,[43] the Sheriff will call to the home of the judgment debtor and attach movable property to settle the debt. If there is not sufficient movable property, the Sheriff issues a *nulla bona* return to state that there is not enough movable property to settle the debt. Before *Jaftha*,[44] the clerk of the court was then obliged to issue a warrant of execution against the immovable property if she was satisfied that there are insufficient movables to satisfy the judgment.[45]

Rule 36 of the Magistrates' Courts Rules dealt with the situation where the judgment in the plaintiff's favour was not satisfied. The judgment creditor's attorney would prepare a warrant that is issued and signed by the clerk of the court and addressed to the Sherriff who then attached and sold the property in execution.[46]

Where the original judgment was entered into by consent or default, the court was not involved in the process of issuing a warrant. In other cases, execution was only issued with leave of the court, sought at the same time as the granting of the judgment. The effect of the old rule 36(7) of the Magistrates' Courts Rules was that judicial oversight only occurred at the initial hearing, since the application of the process of execution occurred with the granting of the judgment.[47]

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42 S66(1)(a) MCA states: Whenever a court gives judgment for the payment of money or makes an order for the payment of money in instalments, such judgment, in case of failure to pay such money forthwith, or such order in case of failure to pay any instalment at the time and in the manner ordered by the court, shall be enforceable by execution against the movable property and, if there is not found sufficient movable property to satisfy the judgment or order, or the court, on good cause shown, so orders, then against the immovable property of the party against whom such judgment has been given or such order has been made.

43 32 of 1944.

44 *Jaftha v Schoeman; Van Rooyen v Stolz* 2005 2 SA 140 (CC).

45 *Jaftha v Schoeman; Van Rooyen v Stolz supra* par 16. Once the property is sold, the judgement debtor can either vacate the premises voluntarily, or stay on. If the judgement debtor chooses to remain on the premise, she will be "holding over" and the new owner would have to evict her in terms of the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE).

R 36(1) Magistrates' Courts Rules provided, before *Jaftha* that "[t]he process for the execution of any judgment for the payment of money, for the delivery of property whether movable or immovable, or for the ejectment shall be by warrant issued and signed by the clerk of the court and addressed to the sheriff".

46 *Jaftha v Schoeman; Van Rooyen v Stolz supra* par 15. If a warrant is obtained and the occupier remains in the house, the occupier will be deemed an unlawful occupier that must be evicted in accordance with PIE.

47 *Jaftha v Schoeman; Van Rooyen v Stolz supra* par 15.

From the aforementioned rules the following needs to be noted. In terms of the old section 66(1) of the Magistrates' Courts Act[48] and rule 36(1) of the Magistrates' Courts Rules, once a *nulla bona* return is issued or at a judgment by consent of default, the clerk of the court was the only person involved in issuing a warrant of execution against the immovable property of the judgment debtor. It should also be noted that such a sale in execution could take place once the judgment creditor complied with all the formalities, with no guarantee that the judgment debtor was actually aware that such a sale was imminent. It is mainly these two problems that caused some constitutional concerns with the execution of immovable property.

Rule 45(1) of the high courts' Uniform Rules of Court, is the equivalent of section 66(1)(a) of the Magistrate's Courts Act.[49] It provides that, unless the immovable property was specially declared executable by the court, or in a judgment granted in terms of rule 31(5) by the registrar, a *nulla bona* return is required before immovable property can be executed.[50] Therefore, if a home was executed based on a default judgment or a *nulla bona* return, no judicial oversight took place. These sections created problems and the questions arose whether the judgment debtor's right to adequate housing is not infringed in the process.

4 Case law

4 1 *Jaftha v Schoeman; Van Rooyen v Stoltz*

Jaftha v Schoeman; Van Rooyen v Stoltz[51] was the first case to question the constitutionality of the execution of residential (immovable) property acquired with state subsidy without judicial oversight. In the *Jaftha* case[52]

48 32 of 1944.
49 *Idem*.
50 Where immovable property is sold in execution certain publicity principles must be adhered to. The execution creditor must, after consulting the sheriff, prepare a short description of the property (such as where it is situated) along with the date and time of the sale. The creditor must then publish this notice in a newspaper in the district where the property is situated, as well as in the *Government Gazette* (r 43(6)(c) Magistrates' Courts Rules). This must be done between 5 and 15 days before the sale.
In certain circumstances a sale in execution can be impugned even after delivery of movables or registration of immovable properties to sales made "in good faith and without notice of any defect" – s 70 Magistrates' Courts Act 32 of 1944 (MCA). Once immovable property is sold in execution, the sheriff is empowered to take the necessary steps to effect registration of transfer (S 68(4)-(5) MCA). A judgment debtor can in such instances ask to impeach the sale in execution if he can show that the purchaser acted in bad faith or the purchaser had knowledge of the defect at the time of purchase. Also, if the principle of legality is violated, the sale in execution will be null and void because the sheriff had no authority to transfer ownership to the purchaser. *Campbell v Botha supra*; *Menqa v Markom* 2008 2 SA 120 (SCA).
51 2005 2 SA 140 (CC).
52 *Idem*.

the two appellants incurred a small debt at a local shop.[53] Not having enough movables to satisfy the debt, the sheriff sold their houses in execution.[54]

Jaftha and Van Rooyen launched proceedings in the Cape High Court asking that the sales in execution be set aside and to get interdicts to prevent the transfer of the houses in the purchasers' names. The *crux* of their argument was that sections 66(1)(a) and 67 of the Magistrate's Court Act[55] was unconstitutional.[56]

The High Court dismissed the argument stating that once the sheriff issued a *nulla bona* return, then the clerk of the court *had* to, in terms of rule 36, issue and sign a warrant of execution against the immovable property.[57]

On appeal the appellants argued that the State and private parties had a duty not to interfere unjustifiably with their existing right to adequate housing as guaranteed in section 26(1) of the Constitution.[58] For the same reason they argued section 66(1)(a) of the Magistrate's Court Act[59] was unconstitutional as it allowed for the unjustifiable removal of their right to access to adequate housing. A person who acquired a house by state subsidy and whose house is sold in execution is prejudiced in that they will be barred from receiving such assistance in future again.[60]

The respondents in turn argued that the measures were reasonable and justified because section 66(1)(a) was part of a scheme and that sections 62 and 73 provided sufficient protection for debtors who wanted to avoid their homes being sold in execution.[61]

The court per Mokgoro J found that section 26(1) of the Constitution contains a negative obligation to not interfere to the right to access to housing, and that this applies to private parties (such as banks) as well.[62] A measure that permits the deprivation access to adequate housing obviously limits the rights in section 26(1).[63] Such a deprivation to the right to adequate housing cannot easily be justified in terms of section 36 of the Constitution since "[i]t is difficult to see how the collection of

53 The debts were not more than R250. Reference is also made to Ms Jaftha's poor health, poverty and very basic education (par 3), and Ms van Rooyen's lack of education and unemployment status.
54 *Jaftha v Schoeman; Van Rooyen v Stolz supra* parr 4, 5.
55 32 of 1944.
56 *Jaftha v Schoeman; Van Rooyen v Stolz supra* par 6.
57 *Ibid* par 13.
58 *Ibid* par 17.
59 32 of 1944.
60 *Jaftha v Schoeman; Van Rooyen v Stolz supra* par 18. They also attacked s 67 MCA on the grounds that it recognises basic necessitates that is needed for survival, but that it does not provide similar protection for the protection of the judgment debtor's house.
61 *Jaftha v Schoeman; Van Rooyen v Stolz supra* par 19.
62 *Ibid* par 31.
63 *Ibid* par 34.

trifling debts in this case can be sufficiently compelling to allow existing access to adequate housing to be totally eradicated".[64]

That being said, *Jaftha* does not mean that *every* sale in execution arising from a small debt will be unreasonable and justifiable,[65] and therefore it is important to consider the facts of each case to ascertain the reasonableness of the execution.[66] If the hardship caused by the execution outweighs the advantage to a creditor, it will be unreasonable. Of course, the reverse can also be true. The "consideration of the legitimacy of a sale in execution must be seen as a balancing process".[67] What is laid on the scales are, on the one hand, that the judgment creditor obtains payment and on the other hand, the judgment debtor's interest in security of tenure of his home. If the sale in execution would leave the judgment debtor homeless, the balancing process must be even more careful.[68]

The court listed factors that should be taken into account when balancing the interest of the parties. These factors are[69] the size of the debt;[70] the circumstances in which the debt arose;[71] the financial situation of the parties;[72] whether the debtor is employed or has another source of income to pay the debt;[73] and the availability of alternative methods of debt recovery.[74]

The court, unable to set down the situations where such a sale in execution would be justifiable or not,[75] ruled that judicial oversight over the execution process in the magistrate's court is needed.[76] This will allow the magistrate to consider all the relevant circumstances of a case in order to decide where there are good reasons to order execution. This does not need prompting by a debtor.[77] To provide for this judicial oversight, the court ordered that "a court, after consideration of all relevant circumstances, may order execution" be read into section 66(1)(a) before the words "against the immovable property of the party".[78]

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64 *Ibid* par 40.
65 Idem.
66 *Ibid* par 41.
67 *Ibid* par 42.
68 *Ibid* par 56.
69 This is not a closed list, see *Jaftha v Schoeman; Van Rooyen v Stolz supra* par 56.
70 *Ibid* par 57.
71 *Ibid* par 58.
72 *Ibid* par 60.
73 Idem.
74 *Ibid* par 59.
75 *Ibid* par 53.
76 *Ibid* par 55.
77 *Idem.*
78 See Menqa v Markom supra for the possible implication of the fact that this order also applies retrospectively. In Menqa Zondi J held that the declaration of invalidity of s 66(1)(a) MCA in *Jaftha* applied retrospectively and that a warrant of execution obtained prior to *Jaftha* without judicial oversight was

The implication of *Jaftha* is that if the Sheriff has issued a *nulla bona* return, the judgment creditor needs to approach the court to seek an order to permit execution against immovable property.[79]

The facts of *Jaftha* (losing a home to a small debt) makes it easy for one to accept that in such circumstances the courts should have judicial oversight to protect the debtor's right to adequate housing. It is clear that the right of adequate housing in this instance weighs more than the right of the creditor to enforce his (small) debt.

After *Jaftha* the question arose: what to do in circumstances where a bank issued summons against borrowers that defaulted on repayment of loans voluntarily entered into? This situation is different because judgment debtors in this case wilfully give the bank a limited real right (of security) in their property.[80]

4 2 *Body Corporate of Sunninghill Park v Nobumba*

A few months after *Jaftha*, the Eastern Cape High Court was asked to review a decision by a magistrate that refused to authorise a warrant of execution against immovable property where a body corporate obtained judgment against Nobumba for arrear levies.

Plasket J distinguished this case from *Jaftha* on the bases that in *Jaftha* the debts were very small and that the appellants would lose their homes (acquired through state subsidy),[81] and that if they sold their sectional title unit and the debt paid to the body corporate, they would still be able to buy another dwelling with the residue. *In casu* the body corporate's

78 invalid. It is for the reason that the warrant of execution issued by the clerk of the court, without judicial oversight, was invalid. Since the sale in execution was invalid, title could not pass to Manqa, and Markom could for that reason recover his property by way of the *rei vindication* (par 12).
A further question in the High Court was whether the sale could be impeached based on s 70 MCA which provides that "[a] sale in execution by the messenger shall not, in the case of movable property after delivery thereof or in the case of immovable property after registration of transfer, be liable to be impeached as against a purchaser in good faith and without notice of any defect". S 70 is restricted to defects at the time of purchase, and not between the time of purchase and transfer (par 16). Further, if the sale in execution was a nullity, then it did not serve to pass title to the purchaser (or successors in title), which means that the judgement debtor as owner can claim back the property using the *rei vindication* (par 9).

79 *Jaftha v Schoeman; Van Rooyen v Stolz supra* par 64.

80 Property is secured by a mortgage bond when the mortgagor contracts with the mortgagee to pass a mortgage bond over specified immovable property in favour of the mortgagee. The mortgagee then acquires a real right in the property of the mortgagor, allowing it to sell the immovable property in execution to recover outstanding moneys should the mortgagor not pay her debts. See Badenhorst, Pienaar & Mostert *Silberberg and Schoeman's Law of Property* 5 ed (2006) 361.

81 The judge also felt that the respondents had enough time to raise the issue of access to adequate housing but failed to do so.

interest in enforcing the debt outweighs the interest of the respondents (to not have judgment against them).[82]

The case illustrate how the court, when applying the *Jaftha* balancing test, will look at the interest of both parties. The court also made it clear, without saying it in so many words, that the right to access to housing does not mean *any* housing, but *adequate* housing. Since Nobumba could still buy a decent house with the residue of the sale of the sectional title unit, the court felt that this did not infringe on his right to housing.

4 3 *Standard Bank of SA Limited v Snyders*

In *Standard Bank of SA Limited v Snyders*[83] the 9 defendants all owe money to the bank in terms of a bond.[84] Standard Bank served summons on each of the defendants, and in all nine cases the defendant did not give notice to defend, in some Standard Bank filed a written application with the registrar for a default judgement in terms of rule 31(5)(a) of the Uniform Rules.[85] The registrar however claimed not to have the power to grant an order declaring the immovable property executable because of *Jaftha*. Standard Bank then enrolled the matters in the High Court.[86] *In casu* the court had to rule on the situation pertaining to default judgements under rule 31,[87] and secondly whether defendants should have been made aware of their rights in terms of section 26 of the Constitution.

The court did not feel it necessary to declare rule 31 invalid, since, according to the Cape High Court, "[a]ll that is required is that it be interpreted in a practical and sensible manner".[88] This, the court found, is inline with the purpose of the rules of the court, namely "to expedite the business of the courts". Rules must therefore be interpreted "to enable litigants to resolve their differences in as speedy and inexpensive a manner as possible".[89] The court found that rule 31(5) did not exclude the powers of the court and that the court can deal with the matter if referred by the registrar or the defendant.

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82 *Body Corporate of Sunninghill ParPark v Nobumba* 2005 ZAECHC 9 par 33.
83 2005 5 SA 610 (C)
84 *Standard Bank of South Africa Ltd v Snyders and eight similar cases* 2005 5 SA 610(C) par 2
85 *Ibid* par 3.
86 *Ibid* par 4.
87 "Whenever a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff, if he or she wishes to obtain judgment by default, shall where each of the claims is for a debt or liquidated demand, file with the Registrar a written application for judgment against such defendant: Provided that when a defendant is in default of delivery of a plea, the plaintiff shall give such defendant not less than 5 days' notice of his or her intention to apply for default judgment"
88 *Standard Bank of South Africa Ltd v Snyders and eight similar cases supra* par 12.
89 *Idem*.

The second issue is whether the defendants should have been notified of their rights under section 26 of the Constitution.[90] Standard Bank argued that these cases can be distinguished from *Jaftha* because the mortgage bonds signed by the debtor contains a specific clause where the debtor agrees that his property may be declared executable should they default on the payment.[91] The court ruled that, before the Constitution an order to declare property executable was simply a procedural step, but due to *Jaftha* and the Constitution this "is no longer simply a matter of procedural law".[92] Section 26(3) introduced a pre-requisite for granting such an order, by placing an obligation on the courts to now consider all the relevant circumstances in a case.[93] The court solved the matter in terms of the general principles of pleading. This entails that the bank must comply with section 26 of the Constitution, and in the summons show that the facts alleged by the bank will justify an order in terms of section 26 of the Constitution.

In the *Snyders* case the Cape High Court added the requirement that the plaintiff must, in its summons, contain a suitable allegation to the effect that the facts alleged by it are sufficient to justify an order in terms of section 26(3) of the Constitution. It also ruled that if the execution order is asked in terms of section rule 31 (default judgment) no judicial oversight is needed, since expediency of the process is important.

4 4 *Nedbank v Mortinson*

Joffe J did not agree with the *Snyders* case. In the Witwatersrand local division *Nedbank v Mortinson*[94] rule 45(1) of the Uniform Rules was challenged. After Mortinson defaulted on his bond payments, Nedbank applied for execution of his home in terms of a default judgment.[95] Since the registrar was aware of the *Jaftha* case, he doubted his competence to declare the hypothecated property executable and required that the matter be set down for a hearing in court.[96]

The court stated that not in all instances the question of violation of section 26 will be relevant as commercial property is sometimes hypothecated as security. The court accepts without going into it that a declaration to execute residential property in terms of rule 31(5) is a limitation of section 26 constitutional rights,[97] and went on to consider

90 The summons in this case made no reference to s 26(3) Constitution.
91 For this the plaintiff relied on *Jaftha* where the one factor that could be taken into account was whether the defendant willingly put his house up as security for the debt (par 17).
92 *Standard Bank of South Africa Ltd v Snyders and eight similar cases supra* par 22.
93 *Idem.*
94 2005 (6) SA 462 (W)
95 *Nedbank v Mortinson* 2005 6 SA 462 (W) parr 1-2.
96 *Nedbank v Mortinson supra* par 3.
97 *Ibid* par 22.

whether this is a justifiable limitation in terms of section 36(1) of the Constitution.[98]

In answering the question the court noted that "the smaller the amount the greater the need for careful scrutiny and the more compelling the reasoning in the *Jaftha* judgment that the limitation is not reasonable and justifiable".[99] This implies that the cases in the magistrates' courts probably warrant more careful scrutiny.

The second distinction the court made between the facts *in casu* and *Jaftha* is that the sale in execution of hypothecated property should be treated differently because "the debtor has participated in a commercial transaction and has willingly utilised his or her immovable property as security and thus put it at risk".[100]

Thirdly, the court found that the Uniform Rules as opposed to the Magistrates' Courts Rules have a safeguard to protect the debtor, since, the court can reconsider a judgment or direction given by the Registrar within 20 days after the concerned party acquired knowledge of the judgement or direction.[101] The debtor should be aware of this rule because he "who participate in economic activity to the extent of hypothecating immovable property" would in normal circumstances have access to legal advice.[102] For those instances where such an assumption would not be true, the court found that a rule of practice that prescribes to the Registrar to include the provisions of rule 31(5)(d) should suffice.[103]

The court had no difficulty to find, based on the above, that where a debtor specifically hypothecated his immovable property and there is no abuse of court procedure, that the limitation on one's access to housing is justifiable in terms of section 36(1) of the Constitution. The court found that rules of practice to alert the Registrar to assist him to determine

98 *Ibid* par 23.
99 *Nedbank v Mortinson supra* par 24.
100 *Ibid* par 25.
101 *Ibid* par 26. Such an order must be brought to the attention of the court that will consider the default judgment *de novo* without the *onus* on the debtor.
102 The court finds it impractical that 300 to 400 applications for default judgements of this nature be heard in open court. In this context the court re-iterates that "[w]here the judgement debtor willingly puts his or her house as security for a debt, a sale in execution should ordinarily be permitted, absent to abuse of court procedure" (par 28).
103 *Ibid* par 27. The court also regarded the view that "summons should contain a suitable allegation to the effect that the facts alleged by it […] are sufficient to justify an order in terms of s 26(3) of the Constitution" to be "no more than allegations relating to the existence of the loan, that the full amount of the loan has become repayable by virtue of the debtor's default and the loan has been secured by immovable property which has been specially hypothecated". These facts, the court found, is the same that is used in a non-excipiable summons for this relief (par 32).

abuses and to refer those applications to the consideration by the court.[104]

On rule 45(1) and the issue of writs after immovable property has been declared executable by the Registrar the court ruled that if the Registrar declared immovable property executable, then the writ may be issued. If the writ was issued after the movables were insufficient to satisfy the debt, then the *Jaftha* judgment is applicable as there is no basis on which the judgement can be distinguished.[105] To remedy this defect the words "and a court, after consideration of all relevant circumstances, has authorised execution against the immovable property" must be inserted after "movable property" in rule 45(1).[106]

The court attached a lot of weight to the debtor's presumed knowledge of the law – if the debtor can enter into mortgage agreement, he must be able to participate and bear the consequences of such agreement. The Johannesburg court ruled that even if the amount falls within the jurisdiction of the magistrate's court, the Registrar must refer all cases where hypothecated property is sought to be declared executable to be heard in the open motion court.[107] Magistrate court's execution requires careful scrutiny because the debts will be relatively low most of the times, while in the High Court the debtor seems to be protected by the Uniform Rules. According to *Mortinson*, therefore, default judgments does not require judicial oversight, while executions based on a *nulla bona* return, will be bound by *Jaftha*.

4 5 *Standard Bank of South Africa Limited v Saunderson*

Standard Bank of South Africa Limited v Saunderson[108] gave the Supreme Court of Appeal the opportunity to clarify the situation in the High Court. In *Saunderson* Standard Bank requested the payment of the outstanding bond amounts. The debtors did not respond to the summons and Standard Bank applied for default judgement, requesting the Registrar to order the immovable properties executable.

The court from the outset made it clear that a mortgage bond might be treated differently from the *Jaftha* scenario by emphasising that it is an agreement that is entered into freely through which the borrower

104 Par 33.

105 *Nedbank v Mortinson supra* par 38. In *Nedbank Limited v Mashiya* 2006 4 SA 422 (T) the defendants owed R17,379.10 in terms of mortgage bonds. Nedbank claimed payment and an order to declare the property executable. In light of *Mortinson*, the application was referred by the Registrar for consideration in terms of r 31(5)(b)(vi) Uniform Rules. Bertelsmann J made it clear in this judgment that the information in the affidavit based on the requirements set down in *Mortinson* needs to be reliable (par 52).

106 *Ibid* par 39.

107 *ABSA Bank Ltd v Ntsane* 2007 3 SA 554 (T) confirmed this.

108 2006 2 SA 263 (SCA)

compromise their rights of ownership.[109] This curtailment of the right of property "penetrates the rights of ownership", and the "bond-holder's rights are fused into the title itself".[110]

The court placed a lot of emphasis on the mortgage bonds as instrument of security and the fact that the law will give effect to its terms. The purpose of a mortgage bond is to allow the secured creditor to ask the court to execute against immovable property immediately.[111]

The court highlighted that *Jaftha* does not imply that section 26(1) would be compromised in every case where execution is levied against residential property, but that only a writ of execution that deprives a person of "adequate housing" (a relative concept, according to the court)[112] would violate section 26(1) and would therefore need justification in terms of section 36(1).[113] In cases where poor people are evicted from their state subsidised homes, this answer seems obvious, but the question is whether every threat of ownership of a house would constitute an infringement of section 26(1). Just because the court in *Jaftha* found this to be the case, not all residential property will be protected by section 26(1).[114] The court found that, unlike in *Jaftha,* in *Saunderson* "the property owners […] have willingly bonded their property to the bank to obtain capital. Their debt is not extraneous, but is fused into the title to the property".[115] The defendants should therefore show that the execution order would infringe their right to adequate housing, and only then the bank would have to justify the grant of orders. The court also emphasised that just because the property is residential property does not automatically mean that there was an infringement of section 26(1).[116]

The court held that the registrar is entitled to dispose of the application for orders of execution in terms of a default judgment.[117] The defendant can then raise the alleged infringement of section 26(1) that the plaintiff will then have to justify. When the defendant raises a defence (formally or informally), the registrar is in any case in terms of rule 31(5) obliged

109 The court started with an explanation of why "[t]he mortgage bond is an indispensable tool for spreading home ownership", and highlighting the fact that loans secured by mortgage bonds amounted to almost R500 billion in Aug 2005 (par 1).

110 *Standard Bank of South Africa Ltd v Saunderson* 2006 2 SA 263 (SCA) par 2.

111 *Ibid* par 3.

Ibid par 16.

113 *Ibid* par 15.

114 *Ibid* par 17.

115 *Standard Bank of South Africa Ltd v Saunderson supra* par 18. The court also accepts (without deciding) that execution against mortgaged property could conflict with s 26(1) Constitution, but that such a conflict would be the exception. For this the court again rely on a comment made in *Jaftha* that "in the absence of abuse of court procedure […] a sale in execution should ordinarily be permitted against even a home bonded for the debt sought to be reclaimed" (par 19).

116 *Ibid* par 20.

117 *Standard Bank of South Africa Ltd v Saunderson supra* par 21.

to refer it to a judge sitting in an open court.[118] However, the court as a "safety net" ordered that the defaulting debtor (of an execution based on mortgage) should be informed, when action is initiated, that his section 26(1) rights might be infringed.[119]

In *Saunderson* the Supreme Court made it clear that the sanctity of contract (mortgage agreements voluntarily entered into) and the fact that a mortgage bond is so closely linked to the title of the house that the execution orders (based on a default judgment) do not need judicial oversight. Rule 31(5) that allows for matters to be referred to a judge in an open court, as well as informing a debtor at the summons of his section 26(1) rights, provides sufficient protection of such a debtor's section 26(1) rights.

4 6 *ABSA Bank Ltd v Ntsane*

In *ABSA bank Ltd v Ntsane*[120] the bank applied for default judgment against the defendants, claiming the sum of R62 042,43 being the principle sum under a mortgage bond registered over the immovable property of Ntsane. At date of application the defendants were only R18,46 in arrears.[121] Based on the *Mortinson* judgment, the court heard the application to declare the property executable in the open motion court.[122] From the outset the court made clear that the "decision to enforce the bond appeared morally and ethically questionable".[123]

118 *Ibid* par 23.

119 *Ibid* par 24. In reaction to *Saunderson*, in *Campus Law Clinic v Standard Bank of South Africa* 2006 6 BCLR 669 (CC), the Campus Law Clinic approached the Constitutional Court in the public interest to clarify the circumstances in which a court or court official will permit a creditor to sell immovable property to recover money owed to it in terms of a mortgage bond. The Campus Law Clinic questioned the constitutionality of s 27A Supreme Court Act 59 of 1959 and r 31 Uniform Rules, none of which was before the High Court or the Supreme Court of Appeal. The Constitutional Court did not grant the Campus Law Clinic leave to appeal because the challenge involved statutory provisions and rules of the court, and the record of appeal was not enough for a full consideration of all the issues relevant to the matter. Central to the inquiry was what precautions must be taken to ensure that the right of access to adequate housing is taken into account at the execution of immovable property. The court did acknowledge that there was uncertainty about the situation created by the *Jaftha* and *Saunderson* judgments (par 18), as well as the different directives and judgments of the high courts, but did not rule on it since the appeal was dismissed on different grounds.

120 2007 3 SA 554 (T).

121 The court later refers to the arrears amount as "piffling, particularly when the status of the plaintiff as part of a multi-billion Rand international financial conglomerate is taken into account". *ABSA Bank Ltd v Ntsane supra* par 18.

122 *ABSA Bank Ltd v Ntsane supra* parr 1-10.

123 *ABSA Bank Ltd v Ntsane supra* par 22. The court compared the actions of the bank to the likes of William Shakespeare's Shylock character in *The Merchant of Venice*.

Bertelsmann J noted that "[a]djudication between conflicting interest in a society that is governed by a democratic constitution involves the continuous weighing up of competing rights". The rights *in casu* were the bank's right to commercial activity (and to enforce agreements) versus the right to access to adequate housing.[124] During such a weighing up process the proportionality of the harm against the judgment debtor must weighed against the harm the bank may suffer if the agreement is rendered "commercially ineffective" (what was protected in *Saunderson*).[125] *In casu* the court was of the opinion that the arrear amount was so trifling that the bank in effect lost its right to accelerate the bond upon non-payment. This is also because alternative means were available to pay it (such as execution against movable assets),[126] or plaintiffs selling the house on the open market.[127] The court may, in such instances, refuse to grant execution against an immovable property if the result will be "iniquitous or unfair" for the homeowner.[128]

The *Ntsane* judgment, like with *Jaftha*, makes it easy to accept that judicial oversight in some instances leads to fairer results. Here was a clear abuse of the court procedure (preferring execution to alternative means of recovering a trifling debt). It was a modest home executed for a small debt. The fact that Ntsane is not a first time owner means that he will not qualify for state subsidy of a house and that the sale of his house will therefore limit his access to adequate housing.[129]

4 7 *Firstrand Bank Limited v Maleke; Firstrand Bank Limited v Motingoe; Peoples Mortgage Ltd v Mofokeng; Firstrand Bank Limited v Mudlaudzi*

In *Firstrand Bank Limited v Maleke; Firstrand Bank Limited v Motingoe; Peoples Mortgage Ltd v Mofokeng; Firstrand Bank Limited v Mudlaudzi*[130] the Registrar referred the matters to an open court in terms of rule 31(5)(b)(vi) and the *Mortinson* judgment. All four applications dealt with a situation where the amount claimed fell within the jurisdiction of the Magistrate's Court but was placed before the Registrar of the high court.[131] All the defendants further averred that they complied with sections 129 and 130 of the NCA.

124 *Ibid* parr 69-70.
125 *Ibid* par 71.
126 *Ibid* par 72.
127 *Ibid* par 83.
128 *Ibid* par 8.
129 Cleaver J in *First Rand Bank Limited v Swarts* 2010 ZAWCHC 35 relied on *Saunderson*'s emphasis on a right to *adequate* housing, and the emphasis *Saunderson* placed on the property owner that willingly bonded their property to the bank for capital (par 3). The court also found that over-indebtness was not proved (par 7).
130 2010 1 SA 143 (GSJ).
131 *Firstrand Bank Limited v Maleke; Firstrand Bank Limited v Motingoe and Another; Peoples Mortgage Ltd v Mofokeng and Another; Firstrand Bank Limited v Mudlaudzi supra* par 2.

All the defendants were historically disadvantaged individuals.[132] The bonds were paid in instalments on relatively small loans and had been paid regularly for the past 13 + years. The arrears were relatively minor. The section 129 letters of demand that were sent did not expressly warn the defendants that their homes could be sold in execution (and that they might lose it and be evicted) if they did not respond, since this was not required by the act.[133]

The court considered the fact that the defendants paid their instalments regularly and dutifully, and that, should their homes be sold in execution, the banks would benefit from their capital grown while the arrears were relatively minor. The fact that the defendants may have received the excess of the outstanding balance when the property was sold did not protect the execution debtor, since the credit provider had no incentive to sell the property for more than the outstanding debt. There was also no guarantee that the excess would be enough to enable the debtor to purchase a new home.[134]

Instead, the court found that the defendants were ideal candidates for debt councillors in terms of section 85(a) of the NCA. The problem in this case was that, with default judgments there are normally no allegations of over-indebtness before the court. Thus, when a court is considering credit agreements in terms of rule 31(5) in the absence of the debtors it cannot apply the remedies provided in section 85. Section 86(2) actually prevents a referral to a debt counsellor once the credit provider instituted steps in terms of section 129 of the NCA. This not being done in the *Maleke* case, the court could not assist the defendants in protecting their homes in terms of the NCA. The only manner in which the defendants could be afforded protection would be if the matters were re-instituted in the Magistrate's Court.[135]

In *Maleke* the court weighed the interest of the bank in obtaining judgment with the prejudice the debtor may suffer if the house was sold. The fact that the debts were relatively small, that the bank would benefit from the capital growth of the house and that the house would probably not be sold at market value all played on the court's decision.

The court's comments about the role which the NCA plays in the process is also interesting. The court started off to emphasise that the NCA specifically aims at protecting previously disadvantaged individuals. It explicitly mentions that the section 129 notice does not warn a debtor

132 *Firstrand Bank Limited v Maleke; Firstrand Bank Limited v Motingoe and Another; Peoples Mortgage Ltd v Mofokeng and Another; Firstrand Bank Limited v Mudlaudzi supra* par 3. This is relevant since the NCA in its preamble and s 3 makes it clear that it is "designed to render assistance and protection to the previously disadvantaged section of the population who wish to enter the property market".

133 *Ibid* par 5.

134 *Ibid* par 8.

135 The court deems this a possibility based on *Jaftha* and in terms of s 73(1) Magistrate's Court Act 44 of 1945.

of the possible infringement to the right to adequate housing. Lastly, the court in effect warned banks that if the problem can be solved by appointing debt councillors and making alternative arrangements for repayment that the banks must do that.

4 8 *Changing Tides 17 (Pty) Ltd v Scholtz*

Changing Tides 17[136] was also an application for summary judgment where the plaintiff sought judgement for the payment of a sum of money, and an order to declare certain immovable property executable. Scholtz, however, applied for debt review in terms of section 86 of the NCA, and was found to be over-indebted.[137] Four months later the plaintiff gave notice in terms of section 86(10)[138] to terminate the debt review process. The debt counsellor issued an application in the Port Elizabeth Magistrate's Court. At the time of the High Court application, the matter was still pending in the Magistrate's Court. Three months later, the plaintiff issued summons.[139] Scholtz raised the defence that, in terms of section 86(11) of the NCA even if a credit provider gave notice to terminate a review and continue to enforce an agreement, the Court can still order that the debt review process resume.[140]

The court considered the nature of the debt review process and concluded that during the entire process the Magistrates' Court must provide judicial oversight.[141] The court also emphasised the credit provider's (plaintiff's) right to terminate the review process after at least sixty days had lapsed.[142] Should the credit provider apply for such a termination, the Magistrate's Court may order it to resume if it is just in the circumstances. In this case the court ruled that it was only the Magistrate's Court that provided judicial oversight over the debt review process that could make such and order, since it had all the information required to exercise such discretion.[143]

The court then considered the question whether an order declaring the property hypothecated executable would be justified in light of the *Jaftha* judgement.[144] Scholtz did not place any information in front of the court pertaining to the nature of the residence. The court mentioned that the fact that Scholtz was declared over-indebted may in certain circumstances show that such an order would not be justified, but felt that due to the haste of declaring Scholtz over-indebted and the lack of evidence before the court, that a summary judgement was justified.[145]

136 *Changing Tides 17 (Pty) Ltd v Scholtz* 2010 SAECPEHC 3 par 1.
137 *Ibid* par 3.
138 Of the NCA.
139 *Changing Tides 17 (Pty) Ltd v Scholtz supra* par 4.
140 *Ibid* par 6.
141 *Ibid* parr 9-13.
142 *Ibid* par 15.
143 *Ibid* par 16.
144 *Ibid* par 23.
145 *Ibid* par 24.

