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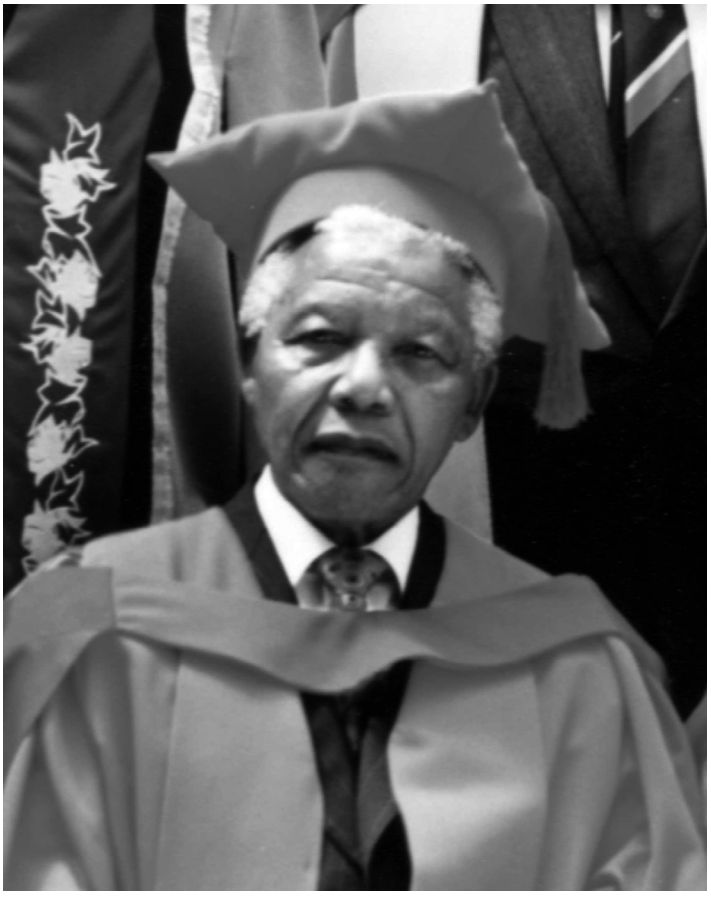

LLD (*honoris causa*) University of Pretoria, 1997

In memoriam

Speaking across generations:
Nelson Rolihlahla Mandela 1918 – 2013

Nelson Mandela had a profound impact on the Faculty of Law of the University of Pretoria, directly and indirectly; on us as a Faculty and on the world in which we operate.

In 1997 the University awarded him a doctorate in law. He used the opportunity to reach out both in Afrikaans and in English, with pathos, humility, wisdom and humour.[1] This was his second time on campus. In 1991 he was supposed to speak at an event organised by students, but violence erupted and he had to be rushed off the stage.[2]

It is worth quoting his speech at the graduation ceremony at some length:

> *Dit is baie maklik om leë woorde te gebruik, en gewoon om hoflikheidsonthalwe te sê wat 'n groot eer 'n mens aangedoen word. Ek sou egter vandag wou hê dat u moet weet hoe diep geraak ek is deur hierdie eerbetoon wat u as universiteit aan my bring.*
>
> *Dit is goed dat ons die verlede agtergelaat het en nie te veel daaroor tob nie. Maar miskien vergeet ons, aan die ander kant, ook te gou en te maklik hoe verdeeld en verskeurd ons was, en watter wonderlike prestasie dit was om daardie verdeeldheid sonder vernietigende bloedvergieting te bowe te kom. Hierdie byeenkoms vandag behoort ons, al is dit net vir 'n oomblik, te herinner aan die pad wat ons in hierdie kort tydjie geloop het om 'n verenigde samelewing te bou. Hierdie inrigting en sy ere-graduand kom uit sterk uiteenlopende geskiedenisse en agtergronde. Vandag is ons hier bymekaar met 'n groot mate van eensgesindheid oor die visie en ideale vir ons land en sy mense.*[3]
>
> I am proud to be thus associated with the University of Pretoria. I am honoured to be the recipient of an award through which you are paying tribute to our nation as a whole, for their achievement in overcoming our past

1 For the full text, see http://web.up.ac.za/default.asp?ipkCategoryID=7552&subid=7552&ipklookid=10 (accessed 2013-12-17).

2 For a copy of the speech he would have presented on that occasion, see http://www.sahistory.org.za/search/apachesolr_search/University%20of%20Pretoria%201991 (accessed 2013-12-17). See also http://madiba.mg.co.za/article/1991-05-03-when-will-the-right-learn (accessed 2013-12-17).

3 Translation: "It is very easy to use empty words, and to say simply as a matter of courtesy that this is an honour. I would however want you to know today how deeply I am touched by the honour that you as a university are bestowing upon me.
It is good that we have left the past behind us, and do not ponder upon it too much. But perhaps we also forget, on the other hand, too easily how divided and torn we were, and what a remarkable achievement it was to overcome that division without debilitating bloodshed. This meeting today should remind us, even if it is just for a moment, of the road that we have travelled in this short space of time to build a united society. This institution and its honorary graduate come from vastly different histories and backgrounds. Today we are here with a large degree of unanimity on the vision and ideals for our country and its people."

of conflict and division and joining hands to work for shared ideals. I humbly accept it in their name.

In its past this University had a reputation for serving a particular ideology which inflicted great suffering upon the majority in our country. Today it is a transformed and transforming institution, providing further testimony to my conviction that in spite of a political past that dealt terrible cruelty to fellow citizens with great insensitivity, Afrikaners when they change, do so completely, becoming people upon whom one can trust fully.

As our institutions transform, changing their composition to reflect the diversity of our rainbow nation, we must not be too surprised or disheartened if and when tension and conflict come to the surface, as it has on some occasions on this campus. We have not fallen from heaven into this new South Africa; we all come crawling from the mud of a deeply racially divided past. And as we go towards that brighter future and stumble on the way, it is incumbent upon each of us to pick the other up and mutually cleanse ourselves.

It has often been said in recent years that university-based intellectuals in South Africa – whether antiapartheid or apartheid supporting in thrust – had derived so much of their focus from the fact of the apartheid society, that they have now somewhat lost their way. There is a sense that the voice of the universities has fallen quiet in the larger debates of our society. That vibrancy in our intellectual life, which was so much a feature of internal challenge to apartheid, seems to have largely disappeared. One trusts that our university-based intellectuals – staff and students – will soon once more take up the role of critical partners in building and developing our new society – identifying through research, scholarship and debate the burning issues at the heart of our new society.

It is through such engagement that our national efforts of reconstruction and reconciliation, of nation-building and development, will reap the full benefit of the prestigious achievements of this university, across the disciplines.

Having been so graciously granted an honorary doctorate by yourselves does not make me you intellectual peer. And I should be very careful about treading on the domain of trained intellectuals. But let me nevertheless be so foolish as to venture a final thought.

It does seem as if South African intellectuals – whether in the universities or the media – at times allow themselves to be impeded by a fear of appearing to be co-opted. Progressive intellectuals have traditionally and rightly been very suspicious of the concept of "patriotism", so often abused by demagogues and autocrats to suppress criticism and independence of thought. One fully grants our intellectuals the right to share that attitude. Our own call – including to intellectuals – for a new patriotism is, however, not a call to compromise anyone's independence. Pride in national development and commitment to it do not stand in any necessary contradiction to critical independence. A professional fetish about "criticalness" at all costs may, on the other hand, hamper intellectuals in playing the full role they should be playing in recording, describing, analysing, evaluating and criticising our efforts at building and developing the new society.

Ek het waarskynlik nou reeds te veel gesê. Laat ek afsluit voor die Universiteit besluit om die doktorsgraad terug te trek. Nogmaals baie dankie vir hierdie groot eer. Ek is trots daarop om nou 'n lid van hierdie universiteitsgemeenskap te wees.

> *Ek sê dit in die volle vertroue dat hierdie inrigting sal voortgaan om sy rol te speel in die opbou en ontwikkeling van ons nuwe samelewing.*[4]

Faculty members participated in technical groups tasked with dismantling apartheid laws as part of the transition during the early 1990s, and Johann van der Westhuizen served as one of the technical advisors who drafted the first democratic Constitution that entered into force in 1996, and in that capacity also engaged with then President Mandela.

In 1995, the Centre for Human Rights of the Faculty or Law organized the African Human Rights Moot Court Competition in Pretoria – something it would not have been able to do under apartheid. The Centre had asked the President to welcome the participants by means of a letter. The Centre still reprints Mandela's assessment of the value of the exercise in the documentation of every moot competition:[5]

> One could hardly think of a better way to advance the cause of human rights than to bring together students – who are the leaders, judges and teachers of tomorrow – to debate some of the crucial issues of our time in the exciting and challenging atmosphere of a courtroom, where they can test their arguments and skills against one another in a spirit of fierce but friendly competition.

During the 1990s the Centre for Human Rights ran a programme called the Southern African Student Volunteers (SASVO), which placed students as volunteers at schools, which they renovated, across Southern Africa. The programme was the largest recipient of funds from the Nelson Mandela Foundation. Mandela invited the organisers to an event at his home in Pretoria and said to us: "You have no idea how much hope you are giving all of us."[6] The irony and the magnanimity were unmistakable: The University of Pretoria was regarded and further encouraged to be part of the solution.

It is however the changes that Mandela brought to the world in which we live and operate that have had the most far-reaching consequences on what we can do and what kind of law faculty and university we are today.

Throughout recorded history, humanity has always been divided into clans, tribes and races that were not only exclusive, but often hostile to each other and indeed engaged in war. This was considered to be normal; it was the way things were and how they should be. War itself had not been made illegal until the last century.

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4 Translation: "I have probably said too much already. Let me conclude before the University decides to withdraw the degree. Thank you once again for this great honour. I am proud now to be a member of this university community. I say this in full confidence that this institution will proceed to play its role in the construction and development of our new society."

5 http://www1.chr.up.ac.za/images/files/education/moot/2012/mc%202012%20brochure.pdf (accessed 2013-12-17).

6 http://www1.chr.up.ac.za/index.php/centre-news-2013/1246.html (accessed 2013-12-17).

This started to change with the advent of a global community. The international human rights framework was established after the Second World War and now sets the standards for domestic laws and practices. This framework – prioritising right over might – has become the new "normal", even though it often still does not reflect the real practice.

As with all major social changes, not all parts of the globe moved at the same pace. South Africa, isolated from the rest of the world and with a minority racial group in power, became the most prominent straggler. In 1948, as the rest of the world adopted the Universal Declaration of Human Rights, the then all white electorate in South Africa turned its back on them and voted into power the National Party.

If the practice of the centuries was to be the yardstick, the "normal" outcome of such a situation would at some point or another have been – as Mandela said in his acceptance speech – a bloodbath, or protracted violence. Yet, coming from a traditional background himself, Mandela captured the new ethos of inclusivity in the most dramatic way conceivable, by taking those in whose name he was jailed along with him and creating a "new normal". In so doing, the chapter was closed on the idea that the domination of one group by another was acceptable, not only in South Africa but also worldwide. Never, never, and never again. At the same time he also made it possible for the University of Pretoria to play a role as a continental and a global university.

It is clear that Mandela did not bring about these changes on his own, as he would be the first to recognise. He was in many respects the right person at the right time – the major global catalyst in creating a new right and a new wrong.

Today the Faculty of Law of the University of Pretoria – once an inward-looking and isolated institution – is functioning in an environment where it can compete and participate on the world stage. The Faculty is playing an increasingly active role on the continent, with a unique network and a range of expertise in trade law, company law, insolvency, education law, banking law, and extractive industries in an African context. The Oliver R Tambo Law Library houses the largest and most up-to-date collection of legislation, laws and legal texts from Africa. The Faculty is thoroughly engaged with the international organisations of the continent and the world, and its programmes have won the highest United Nations and African Union prizes.

The Faculty in fact now plays the role of a leader – of all things – in the area of human rights in the African continent. That is how radical the shift that was made possible has been.

In reflecting on this tale, there is something to be learned about the way in which lawyers and others, each with some part of the truth, can reach out to each other across generations and steer their society with relatively few losses through the minefields of history.

Some of the seminal political reformers of South Africa – Mahatma Gandhi, Jan Smuts; Oliver Tambo; FW de Klerk; and Nelson Mandela – have all been trained as lawyers. In many cases they have espoused views based on the mores of their times, which were then challenged by their successors. Some of their insights were rejected while others were used and elaborated upon.

Gandhi's objectives during the 21 years that he spent in South Africa were confined to advancing the cause of the Indians in South Africa, and by today's standards he would probably be regarded as a racist in his attitudes towards Africans.[7] Yet he established the precedent that a brown-skinned person could stand up to a white government – and indeed later also to a colonial power – and win. The method he introduced to achieve this goal – nonviolent mass demonstrations – has become a preferred tool of political resistance in societies around the world. By offering an alternative to violent protest, or at least a restraint on its use, Gandhi established himself as one of the great civilisers of humanity.[8] While few would follow his categorical commitment to non-violence, his success through non-violence was well known and discussed by the leaders of the later struggle against apartheid, including Nelson Mandela, and is probably one of the causes of the relatively peaceful nature of the eventual transition in South Africa.[9]

Gandhi's main adversary – but also someone who learned from Gandhi and used his methods[10] – was Jan Smuts. He was a founder of the League of Nations and the United Nations and the person who inserted the notion of human rights into the preamble of the Charter of the United Nations.[11] While he promoted the idea of human rights on the world stage, his domestic policies were segregationist and at best paternalistic. However, unlike the Nationalists who beat him on the ticket of apartheid, he did not claim to have a final answer. Smuts regarded the apartheid and homelands policies the National Party as "a crazy concept, based on prejudice and fear".[12] With reference to the racial issue Smuts said: "I feel inclined to shift the intolerable burden of solving that sphinx problem to the ampler shoulders and stronger brains of the future."[13]

Mandela as a student of the Faculty of Law at the University of Fort Hare went to listen – and by his account applauded – Smuts, when the

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7 See Lyleveld *Great soul: Mahatma Gandhi and his struggle with India* (2011).
8 See Heyns "On civil disobedience and civil government in South Africa" in *Law, Justice and the State III* (eds Soeteman & Karlsson) (1995) 133-148.
9 See Mandela *Long walk to freedom: The autobiography of Nelson Mandela* (1994) 77.
10 See Smuts "Gandhi's political methods" essay dated 1939-03-27, contained in the JD Pohl Collection, University of Pretoria archives.
11 See Mazower *No enchanted palace: The end of empire and the ideological origins of the United Nations* (2009).
12 Mandela *op cit* 71.
13 See Hancock & Van der Poel (eds) *Selections from the Smuts papers vol 2* (2007) 242.

latter spoke at Fort Hare in support of South Africa's entrance into the Second World War against Nazi Germany. Mandela recounts: "I cared more that he had helped found the League of Nations prompting freedom around the world, than the fact that had repressed freedom at home."[14]

A Hollywood director recreating the scene on the Fort Hare campus would probably not be able to resist the temptation to make Smuts refer in his speech to the "ampler shoulders and stronger brains" needed to address the racial issue of South Africa, and then zoom in on the young Mandela in the audience. In taking on South Africa's most difficult issue, Mandela made the methods introduced by Gandhi his own, as volunteer in charge of the 1952 Defiance Campaign which served to give the ANC national prominence. In an intriguing twist, the liberation struggle would also often rely on the international human rights system, in the introduction of which Smuts had played a key role, against Smuts's successors. In so doing, Mandela gave what at the time may have been lofty aspirations advanced by Smuts for external consumption, concrete application in South Africa.

And yet, the racial issue, like so many others, remains in many respects unresolved. South Africa and the world as a whole is still, in practice, deeply divided along racial lines. Huge discrepancies in access to resources and opportunities remain, often along racial, gender and class lines. While protesters in many countries find it possible to use peaceful demonstrations as a political tool, violence simmers below the surface, and often boils over. In Africa there are numerous obstacles in the way of unlocking our natural resources in a sustained and sustainable way. Poverty and abuse of power remain some of the greatest threats to human dignity.

Any talk about having reached our destination is grossly inappropriate. As Mandela has famously said, one reaches to the top of one hill only to find there are many others.[15] To address the widespread problems that remain, further transformation is called for, which will in turn solve some problems but no doubt create new ones, before moving on. In dealing with Sphinx problems we, like Sisyphus, have to keep rolling the rock up the hill.

It is clear, looking around us in South Africa and the world, that Mandela could only address some issues, and even in those areas his legacy is incomplete and in some cases already under threat. That should not be a surprise. Hope in the long run does not rest with individuals, even exceptional ones, who come and go. Placing too much reliance on individuals and heaping unqualified praise on them undermines the responsibility and agency of the rest of the community, leaving them weak. If hope is to be found it has to come from institutions with life-spans that stretch across time. This includes the institutions that produce

14 Mandela *op cit* 41.
15 *Idem* 385.

the people who have to face the challenges of their era. Indeed, education is the most powerful tool that one can use to change the world. It also includes institutions such as the legal profession, which has produced such outstanding leaders in our society.

The Faculty of Law of the University of Pretoria, alongside the other educational institutions of our country and the legal profession as a whole, benefited in a special way from our interaction with a truly great man. This, however, brings us only as far as the imperfect present. And the opportunities offered place a special responsibility on all of us to place our resources and resourcefulness at the disposal of our society.

The future will depend whether we use the space we have been given as a springboard to produce more people who, when their time comes, will be ready to take on the challenges of their era and their world. The future will depend on whether we who staff and steer these institutions can produce the long chain of reformers – lawyers and others – stretching across generations, who often learn from each other, and as a result have the skills to move the world beyond that which we today consider "normal". In doing so, there is ample inspiration to be found from our own history, and the remarkable voices that have spoken across generations.

Christof Heyns
Professor of human rights law and former Dean, Faculty of Law, University of Pretoria; United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions

Madiba would have agreed: "The law is for protection of the people"*

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PROLOGUE

Reflections on the Occasion of the Acceptance of the Degree *Doctor Legum Honoris Causa* from the University of Pretoria

Deputy Vice-Chancellor and Vice-Principal Professor Pretorius; Dean of the Faculty of Law Professor Boraine; Director of the Centre for Human Rights Professor Viljoen; staff members of the University of Pretoria; my colleague Justice Nkabinde of the Constitutional Court; my previous boss former Judge President of the Gauteng High Court and now member of the African Court and Chancellor of the University of South Africa, Justice Ngoepe; deputy vice-chancellor of the University of Cape Town, Professor Visser; students from all over Africa receiving doctoral and master's degrees, to whom today belongs; representatives of universities and countries in Africa and elsewhere, brothers and sisters –

On this occasion in these days of mourning and memories I pay tribute to our father and leader, President Nelson Mandela. The last time I saw him in person and shook his hand was in the hall right next to this very venue, when he received an honorary doctorate from the University of Pretoria several Decembers ago. I am proud to have been the one who nominated him for it. Without his life and work, we might not have been here today. I remember his words from my mother-tongue when he departed from politics and said good-bye to the nation: "*Mooi loop!*" And I say: "*Mooi loop*, Madiba. *Dankie vir die saamloop en voorloop. Ek dra hierdie beskeie bydrae aan u op*". (Go well Madiba. Thank you for walking with us and leading us. I dedicate this modest contribution to you.)

It is an enormous honour to receive an honorary doctorate from this University where I spent much of my life. I am deeply thankful to those at the University who worked to make it possible; who educated me; and who were colleagues and friends, willing to share my dream that we could play a role in the shaping of a new democratic South Africa as part of Africa. I welcome my dear friends who are present and thank you for your interest and support over the years. I thank and pay tribute to my family for their support, inspiration and love: my dear wife Saro; my children Alexander, Dassie and Vincent; my sister Minda, her husband Thys and their family; and my brother-in-law Dr Radha Persaud from Toronto. I cannot help but spare a thought for my deceased mother and father: Anna, who tried to teach us to work hard, excel and save money, that God commands one to obey the Bible and the government and that almost everything enjoyable is dangerous or sinful; and Vincent, who worked for

* Address delivered at a graduation ceremony hosted by the University of Pretoria 2013-12-10.

the apartheid government, but wrote beautiful Afrikaans poetry and prose, talked about human rights and undermined everything – bad and good – the Afrikaner establishment stood for, long before deconstruction became fashionable.

1 Introduction

The oldest question in legal philosophy is the one most lawyers never think of: What is law and why is it there? In 1970 legendary singer Kris Kristofferson released his song "The Law is for Protection of the People". That year marked the end of a decade – the tumultuous sixties – during which the world changed. The Vietnam war started; student uprisings took place in France and Germany, as did the cultural revolution in China; the Berlin wall was built; President John F Kennedy, Bobby Kennedy and Martin Luther King were assassinated; hippies and flower children promoted peace and free love; the Beatles, Rolling Stones and Bob Dylan burst onto the music scene. Conventional notions of law and morality were questioned as they had not been since Nietzsche and Marx challenged and changed Western philosophy. During the fifties and sixties many African countries were liberated from their colonial oppressors and became independent, with mixed success. British Prime Minister Harold MacMillan famously said in the South African Parliament, that "the winds of change (were) blowing in Africa." Last and least, in 1970 I did my compulsory military service in the South African Air Force, before starting my studies at the University of Pretoria the next year.

The lyrics of the song are:

Billy Dalton staggered on the sidewalk
Someone said, he stumbled and he fell
Six squad cars came screamin' to the rescue
Hauled old Billy Dalton off to jail

'Cause the law is for protection of the people
Rules are rules and any fool can see
We don't need no drunks like Billy Dalton
Scarin' decent folks like you and me, …

Homer Lee Hunnicut was nothin' but a hippie
Walkin' through this world without a care
Then one day, six strappin' brave policeman
Held down Homer Lee and cut his hair

'Cause the law is for protection of the people
Rules are rules and any fool can see
We don't need no hairy headed hippies
Scarin' decent folks like you and me, …

Oh, so thank your lucky stars, you've got protection
Walk the line and never mind the cost
And don't wonder who them lawmen were protectin'
When they nailed the Savior to the cross

'Cause the law is for protection of the people
Rules are rules and any fool can see
We don't need no riddle speakin' prophets
Scarin' decent folks like you and me, …

Of course the singer-poet is sarcastic when he says that the law is for protection of the people and refers to "decent folks". Whereas the law is supposed to protect *all the people*, it is often used as a tool to protect the privileged class (who label themselves as "decent"), to bully the weak and marginalised, to suppress free expression and criticism and to lull us into comfortably ignoring the plight of the majority of human kind and the ideal of justice for all. Often we call the practice of law "an honourable profession" and then dishonour it with our greed, self-interest and lust for power.

Assuming that the purpose of law is to protect all the people, I make a few brief remarks on five points: The qualities required for lawyers; independence; equality before the law; law as a tool; and the role of universities.

2 Qualities of Judges and Other Lawyers

Judges and other lawyers must in my modest view have certain qualities to apply and practise law as it should be done. Our Constitution requires judges and the National Director of Public Prosecutions to be "fit and proper persons".[1] For legal practitioners similar standards exist.

In addition to requirements regarding qualifications, citizenship, and so on, lawyers (and judges in particular) need (in no specific order) –

- integrity;
- intellect;
- a strong work ethic;
- respect for people;
- a sound value system;
- independence; and
- a sense of humour.

Integrity is not negotiable. It is the first and the last word. Without it, the other qualities are either impossible (like independence), or dangerous (like intellect and knowledge of the law). Merula allegedly cited a saying that the learning and ability of a lawyer is like a dangerous weapon: It may be misused, but in proper hands it is used to protect those who are oppressed and wronged.[2] The public must see integrity in action. The ability and willingness to work hard includes the many hours one needs to invest in proper preparation to understand the issues at hand and the applicable law. I do not mention a sound knowledge of the law

1 Ss 174, 179 Constitution of the Republic of South Africa, 1996.
2 Davis's foreword to the 1st Edition of Herbstein & Van Winsen *The Civil Practice of Superior Courts in South Africa* (1954); 3rd Edition (1979) vi.

separately. No one knows all law; one finds it through research and logical thinking.

These seven qualities overlap and operate together. A strong intellect is very helpful. To make up for a limited intellect, one has to work harder. The flip side of this is unfortunately also true. The cleverer one is, the quicker you will understand and the stronger the temptation will be to work less hard, as you can get away with the minimum. But just imagine what you could achieve with a great intellect plus hard work!

The ability and willingness to respect the human dignity of all people and to work with them is crucially important. This applies to colleagues on the bench and in the profession, counsel appearing before courts and frustrating or illiterate litigants. An English Lord Chancellor reportedly once said: "I like my judges to be gentlemen; if they also know a little law, so much the better".[3] And a sense of humour is always very useful when one deals with the stress of human relationships and conflict.

The reality is that no-one is perfect. We all sometimes err, stumble, fall, hurt others and get hurt. This is where values come in. In a constitutional democracy like South Africa we are fortunate to have a set of constitutional values and do not have to delve desperately into natural law or universally accepted notions of justice: Human dignity; equality; human rights and freedoms; non-racialism and non-sexism; constitutional supremacy; the rule of law; democracy; accountability; responsiveness; reasonableness; and openness.[4] These values are not at odds with those of most religious and other ethical systems.

3 Independence

One of these qualities – and my next point – is independence. The Constitution states that courts are independent and subject only to the Constitution and the law, that no one may interfere with the functioning of the courts and that the state must assist and protect the courts. It requires judges to act impartially and without fear, favour, or prejudice and to take an oath that they will do so.[5]

Courts and the judiciary staffing them have to be independent for democracy to succeed. I once heard a senior South African lawyer in a leadership position who was awaiting promotion say at a conference that judicial independence has to be "earned". I was astounded. Earned how and by whom? It cannot be earned by pleasing politicians or any other power. It is given and recognised by the Constitution, like the rights to life and dignity to human beings. A judge who is not independent is not worthy of that title and a court that is not independent is not a true court.

3 *Idem* v-vi.
4 Ss 1, 36 and elsewhere.
5 S 165; s 174(8); Sch 2.

And an independent legal profession is essential for the independence of courts.

Aspects of independence are often discussed. Institutional independence is important. Courts must be supported properly by all organs of state.[6] Judges must have security of tenure as well as financial security. Judges must not be interfered with by improper attempts to influence them, by any group, politician, or other individual, even another judge. Governments have to respect the constitution and laws they are subject to. We often hear reports – for example from Eastern Europe – of constitutional courts that are quickly slapped into place by governments who respond to inconvenient judgments by amending constitutions and passing laws to limit the powers of courts. From our own continent we hear judges complaining about inadequate salaries and benefits.

Let us get the obvious out of the way. To be open to bribery and corruption is criminal and a betrayal of all that a lawyer is supposed to stand for.

But there is another dimension to independence, other than bribery and expensive cars for judges and intimidating telephone calls from politicians. It is the inner part, the mental, psychological and emotional attitude of each individual judge and lawyer. We nowadays realise that judges and other lawyers are *people*, not machines. And people do have fears, favours and prejudices. We are the products of our cultural, social and economic backgrounds. We have dreams and aspirations for ourselves, our families, our countries. We want to be successful and to be recognised as such. We have likes and dislikes. The ghosts of pride, spitefulness, grudges, anger, pettiness and strategic thinking sometimes hide in the dark corners of one's psyche and in the windmills of one's mind. Depending on my background and environment, I may well be more concerned about academic criticism, or being branded an enemy of the poor, or of women's or children's rights, or as conservative, than about a telephone call from a minister or a promise of wealth from a powerful commercial entity.

The starting point is of course to realise that we are all human. To deny it, is dishonest. Then we must come to grips with our subjective fears, favours and prejudices and strive to think independently and act fairly.

Does this mean that a judge must be oblivious to or ignore academic criticism, the views of non-governmental organisations, or generally the "*Zeitgeist*" (the spirit of the time)? Does a judge compromise independence by considering how academics, community organisations, or the media may interpret and receive a judgment? Certainly not, in my view. Judges have to be in touch with the problems, needs and aspirations of their societies, like poverty, illiteracy, violence against

6 S 165(4).

women and children and endemic crime. The law is for protection of the people, not of judges. The study of academic literature is essential to understand the law in order to apply it and to avoid changing it clumsily and unintentionally. In order to develop the common law, as the Constitution empowers courts to do,[7] the first step is to be very aware of what it is. Criticism of judgments from academic and media circles – even based on misinterpretation and ignorance which certainly sometimes play a role – helps to avoid logical errors and to realise the need to write in an understandable way. The accountability of judges is after all in the reasoning of judgments. Legal institutions, despite their state monopoly, must constantly prove themselves.[8]

This is very different from being intimidated or unduly influenced by academic or public opinion though. To judge directly or indirectly motivated by an opportunistic jump at promotion, or by a desire for publicity, popularity, or recognition in the form of invitations to exotic places or seminars in honour of one's work, or honorary degrees, is a breach of the oath of office to dispense justice without fear, favour, or prejudice. And this urge is sometimes difficult to detect and recognise in others and in oneself.

