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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