Changing Tides 17 is important because it shows how the NCA overlaps with declaring a house executable. Here the debtor had the initial protection of the NCA (by being declared over-indebted). That protection fell away when the creditor applied for termination of the debt review process which led for the application of an execution order. If the debtor, at the granting of the execution order, wanted added protection in terms of *Jaftha*, he had to put the necessary facts in front of the court to convince the court that his right to access to housing would be infringed. Mere over-indebtedness would not be enough.

4 9 *Gundwana v Steko Development CC*

Gundwana v Steko Development CC[146] is the case the clears up most of the confusion regarding selling residential property in execution in terms of the Uniform Rules. In *Gundwana* the Constitutional Court had to decide whether the Registrar, in the course of ordering default judgement under rule 31(5)(b) of the Uniform Rules, may grant an order to declare mortgaged property specially executable. Gundwana contended that the power of the registrar was constitutionally invalid.[147]

In 2003, the registrar granted default judgment against Gundwana's property after she had failed to make payments on her bond, and declared the property executable. A writ of attachment was issued to give effect to the execution order.[148] The bank, however, did not act on this and Gundwana continued to make (irregular) payments. In August 2007 the applicant learned that her property would be sold in execution. Upon hearing this, she contacted the bank and promised that she would pay the outstanding moneys and made a payment.[149] The house was nonetheless sold in execution[150] to Steko Development and the property was registered into Steko's name. Gundwana sought rescission of the 2003 default judgement.[151]

The Bank argued that neither the person of the applicant nor her property fell within the *Jaftha* protection. The court rejected this argument on the grounds that "the constitutional validity of the rule cannot depend on the subjective position of a particular applicant ... [i]t is either objectively valid or not".[152] The court also found that it was impossible to determine whether the applicant fell into that category based on the summons alone.[153]

146 2011 8 BCLR 792 (CC)
147 *Gundwana v Steko Development CC* 2011 8 BCLR 792 (CC) par 2.
148 *Ibid* par 5.
149 *Ibid* par 6.
150 With the 2003 writ.
151 *Gundwana v Steko Development CC supra* par 9. She also approached the court for leave to appeal against an eviction order granted to Steko.
152 *Gundwana v Steko Development CC supra* par 42.
153 *Ibid* par 43.

The bank then argued that, unlike in *Jaftha*, the applicant voluntarily placed herself at risk by entering into a mortgage agreement.[154] The court rejected this argument by questioning whether such an applicant also accepted that the mortgage debt may be enforced without a court sanction;[155] waived her right to access to adequate housing or eviction in terms of sections 26(1) and (3) of the Constitution; had the mortgage enforced even in bad faith.[156] This could only be remedied by an evaluation of the facts of each case, which must be done by a court.

The court rejected the bank's argument that the registrar can set the matter down in an open court, or for either of the parties to set the matter down for reconsideration based on the premise that execution of a person's home all require evaluation.[157] With this the court overturned the judgements of *Saunderson* and *Mortinson* but commented that the practical directions given in both cases were valuable.[158]

The court found that in light of constitutional considerations judicial oversight was needed but cautioned that these considerations did not mean that the judgment creditor was no longer entitled to execute upon the assets of a judgement debtor (especially to satisfy a judgement sounding in money). It means that when it does execute against immovable property, due regard should be taken of the impact that this can have on a debtor's right to access to adequate housing. This is especially so "[i]f the judgment debt can be satisfied in a reasonable manner without involving those drastic consequences" then "that alternative course should be judicially considered before granting execution orders".[159]

The court in conclusion acknowledged that execution was part of normal economic life, but that the "disproportionality between the means used in the execution process" to get the payment for the debt and "other available means" might lead to problematic results.[160] "If there are no other proportionate means to obtain the same end," the court concludes, "execution may not be avoided".[161]

To remedy this, the court ordered amendment to the rules (retrospectively) to provide that a writ may only be issued once a court considered all the relevant circumstances.[162]

154 *Ibid* par 42.
155 *Chief Lesapo v North West Agricultural Bank* [1999] ZACC 16 already ruled that the judicial process guaranteed in s 34 Constitution also applies to the attachment and sale of a debtor's property.
156 *Ibid* par 44.
157 *Ibid* par 50.
158 *Ibid* par 52.
159 *Ibid* par 53.
160 *Ibid* par 54.
161 *Idem*.
162 *Ibid* par 55.

In *Gundwana* the Constitutional Court settled the situation in the High Courts by emphasising that the Constitution requires a weighing of interests. These interests can only be weighed by a court. It is then the court's task to look at all the relevant factors to decide whether granting an execution order will infringe on a debtor's right to adequate housing, and whether this restriction is justifiable.[163] This is possible by balancing the interest of the parties. Such "judicial scrutiny in every case should hold no terrors [since] [t]he level of enquiry will vary from case to case and will always be dependent on the circumstances".[164]

5 Conclusion

What does all this mean? Say for instance, D enters into a mortgage agreement with B, and falls behind with her instalments. Her first step will probably be to apply for the safeguards in the NCA, where she can be declared over-indebted. If she is unsuccessful and B then wishes to enforce the agreement, B must first send a section 129 notice. If they end up in court, one of three options is that the court can cancel the contract and order that the goods be sold.[165] Only once the contract is cancelled and B obtains an execution order, does the possibility of infringing a right to adequate housing occur.

Jaftha set the path of what factors a court can take into account when considering whether the right of access to adequate housing is unjustifiably infringed. *Body Corporate Sunninghill* made it clear that it is only a right to *adequate* housing. *Snyders* indicated that the practicalities in high courts do not require the same oversight as in *Jaftha*, but that in the pleadings the creditor must at least show how, by obtaining an execution order, the right to adequate housing will not be infringed. *Mortinson* felt that the high court rules provide adequate protection to a debtor in cases of default judgments, but that in the case of a *nulla bona* return, *Jaftha* applies. In *Saunderson*, the Supreme Court of Appeal made it clear that mortgage agreements willingly entered into will be enforced, and that since the debt in such a case is infused with the title of the property the right to housing is not infringed. *Ntsane* emphasised that the question of infringement is more a weighing of rights, and that if the debts are trifling, the creditor should try and recover it by alternative means first. *Maleke* build on this by stating that in some instances debt counselling should be encouraged. *Changing Tides 17* showed that when a previously declared over-indebted person's house is sold in execution, the fact of over-indebtedness is not enough to convince the court that the right to adequate housing is infringed. In the end the Constitutional Court in *Gundwana* made it clear that whether the right to housing is infringed

163 This was confirmed in *Mkhize v Umvoti Municipality* 2012 1 SA 1 (SCA).
164 *Mkhize v Umvoti Municipality* 2012 1 SA 1 (SCA) par 25.
165 In this context it is important to remember that s 130(2) NCA states that if a house is sold in execution and it does not cover all the outstanding debts, the creditor is not allowed to attach more property to recover the outstanding debt.

unjustifiably can only be determined by a court. The Constitutional Court also made it clear that the fact that a debtor voluntarily placed their house at risk does not mean that the debtor consented to having the house sold in execution without judicial oversight or waive their section 26 rights. Acknowledging the role that execution plays in the economic life, the court made it clear that execution may only take place if there is no other proportionate means to obtain the payment of the moneys.

The taxation of image rights: A comparative analysis

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OPSOMMING

Die belasting van die reg op die openbare beeld: 'n Vergelykende ontleding

Sport het vandag 'n industrie geword en dit het gelei tot die kommersialisering van regte op die openbare beeld wat binne die konsep van persoonlikheidsregte en in die konteks van die *actio iniuriarum* erkenning geniet en as regtens beskermbare belang beskou word. Die daaropvolgende toename in sportlui se waarde en inkomste het onvermydelik die belastinggaarder se belangstelling gewek. Dit het sportlui genoodsaak om belastingadvies te bekom en het 'n aantal belastingbeperkingskemas tot gevolg gehad. Een van hierdie skemas is om 'n sportman se verskaffing van promosiedienste van sy lewering van spelersdienste te skei. Talle sportlui het met die oog op hul regte op die openbare beeld persoonlike maatskappye gestig wat bepaal hoe hierdie regte oorgedra of gelisensieer kan word en sodoende absolute beheer uitoefen oor die kommersiële ontginning van die sportman se regte op sy beeld. Die doel van sodanige skeiding is om die sportman se belastinglas te verlig deur belastingaanspreeklikheid op grond van vergoeding vir promosiedienste te vermy. Die inkomste wat verkry word uit die ontginning van regte op die openbare beeld sal deel van die maatskappy se winste vorm. Die maatskappy sal dan op sodanige winste belas word en die sportman sal 'n dividend van die maatskappy ontvang. Die regsvraag is egter of die belastinggaarder so 'n skema sal toelaat. Daar moet ook vasgestel word of die inkomste verkry uit die gebruik van 'n sportman se regte op die openbare beeld as van 'n kapitale aard beskou kan word wat as 'n kapitaalwins aan minder belasting onderhewig is en of dit as bruto inkomste ingevolge die Inkomstebelastingwet geklassifiseer moet word. Hierdie belastingkwessies is nog nie omvattend in Suid-Afrika aangespreek nie. Ten einde 'n beter begrip te verkry van die verwikkeldhede wat met die belasting van inkomste uit die gebruik van regte op die openbare beeld gepaardgaan, word die benadering in die Verenigde Koninkryk geëvalueer weens die ooreenkomste tussen ons regstelsels in hierdie verband.

1 Introduction

Sport has become an industry today and the image rights of sportspersons have immense commercial value. These image rights are sought after by companies who wish to exploit them in order to enhance brand image, create brand awareness and promote the sale of their products. Individual sportspersons are therefore treated as commodities and are commercialised. There is no better example than David Beckham who earns more off the field of play than on it and has become

an international brand in his own right.[1] This added a fiscal dimension concerning the taxation of image rights. Image rights payments are always taxed more favourably than salary payments and clubs are therefore disguising salary as image rights payments. The circumstances of each individual sportsperson shall determine the legality of any tax mitigation scheme or structure. The first issue to be addressed is whether a sportsperson has an image right in its own right, and secondly whether one can separate the commercial value of his image rights from his playing skills and services.[2]

2 Image Rights

The term "image rights" means the ability of a sportsperson to exclusively control the commercial use of his name, physical/pictorial image, reputation, identity, voice, personality, signature, initials or nickname in advertisements, marketing and all other forms of media.[3] Image rights can also be defined as "any rights that a player has vested in him as an individual person. These rights have value because they can be licensed to a third party for commercial exploitation in the marketplace".[4] Image rights are known in the United Kingdom as "rights of privacy", in the United States as "rights of publicity" and as "rights of personality" in Continental Europe. South African law, however, does not recognise a "right of publicity" and there is also no specific legislative protection available apart from protection against the infringement of a trade mark or copyright.[5] One must therefore seek protection in the common law (for example under unfair competition) or in the Constitution (for example the right of privacy).[6] For purposes of this article I shall refer to image rights in its widest sense and only analyse the

1 Blackshaw "Protecting sports image rights in Europe" May 2005 *Bus L Int* 270 270-273; Gardiner *et al Sports Law* (2006) 53-54; Blackshaw "Protecting and exploiting Sports Image Rights" 2005 3-4 *ISLJ* 42 42-43; Blackshaw *Sports Marketing Agreements: Legal, Fiscal and Practical Aspects* (2012) 379-384.

2 Wentworth "Salary and image rights payments to football players" 2010 4 *WSLR* 3; Gardiner *et al* 443.

3 Cloete *et al Introduction to Sports Law in South Africa* (2005) 176.

4 See Barton, Le Mintier & Tattersall "Player's wages: Can football control the 'prune juice' effect?" in *International Studies in Sport: Selected Essays 2000/2001* (eds Lanfranchi & Probst) (2003) 73-79; Gelder "Image is everything: an analysis of the legal protection of the image of sports athletes" 2005 *ISLJ* 25 25-37; Bray "Image rights: Understanding the matrix of rights" 2003 4 *WSLR* 2.

5 Cloete *et al* 177.

6 For a comprehensive discussion of the protection of image rights see Louw "South Africa" in *International Encyclopaedia of Laws* (ed Hendrickx) (2009) 433-455.

extent to which sportspersons have the right to control the commercial use and economic value attached to their identity.[7]

3 Ownership and Protection of Image Rights

Despite the lack of express (and clear) provisions in most commercial contracts dealing with the ownership of sports image rights, the majority of the sports industry believe that sportspersons should have control over their image rights and the co€mmercial exploitation thereof.[8] It is the right of sportspersons to commercially exploit their own names and likeness for their own financial benefit.

The protection of image rights in Europe varies from country to country. In the United Kingdom there is no specific law protecting image rights.[9] In *Elvisly Yours v Elvis Presley Enterprises*[10] Laddie J found that a personality can only take legal action "if the reproduction or use of [his or her] likeness results in the infringement of some recognised legal right which [he or she] does own". In order to protect their image rights, celebrity sportspersons need to rely on laws such as trademark, copyright, the doctrine of passing off or even breach of commercial confidentiality.[11] In Continental Europe we find a legal right of personality which is often safeguarded and protected under the constitution of that particular country. Image rights then become fundamental human rights and the commercial use thereof can be controlled and exploited.[12]

South African law recognises a number of personality rights and a different common law approach is followed where a person's identity is violated for commercial gain. In *O'Keeffe v Argus Printing and Publishing Co Ltd*[13] Watermeyer J held that the use of a person's image rights without her consent constitutes a violation of that person's identity and further found liability for injury to the person's *dignitas* with the *actio*

7 See Louw "Suggestions for the Protection of Star Athletes and Other Famous Persons against Unauthorised Celebrity Merchandising in South Africa" 2007 *SA Merc LJ* 272; Blackshaw 2005 *Bus L Int* 270 274; Blackshaw 2005 3-4 *ISLJ* 42 43.

8 See "Looking after their image" 2003 (July) *Sport Business Int* 17.

9 Blackshaw "The importance of IP rights in sport" 2008 3-4 *ISLJ* 146 148; Boyd "Does English law recognise the concept of an image or personality right?" 2002 *Ent LR* 1.

10 [1997] RPC 543 548. The recognition of a "character right" was also rejected by the Court of Appeal in *Elvis Presley Enterprises Inc v Sid Shaw Elvisly Yours* [1999] RPC 567.

11 See *Douglas v Hello Limited* [2001] 2 WLR 992; *Irvine v Talksport Ltd* [2003] EWCA Civ 423. See also Blackshaw 2005 *Bus L Int* 270 279, 282; Blackshaw 2005 3-4 *ISLJ* 42 45; Baldwin "Image rights and offshore tax planning" 2003 3 *WSLR* 1; Wentworth 2010 4 *WSLR* 3.

12 See the matter of *Kahn v Electronic Arts GmbH*, unreported 25 April 2003. See also Blackshaw 2005 *Bus L Int* 270 281; Blackshaw 2005 3-4 *ISLJ* 42 47.

13 1954 3 SA 244 (C).

iniuriarum.[14] The commercial exploitation of image rights was also considered by the Supreme Court of Appeal in *Grütter v Lombard*.[15] Nugent JA held that privacy is only one of a variety of interests that enjoy recognition in the concept of personality rights in the context of the *actio iniuriarum* and are worthy of protection.[16] A sportsperson has a proprietary interest in his identity and an infringement of such personality right caused by unlawful commercial exploitation can lead to economic loss.[17] The personality right is distinct from the sportsperson and forms an immaterial asset in the estate of the sportsperson which can be traded.[18]

Image rights are therefore considered legally protectable property and are mostly contractually regulated by sport bodies by means of specific provisions in standard players' contracts. The standard clause in sport contracts usually stipulates that the player assigns the use and enjoyment of his image rights (identity) to the club for which he plays. The player and club may, however, agree that the player keeps control of his image rights and the commercial exploitation thereof.

4 Taxation of Image Rights

The commercialisation of image rights and the subsequent increase in sportspersons' value and income inevitably attracted the interest of the taxman. It became necessary for sportspersons to seek tax advice which resulted in a number of tax mitigation schemes. One of these schemes is to separate a sportsperson's provision of promotional services from his provision of playing services. Many sportspersons have established personal image rights companies which determine how the image rights may be assigned or licensed and therefore exercise absolute control over the commercial exploitation of the sportspersons' image rights. The purpose of such separation is to reduce the tax burden on the sportsperson by avoiding income tax liability on the payments for promotional services. Income derived from the exploitation of image rights will form part of the company profits. The company will then be taxed on such profits and the sportsperson will receive a dividend from the company. The legal question, however, is whether the taxman will allow such a scheme. It must also be established whether the income

14 See also Cornelius "Image Rights" in *Handbook on International Sports Law* (eds Nafziger & Ross) (2011) 507; Louw *International Encyclopaedia of Laws* 435.

15 2007 4 SA 89 (SCA). See Cornelius 508; Louw *International Encyclopaedia of Laws* 435-437.

16 It was also held in *Wells v Atoll Media (Pty) Ltd* [2009] ZAWCHC 173 par 49 by Davis J that the unauthorised use of an individual's attributes with a commercial value "constitutes an unjustifiable invasion of the personal rights of the individual, including the person's dignity and privacy".

17 *Fichard Ltd v The Friend Newspaper Ltd* 1916 AD 1; *Bredell v Pienaar* 1924 CPD 203; *Coxton Ltd v Reeva Forman (Pty) Ltd* 1990 3 SA 547 (A). See also Louw *International Encyclopaedia of Laws* 435.

18 See the discussion in Cornelius 509.

derived from the use of a sportsperson's image rights can be regarded as capital in nature and subject to lesser tax as a capital gain, or whether it should be classified as gross income in terms of the Income Tax Act.[19] These taxation issues have not been comprehensively dealt with in South Africa. In order to establish a better understanding of the intricacies associated with the taxation of income derived from the use of image rights, the approach taken in the United Kingdom is evaluated because of the similarities between our legal systems in this regard.

4 1 The Position in the United Kingdom

The tax position in the United Kingdom of sportspersons resident and domiciled in the United Kingdom and employed by a club is as follows: The sportsperson must pay income tax on the payment made by the club to the sportsperson for his playing services which is employment income. The club must therefore account for income tax and is also responsible for the sportsperson's National Insurance Contributions (NICs) under the UK PAYE system.[20] Most sportspersons are taxed at the highest income tax rate of 50 % (the rate has increased from 40 % since 6 April 2010) and employer NICs add to the cost of the sportsperson's salary package paid by the club. Unsurprisingly, schemes to avoid such taxes have become very tempting, but are mostly seen as artificial and a sham. The use of a service company between the sportsperson and the club is judged to be artificial because the sportsperson remains an employee.[21] It is, however, also possible for a sportsperson to provide promotional services to his club and to third parties. The income generated through promotional services and the exploitation of the image rights of the sportsperson is not always connected with his employment by the club. An intermediary company may then be used for tax mitigation purposes.[22] Image rights are, however, deemed to be capital assets for tax purposes.

4 1 1 Case Law

In the UK case of *Sports Club, Evelyn and Jocelyn v Inspector of Taxes*,[23] Arsenal Football Club made payments to offshore companies in respect of the club's commercial exploitation of the image rights of two of their players, Dennis Bergkamp and David Platt. Bergkamp had his own image

19 58 of 1962. See also Benjamin "Image rights: Image rights and offshore tax planning" 2003 3 *WSLR* 1.

20 See Lewis & Taylor *Sport: Law and Practice* (2008) 1194; Anderson *Modern Sports Law* (2010) 302-303; Blackshaw *Sports Marketing Agreements* 379-380.

21 This arrangement is commonly known as "IR 35" or the "Intermediaries" legislation under the provisions contained in Ch 8 Pt 2 Income Tax (Earnings and Pensions) Act 2003.

22 See Lewis & Taylor 1195.

23 [2000] STC (SCD) 443. See Blackshaw *Sports Marketing Agreements* 266, 380-383; Anderson 303-304; Wentworth 2010 4 *WSLR* 4; Blackshaw 2005 *Bus L Int* 270 283; Blackshaw 2005 3-4 *ISLJ* 42 47; Louw *International Encyclopaedia of Laws* 432.

rights company (incorporated in the Dutch Antilles in 1991) and had assigned his image rights to the company. The company sub-licensed the rights to an intermediary company which was owned by Bergkamp's agent. The intermediary company sub-licensed the rights to his club and to Reebok. Platt also had an offshore image rights company which contracted with third parties. The company was wound up in 1995 and he set up a new image rights company in the UK with him and his wife as directors and shareholders. He subsequently assigned the right to exploit his image rights to that company.[24]

Both players signed playing (employment) contracts with Arsenal Football Club in 1995. Arsenal also signed separate agreements with their image rights companies. The companies granted Arsenal the right to exploit the players' image rights in return for an agreed fee. This fee was seen by the Inland Revenue as income from the players' employment and subject to the normal deductions for income tax. They viewed the agreements as a smokescreen and took the view that the payments were rewards for the players acting as or becoming employees.[25] Bergkamp, Platt and Arsenal appealed against this ruling to the Special Commissioners where the players argued that the exploitation of their image rights was separate from the playing services they provided to Arsenal and that the agreements had independent commercial value.[26]

The Special Commissioners concluded that the payments were not emoluments of the players' employment by Arsenal in terms of section 19 of the Income and Corporation Taxes Act 1988.[27] These payments were classified as capital sums and therefore non-taxable as income. The tax office thus departed from the notion that image rights are not recognised in that they considered image rights to be capital assets. The Special Commissioners held that the image rights agreements had independent and separate value over and above the playing services agreements.

In a recent matter Her Majesty's Revenue and Customs (HMRC) was of the view that there was no proper basis for the payment of the image rights sums and that they were, in effect, shams. In reality they were just

24 See Blackshaw 2008 3-4 *ISLJ* 146 147; Gardiner *et al* 443.
25 Par 87.
26 Par 83.
27 "We note that the promotional agreements and the consultancy agreement were contracts for full consideration and so would be excluded from tax under section 19 for that reason alone. Also, we find that the payments under those agreements were made in return for promotional rights and consultancy services respectively and were not made 'in reference to' the playing of games which was the service rendered by each player by virtue of his player's agreement with [Arsenal]. Neither were the payments under the promotional and consultancy agreements a reward by [Arsenal] for their services of the players; they were paid by [Arsenal] for the promotional rights and the consultancy services respectively." [2000] STC (SCD) 443 par 100.

part of the remuneration. Accordingly, the HMRC was entitled to claim PAYE and NIC on those sums. In the subsequent case of *HMRC v Portsmouth City Football Club Limited*,[28] Mann J stated:

> [t]hat a club is entitled to pay, and a player is entitled to receive, payments for his image rights, that is to say for use of his image in publicity and other material. Where those payments are properly made the club is not obliged to account for PAYE or NIC in respect of them. A club is also entitled to pay, and a player is entitled to agree, the payment of sums to a discretionary trust for his benefit or the benefit of his family. Where such payments are made PAYE and NIC are not paid when the payment is made; they are paid later when the moneys are applied for the benefit of the employee.

4 1 2 Intermediary Companies (IR 35)

New legislation was introduced on 6 April 2000 to prevent employees from using personal service companies to avoid liability for income tax and NIC. This is where a worker provides services through an intermediary and is treated as an employee of the client for tax purposes. The fees paid to the intermediary company is deemed to be salary paid to the worker and employment income tax and employee NICs are payable.

It is uncertain whether the IR 35/intermediaries legislation applies to an image right company. According to Lewis and Taylor[29] one must determine whether "the promotional services were provided under a contract directly between the sportsperson and the club". If that is determined, the sportsperson is regarded as an employee liable for income tax. It is, however, possible to avoid the application of IR 35 if the sportsperson can show that there is a genuine arrangement regarding his playing services and his promotional services. The first step is to use an image rights company in order to transfer the sportsperson's image rights to such a company. The sportsperson would then enter into an agreement with the image rights company to perform promotional services. The image rights company would then enter into agreements with his club and other third parties for the exploitation of his image rights and promotional services. All earnings derived from these activities accrue to the image rights company. The income derived through this agreement is not regarded as income from the sportsperson's employment. Employment income tax and NIC legislation does not apply and results in huge tax savings for both player and club.

The second important arrangement is the contract between the player and the club. This contract must only refer to playing services and not promotional services. The promotional services are provided for in a separate contract between the image rights company and the club as discussed above. If a finding can be made that the image rights company

28 [2010] EWHC 2013 (Ch) par 19.
29 See Lewis & Taylor 1200.

is indeed a sham, the sportsperson can be regarded as an employee under IR 35. However, the transfer of the image rights to the image rights company is a disposal of an asset and subject to a capital gains tax charge. The capital gains tax liability is based on fair market value, the length of the agreement and the celebrity status of the player. Once calculated, certain contingencies such as early retirement, risk of injury and loss of form resulting in varying income levels are applied. The player should avoid receiving a salary from the intermediary company, because that would make him liable for employment income tax and NICs. The company should rather pay the corporation tax due on profits each year (between 10 % and 30 %) and pay dividends to the player. The player (as a shareholder in the company) will then pay income tax at an effective rate of 25 % on his dividend income.[30]

4 1 3 Managed Service Companies

The Finance Act 2007 makes provision for the taxation of individuals whose services are provided through managed service companies. MSCs are managed by scheme providers who provide the services of an individual to a client. The individual is a shareholder and employee, but exercises no control over the company and is not responsible for any administration.

Scheme providers must be involved in the MSC and meet certain criteria: They must –

(1) benefit financially from the individual's services to the company;

(2) influence the provision of those services;

(3) influence the way in which payments are made;

(4) influence the finances of the company; or

(5) provide an undertaking to make good a tax or NIC liability.

If these new rules on MSCs apply to image rights companies, the tax advantages as discussed above would no longer benefit sportspersons. Sportspersons must therefore make sure that their image rights companies do not constitute MSCs.[31]

4 1 4 Non-UK Domiciled Sportspersons

Overseas sportspersons and teams are increasingly refusing to participate in sporting events in the UK due to its harsh tax regime which applies to sport.[32] The recent increase in the income tax rate to 50 % and

30 *Ibid* 1196.
31 *Ibid* 1202.
32 Baldwin "Tax: International sport shuns the UK because of Tax" 2012 8 *WSLR* 1 2; Baldwin "The Budget: impact on sport and athletes earnings" 2009 6 *WSLR* 11.

the HMRC's view taken in the *Agassi*[33] matter worsened the situation.[34]

In *Agassi v Robinson (Inspector of Taxes)*,[35] the Court of Appeal extended the scope of UK income tax for overseas sportspersons participating in the UK. The court held that Agassi was liable to pay UK income tax on endorsement income paid by his sponsors (Nike and Head) to his personal image rights company.[36] Foreign sportspersons face the same UK taxes which British nationals face and there are no tax incentives.[37]

Sportspersons resident outside the UK pay tax on what they earn in the UK and a share of endorsement and sponsorship income, even if this income is earned through an offshore image rights company.[38] The result is that many sportspersons paid more UK income tax than the actual prize money they may have won. Non-UK domiciled sportspersons are usually exempt from paying UK tax on income and capital gains arising abroad. Therefore, the fee paid by a foreign sportsperson's club for the use of his image rights to an offshore company can be exempted from UK taxes.

4 2 The Position in South Africa

Sportspersons in South Africa contribute mainly to the fiscus in the form of normal tax levied in terms of the Income Tax Act.[39] Provisions for the determination of the amount of tax payable by sportspersons are scattered throughout the Act and induced the South African Revenue Services (SARS) to publish a *Draft guide on the taxation of professional sports clubs and players*[40] to present a consolidated view of the taxation of professional sports players in South Africa. However, this guide is not meant to be used as a legal reference and is not a binding general ruling.[41]

33 *Agassi v Robinson (Inspector of Taxes)* [2006] UKHL 23.

34 Guernsey has recently become the first jurisdiction in the world to introduce specific image rights legislation with very attractive tax provisions. See Blacksha*w Sports Marketing Agreements* 283.

35 [2006] UKHL 23.

36 Baldwin "Tax issues facing sports stars performing in the UK" 2006 5 *WSLR* 1; Baldwin "The taxation of overseas sports stars performing in the UK" 2004 11 *WSLR* 5.

37 France and Spain have also begun to impose less favourable tax regimes. France has repealed legislation which allowed clubs to treat 30% of a sportsperson's income as for image rights and the law allowing foreign players in Spain to pay tax at 24% if they earned over £600,000 per annum were amended. See further Sanchez "Changes to taxation: impact on professional sport" 2010 2 *WSLR* 8.

38 See *Agassi v Robinson (Inspector of Taxes)* [2006] UKHL 23; Wright "Agassi tax case deals potential blow to image rights tax structures" 2004 *SLAP* 6 6-7.

39 See also Louw *International Encyclopaedia of Laws* 143-144.

40 Date of issue: Nov 2010.

41 It is not issued in accordance with s 76P Income Tax Act 58 of 1962.

Since 1 January 2001[42] the method of determining whether sportspersons are liable for normal tax in South Africa is residence-based and any sportsperson who qualifies as a "resident"[43] is liable for normal tax on their worldwide "gross income"[44] which includes all benefits (cash as well as payments in kind) received. In the case of image rights payments received from a club that uses the image of a sportsperson for commercial exploitation purposes, it can either be seen as remuneration for employee's tax purposes or even possibly as intellectual property for purposes of royalties' withholding tax. In *ITC 1735*[45] a leading golf professional entered into an agreement with Sun International who agreed to pay him US $100,000 in consideration for the right:

> [t]o exploit the golfer's intellectual property ... including the utilisation of his likeness, biographical material, his presence at promotional events and media conferences and repeat television/video utilisation of his participation in the Tournament ...[46]

Goldblatt J held that the payment made was income in the ordinary sense of the word and could not be considered as of a capital nature. He further held that the payment in issue was not a royalty[47] since the player's name, likeness and biographical details are not creative effort and are accordingly of an entirely different nature to patents, designs or copyright. Image rights payments therefore form part of the sportsperson's gross income and will be included in his taxable income.

The issue of double taxation must also be addressed when a local sportsperson earns foreign income.[48] The sportsperson is liable to pay tax on the foreign income in the country where it was earned and as a taxpayer in South Africa. The problem with double taxation has been recognised by SARS and numerous double taxation agreements (DTA)[49] with various countries have been concluded as a result. The main objective of a DTA is to avoid double taxation and section 6*quat* specifically provides for the claiming of foreign taxes paid by a

42 Revenue Laws Amendment Act 59 of 2000.

43 See for a definition of "residence": *Robinson v COT* 1917 TPD 542; *Cohen v CIR* 1946 AD 174; *CIR v Kuttel* 1992 3 SA 242 (A).

44 See the definition of "gross income" in s 1 Income Tax Act. See further *Van Heerden v The State* 73 SATC 7 where the definition of "gross income" was explained in detail.

45 64 SATC 455.

46 456.

47 If it was found to be a royalty payment, it would have been exempted from South African tax as he was subject to tax in the United Kingdom in respect thereof in terms of art 11 DTA United Kingdom/South Africa.

48 In *Retief Goosen v Commissioner of Internal Revenue* USA Tax Court 136 TC No 27 filed 9 June 20110609 the Tax Court ruled that Goosen could not benefit under either the 1975 or 2001 USA/UK tax treaty because of his Lichtenstein bank account which were used for his non-UK income. His royalty income was allocated as being from a USA source and must be taxed in the USA.

49 See the SARS website www.sars.gov.za (accessed 2012-11-12) for a full list of the double tax agreements.

sportsperson as a credit against his South African tax liability.[50] These agreements usually provide that one of the countries shall have full taxing rights in respect of the income.[51]

The attention of SARS has forced sportspersons to seek specialist tax advice and undoubtedly resulted in a number of tax mitigation schemes. A popular scheme is to separate a sportsperson's image rights from his playing services. The credit worthiness of such a scheme depends on the value placed on the player's image and whether the sum paid for the image rights is a true and accurate reflection of his worth. The value attributable to image rights must be proportionate to the player's on-field value. Therefore, the image rights payments must be a true reflection of the player's profile, exposure and corresponding off the field value. The following scenarios illustrate the possible tax liability where image rights payments have been separated from payment for playing services in respect of payments made to the player (Table A), to an image rights company (Table B) and to an offshore company (Table C):

Table A: Salary and image rights payment to player

Salary	**R'000**	**Image rights**	**R'000**
Receipt	20	Receipt	80
Less 40% tax	(8)	Less 40% tax	(32)
Net income	12	Net income	48

Total net income = R60,000.00

Table B: Salary payment to player and image rights payment to image rights company

Salary (player)	**R'000**	**Image rights (company)**	**R'000**
Receipt	20	Receipt	80
Less 40% tax	(8)	Less 28% Company tax	(22.40)
Net income	12	Income	57.60
		Less 15% Dividends tax	(8.64)
		Net income	48.96

Total net income = R60,960.00

50 See *Interpretation Note No 18 (Issue 2) – 31 March 2009 Income Tax: Section 6quat: Rebate or deduction for foreign taxes on income*).

51 The relevant provisions of the double taxation agreement between the United Kingdom and South Africa is discussed in detail in *ITC 1735* 64 SATC 455.