One last word on judicial independence: It is often said in this country that opposition parties and other pressure groups politicise the Constitution and use the courts as a tool by litigating against the government on every possible occasion to fight political battles. We hear that this practice must stop. It is true that courts are often dragged into political disputes. In a young democracy, where the governing party enjoys a very large majority and is unlikely to be voted out of office in the near future, it is to be expected though. Opposition groups will make maximum use of the media, institutions like the Auditor General and Public Protector and the courts to test government action and expose abuse. We know that constitutional law is inherently "political". This does not mean that courts should "play politics". They should leave political disputes to be resolved politically and as far as possible not get caught up in frivolous fights. But courts have to apply the Constitution and the law as objectively and fairly as they can, when these are indeed applicable.

4 Equality Before the Law

The third point is equality before the law. The law should be for the protection of *all* the people. Equality before the law is essential for the rule of law and is protected in our Constitution.[9] I express two brief thoughts on this.

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7 S 39(2).
8 Auerbach *Justice without Law? Resolving Disputes without Lawyers* (1983) 142.
9 S 9(1).

The first relates to the widely recognised problem of economic inequality. The poor can either not afford legal advice and representation at all, or only modest legal assistance. The wealthy and well-connected are able to instruct teams of senior and junior counsel and attorneys – which the media would call "high-powered" – to represent them in court, not necessarily because each member of the team contributes to eloquent and well-prepared argument, but also to create atmosphere, impress and intimidate.

I do not claim to have the solution for this worrying lack of equal access to justice which no doubt undermines the legitimacy of a constitution and legal system. Legal aid, *pro bono* work and other possibilities have been discussed at length. I express only one wish, namely that wealthy lawyers would seriously consider lowering their fees to reasonable and realistic levels when representing the poor and marginalised. There is no need for a successful practitioner to arrive at an informal settlement or traumatised community of mine or other workers in the newest model Range Rover or sports car, to prove that he is successful. Or is there?

My *second equality* concern is that *reasonable public perceptions of bias* and unequal treatment by courts and before the law must be avoided. The harshest examples probably relate to the criminal justice system, especially sentencing by courts and the serving of prison sentences. Perceptions of favouritism and prejudice based on race, wealth, or political affiliation can poison a constitutional democracy. Of course public opinion – genuinely, misguided, or mischievously – does not always understand and appreciate legitimate differences between people and cases. But when for example a glaring possibility emerges that race or political connectivity made a crucial difference in a decision about parole, authorities have to explain exactly how the law was applied in the particular case; not only in the interest of equality before the law, but also because the constitutional values of transparency and accountability demand it.

5 Law as a Tool

The fourth of my five points is that the law is a powerful instrument in the hands of a very small group of us, privileged to have been educated and trained in it. We could either use it to intimidate, oppress and further marginalise those who are not as privileged as we are; or to inform, educate and empower, indeed to protect, the people.

In this, legal language plays an important role. Lawyers are notorious for the way they write and speak. Why do we say "same" in attorneys' letters instead of "he", "she", or "it"? Why do we write "where" when we mean "when" or "if" and "shall" when we mean "must"? Why do we draft legislation like the "Nuts Order" and article 25(1)(a) of the Namibian

Constitution?[10] Stark[11] wrote in the *Harvard Law Review* "... 'legal writing' has become synonymous with poor writing; specifically, verbose and inflated prose that reads like – well, like it was written by a lawyer" and: "Every time lawyers confound their clients with a case situation, a 'Heretofore', or an 'in the instant case', they are letting everyone know that they possess something the non legal world does not".

Thus, lawyers use language as an instrument to protect the need for and status of their profession. He concludes:

> Perhaps most damaging, however, is lawyers' frequent use of language as an instrument of deception. Face it: if lawyers know they have a losing case – and half the time they should – confusing the court may be the best they can do for their clients. Indeed, attorneys may be our most respected con artists; after all, their job in many cases is to try to make something out of nothing. Again, there is nothing necessarily wrong with that: lawyers may simply be victims of the role society has created for them. But lawyers recognize their role as deceivers and understand that language is the means by which they work their magic. And after a while, they begin to lose faith in the honesty of words. Language is a human invention, one designed to bring people closer together. But after a lifetime of using words to strangle communication, lawyers begin to view speech as a barrier that separates them from others and others from the truth.

We could all try to use simpler, plainer, more easily understandable language in legislation, judgments, argument, opinions and correspondence. Our Constitution and hopefully some Constitutional

10 The "Nuts Order" was once listed in the *Guinness Book of Records* as the world's most incomprehensible legal provision:
"In the Nuts (underground) (other than ground nuts) Order, the expression nuts shall have reference to such nuts, other than ground nuts, as would but for this amending Order not qualify as nuts (underground) (other than ground nuts) by reason of their being nuts (underground)."

Article 25(1)(a) of the Namibian Constitution states:
"Save insofar as it may be authorised to do so by this Constitution, Parliament or any subordinate legislative authority shall not make any law, and the Executive and the agencies of Government shall not take any action which abolishes or abridges the fundamental rights and freedoms conferred by this Chapter, and any law or action in contravention thereof shall to the extent of the contravention be invalid: provided that a competent Court, instead of declaring such law or action to be invalid, shall have the power and the discretion in an appropriate case to allow Parliament, any subordinate legislative authority, or the Executive and the agencies of Government, as the case may be, to correct any defect in the impugned law or action within a specified period, subject to such conditions as may be specified by it. In such event and until such correction, or until the expiry of the time limit set by the Court, whichever be the shorter, such impugned law or action shall be deemed to be valid."

11 Stark "Why Lawyers Can't Write" 1984 *Harv LR* 1389 1392.

Court judgments contain examples.[12]

This does not mean that there is no place for some poetic or prosaic charm in legal writing. A little flavour and colour could help to brighten up dull and boring texts, provided that clarity and accuracy are not sacrificed.

Furthermore, courts must be accessible and transparent. But we do not have to do away with all courtesy, tradition and ceremony. On a day like today we once again realise that a society needs myths, legends, heroes and symbols to bind and keep it together and also to foster respect for a legal system, without which it cannot do. Deconstruction is essential to get rid of false assumptions and harmful stereotypes and myths; but reconstruction is then often necessary; and preservation is sometimes preferable, not only of rhinos, old buildings and documents, but also of the dreams and symbols needed by humanity.

Auberbach[13] wrote:

> The luster of the legal process radiates the promise of justice. People are persuaded that law will protect their rights, preserve their liberty and secure their property. When disputes cannot be reconciled litigation structures the melodrama of human conflict within a precise set of procedures .... State authority is reinforced by the deference afforded to official symbols of law and order.

6 Universities

My last point relates to the role of universities. When I studied at this University and for quite some years of teaching here, it produced eminently able scientists, researchers, teachers, lawyers, artists and actors. It had a famous choir, excellent rugby players and athletes and very attractive rag queens. (It still has these, as far as I know, even with a premier league soccer team added.) But it was an all-white Afrikaans institution, largely dedicated to support the apartheid ideology and regime. It was referred to as "the Voortrekker University" and "the largest Afrikaans university in the world". When an academic was pointed out on campus as "the best in the world in his field", the "world" often referred to the space between Lynnwood Road, University Avenue, Park Street and Duncan Street.

Law professors taught us that draconian security legislation permitting indefinite detention without trial was necessary to fight the evil total onslaught of communism. The main exam question in a course called

12 See eg Van der Westhuizen "Legal Language: Instrument of Deception or Empowerment? (Notes on Plain Language and the Constitution) 12 September 2013" available at http://www.constitutionalcourt.org.za/site/judges/justicejohannvanderwesthuizen/TALK-TO-LAW-CLERKS-OF-THE-CONSTITUTIONAL-COURT-PLAIN-LANGUAGE-AND-THE-CONSTITUTION(2).pdf (accessed 2013-12-01).

13 *Op cit* vii-viii.

"Bantu Law" (nowadays probably African customary law) was: "What is a Bantu?" in terms of the Bantu Administration Act of 1927. The concept of human rights was never mentioned in a very detailed course on Criminal Procedure. At my final year law dinner the guest speaker was … the prosecutor of Nelson Mandela and his co-accused in the Rivonia Trial! The trialists were relieved when they were sentenced to life imprisonment, as the death penalty was called for and expected in many circles. A former colleague in the faculty referred to rape as "a crime of enjoyment" in his lectures – and no one complained.

When it became possible to invite black speakers to conferences, permission had to be requested by filling in forms. One of the questions was whether the visiting professor or community leader was likely to use a university toilet during the visit. When student leader Christof Heyns and his colleagues wanted to invite the famous singer David Kramer to the campus, they thought he was coloured and I presume they filled in the forms. The University of Pretoria even made the law reports, but not only because some of its graduates were judges. It sued a film producer for defamation of the University, when a film depicted a coloured rugby player in the famous white TUKS colours![14]

Today this University and Law Faculty have much to be proud of. It has a Centre for Human Rights, internationally acclaimed for its leading role in Africa. It was a privilege to be part of its founding and development. The University's experts are widely recognised. It has been highly successful in transforming itself to serve all the people of our country and our continent. I hope and trust that its academic research and teaching standards will reach even greater heights, to compete with the very best, matching its Olympic gold medals.

I congratulate the graduating students and their families, as well as the University of Pretoria. I am sure you will continue to protect and strengthen constitutional democracy in our country, on our continent and in the world. Please go forth and try to ensure that the law is for the protection of the people. Unfortunately history has shown that democracy and respect for human rights is not necessarily a natural attribute of human kind. We have to continually work for it.

The Freedom Charter, adopted in 1955 by the Congress of the People at Kliptown, Johannesburg, states: "These freedoms we will fight for, side by side, throughout our lives, until we have won our liberty". Perhaps we should add: "and forever after!"

I think Nelson Rolihlahla Mandela would have agreed.

14 *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 4 SA 376 (T).

Vermoënsregtelike gevolge by die verandering van die huwelikstelsel

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SUMMARY

Patrimonial Consequences at the Conversion of the Marriage System

The Recognition of Customary Marriages Act provides for the "conversion" of a customary marriage into a civil marriage. The Act, however, does not adequately regulate the consequences during the interface between the spouses' customary marriage and civil marriage. Section 10(2) provides only that if spouses who are married at customary law subsequently enter into a civil marriage with each other, their marriage is in community of property and of profit and loss unless such consequences are specifically excluded in an antenuptial contract which regulates the matrimonial property system of their marriage. This section does not deal with the position where the customary marriage, for example, is in community of property and the spouses want to "convert" their customary marriage in a civil marriage out of community of property. Uncertainty exists as to whether the joint estate of the customary marriage continues to exist or is terminated at the date of the civil marriage, and whether the spouses in the aforementioned example have to enter into an antenuptial contract prior to the civil marriage or have to comply with other requirements. The fact that the Act is silent on the effect of the conversion on the customary marriage contributes to the uncertainty. The purpose of this article is to address these issues.

1 Inleiding

Die Wet op Erkenning van Gebruiklike Huwelike[1] (WEGH), wat op 15 November 2000 inwerking getree het, gee volle erkenning aan monogame en *de facto* poligiene gebruiklike huwelike ongeag wanneer hulle gesluit is. Die WEGH reël die bevoegdheid van 'n gade in 'n gebruiklike huwelik om 'n burgerlike huwelik[2] aan te gaan. Artikel 3(2) van die WEGH bepaal dat 'n gade wat ingevolge 'n gebruiklike huwelik getroud is, nie bevoeg is om 'n burgerlike huwelik gedurende die bestaan van die gebruiklike huwelik te sluit nie. Daar is egter een uitsondering op hierdie verbod. Ingevolge artikel 10(1) is 'n man en 'n vrou tussen wie 'n gebruiklike huwelik bestaan, bevoeg om met mekaar 'n burgerlike huwelik te sluit indien nie een van hulle 'n gade in 'n bestaande gebruiklike huwelik met 'n ander persoon is nie. Die WEGH maak dus voorsiening vir die omskepping van 'n gebruiklike huwelik in 'n burgerlike huwelik.

1 120 van 1998.
2 'n Huwelik kragtens die Huwelikswet 25 van 1961.

Die WEGH reël nie die vermoënsregtelike gevolge by die skeidingsfase van die gades se gebruiklike en burgerlike huwelik behoorlik nie. Artikel 10(2) bepaal slegs dat indien die twee gades in 'n gebruiklike huwelik later ook 'n burgerlike huwelik met mekaar sluit, die huwelik binne gemeenskap van goed en wins en verlies is tensy sodanige gevolge uitdruklik deur die gades in 'n huweliksvoorwaardekontrak, wat die huweliksgoederebedeling van hul huwelik reël, uitgesluit word. Die artikel sit nie die posisie uiteen waar 'n gebruiklike huwelik byvoorbeeld binne gemeenskap van goed is, en die gades die gebruiklike huwelik in 'n burgerlike huwelik met huweliksvoorwaardes wat gemeenskap van goed uitsluit, wil omskep nie. Daar is gevolglik nie sekerheid oor die vrae of die gemeenskaplike boedel van die gebruiklike huwelik bly voortbestaan of beëindig word op datum van die burgerlike huwelik nie, en of die gades in bogenoemde voorbeeld 'n huweliksvoorwaarde-kontrak moet opstel voor die burgerlike huwelik of aan ander vereistes moet voldoen. Die feit dat die WEGH swyg oor die effek van die omskepping op die voortbestaan van die gebruiklike huwelik dra verder by tot die onsekerheid.

Die doel van die artikel is om die bogenoemde vrae aan te spreek. Die vermoënsregtelike gevolge van gebruiklike huwelike en die verandering van die vermoënsregtelike gevolge van die gebruiklike huwelike word eers bespreek. Daarna volg 'n kritiese bespreking van die vermoëns-regtelike gevolge van die burgerlike huwelik in die geval van omskepping van die gebruiklike huwelik in 'n burgerlike huwelik.

2 Vermoënsregtelike Gevolge van Gebruiklike Huwelike

Voor die konstitusionele hof se beslissing in *Gumede v President of the Republic of South Africa*[3] het die vermoënsregtelike gevolge van monogame gebruiklike huwelike wat gesluit is voor die inwerkingtreding van die WEGH verskil van die wat gesluit is na die inwerkingtreding van die WEGH. Die verskil het ontstaan as gevolg van artikel 7(1) en die frase "gesluit na die inwerkingtreding van die wet" in artikel 7(2) van die WEGH. Artikel 7(1) bepaal dat die vermoënsregtelike gevolge van 'n gebruiklike huwelike wat voor die inwerkingtreding van die WEGH gesluit is, onderworpe bly aan die gewoontereg. Artikel 7(2) bepaal dat 'n gebruiklike huwelik wat na die inwerkingtreding van die WEGH gesluit is en waarin 'n gade nie 'n eggenoot in enige ander bestaande gebruiklike huwelik is nie, binne gemeenskap van goed en van wins en verlies is tussen die gades, tensy dit uitdruklik deur die gades in 'n huweliksvoor-waardekontrak uitgesluit is. Die frase "gesluit na die inwerkingtreding van die wet" het beteken dat die reëls met betrekking tot die vermoënsregtelike gevolge van burgerlike huwelike slegs van toepassing

3 2009 3 BCLR 243 (CC).

is op monogame gebruiklike huwelike gesluit na inwerkingtreding van die WEGH.

In die *Gumede*-saak is artikel 7(1) ongrondwetlik bevind sover dit betrekking het op monogame gebruiklike huwelike.[4] Die rede vir die bevinding is dat die artikel onregverdig op grond van geslag[5] diskrimineer en dit nie ingevolge die bepalings van artikel 36 van die Grondwet van die Republiek van Suid-Afrika, 1996 geregverdig kon word nie.[6] Die artikel is met onmiddelike effek geskrap. Artikel 7(1) is tans slegs op poligiene gebruiklike huwelike wat voor die inwerkingtreding van die WEGH gesluit is van toepassing. Die hof het ook die woorde "gesluit na die inwerkingtreding van die wet" in artikel 7(2) ongrondwetlik en ongeldig verklaar en dit geskrap van die artikel. Die hof het beslis dat die bevel van ongrondwetlikheid terugwerkend van toepassing is. Gevolglik is alle monogame gebruiklike huwelike, wat voor die inwerkingtreding van die WEGH gesluit is, vanaf 8 Desember 2008 (die datum van die beslissing) in gemeenskap van goed en wins en verlies. Die uitspraak het egter nie betrekking op gebruiklike huwelike wat voor die inwerkingtreding van die datum deur die dood of egskeiding beëindig is nie.[7]

Artikel 7(2) is nou op alle monogame gebruiklike van toepassing terwyl artikel 7(1) slegs van toepassing is op poligiene gebruiklike huwelike wat voor die inwerkingtreding van die WEGH gesluit is. Gevolglik is die vermoënsregtelike gevolge van monogame gebruiklike huwelike, ongeag wanner dit aangegaan is, presies dieselfde terwyl die vermoënsregtelike gevolge van poligiene huwelike steeds afhang van of die huwelik voor of na die inwerkingtreding van die WEGH gesluit is.

2 1 Monogame Gebruiklike Huwelike

Ingevolge artikel 7(2) word die vermoënsregtelike gevolge van monogame gebruiklike huwelike deur dieselfde reëls bepaal as die van burgerlike huwelike. Met ander woorde, as die partye nie 'n huweliks-voorwaardekontrak opstel nie, is die huwelik binne gemeenskap van goed. Die artikel bevestig dat binne gemeenskap van goed dus die outomatiese en primêre huweliksgoederebedeling is.

Artikel 7(3) van die WEGH bepaal uitdruklik dat hoofstuk III en artikels 18, 19, 20 en 24 van hoofstuk IV van die Wet op Huweliksgoedere[8] van toepassing is op 'n gebruiklike huwelik wat binne gemeenskap van goed is soos beoog in subartikel (2). Hierdie artikels het te doen met die beheer oor die gemeenskaplike boedel, litigasie deur of teen 'n gade wat binne gemeenskap van goed getroud is, vergoeding vir nie-vermoënsregtelike skade wat sodanige gade ontvang of moet betaal, die gade se deliktuele

4 Sien parr 55-56, veral par 56.
5 Sien veral par 34; a 9(3) Grondwet.
6 Sien parr 37-49, veral par 49.
7 Par 52.
8 88 van 1984.

aanspreeklikheid en die statutêre beskermingsmaatreëls wat een gade teen die ander kan gebruik. Dieselfde huwelik "binne gemeenskap van goed" wat geld ten opsigte van 'n burgerlike huwelik, is dus ook op gebruiklike huwelike van toepassing.[9] Die strekking van hierdie bepaling is ook verder dat gemeenskap van goed by wyse van 'n huweliksvoorwaardekontrak uitgesluit kan word, net soos in die geval van die burgerlike huwelik. Beoog die gades om ook die aanwas uit te sluit, sal dit uitdruklik gedoen moet word.[10]

2 2 Poligiene Gebruiklike Huwelike

2 2 1 Huwelike Gesluit Voor die Inwerkingtreding van die Wet

Soos hierbo aangedui het die *Gumede*-beslissing artikel 7(1) ongeldig verklaar sover dit monogame huwelike wat voor inwerkingtreding van die WEGH gesluit is, aanbetref. Gevolglik word die vermoënsregtelike gevolge van poligiene huwelike wat gesluit is voor die inwerkingtreding van die WEGH steeds deur die gewoontereg gereël. So 'n poligiene gebruiklike huwelik is dus nóg binne nóg buite gemeenskap van goedere.[11]

2 2 2 Huwelike Gesluit na die Inwerkingtreding van die Wet

Ingevolge artikel 7(6) moet 'n man wat in 'n gebruiklike huwelik is en wat na die inwerkingtreding van die WEGH 'n verdere gebruiklike huwelik wil sluit eers 'n skriftelike kontrak wat die toekomstige huweliksgoederebedeling van sy huwelike sal reel, deur die hof laat goedkeur.[12] Die hof moet die man se bestaande huwelik se huweliksgoederebedeling beëindig en 'n verdeling van die huweliksgoedere bewerkstellig. Dit wil voorkom of die WEGH daarop dui dat slegs een huweliksgoederebedeling vir alle huwelike moet geld.[13] Voorts blyk dit dat die enigste moontlike opsie buite gemeenskap van goed is.[14]

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9 Himonga "The advancement of Africa's women's rights in the first decade of democracy in South Africa: The reform of the customary law of marriage and succession" 2005 *Acta Juridica* 82 87; Van Schalkwyk *Familiereg* (2010) 346; Van Schalkwyk "Kommentaar op die Wet op Erkenning van Gebruiklike Huwelike 120 van 1998" 2000 *THRHR* 479 481.

10 Vergelyk a 2 hfst 1 Wet op Huweliksgoedere 88 van 1984.

11 Vir 'n bespreking van die gewoonteregtelike gevolge sien Jansen "Gewoonteregtelike familiereg" in *Inleiding tot Regspluralisme* (reds Rautenbach, Bekker & Goolam) (2010) 64; Heaton *South African Family Law* (2010) 210.

12 Daar is nie sekerheid oor die effek van die afwesigheid van so 'n bevel nie. In *Ngwenyama v Mayelane* 2012 4 SA 527 (HHA) het die Hoogste Hof van Appèl beslis dat die afwesigheid van so 'n bevel nie nietigheid van die huwelik tot gevolg het nie. Die Konstitusionele Hof het egter in *Mayelane v Ngwenyama and Minister for Home Affairs* 2013 4 SA 415 (CC) die bevel tersyde gestel en vervang met die bevel dat die daaropvolgende huwelik ongeldig is op grond van die feit dat die eerste vrou nie toestemming, soos vereis deur Tsonga-reg, aan haar man gegee het om die tweede huwelik te sluit nie.

13 Die WEGH gebruik net die enkelvoud. Sien ook Jansen 67.

14 Sien Jansen 67; Heaton 212.

Dit dien vermeld word dat indien 'n man in 'n poligiene huwelik, gesluit voor die inwerkingtreding van die WEGH, met nog 'n vrou trou na die inwerkingtreding van die WEGH sal die gewoonteregtelike huweliksgoederebedeling vervang word met 'n burgerlike huweliksgoederebedeling weens die werking van artikel 7(6).[15]

Dit is duidelik uit bogenoemde bespreking dat die gewoonteregtelike gevolge van die gebruiklike huwelike, met uitsondering van poligiene gebruiklike huwelike gesluit voor inwerkingtreding van die WEGH, vervang is met die gevolge van burgerlike huwelike.[16] Monogame gebruiklike huwelike het presies dieselfde vermoënsregtelike gevolge as burgerlike huwelike.

3 Vrywillige Verandering van die Huweliksgoederebedeling

Die WEGH maak voorsiening vir twee verskillende wyses waarop die huweliksgoederebedeling van 'n gebruiklike huwelik vrywillig verander kan word, afhangende van die betrokke datum van die huweliksluiting.

3 1 Gebruiklike Huwelike Gesluit Voor Inwerkingtreding van die WEGH

Artikel 7(4)(a) en (b) van die WEGH maak voorsiening vir die verandering van die huweliksgoederebedeling wat van toepassing is op 'n gebruiklike huwelik wat voor die inwerkingtreding van die WEGH gesluit is. Die inhoud van hiedie bepaling stem grootliks ooreen met die bepalings van artikel 21(1) van die Wet op Huweliksgoedere. Die gades moet gesamentlik die aansoek na die hof bring. Die artikel maak nie net voorsiening vir die verandering van die vermoënsregtelike gevolge van 'n monogame gebruiklike huwelik nie, maar ook 'n poligiene gebruiklike huwelik. In die geval van 'n poligiene gebruiklike huwelik moet al die gades by die verrigtinge gevoeg word.[17] Die hof sal die aansoek net toestaan indien daar goeie rede vir die voorgestelde verandering bestaan, voldoende skriftelike kennisgewing van die voorgenome verandering aan al die skuldeisers van die gades gegee is vir bedrae van meer as R500 of 'n bedrag wat deur die Minister van Justisie by kennisgewing in die staatskoerant bepaal is en geen ander persoon deur die voorgenome verandering benadeel word nie.[18]

As die hof die aansoek toestaan sal die huweliksgoederebedeling wat op die huwelik van toepassing is, nie langer van toepassing wees nie. Die bepaling stel dit duidelik dat die verandering nie terugwerkend gemaak

15 Bakker "Die Civil Union Act, Draft Domestic Partnership Bill en moontlike deregulering van die huwelik" 2009 *TRW* 1 16 n 115.
16 Bakker 2009 *TRW* 1.
17 Heaton 215, Jansen 65.
18 Jansen 65.

kan word nie. Die partye word dan gemagtig om 'n skriftelike kontrak te sluit waardeur die toekomstige huweliksgoederebedeling van hulle huwelik of huwelike gereël word, onderworpe aan voorwaardes deur hof bepaal. Die hofbevel en gesertifiseerde afskrif van die kontrak moet dan aan elke registrateur van aktes in die gebied waar die hof gesetel is, gestuur word.

3 2 Gebruiklike Huwelike Gesluit na die Inwerkingtreding van die WEGH

Artikel 7(5) van die WEGH bepaal dat gades in 'n monogame gebruiklike huwelik wat gesluit is na die inwerkingtreding van die WEGH by die hof aansoek kan doen ingevolge artikel 21 van die Wet op Huweliksgoedere vir toestemming om die huweliksgoederebedeling te verander. Die WEGH brei dus die bepaling van die Wet op Huweliksgoedere uit na gebruiklike huwelike.[19] Die artikel is beperk tot monogame gebruiklike huwelik wat gesluit is na die inwerkingtreding van die WEGH.[20]

Die gades moet 'n voorgestelde huweliksgoederebedeling in 'n notariële kontrak uiteensit en by die hof indien. As die hof die verandering magtig, moet die goedgekeurde notariële kontrak geregistreer word ingevolge artikel 89 van die Registrasie van Akteswet.[21] Die hof sal slegs die aansoek goedkeur as daar goeie rede vir die voorgestelde verandering bestaan, voldoende skriftelike kennisgewing van die voorgenome verandering aan al die skuldeisers van die gades gegee is en geen ander persoon deur die voorgenome verandering benadeel word nie.[22] Die artikel stel dit egter nie duidelik of die verandering terugwerkend gemaak kan word of nie.[23]

In beide bogenoemde gevalle (bespreek in 3 1 en 3 2) is 'n hoë hof bevel noodsaaklik vir verandering en vir die registrasie van 'n kontrak wat die huweliksgoederebedeling van die huwelik reël in die akteskantoor. Gedagte aan wat hierbo gesê is, geld presies dieselfde vermoënsregtelike gevolge vir monogame gebruiklike huwelike (ongeag wanneer hulle gesluit is) en burgerlike huwelike. Die huwelike is binne gemeenskap van goed tensy dit uitdruklik uitgesluit is in 'n huweliksvoorwaardekontrak. Indien gades hulle huweliksgoederebedeling wil verander na die sluiting van die monogame gebruiklike huwelik (ongeag of dit voor of na inwerkingtreding van die WEGH gesluit is) sal die huweliksgoederebedeling na enige van die gebruiklike huweliksgoederebedelings wat ook op 'n burgerlike huwelik van toepasssing is, verander kan word.[24] Dit blyk uit die WEGH dat partye in 'n poligiene gebruiklike huwelik, gesluit voor die inwerkingtreding van die WEGH, die gewoonteregtelike huweliksgoederebedeling van hul

19 Himonga 2005 *Acta Juridica* 82 88.
20 Heaton 215 n 61.
21 47 van 1937.
22 Heaton 104; Jansen 65.
23 Heaton 104.
24 Van Schalkwyk 2000 *THRHR* 479 490.

huwelik kan verander na een van die huweliksgoederebedelings wat op burgerlike huwelike van toepassing is. Daar word aan die hand gedoen dat min, indien enige huwelike so verander sal word, aangesien dit baie duur sal wees.[25] Dit sal ook vir vroue in 'n poligiene huwelik moeilik wees om hul gades te oorreed om hulle uitsluitlike beheer oor die huweliksgoedere prys te gee.[26]

4 Verandering van Huwelikstelsel en die Vermoënsregtelike Gevolge

Soos reeds aangedui[27] bepaal artikel 10(1) dat 'n man en 'n vrou tussen wie 'n gebruiklike huwelik bestaan, bevoeg is om 'n burgerlike huwelik kragtens die Huwelikswet te sluit, solank as wat geeneen van hulle 'n gade in 'n bestaande huwelik met 'n ander persoon is nie. Indien die man 'n gade in ander gebruiklike huwelike is, moet die ander gebruiklike huwelike van die man eers ontbind word alvorens die oorblywende gebruiklike huwelik tussen hom en sy vrou omskep kan word in 'n burgerlike huwelik. Artikel 10(2) bepaal dan as volg:

> Wanneer 'n huwelik soos beoog in subartikel (1) gesluit is, is die huwelik in gemeenskap van goed en wins en verlies, tensy sodanige gevolge uitdruklik deur die gades in 'n huweliksvoorwaardekontrak wat die huweliksgoederebedeling van hulle huwelik reël, uitgesluit word.