Table C: Salary payment to player and image rights payment to offshore image rights company

Salary (player)	**R'000**	**Image rights (offshore company)**	**R'000**
Receipt	20	Receipt	80
Less 40% tax	(8)	Less 10% Corporate tax	(8)
Net income	12	Income	72
		Less 0% Dividends tax	(0.00)
		Net income	72

Total net income = R84,000.00

It is clear from the above that tax mitigation schemes make a huge difference on the total net income of sportspersons and it is no surprise that these schemes are attracting the attention of the taxman.

5 Conclusion

Image rights are valuable commodities, but the commercial exploitation thereof throughout the world has become more difficult due to the different interpretations given to image rights.[52] Image rights are not uniformly treated and some harmonisation is required to provide a level playing field for the legal treatment and taxation of image rights.[53] Proper thought and attention are required before entering into any image rights arrangement.[54] Playing services must be separated from promotional services, payments for these services must be distinguished, the image of the sportsperson must have commercial value, the club needs to show that it is actively exploiting the image rights, and image rights payments must be appropriate and reasonable in relation to the commercial value of the image rights. Compliance with these criteria should result in a sensible and legal tax avoidance structure and benefit both sportsperson and club. Poor structuring of these agreements often results in tax authorities viewing these schemes as a sham and challenges the tax treatment of image rights companies.[55] The unfortunate result is that the taxation of international sportspersons at the current high tax rate is alienating them and has a negative impact on the quality of sports events.[56]

52 See Cornelius 517.
53 Blackshaw 2005 *Bus L Int* 270 284; Blackshaw 2005 3-4 *ISLJ* 42 49.
54 Gardiner *et al* 443.
55 Wentworth 2010 4 *WSLR* 7.
56 Baldwin "Time to reform sport's tax structure" 2005 6 *WSLR* 3.

The judicial and legislative reform of the customary law of succession

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OPSOMMING

Regterlike en Wetgewende Hervorming van Gewoonteregtelike Erfopvolging

Die inheemse erfreg was gebaseer op die grondslag dat die manlike eersgeborene die oorledene se erfgenaam is. Die Konstitusionele Hof het dit ongrondwetlik verklaar omdat dit teen vrouens en kinders van die oorledene diskrimineer. Die hof het dus gelas dat alle intestate boedels moet vererf ingevolge die Wet op Intestate Erfopvolging. Weens die verweefdheid van die inheemse familiereg met die erfopvolgingsreg was die wetgewer verplig om die reëls van die intestate erfopvolging te versoen met sekere familieregtelike gebruike. Die uitkoms was die "*Reform of Customary Law of Succession and Regulation of Related Matters Act*". In hierdie artikel wys die skrywers op sekere ongerymdhede in die Wet en dat sommige bepalings nie prakties uitvoerbaar is nie.

1 Introduction

The object of this article is not a mere narration of the current customary law of succession. It is fully covered in recent literature.[1] Our purpose is to examine the implications of what may be termed the judicial and legislative reconstruction of the customary law of succession.

A great deal has been written about the judgment of the Constitutional Court that the rules of male primogeniture are unconstitutional.[2] We accept that the unconstitutionality is a *fait accompli*. It, however, left the legislature with the unenviable task to create a framework for nevertheless applying the customary law of succession, or rather what was left of it.

1 See, among others, Himonga "The Advancement of African Women's Rights in the First Decade in South Africa: The Reform of the Customary Law of Marriage and Succession" 2005 *Acta Juridica* 82; Mbatha "Reforming the Customary Law of Succession" 2002 *J of Human Rights* 159; Rautenbach "South African Common Law and Customary Law of Intestate Succession: A Question of Harmonisation, Integration or Abolition" 2008 *Electronic J of Comp L* 1.

2 See, among others, Rautenbach & Du Plessis "Reform of the South African Customary Law of Succession: Nails in the Customary Law Coffin" in *The Future of African Customary Law* (eds Fenrich *et al*) (2011) 336-360; also Rautenbach 2008 *Electronic J of Comp L* 1.

2 Traditional Customary Law of Succession in a Nutshell

The African system of succession was almost invariably patrilineal. Although in practice the order of succession differs nowadays so much so that every woman may succeed, the official version is as stated by Bennett:[3]

> The rules of succession to a deceased who had only one wife are the same for all systems of customary law in South Africa. The guiding principle is always primogeniture in the male line. If the deceased had no descendants the whole range of male ascendants would be considered in order of 'seniority'.

For present purposes no details are necessary.

It was governed by the principle of primogeniture that even prevailed in polygamous marriages. The rules were plain, straightforward and part and parcel of their system of family law, catering among others for the status and well being of all members of an extended family.

Each family home was a separate establishment. Movable property acquired by the husband accrued to, or was allotted, by him to the different houses. The eldest son of each house succeeded to the property of that house whereupon he was responsible for the widow and children. The system also covered land so that on the death of the family head it accrued to the benefit of his dependants.

This is not merely an idyllic sketch of primitive African life. To this day Africans put a high premium on family solidarity and ancestor veneration. According to Mbiti:[4]

> [w]hen [a man] gets married, he is not alone, neither does his wife "belong" to him alone. So also the children belong to the corporate body of kinsmen, even if they bear only their father's name. Whatever happens to the individual happens to the whole group, and whatever happens to the whole group happens to the individual. The individual can only say: 'I am, because we are, and since we are, therefore I am'.

There are such family homes – many indeed, especially in rural areas[5] where a family head – male or female plays an indispensable role in caring for all the inmates. The family home (household) has no monetary value worth distributing among heirs. It may consist of a single house or a cluster of houses occupied by the family.

But we hasten to add that the primogeniture rule need not necessarily last forever. Take the fact that all westernised blacks – the teachers,

3 Bennett *Customary Law in South Africa* (2004) 337.
4 Mbiti *African Religions and Philosophy* (1969) 108-109.
5 Sibanda "The birth of a new order and unitary land administration system in communal areas of South Africa" (unpublished paper) (Feb 2006) par 2.1 states that there are 3,550,402 households who occupy communal land.

lawyers, clerks, doctors etc, without coercion or persuasion of any kind get married in terms of the common law. Today marriages are accordingly dissolved in terms of the common law and their estates are wound up as though they were Europeans. Many get married in community of property and the rules of community apply without any arguments on the death of one or the other spouse. Furthermore, South Africa is a growing industrial society. Although most of those who work in the labour centres retain close ties with their rural homes and adhere to the primogeniture rule, there is a growing tendency to establish a place of residence away from home and to lead an independent life. In time these people would easily change and adopt the solutions of the Intestate Succession Act.[6] This is evolutionary and smooth as against the revolutionary method brought about by hasty legislation.

3 The Emergent "Living" Customary Law of Succession

Having said that we must add that in the field of succession a substantial volume of living customary law has emerged. This is due to several factors:

(a) Patrilocal residence[7] is no longer practiced, that is the families no longer converge around a male-headed household. Children move to centres where they are employed and there are innumerable female-headed households.

(b) Communal lands are no longer coherent entities. Some erstwhile communal areas are, for instance, huge conurbations where acquisition of ownership and succession differ vastly from typical rural areas. The monetary value of property is far less important than in an industrial economy.

The consequential incidents of "living" customary law of succession may be summarised as follows:[8] The monetary needs of a widow or children may dictate what is to be done with the assets of a deceased.

Several field studies have shown that last-born sons and even daughters inherit the family homestead, this is sometimes done on the basis of a living will. In a case culled from our own material the story was simply that before he died a deceased asked his last-born daughter to take over his homestead and even told her where to bury him.

6 81 of 1987.

7 See about patrilocal residence Ember & Ember *Cultural Anthropology* (1988) 188-190.

8 Legal anthropologists point out that "official" customary law consists of the version developed by colonial administrations in written renditions, case law and legislation. On the other hand, "living" customary law is the law that has been adapted to fit the circumstances, such as that in some communities a system of ultimogeniture, as distinct from primogeniture, is applied. See Rautenbach *et al Introduction to Legal Pluralism* (2011) 28-30.

Disputes are settled by the family. First-born sons would readily concede that property should devolve upon other family members. Some of this might coincide with the application of the Intestate Succession Act,[9] but the Act is rigid. It might jeopardise the give and take approach that occurs in real life situations.

Moreover, incidents of living customary law cannot without more ado be elevated to a general rule of law. We suggest that it could only be regarded as law if "... a fixed line of behaviour is followed by a more or less constant group of persons for a certain period", and ... "a custom, in order to be law, must be commonly believed to be obligatory".[10]

4 Declaration of Unconstitutionality of Customary Rule of Male Primogeniture.

In *Bhe v The Magistrate, Khayelitsha; Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa*[11] (hereafter the *Bhe* case) the Constitutional Court declared customary rule of male primogeniture, which allows only an oldest male descendant or relative to succeed to the estate of a Black person, unconstitutional and invalid. It also declared unconstitutional and invalid, section 23(7) of the Black Administration Act[12] which unfairly discriminates against women and others with regard to the administration and distribution of black deceased estates. The court imposed, as an interim measure, the provisions of the Intestate Succession Act[13] on estates previously dealt with under the Black Administration Act.[14] It also made special provision for estates relating to polygynous marriages and that estates previously administered in terms of the Black Administration Act[15] must be administered by the Master of the High Court in terms of the Administration of Estates Act.[16]

This judgment was widely hailed as a major victory for rights of African women, particularly those married in terms of customary law. They now enjoy the same rights of succession as their white counterparts and men. Women in polygynous marriages and their children have equal succession rights. Extra-marital children are brought into the fold of successors. Above all the law no longer recognises the concept of "*indlalifa*" or universal heir.

9 81 of 1987.
10 Ubink *In the Land of the Chiefs: Customary Law, Land Conflicts and the Role of the State in Peri-urban Ghana* (2008) 221.
11 2005 1 SA 580 (CC).
12 38 of 1927.
13 87 of 1987.
14 38 of 1927.
15 *Idem*.
16 68 of 1965.

5 Brief Evaluation of *Bhe* Judgment

It would serve no purpose whatsoever to deal with the judgment in detail. The outcome is a *fait accompli*. We nevertheless have a few remarks about the manner in which the court went about its task.

Succession in customary law is not as in European legal systems a matter of winding-up an estate (a deceased's wealth and property) and distributing the proceeds to legally specified heirs. Succession in customary law could aptly be described as universal succession, which cannot be understood in isolation. It is inextricably interwoven with African family law and society. Maine[17] explains:

> The decease of individual members makes no difference to the collective existence of the aggregate body, and does not in any way affect its legal incidents, its faculties or liabilities.

The Constitutional Court did not see it in this wider context. It seemed to have been overawed by the submission that male primogeniture is unconstitutional. Was there no middle way? The judges did not seem to have been able to think "outside the box".

Justice Langa, delivering the majority judgment, added a vacuous remark[18] about the manner in which customary law may be "developed":

> The order made in this case must not be understood to mean that the relevant provisions of the Intestate Succession Act are fixed rules that must be applied regardless of any agreement by all interested parties that the estate should devolve in a different way. The spontaneous development of customary law could continue to be hampered if this were to happen. The Intestate Succession Act does not preclude an estate devolving in accordance with an agreement reached among all interested parties but in a way that is consistent with its provisions. There is, for example, nothing to prevent an agreement being concluded between both surviving wives to the effect that one of them would inherit all the deceased's immovable property, provided that the children's interests are not affected by the agreement.

The suggestion is quite absurd. It does not warrant comment, except to say that it is highly improbable that "all interested parties" or two women will spontaneously develop customary law of succession in this manner. Even if two persons come to an agreement it would be *ad hoc*, not developing customary law.

The minority judgment of Ngcobo J[19] is a more true reflection of the customary law of succession and the possibility of developing it. Comments would serve no purpose, because the judicial abolition of the customary law of succession is an accomplished fact.

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17 Maine *Ancient Law: Its Connection with the Early History of Society and its Relation to Modern Ideas* (1930) 202.
18 Par 130.
19 Parr 137-241.

6 The Constitutional Court Orders on the Dismembered Rules of Succession

We quote only two aspects from the judgment that are relevant for our purposes:

> The rule of male primogeniture as it applies in customary law to the inheritance of property is declared to be inconsistent with the Constitution and invalid to the extent that it excludes or hinders women and extra-marital children from inheriting property.
>
> In the application of sections 1(1)(c)(i) and 1(4)(f) of the Intestate Succession Act 81 of 1987 to the estate of a deceased person who is survived by more than one spouse:
>
> (a) A child's share in relation to the intestate estate of the deceased, shall be calculated by dividing the monetary value of the estate by a number equal to the number of the children of the deceased who have either survived or predeceased such deceased person but are survived by their descendants, plus the number of spouses who have survived such deceased;
>
> ((b) Each surviving spouse shall inherit a child's share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Minister for Justice and Constitutional Development by notice in the *Gazette*, whichever is the greater; and
>
> (c) Notwithstanding the provisions of subparagraph (b) above, where the assets in the estate are not sufficient to provide each spouse with the amount fixed by the Minister, the estate shall be equally divided between the surviving spouses.[20]

7 The Reform of Customary Law of Succession and Regulation of Related Matters Act

7 1 Introduction

At the outset we would like to state categorically that the Reform of Customary Law of Succession and Regulation of Related Matters Act[21] (hereafter "the Reform Act"), is not customary law in the true sense of the word. It is said in the long title that it is a "modification" of the customary law of succession, but section 2(1) emphatically provides that:

> [t]he estate or part of the estate of any person who is subject to customary law ... and whose estate does not devolve in terms of that person's will, *must devolve in accordance with the law of intestate succession*.[22]

20 Par 136.
21 11 of 2009.
22 Our emphasis.

The Reform Act makes a few gratuitous concessions, amongst others, that women in ancillary unions may also share in the estate of the deceased man, but that does not create customary law. We shall presently return to these unions. We would rather move on to the consequences of judicial and statutory reconstruction of the customary law of succession.

7 2 The Definitions in the Act

7 2 1 Customary Law

"Customary law" is defined as meaning the customs and practices traditionally observed among the indigenous African people of South Africa, which form part of the culture of those people. It is only lately that customary law came to be defined in some laws in South Africa. Just as "common law" or "Roman-Dutch law" was never defined by statute, customary law was also not defined. Bekker[23] contains a section under the sub-heading "customary law defined" but it is a description of customary law, not a definition.

Some African countries have definitions. Allott[24] says about them: "Whether these definitions of customary law contribute anything by way of precision or facilitation of choice of laws is an open question."

In view of the aforegoing there is a problem that might arise from the customs and practices traditionally observed among the indigenous African people of South Africa. The phrase seems to confine the operation of the law to South African Africans. By implication it excludes persons who are non-Africans and other people of mixed origin who entered into customary marriages. Some were legally married by customary law, because "Blacks" included "any person residing under the same conditions as a Black in a scheduled Black area or a released area". In terms of the definition in the Black Administration Act,[25] somebody who was in fact married by customary law could now on his or her death therefore be regarded as single with the result that a spouse would not reap the benefit of the estate devolving according to the common law of intestate succession. So much more, there has for some time been no longer a prohibition on inter-racial marriages.

One may ask: Who are the indigenous African people of South Africa? According to anthropologists the only true indigenous people of South Africa are the Khoi-San. If in any event African people are meant to be what is presently referred to as Africans or Blacks, what about the Nama and Griquas?

23 Bekker *Seymour's Customary Law in Southern Africa* (1989) 11-13.
24 Allott *New Essays in African Law* (1970) 157.
25 38 of 1927. This inclusion was repeated by s 9(a) Abolition of Racially Based Land Measures Act 108 of 1991.

The Government has drafted the National Traditional Affairs Bill, 2011 to recognise Khoi-San communities and their leadership positions in the same manner as existing traditional leaders. The bill takes it for granted that the Khoi-San disposes of customs in principle akin to South African customary law. For instance, in terms of clause 35(1) a Khoi-San council and branch have a variety of functions including:

(a) Administering the affairs of the traditional or Khoi-San community in accordance with custom and tradition.

(b) Performing the functions conferred by customary law, customs and customary law consistent with the constitution.

These questions are not merely academic. When money is in issue, claimants will try to show that the deceased was, or was not, an indigenous person, depending on what is to be gained from either one or the other. We are being consulted on an ongoing basis by persons who want to prove that they were or were not married by customary law – depending on what is to gain from an estate.

We are of the view that intensive research and wide-ranging consultation could produce a less problematic ratio for applying customary law to some across the board.

7 2 2 Traditional Leader

In terms of the definition in section 1 of the Reform Act "traditional leader" means a traditional leader as defined in section 1 of the Traditional Leadership and Governance Framework Act.[26] In section 1 of that Act "traditional leader" means any person who, in terms of customary law of the traditional community concerned, holds a traditional leadership position and is recognised in terms of that Act.

Other definitions in the Traditional Leadership Act define the whole range of traditional leaders, namely –

(a) Principal traditional leader;

(b) Regents;

(c) Senior traditional leader;

(d) King or queen;

(e) Headman or headwoman.

The Reform Act does not deal with succession to traditional leadership positions. But section 6 deals with "disposition of property held by traditional leader in an official capacity", as follows:

> Nothing in this Act is to be construed as amending any rule of customary law which regulates the disposal of the property which a traditional leader who has died held in his or her official capacity on behalf of a traditional

26 41 of 2003.

community referred to in the Traditional Leadership and Governance Framework Act.[27]

What the drafters had in mind was probably cases where communities acquired land and had it registered in the name of the traditional leader to be held in trust for the community. The land can obviously not devolve in terms of the Intestate Succession Act.[28] It is now required to be disposed of in terms of the rule of customary law which regulates the disposal of such property. The rule is based on male primogeniture. The property would then have to pass on to the first-born son of the deceased chief's wife, to be held in trust for the community. This was probably not intended. The incongruity, we suggest, should be rectified by statute.

Another matter that is more important is that the Reform Act implies that a traditional leader is just an ordinary person whose property on his death passes to his common law heirs. In our view it is wishful thinking. The succession to the office and inheritance of the property are intertwined. The idea is apparently that when a traditional leader dies his successor in title is recognised by the Premier of the province concerned,[29] but his property must be turned into money and distributed among some common law heirs, including his wife or wives in terms of the Reform Act. That is unlikely to happen.

A traditional leader's family home (homestead, if you wish to call it that) is a socio-political unit. That is where his spouses and children live. It is their home. It has no monetary value. This is the place from where he governs his nation. It would be the meeting place of the elders and the seat of the court. This is no small matter. The definition is so wide that even headmen are traditional leaders. Altogether there are about 1 640 traditional leaders.[30]

When a traditional leader dies, it is often not obvious who is to succeed him. If, for instance, he dies leaving no male offspring his wife may be engaged in an *ukungena* relationship to raise an heir. In such event the inheritance to property and succession to office may be in abeyance for many years – at least until the lineage successor reaches adulthood and is formally accepted by the royal council as successor and installed.

At any given time there are dozens of disputes about appointment, removal and settlement of disputes about traditional leaders. In that regard a Commission on Traditional Leadership Disputes and Claims

27 41 of 2003.
28 81 of 1987.
29 Ito s 11 Traditional Leadership and Governance Framework Act 41 of 2003.
30 The scope of identifying the persons who hold positions in the ruling hierarchy is illustrated by the fact that according to the *Department of Provincial and Local Government Report* (undated) 39 there are 1 640 traditional leaders remunerated by the government. In addition there are a number of headmen who are recognised in terms of custom but who are not accorded statutory recognition.

established by sections 21 to 26A of the Traditional Leadership and Governance Framework Act[31] is engaged in resolving disputes.

Thus, we submit, the Act is not worth a straw in bringing intestate succession to traditional leaders within its ambit. It will be well-neigh impossible for them to comply.

7 2 3 Descendant

"Descendant" is defined as a descendant in terms of the Intestate Succession Act,[32] but who, during the lifetime of the deceased person, was accepted by the deceased person in accordance with customary law as his or her own child.

This is an all-embracing provision. It is necessary to express the situation that Africans have an accommodating view in respect of children. They always "belong" to some or another person or family. The children that the legislature had in mind would include the following:

(a) Children of a spinster – they belong to the house to which their mother belongs at her father's family home, and so to her father or his heir.

(b) Children of a wife – children born of, or conceived by a wife during the course of her marriage, whether legitimate or adulterine, belong to her house and so to her husband, except those conceived before the marriage. The husband may claim damages for adultery in respect of adulterine children, but that is not a matter of succession.

(c) Children born of a widow (*ukungena* unions) – the widow of a deceased may enter into an *ukungena* relationship with one of her husband's male relatives to raise children. They are legitimate and belong to her house and so to her late husband's heir. This poses a problem because the husband on whose behalf they were raised is dead. In the light of the unconstitutionality of the rule of primogeniture the deceased customary law heir has no status. Odd though it might seem, the children would be entitled to inherit from their mother and maybe also from their biological father, the *ukungena* partner. In terms of the Intestate Succession Act[33] a child would be entitled to share in his or her biological father's estate. We have recently made enquiries and were told that these *ukungena* relationships still occur. One spokesperson added that in his community the widow may choose a consort. This has all along been done among the Xhosa who frown upon the idea of a woman being taken over by the deceased's brother or any relative; the Xhosa prefer a stranger and if the child is born "on the mat" where the widow used to sleep with the deceased, the child is legitimate and can inherit.[34]

(d) Children of a widow – children born of a woman from her extra-marital intercourse whether while staying at her husband's home or elsewhere,

31 41 of 2003.
32 81 of 1987.
33 81 of 1987.
34 Koyana *Customary Law in a Changing Society* (1980) 83-84.

belong to her house. The husband may claim damages for adultery, but that is not an issue of succession.

(e) Adopted children – children may be adopted in terms of customary law either by a man or a woman. Our courts have in several cases confirmed that such adoptions are valid.[35] As may be expected in the case of Africans, the two families must be involved and the matter must be reported to the traditional leader.

(f) Seedraisers – to the aforegoing we must add seedraisers. It is quite in accordance with custom[36] for a man to marry a seedbearer for either of his two principal wives who, owing to either death or barrenness, produces no heir. Bekker[37] summarises these marriages as follows:

> In the majority of the Cape *Nguni* tribes, if the wife of a main house, that is, of the great or right hand house, without having borne a son, has died, or been divorced, or has absconded and refused to return, or if it appears that she is barren, the family head may marry a new wife for the purpose of raising seed to the main house; since it is the special function of this woman to bear a heir for the house, she creates no house of her own, but is merely an auxiliary wife of the house into which she has been placed, and all her children belong to that house as if they were the children of the main wife; if the main wife has died or has been divorced, the seed-raiser takes her place in all respects.

This should pose no problems if these unions are simply regarded as customary marriages. However, the drafters of the Reform Act got their lines crossed. In terms of section 2(2)(b) of the Reform Act:

> [a] woman, other than the spouse of the deceased, with whom he had entered into a union in accordance with customary law for the purpose of providing children for his spouse's house must, if she survives him, be regarded as a *descendant* of the deceased.

Thus the seedraiser becomes a descendant. But section 3(1) provides that:

> For the purposes of this Act, any reference in section 1 of the Intestate Succession Act to a spouse who survived the deceased must be construed as including every spouse and every woman referred to in paragraphs (a), (b) and (c) of section 2(2).

Which means that a seedraiser is a descendant as well as a spouse. The anomaly is surely an oversight. The Reform Act has not yet been amended, but heads of offices of the Masters of the High Courts decided at a meeting during November 2010 that they would interpret the contradiction in the provisions of sections 2(2)(b) and (c) and section 3(1) of the Reform Act as follows: "The women referred to in these sections are regarded as spouses of the deceased in terms of section 1 of the Intestate Succession Act but not as his descendants." This conclusion was reached to ensure that the seed-raising women are placed in the best

35 *Kewana v Santam Insurance Company Ltd* 1993 4 SA 771 (Tka); *Metiso v Padongelukkefonds* 2001 13 SA 1142 (T).
36 Brownlee cited in *Yoywana v Yoywana* 1912 3 NAC 301 302.
37 Brownlee 279.

possible position, which, in this case, is being regarded as a spouse instead as a descendant. Evidently depending on the form of the marriage, a spouse shares in the deceased estate before the residue is divided between the remaining descendants.[38] This may be fair, but the Act should surely be amended to make it clear what the legislature had in mind.

There is another anomaly in regard to these seedraising unions and the application of the Intestate Succession Act[39] in respect of the childbearers being spouses or descendants. In a seedraising union:

(a) a married man dies (so he is out of the picture);

(b) his widow (a woman past childbearing age) marries another woman after paying lobola;

(c) to provide children for her late husband.

But the late husband is dead and his estate would be finalised by the time this type of union is entered into so the female wife (the childbearer) cannot be said to be his descendant nor spouse for purposes of sharing in his estate.

In section 2(2)(c) of the Reform Act the drafters got their lines entangled. It provides that:

(2) In the application of the Intestate Successions Act –

(c) if the deceased was a woman who was *married* to another woman under customary law for the purpose of providing children for the deceased's house, that other woman must, if she survives the deceased, be regarded as a descendant of the deceased.

A description of the nature and occurrence of these marriages is not necessary for present purpose. Suffice it to say that Bennet[40] briefly refers to them as follows:

> In this type of marriage, an older woman of wealth and status provides lobola in order to acquire a younger woman as her "wife". The "wife" is expected to have sexual relations with a selected male consort so that she can produce children for the "husband's" house. Women-to-women marriages were never common, but they were fully recognised by various systems of customary law in South Africa, notably Venda, Lovedu, Pedi, Sotho and Zulu.

Note that they are independent marriages – not extensions of existing marriages.

38 s 1 Intestate Succession Act 81 of 1987 read with s 3 Reform Act. See also Rautenbach & Meyer "Lost in Translation: Is a Spouse a Spouse or a Descendant (or Both) in Terms of the Reform of Customary Law of Succession and Regulation of Related Matters Act?" 2012 *TSAR* 159. The anomaly is discussed in detail in this article.

39 81 of 1987.

40 Bennet *Customary Law in South Africa* (2004) 197-198.

Bearing that in mind we return to section 2(2)(c) of the Act. It provides that:

(a) a deceased woman;
(b) who was married to another woman under the customary law;
(c) for the purpose of providing children for the deceased's house
(d) that other woman, if she survives the deceased;
(e) must be regarded as a descendant of the deceased.

There are rare cases of female-female marriage. They are not entered into for the main purpose of providing children for the deceased's (female husband's) house. In such cases: "Often such women are traders, political leaders, or religious leaders who seek the social recognition only husbands get".[41]

Oomen[42] shows that all women-to-women marriages may fall within the ambit of the Recognition of Customary Marriages Act.[43] However, she fails to define "marriage". As pointed out all the ancillary unions are not marriages; only those we call "true" women to women marriage.

One would add that if all these unions were marriages the provisions of the Recognition of Customary Marriages Act[44] would apply to them, including patrimonial consequences as well as the rules of succession in terms of the Intestate Succession Act.[45] They would furthermore have to be registered.

7 2 4 Disposal of Property Allotted or Accruing to a Woman in a Customary Marriage

In terms of section 4(1) of the Reform Act such property may be disposed of in terms of a will. There has never been any limitation on anybody's testamentary capacity, except that in terms of section 23(a)(i) of the Black Administration Act[46] a family head could not dispose of:

> [m]ovable property belonging to him and allotted by him or accruing under customary law to any woman with whom he lived in a customary marriage, or to any house, such property devolves in terms of customary law.

This Act has been repealed.

Moreover, in terms of section 6 of the Recognition of Customary Marriages Act:[47]

41 See Krige & Comaroff *African Marriage in Southern Africa* (1981) 8.
42 Oomen "Traditional Woman-to-woman Marriages and the Recognition of Customary Marriages Act" 2000 *THRHR* 274.
43 120 of 1998.
44 *Idem*.
45 81 of 1987.
46 38 of 1927.
47 120 of 1998.

> [a] wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law.

Thus there seems to be no reason why an enactment was necessary to enable her to dispose of her own property (assets) by will.

More importantly, it is unlikely that a woman would ever make a will to dispose of property allotted to her or accrued to her under customary law. Except in rare cases the property would be a family home property to be used to fulfil the needs of the inmates.

In terms of section 7(1) and (2) of the Recognition of Customary Marriages Act:[48]

> (1) The proprietary consequences of a customary marriage entered into before the commencement of this Act continue to be governed by customary law.
>
> (2) A customary marriage entered into after the commencement of this Act in which a spouse is not a partner in any other existing customary marriage, is a marriage in community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouses in an antenuptial contract which regulates the matrimonial property system of their marriage.

In *Gumede v The President of the Republic of South Africa*[49] section 7(1) was declared unconstitutional as far as it relates to monogamous customary marriages. All monogamous customary marriages entered into before the Act came into operation are, as from 8 December 2008 (the date of the judgment), in community of property and of profit and loss between the spouses. The court order has no bearing on customary marriages which had been terminated by death or by divorce before the date of the judgment. Section 7(2) was also declared unconstitutional insofar as it distinguishes between a customary marriage entered into before and after the commencement of the Act. The words "entered into after the commencement of the Act" where therefore declared unconstitutional. The patrimonial consequences of monogamous customary marriages entered into before and after the commencement of the Act, are now the same.

All this means that whatever property allotted to or accrued by the wife becomes assets in the joint estate of the marriage in community of property. In fact the woman would have acquired the property by virtue of it being allotted to her by her husband. On the one hand one may speculate whether he, no longer being the general heir and by implication the *pater-familias*, may distribute (allocate) property. On the other hand all the assets belonging to the spouses prior to the conclusion

48 *Idem*.
49 2009 3 SA 1521 (CC).

of the marriage as well as assets subsequently accumulated fall into the joint estate.

This means that a house is a homestead allotted to a woman or something accruing to her, such as an *ubulungu* beast to be pooled in the joint estate, so that she could dispose of only her share by will. All this will be preposterous in real life situations.

We may emphasise that all monogamous customary marriages, except polygynous marriages entered into after September 2008 when the *Gumede* judgment came to apply, are in community of property.

Taking all the aforegoing into account we daresay that section 4(1) purporting to allow a woman to dispose of property allotted or accruing to her in a customary marriage is meaningless.

7 3 Disputes

In terms of section 5 of the Act:

> If any dispute or uncertainty arises in connection with –
>
> (a) the status of or any claim by a person in relation to a person whose estate or part thereof must in terms of this Act, devolve in terms of the Intestate Succession Act;
>
> (b) the nature or content of any asset in such estate; or
>
> (c) the devolution of family property involved in such estate,
>
> the Master may refer the dispute or uncertainty to a magistrate or traditional leader for an enquiry and recommendation.

Such enquiry may be quite helpful, but we observe that the heading to this section refers to "dispute or uncertainty" in consequence of the nature of customary law! We assume that the magistrate *or* traditional leader may be called upon to enquire into ancillary matters such as the status of children.

Who is the magistrate going to be? It is common knowledge (which we may affirm) that magistrates (judges too for that matter) are ill informed, if at all, about customary law and custom. Magistrates were formerly also district administrators. But they have long ago been ascribed the functions of judicial officers – only that and nothing more. One could assign to them a quasi-judicial enquiry, but to use them as advisors of another official seems misplaced.

What control measures are there to protect the interests of disputing parties? Who is the alternative traditional leader going to be? There are 1640 of them at four levels. Traditional leaders normally hear disputes in council and then only in respect of members of their own communities (tribes).

This casual ruling is in our view ill-conceived. It smacks of colonial-apartheid *ad hoc* enquiries in which an official (mostly a commissioner) would direct what "natives" should do or not do.

There are in fact many and serious disputes about succession. Brandel-Syrier[50] deals with the large number and vehemence of succession disputes. She wrote (*inter alia*)[51] that:

> [t]here was firstly an increase in inheritance disputes and secondly a decrease in the number of first-borns who had been heirs in the traditional manner (ie in the manner in which inheritance was customary practice.

She adds[52] that:

> [t]his increase in inheritance disputes is symptomatic of the heightened conflict which, inevitably occur in any disturbed social system, but also of the growing tensions appearing in an impoverishing rural economy.

8 Conclusion

Higgins *et al*[53] did extensive field research on the impact of the Recognition of Customary Marriages Act.[54] Their concluding remarks speak volumes. This is what they said[55] about the new marriages:

> The South African Constitution is doubtlessly a victory for women in its explicit guarantees of non-discrimination on the basis of gender, sex, pregnancy, marital status, the right to be free from both public and private violence. And the right to bodily and psychological integrity. Yet, despite the triumph of equality at the constitutional level in South Africa, marriage is often the site of women's legal, social and sexual subordination, as well as vulnerability to domestic violence and HIV/AIDS, all of which are exacerbated by poverty.

Their finding on the abolition of the customary law of succession is similar. It confirms our observations and experience at the time of writing this article that the provisions of the Reform Act are not fully implemented at all. It deserves to be quoted in full:[56]

> Following the *Bhe* decision, our interviews with South African lawyers and representatives of non-governmental organisations working on gender equality issues suggest that, as of May 2006, the case had virtually no impact

50 Brandel-Syrier *First-borns and Younger Sons: Culture Change and Sibling Relations* (1980).
51 *Ibid* 7.
52 *Ibid*.
53 Higgens, Fenrich & Tanzer "Gender Equality and Customary Marriage: Bargaining in the Shadow of Post-apartheid Legal-Pluralism" 2007 *Fordham Int LJ* 1651.
54 120 of 1998.
55 Higgens, Fenrich & Tanzer "Gender Equality and Customary Marriage: Bargaining in the Shadow of Post-apartheid Legal-Pluralism" 2007 *Fordham Int LJ* 1651 1654.
56 *Ibid* 1696.