Artikel 10(3) bepaal verder dat as die huwelik binne gemeenskap van goed is, is hoofstuk III en artikels 18, 19, 20 en 24 van hoofstuk IV van die Wet op Huweliksgoedere van toepassing daarop.[28]

Soos reeds aangedui[29] reël die WEGH nie die vermoënsregtelike gevolge by die skeidingsfase van die gades se gebruiklike en burgerlike huwelik behoorlik nie. Die artikel vermeld byvoorbeeld nie wat die posisie is waar 'n monogame gebruiklike huwelik binne gemeenskap van goed is, en die gades die gebruiklike huwelik in 'n burgerlike huwelik met huweliksvoorwaardes wat gemeenskap van goed uitsluit, wil omskep nie. Daar is nie sekerheid oor die vrae of die gemeenskaplike boedel van die gebruiklike huwelik bly voortbestaan of beëindig word nie, en of die gades in bogenoemde voorbeeld 'n huweliksvoorwaardekontrak moet opstel voor die burgerlike huwelik of aan ander vereistes moet voldoen. Die feit dat die WEGH ook swyg oor die effek van die omskepping op die voortbestaan van die gebruiklike huwelik dra ook by tot die onsekerheid.

Die weglating van die effek van die omskepping op die voortbestaan van die gebruiklike huwelik gee aanleiding tot die vraag of die gebruiklike

25 Jansen 65.
26 *Ibid*.
27 Par 1.
28 Sien die bespreking van die verskil in bewoording van die Afrikaanse en Engelse tekste hieronder.
29 Par 1.

huwelik bly voortbestaan met die gevolg dat gades tegelykertyd ingevolge twee regstelsels getroud is, soos wat in *Kumalo v Jones*[30] beslis is. In die saak het die hof, deur gewoontereg toe te pas, beslis dat die gebruiklike huwelik nie deur die burgerlike huwelik beëindig word nie en dat die eiser se aksie, wat ontleen is aan die gebruiklike huwelik, ingelyks nie beïnvloed is nie. Dit impliseer dat 'n dubbele huwelik bestaan en dat "*the union of both parties as man and wife continues uninterruptedly, albeit under two different forms of nuptial union*".[31] Gevolglik in bogenoemde voorbeeld sal binne gemeenskap van goed van toepassing wees op die gebruiklike huwelik en buite gemeenskap van goed op die burgerlike huwelik. Die gemeenskaplike boedel bly voortbestaan en die gades sal ook voor die burgerlike huwelik 'n huweliksvoorwaardekontrak moet opstel. Dit is twyfelagtig of die howe die uitspraak in die toekoms sal volg aangesien die gelyktydige bestaan van twee huwelike 'n onhoudbare situasie skep.[32] Ten eerste verskil die huweliksgoederebedelings van die gebruiklike huwelik en burgerlike huwelik fundamenteel van mekaar en sal dit myns insiens regtens en prakties onmoontlik wees om gelyktydig effek te gee aan beide huweliksgoederebedelings. Ten tweede al is beide huwelike statutêr binne gemeenskap van goed, beteken dit dat indien die huwelik deur egskeiding ontbind wil word, twee egskeidingsbevele verkry sal moet word aangesien twee huwelike bestaan.[33] Dit dien vermeld word dat die gebruiklike huwelik net weens een grond, naamlik die onherstelbare verbrokkeling van die huwelik, deur egskeiding ontbind kan word.[34] Die ander twee egskeidingsgronde wat vir die burgerlike huwelik geld, naamlik geestesongesteldheid[35] en voortdurende bewusteloosheid[36] van die Wet op Egskeiding[37] is nie van toepassing by egskeiding van 'n gebruiklike huwelik nie. Dit kan tot gevolg hê dat twee verskillende gronde vir egskeiding gebring moet word om die huwelik te beëindig. Dit kon beslis nie die wetgewer se bedoeling gewees het nie.[38] In die verslag wat die WEGH voorafgegaan het, het die Suid-Afrikaanse Regshervormingkommissie ook die "*impossibility of enforcing both common- and customary-law regimes simultaneously*" erken.[39]

Heaton[40] doen aan die hand dat as mens artikel 10(2) versigtig lees die bepaling daarvan slegs van toepassing is op datum van die burgerlike huwelik. Sy redeneer soos volg:[41]

30 1982 AHK 111 (S).
31 Par 118. Sien ook Jansen 75.
32 Van Schalkwyk 2000 *THRHR* 479 481; Jansen 75; Heaton 226.
33 Sien ook Van Schalkwyk 2000 *THRHR* 479 481.
34 A 8(1) WEGH.
35 A 5(1) Wet op Egskeiding.
36 A 5(2) Wet op Egskeiding.
37 70 van 1979.
38 Sien ook Van Schalkwyk 2000 *THRHR* 479 481.
39 *Report on Customary Marriages* Projek 90 par 3.2.9.
40 226.
41 *Ibid*.

> Artikel 10(2) skryf die vermoënsregtelike gevolge in 'die huwelik' voor '[w]anneer 'n huwelik soos beoog in subartiklel (1) gesluit is'. Artikel 10(1) reël die bevoegdheid van gades tussen wie 'n gebruiklike huwelik bestaan 'om 'n huwelik kragtens die bepalings van die Huwelikswet ... met mekaar te sluit', dit wil sê hulle bevoegdheid om 'n siviele huwelik aan te gaan.

Gevolglik reël die artikel die vermoënsregtelike gevolge van die burgerlike huwelik. Volgens haar word die vermoënsregtelike gevolge van die gebruiklike huwelik beëindig op die datum waarop die burgerlike huwelik gesluit word, maar die beëindiging is nie terugwerkend nie.[42] Jansen[43] neem dieselfde standpunt in. In die bogenoemde voorbeeld sal binne gemeenskap van goed van toepassing wees tot die datum van die burgerlike huwelik waarna die bepaling van artikel 10(2) sal geld. Al die bates verkry voor die burgerlike huwelik word dus gereël deur die reëls van toepassing op gemeenskap van goed terwyl al die bates verkry vanaf die datum van die burgerlike huwelik, die gades se aparte bates bly, onderhewig aan die aanwasbedeling of nie. Volgens die standpunt sal die partye voor die burgerlike huwelik 'n huweliksvoorwaardekontrak moet opstel waarin die waardes van hulle onderskeie boedels by die aanvang van die burgerlike huwelik verklaar word.

Van Schalkwyk[44] is ook van mening dat artikel 10(2) die vermoënsregtelike gevolge van die burgerlike huwelik reël. Hy verwys egter ook na artikel 10(3) en dui op die verskil in die bewoording van die Afrikaanse en Engelse weergawes van hierdie subartikel. Artikel 10(3) bepaal dat hoofstuk III en artikels 18, 19, 20 en 24 van hoofstuk IV van die Wet op Huweliksgoedere van toepassing is op 'n "*gebruiklike* huwelik wat in gemeenskap van goed is soos beoog in subartikel (2)" (my beklemtoning). Die Engelse bepaling sê dat hoofstuk III en artikels 18, 19, 20 en 24 van hoofstuk IV van die Wet op Huweliksgoedere van toepassing is "*in respect of* any *marriage which is in community of property as contemplated in subsection (2)*" (my beklemtoning). Van Schalkwyk is van mening dat die Engelse teks eerder sin maak en tot gevolg het dat die gebruiklike huwelik beëindig en vervang word deur die burgerlike huwelik. Volgens hom kan die Afrikaanse teks alleen sin maak indien die gebruiklike huwelik nog van krag is. Die resultaat is dat twee huwelike gelyktydig bestaan en dit skep volgens hom 'n onuithoudbare situasie. Hy skryf die verskil in bewoording toe aan onnoukeurige wetsopstelling en dui daarop dat die Afrikaanse subartikel woordeliks ooreenkom met die Afrikaanse subartikel (3) van artikel 7.[45] Dit dui daarop dat die wetgewer die subartikel 3 van artikel 7 net so oorgeneem het sonder om die nodige aanpassings, te maak.

42 *Idem* 227.
43 Jansen 75.
44 2000 *THRHR* 479 493.
45 Sien par 2 1 hierbo.

Volgens Van Schalkwyk[46] is die gevolg van artikel 10(2) en (3) dat die gebruiklike huwelik beëindig en vervang word met die burgerlike huwelik.[47] Hy sê:

> [a]rtikel 10(2) stel dit duidelik dat die normale gevolge van 'n burgerlike huwelik 'n huweliksgoederebedeling binne gemeenskap van goed is, tensy dit deur huweliksvoorwaardes uitgesluit word.[48]

Hy erken die artikel vermeld nie wat die gevolg is waar die gebruiklike huwelik buite gemeenskap van goed is, en hul later die gebruiklike huwelik wil omskep in 'n burgerlike huwelik binne gemeenskap van goed en wins en verlies. Hy is egter van mening dat indien die standpunt wat hy huldig, korrek is, die burgerlike huwelik die gebruiklike huwelik beëindig en vervang en die burgerlike huwelik binne gemeenskap van goed sal wees. Indien Van Schalkwyk se standpunt van toepassing gemaak word op die voorbeeld waar die gebruiklike huwelik binne gemeenskap van goed is en later omskep word in 'n burgerlike huwelik buite gemeenskap van goed sal die partye ook moet toesien dat 'n huweliksvoorwaardekontrak voor die burgerlike huwelik opgestel word.

West[49] verskil van Heaton en Van Schalkwyk. Hy meen, dat aangesien die vermoënsregtelik gevolge van monogame gebruiklike huwelike en burgerlike huwelike presies dieselfde is[50] en die WEGH voorsiening maak vir die verandering van die huweliksgoederebedeling,[51] die vermoënsregtelike gevolge van 'n monogame gebruiklike huwelik nie beëindig word op die datum van die burgerlike huwelik nie, maar dat dit bly voortbestaan en van toepassing is op die daaropvolgende burgerlike huwelik. Volgens hom bly die burgerlike huwelik binne gemeenskap van goed indien die partye 'n monogame gebruiklike huwelik (voor of na die inwerkingtreding van die WEGH) gesluit het sonder dat 'n huweliksvoorwaardekontrak geregistreer is. Die burgerlike huwelik sal alleenlik 'n huwelik buite gemeenskap van goed wees in die volgende twee gevalle:[52]

(i) Waar die partye, na inwerkingtreding van die wet, 'n gebruiklike huwelik gesluit het met 'n huweliksvoorwaardekontrak wat gemeenskap van goed en wins en verlies uitgesluit het of

(ii) Waar die partye, voor inwerkingtreding van die wet, 'n gebruiklike huwelik gesluit het en ingevolge artikel 7(4)[53] die huweliksgoederebedeling verander het na buite gemeenskap van goed met of sonder die aanwasbedeling.

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46 2000 *THRHR* 479 494.
47 Vir dieselfde mening sien Bonthuys & Pieterse "Still unclear: The validity of certain customary marriages" 2000 *THRHR* 616 623.
48 *Idem* 494.
49 "Change of customary marriage system into a civil marriage system" *Praktykskennisgewing 75 van 2012 Aktes-opleiding* 1-4.
50 Sien die bespreking in par 2 1 hierbo.
51 Sien die bespreking in par 3 hierbo.
52 West 4.
53 Sien bespreking in par 3 1 hierbo.

Volgens West kan die partye dus nie 'n huweliksvoorwaardekontrak voor die burgerlike huwelik opstel nie en moet hulle as hulle die huweliksgoederebedeling wil verander by die omskepping van die huwelik 'n aansoek ingevolge artikel 21, soos hierbo bespreek, bring.[54]

Dit blyk uit West se benadering dat die huweliksvorm (gebruiklike of burgerlike huwelik) moontlik nie meer relevant is om die regstelsel (gewoontereg of gemenereg) wat die vermoënsregtelike gevolge by omskepping reël, te bepaal nie. Dit blyk ook dat die vraag oor die effek van die omskepping op die voortbestaan van die gebruiklike huwelik nie meer, sover dit die vermoënsregtelike gevolge aanbetref, relevant is nie. Die volgende besware kan egter teen West se standpunt geopper word: Ten eerste verwys hy slegs na die gevolge waar 'n monogame gebruiklike huwelik omskep word in 'n burgerlike huwelik. Hy vermeld en neem nie die feit dat die gebruiklike huwelik poligienies van aard mag wees en sy eie besonderse probleme mag oplewer in ag nie. 'n Voorbeeld sal dit illustreer. Gestel 'n man het 'n poligiene huwelik met twee vroue gesluit voor inwerkingtreding van WEGH. Ingevolge artikel 7(1) van die WEGH word die vermoënsregtelike gevolge van die poligiene huwelik deur die gewoontereg beheer.[55] Die partye in die poligiene gebruiklike huwelik bring ook nie 'n gesamentlike aansoek vir verandering van die huweliksgoederebedeling ingevolge artikel 7(4) van die WEGH nie.[56] Die eerste gebruiklike huwelik word nou deur egskeiding ontbind. Die man en vrou in die oorblywende huwelik wil hul gebruiklike huwelik omskep in 'n burgerlike huwelik. Die vraag is wat is die vermoënsregtelike gevolge van die oorblywende huwelik? Is die oorblywende huwelik nou 'n monogame huwelik wat outomaties binne gemeenskap van goed is? Na my mening bepaal die WEGH nie dat beëindiging van een gebruiklike huwelik noodwendig beteken die gewoonteregtelike vermoënsregtelike gevolge wat in die oorblywende gebruiklike huwelik geld ook beëindig word nie. Verder, ingevolge artikel 8(4)(b) van die WEGH het die hof wat die individuele huwelik ontbind wat deel vorm van 'n poligiene gebruiklike huwelik slegs die bevoegdheid om die gades se bates te herverdeel as die hof meen dat herverdeling billik is. Die artikel maak nie voorsiening vir 'n bevel wat die toekomstige huweliksgoederebedeling van die oorblywende huwelik reël nie. Indien gewoontereg steeds die vermoënsregtelike gevolge van die oorblywende huwelik reël en die gades die huwelik wil omskep in 'n burgerlike huwelik sal die vermoënsregtelike gevolge van die twee huwelikstelsels fundamenteel verskil. West se benadering kan nie hier toegepas word nie. Die huweliksvorm is in die geval steeds relevant om die regstelsel wat die vermoënsregtelike gevolge reël te bepaal. Heaton en Van Schalkwyk se benadering sal wel toegepas kan word met die gevolg dat die oorblywende huwelik en die gewoonteregtelike gevolge daarvan beëindig word op datum van die burgerlike huwelik. Artikel 10(2) bepaal die vermoënsregtelike gevolge van die burgerlike huwelik. Indien die

54 West 4.
55 Sien bespreking in par 2 2 1 hierbo.
56 Sien bespreking in par 3 1 hierbo.

partye 'n burgerlike huwelik buite gemeenskap van goed wil sluit sal 'n huweliksvoorwaardekontrak voor die burgerlike huwelik opgestel moet word.

Ten tweede kan gevra word wat is dan die doel van artikel 10(2) soos dit tans op die wetboek is? Indien West se standpunt toegepas word sal die artikel min sin maak en waardeloos wees.

Om praktiese en administratiewe probleme te vermy word 'n eenvormige benadering wat die vermoënsregtelike gevolge by omskepping van die gebruiklike huwelik in 'n burgerlike huwelik reël voorgestel. Die benadering van Heaton en Van Schalkwylk is myns insiens die mees praktiese benadering, naamlik dat die gebruiklike huwelik en die vermoënsregtelike gevolge daarvan beëindig word op datum van die burgerlike huwelik en dat artikel 10(2) van die WEGH die vermoënsregtelike gevolge van die burgerlike huwelik reël. Indien die partye hul gebruiklike huwelik wil omskep in 'n burgerlike huwelik wat gemeenskap van goed uitsluit moet 'n huweliksvoorwaardekontrak opgestel word voor die burgerlike huwelik. Dit sal ook meer koste-effektief wees as om 'n hoë hof aansoek ingevolge artikel 21 te bring soos West voorstel.

Dit is ook belangrik om daarop te let dat die wetgewer voorsiening maak vir verskillende huweliksvorme naamlik, 'n burgerlike huwelik wat gereguleer word deur die Huwelikswet en die Wet op Huweliksgoedere, 'n gebruiklike huwelik wat gereguleer word deur die WEGH en 'n burgerlike verbinding ("*civil union*") wat gereguleer word deur die *Civil Union Act*.[57] Solank as die wetgewer onderskei tussen die huweliksvorme moet effek daaraan gegee word. As partye hul gebruiklike huwelik wil omskakel in 'n burgerlike huwelik moet daar aan die vereistes vir sluiting van 'n burgerlike huwelik voldoen word, asook die registrasie daarvan soos uiteengesit in die Huwelikswet. Artikel 10(2) van die WEGH bevestig myns insiens die normale gevolge van die burgerlike huwelik soos in die Wet op Huweliksgoedere uiteengesit naamlik, dat gemeenskap van goed en wins en verlies die outomatiese en primêre huweliksgoederebedeling is en indien partye dit wil uitsluit hulle 'n huweliksvoorwaardekontrak moet opstel voor die burgerlike huwelik.

5 Slot

Dit is duidelik uit voorafgaande bespreking dat omrede die wetgewer nie die vermoënsregtelike gevolge by die skeidingsfase van die gades se gebruiklike en burgerlike huwelik behoorlik reël nie, en ook swyg oor die effek van die omskepping op die gebruiklike huwelik, dit aanleiding gee tot uiteenlopende standpunte oor die vermoënsregtelike gevolge by die verandering van die huwelikstelsel. Veral kommerwekkend is die uiteenlopende standpunte oor wanneer die huweliksvoorwaardekontrak

57 17 van 2006.

opgestel moet word as 'n gebruiklike huwelik binne gemeenskap van goed later omskep word in 'n burgerlike huwelik buite gemeenskap van goed. Die spoedige aandag van die wetgewer word bepleit aangesien notarisse moontlik verkeerdelik huweliksvoorwaardekontrakte opstel of nie opstel nie voor die burgerlike huwelik en so gades onder die verkeerde indruk bring ten opsigte van hulle huweliksgoederebedelings.

Access to justice in the South African social security system: Towards a conceptual approach

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OPSOMMING

Toegang tot Regspleging in die Suid-Afrikaanse Sosiale Sekerheidstelsel: Op Pad na 'n Konseptuele Benadering

Die Grondwet waarborg aan elkeen die reg op toegang tot sosiale sekerheid. Dit verplig die staat verder om redelike wetgewende en ander maatreëls, binne die perke van beskikbare middele, te neem om die toenemende verwesenliking van die reg op toegang tot sosiale sekerheid te bewerkstellig. 'n Stelsel wat deur die staat ingestel is om die reg op toegang tot sosiale sekerheid te verwesenlik, sou onvolledig wees sonder 'n doeltreffende en uitvoerbare stelsel wat gebruikers van die stelsel in staat stel om geskille wat mag ontstaan, te besleg. So 'n stelsel sou gevolg moes gee aan die reg op toegang tot die howe (regspleging). Gevolglik moet 'n sosiale sekerheids-geskilbeslegtingstelsel bestaanbaar wees met die begrip van toegang tot regpleging, soos beoog in die Grondwet. Alhoewel die Grondwet nie toegang tot regspleging omskryf nie, dui dit die benadering wat by die uitleg van die regte in die Handves van Regte gevolg moet word, aan. Hierdie artikel poog om die begrip van toegang tot regspleging te ontwikkel vir sover dit van toepassing is op ontvangers van sosiale sekerheid. Dit beveel 'n breë benadering tot die begrip aan, wat voorsiening maak vir die instelling van 'n geskilbeslegtingstelsel; en die aanname van maatreëls gerig op die bemagtiging van ontvangers.

1 Introduction

The Constitution guarantees everyone the right to have access to social security (including social assistance).[1] It further enjoins the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right to access to social security.[2] According to the International Labour Organisation (ILO), the right to lodge a complaint and the right of appeal in social security matters ensure compliance with and the effective implementation of the rights of insured persons and of due process.[3] Therefore, a system set up

1 S 27(1)(c) Constitution.
2 S 27(2) Constitution.
3 ILO *Social security and the rule of law* (General Survey concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization) (Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution) Report III (Part 1B)) International Labour Conference, 100th Session, 2011 (2011) par 403.

by the state to realise the right of access to social security would be incomplete without an effective and efficient system that enables users of the system to resolve any disputes that might arise. Such a system would give effect to the right of access to courts (justice) which is also protected in the Constitution.[4]

> One of the three components of section 34 is the guarantee of everyone with a dispute to be able to bring the dispute to a court or tribunal to seek redress (right of access to justice).[5] This is to ensure protection against actions by the state and other persons which deny access to courts or other fora.[6] Therefore, a social security dispute resolution system establish to give effect to the right of access to justice in terms of section 34 must be consistent with the concept of access to justice as envisaged by the Constitution.

2 Evolution of the Concept of Access to Justice

The concept of access to justice has evolved over the years from a narrow definition that refers to access to legal services and other state services (access to the courts or tribunals that adjudicate or mediate) to a broader one that includes social justice, economic justice and environmental justice.[7] This broadening of concept was due to the belief that its confinement to the courts or tribunals that adjudicate or mediate was considered to be too narrow a definition, although courts or tribunals that adjudicate or mediate were a very important component of access to justice. It is argued that (in the case of South Africa):

> [j]ustice is not the exclusive preserve of the courts. The Constitution … is designed to achieve justice in the broader sense including social justice and various functionaries including government, independent institutions, the private sector and indeed civil society take on a special responsibility for the achievement of justice and thus access to justice is more, much more tha[n] simply access to courts.[8]

However, social security dispute resolution systems, as required by the right (of access) to social security, are concerned with the resolution of disputes in a fair public hearing by a court or another independent and impartial tribunal or forum. In this instance, the concept thus relates to access to justice in the sense of access to the courts or tribunals that adjudicate or mediate social security disputes.

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4 S 34 Constitution states that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

5 The other components of the right are for courts, tribunals or forums that resolve disputes to be independent and impartial in the execution of their duties; and for disputes to be resolved in a fair and public hearing.

6 Currie & De Waal *The Bill of Rights Handbook* Cape Town (2005) 704.

7 Open Society Foundation for South Africa *Access to Justice Round-Table Discussion* (Parktonian Hotel, Johannesburg 2003-07-22) 5.

8 Kollapen "Access to Justice within the South African context" Keynote Address to *Access to Justice Round-Table Discussion* 5.

The legal dimension of the concept of access to justice developed as an element of the fundamental principle that all people should enjoy equality before the law. It proposes (amongst others) that each person should have effective means of protecting his or her rights or entitlements under the substantive law.[9]

The concept of access to justice is understood in terms of legal rights, processes and procedures. It denotes the situation where state legal systems are organised "to ensure that every person is able to invoke the legal processes for legal redress irrespective of social or economic capacity" and "that every person should receive a just and fair treatment within the legal system."[10] This view of the concept is based on the principle that the legal system should be structured and administered in such a manner that it provides everyone with affordable and timeous access to appropriate institutions and procedures through which to claim and protect their rights. In this case, access to justice refers to "the equity with which those from differing backgrounds are able to gain from the justice delivery system."[11]

Such a view of the concept only focuses on the operation of the dispute resolution system. As an example, a review of access to justice in the United Kingdom by Lord Woolf was only concerned with the civil justice system and the problems it faced.[12] The principles laid down were thus

9 Sackville R "Some thoughts on access to justice" paper presented at the New Zealand Centre for Public Law First Annual Conference on the Primary Functions of Government (Faculty of Law, Victoria University of Wellington, New Zealand: 2003-11-28–29) 1. He further remarks that the concept assumes that access to justice can be achieved by the law and the legal system, and that a just society will be prepared to find the resources required to achieve the goal of access to justice. It also suggests that it is feasible to establish mechanisms that will effectively break down the barriers preventing disadvantaged individuals and groups from utilising the legal system to enforce their rights and protect their interests.

10 Murlidhar *Law, Poverty and Legal Aid: Access to Criminal Justice* (2004) 1.

11 Bowd *Access to justice in Africa: Comparisons between Sierra Leone, Tanzania and Zambia* Institute of Security Studies Policy Brief Nr 13 (Oct 2009) 1.

12 Lord Woolf MR *Access to Justice: Final Report to the Lord Chancellor on the civil justice system in England and Wales* (Jul 1996) 2. The problems identified in civil law system at the time were that it is too expensive in that the costs often exceed the value of the claim; too slow in bringing cases to a conclusion and too unequal: there is a lack of equality between the powerful, wealthy litigant and the under resourced litigant. It is too uncertain: the difficulty of forecasting what litigation will cost and how long it will last induces the fear of the unknown; and it is incomprehensible to many litigants. Above all it is too fragmented in the way it is organised since there is no one with clear overall responsibility for the administration of civil justice; and too adversarial as cases are run by the parties, not by the courts and the rules of court, all too often, are ignored by the parties and not enforced by the court.

aimed at solving these problems and in this way improve access to the system.[13]

The view of the concept by the Law Society of New South Wales (Australia) is also restricted to the functioning of the justice system, placing importance on the system being and being seen to be accessible and affordable, readily easy to understand, fair, efficient and effective.[14] It is contended that this approach

> [c]entralises the issue of overcoming the procedural barriers within the court system itself. Such an approach tends to concentrate on issues of overcoming delays within the court process, efficiency, formality and cost of proceedings, and the organisation, structure and administration of courts and tribunals.[15]

A slightly wider approach to the concept of access to justice was adopted by the Australian Access to Justice Advisory Committee. It considers access to justice to consist of three key elements: equality of access to legal services (ensuring that all persons, regardless of means, have access to high quality legal services or effective dispute resolution mechanisms necessary to protect their rights and interests); national equity (ensuring that all persons enjoy, as nearly as possible, equal access to legal services and to legal service markets that operate consistently within the dictates of competition policy); equality before the law (ensuring that all persons, regardless of race, ethnic origins, gender or disability, are entitled to equal opportunities in such fields as education, employment, use of community facilities and access to services).[16]

It has been remarked that

> [w]hile this concept of access to justice focuses on the justice system, it is confined neither to the courts nor to services associated with courts. It extends to the structure of the legal services market, improved access to sources of information for consumers (in both the public and private sector), and alternatives to the judicial process for the resolution of complaints or disputes.[17]

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13 Woolf 2. The Report stated that the civil justice system should be *just* in the results it delivers; be *fair* in the way it treats litigants; offer appropriate procedures at a reasonable *cost*; deal with cases with reasonable *speed*; be *understandable* to those who use it; be *responsive* to the needs of those who use it; provide as much *certainty* as the nature of particular cases allows; and be *effective* (i.e. adequately resourced and organised).

14 Law Society of New South Wales *Access to Justice – Final Report* (Dec 1998) 11.

15 Schetzer, Mullins & Buonamano "Access to Justice & Legal Needs: A project to identify legal needs, pathways and barriers for disadvantaged people in NSW" (Background Paper) Aug 2002 65.

16 Access to Justice Advisory Committee (Australia) *Access to Justice: An Action Plan* (1994) 7-9.

17 Sackville "Some thoughts on access to justice" paper presented at the New Zealand Centre for Public Law First Annual Conference on the Primary Functions of Government (2003-11-28–29) 2.

An even broader approach to the concept of access to justice sees the law as only one means of achieving justice. It is proposed that

> a variety of other means of doing justice including alternative dispute resolution, participation in social movement politics, democratic representation, and civic education for the respect of rights must proliferate.[18]

This view therefore suggests that justice in the courtroom should give way to justice in many rooms.[19]

The evolution of the definition of the concept of access to justice indicates that earlier approaches to the concept failed to take into account the impact of the social and economic conditions on the ability of claimants to use dispute resolution institutions and processes. Therefore, the concept of access to justice must go beyond the functioning of institutions that resolve disputes and legal processes; and should be defined within the context of the social and economic conditions of prospective users of the justice system. Despite the availability of well-functioning dispute resolution institutions and processes, conditions such as poverty, illiteracy, geographical location, etcetera) have an inevitable impact on the ability to utilise the legal system. Defined as such, any measures adopted to enhance access to justice will include measures aimed at empowering users in using the systems established.

Such an expanded view of the concept of access to justice was recognised as early as the 1960s and 1970s. This recognition engendered the idea that an aggrieved individual's formal right to litigate or defend a claim must be transformed into a right of effective access to the legal system.[20] This implied that affirmative steps had to be taken to give practical content to the law's guarantee of formal equality before the law. It was thus "necessary to overcome, or at least ameliorate, the barriers inhibiting access."[21] This was because it was

> [n]o longer sufficient for the law to provide a framework of freedom in which men, women and children may work out their own destinies: social justice, as our society now understands the term, requires the law to be loaded in favour of the weak and exposed, to provide them with financial and other support, and with access to courts, tribunals and other administrative agencies where their rights can be enforced.[22]

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18 Parker *Just Lawyers: Regulation and Access to Justice* (1999) 56.