> even on the adjudication of disputes concerning inheritance rights. Although legal services organisations had begun to conduct training sessions for lawyers and magistrates on a limited basis, many estates were still administered informally by family members or traditional leaders in rural and semi-urban communities where knowledge of the *Bhe* decision was virtually nonexistent. As a practical matter, this means that a widow's access to her deceased husband's home and property depends on the inclinations of the male heir. If that heir is her son, she will likely remain in her home. If the heir is another male relative, she may well be evicted from the property, particularly if she has no children of her own.

Enquiries we made in various rural villages during the drafting of this article confirm that to date there is no evidence of even the slightest change in the *status quo*. No wonder it is so. So, angered by the Bill that paved the way to the Reform Act, the Congress of Traditional Leaders of South Africa through its Secretary, Adv Mwelo Nonkonyana, publicly vowed "to fight this immoral law".[57]

The essence of the matter is that the customary law of succession has been abolished all but in name, but no account was taken of the social and monetary circumstances of the vast number of Africans that will have to live with the new law in years to come. Admittedly in urban areas some women and children will benefit. Even for them it may be a mixed benefit. Our observation is that even in urban areas family members are exasperated when they learn that their family homes are no longer family homes, but assets in an estate. From its conversion into money to be distributed among heirs, they will get a mere pittance. The major problem is that formal, common law equality cannot without more ado be replicated in the customary law system.

57 *Daily Dispatch* (2009-08-23).

S v Matyityi
2011 1 SACR 40 (SCA)

Compliance with mandatory sentencing, and placing the victim at the centre of the criminal justice system

1 Introduction and Judicial History

In the case of *S v Matyityi* 2011 1 SACR 40 (SCA), the SCA emphasised the importance of a victim-centred approach to sentencing. The SCA held that by accommodating the victim during the sentencing phase, the court would be better informed about the impact of the crime on the victim, and thus better able to achieve proportionality and balance between the interests of society and of the accused. In the judgment, the SCA also commented on the need for courts to comply with prescribed sentencing legislation – observing that prescribed sentences are frequently deviated from for the flimsiest of reasons. The SCA found this to have been the case in the court *a quo*, where the accused's age and purported remorse were incorrectly regarded as "substantial and compelling circumstances" justifying a deviation from the prescribed minimum sentence. The SCA considered that the court *a quo* had also erred in failing to take account of the accused's previous conviction, and in finding that the rape victim had sustained no injuries.

2 Judicial History

The respondent was a 27 year old repeat offender, who had acted as the ringleader of a gang of three in committing the crimes of rape, murder and robbery. He was convicted of one count of rape, one count of murder, and two counts of robbery. The respondent chose not to testify, nor was any evidence led in mitigation on his behalf, although some submissions regarding his personal circumstances were made from the bar (par 12). He was duly sentenced in the Eastern Cape High Court. The Director of Public Prosecutions (Eastern Cape) (DPP) was aggrieved by the sentences which were imposed in respect of the rape and murder (but not robbery) convictions, which were regarded as being too lenient. The DPP appealed on this basis in terms of section 316B of the Criminal Procedure Act 51 of 1977 (CPA), with the leave of the High Court (par 8).

3 Facts

The crimes took place in two separate incidents, separated by five days. In the first incident, the respondent was one of a gang of three who attacked and robbed the complainant (Mr AC). Mr AC had been sitting in his car at the beach when his car window was smashed, and he was hit in the face. His cell phone, cash and ATM card were stolen. The

respondent placed a hood over Mr AC's face, and he was driven in the back seat of his car to a secluded spot, where he was bound up and tied to a tree. His attackers demanded his ATM pin number, and he deliberately gave an incorrect one. The attackers left him, but returned when they discovered this. He then gave them the correct number, and they left again. Fortunately, he was able to free himself from the tree and escaped from the area on foot. His car was later recovered, but the CD player had been stolen (parr 1-2).

Five days later, the respondent and his gang struck again. This time they attacked a couple who were parked in a secluded spot at the same beach. The male complainant (Mr MF) was attacked and was placed in the boot of the car, bleeding badly, and the female complainant (Ms KD) was driven in the car to a secluded spot and raped by each of the attackers. Mr MF, who was unconscious at that stage, was removed from the boot. The attackers then drove the vehicle back from where they had come, and abandoned the vehicle. Ms KD drove the vehicle to the hospital, but Mr MF was already dead on arrival (parr 3-5).

The respondent and the other gang members were arrested as a result of a tip-off (par 6).

4 Sentence Imposed by the Court *A Quo*

The nature of the offences brought the case within the ambit of section 51 of the Criminal Law Amendment Act 105 of 1997 (the CLAA), which provided for a minimum sentence of life imprisonment for each of the counts of rape and murder (par 9). This was because the murder took place in the course of a robbery with aggravating circumstances, and the complainant was raped by both the respondent and his accomplices (s 51, read with sch 2 Part 1 CLAA and s 1 CPA). Section 51(3)(a) of the CLAA provides that the prescribed minimum sentence can be departed from where "substantial and compelling circumstances" exist.

The court *a quo* did not impose the prescribed minimum sentence of life imprisonment for either of the counts of robbery or rape. Instead, it sentenced the respondent to 25 years' imprisonment on each of the charges of rape and murder, and 13 years' imprisonment on each of the two counts of robbery. The sentences were ordered to run concurrently – meaning that the respondent would serve a total of 25 years at most (par 7).

The reason the prescribed minimum sentences were not imposed, was the respondent's age (27), and because he had pleaded guilty and had expressed remorse (par 9). In addition, the court *a quo* had found no aggravating factors to be present, as it held that the respondent's previous conviction was irrelevant to the case before it, and that the rape victim "had sustained no injuries" (par 10).

5 Prescribed Minimum Sentencing

The prescribed minimum sentencing regime has been described as an unsophisticated instrument, covering "the field of serious crime in no more than a handful of blunt paragraphs" (*S v Vilakazi* 2009 1 SACR 552 (SCA) par 11). It has been much criticised (see for example, Terblanche in *Criminal justice in a new society: Essays in honour of Solly Leeman* (eds Burchell & Erasmus) (2003) 194).

The legislative scheme provides that the maximum sentence allowed by law (life imprisonment) must be imposed in certain cases, unless substantial and compelling circumstances require otherwise.

The leading case on what will count as such circumstances, is *S v Malgas* 2001 1 SACR 469 (SCA), in which the SCA held (par 25) that ordinarily the prescribed sentence should be imposed, and that the sentencing court should not deviate from the prescribed sentences for flimsy reasons. However, if the prescribed sentence would be unjust, or disproportionate to the offence, then it must be departed from (par 25).

In determining whether injustice would result from the imposition of the prescribed sentence, all the usual mitigating and aggravating factors have to be considered (Terblanche & Roberts "Sentencing in South Africa: Lacking in principle but delivering justice?" 2005 *SACJ* 187 189). However, there is still uncertainty as to precisely what circumstances will be sufficient to justify a departure from the prescribed minimum sentence. This has led to uncertainty in sentencing (Sloth-Nielson & Ehlers "A phyrric victory? Mandatory and minimum sentencing in South Africa" Institute for Social Studies paper 111 (2005) 12; Terblanche "Sentencing guidelines for South Africa: Lessons from elsewhere" 2002 *SALJ* 858 859).

However, subsequent courts have clarified that it is incorrect to interpret *Malgas* (supra) as meaning that the prescribed sentence must be imposed in "typical" cases, and may be departed from only where the case is atypical (*S v Vilakazi supra* par 19). It is also wrong to view circumstances as substantial and compelling only if they are exceptional in the sense of being seldom encountered or rare (*Malgas supra* par 10; Terblanche & Roberts 2005 *SACJ* 187 192; but see *S v Mofokeng* 1999 1 SACR 502 (W)). Likewise, it is also wrong to view *Malgas* (*supra*) as jettisoning the "substantial and compelling circumstances" requirement, and replacing it with an unfettered discretion for the sentencing court to impose whatever sentence it considers fair.

The SCA in *Matyityi* (*supra*), clarifies that *Malgas* (*supra*) simply establishes that the sentencing court must independently apply its mind to the question of whether the prescribed sentence is proportionate to the crime. If not, substantial and compelling circumstances as contemplated in section 51(3)(a) exist, and the court may not impose the prescribed sentence.

The debate about when the prescribed sentence can be departed from continues to rage, and is especially robust in the context of rape. The SCA has conceptualised rape on a continuum from bad to worst, and has repeatedly held that it is only for rapes of the worst type, that life imprisonment will be justified (*S v Abrahams* 2002 1 SACR 116 (SCA); *S v Mahomotsa* 2002 2 SACR 435 (SCA); *Rammoko v Director of Public Prosecutions* 2003 1 SACR 200 (SCA)). However, in the case of *S v Vilakazi* (*supra* par 30), the SCA held that this did not mean that the sentence of life imprisonment was reserved for extreme cases only, holding that:

> [t]here comes a stage at which the maximum sentence is proportionate to an offence and the fact that the same sentence will be attracted by an even greater horror means only that the law can offer nothing more.

Some legislative guidance in this area has been provided by the Criminal Law (Sentencing) Amendment Act 38 of 2007, which came into effect on 31 December 2007. It amended the CLAA, by introducing section 51(3)(aA), which specifies that when sentencing for rape, there are four factors which will not count as substantial and compelling circumstances to justify the imposition of a lesser sentence. These are: the complainant's previous sexual history; the apparent lack of physical injury to the complainant; the accused person's cultural or religious beliefs about rape; and any relationship between the accused person and the complainant prior to the offence being committed.

The *Matyityi* case (*supra*) provides further guidance on how the minimum sentencing regime should be approached. The SCA held, in *Matyityi* that where minimum sentencing legislation applies, it must be the starting point for the presiding officer (par 11), and that there was no longer a clean slate upon which the presiding officer could inscribe whatever sentence was thought fit (par 18). The SCA held that this had been clearly and authoritatively held in *Malgas* (*supra* par 11). The SCA held that the proper approach was for the presiding officer to take as his point of departure that the minimum sentence was to be applied, and then to assess whether substantial and compelling factors justifying a departure from the norm were present (*Matyityi* par 18). However, the SCA noted (par 23), that sentencing courts are all too frequently willing:

> [t]o deviate from the minimum sentences prescribed by the legislature for the flimsiest of reasons [such as] speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations …

The SCA held that the factors referred to above were obviously not intended to qualify as substantial and compelling circumstances for the purposes of the prescribed minimum sentence legislation. In *S v PB* 2011 1 SACR 1 (SCA) par 21), the SCA reiterated that sentencing courts should not fall into the trap of deviating from the prescribed sentences for flimsy reasons, and on the basis of speculative hypotheses.

The SCA in the *Matyityi's* case (*supra*), held further that a failure to apply the will of parliament ultimately subverts the constitutional order. It held (par 23) that:

> … as *Malgas* makes plain, courts have a duty, despite any personal doubts about the efficacy of the policy or personal aversion to it, to implement those sentences. Our courts derive their power from the Constitution and, like other arms of State, owe their fealty to it. Our constitutional order can hardly survive if courts fail to properly patrol the boundaries of their own power by showing due deference to the legitimate domains of power of the other arms of State. Here Parliament has spoken. It has ordained minimum sentences for certain specified offences. Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them.

Against this background, I will consider the SCA's finding in the *Matyityi* case (supra), that the court *a quo* had erred in finding that substantial and compelling circumstances justifying a departure from the prescribed minimum sentence of life imprisonment for each of the counts of rape and murder, existed. The SCA found that the court *a quo* had erred, both in finding there to be an absence of aggravating factors, and in finding that mitigating circumstances were present.

6 Lack of Aggravating Factors

6 1 Previous Conviction

The SCA held that the court *a quo* had fundamentally misdirected itself, by finding that the previous conviction of the respondent was "not much related" to the offence for which he had been convicted, and that it was therefore irrelevant. In 2005, the respondent had been convicted of being in possession of an unlicensed firearm in contravention of the Arms and Ammunitions Act 75 of 1969, for which he was sentenced to a fine of R1500 or 12 months imprisonment (par 10). His (recent) previous conviction was clearly linked to his capacity for violent crime, and was therefore relevant to his sentencing for the crimes of rape, murder and robbery (*S v J* 1989 1 SA 669 (A) 675). Even if the previous conviction had been remote in nature from the current case, it remained relevant to the respondent's sentencing, because it showed that he had not been deterred by his previous encounter with the law. The SCA commented that the respondent had apparently spurned the mercy shown by the previous court, by continuing with his life of crime (par 10). This was a significant factor in determining the appropriate sentence for him, as it revealed that he had diminished prospects of rehabilitation, and was an indicator that he would not easily be deterred from the future commission of crime.

6 2 Rape Victim's Injuries

The SCA found that the court *a quo* had fundamentally misconstrued the nature of the crime of rape, by remarking that the complainant (Ms KD) had sustained no injuries as a result of it. Indeed, the observation strikes one as shockingly insensitive and callous, even if the magistrate intended only to refer to an absence of permanent physical injuries. The SCA held

that although it was true that Ms KD had sustained no permanent physical injuries, the court *a quo* had ignored the profound psychological, emotional and symbolic significance of the crime of rape for the victim (par 10).

The significance of the absence of physical injuries suffered by a rape complainant, as well as the extent of the emotional trauma suffered by her or him, has received much judicial attention in the context determining the appropriate sentence for the crime of rape.

6 2 1 Physical Injuries

There have been a number of cases in which the absence of (serious) physical injuries suffered by the complainant has been held to be a factor (usually amongst others) indicating that substantial and compelling circumstances which justify a deviation from the statutorily prescribed sentence exist (see for example *S v Mahomatsa* (*supra*); *S v Sikhipha* 2006 2 SACR 439 (SCA)). Legislation now provides that an apparent lack of physical injury to the complainant does not count as a "substantial and compelling" circumstance, justifying the imposition of a lesser sentence (s 51(3)(aA)(ii) CLAA; see also *S v Ntozini* 2009 1 SACR 42 (E); *S v M* 2007 2 SACR 60 (W)). The SCA did not refer to this legislation in the *Matyityi* judgement. Refer also to *S v MN* 2011 1 SACR 286 (ECG); *S v Dayile* 2011 1 SACR 245 (ECG)), where the courts took into account the absence of physical injury, despite the provisions of section 51(3)(aA)(ii) of the CLAA – as did the SCA in *S v Vilakazi* (*supra*).

6 2 2 Emotional Damage

Courts have also held that unless there is evidence as to the emotional impact the rape has had on the complainant, it will not take this into account as a factor indicating that the prescribed minimum sentence should be applied. In other words, the court will not regard the emotional impact of the rape on the complainant as an aggravating factor, without specific evidence of this being presented to the court (see *S v Mahomatsa* (*supra*); *S v Ntozini* 2009 1 SACR 42 (E); *S v Rabako* 2010 1 SACR 310 (O)).

In the case of *Rammoko v Director Public Prosecutions* (*supra*), the SCA refused to impose the mandatory sentence of life imprisonment for the rape of a child, because no evidence of serious emotional *sequelae* for the child had been presented. The SCA held (par 13) that:

> Life imprisonment is the heaviest sentence a person can be legally obliged to serve. Accordingly, where s 51(1) applies, an accused must not be subjected to the risk that substantial and compelling circumstances are, on inadequate evidence, held to be absent.

It was argued that the effect of *Rammoko* (*supra*), was that it would be a misdirection for a court to impose the prescribed sentence in the absence of evidence regarding the emotional impact of the rape on the complainant. However, in the case of *S v Ncheche* 2005 2 SACR 386 (W) par 29, the court held that certain cases of rape were so serious, that

regardless of the emotional consequences for the complainant, they justified life imprisonment.

In the *Matyityi* case (*supra*), neither the complainants (Mr AC and Ms KD), nor the survivors of the deceased (Mr MF), testified in aggravation of sentence, nor did they submit victim impact statements. The SCA therefore complained (par 15) that it knew very little about the complainants, and the impact the crime had had on them. However, the SCA, while regretting that there were no victim impact statements, did not regard the lack of specific evidence addressing the emotional consequences of the ordeal for Ms KD, as constituting a substantial and compelling factor justifying a sentence other than life imprisonment for the rape. The SCA was willing to infer the likely impact on the rape complainant from the other evidence (par 20).

7 Victim Impact Statements

The SCA (*Matyityi supra* par 15) stressed that an enlightened and just penal policy needs to be victim-centred, and that in South Africa victim empowerment is based on restorative justice, which seeks to emphasise that a crime is more than the breaking of the law or offending against the state – it is an injury or wrong done to another person.

The SCA (par 16) referred to the United Nations Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power (GA Res 40/34 1985-11-29), and The Service Charter for Victims of Crime in South Africa (approved by cabinet on 2/12/04) – both of which seek to accommodate victims more effectively in the criminal justice system, and to place them at the centre of it.

The SCA (par 16) held that the emphasis in South Africa on restorative justice was necessary to give meaningful content to the rights of victims, by reaffirming their constitutionally protected human dignity. Further, restorative justice enabled society to vindicate its collective sense of humanity and humanness.

The SCA held (parr 16-17) that the value of a victim impact statement was that by providing the court with a description of the physical and psychological harm suffered, and the likely future social and economic effect of the crime on the victim and his family, the court would be given an opportunity to truly recognise the wrong done by the accused, and would thus be able to achieve the right degree of balance between the competing interests, and ultimately facilitate the achievement of proportionality in the sentence imposed (see also Muller & Van der Merwe "Recognising the victim in the sentencing state: the use of victim impact statements in court" 2006 *SAJHR* 647 650 (which the court refers to (par 16)); Makiwane "Victim impact statements at the sentencing stage: Giving crime victims a voice" 2010 *Obiter* 606).

The SCA noted (*Matyityi* (supra) par 17) that victim impact statements play a particularly important role in rape cases, because generally courts lack the necessary experience to generalise or draw conclusions about the effects and consequences of a rape, for a rape victim.

It should be noted that the use of victim impact statements in court is not universally accepted as a positive development. Various commentators have considered possible negative consequences flowing from their use, and have found that certain role players in the criminal justice system also find them problematic (see Erez "Neutralising victim reform: Legal professionals' perspectives on victim impact statements" 1999 *Crime and Delinquency* 520; Sanders, Hoyle, Morgan & Cape "Victim impact statements don't work, can't work" 2001 *Criminal LR* 447; Meintjies-van der Walt "Towards victim empowerment strategies in the criminal justice process" 1998 *SACJ* 157 167: *Makiwane supra*).

8 Mitigating Factors

The SCA noted that the respondent had chosen not to testify in mitigation, as was his right (*Matyityi supra* par 12). The SCA held, however, that his silence had negative consequences for him, in the sense that it pointed irresistibly to the conclusion that there was nothing to be said in his favour (par 21).

8 1 Personal Circumstances

It was placed on record from the bar that the accused was 27, that he was married with three children, and that his highest level of education was standard seven (par 12). The court *a quo* only considered his age to be significant as a factor impacting on the decision on how to sentence him. The court *a quo* was correct to ignore his personal circumstances in the context of the case. As was observed in *S v Vilakazi* (*supra* par 58):

> ... in cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of 'flimsy' grounds that Malgas said should be avoided.

8 2 Age

The SCA was critical of the fact that the court *a quo* made reference to the respondent's "relative youthfulness", without elaborating on what that meant (par 14). The SCA agreed that youth will ordinarily constitute a mitigating factor, but held that ultimately the enquiry should be whether "the offender's immaturity, lack of experience, indiscretion and susceptibility to being influenced by others reduces his blameworthiness". Terblanche (*Guide to sentencing in South Africa* (1999) 197) writes that "age tends to be an irrelevant consideration as far as sentencing is concerned if the offender is more than 21 years old" (but compare *S v Nkomo* 2007 2 SACR 198 (SCA) par 13 where the majority found the fact that the appellant was "relatively young at the time" (at age 29) to be a mitigating factor).

In casu, the SCA found that at the age of 27, the respondent's age could not be assumed to be a mitigating factor. The SCA held that anyone over the age of 20 must show by acceptable evidence, that he was

immature to such an extent that his immaturity operated as a mitigating factor (par 14). As the respondent had declined to testify, the SCA could not draw any conclusions about his level of maturity. In any event, the SCA found that his deeds were particularly vicious, having been "breathtakingly brazen", and having been executed with "callous brutality" (par 19). This was inconsistent with immaturity as a mitigating factor. This approach is consistent with that taken in the case of *S v Dlamini* 1991 2 SACR 655 (A) 666, where the AD held that the vicious nature of the accused's deeds could rule out the possibility of immaturity (referred to in *Matyityi's* case *supra* par 13). However, this cannot be a hard and fast rule, as common sense tells us that brazen brutality may in fact be evidence of immaturity, in the sense that it reveals an inability to empathise with others, nor to control impulses nor engage in rational thinking, all of which are hallmarks of immaturity.

More compelling evidence that the respondent was not immature, is to be found in the fact that the respondent supplied the rape complainant, Ms KD, with toilet paper to clean herself after the rapes, and wiped his fingerprints from the steering wheel and door handles. The SCA held (par 19) that this reflected an awareness, presence of mind and sophistication, that was inconsistent with immaturity. It is also noteworthy that the respondent was found to have acted as the ringleader in both incidents, and that the perpetrators had the presence of mind to wipe Mr MF's blood off the exterior of the car, before driving away in the vehicle (par 4).

Accordingly, the SCA found that the respondent's age was a neutral factor, with regard to sentencing (par 14).

8 3 Plea of Guilty

It is a well-known principle of sentencing that a guilty plea in circumstances where the case against the accused is very strong, does not serve as a mitigating factor. It is rather regarded as a neutral one (par 13). In *Matyityi's* case (*supra*), the evidence linking the respondent to the crimes was overwhelming. The incriminating evidence included stolen items found at the home of the respondent's girlfriend, DNA evidence linking him to the crime scene, pointings-out made by him, and the fact that Ms KD, the rape survivor, had identified him at an identification parade (par 13).

The SCA held, that in the circumstances, the plea of guilt was not a relevant factor in determining an appropriate sentence in the case before it, and that the court *a quo* had erred in regarding it as such (par 13).

8 4 Remorse

The respondent's "remorse" was nothing more than an apology expressed by his legal representative from the bar (par 13). The SCA (par 13, quoting *S v Martin* 1996 2 SACR 309 (SCA) par 9) pointed out the "chasm between regret and remorse", explaining the difference as follows:

> Many accused persons might well regret their conduct but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful and not simply feeling sorry for himself or herself at having been caught is a factual question.

The SCA concluded that there was no indication that any of this had been explored in the court *a quo*, and thus that remorse could not count as a mitigating factor. The SCA held that information relevant to remorse lies peculiarly within the knowledge of the accused. The implication of this is that (generally) where an accused elects not to testify, a finding of remorse cannot be made by the presiding officer. Sometimes, however, the actions of the accused, rather than what he says in court, can provide more convincing evidence of genuine remorse.

The sentencing court will also have to be convinced of the genuine nature of the accused's alleged remorse, for it to act as a mitigating factor. This will inevitably require that the accused takes the court fully into his confidence regarding what motivated him to commit the crime, and what has since provoked the change of heart; and whether he does indeed have a true appreciation of the consequences of those actions. The respondent *in casu* chose not to do this (par 12). In any event, the respondent's alleged remorse was also inconsistent with the fact that the offences were committed five days apart. The SCA noted (par 19) that the respondent had had "sufficient time for pause and reflection" after the first incident, yet had proceeded to commit the subsequent (more serious) offences.

8 5 Rehabilitation

The lack of remorse is also significant insofar as it has a bearing on the respondent's prospects for rehabilitation, which is another factor relevant to determining the appropriate sentence to impose. In the case of *S v Dyantyi* 2011 1 SACR 540 (ECG) par 26, the court found that an accused will rarely be able to show that he is a suitable candidate for rehabilitation, without proving to the court that he is genuinely remorseful (see also Mujuzi "The prospect of rehabilitation as a substantial and compelling circumstance to avoid imposing life imprisonment in South Africa" 2008 *SACJ* 1).

9 Sentence Increased

The SCA thus found that the magistrate, by sentencing the accused to 25 years imprisonment (instead of life imprisonment) for each of the crimes of rape and murder, had erred. The court had thus imposed a sentence that was disproportionate to the crime and the interests of society. The court *a quo* had inappropriately emphasised the personal interests of the respondent, above the interests of society. It did not take sufficient account of the prevalence of violent crime; the wanton criminality displayed by the respondent; the right of the public to be protected from crime; the public interest in suitably fair, just and balanced punishment;

and the harm suffered by Mr AC, Ms KD and those who survived Mr MF (par 24).

The SCA concluded that there were no substantial and compelling circumstances present, to warrant a departure from the prescribed statutory sentence, and that this was precisely the type of case that the legislature had in mind when it enacted the minimum sentencing legislation. The SCA therefore imposed the prescribed minimum sentence on the respondent – life imprisonment – for each of the offences of rape and murder.

10 Conclusion

The significance of the *Matyityi* case (*supra*), cannot be over-emphasised. The SCA expressed itself forcefully in three fundamentally important areas. Firstly: prescribed sentences. Secondly: the role of the victim of crime in the sentencing process. Thirdly: the importance of placing all relevant information before the sentencing court, to enable it to properly exercise its sentencing function.

In respect of the prescribed minimum sentence regime, the SCA held (par 23) that sentencing courts should not subvert the will of the legislature by resorting to "vague, ill-defined concepts such as 'relative youthfulness' or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer's personal notion of fairness" to justify deviating from the sentences prescribed by the CLAA. The SCA stressed that "predictable outcomes, not outcomes based on the whim of an individual judicial officer, [are] foundational to the rule of law which lies at the heart of our constitutional order" (par 23). The elimination of uncertainty in sentencing was in fact one of the key reasons for introducing the mandatory minimum sentencing regime into South Africa in the first place (Sloth-Nielson & Ehlers 12). Unfortunately, until more structured sentencing guidelines are put in place, it is unlikely that this objective will be achieved (Terblanche 859).

The SCA also emphasised the importance of the participation of the victim of crime, in the sentencing process. The SCA placed the victims of crime at the centre of the criminal justice system, and held that victim impact statements are essential to just sentencing (parr 16-17). In this regard, the judgment supports the argument that the notion of the "triad" as representing the key sentencing considerations, is outdated. The triad represents the accused, the crime, and the interests of society (*S v Zinn* 1969 2 SA 537 (A)). The impact of the crime on the victim is recognised in this judgment as an independent and equally important consideration. Muller and Van der Merwe (2006 *SAJHR* 647) represent this approach elegantly, when referring to the "squaring of the triad".

Finally, with regards the need to equip the sentencing court for its function, the SCA held (par 24) that an appropriate sentence may well have been imposed by the court *a quo*, had more relevant evidence been placed before it. The responsibility for ensuring that the sentencing court has all the necessary information to reach a fair decision on sentence,

rests on all the role players in the process (the legal representative for the accused, the prosecutor and the presiding officer) (see *S v Siebert* 1998 1 SACR 554 (SCA); *S v Olivier* 2010 2 SACR 178 (SCA); *S v Samuels* 2011 1 SACR 9 (SCA); *S v Pillay* 2011 2 SACR 409 (SCA)), and it is time that the perfunctory approach to sentencing, which is too often displayed in the courts, comes to an end.

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Netshituka v Netshituka
2011 (5) SA 453

Revival of a customary marriage previously dissolved by a subsequent civil marriage

1 Introduction

Prior to the coming into operation of the Recognition of Customary Marriages Act 120 of 1988 (RCMA) on 15 November 2000, customary marriages were referred to as "customary unions" and were not recognised as valid (Bakker & Heaton "Co-existence of customary and civil marriages under the Black Administration Act 38 of 1972 and the RCMA 120 of 1998 – the Supreme Court of Appeal introduces polygamy into some civil marriages" 2012 *TSAR* 586). As they were not recognised as valid marriages they presented no legal obstacle to the conclusion of a civil marriage during their existence.

Customary unions were regulated by the Black Administration Act 38 of 1927 (BAA). Of particular interest for present purposes is section 22 of the BAA. This section did not render an existing customary union an impediment to a civil marriage and spouses could thus at any time during the subsistence of such union, conclude a valid civil marriage with another person. The effect of such civil marriage on the customary union was that it dissolved the customary union (*Nkambula v Linda* 1951 1 SA 377 (A)). On 2 December 1988, section 22 of the BAA was amended by section 1 of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988. This section prohibited a husband of a customary union from contracting a civil marriage with another woman during the subsistence of such customary union. A civil marriage concluded in contravention of this section did not dissolve the customary union. As the amendment was not retroactive, the position before 2 December 1988 was left unchanged (Bakker & Heaton 2012 *TSAR* 586 587).

When the RCMA came into operation on 15 November 2000 "customary unions? were turned into "customary marriages?. The act afforded retrospective recognition to all customary unions that were valid

in terms of customary law and existed at the time of the commencement of the RCMA. The RCMA also repealed section 22(1) to (5) of the BAA. However, the repeal does not have retrospective effect (Bakker & Heaton 2012 *TSAR* 586 587).

Of further particular interest for present purposes is that the RCMA does not deal explicitly with the status of customary unions that had previously been nullified by the subsequent civil marriages. After 60 years, the Supreme Court of Appeal in *Netshituka v Netshituka* 2011 (5) SA 453 (SCA) revisited the decision in *Nkambula v Linda* 1951 1 SA 377 (A) and adjudicated firstly on the question whether, in particular circumstances, a customary marriage which had previously been dissolved by a subsequent civil marriage could be revived and secondly, if so, what the effect thereof would be on the validity of a further civil marriage.

The purpose of this discussion is to look at the court's approach in addressing these questions and to indicate that the court's approach is in material respects the opposite of current legal practice.

2 Facts and Judgment

While the facts are not altogether clear from the judgment of Petse AJA, they appear to be as follows:

> The deceased was (prior to 1988) married to three women, namely Tshinakaho, Masindi and Diana by customary rites (parr 3, 4, 7, 11). During the subsistence of these customary marriages the deceased contracted (prior to 1988) a civil marriage with Martha (parr 7, 11), which marriage was terminated by a divorce in 1984 (par 7). After divorcing Martha the deceased continued to cohabit with the wives of the former customary marriages (par 11). On 17 January 1997 the deceased contracted a civil marriage with Joyce (first respondent). The deceased died in 2008, leaving a will in which he appointed Joyce executrix of his estate. One of the deceased's customary wives and her daughter contested the validity of the deceased's civil marriage to Joyce as well as the validity of the will. The trial court dismissed their application for an order declaring the civil marriage between Joyce and the deceased void and declaring the deceased's will invalid. The appellants appealed to the Supreme Court of Appeal. This note does not deal with the validity of the deceased's will. It focuses solely on whether the civil marriage between the deceased and Joyce was valid.

The appellants contested the validity of the civil marriage to Joyce on the grounds that the marriage did not comply with the provisions of section 22(1) and (2) of the BAA, read with section 1(a) of the Marriage and Matrimonial Property Law Amendment Act. This section prohibits a husband of a customary union from contracting a civil marriage with another woman during the subsistence of such customary marriage. Joyce denied the existence of the customary marriages, and more specifically, that they were in existence at the time she married the deceased (par 7). She argued that the deceased's customary marriage had automatically been dissolved when he and his first wife at civil law, Martha, had entered into their civil marriage. Therefore, the deceased was an unmarried man when she had entered into a civil marriage with

him after the dissolution of his civil marriage to Martha by divorce in 1984. In support of this argument, she cited *Nkambula v Linda supra*.

The Supreme Court of Appeal declared the civil marriage contracted between Joyce (first respondent) and the deceased on 17 January 1997 null and void. The reason is as follows:

> During the subsistence of the customary marriages the deceased contracted a civil marriage with Martha, which marriage was terminated by divorce in 1984. At the time the deceased entered into the civil marriage the amendments brought about to section 22 of the BAA by the Matrimonial Property Law Amendment Act did not yet apply (par 9). It was also common cause that the deceased's customary wives did not leave him after he entered into the civil marriage with Martha (par 11). After he divorced Martha, he continued cohabiting with his customary marriage wives, thus showing his reconciliation with them (par 11). Petse AJA concluded that the intention of the parties, indicated by their conduct "clearly indicates that to the extent that the deceased's civil marriage may have terminated his unions with his customary law wives, those unions were revived after divorce? (par 13). As the customary marriages revived, the deceased was still married to his customary wives when he entered into the civil marriage with Joyce in 1997. This civil marriage was solemnised before the coming into operation of the RCMA, but after the amendment of section 22 of the BAA by the Matrimonial Property Law Amendment Act. As indicated above, this section prohibits a husband of a customary union from contracting a civil marriage with another woman during the subsistence of such customary marriage. As he was still married to his customary law wives, he was not competent to enter into a civil marriage with Joyce.

The court's approach in reaching this decision is in material respects the opposite of current legal practice and deserves consideration.

3 The Law

Since the provisions of the RCMA that deal with the validity of civil marriages concluded during the subsistence of customary marriages (ss 3(2), 10(1)) do not apply retrospectively, the validity or otherwise of such marriages have to be determined in terms of the provisions of section 22 of the BAA in force at the time. As indicated above (par 1) section 22 was amended by the Marriage and Matrimonial Property Law Amendment Act, which commenced on 2 December 1988. Because the deceased's civil marriage with Martha pre-dated the Marriage and Matrimonial Property Law Amendment Act, having been concluded before 1988, it is vital for this discussion to distinguish between civil marriages entered into before 2 December 1988 and those that were concluded after 2 December 1988, up to the commencement of the RCMA.

3 1 Position Before 2 December 1988

The deceased divorced Martha in 1984. Therefore the deceased's prior civil marriage to Martha was regulated by section 22 of the BAA. Section 22(1) provided that:

> No male Black shall, during the subsistence of any customary union between him and any woman, contract a marriage with any other woman unless he

> first declared upon oath, before the magistrate or commissioner of the district in which he is domiciled, the name of every such first-mentioned woman; the name of every child of any such customary union; the nature and amount of the movable property (if any) allotted by him to each such woman or House under Black custom; and such other information relating to any such unions as the said official shall require.

The act was silent on the validity of a civil marriage concluded without the declaration. Section 22(5) merely stated that it was an offence to enter into a civil marriage without having made the declaration. However, in *Malaza v Mndaweni* 1975 BAC 45 (C) 58 it was held that the civil marriage was valid.

Section 22 did not forbid or expressly declare invalid a civil marriage concluded with another woman during the subsistence of a customary marriage. In 1951 the Appellate division in *Nkambula v Linda supra*, intimated that where a man marries a woman by civil rights during the subsistence of a customary marriage the civil marriage would be valid, while the customary marriage would be dissolved by the conclusion of the civil marriage. The reasoning appears to be that civil marriages are by definition monogamous and cannot exist alongside customary marriages (see also *Kos v Lephaila* 1945 NAC (C & O) 45; *Bucwa v George* 1946 BAC 1 10 (S); *Malaza v Mndaweni* 1975 BAC 45 (C)). Where a man was a partner to both a civil marriage and customary marriage, the existing customary marriage had to give way because (*Nkambula* 381H-I):

> [s]ince our common law did not regard a Native customary union as a legal marriage, such a union was no legal obstacle to a civil marriage between one of the partners to it and a third person, and there was no reason why the Act should make it so.

Modern writers are also of the view that a subsequent civil marriage had the effect of automatically dissolving an existing customary marriage (Dlamini "The new marriage legislation affecting Blacks in South Africa" 1989 *TSAR* 409; Bekker *Seymour's customary law in Southern Africa* (1989) 153, 181; Bonthuys & Sibanda "Till death us do part: *Thembisile v Thembisile?* 2003 *SALJ* 787; Bennet *Customary law in South Africa* (2004) 239; Maithufi "The need for the protection of rights of partners to invalid marital relationships: A revisit of the discarded spouse debate? 2005 *De Jure* 145; Rautenbach, Bekker & Goolan *Introduction to legal pluralism* (2010) 72).

The wife to such customary marriage was known as a "discarded spouse? (concept raised in *Nkambula* case – see discussion in par 4). Section 22(7) of the BAA did, however, provide some measure of protection to the discarded spouse. Section 22(7) read as follows:

> No marriage contracted after the commencement of the Act during the subsistence of any customary union between the husband and any woman other than the wife shall in any way affect the material rights of any partner of such union or any issue thereof, and the widow of any such marriage and any issue thereof shall have no greater rights in respect of the estate of the

> deceased spouse than she or they would have had if the said marriage had been a customary union.

This section served to safe-guard the material rights (property rights) of the discarded wife (or wives) and her children by ensuring, firstly, that she continued to enjoy rights to property allotted to her house before the civil law marriage and, secondly that upon death of her husband, she, although no longer married to the deceased, would be entitled to share in his deceased estate in accordance with customary law (Bennet 240; Maithufi & Moloi 2005 *De Jure* 145 147). Thus, on the death of the husband both types of marriages were regarded as customary marriages for the purpose of succession. The customary law wives and their children were placed in the same position as her deceased ex-husband's civil law wife and children to whom also, customary succession law rather than common law applied.

Previous court decisions as well as writers support the conclusion that when the deceased entered into a civil marriage with Martha his prior customary marriages were automatically dissolved, irrespective of whether his relationships with his customary law wives continued. The Supreme Court of Appeal's approach and decision, on the other hand, will be considered under the heading "The 'discarded wife' concept".

3 2 Position Between 2 December 1988 and the Commencement of the RCMA

Due to the desperate situation of customary wives, section 22 was amended by the Marriage and Matrimonial Property Law Amendment Act.

The respondent, Joyce, alleged that she had entered into a civil marriage with the deceased on 17 January 1997. At the time the civil marriage was concluded the amended section 22 was therefore in force (This section was repealed by the RCMA and replaced with similar provisions in s 3(2), 10(1) and 10(4)). The amended section 22 read as follows:

> (1) A man and a woman between whom a customary union subsists are competent to contract a marriage with each other if the man is not also a partner in a subsisting customary union with another woman ('marriage' denoting a civil marriage).
>
> (2) Subject to subsection (1), no person who is a partner in a customary union shall be competent to contract a marriage during the subsistence of that union.

Contrary to the position before 2 December 1988, the customary union is not automatically terminated by the subsequent civil marriage (concluded in contravention of s 22). This also means that the phenomenon of the "discarded customary wife" is no longer legally possible.

The BAA did not expressly provide that a civil marriage contracted contrary to this prohibition would be invalid, but merely provided that where a husband to a customary union contracted a civil marriage with

another woman, he committed a criminal offence (s 22(3)-(5) BAA). Various opinions have been expressed as to the validity of these marriages, but it would appear from *Thembisile v Thembisile* 2002 2 SA 209 (T) that the purported civil marriage is null and void (see Maithufi "Do we have a new type of voidable marriage?" 1992 *THRHR* 628; Sinclair *The law of marriage* (1996) 225-227).

The amendment, however, did not apply retrospectively (Bakker & Heaton 2012 *TSAR* 586 587). The provision relating to the protection of the material rights of the discarded wife and children of a customary union which was dissolved by a civil marriage was retained (Bennet 240). It should be noted that subsequent to *Bhe v Magistrate, Khayelitsha (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* 2005 1 SA 580 (CC) both the discarded wife and the civil law wife will be deemed spouses of the deceased for purpose of intestate succession.

Had the deceased's civil marriage to Martha in fact been valid (as accepted by the Supreme Court of Appeal) positive law indicates that his customary marriages would automatically have been dissolved, and that there would be no impediment against his entering into a civil marriage with Joyce in 1997 (ie after his divorce from Martha). However the Supreme Court of Appeal did not consider the effects of a civil marriage on the validity of existing customary marriages. The court decided to adjudicate the matter on the "discarded wife" concept raised in *Nkambula*.

4 The "Discarded Wife" Concept

In the *Nkambula case*, the wives of the customary unions which were dissolved by civil marriage were referred to as "discarded wives". In *Nkambula* the court stated "[A] civil marriage is 'the union of one man and one woman', incompatible with a continued association of the man in conjugal relationship with another woman" (381B), and further that the material rights protected by section 22(7) of the BAA do not include the right of the woman to cohabit with her husband from the dissolved customary union (382B). The court concluded by stating (384C-D) that:

> [a] man who is a partner in terms of a customary union and subsequently contracts a civil marriage with another woman during the subsistence of the customary union must be regarded by this act as having deserted his wife, and under these circumstances the woman to the customary union is justified in leaving her husband without rendering her guardian liable for the refund of lobolo.

It is important to note that this part of the decision dealt primarily with the issue of the return of lobola, that is, one of the consequences of the dissolution of the customary marriages (see also Bakker & Heaton 2012 *TSAR* 586 591).

In the present (*Netshituka*) case (par 11), the question posed is, what was the relationship between the deceased and his "deserted" customary

law wives after his civil marriage to Martha was terminated by divorce? Apparently, the court avoids adjudicating on the validity of the customary marriages after the deceased had entered into the civil marriage with Martha. The factual position was that the deceased had continued to cohabit with his customary law wives during his civil marriage to Martha. Without addressing the effect of a civil marriage on the validity of a customary marriage, the court refers to the customary law rule of "phuthuma" (literally "to fetch her"). Petse AJA held that at customary law, desertion by a husband of his customary wife is not irreparable, because the husband may "phuthuma" (fetch) his wife and his desertion does not give her the right to refuse to return to him when he comes to "phuthuma" her, unless the circumstances correspond to those set out in the *Nkambula* case (par 12). It is clear that if a customary law wife left her husband as a result of him having contracted a civil marriage with another woman she would be entitled to refuse to return to him when he goes to *phuthuma* her. She would be entitled to assert that he had terminated the union between them. Petse AJA, however, stated that nothing would prevent her from returning to him if she was prepared to do so (par 12).

It is interesting to note that the court takes judicial notice of the "*phuthuma*" custom without referring to readily available literature on the subject (see Koyana *Customary law in a changing society* (1980) 18-19; Olivier *et al Die privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes* (1981) 180-181; Bekker *Seymour's customary law in Southern Africa* (1989) 181). A reference to relevant literature would have made the judgment more informative and, with respect, authoritative. From the literature it could have been established that "*phuthuma*" is an Eastern Cape Nguni custom and that it is not known whether it is also practiced by other ethnic groups (Olivier 193). The appeal originated from the Limpopo High Court (Thohoyandou) and the parties involved were from the Venda group. The Venda has a custom called "*tshipfumelo*" where the wife on being maltreated seeks refuge with her husband's sister, her mother-in-law or her husband's eldest brother. To restore friendly relations with his father-in-law the husband has to approach his father-in-law and hand to him the "*tshipfumelo*" (gift of reconciliation or to make amends) which is usually a beast or goat (Van Warmelo *Venda law* (1948) 465). Although both "*phuthuma*" and "*tshipfumelo*" relate to the reconciliation of the parties concerned the preceding processes differ. In this regard Bekker's ("Phuthuma/Ngala" en siviele huwelike? 1985 *De Jure* 178) observations are apt:

> Die howe doen soms baie moeite om ou Romeinse bronne te ontrafel. Die opspoor en analise van inheemsregtelike bronne is eintlik makliker. As daar onsekerheid is, is dit ook nie baie moeilik om getuienis oor die aspek te bekom nie. Daar word tans heelwat navorsing oor die inheemsereg van die verskillende etniese groepe gedoen en volkekundiges en regsgeleerdes wat daarmee besig is, sou maar te bereid wees om daaroor te getuig.

In *Zwane v Twala* 1945 NAC (N&T) 59 it was held that a court has no power to alter African customs or attempt to introduce any uniform

system of customs, however desirable it may be, since the court would be usurping the functions of the legislature.

The application of the "*phuthuma*" custom in this particular case fortunately had no effect on the court's decision, as per Petse AJA "the customary law wives (had) never left (the deceased) after he had married Martha (by civil rights)? (par 13).

As already stated it appears that the Supreme Court of Appeal avoids the question on the validity of the pre-existing customary marriages. The court is not bound by *stare decisis* but if it refuses to apply a particular existing legal ruling it is customary to provide a reasoned judgment on the aspect under consideration. Previous decisions indicated that a customary marriage was dissolved by a subsequent civil marriage. The question now arises whether the court confirmed, overruled or qualified this decision. By not pertinently addressing the effect of this rule it appears as if the court by implication recognised the ruling. If it overruled the rule it would have provided specific reasons for its rejection. It does appear as if the court has qualified the rule based on the fact that the customary law wives have never left the deceased after his civil marriage to Martha. His continued cohabitation with them after the divorce was clear evidence of a husband who had reconciled with his previously deserted wives. The intention of the parties, indicated by their conduct, "clearly indicates that to the extent that the deceased's civil marriage may have terminated his unions with his customary law wives, those unions were revived after divorce? (ie from Martha – par 13).

In the light of the Supreme Court of Appeal's decision the rule regarding the validity of customary marriages prior to the period 2 December 1988 would now appear to be as follows: A customary marriage is dissolved by a subsequent civil marriage but is revived after divorce (or death) of the civil marriage wife if the "husband? continued cohabiting with the customary wives after and during the civil marriage, and the intention, inferred by the conduct of the parties, was to simply continue with their relationship and roles as partners in customary marriages.

The effect of this rule is that should a particular factual situation exist, the dissolved customary marriage will now be regarded as so-called latent (suspended) marriages which may be revived if the civil marriage is terminated by divorce (or death) of the civil law wife. This is clearly contrary to positive law, which does not recognise latent (suspended) marriages. This would also produce intractable legal problems as far as the property rights of the women are concerned. The Supreme Court of Appeal has with the resurrection of the customary marriage wives released on us an arcane mystery void of legal certainty.

5 Validity of Civil Marriage to Joyce

The second question before the court was whether it was competent for the deceased to contract (on 17 January 1997) a civil marriage with the first respondent (Joyce), during the subsistence of the customary

marriages. In dealing with this question, the Supreme Court of Appeal does apply positive law. With reference to section 22 of the BAA as amended by the Marriage and Matrimonial Property Law Amendment Act and the interpretation thereof in the *Thembisile* case (see par 2 2 above), it comes to the conclusion that as the deceased had been a partner in existing customary marriages, his civil marriage to Joyce was a nullity.

However, had *Nkambula v Linda* been applied to the so-called "discarded wives? and their customary unions viewed as dissolved by the civil marriage to Martha prior to 1988, the court's findings would most likely have been the opposite. In other words the civil marriage to Joyce would have been considered valid. It is unfortunate that the court did not indicate why it chose to apply positive law in the one instance and not in the other. One reason may be that the court did not want to perpetuate the previously subordinated status of customary marriages. However, the court's decision to declare the civil marriage void simply puts the proverbial boot on the other foot, leading to a host of problems similar to those previously experienced by the discarded customary wives. Previously it was the customary law wife that was discarded in favour of the civil marriage wife (*Nkambula* case) but now it appears that the civil law wife is discarded. In fact, a discarded civil marriage wife is worse off than before, as her patrimonial rights are not protected in the same way as those of the customary wife. The discarded civil law wife is for example not entitled to share in any matrimonial property system, or intestate inheritance from her deceased husband's estate. These consequences are also emotionally devastating in that the right to bury the husband is that of the customary wives (*Fanti v Boto* 2008 5 SA 405 (C)). It appears that the court paid greater homage to the "rights? of the discarded customary marriage wives, to the extent of excluding the patrimonial, and indeed also human rights (such as to respect her dignity, physical and emotional integrity) of the civil law wife.

6 Conclusion

As stated *supra* (par 3), the decision in *Netshituka* rings contrary to positive law because the latter does not recognise latent (suspended) marriages. In addition, by not being consistent in the application of positive law, it meanders into the sphere of usurping the powers of the legislature. The court has also failed to give an equitable solution to the rights of both the customary marriage and civil marriage wives.

Should it be the legislature's intention to revive customary unions that had previously been nullified due to the conclusion of civil marriages, they should be so revived by the appropriate legislation. This could be affected by amending the RCMA. The effect of the "revival" of customary marriages in the case of subsequent civil marriages also requires the urgent attention of the legislature. Various authors are of the opinion that polygamy should be legalised to avoid the harsh consequences for the woman who is a party to the invalid marriage (Bonthuys & Pieterse "Still unclear: The validity of certain customary marriages in terms of the

RCMA? 2000 *THRHR* 624; Maithufi & Bekker "The existence and proof of customary marriages for purposes of Road Accident Fund claims? 2009 *Obiter* 74). Both these marriages can, for example, be recognised as valid customary marriages.

One can only hope that, especially in the light of the constraints of section 39 of the Constitution of the Republic of South Africa, 1996, the legislature and in the interim, the courts, will earnestly consider ways and means to promote the spirit, purport and objects of the Bill of Rights (Ch 2 Constitution) that will serve to protect and indeed engender the values of human dignity and equality amongst wives variously married to a husband, whether in terms of customary marriages or a civil marriage, or as in this case, both.

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Cadia Holdings Pty Ltd v State of New South Wales
(2010) 269 ALR 204

Publicly owned minerals: Let the truth be spoken[*]

1 Introduction

The decision of the High Court of Australia in *Cadia Holdings* dealt with the amount of royalties that was due to the Minister for Mineral Resources of New South Wales ("Minister") by Cadia Holdings Pty Ltd ("Cadia") in respect of copper mined from land in New South Wales ("NSW") (*Cadia Holdings v State of New South Wales* par 1).

French CJ indicated in a separate judgement that the determination of the amount of royalties payable in NSW depends on events "which occurred more than three centuries ago" in Tudor England (par 1). The High Court had to embark on a route which started in 1568 when the English court in *Case of Mines (R v Earl of Northumberland)*((1567) 1 Plowden 310) recognised the royal prerogative to gold, silver and other metals, such as copper mixed with gold and silver (*Cadia Holdings* par 1). This was followed by an examination of the statutory modification of the prerogative in England in favour of owners of base-metal mines (see par 1). Thereafter, the court had to determine whether:

* I wish to acknowledge the comments and suggestions of Samantha Hepburn, of Deakin University. I, however, remain responsible for the correctness of the end product. The law is stated as at 30 December 2011.

(a) the modified prerogative was received as part of the common law of NSW;

(b) upon federation in Australia such prerogative formed part of the executive powers of the Commonwealth (Federal government) or the State governments; and

(c) NSW mining legislation affected the disposition of the minerals upon the grant of freehold (an estate) in land by the State.

This was followed by an examination of the applicable provisions of the Mining Act 1992 (NSW) ("Mining Act 1992").

The Mining Act 1992 provides for the granting of prospecting or mining rights in respect of minerals. Any person may apply to the state for a mining lease (see s 51). Section 11(1) provides that upon lawful severance of minerals from the land such minerals become the property of the miner (par 78). In terms of the Mining Act royalties are payable by holders of mining leases upon recovery of "publicly owned minerals" (par 7). If the minerals are privately owned, the lessee remains liable to pay royalties as if they were publicly owned, but the Minister in turn has to repay seven-eighths of the royalties to the owner of the minerals (s 284; parr 7, 64). In terms of the Mining Act 1992 the concept of a "mineral" includes copper and gold, whilst a "publicly owned mineral" is defined in section 4 as "a mineral owned by, or reserved to, the Crown" (par 7). A "privately owned mineral" is just the opposite of a publicly owned mineral (see s 4; par 61). The expression "the Crown" is a reference to "the Crown in the right of the State of New South Wales" (parr 63, 48).

After my summary of the facts in *Cadia Holdings*, the historical route followed by the High Court, especially in the judgement of French CJ, will be discussed followed by the decision of the High Court. A joint judgement was delivered by Gummow, Hayne, Heydon and Crennan JJ. The decision illustrates how the pendulum has swung in Anglo-Australian law over a period of more than three centuries from privately owned minerals to publicly owned minerals. An attempt will be made to determine the parameters of the royal prerogative in modern day Australia. Due to the creation by section 3(1) of the Mineral and Petroleum Resources Development Act 28 of 2002 of state custodianship over minerals in South Africa (see Badenhorst "Ownership of minerals *in situ* in South Africa: Australian darning to the rescue?" 2010 *SALJ* 646), the importance of the *Cadia Holdings* decision for South African mining law will also be shown. A conclusion will also be reached as to the importance of the *Cadia Holdings* decision.

2 Facts

Cadia and Newcrest Operations Ltd ("Newcrest") were the owners of the freehold in the land near Orange. They held 10 certificates of title to different portions of the land (parr 1, 6). The certificates of title were subject to "reservations and conditions in the Crown grant(s)". The original nine Crown grants were made between 1852 and 1881 (parr 6, 68). Only one of the Crown grants reserved "all gold and mines of gold"

to the Crown (parr 6, 69). The copper was not expressly reserved to (or conveyed by) the Crown during the original grants of freehold in land.

Cadia held four mining leases in terms of the Mining Act 1992 in respect of the land. By virtue of these leases it operated two mines from which it recovered ore in which gold and copper were so intermingled that they could not be mined separately (par 6). The weight of the extracted copper vastly exceeded the weight of the extracted gold. The value of the recovered gold, however, substantially exceeded the value of the recovered copper (par 6). Cadia paid royalties to the Minister for the period 1 July 1998 to 31 March 2008 (par 8).

To recap, Cadia and Newcrest held the freehold of the land subject to the mining leases of Cadia. As a lessee in terms of a mining lease, Cadia paid royalties to the state. If the copper mined qualified as "privately owned minerals", the state had to repay seven-eighths of the royalties to Cadia and Newcrest. If the copper mined qualified as a "publicly owned mineral" the state would be entitled to all the royalties paid for copper mined on the land. Copper would qualify as a privately owned mineral if it was not subject to the royal prerogative, or if conveyed to the grantee at the time of the original Crown grants of freehold. The crux of the matter was, therefore, the origin and meaning of the notion of "publicly owned minerals".

Cadia and Newcrest successfully recovered the seven-eighths of royalties paid in the Supreme Court of NSW because, on the facts, it was decided that the copper was a "privately owned mineral" within the meaning of the Mining Act 1992 (*Cadia Holdings Pty Ltd v NSW* 2008 1 ALR 334 (NSW)). The State and Minister subsequently appealed successfully to the Court of Appeal of NSW (*NSW v Cadia Holdings Pty Ltd* (2009) 257 ALR 528). Briefly, the majority of the Court of Appeal held that:

(a) the royal prerogative was not modified and still applied to an indivisible ore body (which included the copper) (per Basten JA par 120); or

(b) the Royal Mines Act 1688 (UK) and Royal Mines Act 1693 (UK) withdrew copper mines from the prerogative although the ore contained appreciatable quantities of gold and silver which were of commercial value, provided the mines could fairly be described as copper mines

(per Kay LJ par 144)(and not gold-copper mines, such as the Cadia mines)(par 154). As will be shown in 3 below, the 1688 statute excluded mines of copper from the royal prerogative. Consequently, it was held that the copper mined was "publicly owned minerals" and subject to payment of higher royalties. Cadia and Newcrest were ordered to repay the royalties together with interest to the Minister (parr 125, 158).

3 Arguments

In a subsequent appeal to the High Court of Australia, Cadia and Newcrest claimed repayment of seven-eighths of the royalties alleging that the copper mined was "privately owned minerals" (par 9). It was argued that the copper had been granted away at the time of the original

Crown grants of the land. In the alternative, it was argued that the Crown's title to copper was abrogated by the Mining Act 1992 (par 12). As will be shown, the first argument was successful in the appeal to the High Court.

The State of NSW and the Minister resisted the claim on the basis that the copper was "vested in the Crown pursuant to its prerogative right to mines of gold and was therefore a publicly owned mineral" (par 8). Their contention depended on the proposition that the mines were properly characterised as mines of gold for purposes of the royal prerogative despite the fact that they contained copper (par 9). The Minister argued that he was entitled to retain the royalties payable in respect of copper on the basis that the quantity and value of the gold in the ore body meant that the mines could not be regarded as mines of copper protected by the Royal Mines Act 1688 (UK) (par 4). In their interpretation of the Royal Mines Act 1688 the Minister also relied on a rule of statutory construction that the prerogative is not displaced except by express words or necessary implication (par 94). In other words, the prerogative was not expressly or by necessary implication modified by the said statute.

4 Decision of the High Court

According to the court the right of the Minister to royalties depended "upon the interaction between the rules of law laid down in the 16th and 17th century and the Mining Act 1992" (par 2). The court held that the royal prerogative, as modified by the Royal Mines Act 1688, applied to NSW and had the "effect that the right to copper in the land at Orange was conveyed by the Crown grants of that land in the mid-19th century" (par 5). Such copper was, therefore, "privately owned minerals" (parr 59, 106). The decision of the court in respect of the following sub-headings will now be discussed in more detail:

4 1 Royal Prerogative

In the *Case of Mines (R v Earl of Northumberland)* miners found a mixture of gold and silver in copper that was mined from lands belonging to the 7th Earl of Northumberland. A suit was brought by Queen Elizabeth I claiming prerogative rights to the gold. Despite the absence of legislation or case law to that effect (*Q v Wilson* 1874 12 SC NSW 258 270) the existence of such prerogative to gold and silver was judicially recognised by all the justices of England and Barons of the Exchequer (par 13). The High Court dealt with the *Case of Mines* against the background of Australian case law (see pars 14-15, 80-82). It is submitted that the following rules can be deduced from the *Case of Mines*:

(a) Mines of gold and silver belong to the Crown by prerogative (the *Case of Mines* 336).

(b) By virtue of the prerogative the Crown is entitled to: (i) enter the land of a subject to dig and carry away the ore of gold and silver; and (ii) other incidents that are necessary for getting the ore (the *Case of Mines* 336; *New South Wales v Cadia Holdings Pty Ltd* (2009) 257 ALR 528 par 123).

(c) The Crown's prerogative did not extend to mines of copper, tin, lead or other base metals (*Cadia Holdings (Pty) Ltd v State of NSW* 7).

(d) If gold and silver are found in mines of base metals, the base metals, gold and silver belong to the Crown by prerogative (This was decided by the majority of the court (*Case of Mines* 336). The three dissenting judges only recognised the royal prerogative to other base metals contained in gold and silver if the value of gold and silver exceeded the value of the other base metals (336). The position of the nine judges in respect of mixed ore was modified by an opinion obtained in 1640 from 15 leading Counsel that the Crown would only acquire the whole of the ore if the value of the royal metal exceeded the cost of separation (*New South Wales v Cadia Holdings Pty Ltd* (2009) 257 ALR 528 parr 17, 76)).

(e) By virtue of the prerogative the Crown is entitled to dig and carry away the mixed minerals, even if the gold or silver is less valuable than the base minerals (*Case of Mines* 337; *New South Wales v Cadia Holdings Pty Ltd* parr 16, 17, 101).

(f) A grant of a freehold (an estate) in land, containing gold and silver, by the Crown will not convey the gold and silver to the grantee unless there is a specific grant or conveyance of the gold or silver (*Case of Mines* 337; Q *v Wilson* 1874 12 SC NSW 258 281; *Commonwealth of Australia v State of NSW* (1920) 33 CLR 1 11 20).

(g) If a legislature wants to abrogate or qualify the prerogative in any way "patent precise words" (and possibly necessary implication) are formally required for such abrogation or qualification (*Cadia Holdings Pty Ltd v State of NSW* 24 37).

The royal prerogative thus "allocated to the Crown, without parliamentary sanction, the right to important natural resources including base-metal mines containing gold or silver" (*Cadia Holdings Pty Ltd v State of New South Wales* 24). The following justifications were advanced for the recognition of the royal prerogative: First because of the excellence of gold and silver contained in the soil, the common law has allocated them to the person that is most excellent, and that is the King (*Case of Mines* 315-316). Second because of the necessity of gold and silver, the King will be able to defend his subjects with an army against hostilities and with good laws (*Case of Mines* 316). Third because of the convenience of gold and silver for mutual commerce, trafficking, coinage and other like purposes (*Case of Mines* 316; Badenhorst 2010 *SALJ* 646 663). Further, the need to avoid undue concentration of financial power in the King's subjects was perceived as an important justification (*Cadia Holdings Pty Ltd v State of New South Wales* 5). These policy reasons had an impact on the classification of the royal prerogative. For instance, French CJ perceived it as an aspect of the Crown's fiscal prerogatives (par 3). Reference was also made to the classification of the prerogative as a proprietary right of the King (par 32). In the joint judgement the royal prerogative is described as "preferences, immunities and exceptions peculiar to executive government" (par 75) and "an exceptional right which partakes of the nature of property" (par 75).

4 2 Modification of the Prerogative

The Royal Mines Act 1688 (UK) and the Royal Mines Act 1693 (UK) modified the prerogative with respect to any mine of copper, tin, iron or lead. By section 3 of the 1688 Act, no mine of copper, tin, iron or lead would be taken to be a royal mine on the basis that gold or silver may be extracted from it (*Cadia Holdings Pty Ltd v State of New South Wales* 7-8, 27)·. French CJ explained that the 1688 Act protected private interest in copper mines which contained gold by allowing their owners to retain the copper (par 3). The 1688 Act did not affect the Crown's prerogative to mines of gold and silver (par 19), but "altered, in favour of private interests, the balance of private and public rights in relation to base metals associated with gold and silver" (par 57). As such it was expressly directed to the scope of the prerogative right and constituted the "patent precise words" required by common law rule of interpretation for qualification of the prerogative stated in the *Case of Mines* (par 57). The 1693 Act attempted to avoid taxonomical difficulties by permitting the owner of a mine containing copper, tin, iron or lead to work the mine even though it might be claimed to be a royal mine (par 17).

In the joint judgement it was held that section 3 of the Royal Mines Act 1688 was a limitation of the prerogative (par 100) and removed the specified minerals from the prerogative (parr 102-113). A mine may be characterised as a "mine of copper" as well as a "mine of gold" for the operation of section 3 of the Royal Mines Act 1688 (par 103). It was held (par 105) that:

> [b]y operation of section 3 of the Royal Mines Act, a mine of copper thereafter could not be classified as a 'mine of gold' within the scope of the prerogative given by the *Case of Mines* where copper was mingled with gold in the ore.

4 3 Reception of the Prerogative

The rule regarding the reception of English law by the colonies is stated as follows by French CJ (par 21):

> It was a common law rule that the common law applied to a colony characterised as 'settled' to the extent applicable to the conditions of the colony and the terms of the charter or instrument providing for its government.

Imported English law included statute law and judge-made law (Butt *Land Law* (2010) 1). From the earliest time Australia was legally regarded as a colony that had been settled and not conquered (Butt *Land Law* 1; Gray, Edgeworth, Forster & Grattan *Property Law in New South Wales* (2007) 70)). Despite vastly different conditions in England and Australia a vast amount of English law was received in Australia (see Gray *et al* 71). The royal prerogative was part of the common law (par 21) and its application in mines of gold and silver in the Australian colony was acknowledged in NSW (10; *Millar v Wildish* (1863) 2 W & W (E) 37 43; *R v Wil*son (1874) 12 SCR (L) NSW 258 269-271 280 281;). The cut-off date for the reception of English law into Australia was 1828 (Butt *Land Law* 2). In terms of the Australian Courts Act 1828 (Imp) all the laws and

statutes in force in England on 25 July 1828 applied to the administration of justice in the courts of NSW and Van Diemen's Land (Tasmania) (par 23). The practical problem of determining which pre-1828 law applied to the colony was resolved by the Imperial Acts Application Act 1969 (NSW) (See Butt 2-3; Gray *et al* 71-72).

The introduction of the rule of construction, which accepted in the *Case of Mines* that a specific grant of gold and silver is required before it passes under grant of land from the Crown (see 3 (f) above), into the colony of Victoria was confirmed by the Privy Council in *Woolley v Attorney-General of Victoria* ((1877) 2 App Cas 163 166)(10)). It was found in *Woolley* that the rule of construction had not been modified by the Waste Lands Act of 1842 (Imp)(167). In *Wade v New South Wales Rutile Mining Co Pty Ltd* ((1969) 121 CLR 177 186) the correctness of *Woolley* in establishing the royal prerogative and the rule of construction in the Australian colonies was accepted beyond doubt (par 26). It was held that the rule of construction, "required clear words or necessary implication before legislation or a grant thereunder could be taken as authorising a grant of land conveying with it rights to mines of gold and silver in the land" (par 29). The rule of construction was applicable to legislation and other executive grants to land (par 14). The result of the law of construction was that no express reservation of gold and silver was necessary to preserve the Crown's rights (see par 70). Thus, gold or silver did not automatically pass by a Crown grant of freehold in land (par 70).

French CJ confirmed that the 1688 and 1693 Acts (despite their repeal in 1969 by the Imperial Acts Application Act 1969 (NSW)) were part of the law in force in NSW at the time when the grants of the land owned by Cadia and Newcrest were made by the Crown (par 27). The subsistence of the prerogative in the colony of NSW was also found to be in line with the characterisation of the Crown's rights in respect of the lands of the colony in *Mabo v Queensland (No 2)* ((1992)175 CLR 1) (par 28; see also par 51). In the *Mabo* decision a distinction was drawn between the Crown's title to a colony (*imperium*) and the Crown's ownership of land in the colony (*dominium)* (*Mabo* par 45). Upon acquisition of sovereignty to the territory the Crown acquired radical (ultimate) title to all the land in the territory (par 50), but it did not automatically acquire absolute sovereignty of title (Hepburn *Australian Property Law Cases, Materials and Analysis* (2012) 366). The notion of radical title enabled the Crown to become the absolute beneficial owner of unalienated land required for the Crown's purposes if the land was uninhabited (par 51). If the land was occupied by the indigenous inhabitants the radical title acquired with the acquisition of sovereignty was burdened by native title (par 69). Radical title was described as "a postulate of the doctrine of tenure and a concomitant of sovereignty" (par 50). The doctrine of tenure, which forms the foundation of Australian land law (*Attorney-General (NSW) v Brown* (1847) 2 Legge 312; *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141; *Mabo v Queensland (No 2)* par 47), entails that the Crown is the original owner of all land and

no person holds a title in land except "of or from" the Crown (Price & Griggs *Property Law in Principle* (2008) 42).

In the joint judgement it was held that the common law prerogative as abridged by section 3 of the Royal Mines Act 1688 was received into NSW (41). As section 3 was in force in England on 25 July 1828 it was declared to have been in force in NSW on that day by the Imperial Acts Application Act 1969 (NSW) (par 104).

4 4 Effect of Federation Upon the Prerogative

By the Commonwealth of Australia Constitution Act 1900 (UK) the Australian federation was established on 1 January 1901. At the outset French CJ indicated that "distribution" of prerogative powers and rights between the Commonwealth and the States is not spelt out in the Commonwealth Constitution (par 30). French CJ showed that the different justifications for the existence of the royal prerogative (see 3 above) could mean that the prerogative could arguably be either an incident of Commonwealth executive power or State power (see par 33). French CJ seemed to have favoured the view and disposed of the appeal on the basis that the prerogative remained with the executive governments of the States after federation (par 33). It was deemed unnecessary by the other justices to consider this issue insofar as the litigation was conducted on the assumption that a prerogative of a proprietary nature, which before the federation was exercisable by the executive government of the colonies, was exercisable by the executives of the various States (par 88).