19 *Idem* 207. See generally Galanter "Justice in Many Rooms" in *Access to Justice and the Welfare State* (ed Cappelletti) (1981) 147-181.

20 Cappelletti & Garth (eds) *Access to Justice: A World Survey* (Vol. 1) (1978) 6-10.

21 Law and Justice Foundation of New South Wales (Australia) *Access to Justice Roundtable: Proceedings of a Workshop on July 2002* (Apr 2003) 20.

22 Scarman *English Law - The New Dimensions* (1974) 28-29; as quoted in Law and Justice Foundation of New South Wales (Australia) *Access to Justice Roundtable Proceedings of a Workshop July 2002* (April 2003) 20.

Therefore, the modern concept of access to justice must be defined in a manner that also considers the number of ways in which access is denied either through spatial, temporal, linguistic, social or symbolic barriers.[23] The concept is also about empowering the users of a dispute resolution system, by breaking down the barriers that prevent access to the poor and indigent. This view of the concept of access to justice is supported in the South African context, as the Constitution guarantees a right of "access to" justice.

3 The Right of Access to Court (Justice)

The right of access to justices must be interpreted in accordance with approach for the interpretation of the rights in the Bill of Rights. In terms of the Constitution, any interpretation of the rights in the Bill of Rights must promote the values that underlie an open and democratic society based on human dignity, equality and freedom, must consider international law and may consider foreign law.[24] It must also promote the spirit, purport and objects of the Bill of Rights.[25] In the case of *S v Zuma*,[26] the Constitutional Court also laid down the approach to be adopted in the interpretation of a fundamental right in the Constitution. The Court proposed that a right must be interpreted in a manner that seeks to realise the objectives of the right. It held that:

> The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect. In my view, this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concept enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be … a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection.[27]

The character and larger objects of the Bill of Rights and the Constitution can be ascertained by considering its aims. The preamble to the Constitution stipulates what was hoped to be achieved through the enactment of a Constitution as the supreme law of the Republic. The aims reflect the spirit and purpose of the Constitution, and must be taken into consideration when constitutional rights and obligations are to be

23 Baxi P "Access to justice and rule-of- [good] law: the cunning of judicial reform in India" Working Paper Commissioned by the Institute of Human Development, New Delhi on behalf of the UN Commission on the Legal Empowerment of the Poor (May 2007) 4.
24 S 39(1)(a)-(c) Constitution.
25 S 39(2) Constitution.
26 *S v Zuma* 1995 2 SA 642 (CC).
27 *Idem* par 15.

interpreted, and when the rights are to be limited. It has been declared that the preamble should not be dismissed as a mere aspirational and throat-clearing exercise of little interpretive value, as it connects up, reinforces and underlies all of the text that follows. It helps to establish the basic design of the Constitution and to indicate its fundamental purposes.[28]

Some of the aims of the Constitution are to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights and to improve the quality of life of all citizens.[29] Therefore, the Constitution was adopted and a bill of fundamental rights was entrenched not only to avoid a repetition of and to redress South Africa's past injustices, but in order to establish a new society based on mutual respect, equality and freedoms.[30] The Constitution's aims to heal the divisions of the past and to improve the quality of life of all citizens further indicates that it seeks to eradicate social and economic disadvantages (such as inequality, poverty and lack of access to basic human rights). This has been confirmed by the Constitutional Court, when it stated that

> [w]e live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment; inadequate social security and many do not have access to clean water or adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring ... This commitment is also reflected in various provisions of the bill of rights and in particular in sections 26 and 27 which deal with housing, health care, food, water and social security.[31]

In *Government of the Republic of South Africa v Grootboom*,[32] the Constitutional Court held that rights must further be interpreted with regard to the context within which the right was enacted.[33] The Court stated that interpreting a right in its context requires the consideration of two types of context. On the one hand, rights must be understood in their textual setting (which requires a consideration of Chapter 2 and the Constitution as a whole). On the other hand, rights must also be understood in their social and historical context. The context of the right of access to justice will indicate the nature and scope of the concept envisaged by the Constitution.

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28 *S v Mlungu* 1995 3 SA 867 (CC) par 112.
29 Preamble to the Constitution.
30 Olivier *et al* "Constitutional issues" in *Social Security: A Legal Analysis* (ed Olivier) (2003) 52.
31 *Soobramoney v Minister of Health (KwaZulu Natal)* (1997) 12 BCLR 1696 (CC) parr 8-9.
32 *Government of the Republic of South Africa v Grootboom* (2000) 11 BCLR 1169 (CC) parr 21-22.
33 *Ibid*.

3 1 Textual Context of the Right of Access to Justice

The textual setting of the right of access to justice relates to its inclusion in the Bill of Rights together with all other rights. In the case of a social security dispute resolution system, it should be interpreted in consideration of the right of access to social security. In addition, any interpretation must have regard to all the other rights in the Bill that have a bearing on any of these rights. As the Constitutional Court has affirmed, all the rights contained in the Bill of Rights are interrelated and mutually supporting. Together these rights have a significant impact on the dignity of people and their quality of life.[34]

The interrelatedness would require that the right of access to justice must be in place to enable the realisation of all the other rights in the Bill of Rights, especially socio-economic rights. Whilst the right of access to justice is necessary for the realisation of all the other rights in the Constitution;[35] the other rights are also necessary for its realisation. In order for social security claimants to be able to realise their right of access to justice, other rights (especially social economic rights) must be realised. In the opinion of the Constitutional Court

> [t]here can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.[36]

Therefore, the right of access to justice and to social security cannot be seen in isolation. There is a close relationship between them and the other socio-economic rights. These rights must all be read together in the setting of the Constitution as a whole.[37] The concept of access to justice must be interpreted as including elements of other rights necessary for its attainment.

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34 *Idem* par 53.

35 The right of access to courts is considered a "leverage right" through which a person can enforce their other rights. Therefore, it is a constitutional tool for the enforcement of all the other rights in the Bill (See Brickhill & Friedman "Access to courts" in *Constitutional Law of South Africa* (eds Woolman S *et al*) (Original Service 07-06) 59-3). It is fundamental to a viable and dynamic legal system based on justiciable human rights; as the substantive rights in the Bill of Rights would be inaccessible and therefore meaningless to the ordinary person if there was no right of access to courts. The absence of access to courts would make fundamental rights to be elitist; and negate the principle of equality (Devenish *A Commentary on the South African Bill of Rights* (1999) 486).

36 *Grootboom* par 23.

37 Constitutional Court in *Grootboom* (par 23) referring to the relation between the right of access to housing.

The broad conceptualisation of access to justice accords with the constitutional concept of equality. Since the Constitution guarantees the right of access to justice to everyone, the right must be interpreted within the context of the Constitution's equality concept.[38] Equality involves both formal and substantive dimensions. Formal equality entails the prohibition of unjustified discrimination, in the sense that all persons must be treated in the same manner, irrespective of their circumstances. Equality of access to courts in the formal sense ensures that all persons should have equal access to effective dispute resolution mechanisms necessary to protect their rights and interests. Formal equality requires sameness of treatment, implying that the adjudication system should be open to everybody in the same manner, irrespective of their circumstance.

However, formal equality is insufficient because it ignores economic and social differences between individuals or groups of persons. Where a concept of formal equality is applied in relation to access to a social security adjudication framework, accessibility to dispute resolution institutions may be denied to some claimants due to their social and economic conditions (such as poverty, literacy level, geographical location, etcetera). Formal equality is therefore insufficient to ensure everyone is able to get their disputes resolved since social and economic conditions can influence the ability of a person to be able to utilise the adjudication system to a greater or lesser extent.

Substantive equality aims to promote the attainment of equality, by focusing on outcomes. It requires the law to ensure equality of outcome and is prepared to tolerate disparity of treatment to achieve this goal. In this case, the economic and social conditions of individuals or groups of persons are taken into account in determining the attainment of equality of access to justice. Adopting a substantive approach to equality in relation to access to justice for social security claimants is about the law being loaded in favour of the weak and exposed, and providing them with financial and other support.[39] This has the effect of breaking down

38 Section 9 Constitution states as follows:
(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

39 As proposed by Scarman *op cit*.

the barriers that prevent the poor and indigent from accessing the (social security) adjudication system.

3 2 Historical Context of Access to Justice

The history and background to the adoption of the right of access to justice was one where significant obstacles were placed in the way of an unqualified access to courts in the past. These include the prohibition of legal proceedings against the state; the use of "ouster clauses"; and restrictive time limit and notice requirements.

3 2 1 Prohibition of Legal Proceedings Against the State

Before the adoption of the Constitution, the state used various mechanisms to eliminate the jurisdiction of the courts. One such mechanism was an outright prohibition against the bringing of legal proceedings against the state. The Ciskei Definition of State Liability Decree is an example of this. The decree provided that "no legal proceedings may be brought against the state in respect of any claim arising from any procedural irregularity, abuse of power, maladministration, nepotism, corruption or act of negative discrimination on the part of any member or servant of the Government of the Republic of Ciskei which was overthrown on 4 March 1990."[40] Such provisions automatically eliminated access to courts as a litigant could not institute legal proceedings, irrespective of the correctness of the claim. This would therefore be in contravention of the right of access to courts.[41]

3 2 2 Use of "Ouster Clauses"

The right of access to court was also restricted through the use of the so-called "ouster clauses." These clauses, which have the effect of ousting the jurisdictions of courts to review state conduct, ensured that apartheid-era state conduct was beyond judicial scrutiny.[42] Access to court was further restricted by interfering in the independence of the judiciary. This was achieved by appointing executive-minded judges into the judiciary and making political appointments of judges.[43]

These made it difficult for aggrieved persons to seek redress. Courts were also prohibited from dispensing justice to all independently and impartially.[44] The right of access to justice must therefore be interpreted with regards to the historical denial of the right and the Constitution's aim to prevent the recurrence of this.

40 S 2(1) State Liability Decree 34 of 1990 (Ck).
41 *Ntenteni v Chairman, Ciskei Council of State* 1993 4 SA 546 (Ck).
42 See Brickhill & Friedman 59-1, 59-2.
43 *Idem* 59-2.
44 Devenish 485.

3 2 3 Time Limit and Notice Requirements

Restrictive time limit and notice requirements pose barriers to access to justice. Time limits and/or notice periods for the institution of a case are stipulated in various statutes.[45] Time limits and notice periods are necessary in a dispute resolution system as they bring certainty and stability to social and legal affairs and maintain the quality of adjudication (which is central to the rule of law).[46] However, where a statute imposes a time limit and/or notice period requirement, an aggrieved person is barred from bringing the case to court after the expiry of the time limit. The negative effect of time limits and notice requirements on the right of access to court has been described in many cases. Such requirements have been described as "conditions which clog the ordinary right of an aggrieved person to seek the assistance of a court of law";[47] as "a very drastic provision" and "a very serious infringement of the rights of individuals".[48] Such requirements have the effect of "hampering as it does the ordinary rights of an aggrieved person to seek the assistance of the courts".[49]

In *Brümmer v Minister for Social Development and Others*, the Constitutional Court held that time-bars limit the right to seek judicial redress. However, they serve an important purpose in that they prevent inordinate delays which may be detrimental to the interests of justice. But not all time limits are consistent with the Constitution. There is no hard-and-fast rule for determining the degree of limitation that is consistent with the Constitution. The enquiry turns wholly on estimations of degree. Whether a time-bar provision is consistent with the right of access to court depends upon the availability of the opportunity to exercise the right to judicial redress. To pass constitutional muster, a time-bar provision must afford a potential litigant an adequate and fair opportunity to seek judicial redress for a wrong allegedly committed. It must allow sufficient or adequate time between the cause of action coming to the knowledge of the claimant and the time during which litigation may be launched. And finally, the existence of the power to condone non-compliance with the time-bar is not necessarily decisive.[50]

In evaluating the appropriateness of a time bar or notice requirement, the courts have held that what counts is the sufficiency or insufficiency, the adequacy or inadequacy, of the room which the time bar and notice provision leaves open in the beginning for the exercise of the right. The appropriateness of the requirement depends upon the availability of an initial opportunity to exercise the right that amounts, in all the

45 See for example the Road Accident Fund Act 56 of 1996.
46 See *Road Accident Fund v Mdeyide* 2011 1 BCLR 1 (CC) par 8.
47 See *Benning v Union Government (Minister of Finance)* 1914 AD 180 185.
48 *Gibbons v Cape Divisional Council* 1928 CPD 198 200.
49 See *Avex Air (Pty) Ltd v Borough of Vryheid* 1973 1 SA 617 (A) 621F-G; *Administrator, Transvaal, and Others v Traub and Others* 1989 4 SA 731 (A) 764E.
50 See *Brümmer v Minister for Social Development* 2009 6 SA 323 (CC) par 51.

circumstances characterising the class of case in question, to a real and fair one.[51] Therefore, adequate time must be given to institute a claim and the practical possibility and genuine opportunity to do so is important.

3 3 Social Context of Access to Justice

The social context of the right relates to the position of the persons or categories of persons who are (to be) protected by the right. Since a social security dispute resolution system gives effect to the right of access to justice of social security claimants, their social (and economic) context must be taken into account in interpreting the nature and scope of the right. The socio-economic context reflective of social security claimants in particular (and the poor in general) has been explained in numerous cases. In *Soobramoney v Minister of Health (KwaZulu Natal)*,[52] the court highlighted the socio-economic and historical conditions prevailing in South Africa when it remarked that

> [w]e live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment; inadequate social security and many do not have access to clean water or adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.[53]

The socio-economic and historical conditions of such (categories of) persons affect their ability to bring a case before a court or another independent and impartial tribunal or forum established to resolve disputes (access to justice). In relation to the socio-economic and historical context of persons in need of access to courts in general, it was remarked that South Africa is

> [a] land where poverty and illiteracy abound and differences of culture and language are pronounced, where such conditions isolate the people whom they handicap from the mainstream of the law, where most persons who have been injured are either unaware of or poorly informed about their legal rights and what they should do in order to enforce these, and where access to the professional advice and assistance that they need so sorely is often difficult for financial or geographical reasons.[54]

A broad approach to the concept of access to justice goes beyond access to the institutions that resolve disputes and to legal services. The socio-economic condition of claimants (especially poverty) has an inevitable impact on the ability of the poor and the marginalised to utilise the legal

51 See *Mohlomi v Minister of Defence* 1997 1 SA 124 (CC) par 12.
52 *Soobramoney v Minister of Health (KwaZulu Natal)* (1997) 12 BCLR 1696 (CC) par 8.
53 *Ibid*.
54 Didcott J in *Mohlomi v Minister of Defence* 1997 1 SA 124 (CC) par 14.

system. As Baxi proposes, the modern concept of access to justice must be defined in a manner that also considers the number of ways in which such access is denied.[55] It has been remarked that although traditionally access to justice is understood in terms of legal rights, processes and procedure, (often shadowing the socio-economic element, particularly that of poverty), the link between justice and poverty is the inevitable impact on poor and marginalised communities, the majority of whom are women, who are "deprived of choices, opportunities, and access to basic resources".[56] Therefore, the interpretation of the concept should be one which ensures the breaking down of barriers that prevent the poor and indigent from accessing the social security adjudication system.

4 Some Barriers Against Access to Justice

Some of the barriers against access to justice for social security claimants include poverty; geographic location of adjudication institutions; physical inaccessibility of adjudication institutions; lack of knowledge of rights (also due to illiteracy); inappropriate dispute resolution institutions and mechanisms; procedural hurdles; and delay in the resolution of disputes.

4 1 Poverty

Poverty poses a significant challenge to access to justice. The principal barrier posed by poverty is the inability to meet the costs of representation (also due the high cost of legal services and challenges in receiving legal assistance from Legal Aid South Africa). Recent studies indicate that the average South African household would need to save a week's income in order to afford a one-hour consultation with an average attorney. Even worse, for black households (who are mostly poorer than the average) the barrier to access to court is even higher.[57] Where the dispute resolution system fails to take such a barrier into consideration (for example, by simplifying the mechanisms and procedures of the system and reducing or eliminating issues such as rules for the initiation of court proceedings, the payment of court fees and the need for legal representation) there would be an even stronger argument for the availability of state-provided legal assistance for such cases.

4 2 Geographic Location of Adjudication Institutions

One of the factors restricting the right of access to courts in South Africa is the long distances that many people have to travel in order to access the courts and related services. The courts are not located in places that can be easily accessed by aggrieved social security applicants/ beneficiaries. Only the magistrates' courts are widely spread throughout the country (also in rural and township areas). High courts (which

55 Baxi 4.
56 United Nations Development Programme *Access to Justice* March 2004.
57 AfriMAP & Open Society Foundation of South Africa "South Africa: Justice sector and the rule of law (A discussion paper)" (2005) 29.

adjudicate most constitutional rights cases) are largely limited to urban areas, making them less accessible to the users of these fora.[58] The Department of Justice and Constitutional Development has taken cognisance of the impact of geography on access to courts, as it identified the establishment of suitable courts in rural and township areas as a priority as far back as 1999.[59]

4 3 Physical Inaccessibility of Adjudication Institutions

An aspect of access to justice is the ability to walk to and reach the building where justice is administered. However, courts are also not physically accessible to some litigants, such persons with the disabilities.[60] A social security adjudication system must ensure that court structures are accessible to all users, including persons with disabilities.

4 4 Lack of Knowledge of Rights (also due to Illiteracy)

For a person to be able to approach a court or tribunal to seek redress, he or she must have knowledge of his or her rights. Therefore, knowledge of rights is a prerequisite to access to justice. However, many South Africans have little knowledge of the law and human rights.[61] An inherent aspect of the positive obligations on the state in relation to constitutional rights is the active education of citizens (in this case social security applicants/beneficiaries) about their right of access to courts and to social security.[62] Some social security statutes recognise the need for education on rights. As an example, the Social Assistance Act requires the South African Social Security Agency (SASSA) to publish and distribute to beneficiaries and potential beneficiaries, brochures in all official languages of the Republic setting out in understandable language the rights, duties, obligations, procedures and mechanisms of the Act, as well as contact details of the Agency or anyone acting on its behalf.[63]

4 5 Inappropriate Dispute Resolution Institutions and Mechanisms.

At present, disputes relating to entitlement and access to social security (both social assistance and social insurance) in South Africa are resolved mainly by resort to litigation in the High Court. Many of the barriers against access to justice (especially issues of cost, delay and travel

58 *Idem* (2005) 109.
59 *Ibid*.
60 *Esthé Muller v DoJCD and Department of Public Works* (Equality Court, Germiston Magistrates' Court 01/03).
61 Mubangizi "Protection of Human Rights in South Africa: Public Awareness and Perceptions" 2004 *JJS* 62.
62 Heywood & Hassim "Remedying the maladies of 'lesser men or women': The personal, political and constitutional imperatives for improved access to justice" 2008 *SAJHR* 263 278.
63 S 2(4) Social Assistance Act 13 of 2004.

distances) relate to the use of litigation in the High Court to resolve social security disputes. This implies that the absence of alternative avenues for dispute resolution in South African social security has an adverse impact on the right of access to social security (their right of access to justice is limited).

4 6 Procedural Hurdles

Access to courts involves a process of enabling and empowering those not enjoying rights to claim those rights; which includes eliminating any procedural hurdles that prevent the free exercise of the right.[64] Therefore, even where a social security adjudication system it is accessible in other aspects, it will still be ineffective if (potential) users are restricted from the system due to insurmountable procedural hurdles. Procedural rules give content to substantive rights, and must enable the effective realisation of the rights. It has been declared that

> [a] substantive right on paper is of no use unless it is harnessed to an effective procedural remedy which allows the litigant to actually bring the case before the court in good time and without excessive cost. Legal gateways are important determinants of what kind of justice can be achieved. ... Legal procedures not only determine whether the poor can get access to legal remedies, and how quickly and effective such remedies will be, they can also influence the way that a particular dispute is construed by the law, and the kinds of outcomes which are possible.[65]

4 7 Delay in the Resolution of Disputes

A major problem facing social security and other adjudication in the South African context is the length of time it takes for disputes to be resolved. Recent research points out that it takes a long time for a civil case to be heard, particularly in the busier courts. As an example, in the Cape High Court the ordinary court roll for civil matters is full for up to a year.[66] It is clear that access to justice only becomes complete when one's dispute is settled speedily.[67] It was held in the *Mohlomi* case that

> inordinate delays in litigating damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs.[68]

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64 Vawda "Access to justice: From legal representation to the promotion of equality and social justice – Addressing the legal isolation of the poor" 2005 *Obiter* 234 239-240.

65 Anderson "Access to justice and legal process: making legal institutions responsive to poor people in LDCs" (IDS Working Paper 178) Institute of Development Studies (Feb 2003) 15.

66 AfriMAP 118.

67 African National Congress "Access to justice in a Democratic South Africa" (Lecture by ANC President Jacob Zuma to the Platform for Public Deliberations) University of Johannesburg 2008-09-09.

68 *Mohlomi v Minister of Defence* 1997 1 SA 124 (CC) par 11.

Delay in finalising adjudication impairs social security litigants' rights of access to courts. It further compounds the problems they face, since it is not only their right of access to courts that is infringed, but also their right of access to social security.

5 Conclusions

Despite the argument that the concept of access to justice has evolved over the years from a narrow definition (that refers to access to legal services and other state services) to a broader one (which includes social justice, economic justice and environmental justice), a reading of the right protected in section 34 of the Constitution (the resolution of disputes in a fair public hearing by a court or another independent and impartial tribunal or forum) suggests access to justice in the sense of access to the courts or tribunals that adjudicate or mediate disputes. The concept of access to justice is thus to be understood in terms of legal rights, processes and procedures.

However, developments on the concept of access to justice envisage the concept to be more than the establishment of a legal system for the resolution of disputes. It must be defined in a manner that also considers the number of ways in which access is denied. Therefore, the concept includes the empowerment of users of a dispute resolution system, by breaking down the barriers that prevent access to the poor and indigent.

This is the approach adopted by the Constitution, since it guarantees everyone a right of "access to" justice. The constitutional notion of equality; and the interrelated and mutually supporting nature of the rights in the Bill of Rights dictate the need for a broad concept of access to justice. The idea of substantive equality requires that for the poor and indigent to have access to justice, the law to be loaded in favour of the weak and exposed, to provide them with financial and other support. In addition, the interrelated and mutually supporting nature of the rights in the Bill of Rights requires that in realising the right of access to justice, other elements that form the basis of other rights (such as socio-economic rights) must be provided.

The historical context of access to justice (characterised by the placing of significant obstacles in the way of an unqualified access to courts) and the social context of social security claimants further support the need for the modern concept of access to justice to be defined in a manner that also considers the number of ways in which access is denied (either through spatial, temporal, linguistic, social or symbolic barriers). Therefore, it may be true that the right of access to justice in section 34 of the Constitution (understood in terms of legal rights, processes and procedures) is a broad one that includes social justice, economic justice and environmental justice.

A contractual perspective on the strict liability principle in the World Anti-Doping Code*

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OPSOMMING

'n Kontraktuele Perspektief op die Beginsel van Strenge Aanspreeklikheid in die *World Anti-Doping Code*

Die beginsel van strenge aanspreeklikheid in die *World Anti-doping Code* bepaal dat indien die atleet se bloed of urinemonster 'n positiewe resultaat vir verbode middels toon, die atleet outomaties skuldig is aan 'n oortreding ingevolge die kode. Die skuldigbevinding staan ongeag of die atleet op 'n skuldige of onskludige wyse gehandel het. Die afwesigheid van skuld sal slegs 'n rol speel by die bepaling van die sanksie wat die atleet ontvang. Hierdie beginsel is direk uit die privaatreg oorgeplant om toepassing te vind in dissiplinêre verhore wat handel oor die gebruik van verbode middels in sport. Sommige skrywers meen dat privaatregtelike beginsels nie 'n plek in dié soort tugverhore behoort te hê nie. Hulle verloor egter uit die oog dat die verhouding tussen atleet en sportligaam 'n kontraktuele verhouding is en dat die atleet kontraktueel gebonde is om nie in stryd met die kode te handel nie. Dus, indien die atleet 'n bepaling van die kode oortree, stel dit kontrakbreuk daar in die vorm van positiewe wanprestasie. In die geval van positiewe wanprestasie is dit nie nodig vir die eiser om te bewys dat die verweerder skuld gehad het toe kontrakbreuk plaasgevind het nie. Geen verontskuldiging kan die kontrakbreuk tot niet maak nie. Die afwesigheid van skuld, al dan nie, speel slegs 'n rol by die bepaling van die mate waartoe die verweerder aanspreeklik gehou kan word. Daarom word aangevoer dat die beginsel van strenge aanspreeklikheid in tugverhore rakende die gebruik van verbode middels deur atlete slegs 'n toepassing is van die algemene beginsels van die kontraktereg.

1 Introduction

The strict liability principle has been applied in doping disciplinary rules for decades. This principle is specifically applied where an athlete's blood or urine sample has returned a positive test result for the presence of substances which are prohibited in sport. In various cases the Court of Arbitration for Sport (CAS) has considered the strict liability principle

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from a private law perspective and in one such case, *Bernhard v ITU*,[1] the CAS indicated that "[t]his is … a faithful transposition of the civil (tort) law concept of strict liability".

It has, however, been suggested that private law principles should not be applied when athletes are accused of having committed anti-doping rules violations, especially in respect of allegations where the strict liability principle finds application.[2] Soek, although admitting that the field of disciplinary doping law is surrounded by private law, specifically asserts that the law of contract should have no influence in the sphere of doping disciplinary law and that solutions offered by the private law will always "fall wide off the mark".[3]

It is widely accepted that the relationships between athletes and sports governing bodies are of a contractual nature[4] and the World Anti-Doping Code[5] (the Code) itself acknowledges the contractual relationship between athlete and organisation.[6] In this article it will be argued that due to the fact that athletes are contractually bound not to commit anti-doping offences, the influence of the law of contract cannot be ignored and that the law of contract can provide meaningful insight into the application of the strict liability principle.

2 The Strict Liability Principle in the World Anti-Doping Code[7]

The strict liability principle is one of the cornerstones of anti-doping policies in sport.[8] This principle is applied when an athlete has been found guilty of using a prohibited substance or prohibited method. An athlete's guilt in this regard can be established by either the fact that the athlete has returned a blood or urine sample which has tested positive for

1 CAS 98/222, award of 1999-08-09; see also Soek *The strict liability principle and the human rights of athletes in doping cases* (2006) 221.
2 Soek 220.
3 Soek 227. According to Soek, the principles of criminal law should have the upper hand in these type of disciplinary actions and the application of private law concepts may give rise to a misconception.
4 Beloff *et al Sports law* (2012) 35-43; Cloete (ed) *Introduction to sports law in South Africa* (2005) 17.
5 Unless stated otherwise, all references to the Code are to the revised 2009 Code. A new revised Code was adopted at the 2013 WADA Congress in Johannesburg and will come into operation on 2015-01-01.
6 Introduction to the Code 11.
7 The Codes of 2003 and 2009 both adopt the principle of strict liability, with the only difference being slightly more flexibility in the reduction of sanctions in the 2009 Code. Also see Blumenthal "The punishment of all athletes: The need for a new world anti-doping code in sports" 2010 *Int'l Bus & L* 215 f 113 on the difference between the strict liability principle in the 2003 Code and the 2009 Code.
8 Gray "Doping control: The national governing body perspective" in *Drugs and doping in sport: socio-legal perspectives* (ed O'Leary) (2001) 14. See also Amos "Inadvertent doping and the WADA Code" 2007 *Bond LR* 2.

a prohibited substance,[9] or other evidence which proves that the athlete has used such substance or a prohibited method.[10] It is not necessary for the sports governing body to show intent, fault, negligence or knowing use on the athlete's part in order to establish an anti-doping rule violation under article 2.1 or 2.2 of the Code.[11] Both of these articles provide that it is each athlete's personal duty to ensure that no prohibited substance enters his or her body and athletes are responsible for any prohibited substance or its metabolites or markers found to be present in their samples.[12] When an athlete is accused under any one or both of these articles, the burden of proof is on the sports governing body to prove the presence of the substance in the athlete's sample or the use or attempted use by the athlete of a prohibited substance or method.[13] The standard of proof required is that the alleged violation must be established to the "comfortable satisfaction" of the tribunal bearing in mind the "seriousness of the allegation which is made".[14] The operation of the strict liability principle entails that once the sports governing body has discharged its burden of proof in respect of the offences in article 2.1 and 2.2, the athlete is automatically found to be guilty of an anti-doping rule violation. The athlete cannot escape a guilty finding on the basis that he or she had acted without intention or negligence.[15]

If the athlete is found guilty as a result of an in-competition test in an individual sport, the athlete is automatically disqualified and forfeits any

9 Art 2.1 Code.

10 Art 2.2 Code. Such other evidence include, but is not limited to, admissions made by the athlete and evaluations of the athlete's biological passport. See David *A guide to the World Anti-Doping Code: The fight for the spirit of sport* (2013) 172.