4 5 Regulation of Mining in NSW

Legislative regulation of mining in NSW commenced after the discovery of gold in significant quantities in 1849 (par 35). The proclamation of Governor Fitzroy on 22 May 1851 asserted the right of the Crown to all gold in NSW and prohibited mining for gold in the colony without a licence (par 36). The assertion of the Crown's rights to gold was unnecessary in the light of the *Case of Mines* (par 36). By section 2 of the NSW Constitution Act 1855 (Imp) control over Crown land was vested in the colony. This control permitted the NSW Parliament to legislate for ownership of minerals to be retained by the Crown in future grants of freehold title (Hunt *Mining Law in Western Australia* (2009) 2). A policy decision was thus taken that the Crown should own all minerals (Hunt 1). It is submitted that the policy decision was probably influenced by the royal prerogative. A general policy in favour of mineral reservation in favour of the Crown was introduced by the Crown Lands Act 1884 (NSW), which states that all grants of land issued under the Act shall contain a reservation of all minerals (Bradbrook, MacCallum, Moore & Grattan *Australian Real Property Law* (2011) 796). Private ownership of minerals will only exist in NSW if the Crown grant was made prior to the Crown Lands Act 1884 and minerals were not exempted prior to that date. As will be shown, the Crown grants in *Cadia Holdings* provide an example of such private ownership of copper in NSW (Bradbrook *et al* 796). Due to such retention of minerals upon grant (alongside the royal prerogative)

the situation has developed that the Crown in right of the State owns nearly all minerals in Australia (Hunt 2). In addition, statutes of other Australian States reserve ownership of other minerals in the Crown (in right of the State) (s 9(1)(b) Mineral Resources (Sustainable Development) Act 1990 (Vic); s 8(2), (3) Mineral Resources Act 1989 (Qld); s 16(1) Mining Act 1971 (SA); s 16(3) Crown Lands Act 1976 (Tas); s 6(2)-(5) Mineral Resources Development Act 1995 (Tas); s 9(1)(b) Mining Act 1978 (WA); s 16 Mining Act 1991 (SA)). In the Northern Territory reservation is in the Crown (in right of the Commonwealth) (s 3 Minerals (Acquisition) Act (NT)). If such statutes did lead to expropriation of "privately owned minerals" provision was made for compensation thereof (see the examples given in Badenhorst 2010 *SALJ* 646 666-667). Unlike those statutes, neither the Mining Act 1992 nor its predecessors asserted Crown ownership of other minerals and such ownership depends upon the terms of the Crown Grant (Crommelin "Native Title Claims and Mineral Ownership" Research paper, Mineral law 2011 Melbourne School of Law 19).

French CJ provided an overview of legislation which preserved the prerogative rights or common law rule of interpretation stated in the *Case of Mines* (parr 36-42). French CJ held that the mining legislation in NSW did not affect the disposition of the minerals at Orange by the original Crown grants (par 42). That disposition in respect of copper and gold in the land had to be determined by the scope of the royal prerogative (par 42). In other words, whether copper was privately owned depended on the scope of the prerogative at the time of grant of freehold of the land and the terms of the grant (see 4 7 below).

4 6 Effect of Mining Act 1992 on the Royal Prerogative

In examining the impact of the Mining Act 1992 it was mentioned that the royal prerogative was preserved by section 379 of the Mining Act 1992 (parr 7, 48). Insofar as the Mining Act 1992 provided that it was binding on the Crown in right of the state (par 49) it had an impact on the prerogative. The Mining Act 1992 contains a broad prohibition against mining by any person without the relevant authority. In light thereof it was accepted by the State in *Cadia Holdings* that the Crown, therefore, no longer had the right to enter the land and mine for gold and silver (par 49). With reference to case law it appeared that:

(a) There are no recorded instances where the Crown exercised its right of entry and mined for gold and silver (par 50).

(b) The common law rights of a holder of an estate were not interfered with (see par 50).

French CJ, however, decided that the absence of such a right of entry did not result in the abolition of the royal prerogative as such (see par 50). He reasoned that "the right of entry, while a logical incident of the prerogative right, is not a necessary condition of its existence" (par 50). Viewed in the light of the concept of radical title as considered in *Mabo v Queensland* (*supra*), it was held that the existence of the prerogative (whether as sovereign authority or beneficial ownership) is not affected

by "the Crown's inability to enter, without relevant authority, the land in which they are located" (par 51).

4 7 Application of the Modified Prerogative

The decision of the High Court illustrates that the prerogative as modified (by the 1688 and 1693 British Acts) determines the scope of the grant of an estate in land upon which copper and gold mining operations are conducted (see par 4).

At the outset French CJ held that the modified prerogative had the effect that the right to copper was conveyed by the Crown grants of the land in Orange between 1852 and 1881 (par 5). French CJ concluded that a mine containing a substantial amount of copper answers the statutory description of a mine of copper for purposes of the 1688 Act. That would be the case "even if the quantity of gold in the mine is such that it is capable of dual characterisation as a gold mine" (par 59). The effect of such conclusion is that (par 59; see also par 50):

> [t]he original Crown Grants of the land on which the mines stand passed over the ownership of the copper such that the copper is properly characterised as a 'privately owned mineral' within the meaning of the Mining Act of 1992.

Copper is, accordingly, privately owned. French CJ decided that "the liability to pay royalties for the copper mined from the land is therefore to be assessed on the basis that it was a 'privately owned mineral' within the meaning of the Mining Act 1992" (par 5). In the joint judgment it was also found that the Cadia mine should be classed as a "mine of copper" (par 103) and that the copper upon which the royalty was payable by Cadia to the Minister was a privately owned mineral for purposes of the Mining Act (par 107). The decision of the Supreme Court of NSW was found to be correct and it was decided that the appeal against the decision of the NSW Court of Appeal should succeed (par 67).

4 8 Modern Day Meaning of the Royal Prerogative

To recap, it was thus decided that, upon the grant of freehold in land by the Crown (in NSW prior to 1884), ownership of copper was also conveyed to the grantee of the freehold in land. Upon such conveyance the copper qualified as "privately owned minerals" in terms of the Mining Act 1992 and for a repayment to the owners of the minerals of seven-eighths of the royalties paid by the mineral lessee.

It is submitted that, as deduced from *Cadia Holdings,* the royal prerogative at present entails the following in Australia:

(a) Mines of gold and silver belong to the Crown in right of the State by prerogative.

(b) Such prerogative does not extend to mines containing a substantial amount of copper, tin, lead or other base metals even if gold or silver may also be extracted from them.

(c) A grant of freehold in land, containing gold and silver, by the Crown will not convey the gold and silver to the grantee unless there is a specific grant or conveyance of the gold or silver.

(d) A grant of an estate in land, containing copper, tin, lead or other base metals, by the Crown will convey to the grantee such base metals (unless ownership of such metals has prior to the grant been reserved to the State or Territory by legislation).

(e) Abrogation or modification of the royal prerogative by the legislature has to take place expressly or by necessary implication.

As indicated in *Cadia Holdings* state legislation such as, for instance, the Mining Act 1992, has abrogated the rights or incidents of the Crown in right of the State to enter the land and mine for gold and silver. Despite such abrogation, the modified prerogative to gold and silver remains otherwise intact.

Since the days of the *Case of Mines* the metaphorical pendulum of mineral ownership has started to swing in England from common law private ownership of minerals to public ownership of gold and silver (and base minerals mixed with gold and silver). The pendulum moved slightly back during the modification of the prerogative by British legislation in the 17th century by excluding certain base minerals, even if gold and silver could also be extracted. Upon reception of English law in colonial Australia the pendulum and its position became part of Australian law. In addition to the royal prerogative, a policy of Crown ownership of minerals was adhered to by legislatures upon granting of freehold to land. Because the right of entry and mining was not exercised by the Crown the pendulum swung a little backwards again resulting in the loss of the Crown's incidents of entry and mining. With the statutory reservation of ownership of other (or all) minerals in Australia the pendulum moved towards a state of almost complete publicly owned minerals.

In modern times the following policy reasons are advanced for the retention of ownership of minerals by the Crown. The first is the economic value of the minerals to the States and Territories. Secondly, the government has greater control over the development of mineral resources, which can be used to encourage development and to regulate and protect the environment, heritage sites and the interests of other members of society (Chambers *An Introduction to Property Law in Australia* (2008) 178; Badenhorst "The make-up of transitional rights to minerals: Something old, something new, something borrowed, something blue …?" 2011 *SALJ* 763 666). Due to the strong economic focus of Australian mineral laws in general the environment is not always protected with too much rigour and there is a new concern about the protection for private land interests during the extraction process.

5 Importance to South African Law

South Africa was acquired by the British during the 19th century by conquest which meant that "the laws of a conquered country continue in force, until they are altered by the conqueror" (*Campbell v Hall* 1774 1 Cow 204 209). Therefore, the royal prerogative was not received as part of South African law. Sir John Cradock's Proclamation on Conversion of Loan Place to Quitrent Tenure, dated 6 August 1813 can, however, be

explained as a statutory manifestation of the royal prerogative or an attempt by the legislature of the Cape colony to retain rights to minerals in future grants of ownership of land. Section 4 of the Proclamation reserved to the Crown rights "on mines of Precious Stones, Gold or Silver" (Dale *An Historical and Comparative Study of the Concept of Acquisition of Mineral Rights* LLD thesis Unisa (1979) 217; *Benade v Minister van Mineraal-en Energiesake* 2002 JDR 0769 (NC) 8). Despite the ambiguity of the wording, Sir John Cradock's Proclamation has been regarded as the statutory reservation of the rights to gold, silver and precious stones in favour of the state (Franklin & Kaplan *The Mining and Mineral Laws of South Africa* (1982) 36 n 33; Jones & Nel *Jones Conveyancing in South Africa* (1991) 4, 28, 403). Another South African example may be given. The Crown Lands Act 14 of 1878 (C), which provided for the sale of Crown land, also preserved a type of royal prerogative, and provided in section 10(e) that the rights of prospective purchasers would not extend to any deposits of gold, silver and precious stones (Dale 218). Sir John Cradock's Proclamation was repealed by Act 44 of 1968 (Badenhorst & Mostert *Mineral and Petroleum Law of South Africa* (2004) revision service 8 1-18). Unlike in Australia, a policy decision was not taken by legislatures of, for instance, the old *Zuid-Afrikaansche Republiek* or Orange Free State, that the State should own all minerals. On the other hand, in the colony of Natal the philosophy was one of vesting in the State the right of mining and disposing of all minerals (Badenhorst & Mostert 1-20).

Land subject to statutory reservation of mineral rights in favour of the State became subject to the transitional measures of section 43 of the Minerals Act 50 of 1991 that were applicable to owners of "alienated State land" (Stevens "Mining Law and Mineral Rights" in *Practical Legal Training: Notarial Practice* Law Society of South Africa (2000) 106). In terms of the definition in section 1 of the (repealed) Mining Rights Act 20 of 1967, and section 1 of the (repealed) Precious Stones Act 73 of 1964, "alienated State land" was land not owned by the State, but subject to a reservation of mineral rights in favour of the State. Briefly, in terms of section 43 of the Minerals Act, owners of such land (or their nominees) could, during a transitional period, either acquire the State's mineral rights or grant consent to a nominee to mine (Badenhorst & Mostert 12-5). Such an owner of "alienated State land" could, in turn, have qualified as a holder of an "old order right" for purposes of the transitional arrangements contained in the Mineral and Petroleum Resources Development Act 28 of 2002 ("MPRDA") (see further Badenhorst & Mostert 12-14). Holders of "old order rights" could either convert their rights into prospecting or mining rights or apply for such rights in terms of the MPRDA depending on whether prospecting/mining took place or not upon commencement of the MPRDA (see further Badenhorst & Mostert ch 25 3 1 - 4). Thus, some current day prospecting or mining right holders may trace their root of title back to land for which mineral rights were originally reserved in favour of the state.

Since the discovery of gold and diamonds during 1867 and 1870 in southern Africa (see further Badenhorst & Mostert 1-20 - 1-21) a division by successive southern African legislatures between –

(a) precious metals and precious stones on the one hand and base minerals on the other hand; and

(b) holders of prospecting and mining rights in respect thereof, created a half-way house between "complete State monopoly and unfettered private enterprise" (Franklin and Kaplan 1).

The final median position of the South African pendulum was reached during the 1960s. In terms of section 2(1)(*a*) of the repealed Mining Rights Act and section 2 of the Precious Stones Act, the following rights were vested in the state (*Benade v Minister van Mineraal-en Energiesake* 2002 JDR 0769 (NC) 9; Badenhorst & Mostert 1-18):

(a) The rights of prospecting and mining for and disposing of natural oil.

(b) The rights of mining for and disposing of precious metals and precious stones.

The following rights were retained by the respective private holders (s 2(1)(*b*) of the Mining Rights Act; Badenhorst & Mostert 1-18 - 1-19):

(a) The right of prospecting for precious metals and precious stones.

(b) The rights of prospecting and mining for and disposing of base minerals.

In addition, the rights to prospect precious metals, base minerals (s 12(1) Mining Rights Act) and precious stones (s 5(1) Precious Stones Act) on "alienated State land" were reserved in favour of the owner of the land (Badenhorst & Mostert 1-19). In retrospect, the halfway-house position between the state and private enterprise was to some extent similar, and even broader than the royal prerogative. The right to mine precious metals (and precious stones) was vested in the state (publicly owned rights) whilst the right to mine base minerals was vested in private holders of mineral rights (privately owned rights). The underlying rights in South Africa were mineral rights whilst the underlying rights in English law were ownership of the minerals. In effect, a similar mineral régime existed in both systems. As part of a privatisation drive by the Apartheid government, the Minerals Act 50 of 1991 terminated the states' statutory rights to certain classes of minerals, and former state-held rights were revested in the private holder of such mineral rights (s 5(1); Badenhorst "The revesting of state-held entitlements to exploit minerals in South Africa: Privatisation or deregulation?" 1991 *TSAR* 113 124-127, 130-131). The South African pendulum swung back to a system of "privately owned mineral rights". Upon enactment of the MPRDA by the ANC led government, "mineral and petroleum resources" became the "common heritage" of all South Africans subject to "custodianship" by the State (s 3(1)). This meant that private law rights to minerals had been ousted by the "prevalence of State power of control over mineral resources" (*Meepo v Kotze* 2008 1 SA 104 (NC) par 8) or state custodianship. This policy decision resulted in an overnight change to state control or custodianship over mineral resources (see further Badenhorst 2010 *SALJ*

646 654). When compared with Australian law, the movement in the pendulum in South Africa took place at different times in history and for different reasons. Publicly owned minerals were created at almost the beginning of the creation of rights to minerals in Australia, whereas total state control or custodianship over mineral resources was established more than a century after the creation of privately held mineral rights in South Africa. The reader is referred to the policy reasons for the transformation of the mineral law régime in section 2 of the MPRDA.

With the achievement of a comparable end result in both systems, it is submitted that the *Cadia Holdings* decision, and Australian mining law for that matter, is relevant in the South African context:

First, the *Cadia Holdings* decision shows that royalties are payable by miners to the owner of minerals *in situ*, that is, the state in the case of "publicly owned minerals", or to the freehold owner of the land in the case of "privately owned minerals". It is conceded that payment of royalties by miners is regulated by a specific Australian mining statute. In South Africa royalties are now also payable by holders of mining rights to the state (s 3(2)(b) MPRDA; s 2 Mineral and Petroleum Resources Royalty Act 28 of 2008). Payment of royalties does not take place to owners of land or former holders of mineral rights under the previous dispensation (except in exceptional cases of continued payment of contractual royalties to a community in terms of item 11 Sch II MPRDA). If royalties are, in principle, payable to an owner of minerals *in situ*, can one draw the inference that minerals *in situ* are owned by the state in South Africa? It looks like an attractive answer to the question: "In whom is ownership of minerals *in situ* vested in South Africa?" It is conceded that it will be argued that royalties are rather payable to the state because it merely acts as the custodial grantor of rights to minerals (see s 3(2)(a)). Playing devil's advocate, should the custodian not make some repayment to former holders of mineral rights if it is not owned by the state?

Secondly, the MPRDA also binds the state (s 109). Prospecting or mining is, for instance, prohibited by the MPRDA unless a prospecting right or mining right (or mining permit) is obtained, an environmental management programme or plan is approved and notification and consultation with the owner of or lawful occupier of the land has taken place (s 5(4); *Kowie Quarry CC v Ndlambe Municipality* 2008 JDR 1380 (E) par 18). It is submitted that this prohibition also applies to the state (as prospector or miner). As illustrated in the *Cadia Holdings* decision, one can take it a step further by arguing that the state *per se* does not have the right to prospect and mine for minerals despite being state controlled or state owned. This may be a useful argument against direct or indirect attempts by the state to become actively involved in mining to the detriment of the private sector. A conflict of interest clearly arises if the state is grantor of rights to a state entity. The conflict of interest is increased if the state is to act as custodian. The application of the prohibition to the state would also mean that the state is not empowered to exempt applicants from compliance with section 5(4) or other

provisions of the MPRDA. Exemption of state entities from compliance with the provisions of the MPRDA is only provided for "any activity to remove any mineral for road construction, building of dams or other purposes which may be identified" (s 106(1)). This exemption does not conflict with the interest of mining companies. During 2008 the Minister of Mineral Resources, relying on section 106(1) of the MPRDA, exempted (GN 1081 *GG* 31485 2008-10-10) the state-owned African Exploration Mining Finance Corporation from the provisions of applying for -

(a) a prospecting right;

(b) the right to remove minerals;

(c) a mining right; or

(d) a mining permit.

This exemption was said to apply "in so far as it relates to any activity to prospect, mine and the removal of any mineral for accumulating and stockpiling for purposes of security of supply and purposes incidental thereto" (GN 1081 *GG* 31485 2008-10-10). It was argued that the exemption of the state-owned African Exploration Mining Finance Corporation is *ultra vires* the power of the Minister to exempt state entities insofar as the Minister's power of exemption is, in terms of the *eiusdem generis* rule of statutory interpretation, limited to the building of infrastructure (Badenhorst & Mostert 24-10; Leon "Creeping expropriation of mining investments: an African perspective" 2009 *J of Energy and Natural Resources L* 597 625-626). It is submitted that the *Cadia Holdings* decision shows that a provision in a statute binding the state has legal consequences and the state should not directly or indirectly try to evade those provisions. Somehow, wisdom prevailed because the exemption of African Exploration Mining Finance Corporation has subsequently been withdrawn by the Government (GN 1081 *GG* 34115 2011-03-14). Nevertheless, a provision which binds the state can, as indicated in *Cadia Holdings*, be a useful instrument in limiting the parameters of the rights of the state. The state owned mining company still exists and with amendment of the MPRDA some preferential treatment may again be bestowed upon it or other state entities.

Thirdly, viewing the rights of the South African state through prerogative glasses, it would mean that all minerals are owned by the state and that the state is entitled to prospect and mine for such minerals, upon compliance with the provisions of the MPRDA. Since the enactment of the MPRDA, if the state grants ownership of land, no rights to minerals are conveyed to the transferee.

Fourthly, the *Cadia Holdings* decision has shown that upon granting of rights the content or parameters of those rights are dependent on the rights held by the grantor and the rights which were actually granted. The extent of any state grant may be circumscribed by the statutes (or the prerogative) applicable at the time of grant. The content and parameters of the South African state's power of control or custody over mineral resources is not so clear. It has as its content considerable discretionary

powers to attain the MPRDA's broad socio-economic objectives (Leon *J of Energy and Natural Resources L* 597 627) which are difficult to circumscribe. A few pertinent questions remain in South Africa: Has common law ownership of minerals *in situ* by the owner of the land been replaced by state control or some form of public ownership of minerals *in situ* in favour of the state? Or, is common law ownership retained subject to the control or custody of the state? What exactly is the content of state power of control or custody over minerals? If rights to minerals are created upon granting thereof by the state, in whom was the content of these rights vested immediately before the grant by the state?

The courts are starting to provide answers to some of these questions. In *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* (2011 4 SA 113 (CC) par 40) a possible change in ownership of minerals *in situ* was raised but not decided by the Constitutional Court. Two possible scenarios were only mentioned, namely, ownership of unsevered minerals residing in "custody of the state", or ownership of the land including surface rights and what is beneath it "in all the fullness that the common law allows" (par 63; see, however, s 4(2) MPRDA which provides that if the common law is inconsistent with the MPRDA, the MPRDA prevails). In *Agri SA v Minister of Minerals and Energy* ((2011) 3 All SA 296 (GNP) par 94) the question of ownership of minerals *in situ* was left open. It was decided that upon commencement of the MPRDA the state acquired the substance of the property rights of the erstwhile holder of common law mineral rights (par 82). The court reasoned that from a reading of sections 3 and 5 of the MPRDA, the Minister was "vested with the power to confer rights, the contents of which were substantially the same as, and in some respects, identical to, the contents of common law mineral rights" (par 82). The fact that the competencies of the state are collectively called "custodianship" was regarded as immaterial by the court (par 82; see further Badenhorst & Olivier "Expropriation of 'unused old order rights' by the MPRDA: you have lost it! *AgriSA v Minister of Minerals and Energy*" 2012 *THRHR* 329 335). Just as in Australia, compensation was found to be payable for termination of "privately owned minerals" (item 12 Sch II MPRDA; *Agri SA v Minister of Minerals and Energy* par 91-94).

It is submitted that the legislature utilised the vehicle of custodianship to deny that upon enactment of the MPRDA a form of property of mineral resources was acquired by the state. The denial is theoretically ineffective in the sense that control or the right of disposal (*ius disponendi*) of minerals *in situ* (by the state) can be construed as an entitlement of ownership in South African Property law. The existence of an entitlement of control requires the concomitant existence of a right, albeit a public law right. In other words, the state has control over mineral resources by virtue of some form of a public law right. Susceptibility to legal control is in turn an essential characteristic of a thing (Van der Merwe *Sakereg* (1989) 26) which would be present in respect of minerals *in situ*. The English common law rather perceives control as a feature to determine whether "something" qualifies as "property". The dominion or control

exercised by a legal subject over an object is perceived as one of the standard features of "property" in English law (Gray *et al* 3). Gray and others rely on the following definition by Blackstone in his *Commentaries on the Law of England* (Volume II page 2):

> Property is that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.

The custodianship of the state created in the MPRDA also seems to meet other English law features of property, such as excludability and transferability (see Gray *et al* 3-4). Externalisation of the object (of the right) takes place in both systems by statute. What has been created by the MPRDA would arguably meet the requirements of property in English common law. In other words, the state is holding such property. If the state's power of control over mineral resources is equated in South Africa to the notion of publicly owned minerals, such notion, as developed in Australia, may assist in providing answers to the above questions. The Roman *res publicae* (public things) has also been suggested as an explanation of state control or custodianship (Badenhorst & Mostert 13-4; Van den Berg "Ownership of minerals under the new legislative framework for mineral resources" 2009 *Stell LR* 139 153). Originally, *res publicae* also meant state property but at the time of Justinian the term denoted only such public things that are devoted to the common use of all, such as public roads, public places and public rivers (see *Sohm's Institutes of Roman Law* (translated by Ledlie) (1907) 303). Although anyone may apply for rights in terms of the MPRDA (unless a prior lesser right has been linked to acquisition of a subsequent right), the Justinian notion of *res publicae* is perhaps not entirely suitable to modern day mining. This is because eventually a right would be granted by the state to an applicant to the exclusion of other persons' entitlement of "common use". Whilst a public road may be used by all, for instance, a mining right once granted would only be exercisable by the holder thereof. In *De Beers Consolidated Mines Ltd v Ataqua Mining (Pty) Ltd* (Unreported, OPD case no 3215/06, 3215/06 (2007-12-13) par 38) counsel argued that minerals are not *res publicae*. They argued, by drawing an analogy with fishing resources, that because the state is also the custodian of fishing resources it does not mean that the state owns the fishing resources. The court did not decide as to whether minerals *in situ* constitute *res publicae* or not (par 38). Counsel's argument can be viewed in light of the decision of the High Court of Australia in *Yanner v Eaton* ((1999) HCA 53). The court had to consider the meaning of section 7(1) of the Fauna Conservation Act 1974 (Qld) which provided that all fauna "is the property of the Crown and under the control of the Fauna Authority" (par 15). At issue was the nature of the interest in fauna that was vested in the Crown by this provision (par 20). The court decided that the "property" conferred on the Crown cannot accurately be described as "full, beneficial, or absolute ownership" (par 22; as to the reasoning of the court, see parr 22-27). It held that the property conferred was "no more than the aggregate of the various rights of control by the Executive that the legislation created" (par 30). It should be noted that

the interest conferred by the Fauna Act was still regarded as some form of property even though not absolute ownership. Property was perceived by the High Court as not being "a monolithic notion of standard content and invariable intensity" (par 19). By analogy, the absence of *dominium* of minerals *in situ* by the state in South Africa does not mean the absence of "property" therein (even in the sense of "property" for purposes of section 25(1) of the Constitution of the Republic of South Africa, 1996). The ambiguity of section 3(1) of the MPRDA could perhaps be dealt with by asking "In whom is property of minerals *in situ* vested in South Africa?" The answer is "the state". The next logical step is that the state has deprived prior holders of such property which triggers section 25(1) of the Constitution.

Denial of the true legal position by creating the smokescreen of the state being a custodian over the common heritage of the people, that is, mineral resources, has to some extent backfired in the political arena. It has perhaps led to the clamour for nationalisation of mines (see, for instance, "Towards the transfer of mineral wealth to the ownership of the people as a whole: a perspective on nationalisation of mines", ANCYL discussion document Aug 2010) to the detriment of the economy and foreign investment (for instance, the Moodys rating agency has recently downgraded South Africa due to the likely nationalisation of mines (Anon "Moody's Downgrades South Africa" (2011-11-08) *Silverstackers* http://goldstocksforex.com/2011/11/09/moodys-downgrades-south-africa/ (accessed on 2011-12-09)). Ulterior motives, such as the economic failure of beneficiaries of broad-based black economic empowerment and their hope of being rescued by nationalisation were also raised as reasons for the call for nationalisation. By working with the notion of "publicly owned minerals" it would be more apparent that such minerals are already owned by the state. Nationalisation of the mines is, of course, another more complex issue, to be distinguished from publicly owned minerals. (A report by the ANC on the feasibility of the nationalisation of mines is due at the end of 2012 (Anon "S.Africa ANC report on mines nationalisation due end-2012" (2001-11-28) allAfrica.com http://www.reuters.com/article/2011/08/31/australia-mining-south-africa-idUSL4E7JV02U20110831) (accessed on 2012-09-12)).

The true legal position in South Africa, namely, publicly owned minerals should be acknowledged simply by amendment of section 3(1) of the MPRDA by stating that ownership of minerals (*in situ*) is vested in the state. Notions such as "heritage" and "custodian" remain vague and without much substance.

6 Conclusion

It was decided in *Cadia Holdings* that, upon the grant of freehold in land by the Crown (in NSW prior to 1884), ownership of copper was conveyed to the grantee of the freehold in land. Upon such conveyance the copper qualified as "privately owned minerals" in terms of the Mining Act 1992, and for a repayment to the owners of the land of seven-eighths of the royalties paid by the mineral lessee. Ownership of gold or silver was not

conveyed by such a Crown grant but was vested in the state of NSW. This was due to the reception of the royal prerogative into Australian law. The royal prerogative originated in the famous English decision the *Case of Mines* of 1568, but was modified over time by British legislation. In modern day Australia the Crown in right of the state, by prerogative and retention of ownership of minerals upon grant of freehold or statutory reservation, owns nearly all minerals making *Cadia Holdings* an interesting example of an exception to publicly owned minerals.

Perhaps more importantly, the decision of the High Court in *Cadia Holding*s provides an historical account of the movement from private ownership of minerals to public ownership of minerals in Anglo-Australian law. The interaction between the rules of law laid down in 16th and 17th century England and the Mining Act 1992 in NSW is indicated in this decision. The imprint of the royal prerogative and the thinking behind it on Australian land is shown and placed in its proper historical context.

In finding answers to the questions which arose in South Africa as to the nature of the power of state control or custody of mineral resources created by the MPRDA, the notion of publicly owned minerals as developed over centuries in Anglo-Australian law may be of assistance. The state's custody or control over mineral resources may be equated to and identified for what it is, namely, publicly owned minerals, or alternatively state held "property". Denial of the truth by relying on vague notions such as custodianship and common heritage will cause further legal confusion. The true legal position in South Africa, namely, publicly owned minerals should be acknowledged by amendment of section 3(1) of the MPRDA by stating that ownership of minerals is vested in the state. In essence, in English common law speak, the state holds the "despotic dominion" over mineral resources in South Africa. Acknowledging and identifying restrictions on the discretionary exercise of dominion over mineral resources by the state to the (indirect) benefit of all South Africans remains the crucial next step.

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Association belge des Consommateurs Test-Achats ASBL, Vann van Vugt, Charles Basselier v Conseil des ministres
Case C-236/09 ECJ

Gender equality in insurance

1 Introduction

The recent judgment by the European Court of Justice (ECJ) in the case of *Association belge des Consommateurs Test-Achats ASBL, Vann van Vugt, Charles Basselier v Conseil des ministres* that the unequal treatment of men and women in the assessment of insurance risks is in fact unlawful discrimination, has rocked the international insurance industry. The applicants brought the case from the *Cour constitutionelle* (Belgium) to the ECJ for a preliminary ruling under Article 234 of the Treaty establishing the European Community. The effect of the ruling is, in a nutshell, that insurers will be required to restructure and reinvent current actuarial factors and information used for risk profiling to prevent disparate rates for the different genders for personal insurance cover. The ruling cuts both ways, as it will clearly affect the lower costs payable by men for pension annuities, and the lower car insurance premiums that women are currently charged.

2 Judgment

On 1 March 2011 the ECJ, the highest court in the European Union (EU), handed down its judgment and held that insurers, who offer different prices and premiums to men and women, are acting in contravention of the EU's laws on gender equality. The EU Gender Directive, Article 5(2) of the Council Directive 2004/113/EC of 13 December 2004, implements the equal treatment of men and women in the access to and supply of goods and services. The Directive applies to both direct and indirect discrimination based on gender. The Court ordered that these unlawful practices must stop by 21 December 2012, which leaves very little time to effect changes in actuarial tables. It found that the mere statistical correlation between a group and a higher risk cannot justify discrimination on prohibited grounds. Such a correlation accepts the very stereotyping that is targeted by human rights legislation, in that prohibited grounds form the basis to ascribe the characteristics of a group to all individual members in that specific group. Discrimination based on statistical correlation is simply discrimination in a more exceptionable form.

To avoid a knee-jerk negative readjustment of the market, the ruling only applies to contracts concluded after the date of transposition of the Directive. States are, however, allowed to continue to use gender as a determining factor to allow for proportionate differences in insurance

premiums, provided their data is published and the ECJ judgment is reviewed by 21 December 2012.

3 EU Law and Responses to the Judgment

One must keep in mind that a directive is a legislative act of the European Union that prescribes a certain end result for its member states, without prescribing the means to achieve that goal. Article 288 of the Treaty on the Functioning of the European Union forms the legal basis for the enactment of directives that are binding upon EU member states. Each state retains its independence to determine the forms and methods that it must implement to effect changes in its law to achieve the end result in accordance with the directive. The EU published guidelines on 22 December 2011 (Directory Code 05.20.05.10), to assist states in implementing non-discrimination unisex insurance premiums. Types of insurance affected are car insurance, term life insurance, health insurance and annuities.

Reactions from the insurance industry have been vehement. The industry will have no choice but to respond by adapting its actuarial tables to comply with the directive. Insurers warn that it will inevitably have an adverse effect on the consumer, as it could mark the end for cheaper insurance products based on what actuarial science considers to be hard statistical evidence. Clearly in this case, what you win on the swings, you lose on the roundabout. What one gender will lose for one type of product, the other might win, and *vice versa* for other products, yet not necessarily with the same margins. Insurers predict an inevitable increase in insurance premiums across the board. Simply put, the higher the likelihood that someone will claim, the more expensive the insurance product.

4 South African Law

Due to the international nature of insurance, comparative legal studies play a major role in the search for answers on issues pertaining to insurance. The laws of especially the United Kingdom and, more recently the EU, are often referred to where national law is lacking. In view of the sensitivity to discrimination in South Africa and the possibility of a similar judgment being handed down locally, this ruling has been received with interest.

As a constitutional state, South Africa must abide by the Constitution of the Republic of South Africa, 1996 and the right to equality as contained in section 9 of the Bill of Rights in Chapter 2 of the Constitution. Although the Constitution only enjoys an indirect horizontal application in the relationship between individuals (s 8(2)), the fundamental rights will impact on the private law relationship between insurers, insureds, brokers and agents as role players in the insurance industry. Two important constitutional issues in this context include the inequality of bargaining power and outright discrimination. Furthermore, the Constitution also requires that the law must be developed (s 8(3)) and interpreted (s 39(2)) in the spirit, purport and objects of the Constitution,

yet does not contain any statutory provisions that apply directly to insurance matters.