11 Arts 2.1, 2.2 Code. In *Baxter v International Olympic Committee* CAS 2002/A/376, award of 20021015, a British skier with a documented history of nasal congestion was stripped of his bronze medal which he won at the 2002 Winter Olympics in Salt Lake City. The athlete tested positive for a banned substance which he had ingested due to using over-the-counter medication which he purchased in the United States of America. The athlete used the same product in the United Kingdom, and was unaware that the product had a different formulation when sold in the United States of America. Although the panel found that the athlete did not ingest the prohibited substance intentionally, he was nevertheless found guilty of the doping offense and disqualified. See also *Raducan v International Olympic Committee* CAS 2000/011, award of 2000-09-28.

12 Art 21.1.3 Code also emphasises the athlete's responsibility for what they ingest and use. See also Anderson *Modern Sports Law* (2010) 123 in this regard.

13 In respect of art 2.1 Code it is sufficient to present a positive sample test, but in respect of art 2.2 Code the sports governing body may use evidence such as admissions or the evaluation of an athlete's biological passport.

14 In art 3.1 Code this standard is expressed to be higher than the standard of mere balance of probability which applies in civil proceedings, but less than the general criminal standard of proof, namely, proof beyond a reasonable doubt. The standard of proof is comparable to the standard which is applied, in most countries, to cases involving professional misconduct.

15 The most common defence athletes attempt to use is that of "inadvertent doping". This simply means that they had ingested the substance without knowing it and without intending to do so.

medals, points and prizes won in that event.[16] Furthermore, if the athlete has participated in other events at the same competition, subsequent to the event for which he or she returned a positive test,[17] the results obtained in these events will also be invalidated and the athlete will also lose medals, points and prizes for those events.[18] For a first violation in respect of the offences described in article 2.1 and 2.2 of the Code, a two-year ban must be imposed, followed by a ban for life for further violations.[19] However, the imposition of these penalties is not absolute and there is some discretion to have the ban reduced or completely eliminated.

If the athlete has tested positive for a specified substance[20] and can establish how this specified substance entered his or her body and that such a substance was not intended to enhance his or her sports performance, the two-year period of ineligibility can be eliminated in its entirety or otherwise reduced.[21] To justify any elimination or reduction under this article, the athlete must, on a balance of probabilities, show both that the substance in question is a "specified" substance and establish how that substance entered his or her body. However, even if an athlete succeeds in proving these two elements, article 10.4 further provides that the athlete's degree of fault should correlate with the assessment of the reduction, if any, in the period of ineligibility. It appears therefore that only in the most exceptional of cases will the two-year period of ineligibility be eliminated in its entirety.[22]

In the case of a positive test for a non-specified substance, if an athlete establishes in a particular case that he or she bears "no fault or negligence", the otherwise applicable period of ineligibility may be eliminated.[23] In order to avail him or her of this "absolute" defence, the athlete would, on the balance of probabilities, have to provide proof establishing how, notwithstanding the utmost caution, the prohibited

16 Art 9 Code. Art 9 is unaffected by the provisions of art 10 Code, and cannot be removed or mitigated if the athlete establishes the basis for removing or reducing the sanction.

17 Eg FINA swimming championships or IAAF athletics championship where athletes participate in multiple events.

18 Art 10.1 Code.

19 Art 10.2 Code.

20 The WADA recognises certain substances as specified substances because there is a greater likelihood that a credible explanation can be provided for the ingestion of these substances. Specified substances are not necessarily less serious agents for the purpose of doping than other prohibited substances, and nor do they relieve athletes of the strict liability rule that makes them responsible for all substances that enter his or her body. However, tribunals are allowed more flexibility when considering sanctions for the use of specified substances. For more information on specified substances see the Prohibited List at http://www.wada-ama.org/en/World-Anti-Doping-Program/Sports-and-Anti-Doping-Organizations/International-Standards/Prohibited-List/ (accessed 2013-10-28).

21 Art 10.4 Code.

22 Anderson 136.

23 Art 10.5.1 Code.

substance entered his or her system through no fault or negligence on the part of the athlete. Article 10.5.1 of the Code is an extremely difficult defence to prove and has only been applied under exceptional circumstances.[24] Furthermore, if the athlete can establish that there was no significant fault or negligence[25] on his or her part in the use of these substances, the ban may be reduced, but the reduced ban may not be less than half that which would otherwise have applied.[26] In order to avail himself or herself of this "partial" defence, the athlete would, on the balance of probabilities, have to provide proof establishing how the substance entered their system through no significant fault or negligence on their part. Article 10.5.2 is also a difficult defence to prove and has very rarely been satisfied.[27]

3 Criticism Against Strict Liability Principle

The strict liability principle has always been the subject of much criticism. Prior to the adoption of the Code,[28] the principle was mainly criticised for the fact that the application thereof could lead to unfairness in cases of inadvertent doping or where the athlete had no intention to enhance his or her performance. Critics argued that the approach did not allow for a number of circumstances that might result in a positive test but might not have entailed fault on the part of the athlete. Examples of such circumstances include: Acting on the medical advice of the team doctor;[29] a prescription error by a medical adviser; a dispensing error by a pharmacist; an honest and reasonable belief that the substance was not prohibited;[30] or even the malicious act of a third party who might have "spiked" the drink of the athlete.[31] The Court of Arbitration for Sport has itself recognised that the application of the strict liability principle does

24 Anderson 136-137. For an example of a case where this defence was successful see *P v IIHF* CAS 2005/A/990, award of 2005-08-24.

25 No significant fault or negligence can be defined to mean that, while fault is present, it is insignificant when viewed in the totality of circumstances – Le Roux "The World Anti-Doping Code: A South African perspective" 2004 *SA J Research in Sport, Phys Ed & Rec* 65 71-72.

26 Art 10.5.2 Code.

27 Anderson 137. For instances where athletes have attempted to use this defence see *V v FINA* CAS 2003/A/493, award of 2004-03-22; *IRB v Keyter* CAS 2006/A/106, award of 2006-10-13; *WADA v FAW and James* CAS 2007/A1364, award of 2007-12-21.

28 Prior to the Code, the strict liability was applied in a very absolutist fashion – if an athlete was found to have committed an anti-doping offence, such athlete was automatically suspended for a minimum of two years. In essence, the same rule applies in the 2003 and 2009 Codes, however now an athlete can use the defence of no fault or no significant fault to either eliminate or reduce the applicable sentence.

29 *Raducan v IOC* CAS 2000/011, award of 2000-10-28. In this case, a Romanian gymnast had to forfeit her gold medal at the Sydney Olympics after following the team physician's advice to take a headache tablet which contained a prohibited substance.

30 *Baxter v IOC* CAS 2002/A/376, award of 2002-10-15.

31 Anderson 125.

not always appear to be fair. The panel in *Mariano Puerta v ITF*[32] stated that

> [t]he problem with a 'one size fits all' solution is that there are inevitably going to be instances in which one size does not fit all ... It is argued that this is the inevitable result of the need to wage a remorseless war against doping in sport, and that in any war there will be the occasional innocent victim.

Further criticism relates to the justification offered for the application of the strict liability principle.[33] In the matter of *USA Shooting & Quigley v UIT*[34] the panel remarked that a requirement of intent would invite costly litigation that may well cripple federations in their fight against doping.[35] It has subsequently been suggested that if the strict liability principle was done away with, federations would have to prove the guilt of the athlete and that federations would be overwhelmed by this heavy burden of proof.[36] The World Anti-Doping Agency[37] (WADA) has been criticised for retaining the strict liability principle in the Code for fear that its fight against doping would be ineffective, at the expense of occasional innocent victims.

Even though the original 2003 Code and the revised 2007 Code now provides for the possibility of sanctions being eliminated or reduced, opponents of the strict liability principle have not been appeased and are still holding fast to their arguments. Additionally, the actual "guilty" finding, rather than the eventual sanction, in instances where the athlete may not have been at fault for the doping infraction have also come under fire. It is now argued that athletes suffer reputational, financial and psychological damage because the athlete is labelled as an offender or a cheat for the rest of his or her life, regardless of whether he or she has received the standard sanction, a reduced sanction or no sanction at all.[38] Blumenthal[39] is highly critical of the strict liability principle and argues that it has unjustifiably destroyed the careers of many athletes. According to him there is a power imbalance between the WADA and athletes and that the Code and its components were created unilaterally by the WADA in favour of the WADA. He suggests that the Code should be rid of the strict liability principle and the facts of each case should be

32 *Mariano Puerta v ITF* CAS 2006/A/1025, award of 2006-07-12.
33 Anderson 125.
34 CAS 94/129, award of 1995-05-23.
35 *USA Shooting & Quigley v UIT* CAS 94/129, award of 1995-05-23, par 15.
36 Anderson 125.
37 WADA was established in February 1999 under the auspices of the International Olympic Committee. WADA operates as an independent private law organisation whose task it is to produce an anti-doping code with the aim of harmonising anti-doping regulations globally and enforcing these regulations to ensure that all athletes are treated equally by sports bodies and governments regarding anti-doping issues – Trainor "The 2009 WADA Code: A more proportionate deal for athletes? 2010 *ESLJ* par 4; see also the WADA website at http://www.wada-ama.org/en/About-WADA/ (accessed 2013-09-28).
38 Anderson 125. See also Blumenthal 2010 *Int'l Bus & L* 201 -229.
39 Blumenthal 2010 *Int'l Bus & L* 224.

considered without a negative presumption against the athlete. Instead, he suggests that pharmaceutical experts should testify in each case to help clarify the probability that a doping violation was committed with the intent to enhance the athlete's performance.[40]

Regardless of the criticism against it, the strict liability approach has been consistently upheld in arbitral awards delivered by the CAS. The use of the strict liability principle has been justified on two grounds. First, the principle is said to operate to the benefit of all "clean" athletes or as the comment to article 9 of the Code states simply

> [w]hen an athlete wins a gold medal with a prohibited substance in his or her system, that is unfair to the other athletes in that competition regardless of whether the gold medallist was at fault in any way. Only a 'clean' athlete should be allowed to benefit from his or her competitive results.[41]

The panel of the CAS in the matter of *USA Shooting & Quigley v UIT* remarked that "it is a laudable policy objective not to repair an accidental unfairness to the whole body of competitors". According to the panel, this is what would happen if banned performance enhancing substances were tolerated when absorbed inadvertently and moreover, it is likely that even intentional abuse would in many cases escape sanction for lack of proof of guilty intent.[42]

Secondly, it has been argued that the application of the strict liability principle is counterbalanced by the fact that an athlete has the opportunity to avoid or reduce the applicable sanction. An athlete can do so if they can demonstrate that, pursuant to article 10 of the Code, the substance in question was not taken with the intention to enhance performance or was ingested negligently or through no fault or no significant fault of that athlete.[43]

Therefore, it has been said that the revised approach to the strict liability principle in the Code achieves a satisfactory balance between the attempt by the WADA to effectively regulate the fight against doping by harmonising the surrounding regulatory and sanctioning framework, and the athletes' legitimate expectation of both a fair process and proportionality in the outcome.[44] Apart from that fact that the strict liability principle appears to be the fairest way to handle the anti-doping offences described in article 2.1 and 2.2 of the Code, it will be argued below that the application of the strict liability principle is also in line with general contractual principles relating to breach of contract.

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40 Blumenthal 2010 *Int'l Bus & L* 225, 226.
41 See also Le Roux 2004 *SA J Research in Sport, Phys Ed & Rec* 65 70 in this regard.
42 *USA Shooting & Quigley v UIT* CAS 94/129, award of 1995-05-23 par 15.
43 Anderson 123.
44 *Idem* 130.

4 A Contractual Perspective on the Strict Liability Principle in the World Anti-Doping Code

4 1 Contractual Basis of Sport Relationships

While authors criticise the strict liability principle, they lose sight of the fact that participation in sport is based on a contractual relationship. An athlete, by participating in a sport and/or by affiliating to a sports federation, does so by accepting the provisions in the constitution, bye-laws and regulations of that federation, as well as the rules of that sport. The provisions of these constitutions, bye-laws, regulations and the rules of the sport constitute the contract between the athlete and federation and embody the terms and conditions upon which the athlete has agreed to become bound and to remain associated to that body.[45]

The majority of sports federations are now signatories to the Code, including all international federations of Olympic sports. In the fight against doping, the role of international federations is to adopt and implement anti-doping policies and controls which comply with the Code. These international federations are also required to ensure that national federations and individual athletes and coaches comply with the provisions of the Code. Therefore most national and provincial federations have incorporated anti-doping regulations in their constitutions, regulations, bye-laws and rules and thus, these anti-doping regulations form part of the contract between athlete and federation. It follows that an athlete and athlete support personnel are contractually bound to comply with the provisions relating to anti-doping, by virtue of their agreements for membership, accreditation, or participation in sports organisations or sports events subject to the Code.[46] The Code itself[47] also confirms the contractual nature of anti-doping regulations by stating in its introduction:

> Anti-doping rules, like Competition rules, are sport rules governing the conditions under which sport is played. Athletes or other Persons accept these rules as a condition of participation and shall be bound by these rules. Each Signatory shall establish rules and procedures to ensure that all Athletes or other Persons under the authority of the Signatory and its member organizations are informed of and agree to be bound by anti-doping rules in force of the relevant Anti-Doping Organisation.

45 Cloete 17; Basson & Loubser *Sport and the law in South Africa* (2000) ch 6-1; Beloff *et al* 35-37; *Turner v Jockey Club of South Africa* 1974 3 SA 633 (A). See also Trainor 2010 *ESLJ* par 34: "Essentially, the relationship of the athlete through their membership of bodies such as the ATP Tour is based on the establishment of a legally binding contractual relationship."

46 Basson & Loubser par 10-15. See also the comment on the introduction to the Code 17.

47 Introduction to the Code 17.

By entering into a contract with a local or provincial club, an athlete enters into an indirect contractual relationship with other bodies to which the club or federation itself may be connected. Beloff explains that an athlete may have contracted with a club to submit to the jurisdiction of the governing body within the sport concerned; and the club may in turn have contracted with the governing body that the players will abide by the disciplinary regime established by that body from time to time. In this manner a contractual *nexus* between the members at club level up to the international body is established[48] and contract is the legal mechanism whereby local and national bodies in sport are obliged to comply with rules and rulings of their international counterparts.[49]

4 2 Breach of Contract and Strict Liability

According to the principle of *pacta sunt servanda*, a party which freely enters into an agreement and assumes obligations under it must perform in terms of that agreement.[50] Since it has been established that an athlete is contractually bound to comply with anti-doping regulations, be it the Code or a sports club or federation's anti-doping policy which should be in line with the Code, it follows that the athlete commits a breach of contract if he or she contravenes these regulations.[51] More specifically, the athlete commits breach of contract in the form of positive malperformance.

Breach in the form of positive malperformance relates to the content of the performance made. It may take either one of two forms, depending on whether the duty is positive or negative. In the first instance, positive malperformance occurs where a person has the duty to do something and the person duly performs but in an incomplete or defective manner. In the second instance, positive malperformance can also occur if a person does something which he is bound not to do.[52] It is submitted that an anti-doping rule violation will fall into the second category of positive malperformance, in that an athlete has a duty to refrain from using prohibited substances and methods.

48 In 1992 Katrin Krabbe, the world 100 and 200m champion, and two other German athletes, were suspended for 4 years as a result of irregularities arising from out-of-competition testing conducted on them during training in South Africa. These athletes were found guilty of tampering with their urine samples, as all three samples were from the urine of one and the same female. Krabbe and her colleagues successfully appealed against their suspension on the basis that South Africa was (at the time) not a member of the IAAF, there had been delays in getting the urine sample to an accredited laboratory, and that there was no provision for out-of-competition testing in the German Athletics Association Rules.

49 Beloff *et al* 171-172, 206. See also Basson & Loubser par 6-1, 6-2.

50 Beloff *et al* 14.

51 Cloete 25.

52 De Wet & Van Wyk *Die Suid-Afrikaanse kontraktereg en handelsreg* (1992) 177. See also Van Rensburg *et al* LAWSA (ed Joubert) 5(1) (1981) par 479; Hutchison & Pretorius (eds) *Law of contract in South Africa* (2012) 294; Van Jaarsveld, Boraine & Oosthuizen *Suid-Afrikaanse Handelsreg* (1988) 143.

Only two requirements must be proven for this form of breach of contract. Firstly, it must be proven that there was a duty to refrain from doing something, and secondly, that this duty was breached. It is not necessary to prove fault in the form of intention or negligence to establish this type of breach of contract. [53] Thus, if the two requirements have been satisfied, the person is automatically guilty of breach of contract. A good excuse for breach of contract does not take away the fact that there has been a breach of contract. In essence this means that committing breach of contract in the form of positive malperformance, leads to the principle of strict liability being applied. Similarly, when an anti-doping rule violation has been committed, the athlete is automatically found to be guilty regardless of the excuse that they athlete may present for committing the violation.

However, in respect of positive malperformance, the debtor may produce evidence, to reduce or avoid liability in respect of the breach. Evidence which may be produced here, can relate to the fact that the malperformance was caused by factors beyond the debtor's control and that the debtor acted without intention or negligence.[54] Similarly, with an anti-doping rule violation, the reasons behind the presence of the prohibited substance or method cannot provide a defence to the infraction but the athlete may produce evidence to show that he or she had no fault or negligence, or no significant fault or negligence in respect of the violation and can receive a reduced sanction or avoid any sanction.[55]

Another fact worth noting here is that, while the law provides certain remedies for breach of contract such as termination of the contractual relationship, the parties may also agree on the remedies that will be available in the case of breach.[56] Therefore, it is completely consistent with the principles of the law of contract that the parties may agree on disciplinary hearings and applicable sanctions, should a party breach the

53 Zimmerman & Visser *Southern Cross: Civil Law and Common Law in South Africa* (1996) 312; Van der Merwe *et al Contract: General principles* (2012) 301. There are authors who are of the opinion that fault is a requirement for positive malperformance in South African law – see Van Rensburg *et al* LAWSA 5(1) par 481; Nienaber "Kontrakbreuk in anticipando in retrospek" (1989) *TSAR* 6; Van der Merwe *et* al 237-238. It has, however, been argued by Cornelius that authority suggesting fault to be an element for malperformance is wrong. In Cornelius "*Mora debitoris* and the principle of strict liability: *Scoin Trading (Pty) Ltd v Bernstein* 2011 2 SA 118 (SCA) 2012 *PER* 620 he argues that no support for such requirement can be found in the Roman law or Roman-Dutch law. Furthermore, there are Appellate Division and Supreme Court of Appeal cases supporting the notion that fault is not a requirement that needs to be proven – see *Administrator Natal v Edouard* 1990 3 SA 581 (A) 597E-F ("fault is not a requirement for a claim of damages based upon a breach of contract"); *Scoin Trading (Pty) Ltd v Bernstein* 2011 2 SA 118 (SCA); Van der Merwer *et al* 354; *Gengan v Pathur* 1977 1 SA 826 (D) 830G.

54 Van Jaarsveld 143-144.

55 Beloff *et al* 255.

56 Cloete 27.

provisions of the contract, instead of aiming at the fulfilment of the contract or the termination of the contractual relationship.

5 Conclusion

In this article the strict liability principle, which is applied in doping law, was evaluated from a contractual perspective. Because it is generally accepted that the athlete's relationships with the various sports federations and sports regulating bodies are of a contractual nature, it is submitted that the general principles of the law of contract cannot be ignored. Specifically, the principles of contract relating to breach of contract become relevant where anti-doping rule violations are concerned. When a debtor does not perform properly in terms of a contract, it automatically leads to breach of contract. Evidence in respect of fault of the debtor only becomes relevant when the extent of his or her liability is determined. Similarly, when an athlete breaches an anti-doping rule, that athlete is automatically guilty of an offense. Evidence in respect of the athlete's fault is, however, taken into consideration to determine what the extent of his or her sanction will be. When comparing the strict liability principle with the general contractual principles pertaining to breach of contract, it is clear that these principles operate in exactly the same fashion.

Section 49, lethal force and lessons from the De Menezes shooting in the United Kingdom

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OPSOMMING

Artikel 49, Dodelike Geweld en Lesse uit die De Menezes Skietvoorval in die Verenigde Koninkryk

Die Strafproseswysigingswetsontwerp 2010 stel sekere wysigings aan artikel 49 van die Strafproseswet 51 van 1977 voor ten einde die artikel in lyn te bring met die riglyne wat vasgestel is deur die Konstitusionele Hof in *Ex parte: The Minister of Safety and Security: In re S v Walters* 2002 2 SASV 105 (KH) rakende die gebruik van geweld ten einde 'n inhegtenisneming uit te voer. Hierdie artikel poog om die aandag te vestig op die tekortkominge van die voorgestelde wysigings aan artikel 49, deur gebruik te maak van die De Menezes-voorval wat plaasgevind het in die Verenigde Koninkryk, as 'n voorbeeld om die potensiële probleme met die bewoording van die wysigingswetsontwerp toe te lig. Hierdie voorval, waarin 'n onskuldige man deur die Britse polisie doodgeskiet is, gee aanleiding tot 'n aantal interessante vraagstukke met betrekking tot die vlak van geweld wat deur die polisie gebruik mag word om 'n inhegtenisneming te bewerkstellig, en die impak wat terrorisme – spesifiek selfmoordterrorisme – internationaal gehad het op polisie taktiek. In lyn met die Britse ondervinding, sal dit betoog word dat die voorgestelde wysigings aan artikel 49 nie 'n aanvaarbare oplossing in Suid-Afrika bied vir 'n soortgelyke terroristebedreiging nie. Hierdie argument is gebaseer op die voorgestelde teks in artikel 49(2)(b) – naamlik dat "*the suspect is suspected*" ("die verdagte word vermoed") mag lei tot onskuldige dodings, aangesien die woorde die potensiaal het om die beluitneming, rakende die gebruik van dodelike geweld, van die arresteerder na die verwyderde "*supervisor*" ("inspekteur") oor te dra. Verder het die insluiting van die teks, "*having committed a crime*" ("wat 'n misdryf gepleeg het"), en die uitsluiting van die frase, "*future death or grievous bodily harm*" ("toekomstige doding of ernstige liggaamlike besering"), die gevolg dat die voorgestelde artikel 49 slegs bruikbaar sal wees in voorvalle waar die verdagte ook 'n verdagte is in 'n vorige misdaad, en sal dit nie van hulp wees vir die arresteerder in gevalle waar die verdagte moontlik 'n misdaad in die toekoms beplan nie.

1 Introduction

The Criminal Procedure Amendment Bill 2010[1] (the Bill) has the stated objective of aligning section 49 of the Criminal Procedure Act[2] (CPA), with the criteria laid down by the Constitutional Court in *Ex parte: The Minister of Safety and Security: In re S v Walters*.[3] More specifically, the Bill seeks to amend section 49(2) by aligning the criteria on the use of lethal force in affecting an arrest, with those tabulated by the Constitutional Court in the *Walters* case.

The present wording of the current section 49 was introduced in the CPA by the Judicial Matters Second Amendment Act,[4] since it was considered at the time (and judiciously so given the 2002 *Walters* case) that the original provisions of the Act would not pass constitutional muster. Following a series of submissions from civil society, the new wording only came into effect in 2003 – a five-year delay. The primary reason, however, for the delay in the implementation of the 1998 amendment was the uncertainty within the South African Police Services about the interpretation and application of the amended section 49.[5]

The Court in *Walters* laid down a set of nine principles to govern the use of force in affecting an arrest.[6] Unfortunately, and as mentioned above, the *Walters* decision was handed down too late to enable the current section 49 (which came into effect in 2003) to be amended in line

1 *GG* 33619 2010-10-07; Criminal Procedure Amendment Bill B39B-2010.
2 51 of 1977.
3 2002 2 SACR 105 (CC). See "Memorandum on the Objects of the Criminal Procedure Amendment Bill, 2010" 1.11.
4 22 of 1998.
5 Minutes dated 2012-06-20 of a briefing by the Department of Justice to the Parliamentary Monitoring Group on the Criminal Procedure Amendment Bill [B39B-2010] 1.
6 The nine guiding principles are: "(a) The purpose of arrest is to bring before the court for trial persons suspected of having committed offences. (b) Arrest is not the only means of achieving this purpose, nor always the best. (c) Arrest may never be used to punish a suspect. (d) Where arrest is called for, force may be used only where it is necessary in order to carry out the arrest. (e) Where force is necessary, only the least degree of force reasonably necessary to carry out the arrest may be used. (f) In deciding what degree of force is both reasonable and necessary, all the circumstances must be taken into account, including the threat of violence the suspect poses to the arrestor or others, and the nature and circumstances of the offence the suspect is suspected of having committed, the force being proportional in all these circumstances. (g) Shooting a suspect solely in order to carry out an arrest is permitted in very limited circumstances only. (h) Ordinarily such shooting is not permitted unless the suspect poses a threat of violence to the arrestor or others or is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of carrying out the arrest, whether at that time or later. (i) These limitations in no way detract from the rights of an arrestor attempting to carry out an arrest to kill a suspect in self-defence or in defence of any other person." *Idem* par 54.

with these principles. It is for this reason that the current Bill has been tabled before Parliament which, at the time of passing the 1998 Judicial Matters Second Amendment Act, had not had the benefit of the authoritative guidelines furnished by the Constitutional Court.[7]

The provisions of the proposed amendment to section 49 of the CPA will be discussed in this article, in conjunction with an analysis of the *Stockwell One Report* by the Independent Police Complaints Commission (IPCC) in the United Kingdom. This report concerned an *Investigation into the shooting of Jean Charles de Menezes at Stockwell underground station on 22 July 2005*.[8] The aim of this article is to draw attention to short-comings in the proposed amendment to section 49, by using the De Menezes case as a proxy to illustrate potential difficulties associated with the wording of the amendment. This incident, in which an innocent man (De Menezes) was shot dead by the British police, raised some interesting issues pertaining to the level of force that may be used by police in effecting an arrest, and the impact that terrorism – especially suicide terrorism – has had internationally on police tactics.

Aligned to the British experience, it will be argued that the proposed amendment to section 49 does not provide a satisfactory solution to a possible similar terrorist threat in South Africa. This argument is based on the submission that the proposed text in section 49(2)(b) – namely that "the suspect is suspected"[9] may lead to innocent deaths, as these words have the potential to transfer decision-making on the use of lethal force from the arrestor to a distant supervisor (as occurred in the de Menezes incident). Furthermore, the proposed inclusion of the expression "having committed a crime"[10] and the exclusion of the phrase "future death or grievous bodily harm",[11] render the proposed section 49 useful only in incidents where the arrestee is a suspect in a past crime, and will not assist the arrestor in those instances where the arrestee may be planning a future crime.

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7 Memorandum 1.6.

8 See: Stockwell One Report title page at http://www.ipcc.gov.uk/Pages/the_stockwell_investigation.aspx (accessed 2013-12-17).

9 At page four of the Bill. The proposed amendment to s 49(2)(b) reads as follows: "If any arrestor attempts to arrest a suspect and that suspect resists the attempt, or flees, or resists the attempt and flees, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing **but in addition to the requirement that the force must be reasonably necessary and proportional in the circumstances, the arrestor may use deadly force if - the suspect is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no reasonable means of effecting the arrest, whether at that time or later**." [Words in bold are the proposed amendment to s 49(2)(b)].

10 *Ibid*.

11 S 49(2)(a), (b) CPA.

2 Section 49, the Law of Arrest, the Purpose and Means of Arrest, and Proposed Amendments

2 1 Section 49 and the Impact of Human Rights Jurisprudence on the Law of Arrest

The disregard for human rights under apartheid led to many well-documented instances of police brutality and killings. It is primarily against this backdrop that a number of fundamental human rights were enshrined in the South African Constitution,[12] in particular the rights to human dignity[13] and to life.[14]

It is trite law that no right is limitless. This is reflected in section 36 of the South African Constitution, which provides for the instances in which rights may be legitimately limited. It is submitted, for example, that any law that permits the killing of another during an act of self-defence would pass constitutional muster, because the attacker's right to life does not enjoy primacy over the victim's right to life; in other words, the attacker's right to life is not limitless.

A similar "balancing of rights" dilemma arises when an arrest is being attempted; the issue here being under what circumstances can deadly force be used to effect an arrest? Do the suspect's rights take precedence over the rights and interests of society? In the landmark case of *Govender v Minister of Safety and Security*,[15] Olivier JA commented that the state has a duty to preserve the criminal justice system's effectiveness as a deterrent to crime. According to Olivier JA, a failure by the state to preserve the effectiveness of the criminal justice system will end in lawlessness and a loss of legitimacy of the state itself.[16] This suggests that society's interest in bringing a suspect to justice outweighs the suspect's rights. However, does this mean that the suspect can be killed during an attempt to arrest him or her?