The Constitution clearly states that "[n]o person, including the state, may unfairly discriminate against any other person" (s 9). The insurance industry, by its nature, is built on the basis of discrimination. Persons who pose a higher risk or chance of loss pay higher premiums than others for the same insurance cover, and stereotypes are used to predict insurance risks. Whether this discrimination is fair or not, depends on constitutional norms. Grounds of discrimination include race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. Section 9(5) renders discrimination on one or more of the listed grounds unfair unless its fairness is established. However, section 9(2) provides for the achievement of full and equal enjoyment of all rights and freedoms and authorises legislative and other measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Equality Act), for example, gives effect to the Constitution in its goal to prevent or limit unjustified discrimination.

In terms of our common law, any statute or contractual provision that is contrary to public policy, as tested against constitutional values, is unenforceable. The values that underlie our constitutional democracy, among them the values of human dignity, the achievement of equality, the advancement of human rights and freedoms and the rule of law, all form the principles on which the determination of public policy must be based. Leading case law on this point includes *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) 7 for a discussion of public policy *ex ante* the Constitution; and *ex post* the Constitution *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA); *Brisley v Drotsky* 2002 4 SA 1 (SCA); *Johannesburg Country Club v Stott* 2004 5 SA 511 (SCA); *South African Forestry Co Ltd v York Timbers Ltd* 2005 3 SA 323 (SCA) and *Barkhuizen v Napier* 2007 5 SA 323 (CC). The validity requirement that a contract must conform to public policy is especially relevant when one has to determine the constitutionality of clauses in insurance policies that limit or infringe upon the policyholder's constitutional rights.

The effect of the Constitution on insurance contracts in particular, was illustrated by the judgment handed down by the Constitutional Court in the case of *Barkhuizen v Napier* 2007 5 SA 323 (CC). The court held that the principle of *pacta servanda sunt* is not "a sacred cow that should trump all other considerations", as it is subject, as all law is, to constitutional control. Public policy in fact requires parties to comply with contractual obligations that have been freely and voluntarily undertaken, yet must also take into account the necessity to do simple justice between individuals. As public policy is now deeply rooted in our Constitution and its underlying values, its interpretation is simplified. It does not deny, but accommodates the application of the principle of *pacta servanda sunt*. Public policy cannot be separated from the notions

of fairness, justice and equity and reasonableness. Where insurance contracts affect fundamental rights such as the right to equality, section 36(1) of the Constitution on the limitation of rights does not apply, because a contractual clause that limits the operation of a fundamental right is not a law of general application as envisaged by this section.

What will be deemed an acceptable contractual limitation of a constitutional right depends not only on the facts and circumstances in each situation, but also that, irrespective of our Constitution, one remains at the mercy of the subjective interpretations of presiding officers. This has been reiterated by our courts in the *Barkhuizen* case, where Moseneke DJ referred to the "subjective yardstick" (par 95), and Sachs J to the "*ad hoc* determination by each judge in accordance with his or her predilections as to what is fair nor not" on whether a specific limitation is in line with the constitutional values or not (par 146).

Equality and discrimination are also the focal points of the Equality Act that binds the state and all persons, including juristic, non-juristic and even a group or category of persons. Inequality could potentially affect the validity of a contractual clause, as it may be contrary to public policy to enforce an agreement that was entered into while labouring under the inequality.

Section 6 of the Equality Act prohibits unfair discrimination in general. To prove that the discrimination is fair, one must take into account whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria that are intrinsic to the activity concerned. The relevant factors referred to in section 14(2)(b) include:

(a) whether the discrimination impairs or is likely to impair human dignity;

(b) the impact or likely impact of the discrimination on the complainant;

(c) the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage;

(d) the nature and extent of the discrimination;

(e) whether the discrimination is systemic in nature;

(f) whether the discrimination has a legitimate purpose;

(g) whether and to what extent the discrimination achieves its purpose;

(h) whether there are less restrictive and less disadvantageous means to achieve the purpose;

(i) whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to address the disadvantage which arises from or is related to one or more of the prohibited grounds or to accommodate diversity.

The following discriminating factors are identified in Part 5 to the Schedule of the Equality Act specifically regarding insurance services:

(a) unfairly refusing on one or more of the prohibited grounds to provide or to make available an insurance policy to any person;

(b) unfair discrimination in the provision of benefits, facilities and services related to insurance; and

(c) unfairly disadvantaging a person or persons, including unfairly and unreasonably refusing to grant services, to persons solely on the basis of HIV/Aids status.

Case law in South Africa on discrimination in insurance is scant. In the case of *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC), the Constitutional Court was confronted with the issue whether differentiated employer contributions to a pension fund was in fact discrimination. The rules of the Political Office-Bearers Pension Fund provided for differentiated employer contributions in respect of the three different groups or categories of members of Parliament and other political office-bearers between 1994 and 1999. The case by the defendant, who was classified as a Category C member, was that the differentiated employer contributions improperly disfavoured him and other Category C members and constituted an unfair discrimination. The case was contested by the appellant on the basis that the differentiation in the rules of the Fund is not unfairly discriminatory because it constitutes a "tightly circumscribed affirmative action measure" permissible under the equality provisions of our Constitution (s 9). In its judgment, the court once again pointed out that the achievement of equality goes to the bedrock of our constitutional architecture. Thus the achievement of equality is not only a guaranteed and justiciable right in our Bill of Rights but also a core and foundational value; a standard which must inform all law and against which all law must be tested for constitutional consonance. It goes beyond the individual or the personal affront of the claimant (Albertyn & Goldblatt "Facing the challenge of transformation: difficulties in the development of an indigenous jurisprudence of equality" 1998 *SAJHR* 248 272-273). From the major constitutional object to create a non-racial and non-sexist egalitarian society underpinned by human dignity, the rule of law, a democratic ethos and human rights, emerges a conception of equality that goes beyond mere formal equality and mere non-discrimination which requires identical treatment, whatever the starting point or impact. Moseneke J (as he was then) explained at length the tests that had to be applied to determine whether section 9 of the Constitution was infringed upon. Briefly, section 9(5) renders discrimination on one or more of the listed grounds unfair unless its fairness is established. However, section 9(2) provides for the achievement of full and equal enjoyment of all rights and freedoms and authorises legislative and other measures designed to protect or advance persons or categories of persons previously disadvantaged by unfair discrimination. In view of this, the differentiation was found not to be unfairly discriminatory, and was therefore held to be constitutional.

In the case of *Robert v Minister of Social Development* Case Nr 32838/05 TPD, the plaintiffs contended that regulations issued in terms of section 19 of the Social Development Act 59 of 1962, and sections 1 and 10 of the Social Assistance Act 13 of 2004 discriminated against men,

especially poor old men between the ages of 60 and 64. Women qualify for the grant from the age of 60, whereas men only qualify after having attained the age of 65.

The Court conceded that the criteria to determine the eligibility for a social old age grant based on gender is discriminatory towards men, nevertheless, that it is not unfair. It was rationally necessary for the age differentiation to address inequalities against a previously disadvantaged group. Women, especially African women, were on the lowest rung of the social gender and race ladder. Poverty is means-based, and as such it is clear that women between the ages of 60 and 64 lag behind men in that age group. One should, however, keep in mind that the case law refers to state rather than private pensions.

In the last instance, the application of the Consumer Protection Act 68 of 2008 (CPA) should also be kept in mind. Although any "service" as defined in the CPA (s 1), that is regulated by any of the three primary statutes that regulate the insurance industry, namely the Short-term Insurance Act 53 of 1998, the Long-term Insurance Act 52 of 1998 and the Financial Advisory and Intermediary Services Act 37 of 2002, is excluded from the scope of application of the CPA, Schedule 2 of the CPA states specifically that the exclusion of the Long- and Short term Insurance Acts from its application is conditional. The exclusion is subject to the insurance industry aligning its consumer protection measures with the CPA within 18 months from date of commencement of the CPA (which was on 31 March 2011) (s 10). Currently, the Financial Services Laws General Amendment Bill 2012 is serving before Parliament, which will, upon enactment, exempt the financial industry from complying with the CPA (s 28(c)(ii) Bill). As it remains uncertain when this exemption will come into effect, the effect of the CPA will be included for the sake of a comprehensive discussion.

The right to equality is dealt with in Part A of Chapter 2 of the CPA. Goods or services may not be marketed to consumers by excluding specific groups or by charging different prices to any person or category of persons on one or more grounds of discrimination as set out in the Constitution (s 9), as well as in Chapter 2 of the Equality Act (s 8(1) CPA). The gender of the consumer is included in the list. The supplier may also not directly or indirectly treat any consumer differently on one of the grounds mentioned above (s 8(2) CPA). Section 10 enables a consumer to institute proceedings in terms of the CPA before an equality court or file a complaint with the Consumer Commission. In the event of the latter, the Commission must refer the complaint to the equality court. Should a similar issue as in the ECJ *Test- Achats* case arise in South African law the matter will serve before an equality court in the first instance.

5 Conclusion

Clearly the effect of the ECJ *Test-Achats* ruling is that insurers within the EU have a very short time period to revise the application of actuarial factors and information for purposes of risk profiling where factors that

effect gender are concerned. The same can be said for the South African insurance industry who serve consumers, and who must conform to the provisions of the CPA before 1 October 2012. In reviewing the South African position, it becomes clear that a similar outcome could be a reality should the issue serve before our courts.

From a business point of view, such a ruling might be seen as unrealistic, as the hope of reaching total gender equality triumphs over the reality that the different groups do not in fact present an equal risk. Introducing a universal formal equality in this respect will inevitably confront all individuals with the commercial reality that insurance premiums will increase across the board for all.

In view of the effect that a similar judgment might have on the insurance business in South Africa, one could support the views of Kok ("The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: Proposals for Legislative Reform" 2008 *SAJHR* 445) that urgent legislative reform in this regard is required. In anticipation of new insurance legislation to replace the Long-Term and Short-term Insurance Acts by 2015 (see the National Treasury *Policy Document* 2011-02-23), this opportunity might just be presenting itself. When considering such a legislative intervention, the legislator will have to keep in mind the three way test concisely explained in the *Van Heerden* case (par 37) to prevent the legislation from being contested as unconstitutional. The first question would be whether any measure targets persons or a category of persons from a previously disadvantaged group. The second, whether it is designed to protect and advance the interests of those persons previously disadvantaged, and in the third instance, whether the statutory measure promotes the achievement of equality.

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Fish Hoek Primary School v GW
2010 2 SA 141 (SCA)

The meaning of the word "parent" for the purpose of determining liability to pay school fees

1 Introduction

Fish Hoek Primary School sued a parent of a learner for the payment of R1,610.00 as outstanding school fees. Fish Hoek Primary School relied on section 40(1) of the South African Schools Act 84 of 1996 (SASA) which provides:

> A parent is liable to pay the school fees determined in terms of section 39 unless or to the extent that he or she has been exempted from payment in terms of this Act.

The parent involved in this case, the natural father of a child born out of wedlock, denied liability. Liability was denied on the ground that he was a biological father and not a custodian parent who was liable for the payment of such school fees.

The main issue for determination in this case was the meaning to be given to the word "parent" as used in the SASA for the purposes of determining liability for the payment of school fees. The court *a quo* (*Fish Hoek Primary School v Welcome* 2009 3 SA 36 (C)) held that this word should be understood to mean the custodian (by operation of the law) parent or guardian of a learner (38G-H, 44J-45A, 45C). Thus, according to this decision, only the custodian parent is liable for the payment of school fees. An appeal was lodged against this decision to the Supreme Court of Appeal (*Fish Hoek Primary School v GW* 2010 2 SA 141 (SCA)). The decision of the Supreme Court of Appeal and the High Court as well as the meaning ascribed to the word "parent" in *Governing Body, Gene Louw Primary School v Roodtman* 2004 1 SA 45 (C) relating to who is liable for the payment of school fees are hereafter discussed. The court held in the latter case that the word "parent" should be understood to refer to a custodian parent or guardian for the purposes of determining liability for the payment of school fees in terms of section 102A(1) of the Education Affairs Act (House of Assembly) 70 of 1988 (EAA). This definition was applied in *Fish Hoek Primary School v Welcome* (*supra*) but later rejected in *Fish Hoek Primary School v GW* (*supra*) in the interpretation of section 40(1) read with section 1 of the SASA.

2 *Gene Louw Primary School*

Before the decision in *Fish Hoek Primary School v GW* (*supra*) the word "parent" was given a restrictive meaning. It was interpreted as meaning "…the parent or other person who has custody of a child whether by operation of the law or by order of a competent court" (*Gene Louw Primary School* (*supra*) 55F).

This is the meaning that was given to the word "parent" by the court in determining who was responsible or liable for the payment of school fees in state-aided schools established in terms of the EAA. It is advisable to look at the facts in *Gene Louw Primary School* (*supra*) so as to be able to distinguish it from the case under consideration.

The respondent in *Gene Louw Primary School* was the natural father of a child enrolled at the appellant school. He (the respondent) was divorced from the mother of this minor child and the deed of settlement incorporated in the divorce order granted the custody of the child to the mother. Furthermore, in terms of the said deed of settlement, the respondent was to pay maintenance for his two minor children in the total amount of R500.00 per month. The respondent was also obliged to keep his minor children covered by his medical fund and no provision was made for any other payment, such as school fees (47-48*).* Moreover,

there was no contractual relationship between the respondent and the appellant school for the payment of school fees.

This case commenced, just like the case under consideration (*Fish Hoek Primary School* (*supra*)), in the magistrate's court. The magistrate decided that the respondent was not liable for the payment of school fees for his minor child as he was not a person in whose custody the child was lawfully placed. In a stated case, the question to be decided was formulated as follows: "*Of die bepalings van Wet 70 van 1988 die verweerder [the respondent] as nie toesighoudende ouer aanspreeklik stel vir die betaling van onderriggelde vir sy minderjarige kind*" (48G).

As already indicated above *Gene Louw Primary School* (*supra*) dealt with the interpretation of the term "parent" for the purpose of determining who was liable for the payment of school fees in terms of the EAA. The EAA defined "parent" as "the parent of such child or the person in whose custody the child has been lawfully placed" (s 1 EAA).

It was argued on behalf of the appellant that the legislature must have intended the word "parent" to have a broad or expanded meaning to include not only natural or biological parents (the father and mother) but also other persons (not being parents) in whose custody the child was lawfully placed (49H). According to this contention, the person liable for the payment of school fees in terms of section 102A (1) of the EAA would be (49H-50B):

> [e]ither the father or mother (irrespective of whether either or both have custody); and
>
> any third party who has custody of a child in terms of a court order.

The respondent, on the other hand, argued for a more restrictive interpretation of the word "parent" as used in the EAA. The contention was to the effect that (50D-F):

> ….[section] 1 of the Act was intended by the legislature to encompass only those parents or other persons who have custody of a child, either by operation of the law or by order of a competent court. Married parents (who in the absence of a court order, share the custody of their minor child), the surviving parent of a legitimate child whose other parent has died, and the mother of an extra-marital child all have custody by operation of the law".

According to this contention, the following persons may be sued for the payment of school fees as they have custody of a minor child by virtue of a competent court order or operation of the law (50F-H, 57 A-B):

(a) the natural father of an extra-marital child who has been granted custody of such child;

(b) the divorced parent who had upon divorce been granted custody of his or her minor child;

(c) the adoptive parent (or parents) who has custody of a minor child;

(d) the foster parent (or parents) who has custody of a minor child; and

(e) the person in whose custody a neglected child has been placed by order of criminal court.

After considering the rules of interpretation of statutes, the court in *Gene Louw Primary School* decided to restrict the meaning of "parent" to "only a parent who has custody of the pupil in question by operation of law, as also the parent or other person in whose custody the pupil has been placed by order of a competent court" (57 B-C). The court therefore held that a non-custodian parent could not be held liable for the payment of school fees for his or her minor child.

3 The High Court Judgment in *Fish Hoek Primary School*

The dispute in the *Fish Hoek Primary School* case also commenced in the magistrate's court and an appeal was lodged in the Western Cape High Court (2009 3 SA 36 (C)). The issue for determination was whether a non-custodian parent was liable for the payment of school fees for the education of his or her minor child. The respondent was the biological father of the learner who was admitted to the appellant school. He (the respondent) denied that he was responsible for the payment of school fees as he was not a custodian parent. The respondent was therefore relying on the meaning given to the term "parent" in the case of *Gene Louw Primary School* (*supra*) to the effect that the meaning of this word is to be limited to custodian parents. This was in the interpretation of section 102A(1) of the EAA.

Unlike in *Gene Low Primary School* (*supra*) the question for determination in this case (*Fish Hoek Primary School*) revolved around the meaning to be attached to the term "parent" as envisaged in the SASA. This act saddles a parent with the responsibility of paying school fees unless he or she has been exempted (s 40(1) SASA). A "parent" is defined in section 1 of the SASA as:

(a) the parent or guardian of a learner;

(b) the person legally entitled to custody of a learner; or

(c) the person who undertakes to fulfil the obligations of a person referred to in paragraphs (a) and (b) towards the learner's education at school.

It was argued on behalf of the appellant school that the word "parent" has to be given a wide meaning to include a non-custodian parent in the position of the respondent in determining who was liable for the payment of school fees in terms of the provisions of section 40(1) of the SASA (38GH). What was in fact argued was that the court must, in interpreting the SASA, deviate from the meaning ascribed to the term "parent" in *Gene Louw Primary School* (*supra*) in the interpretation of the EAA.

The appellant also relied on the provisions of section 21 of the Children's Act 38 of 2005 (CA) which came into operation on 1 July 2007. This section lays down circumstances under which the biological or natural father of a child may acquire parental responsibilities and rights in respect of his child. Such parental responsibilities and rights may be acquired under the following circumstances (s 21(1)(a), (b) CA):

(a) If at the time of the child's birth he is living with the mother in a permanent life-partnership; or

(b) If he regardless of whether he has lived or is living with the mother -

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

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

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

Although the CA came into operation on 1 July 2007, "some two weeks after the magistrate had given judgement" (39D-E), the main aim of the appellant's argument was to persuade the court that the correct meaning of the word "parent" as intended in the SASA includes also a non-custodian parent in the same position as the respondent.

As this matter was to be dealt with in terms of the SASA, the court proceeded to determine the meaning of the term "parent" as envisaged by this act. Despite this, it was held that "the Schools Act must be viewed against the background of other earlier legislation and the manner in which that legislation has been interpreted by this court" (39H-I). The court therefore relied primarily on the meaning ascribed to the word "parent" in *Gene Louw Primary School* (*supra*) and concluded that the same meaning must be attached to this word in terms of the SASA. The court held (41J-42A) that to depart from this meaning would:

> In the first place, … lead, it seems to me, to an anomalous result, for the liability or otherwise of the respondent to the appellant on the agreed facts of this case would depend solely on whether the appellant had sued him on the applicable provisions of the Education Affairs Act, on the one hand, or on those of the Schools Act, on the other: Under the former legislation, as interpreted in the *Roodtman* case, *supra*, the respondent would not be liable; whilst, under the Schools Act construed as the appellant would have us construe it, he would.

The court then interpreted the word "parent" in terms of the SASA in the same manner as it was done in *Gene Louw Primary School* (*supra*) by restricting its meaning to a custodian parent. The respondent, the biological father of the minor child, was therefore not held liable for the payment of the school fees

Appellant lodged another appeal to the Supreme Court of Appeal against the decision of the High Court. The Supreme Court of Appeal had to consider the same issue, namely, the meaning to be given to the word "parent" as intended by the SASA.

4 The SCA Judgment in *Fish Hoek Primary School*

The question to be decided in *Fish Hoek Primary School* (2010 2 SA 141 (SCA)) was phrased by the Supreme Court of Appeal (as follows (par 1):

> [1] The Concise Oxford Dictionary defines the word "parent", *inter alia,* as 'a person who has begotten or borne offspring'; 'a father or mother'; or 'a person who has adopted a child'. That ordinarily at any rate is the plain

> meaning of the word. What we are called upon to decide in this case is whether when the legislature chose to employ the word in s 40(1) of the South African Schools Act 84 of 1996 ... it intended it in a sense conforming to its literal meaning or in some other narrow sense".

It is quite clear from the above quotation that in the interpretation of any statutory enactment, the basic principle or rule should be that words used have to be given their ordinary everyday meaning unless the context otherwise appears in the enactment itself. The SASA uses the word "parent" in a number of provisions and at the same time defines what should be understood by the said word in its definition section (s 1 SASA). For the purpose of this discussion section 39, 40 and 41 (dealing with the determination of school fees, liability for the payment of school fees and enforcement of payment of school fees) as well as section 1 (definition of "parent") of the SASA are of importance.

Section 39 provides as follows with regard to the determination of school fees:

> (1) Subject to this Act, school fees may be determined and charged at a public school only if a resolution to do so has been adopted by a majority of parents attending the meeting referred to in section 38(2).
>
> (2) A resolution contemplated in subsection (1) must provide for -
>
> (a) the amount of fees to be charged; and
>
> (b) equitable criteria and procedures for total, partial or conditional exemption of parents who are unable to pay school fees.

Section 40 of the SASA, on the other hand, deals with liability for the payment of school fees as follows:

> (1) A parent is liable to pay the school fees determined in terms of section 39 unless or to the extent that he or she has been exempted in terms of this Act.
>
> (2) A parent may appeal to the Head of Department against a decision of a governing body regarding the exemption of such a parent from the payment of school fees.

Section 41 of the SASA deals with the manner in which the payment of school fees may be enforced against parents who are liable to pay such fees. The definition of what should be understood by the word "parent" for the purposes of these provisions is contained in section 1 of the SASA.

It can be safely assumed that in all the provisions mentioned above, which generally deal with school fees, the intention was to ascribe a particular meaning to the word "parent". There is nothing in these provisions to suggest that this word has to be given a meaning other than that intended in the definition section (s 1 SASA). Consequently, the term "parent" as used under these circumstances has to be understood to mean:

> (a) the parent or guardian of a learner;
>
> (b) the person legally entitled to custody of a learner; or

(c) the person who undertakes to fulfil the obligation of a person referred to in paragraphs (a) and (b) towards the learner's education at school.

In determining the meaning to be given to the word "parent" as used in the SASA, resort has to be had first to the definition of this term as provided for by this act (par 1). It is only when such construction leads to some absurdity, inconsistency, hardship or anomaly as viewed from a consideration of the enactment as a whole that the meaning ascribed to this term in the definition section may be departed from *(Bhyat v Commissioner for Immigration* 1932 AD 125). This may, for example, be the position in respect of section 3 of the SASA which requires every "parent" to cause a learner for whom he or she is responsible to attend school from the first day of the school year in which such learner reaches the age of seven until the last school day of the year in which such learner reaches the age of fifteen years or the ninth grade, whichever occurs first. Visser ("Some principles regarding the rights, duties and functions of parents in terms of the provisions of the South African Schools Act 84 of 1996 applicable to public schools" 1997 *TSAR* 626 626-627) commented as follows concerning the possible meaning of this provision and other provisions of a similar nature to the SASA:

> There is nothing expressly requiring a parent to have custody over a learner (or to live within the area the school is situated), but in view of some of the practical implications of the Schools Act it may be assumed that the Act generally applies to custodian parents or guardians.

For the purposes of the provisions of the SASA which deals with school fees, however, the word "parent" has to be interpreted in the wide sense as provided for by the definition section (see Visser "Who is liable to pay school fees? *Governing Body, Gene Louw Primary School v Roodtman* 2004 1 SA 45 (C)" 2004 *THRHR* 534). Any of the persons mentioned in section 1(a), (b) or (c) of the SASA may therefore be held liable for the payment of school fees and not only the person who has custody of the learner.

Without determining the correctness or otherwise of the judgment *in Gene Louw Primary School (*supra) which was deemed unnecessary for the purpose of determining the meaning to be given to the term "parent" as envisaged by the SASA, the court decided to ascribe a broad meaning to this word to include a parent who does not have custody of a child (par 5). The respondent was therefore held to be a "parent" who was liable for the payment of school fees in terms of the SASA.

A closer look at the definition of the word "parent" in the SASA reveals that it has to be interpreted differently from the meaning ascribed to it in *Gene Louw Primary School* (*supra*) in the interpretation of the EAA for the purposes of determining liability for the payment of school fees. As indicated, this word is defined in the SASA to refer to a parent or guardian of a learner (whether or not he or she has custody), the person legally entitled to the custody of a learner or the person who undertakes to fulfil the obligations of the parent or guardian of a learner or a person legally entitled to the custody of a learner (s 1 SASA). On the other hand, the EAA defines "parent" as the parent of a child or the person in whose custody

the child has lawfully been placed (s 1 EAA). There is therefore no doubt that the intention in the latter statute was to restrict the meaning of the word "parent" to a person who has custody of the child for the purposes of determining liability for the payment of school fees.

The court therefore found that the legislature had intended to give the word "parent" a wide meaning in terms of the SASA in contrast to the earlier EAA. It was therefore held that the reliance by the high court on the decision in *Gene Louw Primary School* (*supra*) was misplaced as the legislature had intended that the word "parent" should bear a different meaning from that used in the EAA for the purpose of determining who is liable for the payment of school fees under the SASA. The court commented (par 8) as follows in this regard:

> The legislature has chosen a meaning of considerable breadth. On the literal and ordinary meaning of s 1(a), a natural father such as the respondent is a parent as defined. It matters not that he is married to the child's mother. On the plain meaning of the word, he self-evidently is the child's parent. In my view there is nothing in the definition to suggest that a non-custodian or non-guardian parent is excluded from the meaning of the word. Far from narrowing the definition of a parent in that way, the legislature has chosen a more expansive definition of the word "parent" to include persons not ordinarily comprehended by its plain meaning. Thus in s 1(c) the legislature simply adds a further category of persons not ordinarily comprehended by the word "parent" to whom the school may look for payment. But it does so without releasing those envisaged in categories (a) and (b) from the obligation to pay.

What was in fact emphasised was that in interpreting a statute, the starting point has to be to give effect to the ordinary or literal meaning of the words used. It is only when this is unable to reveal the purpose of the legislation in question that this rule may be departed from. This would be the case where the plain meaning leads to an absurdity or inconsistency (*Poswa v The MEC for Economic Affairs, Environment and Tourism, Eastern Cape* 2001 3 SA 582 (SCA)). The court therefore held that "... reading in the words 'custodian by operation of the law' the high court rendered the reference to parent in s (1)(a) superfluous and redundant. That, as we well know, a court should be slow to do" (par 9). Further, "… if the legislature wanted to restrict liability for school fees to the custodian parent, it could simply have done so by stating that in clear and unambiguous language" (par 12).

It is further worth noting that the interpretation of the word "parent" by the court *a quo* was found by the Supreme Court of Appeal to be inconsistent with the provisions of the Constitution of the Republic of South Africa, 1996 to the effect that in interpreting any legislation, the "spirit, purport and objects of the Bill of Rights" have to be promoted (s 39(2)). The fact that mothers are regarded as primary care-givers and as such custodian parents on the breakdown of the marriage and other significant relationships places an additional burden on them (*Bannatyne v Bannatyne (Commission for Gender Equality, As Amicus Curiae*) 2003 2 SA 363 (CC)). As women are normally regarded as custodian parents, this may therefore constitute unfair gender discrimination on the ground

of differential treatment of custodian parents and their non-custodian counterparts (*F v F* [2008] 1 ALL SA 571 (SCA)). The court concluded (par 13) in this regard that:

> To interpret the section (section 40(1) read with section 1(1)) in such a way as to exclude the non-custodian parent from its operation, as the high court has done, serves ineluctably to further thwart the realisation of that goal.

The Supreme Court of Appeal further found that to interpret the word "parent" as the high court did had the effect of offending against the rule that a statute has to be interpreted in conformity with the common law and the "best interests" of the child as intended by the Constitution (s 28(2)). The common law obliges both parents to support their children, including the provision of their educational needs, in accordance with their respective means and "… to interpret the word (parent**)** restrictively as the high court did can hardly be reconciled with the paramountcy that must be afforded to the best interests of the child principle" (par 14).

6 Conclusion

The SASA contains a number of provisions which deal with the rights, duties and functions of parents of learners admitted to public schools. The word "parent" is defined in the SASA to include certain categories of persons who may not be parents in the biological or natural sense of the word. There are three categories of parents in terms of this Act, namely, parents in the biological or ordinary sense of the word and guardians, persons who are legally entitled to the custody of learners (whether they have custody or not) and persons who have undertaken to fulfil the obligations of persons referred to in paragraph (a) and (b) of section 1 of the SASA. All the persons mentioned above are regarded as parents for the purposes of determining liability for the payment of school fees (s 40(1) SASA).

The decision of the Supreme Court of Appeal in *Fish Hoek Primary School* (*supra*) has to be welcomed as before it only parents who had custody of children by operation of the law or persons in whose custody children were lawfully placed by a competent court were regarded as "parents" who were liable for the payment of school fees (*Gene Louw Primary School* (*supra*)). It cannot be disputed that the majority of persons or parents who have custody of children are women. Consequently, most women, single or divorced, in whose custody children have been placed by order of a competent court, were saddled with the legal responsibility of paying school fees. This was in effect contrary to the Constitution which does not allow unfair discrimination based on sex, gender or marital status (s 9 Constitution). A natural father of a child born out of wedlock and a divorced father whose children have been placed in the custody of their mother by a court order may therefore be held liable for the payment of school fees for their minor children.

The reliance by the court *a quo* in *Fish Hoek Primary School* (*supra*) on the decision reached in *Gene Louw Primary School* (*supra*) was found to be without any foundation. Although the courts in both cases had to deal

with the meaning to be attached to the term "parent", the definitions were contained in two different statutes. The definitions, it is submitted, were also different in the sense that the definition dealt with in the latter case was narrower than the one dealt with in the former case. The legislation used in *Gene Louw Primary School* (supra) was the EAA which was promulgated before the achievement of the current constitutional dispensation in South Africa. *Fish Hoek Primary School* (*supra*) on the other hand involved the interpretation of the term "parent" as envisaged by the SASA, a statute that was promulgated after the achievement of the current constitutional dispensation. In its interpretation, "the spirit, purport and objects of the Bill of Rights" have to be promoted (s 39(2) Constitution).

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FirstRand Bank Ltd t/a First National Bank v Seyffert and three similar cases 2010 6 SA 429 (GSJ) *Seyffert & Seyffert v Firstrand Bank Ltd* 2012 ZASCA 81

*Bringing home the inadequacies of the National Credit Act 34 of 2005**

1 Introduction

The judgments in *FirstRand Bank Ltd t/a First National Bank v Seyffert and three similar cases* 2010 6 SA 429 (GSJ) (hereafter "*Seyffert* (GSJ)") and, on appeal, *Seyffert & Seyffert v Firstrand Bank Ltd* 2012 ZASCA 81 (2012-05-30) (hereafter "*Seyffert* (SCA)") (collectively referred to as "the *Seyffert* judgments"), expose the inability of the provisions of the National Credit Act 34 of 2005 (NCA) adequately to address important issues pertaining to execution against a debtor's mortgaged home. They also underscore the need for a debt relief mechanism, other than debt review and debt rearrangement under the NCA, to provide an alternative to execution against a debtor's mortgaged home that would be workable from the perspective not only of the debtor but also of the mortgagee and other creditors.

* Portions of this note have been copied from the manuscript of the author's doctoral thesis submitted in partial fulfilment of the requirements for the LLD degree at the University of Pretoria in May 2012.

2 Background: Local and Comparative Developments

Recognition by the courts of the right to have access to adequate housing, provided for in section 26 of the Constitution of the Republic of South Africa, 1996 has had a profound effect on developments concerning execution against a debtor's home in the individual debt enforcement process. The combined effect of the Constitutional Court's decisions in *Jaftha v Schoeman*; *Van Rooyen v Stoltz* 2005 2 SA 140 (CC) and *Gundwana v Steko Development CC* 2011 3 SA 608 (CC) is to acknowledge that execution against a debtor's home, including one that has been mortgaged in favour of the creditor, may constitute an unjustifiable infringement of the right to have access to adequate housing. (See *Jaftha* parr 34, 39, 40, 44) Therefore, in every case in which execution is sought against a person's home, judicial oversight is required to determine whether, in terms of section 36 of the Constitution, execution is justifiable in the circumstances. (See *Gundwana* parr 41, 49.) A court is required to undertake an evaluation in which it must consider "all the relevant circumstances" to determine whether execution against a person's home should be permitted.

In *Jaftha*, the Constitutional Court stated that there was a need to find "creative alternatives" which allow for debt recovery but which use the sale in execution of a debtor's home "only as a last resort" (par 59). In *Gundwana*, the Constitutional Court held that, when execution is sought against a person's home, including one that has been mortgaged in favour of the creditor, due consideration should be given to the impact that execution might have on judgment debtors who are poor and at risk of losing their homes. It stated that, "if the judgment debt can be satisfied in a reasonable manner without involving those drastic consequences that alternative course should be judicially considered before granting execution orders" (par 53).

Similar policies are evident in various foreign jurisdictions where systems have been implemented to ensure that execution against a debtor's home occurs only as a last resort. A formal statutory home exemption, limited in certain circumstances, has applied for more than a century in the United States of America and in Canada. (See s 522(b) read with (d)(1) Bankruptcy Reform Act of 1978, Title 11 USC; Ferriell & Janger *Understanding Bankruptcy* (2007) 102*ff*; in relation to Canada, see Davies "Federal Exemptions in Bankruptcy" Parliamentary Information and Research Service document PRB 02-28E http://www.parl.gc.ca/Content/LOP/ResearchPublications/prb0228-e.pdf (accessed on 2012-08-05); Boraine, Kruger & Evans "Policy Considerations Regarding Exempt Property" in *Annual Review of Insolvency Law* (ed Sarra) (2007) 637 681-682.) It may be noted, however, that generally it is the *equity* in the home, and not the home itself, that is exempted up to the applicable limit. Therefore, the exemption is not effective against the claim of a mortgagee of a home. Further, the exemption is often insufficient for the debtor to retain the home but the proceeds of the sale of the home, up to the exempted limit,

are available to purchase other, more affordable, accommodation or to contribute towards payment of rent (Ferriell & Janger 430-431).