The court in the *Walters* case answered this question in the negative, when it stated that the Constitution demands respect for the life, dignity and physical integrity of every individual, and that normally this respect outweighs the disadvantage to the administration of justice in allowing a criminal to escape.[17] In reaching this decision, the Constitutional Court in *Walters* relied heavily on the defining United States decision in

12 See Ch 2 Constitution of the Republic of South Africa, 1996.
13 S 10 Constitution.
14 S 11 Constitution.
15 2001 4 SA 273 (SCA).
16 *Idem* par 12.
17 2002 2 SACR 105 (CC) 129 par 44.

Tennessee v Garner,[18] where White J, writing for the majority, found it "constitutionally unreasonable" to use "deadly force to prevent the escape of all felony suspects, whatever the circumstances".

The Court in *Walters* also found that the value placed on the rights to life and dignity is important when weighing them against the competing societal interest in promoting the efficient combating of crime. This stance resonates with the observation of O'Regan and Cameron JJ, in their minority judgment in *S v Manamela*:[19]

> The level of justification required to warrant a limitation upon a right depends on the extent of the limitation. The more invasive the infringement, the more powerful the justification must be.[20]

Therefore, evidently, the courts' view is that whilst killing a suspect during an attempted arrest should not be condoned lightly, there are circumstances under which it may be acceptable. This would notably be where the arrestor or a third party is being threatened with death or serious physical harm by the suspect.

2 2 The Purpose and Means of Arrest

In discussing the purpose of arrest, the Constitutional Court in *Walters* maintained that arrest is not an objective in itself; rather, it is one of various ways to ensure that a suspected criminal appears before court. Therefore, the purpose of arrest is to take the suspect into custody – to be brought before court as soon as possible on a criminal charge.[21]

The Constitutional Court in *S v Makwanyane*[22] discussed the object of criminal punishment, in particular as it related to the death penalty. In summary, the court held that punishment should have a deterrent effect, a preventative effect and an element of retribution. The court stated

18 *Tennessee v Garner* 85 L Ed 2d 1. Here the court stated the following: "It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower on foot does not always justify killing the suspect. A police officer may not seize an unarmed, nondangerous (sic) suspect by shooting him dead. The Tennessee statute is unconstitutional insofar as it authorises the use of deadly force against such fleeing suspects. It is not, however, unconstitutional on its face. Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given."

19 2000 1 SACR 414 (CC).

20 442 par 69.

21 2002 2 SACR 105 (CC) par 49.

22 *S v Makwanyane* 1995 2 SACR 1 (CC).

further that "the greatest deterrent to crime is the likelihood that offenders will be apprehended, convicted and punished",[23] and that while the death sentence was an effective preventative measure (as the offender would now be dead), imprisonment would achieve the same goal.[24] The court was also of the view that, of the three elements, retribution was the least important of the objectives of punishment. It therefore found that the death penalty was not the only way of expressing society's outrage at the crime, as a long prison sentence would also achieve this goal.[25] In so finding, the Constitutional Court held that the death penalty was not a necessary tool in the fight against crime, and concluded that it was unconstitutional.

The court in the *Walters* case stated that "arrest may never be used to punish a suspect"[26], but nevertheless did *not* rule out the use of force, and indeed *deadly* force in certain circumstances to achieve the goal of arrest. This creates an anomaly: how is it possible that it is unacceptable to kill a person who has been tried and found guilty of a serious crime against society, but yet it is acceptable to kill a person who, at the time of the attempted arrest, is still only a suspect in a criminal matter, still innocent until proven guilty, and still entitled to a fair trial to prove his guilt beyond a reasonable doubt? The courts have answered this question by requiring an actual threat of violence by the suspect, or a suspicion on reasonable grounds that the suspect has committed a crime involving the infliction or threatened infliction of serious bodily harm – to justify the use of lethal force during an arrest.[27]

The Constitutional Court in *Makwanyana*, however, in holding that the death penalty is unconstitutional, laid out a cogent argument that could equally be applied to the use of lethal force in effecting an arrest, when Langa J said the following:

> A culture of respect for human life and dignity, based on the values reflected in the Constitution, has to be engendered, and the State must take the lead in displaying these values. In fulfilling this role, the State not only preaches respect for the law and that the killing must stop, but it demonstrates in the best way possible, by example, society's own regard for human life and dignity by refusing to destroy that of the criminal. Those who are inclined to kill need to be told why it is wrong. The reason surely must be the principle that the value of human life is inestimable, and it is a value which the State must uphold by example as well.[28]

The argument follows, that in order to set an example to the citizens of South Africa, the police cannot be seen to be indiscriminately killing people in the process of arresting them. To do so would breach the duty that the state has to engender respect for the law. This would also lead to

23 50 par 122.
24 52 par 128.
25 Par 129.
26 2002 2 SACR 105 (CC) 134 par 54.
27 *Ibid*.
28 1995 2 SACR 1 (CC) 85 par 222.

the situation where a public that legitimately grows frightened of the police service, will be more inclined to resist arrest, which will then in turn potentially lead to an increase in the use of lethal force by the police, and so the cycle will continue.

2 3 The Proposed Amendments to Section 49

While there are a number of notable changes to the content of section 49 in the Bill, this article will be focusing on the following two phrases, which form a part of the proposed amendments to section 49(2)(b): (i) "... the suspect is suspected" and (ii) "... having committed a crime involving the infliction or threatened infliction of serious bodily harm".

In terms of the current section 49(2) of the Criminal Procedure Act, an arrestor is justified in using deadly force "… only if *he or she believes* on reasonable grounds …" that such force is necessary to protect the arrestor or any person assisting him or any other third party from imminent or future death or grievous bodily harm,[29] or there is a strong likelihood that if not arrested immediately the suspect will cause imminent or future death or grievous bodily harm,[30] or that the offence for which the suspect's arrest is sought is in progress, is forcible and serious in nature and involves the use of life threatening violence or will likely cause grievous bodily harm.[31]

It is submitted that the current provisions require the arrestor to have a personal belief that the attempt to arrest the suspect complies with one of the three grounds set out in section 49(2). This suggests a subjective test of the arrestor's state of mind at the time of the attempt to arrest. However, these provisions also require that the subjective belief must be based on reasonable grounds. This means that there must have been an objective reason for the arrestor's belief. This requirement is in consonance with an observation made by Bruce, that

> it would be unconscionable for police or private persons to regard themselves as having the authority to use lethal force for purposes of arrest without feeling that they have to be able to justify their actions in terms of some standard of reasonableness.[32]

In other words, it will be for the courts to determine whether the arrestor had a genuine belief that he was acting in compliance with section 49, and that that belief was reasonable and not farcical or speculative.

In terms of the proposed amendment to section 49(2)(b) the "… arrestor may use deadly force only if the *suspect is suspected* on

29 S 49 (2)(a) CPA.
30 S 49(2)(b) CPA.
31 S 49(2)(c) CPA.
32 Bruce "Killing and the Constitution – Arrest and the use of lethal force" 2003 *SAJHR* 430 442.

reasonable grounds …".[33] This amendment appears to remove the requirement that the arrestor must have personal knowledge of or belief in the status of the suspect's involvement in a crime involving death or serious bodily harm. The proposed section 49(2)(b) no longer limits knowledge of the crime involving death or serious bodily harm to the arrestor. It appears that this suspicion can be held by *anyone*, not only and indeed not necessarily the arrestor, although the arrestor would probably have to prove that his reliance on the veracity of the other person's belief was reasonable.

This suggests that the arrestor would be entitled to use deadly force based on information told to him at the scene by a remote third party. That information would need to be from a reliable source in order for a court to hold that the arrestor's actions were reasonable, but the wording of the section does not suggest that the arrestor need be aware of the reasonableness of the grounds pointing to the suspect's involvement. His subjective interpretation of the facts before him could, in some instances, be superseded by information provided to him by a person who may be far removed from the scene of the arrest.

This scenario could lend itself to abuse or error; the arrestor may be justified in believing that the person informing him (that the suspect is suspected of having committed a serious offence) is well informed and honest. It is submitted, for instance, that a police officer who is informed over the police radio by his commander, that the suspect is wanted for multiple murders, would be entitled to claim the protection of the amended section 49, if the use of deadly force ensued. The fact that the commander's information subsequently turns out to be incorrect, would not render the arrestor any more liable as there is no subjective requirement for that arrestor to believe that the suspect was indeed the suspect in the multiple murder investigation. This is exactly the issue that arose in London in the De Menezes shooting, which is discussed below.

In terms of the current section 49, the force used in effecting an arrest must be necessary to protect any person from imminent or future death or grievous bodily harm, or there must exist a risk that the suspect will cause imminent or future death or grievous bodily harm if not immediately apprehended. These provisions clearly state that the arrestor may use deadly force to prevent not only a present attack, but also one that may occur shortly thereafter, or even in the future. The wording of this provision echoes that used in the Canadian Criminal Code:

> The peace officer or other person using the force believes on reasonable grounds that the force is necessary for the purpose of protecting the peace

33 The full provision of s 49(2)(b) is as follows: "the suspect is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there was no other reasonable means of effecting the arrest, whether at that time or later."

> officer, the person lawfully assisting the peace officer or any other person from imminent or future death or grievous bodily harm.[34]

In terms of the proposed amendment to section 49, the arrestor may use deadly force if the suspect is suspected of *having committed a crime* involving the infliction or threatened infliction of serious bodily harm. As the wording includes a *threatened* infliction of harm, the suspect need not actually have harmed anyone, but the threat must already have happened. Clearly, the section does not appear to cover a person who has not yet committed a harmful act, or a threat of harm.

This is in keeping with the decisions of the courts in *Tennessee v Garner* and *Walters*, both of whom use this wording in their recommendations. Consequently, it is easy to understand why this wording has been used in the proposed amendment to section 49. Writing in support of these courts' view on this issue, Bruce notes the following:

> What the test says in effect is that an individual who has (or is reasonably believed to have) committed a crime involving the infliction or threatened infliction of serious physical harm, has thereby defined him or herself as posing a danger of harm to other people. The test put forward in *Garner*, *Govender* and *Walters* is therefore a test of future danger, and the motivation for the use of lethal force is that of preventing future harm [35]

Bruce goes on to discuss why he thinks this is preferable system, when he states:

> The judgments also state that – implicitly – a person who is reasonably believed to have committed a crime involving the infliction or threatened (sic) of serious bodily harm, may reasonably be believed to pose such a danger. The judgements therefore go beyond a statement of the principle of 'future danger' which provides the motivation for using lethal force to provide a concrete test as to when an individual may be seen to pose such a danger.[36]

Therefore, according to Bruce, this provision of section 49 acts as a limitation on the arrestor's ability to use lethal force based on some speculative notion of future risk. This is commendable. However, with respect, it is submitted that Bruce has missed a beat here. While future harm is covered by the wording of *Garner* and *Walters*, it is submitted that the wording of the proposed new section 49 only permits the use of deadly force when the suspect is suspected of future harm based on the fact that the suspect has *already* committed another crime involving the actual or threatened infliction of harm.

It is submitted further, that this may have an impact on the police reaction to a terror suspect. For instance, if the police are acting on intelligence that a suspect is planning a bombing, they will not be able to use deadly force in effecting the arrest of that person unless the suspect has committed a previous crime involving the infliction of serious bodily

34 Canadian Criminal Code Ch C-46 s 25(4)(d).
35 Bruce 2003 *SAJHR* 430 445.
36 *Ibid* 448.

harm, or unless a situation of private defence arises which is covered by the common law and by section 49(1) in any event. Therefore, the use of lethal force to affect the arrest of a suspect who has not committed or threatened to inflict serious bodily harm on anyone, will consequently not fall under the provisions of the proposed section 49(2). However, the current section 49(2) does in fact cover this situation, as under the current provisions, the arrestor would be able to rely on the fact that, based on the intelligence received, the arrestee is likely to cause imminent or future death or grievous bodily harm.

3 The De Menezes Killing in the United Kingdom and the *IPCC Stockwell One Report*

3 1 A Synopsis

On 22 July 2005, shortly after the London public-transport bombings, Jean Charles de Menezes was shot and killed by anti-terrorist police, in the mistaken belief that he was a suicide bomber. The police had been staking out a property in which a suspected terrorist (Hussain Osman) was residing. When de Menezes, a Brazilian migrant who also lived in the same building, left to go to work, the police, in a confused interaction between the surveillance team and headquarters, thought that he was Osman and proceeded to follow him. De Menezes boarded a few buses, alighted at an underground station, paid for his ticket, and proceeded to board a train at the bottom of the escalators. Moments later he was dead from seven bullet wounds to the head.[37]

3 2 Atmosphere of Fear – Events Leading up to the Killing

The investigation into de Menezes' killing was conducted by the Independent Police Complaints Commission (IPCC), who compiled their findings into the *Stockwell Report*.[38] The report noted that the incident took place at a particularly sensitive time, as there was "an atmosphere of fear for those living and working in the capital".[39] In fact, more than 3,900 calls had been received by the Anti-Terrorist Hotline in the preceding two weeks.[40] Accordingly, the threat level to the United Kingdom had been raised to Level 1 (critical), which states that

> Available intelligence and recent events indicate that terrorists with an established capacity are actively planning to attack within a matter of days (up to two weeks). An attack is expected imminently.[41]

37 *Stockwell One Report*.
38 *Ibid*.
39 *Idem* 4.6.
40 *Idem* 4.11.
41 *Idem* 4.7.

In response to the threat, London's Metropolitan Police Service prepared a new strategy called "Operation KRATOS PEOPLE" (KRATOS). This strategy was devised with suicide bombers in mind, due to the extraordinary threats posed by such terrorists – in particular, the fact that when apprehended, the suicide bomber will often detonate a bomb. As this would thereby render the suspect's arrest futile, and endanger civilians in the bomber's presence, a unique approach was required outside the usual strategy. A crucial change in policy was encapsulated, as follows:

> It may not be appropriate to issue a warning; the shot may be to the head to avoid detonating an explosive device and that decision to shoot may have to be taken on the command of a senior officer who has sufficient information to justify the use of lethal force.[42]

The strands of KRATOS were three-fold: subject identification, subject confirmation and neutralisation, and it was noted that neutralisation could include a without notice killing if that was the only available option.[43] The operation was headed by Central based at New Scotland Yard, with two surveillance teams on the ground outside the suspect's building. Also in attendance was a specialist firearms' department team, codenamed CO19.

3 3 The Sighting and Killing

The surveillance team reported to Central that they had seen a man leaving the building with a "good possible likeness to the subject" Osman.[44] There were a few communications between Central and surveillance, as Central tried to obtain a positive identification from the surveillance team. There were mixed reports between the team members of what had transpired, but what was clear was that at no stage was there ever a 100% positive identification of the suspect conveyed by the surveillance team, while it appears that Central did believe that a positive identification had been established.[45]

The CO19 firearm team was late to arrive at the underground station; De Menezes had already entered the station. Again, there were mixed reports about the instructions given to CO19, but all agreed that the instruction was to "stop" the suspect. Some CO19 members say they heard "stop at all costs". In any event, the CO19 team, who had until boarding the tube not seen the suspect, at that stage formed the belief that they were required to stop a suspected suicide bomber. Based on their instructions from Central that a positive identification had been established, and based on the surveillance team's identification of the suspect on the train, the CO19 members stormed the train, apprehended

42 *Idem* 9.6.
43 *Idem* 9.12.
44 *Idem* 12.27.
45 *Ibid*.

the suspect, and fired a number of bullets into his head at close range - with the provisions of KRATOS as their guiding tactics.

3 4 The Relevant Law

The IPCC set out the relevant law and its application to the incident.[46] The relevant United Kingdom legislation that was applicable under the circumstances, was section 3(1) of the Criminal Law Act, 1967, which states:

> A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or persons lawfully at large.

The IPCC interpreted this to mean that the test to be applied to a person who relies on the above section, or the common law principles of self-defence, is a subjective one. In other words, the determination to be made is: "what is reasonable in the circumstances as he honestly believes them to be in the defence of himself or another".[47]

Whilst the IPCC report went on to say that the "test is entirely subjective; it is the honest perception of the person using force in self-defence which matters", it is submitted that the test contains an aspect of an objective element. This is because although the courts guard against armchair judgments, they nonetheless assess situations like this to ensure that the force used by the person was reasonable in the circumstances. This is similar to the approach adopted in South Africa, where the courts apply the subjective test to the state of mind of the person, but apply an objective test as a limitation in determining the lengths to which a person can react in any given situation.

3 5 Findings of the IPCC *Stockwell One Report*

The IPCC report held that none of the CO19 officers could be found guilty of murder or manslaughter. All of the officers honestly believed that the suspect was a suicide bomber who was about to detonate a bomb, honestly believed that the suspect had been correctly identified by Central and surveillance, and honestly believed that the only way to prevent the suspect from detonating a bomb was by shooting him in the head. The report found that no material has been seen or assembled by the IPCC to suggest that this tragedy was the result of any deliberate act designed to endanger the life of any innocent third party, or indeed to kill such an individual. All those involved at both command and operational level, were intent upon protecting the general public from a perceived threat of illegal lethal force.[48] The report stated further that "Charlies 2 and 12 [two members of CO19] clearly believed they were acting in self

46 *Idem* 19.3.
47 *Idem* 19.4. *Beckford v The Queen* [1988] AC 130.
48 *Stockwell One Report* 20.1.

defence, and had the right in law to use the force they did".[49] However, it is evident that the death of De Menezes was caused mainly because the CO19 operatives were led to believe that De Menezes was a deadly threat, even though they had no direct knowledge of this fact, and even though they had not had an opportunity to conduct their own identification or confirmation of De Menezes' identity. Central had informed the surveillance team of their mission, and had sent them photographs of the suspect. Accordingly, the surveillance team was dependent on the intelligence coming from Central. The surveillance team then staked out the apartment building and later informed their superiors at Central that the suspect had left the building. Without being able to independently verify this information themselves, Central therefore formed the honest belief that the man heading for the underground station was indeed the suspected terrorist; they relied on the information coming in from trained special operatives on the ground. Based on this information from surveillance, Central then informed the CO19 operatives that this was indeed the man in question, and that they needed them to "stop" him (an ambiguous term in police circles, especially in light of this situation). Consequently, the CO19 operatives formed the reasonable belief that De Menezes was indeed the suspected terrorist.

It is clear, therefore, that not only was the CO19 knowledge of the suspect's status not first-degree, it was arguably fourth-degree. Yet the investigation finding was that this was an acceptable leap of faith to make, based on the flow of information along the chain of command. Essentially, it could be argued that de Menezes was shot by CO19 operatives, not because they suspected him of anything, but because the suspect was suspected of something which was reported to the operatives.

4 Application of the de Menezes Killing to the Proposed Section 49 Amendment

It is not difficult to accept the De Menezes findings in the *Stockwell One Report*, based on the fact that the officers involved in the killing did subjectively believe that the Brazilian was a suicide bomber, and was capable of immediately detonating a bomb if confronted. It is conceded that, in practice, this situation would possibly be covered by section 49(2)(a) of both the current version of the CPA ("the force is immediately necessary for the purposes of protecting ... any other person from imminent death or grievous bodily harm"), and the proposed amendment to the section ("the suspect poses a threat of serious violence to the arrestor or any other person").

The De Menezes incident, however, does illustrate the dangers inherent in the removal of the phrase "he or she believes on reasonable

49 *Idem* 20.74.

grounds" from the current section 49, and its replacement with the phrase "the suspect is suspected on reasonable grounds". It is submitted that the content of the proposed phrase lends itself to the errors that culminated in the death of De Menezes. In that instance, the CO19 operatives used deadly force solely based on Central's suspicion of the suspect, rather than their own suspicion. Under the wording of the current section 49, the operatives could argue that the reasonable grounds – on which they based their belief – were that Central had positively identified the suspect as the suicide bomber. It would be reasonable for the operatives to believe that their superiors and surveillance team had correctly identified the suspect. The operatives would only have to show that their faith in the instructions from their superiors was reasonable. Once they had done that, any error that occurred thereafter would be exonerated by section 49.

Under the proposed section 49, however, it would be possible to argue that there is no need for the operatives to form an opinion on the instructions emanating from their superiors. This is not specified by the new wording. All that is required is that the *suspect is suspected* by someone, not necessarily the arrestor, of having committed a violent crime, and the use of deadly force would then be permissible if no other means is available to arrest the suspect. It is submitted that this could possibly lead to a number of civilian deaths, where the arrestor may have relied on information from headquarters, that may be intentionally, negligently or mistakenly incorrect.

To take this argument further, if the officer at headquarters is relying on information from the field officer about the identity of a suspect, without actually being able to see that person, and the field officer in turn is acting in accordance with information provided by the officer at headquarters, then it is conceivable that a blind-leading-the-blind situation could arise, and an innocent man may be shot dead as a result. There can never be a complete mutual agreement between these two hypothetical officers on the identity of the suspect, because the officer at headquarters is not there to have sight of the suspect. Therefore, he would be reliant on the field officer's information to him, that the suspect is indeed the suspect they are chasing, at which point, acting on this verification, the officer at headquarters will form the suspicion that this is indeed the *suspect who is suspected* in respect of a violent crime, and he will then instruct the field officer accordingly. The field officer, oblivious to the possibility that there may be an identity error, will now be entitled to act under the protection of the proposed new section 49(2)(b), and may resort to the use of lethal force if necessary. It is only when the officer from headquarters arrives on the scene that the identity error will become apparent, but of course by then it would be too late for the deceased "suspect".

As Bruce notes, it is probably for this reason that certain jurisdictions in the United States, namely Kansas City and Atlanta, require "police officers to have direct personal knowledge that someone had committed

a crime".[50] Although this would be an ideal situation to emulate, the practicality of such a policy in crime-ridden South Africa, with its policing problems, would have to be assessed. Ideally, a police officer should not be able to shoot a person simply because he (the police officer) has been told over the police radio that that person is suspected of having committed a crime of threatened violence. Ideally, it should only be the police officer who actually witnessed the alleged crime, who should be permitted to take the decision to use lethal force in attempting to apprehend a suspect. Arguably, to kill in any other situation, would amount to a trial, conviction and sentence, based solely on hearsay evidence, often in a split second, and without the benefit of a lengthy trial. Such a scenario must surely be contrary to the role of the state as laid out in the *Makwanyane* case – that the state should not only preach respect for the law and that killing must stop, but by example should demonstrate regard for human life and dignity by refusing to destroy that of the criminal.[51]

An interesting question to ask could be – what would have happened if De Menezes had not been suspected of carrying a bomb, and instead the police had received a tip-off that he was involved in planning an act of terror? Due to the absence of any weapon or bomb on his person, he would not have posed a threat of serious violence or death to the arrestor, and the provisions of section 49(2)(a) would therefore not have been applicable. Furthermore, the provisions of the proposed section 49(2)(b) would also not be applicable, as it would not have been possible to suspect him of "having committed a crime", as he has not yet committed any offence of which we are aware. The proposed section 49(2)(b) quite clearly stipulates that the crime must already have been committed. Furthermore, the section clearly omits all reference to words such as "future", "imminent" or "likelihood". Therefore, based on the wording of the proposed new section, the arrestor would be obliged to let the suspect escape. While it must be conceded that this argument has merit, as the state's power to use lethal force to prevent possible future events that may never transpire, certainly does need to be curtailed; a suspected terrorist surely cannot simply be allowed to resist arrest and flee. Imagine the public's outrage if that suspect is, shortly thereafter, successful in staging a bombing. This would certainly help to foster the scenario envisaged by the court in the *Govender* case, that a failure by the state to preserve the effectiveness of the criminal justice system, will end in lawlessness and a loss of legitimacy of the state itself.[52] It is submitted that this is a potential issue that will present the arrestor with yet another dilemma when deciding whether or not he is acting in accordance with the proposed new section 49(2).

50 Bruce 2003 *SAJHR* 430 453 (quoting from Sherman "Reducing Police Gun Use: Critical Events, Administrative Policy, and Organisational Change" in *Control in the Police Organisation* (Punch) (1983) 108.
51 1995 2 SACR 1 (CC) 85 par 222.
52 2001 4 SACR 273 (SCA).

5 Conclusion

As South African courts continue to strive to achieve a balance between the interests of the state, suspects and the public, the Constitutional Court's decisions over the last decade or so have forced a rewriting of section 49 of the CPA. The current section 49 of the CPA is a fairly wordy piece of legislation that was drafted prior to judgment in the two landmark South African cases dealing with the issue of the use of force in effecting arrests, to wit *Govender* and *Walters*. Consequently, the proposed amendment to section 49 has been drafted with the aim to amend section 49(2) by

> aligning the words in the proviso, that sets out the criteria as to when deadly force may be used in order to effect the arrest of a suspect, with the criteria tabulated by the Constitutional Court in the *Walters* case.

In effect, the wording of the proposed section 49(2)(b) has been taken almost directly from the eighth guideline laid down by the Constitutional Court in *Walters*,[53] which in turn borrowed from the wording in the *Tennessee v Garner* decision in the United States. It is submitted that this proposed wording is unsatisfactory, and does not achieve the goal of making perfectly clear the circumstances under which an arrestor may use force in effecting an arrest, for two main reasons. First, the words "the suspect is suspected" may lead to too many innocent deaths due to the reliance by field officers on intelligence passed down to them by remote supervisors. It was this very scenario that led to the tragic death of de Menezes on the London underground in London, in 2005, when a number of field operatives – without at any stage pausing to form a subjective opinion of their own as to the suspect's status – used lethal force on De Menezes, based solely on the information received from their superiors. This scenario, and the subsequent investigation, occurred within the highly trained, well-equipped and well-monitored London Metropolitan Police Service. It is submitted that there is an even greater likelihood of such an occurrence taking place in South Africa, due to the stressed, under-equipped status of our Police Service. It is therefore submitted that the proposed amendment should be further amended, to require an element of personal belief on the part of the arrestor, in much the same way as the current section 49 does.

Secondly, the words "having committed a crime" may place too great a limitation on the arrestor, as he will only be able to take action against someone who has *already* committed an offence, while being unable to use lethal force against someone who is reasonably suspected of planning a *future* offence. It is submitted that this may place an anti-terrorist police operative in a quandary, as they lose precious time trying to determine whether or not the suspect is a suspect referred to in the proposed amendment to section 49. This is not an ideal situation, as it could lead to the escape of a dangerous suspect, or to the death of the

53 2002 2 SACR 105 (CC) 134 par 54.

deliberating arrestor. It is therefore submitted that the proposed amendment to section 49 be further amended to include situations where the suspect is suspected of planning a future crime, but subject to a caveat on such action, such as the requirement that the suspicion must be based "on reasonable grounds", for example. This would assist the arrestor in making a speedy decision in a potentially life-threatening situation, and would prevent a suspect from escaping, and to continue potentially life-threatening planning.

Match fixing in sport: a top priority and ongoing challenge for sports governing bodies*

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OPSOMMING

Wedstrydknoeiery in Sport: 'n Groot Prioriteit en Voortdurende Uitdaging vir Sportbeheerliggame

Die gewildheid, wêreldwye invloed en finansiële impak van sport – wat tans meer as 3% tot internasionale handel bydra – is ook verantwoordelik vir 'n groot aantal noemenswaardige probleme, onder andere korrupsie in die vorm van knoeiery, wat al meer algemeen voorkom en soveel verskillende sportsoorte raak, insluitende sokker – die wêreld se gunsteling en mees winsgewende sport! Sport beheerliggame op internasionale-, nasionale- en streeksvlakke is gedurig besig om hierdie plaag van knoeiery te probeer hokslaan, met gemengde resultate. 'n Groot probleem wat hulle in die gesig staar is om op hoogte te bly met nuwe tegnologiese ontwikkelinge, soos aanlyn weddenskappe wat deur groot weddenskap-sindikate gebruike word om resultate van sport byeenkomste te beïnvloed, wat die integriteit en regverdigheid waarvoor sport bekend is, of ten minste bekend moet wees, ondermyn. Hierdie is 'n deurlopende stryd wat gewen moet word! Hierdie artikel bespreek die voortdurende stappe wat geneem word deur sport beheerliggame en ander organisasies met 'n gevestigde belang daarin om ontslae te raak van knoeiery in sport.

1 Introduction

Sport is all about fair play – or, at least, it should be! Competition is keen in all sports, but it should always be conducted on, to use the standard cliché, "a level playing field". It is not a matter of winning at all costs and by all means – fair or foul. It is all about "playing the game".[1] Or as the Olympic Creed puts it: *it is not the winning but the taking part that counts in sport*.

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1 As Albert Einstein put it succinctly: "*You have to learn the rules of the game. And then you have to play better than anyone else.*" Or, as Sir Henry Newbolt put it in his famous poem '*Vitai Lampada*': "*Play up! Play up! And play the game*!"

But with so much money sloshing around in sport nowadays,[2] it is not surprising that sport has become a victim of corruption in various forms[3] – not least, in relation to match fixing and sports betting, the latter of which is as old as the hills and needs to be regulated.[4] Indeed, betting and sport have been – to some extent - uneasy bedfellows probably since the dawn of time: For example, lottery games were originally played in China some three thousand years ago! Not only is it enjoyable to watch a sporting event, but added excitement and interest come from also being able to bet on the outcome of it. In fact, horseracing depends upon betting for its very survival as a sport. But, of course, it should all be fair and above board and no one should gain an unfair advantage over others betting on the same sporting events! In fact, the International Olympic Committee now requires all athletes participating in the Summer and Winter Games to sign a declaration that they will not be involved in betting.

Match fixing may be defined as the deliberate act of losing sports matches, or playing them in such a way as to achieve a pre-determined outcome or result, by illegally manipulating the outcome or result for financial gain or some other unfair sporting benefit.

As Androulla Vassiliou, the European Commissioner for Sport, puts it:

> Match-fixing is a complex problem with many sides to it. But one very important element that the European Commission focuses on in our efforts to tackle match-fixing is prevention. In this respect, educational programmes and awareness raising campaigns can have a significant impact by reaching those most at risk of being approached to fix matches – the athletes themselves.[5]

Match fixing, sadly, affects many sports in many different ways, but, within the confines of this article, I will concentrate on two popular global sports: cricket and football, which have fallen prey to the match fixers and other cheats who are not prepared to play fair and according to the rules; and I will include two glaring examples from each sport.

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2 Sport is now an industry in its own right, worth globally more than 3% of world trade, and, in the European Union, sport accounts for 3.7% of the combined GNP of the twenty-seven member States.

3 For examples of corruption in various sports, see the report entitled *Why Sport is not immune to Corruption* published by EPAS and The Council of Europe 2008-12-01: www.coe.int/t/dg4/epas/Source/Ressources/EPAS_INFO_Bures_en.pdf (accessed 2013-09-18).

4 See Anderson, Blackshaw & Siekmann (eds) *Sports Betting: Law and Policy* (2011).

5 See Press Release of 2013-05-23 on the three-day seminar of EU Athletes, the Federation representing some 25,000 elite athletes in Europe, on "Education against Match-fixing" held in Berlin. The education campaign is based on six main principles: know the rules of your sport relating to betting; it is safest never to bet on your own sport; be careful about handling sensitive information; fixing any part of an event is an absolute no-no; report any approaches; fixers will be caught: suspicious bets are monitored.

2 "Match Fixing" in Cricket

Cricket is not immune from corruption and particular mention may be made, for example, of the recent scandal of "spot fixing" (a species of match fixing) in cricket[6] involving the delivery of "no balls" at timed intervals by certain players in the Pakistani national cricket team during the fourth test match against England at the Lord's Cricket Ground, the ancestral home of cricket, in the summer of 2010. It was alleged and subsequently proved in criminal proceedings, that players deliberately bowled "no balls" at predetermined points in an over, as pre-arranged and agreed with a certain bookmaker, who would take bets on when "no balls" would be bowled during the match.[7] The players concerned have received substantial bans imposed by the International Cricket Council (ICC), the world governing body of cricket, and have also, along with the "fixer" involved in this scam, Mazhar Majeed, a businessman based in Croydon, South London, been sentenced to terms of imprisonment by a criminal court (Southwark Crown Court) following criminal prosecutions in England. Salman Butt received 30 months' imprisonment, Mohammad Asif received 12 months' imprisonment and Mohammad Amir six months' imprisonment. The "fixer", Mazhar Majeed, received two years and 8 months' imprisonment, having been quoted, following an undercover investigation carried out by the UK *News of the World* newspaper, as saying that it would cost £400,000 to fix the result of a "Twenty20" Match, £450,000 for a one-day international and £1,000,000 to fix a Test Match. High stakes indeed! Mr Justice Cooke, the trial Judge, said that custodial sentences were needed in the case "to mark the nature of the crimes and to deter any other cricketer, agent or anyone else who considers corrupt activity of this kind."

So, what are the international and national cricketing sports governing bodies doing about match fixing in its various pernicious forms?

As long ago as 2000, the ICC formed the Anti-Corruption & Security Unit (ACSU), which has actively tried to combat and police any form of corruption within the game of cricket. It is of interest that there were previous incidents that took the game by surprise (as will be referred to below), but nothing quite as shocking and as spectacular as the Butt *et al* scandal.

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6 The genteel game of cricket is probably the last sport where corruption might be expected to take place! However, cricket, in recent years, has become more professional and, as such, may have lost touch with its so-called Corinthian values. Take, for example, the relatively new Indian Premier League (IPL), where players can become "stars" and millionaires overnight! The IPL has also recently been affected by "spot fixing" by three members of a leading IPL team, the Rajasthan Royals. See further on this at www.cricketcountry.com/cricket-articles/Live-Updates-IPL-2013-spot-fixing-controversy-mdash-Ravi-Shastri-to-head-3-member-BCCI-probe-team/26933 (accessed 2013-09-18).

7 For further details of this scandal Blackshaw "Match Fixing in Cricket" *The Times* 2010-08-31.

The ACSU has very firm objectives in combatting corruption:

> for instance, Article 2.1.1 of the ICC Anti-Corruption Code condemns the [f]ixing or contriving in any way or otherwise influencing improperly, or being a party to any effort to fix or contrive in any way or otherwise influence improperly, the result, progress, conduct or any other aspect of any International Match or ICC Event.

The ACSU had also previously released reports relating to the late South African Cricket Captain, Hansie Cronje, who was responsible for the shamed Test Match fixing scandal, back in 2000. Indeed, the report prepared by Sir Paul Condon, a former London Metropolitan Police Commissioner, stated:

> I believe the blatant cases and excesses of cricket corruption have been stopped. I know from the work of the ACSU that most of the preliminary approaches to players, umpires, grounds men and others, to sound out their willingness to be drawn into corruption, have stopped. What is left is a small core of players and others who continue to manipulate the results of matches or occurrences within matches for betting purposes. They may be doing so out of greed, arrogance or because they are not being allowed to cease. Some may fear their previous corruption will be exposed if they try to stop and some may fear threats of violence if they stop. It will take some time before those who have developed a corrupt lifestyle within cricket have sufficient fear of exposure and punishment to stop.

Fine words, but what action has been taken? The warning signs were present back in 2000 that the game of cricket was being infected with corruption from the source. It is interesting note that Sir Paul Condon went on to note:

> From the late 1970s onwards a more insidious and corrosive form of fixing took hold in the game. This involved a player or players under-performing so that the result of a match or occurrences and events within a match were determined and fixed in advance.

This kind of cheating, which runs counter to the uncertainty of outcome of sporting competition, which is the very nature and attractive aspect of sport and sporting endeavour, featured in the 2010 Pakistan cricketing scandal.

More action has been taken in cleaning up cricket as far as the England and Wales Cricket Board (ECB) is concerned, which bodes well for the future and survival of the game of cricket. The ECB's ACCESS Group helps combat corruption in conjunction with the ECB's own anti-corruption code of conduct being applied. The ECB has a transparent nature of operating which can only serve the cricketing world, including its fans and followers, positively and well.

Take, for example, the recent case of corruption involving the first English cricketer to be involved in corruption in the English County Cricket League, namely Mervyn Westfield, the fast bowler, who formerly played for Essex. He pleaded guilty to "spot fixing" involving a county

match and was sentenced to four months' imprisonment in April 2012. Chris Watts, the head of the ECB anti-corruption unit has commented that it was "naive" to think that county cricket had not been affected by corruption in view of the Pakistani scandal that had previously taken place.

Although many sports fans would agree that it is necessary to make an example of high profile sportsmen and women who engage in match fixing by imposing swingeing sporting and criminal sanctions on them, in order to serve as a real deterrent to others who may be tempted by the offers of large sums of money to throw games, one should also spare a thought for the novel practical suggestions made by Nasser Hussein, the former Essex and England Test Cricket Captain, for using cheats to promote a cleaner game as follows

> [The ECB should] use him [Westfield], take him around to counties, do a video with him … use him as an example for future generations of cricketers … instead of just parking him away somewhere to be forgotten, try to use the lad to make sure future generations don't make the same mistakes he has made.

However, in an extensive article by Cornelius on match fixing in cricket,[8] he is rather sanguine about the efforts of the Cricketing Authorities to tackle the problem and reaches the following conclusions:

> If one considers the bigger picture and tie up the various loose ends, the facts speak for themselves. They reveal a world in which there are never more than two degrees of separation between facilities owners, gambling syndicates, bookmakers, organised crime, television networks and cricket. So I would not expect the ICC to pay more than lip service to allegations of match-fixing in cricket. Neither would I expect the ICC to act unless their hand is forced when the media or police reveal their investigations. Again, I would not expect the ACSU to be more than a public relations stunt. After all, it may not be up to the ICC to make the decisions. However, I wait to be pleasantly surprised in the interests of safeguarding and upholding the integrity of sport in general and of cricket in particular!

Be that as it may, the fight against match fixing in cricket will – or, at least, should – continue in one form or another!

3 Illegal Match Fixing in Football

But, sadly, cricket is not the only sport to fall foul of corrupt practices, many of which are related to sports betting and match fixing. Football – the world's favourite sport and the most lucrative one – is not immune either from those who wish to make a fast buck unfairly and at the expense of the fans. The situation is somewhat muddied by the fact that betting companies are now sponsoring football teams (for example, Real

8 "Cricket's Underworld: Fighting Illegal Gambling and Match-fixing" June 2013 *Global Sports Law and Taxation Reports* 17.

Madrid).[9] In fact, in the view of several commentators, football in general is riddled with corruption, not only in relation to the game itself, but also in relation to the administration of the sport. For example, recently there have been scandals regarding the allocation and distribution of tickets for the 2010 FIFA World Cup in South Africa, as well as corruption in the form of the sale of voting rights for the hosting of the World Cup in 2018 and 2022. This latest scandal led to the banning of two members of the FIFA Executive Committee (see below).

As a result, and certainly with his eye on re-election on 1 June 2011 as the President of FIFA, Sepp Blatter announced on 2 January 2011 that he intended to set up "an anti-corruption committee to police world football's governing body."

This development followed closely on the heels of the corruption allegations, which overshadowed the bidding and voting process for the awarding of the World Cup in 2018 and 2022, referred to above, which led, in the event, to bans being imposed on two members of the FIFA Executive Committee, Amos Adamu and Reynald Temarii.[10]

According to Sepp Blatter: "This committee will strengthen our credibility and give us a new image in terms of transparency." And he gave the following personal pledge: "I will take care of it personally, to ensure there is no corruption at FIFA."

The new committee will consist of between seven and nine members, who will be drawn not only from sport, but also from politics, finance, business and culture. This is indeed good news. But, of course, the value of any body depends upon its members and it will be interesting to see who is, in fact, appointed – hopefully not "the usual suspects"! The issue here, however, is well summed up in the well-known Latin tag coined by the Roman poet Juvenal: "*Quis custodiet ipsos custodes*?"[11] – "Who will guard the guardians themselves?"

Reference is made to the agreement signed on 9 May 2011 between FIFA and INTERPOL to kick corruption out of football, which provides a useful working example of collaboration at its best. In a $20,000,000 ten-year project, both entities joined forces in order to rid the beautiful game from match fixing. Sepp Blatter commented on the scourge of match

9 See Blackshaw "Kicking illegal betting out of football" at AISLC/2010-01-26, and, in particular, details of the "Early Warning System" (EWS) introduced in 2005 by FIFA. The aim of EWS is to identify irregular betting patterns and manipulation of gaming in international sport. The system is primarily geared towards prevention, wherever possible. But, where this not possible and illegal betting is identified after the event, EWS is available to assist sports governing bodies in pursuing offenders with appropriate sporting sanctions.

10 *Idem*.

11 For further information on this development, see Blackshaw "FIFA to set up Anti Corruption Body" posted on www.sportslaw.nl at AISLC/2011-01-07 (accessed 2013-09-18).

fixing affecting sport in general and football in particular in the following terms:

> Match-fixing shakes the very foundations of sport, namely fair play, respect and discipline. That's why FIFA employs a zero-tolerance policy when it comes to any infringement of these values.

FIFA recognised that it could not kick out of football corruption in its various forms, including match fixing, by itself and needed to work with outside bodies and agencies. Hence, the agreement with INTERPOL.

Education is also the name of the game, and, in fact, INTERPOL held a Global Academic Experts Meeting for Integrity in Sport in Singapore at the end of November 2012. The aim of this Meeting was to bring together international experts to identify ways and means in which academia could assist the INTERPOL Integrity in Sport Unit in developing and implementing educational lines of study and training modules.

Not to be outdone by the measures taken by FIFA to kick corruption out of football, Michel Platini, who was re-elected President of UEFA for a further term of four years at the UEFA Congress held in Paris on 22 March 2011, has publicly acknowledged that corruption is also a problem at the European level of football, as well as the global level. He has, therefore, made the tackling of corruption one of his priorities during his second term of office in order, as he says, "to protect football's essential values."

With corruption linked to betting activities considered as a considerable threat to football's soul and integrity, Platini has also called for the civil/criminal authorities' help in combating this growing phenomenon: "We have our suspicions but we will give them to the justice authorities, because we are not policemen ourselves". This, of course, is one of the problems of football authorities trying to combat corruption; they have to rely on outside agencies of the country/state in which corruption cases arise and come to light. They cannot do it by themselves!

Platini has also appealed for help from the players themselves, because, as he remarked

> [t]he players are the protectors of the game. It is they who play football, and it is they who should eventually inform us if people approach them to try and corrupt them. There is zero tolerance. The day that they are caught – players, referees, coaches, officials – they will be out of the game forever.

As to Platini's second term of office and what it will bring to the game, he had this to say:

> How do I see my second term? In football, with its infinite history, there are always things that come along. We have 53 countries with their very different characteristics, mentalities and football. I try to help people to defend their football. My role is to protect the game and develop the national associations' football – so that children will continue to play football in the future.

Not a bad sporting aim, but one that will, I am sure, be very hard to achieve in practice. Take, for example, a recent glaring case of match fixing on a big scale involving three of the top Turkish Football Clubs.[12]

Three out of four[13] major sports clubs taking part in the Turkish Football League during the 2010-2011 season, namely Trabzonspor SK, Besiktas JK and Fenerbahce SK, were involved in this corruption affair, which involved match-fixing and incentive premium initiatives. Out of seventeen games that took place during the second-half of that season, thirteen were proven to be corrupted. It is important to underline that the decision concerned not only these major clubs but also other small clubs with a total number of 93 defendants.

The decision contains 739 pages consisting mostly of the detailed telephone conversations of the parties and the collected police evidence. The records demonstrate clearly the illegal activities of the parties involved. In the case of *Trabzonspor SK*, the Court held that there was no convincing evidence against Sadri Sener and Nevzat Sakar.[14] Therefore, Trabzonspor representatives were acquitted and all doubt about Trabzonspor's participation in corruption activities was eliminated.

As regards Besiktas JK, the winner of the Ziraat Turkish Cup during the 2010-2011 season, it has been proven that Tayfur Havutcu,[15] the trainer of the club at the date, offered money and transfers at the end of the season to two footballers[16] of the rival club[17] during the final of the Ziraat Turkish Cup. All the individuals that took part in the process were found guilty by the Court.

Tayfur Havutcu was banned from exercising any activity involving direction or supervision of a sports club for life and to attend the sports events/training sessions taking place in a stadium for a year. Ibrahim Akin was sentenced to imprisonment, a fine and was also banned from exercising any activity involving direction or supervision of a sports club for life and to attend the sports events/training sessions taking place in a stadium for a year. Iskender Alin received the same sanctions as Ibrahim Akin.

In the case of Fenerbahce SK, football league champion of the 2010-2011 season, the extent of involvement in the corruption was revealed to be significantly important. The Court held that match-fixing and offers of incentive premiums have been made during 13 games – out of

12 For an interesting in-depth review of and comments on this major criminal case of match fixing in football, see Yazicoglu "See no evil, hear no evil, speak no evil ... and it will all disappear: The biggest corruption scandal in Turkish football's history" December 2012/3-4 *Int Sports LJ* 12.
13 The fourth major sports club is Galatasaray SK.
14 President and Vice-President of Trabzonspor.
15 The offer has been made to the footballers by their manager, Yusuf Turanli. Serdar Adali, the vice-president of Besiktas at the date, was also involved.
16 Ibrahim Akin and Iskender Alin.
17 Istanbul Büyüksehir Belediye Spor (IBB Spor).

seventeen games in total – of the season. Seven of the games played by Fenerbahce were affected, namely Fenerbahce-Kasimpasa (26 February 2011); Genclerbirligi-Fenerbahce (7 March 2011); Eskisehirspor-Fenerbahce (9 April 2011); Fenerbahce-IBB Spor (1 May 2011); Karabükspor-Fenerbahce (8 May 2011); Fenerbahce-Ankaragücü (15 May 2011); and Sivasspor-Fenerbahce (22 May 2011). Incentive premiums were also offered by the criminal organisation, that the Court found to exist and led by Aziz Yildirim (see below), to the rivals of Trabzonspor and Bursaspor, the closest teams to the championship. Six of the games were thereby affected, namely Manisaspor-Trabzonspor (21 February 2011); Bursaspor-IBB Spor (6 March 2011); Genclerbirligi-Trabzonspor (20 March 2011); Trabzonspor-Bursaspor (17 April 2011); Eskisehirspor-Trabzonspor (22 April 2011); and Trabzonspor-IBB Spor (15 May 2011). Concerning the four remaining games, there was not enough evidence to establish match-fixing and/or incentive premium activities.

Aziz Yildirim, the president of Fenerbahce since 1998, certainly aimed to keep his position that gave him important privileges. In accordance with that intention, he promised three championships in a row at the beginning of the season 2010-2011. As Fenerbahce obtained its last championship in 2006-2007 season, discontent within the club and among supporters was growing day by day and threatening thereby the continuity of his presidency. Hence, the importance for him to keep the promise he made at the beginning of the 2010-2011 season.

As a result of its championship, Fenerbahce obtained, in addition to the prize money allocated by the TFF, 18 million Turkish Liras (TL)[18] as champion's share; TL21 million[19] in accordance with the results obtained within the season (26 victories, 4 draws); TL15 million[20] as championship prize; and TL16 million[21] for its entitlement to participate directly in the Champions League. Moreover, the club was also entitled to the biggest share of the broadcasting income. In Turkey, the income deriving from broadcasting rights is distributed according to league position. The top three clubs are entitled to 40% of the income, whilst the other clubs share the remaining 60%. Consequently, the sum accorded to Fenerbahce, precisely TL64.1 million,[22] was considerably superior to the amounts obtained by the other clubs. For example, Trabzonspor, which completed the league in second position, was granted TL49.875 million.[23]

Operations were led by, amongst others, Aziz Yildirim, the president of Fenerbahce, Ilhan Eksioglu and Sekip Mosturoglu, board members of the Club.

18 Approximately €7,725,000.
19 Approximately €9 million.
20 Approximately €6,425,000.
21 Approximately €6,860,000.
22 Approximately €27,460,000.
23 Approximately €21,365,000.

The Court found Aziz Yildirim guilty of being the leader of a criminal organisation, as well as incentive premiums and corruption activities within football. He was sentenced to imprisonment and a fine. He was also banned from exercising any activity involving the direction or supervision of a sports club for life and to attend the sports events/ training sessions taking place in a stadium for a year. Sekip Mosturoglu and Ilhan Eksioglu were found guilty of participating in the activities of the criminal organisation led by Aziz Yildirim, as well as incentive premiums and corruption activities. They were also sentences to imprisonment, a fine, a ban from exercising any activity involving the direction or supervision of a sports club for life and to attend the sports events/training sessions taking place in a stadium for a year.

4 EUROPOL Investigation into Match Fixing in Football

On 4 February 2013, at a news conference held in The Hague, EUROPOL, the European Union's Law Enforcement Agency, revealed the results of eighteen months' investigation into match fixing in football in Europe and beyond, which do not make at all good reading for the game and the so-called "football family" around the world.

A Champions League tie played in England is one of 380 matches across Europe that investigators say was fixed, but without naming names. This is a blow to England, the home of football, during this year's 150 anniversary celebrations of the founding of the English Football Association.

EUROPOL said that they had uncovered an organised crime syndicate, based in Asia that was coordinating the match fixing, with around 425 match officials, club officials, players and criminals under suspicion.

EUROPOL added that suspected matches included World Cup and European Championship qualifiers; two Champions League ties; and several top football matches in European leagues. Furthermore, criminals bet €16 million on rigged matches and made €8 million in profits. Payments of €2 million are thought, by the investigators, to have been paid to those involved, with the biggest payment to an individual amounting to €140,000.

EUROPOL believe that a crime syndicate, based in Asia, has been liaising with criminal networks throughout Europe and also that match fixing has taken place in 15 countries and 50 people, so far, have been arrested. EUROPOL fears that this is "the tip of the iceberg".

Rob Wainwright, the Director of EUROPOL said: "It is clear to us this is the biggest ever investigation into suspected match fixing in Europe". And added: "This has yielded major results which we think have uncovered a big problem for the integrity of football in Europe."

It will be interesting to see how this major investigation into match fixing in football unfolds and what prosecutions and, indeed, convictions follow from it, as well as what action FIFA and UEFA will take as a result of it!

5 Match Fixing in F1?

There have also been allegations over the years of match fixing in Formula One motorsport, whereby one member of a team allows a fellow member of the team in the final stages of the race to overtake and win the particular event, as happened in the 2013 F1 Malaysian Grand Prix.[24]

In that race, using the tactic known as "team orders", the Red Bull team were assured of first and second places, thereby maximising their points for the lucrative Constructor's Championship!

Of course, it is always argued that Formula One is a team sport not an individual one.

6 Corruption in Australia

The results of a year-long investigation by the Australian Crime Commission (ACC) into Australian sport were announced on 7 February 2013 and again were quite shocking.

The ACC investigation revealed that there is "widespread" doping in some of Australia's most popular sports, as well as links to organised crime that may have led to match fixing in some of them.

7 Concluding Remarks

Match fixing in any sport is an anathema and contrary to the essential nature of sport, which is fair play, and it behoves sports governing bodies to stamp out all kinds of cheating and methods of gaining unfair sporting advantages in order to protect and safeguard the integrity of their sports.

So, let us hope that the ICC does not let up on its fight against corruption in cricket and that Blatter's and Platini's noble words (quoted above) are translated into action to kick corruption out of the "beautiful game"; and let us see how each of them fares against the fraudster barons of cricket and football, who are hell bent on destroying the integrity of these noble and popular sports and their very souls, for their own selfish and financial ends and gains.

24 See Carpenter "There's no Vettel in team: sporting match-fixing in F1?" www.lawinsport.com, posted on 2013-03-31(accessed 2013-09-18).

This is certainly not cricket, to use a popular sporting expression, and neither is it "the beautiful game" of football! Nor, I would add, is it sport in any shape or form! In fact, the complete opposite!

The right to say "I don't": The reception of the action for breach of promise

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OPSOMMING

Die Reg om "Nee" te sê: die Resepsie van die Aksie vir Troubreuk

Hierdie artikel speur die ontwikkeling en aard van die aksie vir troubreuk na van sy Romeinse oorsprong af deur die Kanonieke-, Engelse- en Romeins-Hollandse reg heen tot by die Suid-Afrikaanse reg in die jaar 2013. Die sosiale konteks waarbinne die aksie toepassing gevind het, word ook telkens geskets om die interaksie tussen die reg en sosiale faktore te illustreer. Die volgende premis word deur hierdie oorsig bevestig: die toepassing van die aksie vir troubreuk binne 'n regstelsel weerspieël die *mores* van die eietydse gemeenskap. Die feit dat die aksie vir troubreuk langer as 'n halwe eeu onder dispuut in die Suid-Afrikaanse howe en onder regsgeleerdes is, dui daarop dat die aksie lank reeds nie meer strook met bogenoemde premis nie. Die wye nuusdekking wat die onlangse saak van *Bridges v Van Jaarsveld* geniet het en regter Harms se bedenking oor die paslikheid van so 'n aksie in ons tyd, het hierdie dissonansie opnuut aan die kaak gestel. Met regter Henney se uitspraak in die saak van *Cloete v Maritz* in April 2013 word daar eindelik weggedoen met die aksie vir troubreuk in Suid-Afrika. Met Regter Harms se rigtinggewende *obiter dictum* as basis gee ons 'n opsomming van faktore wat bydra tot die aksie se ongewensdheid binne 'n moderne Suid-Afrikaanse konteks. Baie spesifieke omstandighede het veroorsaak dat dit lank geneem het vir sosiale kragte om 'n impak op die reg te hê, maar ten slotte kon die aksie vir troubreuk nie die veranderende houdings, gewoontes en realiteite van die Suid-Afrikaanse samelewing oorleef nie.

1 Introduction

This article will trace the development and nature of the action for breach of promise from its Roman origins through Canon, English and Roman Dutch law to its current position in South African law. The historical overview will serve to demonstrate "the interaction between the law and social forces"[1] with specific reference to the social purpose served by the engagement and the function of the action for breach of promise within each of these cultural and social environments.[2] The reception history will establish the following premise: The application

1 Lettmaier 2.
2 See Brockelbank "Nature of the promise to marry – a study in comparative law" 1946 *Ill LR* 1 2.

which the action for breach of promise found in a certain society at a specific time reflects the *mores* of that society. The final discussion regarding the relevance and suitability of the action for breach of promise within a modern day South African societal context is based on the premise which has been established and confirmed by the reception history.

2 Engagements in Roman Law

From the time of its inception the Roman marriage was preceded by a betrothal. It was the point at which the match-making negotiations between the parties or their *patresfamilias* or guardians were concluded.[3] In essence it was a mutual promise of marriage and amounted to making a verbal contract (*stipulatio*). However, the liabilities ensuing from the breach of this mutual promise of marriage, varied from time to time in the history of Roman law.

There seems to be general agreement amongst scholars that the Roman betrothal was originally bilaterally actionable.[4] The relevant action was the *actio ex sponsu*. Aulus Gellius mentions in his *Noctes Atticae* that either party had a right of action for breach of the "*sponsio*".[5] Although specific performance could not be enforced with this action, damages could be claimed. Original sources on Roman law support the notion that actions for breach of promise were still possible in Latin cities other than Rome until the grant of citizenship in 90 BC, but that by the 1st century BC no actions based on such promises existed in Rome.[6] Since marriage without *manus* was freely terminable at this time by either of the parties, there would be no point in regarding the betrothal as more binding than marriage itself and betrothal developed into a matter of simple consent. Any contract the parties entered into (such as arrangements for a dowry) was not strictly part of the betrothal itself and was made separately.[7] A stipulation fixing beforehand the sum to be paid as penalty in case of non-performance of the contract was regarded as *contra bonos mores*.[8]

By the time of Justinian a betrothal was simply an indication of intent. Any one of the parties could repudiate the engagement before the actual marriage and neither one of the parties to the betrothal could claim specific performance. The engagement did, however, have some legal consequences: Two simultaneous engagements resulted in praetorian

3 Corbett *The Roman law of marriage* (1969) 1-2.
4 Corbett 12-13.
5 Aulus Gellius *Noctes Atticae* 4 4 2.
6 MacColla *Breach of Promise: Its History and Social Considerations, to which are added a few pages on the Law of Breach of Promise and a glance at many amusing cases since the reign of Queen Elizabeth* (1879) 2; Brockelbank 1946 *Ill LR* 1 3; Treggiari *Roman marriage: iusti coniuges from the time of Cicero to the time of Ulpian* (1991) 142-143.
7 Gardner *Women in Roman law and society* (1986) 45.
8 *D* 45 1 134; Lee *The elements of Roman law* (1956) 66. MacColla 2.

infamia, and a betrothal also set up a kind of legal affinity so that marriage between certain family members of the engaged couple were prohibited.[9]

During this time it had become practise for the man and woman to give something to guarantee the engagement (*arrhae*).[10] Such gifts were exempt from the usual limitations on gifts to outsiders. If breach of promise occurred the gifts were forfeited, unless there was a just cause for the breach.[11] Gifts of this nature often included a ring (*annulus pronubus*) sent by the *sponsus* to his betrothed as a pledge of love and fidelity.[12] Formerly only gifts made *adfinitatis coeundae causa* could be reclaimed, but Constantine abolished any such distinction and all betrothal gifts were to be restored by any party breaking off the match while having no claim to gifts he or she had made.[13] An action always lay where money was given as *dos* but the marriage fell through for whatever reason.[14]

2 1 The Impact of Societal Norms on the Nature of the Roman Engagement

It is fair to say that throughout the whole period of the maturity of Roman law the betrothal was merely a formless pact and no action could be brought for its breach[15]. This was a natural development as the absolute power of *manus* ceased to be assigned to the husband and as the free marriage and the liberty of divorce led to more equal relations.[16]

The impact of societal norms on legal customs becomes even more evident, when Roman law concerning betrothals is compared to that of the Germans in the 1st century AD. In Roman society women were to a large degree responsible for their own fates and they enjoyed freedom of choice as far as their future husbands were concerned. German women on the other hand were regarded as chattel, the objects of sale without rights or freedom of choice. Germanic betrothals were seen as a sale, not only of the bride but also of the *mund* or protectorship of the woman.[17] Since the object of purchase (the bride to be) was already part of the property transferred, the engagement constituted an inchoate marriage.[18] This inchoate marriage had the effect that specific performance could be claimed when the engagement was terminated and thus the claiming of damages was moot.