In England and Wales, a "low equity" home exemption has been introduced in insolvency (s 313A Insolvency Act 1986 inserted by s 261(3) Enterprise Act 2002). However, traditionally, a formal home exemption did not apply. Instead, a combination of legislative provisions grant family members occupation rights protecting them against each other, as well as against claims by creditors against the homeowner (see ss 30-36 Family Law Act 1996). Similar legislation applies in Scotland. (See the Bankruptcy and Diligence etc (Scotland) Act 2007 and the Home Owner and Debtor Protection (Scotland) Act 2010.)

Further, various statutory provisions allow a court to delay the sale of the home in certain circumstances. In England and Wales, in the individual debt enforcement process, a court is required to consider the debtor's ability to repay the arrears within a reasonable period and to fulfil the contractual obligations. (See s 36 Administration of Justice Act 1970.) In Scotland, legislation requires a court to take the personal circumstances of the debtor into account and the reasons for the default. (See s 24(7)(a)-(e) Conveyancing and Feudal Reform (Scotland) Act 1970 as amended by the Home Owner and Debtor Protection (Scotland) Act 2010.) In the insolvency process, the court has the discretion to delay, where appropriate, the realisation of the home by the trustee. In England and Wales, the court may postpone the realisation for up to a year, which it may subsequently extend in "exceptional circumstances" (see ss 335A, 336, 337 Insolvency Act 1986) and in Scotland, the applicable period is three years (see s 40 Bankruptcy (Scotland) Act 1985).

In a number of legal systems, modifications to the substantive and procedural requirements with which a mortgagee of a home must comply have been introduced to deal with the high rate of foreclosures or repossessions, as they are referred to in some jurisdictions, particularly as a result of the recent global recessions. In the United States of America, mandatory pre-action conferences have been introduced, for example, in some states. (For further detail, see Kulp "Foreclosure Mediation Program Models" compiled by the American Bar Association http://www.abanet.org/dispute/mediation/resources.html (accessed on 2012-08-05).) In England and Wales, the Mortgage Conduct of Business Rules (MCOB) were implemented in 2004 (see the *Mortgages and Home Finance: Conduct of Business sourcebook* http://fsahandbook.info/FSA/html/handbook/MCOB (accessed on 20120805)) and the *Pre-Action Protocol for Possession Claims based on Mortgage or Home Purchase Plan Arrears in Respect of Residential Property* (http://www.justice.gov.uk/guidance/courts-andtribunals/courts/procedure-rules /civil/contents/protocols/prot_mha.htm (accessed on 2012-08-05)) came into force on 19 November 2008 and has been amended on a number of occasions. (The most recent amendment is the Civil Procedure Rules 55th Update effective 20110406.) These require the creditor to make reasonable efforts to accommodate the debtor by negotiating alternative payment arrangements, in order to ensure that forced sale of the home

occurs only as a last resort. Scotland has included similar pre-action requirements in legislation. (See s 24A of the Conveyancing and Feudal Reform (Scotland) Act 1970.) In Ireland, the mortgage arrears resolution process (MARP) must be followed before commencement of repossession proceedings by a creditor. Various member states of the European Union also require similar processes to be followed. (See the *Commission Staff Working Paper National measures and practices to avoid foreclosure procedures for residential mortgage loans* SEC(2011) 357 final (2011-03-31) http://ec.europa.eu/internal_market/finservices-retail/docs/credit/mortgage/sec_2011_357_en.pdf (accessed on 2012-08-05).)

Another common feature in systems abroad is that, where appropriate, a debtor is able to avert the forced sale of his or her home by means of a repayment plan for which provision is made in the applicable bankruptcy, or insolvency, legislation. The INSOL *International Consumer Debt Report II*, published in November 2011, describes such a repayment plan as a "rehabilitation procedure". Such repayment plans are commonly devised, specifically with the purpose of allowing the debtor to retain his or her home, in the course of Chapter 13 bankruptcy proceedings in the United States of America, a consumer proposal in Canada, an individual voluntary arrangement (IVA) in England and Wales and the granting of a protected trust deed in Scotland. (See, respectively, Chapter 13 US Bankruptcy Code; ss 66.11-66.40 Bankruptcy and Insolvency Act RSC 1985 c B-3; ss 257-258, 260 Insolvency Act 1986; s 73(1), par 5 sch 5 Bankruptcy (Scotland) Act 1985, as amended by par 60 Sch 1 Bankruptcy and Diligence etc (Scotland) Act 2007.)

Generally, a home mortgage obligation is not included in the repayment plan. While other obligations may be restructured and rearranged, with reduced monthly instalments being made payable, the home mortgage debt is not modified and, ideally, the repayment plan caters for payment in full of the required regular mortgage instalment. In American parlance, no "cram down modification" – court adjustment of the terms of the original agreement without the consent of the creditor – is permitted in relation to a mortgage over real estate which is the debtor's principal residence. (See s 1322(b)(2) Bankruptcy Code; Ferriell & Janger 654-657, 687-688.) Indeed, the success of the repayment plan depends on sufficient income being left with the debtor to meet his or her and their dependants' needs. (See Fletcher *Law of Insolvency* (2009) 75-76; Walters "Individual voluntary arrangements: A 'fresh start' for salaried consumer debtors in England and Wales" 2009 *Int Ins R* 5 34-35.) The fact that the mortgagee's security rights remain intact leaves the mortgagee satisfied while the debtor and his or her family are able to remain in their home.

Typically, the repayment plan runs over a period of up to five years after which the debtor will receive a measure of discharge from liability for debts in line with the policy of affording him a "fresh start". A typical repayment plan might oblige the debtor to refinance the home shortly

before completion of the repayment plan, in order for the benefit of the equity, or at least some of it, accumulated during the period of the payment plan, to be transferred to the creditors in respect of whom obligations were modified. The aim is to balance the interests of the debtor and of all creditors.

Notably, all of the provisions for repayment plans, mentioned above, form part of the foreign jurisdictions' bankruptcy legislation and in effect they may be regarded as constituting debt relief mechanisms as alternatives to liquidation of the debtors' estates. A common feature is that while a debtor is complying with the terms of a repayment plan, a creditor whose claim has been modified in terms of it is not entitled to enforce the original obligation. Neither may the creditor apply for the liquidation of the debtor's estate. Specific provision is made for a court to permit an application for liquidation where appropriate, such as where the debtor fails to comply with the terms of the repayment plan. (See, for example, in relation to the position in the United States of America, Ferriell & Janger 644; Evans "A brief explanation of consumer bankruptcy and aspects of the bankruptcy estate in the United States of America" 2010 *CILSA* 337 349; in relation to England and Wales, see Pt VIII ss 252-263G Insolvency Act 1986, as amended by provisions contained in the Insolvency Act 2000 and the Enterprise Act 2002; Fletcher 50*ff*, 69; Walters 2009 *Int Ins R* 5 17*ff*.)

It may also be noted that, in Scotland, another form of repayment plan, a Debt Arrangement Scheme (DAS), for which provision is made outside of the applicable bankruptcy legislation, potentially enables a financially distressed homeowner who has a reasonable income, but temporary cash flow difficulties, to avert the forced sale of his home. (See the Debt Arrangement and Attachment (Scotland) Act 2002 and the official DAS website http://dasscotland.gov.uk (accessed on 2012-08-05)). It provides debtors with a moratorium from creditor enforcement action through a debt arrangement scheme which allows interest and penalty charges to be frozen and, once the payment plan is completed, cancelled. Significantly, it does not affect the claim of a secured creditor. Recent improvements were made to simplify and streamline the system and debtors may make online applications. (See the *Accountant in Bankruptcy* website http://www.aib.gov.uk/Services/das (accessed on 2012-08-05)).

By contrast, in South Africa, the NCA debt review and debt rearrangement process, the closest equivalent to repayment plans applicable in other legal systems, allows a magistrate's court to modify the terms of a mortgage bond without the consent of the mortgagee (s 87 NCA). In line with the purpose of the NCA as stated in section 3, a debtor who resorts to debt review must satisfy all of his debts in full, over an extended period, with no discharge whatsoever. On the other hand, under the Insolvency Act 24 of 1936 (IA), an insolvent debtor whose estate is sequestrated ultimately receives discharge from liability for pre-sequestration debt. However, the NCA and the IA do not cater for one

another and there is confusion about the interaction between their respective provisions.

Section 88(3) of the NCA prevents a credit provider from enforcing "by litigation or other judicial process any right or security" under the credit agreement in question until debt review has been completed. However, section 88(3) is expressly made subject to section 86(10) which provides that, after 60 business days have elapsed since a consumer's application for debt review, the credit provider may give notice in the prescribed manner to the consumer, the debt counsellor and the National Credit Regulator to terminate the review. Further, section 86(11) provides that if a credit provider, who has given notice to terminate a debt review as envisaged in section 86(10), proceeds to enforce that agreement, the magistrate's court hearing the matter may order that the debt review resume on any conditions the court considers to be just in the circumstances.

Given the delays and backlogs experienced in the magistrates' courts, and particularly in the application of the NCA, in practical terms, the time lapse between the application for debt review and confirmation by the court of a debt rearrangement plan was, and is likely to be, in excess of 60 business days. (See *Wesbank*, *A Division of FirstRand Ltd v Papier* 2011 2 SA 395 (WCC) parr 26*ff*; *Mercedes Benz Financial Services South Africa* (*Pty*) *Limited* v *Dunga* 2011 1 SA 374 (WCC) par 26; see also Van Heerden & Coetzee "*Wesbank v Winston Papier* and the National Credit Regulator" 2011 *De Jure* 463.) A frequent occurrence has been that credit providers terminate the debt review after agreement has been reached on debt rearrangement plans and, sometimes, even though the consumer has been making payments in terms of the proposed plan awaiting confirmation by the magistrate's court on the date for which the matter has already been set down. Contention arose as to whether a credit provider was entitled to terminate a debt review in such circumstances and proceed to enforce a credit agreement. (In relation to conflicting high court judgments, see *Seyffert* (GSJ) parr 8, 9; Roestoff "Enforcement of a credit agreement" 2009 *Obiter* 430; Van Heerden & Coetzee "Perspectives on the termination of debt review" 2011 *PER* 37.) In *Seyffert* (GSJ), the court held that the credit provider *was* entitled to terminate the debt review. In *Collett v FirstRand Bank Ltd* 2011 4 SA 508 (SCA)), the Supreme Court of Appeal confirmed the correctness of this stance as long as the consumer is in default of his or her obligations under the credit agreement.

It may be noted that the courts have held that, for the purposes of section 88(3) of the NCA, an application for the sequestration of the estate of the consumer does *not* amount to enforcing "by litigation or other judicial process any right or security" under a credit agreement. (See *Investec Bank Ltd and Another v Mutemeri* 2010 1 SA 265 (GSJ); *Naidoo v ABSA Bank Ltd* 2010 4 SA 597 (SCA).) Therefore, even where a mortgagor has applied for debt review under section 86 of the NCA, the mortgagee may apply, in terms of the Insolvency Act, for an order for the sequestration of his estate which would result in liquidation of the assets

of the insolvent estate including the mortgaged property. It has also been held that a mortgagee may obtain an order for the sequestration of the mortgagor's estate even after a magistrate's court has confirmed a debt rearrangement order in terms of the NCA to which the mortgage bond in question is subject and the mortgagor is complying with his "amended" obligations in terms of such debt rearrangement order. (See *FirstRand Bank Ltd v Evans* 2011 4 597 (KZD), currently pending appeal; *cf FirstRand Bank Ltd v Janse van Rensburg* 2012 2 All SA 186 (ECP).)

Thus, there are significant differences between statutory repayment plans available in foreign jurisdictions and debt review and debt rearrangement under the NCA in South Africa. The *Seyffert* judgments provide a good illustration of the NCA's lack of some of the features of repayment plans applicable abroad which are crucial to enabling a financially distressed homeowner to retain his or her home.

3 The *Seyffert* Judgments

3 1 Seyffert (GSJ)

Seyffert (GSJ) concerned four applications for summary judgment and for orders declaring the respondents' mortgaged property specially executable. In each matter, the respondents were spouses and the mortgaged property in question was their home, situated in a "comfortably affluent or 'middle-class' area" (par 2). Further, in each matter, the respondents claimed that they had consulted a debt counsellor and that the matter was subject to debt review in terms of the NCA. However, the applicant in each case had given notice to terminate the debt review in terms of section 86(10) of the NCA as more than 60 business days had elapsed since the debtors had applied for debt review. The court, *per* Willis J, held that section 86(10) of the NCA entitled the applicants to terminate the debt review (par 17). Therefore, it concluded, it could grant the application for summary judgment, dismiss it, or adjourn it on appropriate terms and conditions. The court stated: "Active endeavours to exchange serious, sensible and reasonable proposals to resolve a consumer's debt problems will be among the factors which will weigh heavily with a court in deciding which order to make" (par 17).

Willis J observed (par 3):

> The affidavits of the respondents have been cryptic to the extent of coyness. These affidavits are laconic, if not supine, with regard to the real possibility of extrication from financial difficulties which the respondents face. Even where the respondents presented some acceptable evidence as to the fact that they had referred the matter to a debt counsellor, and in some instances annexed that person's recommendations, in no such instance does the proposal make any economic sense at all. Indeed, the proposals are devoid of economic rationality.

Willis J expressed concern and frustration in relation to the difficulties experienced in the interpretation and application of the NCA, particularly the sections providing for termination of debt review by the credit provider (parr 4-18, particularly par 10). Having commented on the

objects of the NCA and its effect on the South African economy, Willis J regarded the respondents as "clutching at straws" (par 18). The court granted summary judgment against each of them in the amounts, respectively, of R219,715.69, R731,217.72, R927,350.14 and R777,011.18 with interest (par 20).

However, significantly, taking into account section 26(1) of the Constitution, the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE), and the decisions in *Jaftha v Schoeman* and *Standard Bank of South Africa Ltd v Saunderson* 2006 2 SA 264 (SCA), Willis J concluded that it would be appropriate to exercise his discretion against declaring the mortgaged properties specially executable (par 18). The rationale was that a clear purpose of the NCA is to afford a debtor the opportunity to discharge a debt on less onerous terms. The court considered that although the credit providers, unable to execute against the mortgagors' homes, might have to wait longer to recover the debt, at least the respondents could try to settle their debt without losing their homes. Willis J stated that the "*Jaftha* and *Saunderson* cases are not … directly in point but they do indicate a wariness about persons losing their homes" (par 18).

3 2 Seyffert (SCA)

Two of the respondents in *Seyffert* (GSJ), Mr and Mrs Seyffert, appealed against the decision in which summary judgment had been granted against them in the amount of R219,715.69 with interest. There was no cross-appeal by FirstRand Bank (par 1).

The court of appeal set out a summary of pertinent facts which had not emerged from the judgment of the court *a quo*. These included that the appellants' agreed monthly instalment was R2,474 per month, payable over 142 months and that the debt counsellor had proposed that they would discharge the debt over 239 months by paying R474.97 per month. FirstRand Bank thereafter terminated the debt review on 21 April 2010. The debt counsellor subsequently revised the proposal to suggest 239 monthly instalments of R808.45 (parr 2-4).

It was argued on behalf of the appellants that the high court ought to have exercised its discretion in their favour by referring their matter to a debt counsellor in terms of either section 85 or 87 of the NCA, or declaring them over-indebted and rearranging their payment obligations. It was further contended that, by terminating the debt review in the circumstances, FirstRand Bank had not acted in good faith and that the effect of the proposed rearrangement would have been merely to extend the period of repayment for a short period without prejudice to the respondent (par 6). The appeal court rejected these arguments in a unanimous judgment per Malan JA.

Referring to its judgment, in *Collett*, delivered subsequently to that of the court *a quo* in *Seyffert* (GSJ), the Supreme Court of Appeal pointed out that the NCA envisaged, in section 86(5)(b), "responsible debt rearrangement", and in section 3, that the proposed debt restructuring

should lead to the "satisfaction by the consumer of all responsible financial obligations" (par 7). It explained that where a credit provider on good grounds concludes that the proposed restructuring will not lead to the "satisfaction by the consumer of all responsible financial obligations", then the court may well refuse to sanction the resumption of the debt review in terms of section 86(11) of the NCA (par 7, with reference to *Collett* par 15).

The Supreme Court of Appeal explained that where, as in the case before it, debtors have applied for debt review, they and the credit provider are obliged not only to comply with any reasonable request by the debt counsellor to facilitate an evaluation of the debtor's indebtedness and the prospects of responsible debt restructuring, but also to participate in good faith in the review and negotiations (par 8). Further, it explained that the credit provider's right to terminate the debt review in respect of a particular credit agreement is balanced by section 86(11) which gives the "enforcing court" the power to order the resumption of the debt review (par 8, with reference to *Collett* par 17). It reiterated what it had stated in *Collett*, namely, that over-indebtedness is not a defence on the merits but that a court could exercise its discretion not to grant summary judgment and to order the resumption of the debt review, depending on the conduct of the parties (par 8, with reference to *Collett* par 18). The terms of a proposed rearrangement would also be relevant at that stage to assess whether it would be "likely to lead to the satisfaction of all responsible consumer obligations", if implemented. The court stated that a balance must be struck between the interests of the consumer and those of the credit provider (par 9).

Malan JA pointed out that the first proposal for debt rearrangement by the debt counsellor was "based on faulty arithmetic" and that the proposed monthly instalments would not even have covered the interest payable in terms of the mortgage bond. Further, even the unsigned, second proposal would not have led to satisfaction of the debt by the end of the proposed payment period: a balance of R193,968.90 would have remained in September 2029 (parr 10, 11). On the facts, in light of the appellants' failure to present any realistic proposal to repay the debt, the court found no basis on which to find that FirstRand Bank had failed to negotiate in good faith (par 12). It noted that the appellants had not applied for a resumption of the debt review in terms of section 86(11) and stated that the appellants' "restructuring proposals were simply, as the court below had found, 'devoid of economic rationality', and would have left a substantial part of the debt unpaid" (par 13).

The appeal court considered whether the court *a quo* had erred by not declaring the appellants over-indebted in terms of section 85 of the NCA, or by not making the appellants' proposal an order of court, alternatively, by not making an order as contemplated by section 87 (parr 14, 15). In view of the fact that the appellants' proposals, if accepted, would not lead to the discharge of their debt, the court found that the bank had been entitled to terminate the debt review and, on the facts, had done so justifiably (par 16). It concluded: "Neither of the proposals envisages the

discharge of the debt within the agreed period or within any suggested, and feasible, extended time. This is not a case where debt review can usefully be employed" (par 16). The appeal was dismissed with costs (par 17).

4 Comment

FirstRand Bank did not enter a cross appeal in relation to the refusal by the court *a quo* to declare the appellants' mortgaged home specially executable. Therefore, it is unfortunate that no clarity emerged from the Supreme Court of Appeal's judgment in relation to the executability of a mortgaged home in circumstances where debt rearrangement under the NCA does not pose a feasible option for achieving satisfaction of the debt. Be that as it may, it is submitted that what *is* clear from the outcome of the *Seyffert* judgments is that the NCA mechanisms do not necessarily provide workable or satisfactory solutions for financially distressed homeowners or for mortgage lenders. Presumably, in the circumstances, either the mortgagee must bide its time in the hope that the debtor's financial position will improve, as the court *a quo* indicated, or it must bring an application for the sequestration of the debtor's estate for the mortgaged home to be realised in the process of liquidation of the insolvent estate by the trustee in terms of the IA.

However, two points should be borne in mind. First, a sequestration order may be obtained only if there is reason to believe that it will be to the advantage of the general body of creditors. (See ss 10, 12 IA; *Trust Wholesalers and Woollens (Pty) Ltd v Mackan* 1954 2 SA 109 (N).) Lack of sufficient proof of advantage to creditors may therefore further frustrate the mortgagor's bid to recover the debt through realisation of the property. Secondly, as things stand, there is no requirement in the IA, or by virtue of any established judicial precedent, for a court specifically to consider the housing needs or section 26 rights of the debtor or his or her dependants in the insolvency process. Upon realisation of the home by the trustee, the housing rights of the insolvent debtor and his or her dependants would be considered only if the insolvent debtor "holds over" and the trustee or a new owner of the property brings an application for eviction of the occupants of the home in terms of section 4 of PIE. (See *ABSA Bank Ltd v Murray* 2004 2 SA 15 (C).)

The effect of PIE is to delay the enforcement of the new owner's right to possession until a court has determined whether eviction of the previous owner would be just and equitable and, if so, a date on which he should vacate his home. Therefore, in effect, PIE offers a measure of protection to a debtor against being rendered homeless by the sale in execution of his home. However, it is submitted that such protection is unsatisfactory and insufficient, in the circumstances, as it will avail only those debtors who are aware of the provisions of PIE or who have sufficient knowledge of the legal process or access to sound legal advice. The reality is also that, in this context, a debtor's reliance on PIE triggers judicial evaluation of the position at a very late stage in the process, only *after* he has lost ownership of his home and when it might be too late to

undo everything that has gone before. (See comparable reasoning in *Jaftha* parr 47, 49; *Gundwana* parr 50, 58.)

In *Seyffert* (SCA), the court pointed out how, in terms of the proposed debt rearrangement plan, the monthly instalments would not have covered even the interest payable in terms of the mortgage bond. It is submitted that, in the absence of reckless lending or any other objectionable conduct or practices on the part of the mortgagee, a repayment plan which has such an effect is undesirable, as it will yield an unworkable result. In such a situation, inevitably, a mortgagee, intent upon realising the property to satisfy its claim, will resort to an application for the sequestration of the estate of the debtor whose debt is proposed to be, or has been, rearranged in terms of the NCA. This was precisely the situation in *Evans*. It is submitted that, in addition to leaving the debtor vulnerable, it undermines the purpose and efficacy of the NCA debt rearrangement process, especially as a valuable mechanism for averting forced sale of debtors' homes. The need to resort to sequestration of a debtor's estate in the circumstances, in order essentially to obtain execution against the debtor's mortgaged property, also holds the potential of giving rise to abuse of process by the creditor, in order to avoid the requirements of the NCA.

An equally significant consideration is that to leave the mortgagee without a remedy might unjustifiably undermine the principle of sanctity of contract, expressed in the maxim *pacta sunt servanda*. It is submitted that this has the potential for unforeseen consequences leading to instability of the mortgage market, investment and the general economy. (See *Jaftha* par 58; *Saunderson* par 3; *Murray* par 46; *Seyffert* (GSJ) par 12; *Standard Bank of South Africa Ltd v Bekker* 2011 6 SA 111 (WCC) par 20.) In the circumstances, it is submitted that comparative analysis tends to suggest that legislative provision for a repayment plan, which leaves the claim of the mortgagee of the debtor's home unaffected, would better serve the needs of both mortgagees and over-indebted consumer debtors who wish to avert the forced sale of their homes.

It may be recalled that, in 2000, the South African Law Reform Commission, in its *Report on the Review of the Law of Insolvency*, proposed in Schedule 4 to the Draft Insolvency Bill the insertion of a new section 74X into the Magistrates' Courts Act 32 of 1944 to provide for a pre-liquidation composition process. Significantly, in terms of the proposed section 74X(11), a composition accepted by the requisite majority of creditors would not prejudice the right of a secured, or otherwise preferent, creditor unless such creditor consented to it in writing. Thus, "cram down" modification would not be permitted. The proposed section 74X was never enacted. However, a similar provision, modified to reflect subsequent recommendations for insolvency law reform, appears as section 118 of the unofficial working draft of a proposed Insolvency and Business Recovery Bill.

It is submitted that a legislative provision along the lines of the proposed section 118 could more effectively protect a debtor's home

against forced sale, where appropriate, and at the same time respect the rights of a mortgagee. Such a pre-liquidation composition procedure, covering all types of debt, would provide an additional debt relief process, available as an alternative to administration in terms of section 74 of the Magistrates' Courts Act 32 of 1944, debt review in terms of the NCA and sequestration in terms of the IA. However, it is submitted that the provision would need to be refined before it is ever enacted. The envisaged relationship between the various debt relief processes available to consumers would need to be clarified. Further, concerns expressed in relation to the magistrates' courts not being able to cope with an additional consumer debt relief process, and suggestions that a less court-driven process, involving attorneys in the administration and co-ordination of the composition, would be more appropriate, would also need to be addressed. (See Coetzee "Personal bankruptcy and alternative measures" Paper delivered at the Eighth International Workshop on Commercial Law 2011-08-03 Sandton; Boraine "Some thoughts on the reform of administration orders" 2003 *De Jure* 230; Boraine "Reform of Administration Orders" in *The Future of Consumer Credit Regulation* (eds Kelly-Louw *et al*) (2008) 197).

For years, academic commentators have emphasised that the South African insolvency regime lacks provision for an effective, easily accessible, consumer debt relief mechanism as an alternative to the sequestration, or liquidation, process provided for by the IA. They have called for a mechanism which balances the interests of both debtors and creditors, and society generally, by *inter alia* permitting the rearrangement of obligations over a reasonable, limited period and, at the end of it, a measure of discharge from liability supporting a policy of providing an "honest" consumer debtor with a "fresh start". They have also expressed the desirability of a legislative and administrative framework that facilitates "single portal access" to the consumer debt relief system. (See, for example, Boraine & Roestoff "Vriendskaplike sekwestrasies" 1993 *De Jure* 229; Evans "Friendly sequestrations" 2001 *SA Merc LJ* 485; Boraine & Roestoff "Fresh start procedures" 2002 *Int Ins Rev* 1; Boraine 2003 *De Jure* 217; Calitz "Developments in the United States' consumer bankruptcy law" 2007 *Obiter* 414.) Cases such as *Mutemeri*, *Naidoo* and *Evans* tend to confirm such a need. It is submitted that an ideal alternative debt relief mechanism, as envisaged by commentators, may indeed take the form of a repayment plan that also provides a solution for over-indebted homeowners who wish to avert the forced sale of their homes. This could occur where a debtor has sufficient income to satisfy the full home mortgage instalment which is due, as well as to make reduced payments in respect of other obligations which are restructured. It is submitted that a prohibition on modification of a home mortgage obligation would counter the nature and level of opposition to debt rearrangement by a mortgagee of the debtor's home, as seen in the reported judgment in *Evans* and in the *Seyffert* judgments.

An advantage of a statutory provision similar to the proposed section 118 is that it would apply in respect of all types of debts and not only

those arising from credit agreements, as is currently the position, in terms of the NCA. Further, the benefit of a measure of discharge from liability for a debtor who successfully completes the composition procedure would address criticisms of the current system and bring it more in line with internationally endorsed consumer debt relief recommendations and policies. (See INSOL *International Consumer Debt Report II* Nov 2011 1-24.) What is more, an appropriately modified provision could allow the court to determine, within the framework of a single insolvency statute, whether the composition process or the liquidation process would be more appropriate in the particular circumstances of the case. Provision could also be made for simple, streamlined conversion between the two processes, the need for which might arise, for instance, where the debtor fails to comply with the terms of the composition. Therefore, the interface between the repayment plan procedure and the liquidation procedure would be clear.

5 Conclusion

It is submitted that, as illustrated by the *Seyffert* judgments and their outcome, the debt review and debt rearrangement provisions of the NCA, as applied by the courts, do not necessarily pose a reasonable or feasible alternative to execution against a debtor's mortgaged home. It is submitted that, as in overseas jurisdictions, legislative provision ought to be made for a repayment plan in terms of which the claim of the mortgagee of the debtor's home remains unaffected. This would make it easier for a court to find "creative alternatives" to execution against the debtor's home, as required by the Constitutional Court in *Jaftha*, so that execution occurs only as a last resort. It would also pose "reasonable alternative means", as the Constitutional Court envisaged in *Gundwana*, by which a homeowner's mortgage obligation might be satisfied without the necessity of execution against the debtor's home.

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University of KwaZulu-Natal

Redaksionele Beleid

1.De Jure se hoofoogmerke is die bevordering van die regswetenskap en 'n kritiese analitiese benadering tot die reg. Ten einde hierdie doelwitte te verwesenlik, word oorspronklike bydraes van 'n hoë akademiese standard daarin gepubliseer.

2.De Jure is 'n nasionale en algemene regstydskrif, waartoe akademici, lede van die regsbank en lede van die verskillende regsprofessies bydra. Geen voorkeur word aan outeurs van enige instelling verleen nie. Die besluit om 'n voorlegging te publiseer, hang daarvan af of dit aan die hoë kwaliteitsvereistes van De Jure en of daar plek vir die publikasie beskikbaar is.

3.Voorleggings in beide Afrikaans en Engels word gepubliseer en dit kan uit artikels, aantekeninge en resente regspraak en boekresensies bestaan. 'n Vertaalde title en 'n kort opsomming van ongeveer 300 woorde in Engels moet 'n artikel vergesel indien die artikel in Afrikaans geskryf is. In geval van 'n artikel in Engels, word dieselfde vereiste gestel met betrekking tot 'n Afrikaanse title en opsomming.

4.Ten einde vir publikasie oorweeg te word, moet 'n voorlegging die resultaat van oorspronklike navorsing deur die outeur(s) wees, aan die toepaslike regsbeginsels met betrekking tot die publikasie voldoen (soos outeursreg ensovoorts), iets wat voldoende nuut is tot die bestaande literatuur voeg en aan taalkundige, tegniese en styl-vereistes van publikasies in De Jure voldoen. Outeurs is persoonlik daarvoor verantwoordelik om toe te sien dat hul voorleggings aan al hierdie vereistes voldoen.

5.Voorleggings word slegs vir oorweging aanvaar op die basis dat alhoewel die redaksie die finale besluit oor publikasie maak, voorleggings aan gepaste portuur-evalueting en evaluering deur deskundiges onderwerp word, asook aan evaluering deur lede van die advieskomitee indien nodig. Die redaksie behou die reg voor om alle voorleggings wat ivr publikasie aanvaar is, ooreenkomstig die redksionele beleid te redigeer, asook om dit te verkort indien nodig.

6.Manuskripte mag slegs in elektroniese format (gebruik MS Word) via 'n e-pos aan die redkteur of deur aflewering van 'n elektroniese skyf by die kantoor van die redakteur, voorgelê word. Bykomend, moet outeurs

(a) relevante kontakbesonderhede, in besonder e-posadres(se) en telefoonnommers verskaf;
(b) waarborg dat hulle geregtig is om die volle voorlegging te publiseer en dat dit, of deel daarvan die elders gepubliseer is nie;
(c) openbaar of die voorlegging, of deel daarvan, ook aan 'n ander tydskrif vir publikasie voorgelê is; en
(d) onderneem om redelike kennis aan die redakteur te gee indien die voorlegging weens enige rede onttrek word.

7.Tensy reelings vooraf met die redakteur getref is, mag 'n artikel (insluitend voetnotas en opsomming) nie 8000 woorde oorskry nie. Ender bydraes mag nie 5500 woorde oorskry nie.

8.Tegniese riglyne vir outeurs is op die webblad van die Fakulteit Regsgeleerdheid van die Universiteit van Pretoria bekikbaar: http://www.up.ac.za/academic/law/dejure.

Editorial Policy

1.De Jure has the promotion of legal science and a critical and analytical approach to law as its main objectives and towards this aim publishes original contributions of a high academic standard.

2.De Jure is a national and general legal journal to which academics, members of the judiciary and members of the different legal professions may contribute. No preference is given to authors from any particular institution. The decision whether to publish any submission depends on whether it meets the high quality standards of De Jure and whether space is available for publication.

3.Contributions in both English and Afrikaans are published and may consist of articles, notes, discussions of recent cases and book reviews. A translated title and a brief summary of approximately 300 words in Afrikaans must accompany an article written in English. In the case of Afrikaans articles a similar requirement applies regarding an English title and summary.

4.In order to be considered for publication a contribution must be the result of original research by the author(s), meet with all applicable legal principles in respect of publication (such as copyright, etcetera), contribute something sufficiently new to the existing legal literature and conform to the linguistic, technical and stylistic requirements for publications in De Jure. Authors are personally responsible to ensure that their submissions meet all these requirements.

5.Submissions are accepted for consideration only on the basis that while the editorial committee makes the final decision on publication, submissions will be subjected to appropriate peer and expert review, as well as review by members of the advisory committee when necessary. The editorial committee further reserves the right to edit all submissions accepted for publication in terms of the editorial policy, as well as to shorten submissions if necessary.

6.Manuscripts may only be submitted in electronic format (utilising MS Word) through an e-mail to the editor or on an electronic disc delivered to the editors office. In addition, authors

(a) must supply their relevant contact particulars, especially e-mail address(es) and telephone numbers;

(b) guarantee that they are legally entitled to have the full submission published and that it, or a part of it, has not been published elsewhere before;

(c) disclose whether it, or a part of it, has been submitted to any other journal for publication; and

(d) undertake to give reasonable notice to the editor if the submission is withdrawn for any reason.

7. Unless prior arrangements have been made with the editor, an article (including footnotes and the summary) may not exceed 8000 words and other contributions may not exceed 5500 words.

8.Technical guidelines to authors are available on the website of the Faculty of Law of the University of Pretoria: http://www.up.ac.za/academic/law/dejure