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9 Gardner 40; Corbett16-17.
10 Lee 66; Cod 5.1.
11 Manson "Breach of promise of marriage" 1910 *J Soc Comp Legis* 157; Treggiari 153; Corbett 18-19.
12 Treggiari 149.
13 Corbett 18-19.
14 Buckland *Manual of Roman private law* (1939) 316.
15 Brockelbank 1946 *Ill LR* 1 3.
16 Corbett 14, 108.
17 Manson 1910 *J Soc Comp Leg* 156; Brockelbank 1946 *Ill LR* 1 2.
18 Van den Heever *Breach of Promise and Seduction in South African Law* (1954) 5.

3 Canon law

Throughout Europe down to the middle of the sixteenth century, marriage was regarded as a consensual contract for which ecclesiastical intervention was not needed. Mere mutual consent, *coniunctio animorum* would constitute a contract and breach of this contract by disagreement or death would result in entitlement to all the rights and liabilities of the marriage. In or about the year 1563 the Council of Trent declared that a marriage would only be valid if celebrated *in facie ecclesiae*. The presence of a parish priest and two witnesses were required.[19] Although the decree did not have reception in England (since Henry VIII had by that time already renounced the Pope's supremacy), it was accepted as the law of most Roman Catholic communities. The church followed the rule known as *consensus facit matrimonium* (agreement to marry constitutes marriage).[20] There were two types of consensus: The first was *sponsalia per verba de praesenti* which can literally be translated as "betrothal/ pledge through words concerning the present" and therefore referred to a promise which was made in the present tense. *Sponsalia per verba de futuro* on the other hand, referred to a pledge pertaining to the future and meant that the marriage would take place at a future date, as is the case in modern engagements. Regarding the termination of the espousals, parties who promised *de praesenti* could be forced to get married by the Ecclesiastical courts, face excommunication or be imprisoned.[21] In the case of a promise *de futuro*, non performance would merely lead to the paying of a penance.[22] Only if the promise had been followed by sexual intercourse would promises to marry in the future tense be treated as a binding and indissoluble marriage. During the Interregnum (from 1649 when Charles I was beheaded to 1660 when the Stuart monarchy was restored under Charles II) the ecclesiastical courts were closed and the ecclesiastical remedies thereby suspended. Plaintiffs therefore began to bring their grievances up in the common law courts, phrasing their claim in terms of a simple executory[23] contract. Unlike the ecclesiastical courts, the common law judges had no power to compel the marriage, but based on the principle of contractually binding consensus, they could award damages to the disappointed party. Although the ecclesiastical courts were reopened after the Interregnum, the passage of Lord Hardwicke's Marriage Act[24] in 1753, deprived the ecclesiastical courts of the power to compel marriages, so that thereafter all a deserted fiancé(e) could hope for was to win damages in the civil courts.[25] The jurisdiction

19 MacColla 5.
20 Van den Heever 8.
21 Manson 1910 *J Soc Comp Leg* 58.
22 Lettmaier 23.
23 An executory contract is one that has not yet been performed on either side.
24 26 Geo II c33.
25 Lettmaier 23.

of the Ecclesiastical Courts fell into disuse and was finally abolished in 1857.[26]

3 1 The Impact of Societal Norms on Actions for Breach of Promise (Canon law)

Canon law regarding breach of promise reflects the enormous influence the church had on society during this time. It based its doctrines regarding marriage on the notion that it is a remedy for concupiscence. The First Epistle of St Paul to the Corinthians 7: 7-9 states that the unmarried and widows do well if they abide in the same way as Paul, "But if they cannot contain, let them marry; for it is better to marry than to burn ..." After the engagement the conduct of the plaintiff had to be impeccable in order to assure the defendant a monopoly of the sexual rights.[27] However, unchastity of the plaintiff was very difficult to prove and the defendant often had no option but to marry or pay damages. "Unwilling parties were subject to admonition and censure and, at a time when one's standing in the church was all important, the threat was sufficient to bring about the proposed marriage."[28]

4 English law

No remedy for a broken promise of marriage existed at common law in England prior to the mid-seventeenth century and the jilted party's only remedy lay in the ecclesiastical court.[29] Claims for damages were in stead based on the action of *assumpsit,* since an implied contract clearly existed between the parties even if it was not in written form.[30] However, after Lord Hardwicke's Act abolished ecclesiastical jurisdiction over such suits, actions for breach of promise to marry were brought in the common law courts. Actions for damages to repair a broken heart ("heart balm" actions) were very common during the nineteenth and early part of the twentieth century. The action was both within the realm of contractual remedies and the law of tort which provides compensation for the commission of a personal wrong. Huge sums were often awarded as a pecuniary consolation for the injury done to the plaintiff's feelings[31] and to avoid damage to the defendant's reputation.

4 1 The Impact of Societal Norms on Actions for Breach of Promise (English law)

The Case of *Orford v Cole* "presents in detail the way the breach-of-promise action was structured around nineteenth-century notions of

26 Brockelbank 1946 *Ill LR* 3.
27 Brockelbank 1946 *Ill LR* 7.
28 Brockelbank 1946 *Ill LR* 3.
29 Lettmaier 22.
30 Hadley "Breach of promise to marry" 1927 *Notre Dame LR* 191.
31 Lettmaier 21.

ideal womanhood".[32] The wealthy Mr Cole, who had inherited a large fortune which included a mansion at Kirkland had proposed to Miss Orford, but married Miss Grimshaw in stead. This resulted in the highest English jury award for breach of promise in the nineteenth century, since Miss Orford "would have been the wife of a man with that fortune and with that establishment which would have belonged to her rank in society as his wife".[33] Marriages had significant economic ramifications and were arranged to enhance political, economic and social advancement.[34]

In 18th and 19th century England, women were severely restrained by social and financial obstacles to education and independence. Women were in the same legal category as wards since the husband was the bearer of all rights in the marriage.[35] The popularity of the action for breach of promise in the 19th century mirrors these social conditions.

The Law Reform Act of 1970, a short Act of just seven paragraphs and one schedule, eventually abolished the action for breach of promise. The decision was mainly based on the following arguments:

> (a) The abolishment was to prevent so-called gold-digging actions and (b) the possibility of blackmail. (c) The risk that a girl whose engagement has been broken will be shunned by potential marriage partners had lessened greatly. (d) Since the purpose of the engagement period is to avoid a marriage that in all probability would fail, the policy to equate termination of the engagement with "fault" seems mistaken. (e) A person with less than a full matrimonial commitment should not be encouraged by a legal action to marry.[36]

5 Roman-Dutch law

The Roman-Dutch legislation concerning marriage as practiced in Holland around 1580 after the reformation was a blend of Germanic, Roman and the modern Dutch law of the time.[37] The Dutch adopted Canon law, with slight adaptations, to suit protestant doctrine.[38] Canon law still influenced legal practice concerning marriage, since the union between a man and a woman was seen as sacred and therefore resorted under the authority of the Pope and the courts of the Holy See.[39] An engagement was regarded as a binding contract and specific

32 Lettmaier 16.
33 *The Examiner* (1818-05-12) 228 http://books.google.co.za/books?id=TMPPAAAAMAAJ&dq=Orford+v+Cole&ots=njxwWbWToU&jtp=227 (accessed 2012-03-17).
34 Nolan and Wardle *Fundamental principles of family law* (2005) 180.
35 Lettmaier 6.
36 Law Commission Report: *The law relating to breach of promise of marriage.* http://www.lawreform.ie/_fileupload/consultation%20papers/wpBreachofPromise.htm (accessed 2013-01-30).
37 Artzenius *Introduction to the Civil Law of the Netherlands* 2 1 5.
38 Van den Heever 10; Robinson *et al Introduction to South African Family Law* (2008) 25.
39 Artzenius 2 1 4.

performance could be enforced if the espousal was unilaterally terminated.[40] In special circumstances, for example where one of the parties had married another,[41] damages could be claimed.

The "just reasons" the Roman-Dutch authors list for breaking off an engagement are, however, very interesting from a receptive point of view. Voet lists nine just reasons for breaking off an engagement and the strong influence of the church is clearly evident from the following: "infamy as a result of a crime"; "apostasy in favour of Judaism" and "paganism or heresy". Surprisingly Voet also lists "implacable dislike" and "unjust and causeless dislike conceived on one side or the other" as valid reasons for breach of the promise to marry.[42]

As a general rule Artzenius states that a party may lawfully repudiate if something emerges or occurs that would have persuaded him/her not to continue with the marriage had he/she been aware of it beforehand, but the influence of the church and moral high ground transpires when he adds "seduction by another man" and a "change of religion" to his list of valid reasons for repudiation. On a more sober note Artzenius also considers "deadly enmity between the parties" and "if the man turns out to be a different man than what the lady thought"[43] reason enough for the lawful termination of the contract. Brouwer's argument that repudiation should be allowed regardless of whether it is lawful or not since forced marriages have tragic consequences,[44] is as valid today as it was in his time. He adds that if mutual agreement to terminate the engagement exists, anything given with the marriage in mind must be returned.

It is clear that the binding legal implications of an engagement at this time stem from the influence of Canon law and society's obedience to the moral regimen and prescriptions of the church and the *Bible* after the reformation in the Netherlands. However, the mature and lucid insights of the Dutch authors seem out of sync with the community's unquestioning obedience to the church and its prescriptions. This incongruence can perhaps be construed as a reflection of the widening gap between academics and the general public at this time.

6 The Action for Breach of Promise within a South African Context

The law relating to engagement in this country is based on Roman-Dutch law principles. The last reported case where specific performance was enforced, was in the case of *Joosten v Grobbelaar* in 1832, but since the Cape Marriage Order in Council of September 1838 an action for

40 Voet 23 1 12; Robinson *Family law* (2008) 25.
41 Van den Heever 11.
42 Voet 23 1 20.
43 Artzenius 2 1 39.
44 Brouwer D I C 25 1 9.

damages has been the only remedy.[45] If *iusta causa* could not be proven, the jilted party could claim for contumely and/or pecuniary loss.

The action for breach of promise has, however, been a bone of contention in South African courts and amongst legal scholars for more than half a century.[46] The extensive media coverage which the case of *Bridges v Van Jaarsveld*[47] received placed this common law action under the spot light yet again. The facts of the case provide a text book scenario for an action based on breach of promise: Bridges allegedly sold her house and gave up her singing career in view of her prospective marriage to Van Jaarsveld. Arrangements had already been made for the reception and the relocation to Van Jaarsveld's farm near Patensie when her prospective husband decided to terminate the engagement and informed her of his decision *via* mobile text message. Basing her claim on the action for breach of promise Bridges claimed more than R1 million, which was later amended to R600,000. The court *a quo* awarded a reduced amount of R282,413 as damages and satisfaction.[48]

Judge Harms did not come to a final conclusion regarding the status of the action when the case went on appeal, but the following *obiter dictum* made his sentiments on the appropriateness and desirability of engagements and promises to marry abundantly clear:

> I do believe the time has arrived to recognise that engagements are outdated and do not recognise the mores of our time, and that public policy considerations require that our courts must reassess the law relating to breach of promise.[49]

Judge Harms's reasoning made the dissonance between the action for breach of promise and the realities of modern day South African society all too clear. We conclude this article with a summary of these realities which render the action for breach of promise undesirable or redundant in modern day South Africa.

6 1 Violation of Constitutional Rights

The constitution recognises diverse forms of intimate personal relationships, and this seems incongruent with the rigid contractual basis of the action which implies that a party who seeks to extract him- or herself from the initial intention to conclude the relationship, would be sued for contractual damages.[50] Within a 21st century context a person's

45 Hahlo & Kahn *The British Commonwealth The Development of Its Laws and Constitution The Union of South Africa* (1960) 392

46 See *Van Jaarsveld v Bridges* 2010 4 All SA 558 (SCA); *Sepheri v Scanlan* 2008 1 SA 322 (C); Lloyd v Mitchell 2004 2 All SA 542 (C); Labuschagne "Deïnjuriëring van verlowingsbreuk: Opmerkinge oor die morele dimensie van deliktuele aanspreeklikheid" 1993 *De Jure* 126; *Guggenheim v Rosenbaum* 1961 4 SA 21 (W).

47 *Van Jaarsveld v Bridges* 2010.

48 *Bridges v Van Jaarsveld* 2008 JOL 22795 (T) 55.

49 *Van Jaarsveld v Bridges* 2010 389.

50 See *Sepheri v Scanlan* 2001 1 SA 322 3301-331.

reasons for breaking off an engagement could easily fall within the highly personal realm and revealing the *iusta causa* for such a step would impinge on this right to privacy which is protected by section 14 of the Constitution of the Republic of South Africa, 1996.

6 2 Possibility of Abuse

There is little doubt that many claims have been made on the basis of extortion[51] and that "[l]egally speaking, the woman, once engaged, has already made her economic establishment."[52] The abuse of this action by unscrupulous persons for gold digging or black mail led to the abolishment of the action in many countries.[53]

6 3 Other Available Actions

Other grounds for actions are available to the injured party. The "indirect application" or "horizontal application" of the Bill of Rights[54] has rendered the action for breach of promise ineffective. Furthermore, the *actio iniuriarum* is also at the disposal of the injured party to claim satisfaction.[55] Where one of the parties was unjustifiably enriched at the expense of another, the wronged party can claim on the basis of unjustified enrichment. As far as gifts exchanged between the engaged couple are concerned, it is up to the court to decide whether it was a conditional or an absolute gift. Wedding presents given by third parties should be returned on the Roman law principle of *conditio causa data causa non secuta*. Another option open to the courts is to apply the same principles of law to disputes between ex-fiancés as to those which apply to disputes between husband and wife.[56]

6 4 The Analogy with Divorce

Since divorce is available in the event of an irretrievable breakdown of a marriage, and guilt (adultery or desertion) is no longer the issue it does not make any sense to attach more serious consequences to an engagement.[57] If a possible legal battle persuades someone with less than a full matrimonial commitment to get married, there is a very real chance that the marriage will end in divorce. As early as in 1876 MacColla maintained that where the right of action for breach of promise

51 Brockelbank 1946 *Illinois LR* 1 13.
52 Brockelbank 1946 *Illinois LR* 1.
53 Brockelbank 1946 *Illinois LR* 1 15; Sinclair, Heaton & Hahlo *The Law of marriage* (1996) 314.
54 Neethling Potgieter & Visser *Law of Delict* (2001) 20.
55 Labuschagne 1993 *De Jure* 129 139.
56 This option was agreed upon in Ireland and the UK. See details of the law reform in these countries at: http://www.lawreform.ie/_fileupload/consultation%20papers/wpBreachofPromise.htmby (accessed 2013-03-04).
57 To quote Judge Harms: "It is difficult to justify the commercialisation of an engagement in view of the fact that a marriage does not give rise to a commercial or rigidly contractual relationship" (*Van Jaarsveld v Bridges* 2010 4 SA 558 (SCA)).

leads to semi-compulsory marriages, it demoralises society, and the law which permits such an action to be held *in terrorem* over the head of the unwilling party to the marriage, "creates and fosters a crime of no small magnitude".[58]

6 5 The Present South African Social Environment

The plaintiffs in most cases relating to breach of promise were women. This relates closely to the position occupied by women in earlier society.[59] Women had very little economic independence, could not work in many of the professions, were often seen as inferior to men and reliant on a future husband for financial support. If a man terminated a prospective marriage in the 19th century, this would have had a huge impact on a young lady's own position in society and the termination of the engagement would have caused great humiliation and shame. The need for an action to protect women from associated humiliation, reflects the social circumstances and morals of a bygone age.[60] The action for breach of promise was based on a pre-constitutional heterosexual definition of marriage but today a woman is no longer dependant on a husband for her livelihood or status and the social assumptions on which the action for breach of promise were based are simply no longer valid. The demise of suits based on the action for breach of promise in England and America were likewise tied to changing cultural ideals for women that include independence and sexuality.[61]

With the emergence of the twentieth century vision of South African women as self-sufficient, energetic and competent, the breach-of-promise action has undoubtedly been turned into "an anachronism, a musty bit of common law machinery".[62]

7 *Cloete v Maritz*: The Final Chapter

In April 2013, in the case of *Cloete v Maritz*,[63] Judge Henney finally ruled that "the position … in respect of when a party can successfully claim prospective losses on the basis of breach of contract no longer forms part of our law." He regarded Judge Harms' remarks "as strong persuasive precedent" and relied on the principle that a trial court is entitled to deviate from a decision of a higher court (or the *stare decisis* rule) where the common law or a legal principle no longer is a reflection of the *boni mores* or public policy if regard is to be had for the values that underlie the constitution. He added that these legal convictions of the community or *boni mores,* are continuously evolving and are not static concepts.

58 MacColla 3.
59 Labuschagne 1993 *De Jure* 129 137.
60 Van den Heever 30.
61 See Grossberg "Governing the Hearth: Law and the Family in Nineteenth-Century America" 1985 *St Leg Hist* 35.
62 Lettmaier 17.
63 2013 SA (WC) 6222/2010.

The fact that this action remained part of the South African legal system for such a long time, is significant. If we are to bring the reception history of the action with its clear line of social and legal interaction to its logical conclusion, we must accept that social and political factors played a role in this tardiness to change the law. We suggest two probable causes: (1) In section 4 and 5 we demonstrated the definitive impact of both religion and a male dominated society on laws pertaining to engagements and marriage in England and the Netherlands. During the years of apartheid in South Africa the ruling party was likewise firmly entrenched in reformed theology and male dominance,[64] epitomised by the secret white male Afrikaner Broederbond. This conservatism was reflected in the reluctance to change the common law and abolish the outdated action for breach of promise. (2) In the post apartheid period, section 39(2) of the Constitution created the opportunity for "judge-made law that is more faithful to reality".[65] The opportunity has, however, been underutilised. Davis and Klare suggest that the training of jurists which dates back to a previous era, is to blame: "Jurists deeply committed to transformation reflexively fall back upon intellectual instincts inculcated in the course of their pre-Constitution professional training and socialisation".[66]

8 Conclusion

The law concerning breach of promise has come full circle: More than two thousand years ago actions based on breach of a promise to marry ceased to exist amongst the Romans. The action was revived under the influence of the church in the 16th century and during the next five centuries ever changing social norms determined the popularity of the action all over the Western world. Due to the very specific political, legal and social circumstances in South Africa, it took much too long for the premise of "interaction between the law and social forces"[67] to be realised, but in the final instance, the action for breach of promise could not outlive the changing attitudes, customs and realities of the South African society.

64 In the title of his book *The rise of Afrikanerdom. Power, Apartheid and the Afrikaner Civil Religion* (1975) Moodie refers to this influence as the "civil religion" of the three Reformed "sister Churches". The fact that one of the three so called "sister churches" still does not permit women to be ordained as ministers is indicative of the traditional Afrikaner view of women as inferior and subservient.

65 Davis & Klare 2010 *SAJHR* 403 409.

66 2010 *SAJHR* 403 414.

67 Lettmaier 2.

Section 85 of the National Credit Act 34 of 2005: thoughts on its scope and nature

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OPSOMMING

Artikel 85 van die Nasionale Kredietwet 34 van 2005: Gedagtes oor die Strekking en Aard Daarvan

Die Nasionale Kredietwet 34 van 2005 het groot omwentelinge in die Suid-Afrikaanse kredietlandskap meegebring deur die invoering van die skuldverligtingsremedies ten aansien van oorverskuldigdheid en roekelose krediet. Dit is veral die konsep van oorverskuldigdheid wat op 'n prosedurele vlak 'n wesenlike invloed het op 'n kredietverskaffer se reg op skuldinvordering. Die Nasionale Kredietwet bevat verskeie bepalings wat aan 'n verbruiker toegang tot die skuldhersieningsproses bied, naamlik artikel 86(1) wat voorsiening maak vir die verbruiker om vrywillig aansoek te doen om skuldhersiening, artikel 85 wat 'n hof magtig om in te gryp indien dit in enige verrigtinge beweer word dat 'n verbruiker oorverskuldig is, artikel 86(11) wat voorsiening maak vir hervatting van 'n skuldhersiening wat beëindig is, artikel 130(4)(c) wat toegang tot skuldhersiening bewerkstellig in gevalle waar die kredietverskaffer nie aan die bepalings van die Kredietwet voldoen het nie. Hierdie bydra ondersoek die aard van die bepalings in artikel 85 en die prosesregtelike interaksie daarvan met die ander bepalings in die Kredietwet wat betrekking het op skuldhersiening. Dit spreek aspekte aan soos wie die prosedure mag gebruik, asook op watter stadium en onder welke omstandighede dit gebruik mag word. Dit stel ook ondersoek in na die verskille tussen die diskresie van die hof, asook die hof se verwysings- en skuldherstruktureringsbevoegdhede, ingevolge artikel 85(a) en (b) onderskeidelik.

1 Introduction

The National Credit Act[1] (NCA) has introduced a myriad of changes into the South African credit landscape and has, especially since it came into full operation on 1 June 2007, thrown various interpretational curveballs at the legal profession, often as a result of poor draftsmanship. One such curveball relates to one of the most notable features of the NCA, namely the introduction in Part D of Chapter 4, of debt relief remedies for financially over-burdened consumers.[2] In this context the NCA has

1 34 of 2005.

2 The introduction of these remedies was pre-empted by some of the stated objectives in s 3 NCA, namely s 3(c)(i), (ii) NCA, s 3(g) NCA. In terms of s 3(c)(i), (ii) NCA one of the purposes of the NCA is promoting responsibility in the credit market by encouraging responsible borrowing, avoidance of over-indebtedness and fulfillment of financial obligations by consumers; and discouraging reckless credit granting by credit providers and

introduced the concepts of "over-indebtedness"[3] and "reckless credit"[4] into South African credit law which concepts impact on both a substantive and procedural level. It is especially the concept of "over-indebtedness" that has taken centre stage within the realm of debt relief and which has led to the creation of a whole new body of case law dealing with various aspects where consumers claim to be over-indebted.[5]

"Over-indebtedness" is an issue that may be raised by a natural person[6] consumer in respect of a credit agreement to which the NCA applies in an attempt to access the debt relief provided for by the NCA.[7] In terms of section 79 of the NCA a consumer is over-indebted when the preponderance of available information at the time that a determination is made indicates that the particular consumer is or will be unable to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, having regard to that consumer's:

(a) financial means, prospects and obligations;[8] and

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contractual default by consumers. A related purpose, in terms of s 3(g) NCA is addressing and preventing over-indebtedness of consumers and providing mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations.

3 S 79 NCA read with ss 85, 86, 87, 88 NCA.

4 Ss 80-83 NCA. A detailed discussion of reckless credit is beyond the scope of this contribution. See further Boraine & Van Heerden "Some observations regarding reckless credit in terms of the National Credit Act 34 of 2005" 2010 *THRHR* 1; Van Heerden & Boraine "The money or the box: Perspectives on reckless credit in terms of the National Credit Act 34 of 2005" 2011 *De Jure* 392.

5 Various interpretational issues have arisen especially in the context of termination of debt review. For an overview of the interpretational challenges posed by the sections relating to over-indebtedness and its associated remedies and the cases that dealt with these issues see Scholtz *et al Guide to the National Credit Act* (Service Issue 5) ch11. See also Otto "Die oorbelaste skuldverbruiker: die Nasionale Kredietwet bied geensins vrydom van skulde nie" 2010 *TSAR* 399.

6 It is specifically stated in s 78(1) NCA that Part D ch 4 NCA does not apply to a credit agreement in respect of which the consumer is a juristic person. In terms of s1 NCA a juristic person has an extended definition and includes a partnership, association or other body of persons, corporate or unincorporated, or a trust if there are three or more individual trustees, or the trustee itself is a juristic person, but does not include a *stokvel*.

7 See Scholtz *et al* par 11.1-11.3.

8 "Financial means, prospects and obligations" have an extended meaning in terms of s 78(3) NCA and includes:
"(a) income, or any right to receive income, regardless of the source, frequency or regularity of that income, other than income that the consumer or prospective consumer receives, has a right to receive, or holds in trust for another person;
(b) the financial means, prospects and obligations of any other adult person within the consumer's immediate household, to the extent that the consumer, or prospective consumer, and that other person customarily –
(i) share their respective financial means; and
(ii) mutually bear their respective financial obligations; and

(b) probable propensity to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, as indicated by the consumer's history of debt repayment.[9]

When a determination is to be made whether a consumer is over-indebted or not, the person making that determination must apply the aforementioned criteria as they exist at the time that the determination is made.[10]

A consumer who is over-indebted may apply voluntarily to a debt counsellor[11] to have his debt reviewed in terms of section 86 of the NCA. A detailed discussion of the debt counselling process in section 86 is beyond the scope of this article. Suffice to say that in brief it entails that the debt counsellor makes a determination regarding whether the consumer is over-indebted or not and if so, thereafter refers a proposal for rescheduling of the consumer's credit agreement debt to the magistrates court so that the court can decide whether or not to sanction the debt restructuring proposal by making it an order of court.[12] The Supreme Court of Appeal in *Nedbank Ltd v The National Credit Regulator*[13] has held that the section 86-procedure can however only be accessed in respect of a specific credit agreement if the credit provider has not yet delivered a section 129(1)(a)-notice[14] to the consumer in respect of that

(c) if the consumer has or had a commercial purpose for applying or entering into a particular credit agreement, the reasonably estimated future revenue flow from that business purpose.

9 S 79(1)(a), (b) NCA.

10 S 79(2) NCA. See Scholtz *et al* par 11.3.2 where it is pointed out that this means that a consumer could have been in a financial position where he was able to afford the credit that was extended to him at the time that the credit agreement was entered into but that he became over-indebted at a later stage, for instance as a result of retrenchment. This position has to be distinguished from the situation where entering into a specific credit agreement was the trigger that immediately caused the consumer to become over-indebted, in which event the credit provider has engaged in reckless credit granting as contemplated in s 80(1)(b)(ii) NCA and in respect of which the determination is made with regard to the moment the credit agreement was entered into.

11 A debt counsellor is a neutral person who is registered in terms of reg 44 NCA regulations (NCR) offering a service of debt counseling. See further Scholtz *et al* par 11.3.3.2(b).

12 For a detailed discussion of the debt review process under s 86 NCA see Scholtz *et al* par 11.3.

13 2011 3 SA 581(SCA).

14 S 129(1)(a) NCA provides as follows: " If the consumer is in default under a credit agreement, the credit provider: may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date."

agreement.[15] The result will then be that the consumer will not be able to apply for debt review of the specific agreement in respect of which the section 129(1)(a)-notice was delivered but will still be able to have a comprehensive debt review of other credit agreements in respect of which no section 129(1)(a)-notices were delivered.[16] Thus the effect of the *Nedbank*-judgment makes it clear that a consumer who wants to make use of the debt review process in section 86 of the NCA has no time to fool around and that it is a process which must be accessed before litigation ensues and more specifically, before a section 129(1)(a)–notice is delivered in respect of a specific agreement. Time is therefore of the essence if a consumer wants to use the voluntary section 86-debt review procedure.

Where the consumer did not make haste with a voluntary debt review application under section 86 or where the credit provider had been quick to send a section 129(1)(a)-notice which effectively barred the consumer from applying for a section 86-debt review in respect of a specific credit agreement, one may wonder if that is the end of the consumer's chances to access the debt relief that the NCA offers to over-indebted consumers. It is however not only a consumer who has been unable to access the debt review process, prior to enforcement of a specific credit agreement, that may want to have the opportunity of debt review. In contrast to the aforementioned situation, where a consumer requires access to the process for the first time there may be instances where consumers who already had such access may want a debt review process which has been disregarded or terminated to continue. Thus, where a consumer has gone for debt review timeously but then had the unfortunate experience that the credit provider proceeded with enforcement without giving notice of termination of the debt review [17] such consumer will most likely want the opportunity to carry on with the debt review. Also, in those instances where a consumer had timeously applied for debt review prior to enforcement and the credit provider then terminated the debt review in accordance with section 86(10)[18] of the NCA, there will be instances

15 This due to the bar contained in s 86(2) NCA which provides as follows: "An application in terms of this section may not be made in respect of, and does not apply to, a particular credit agreement, if at the time of that application, the credit provider under that credit agreement has proceeded to take the steps contemplated in section 129 to enforce that agreement."

16 *Nedbank v National Credit Regulator* 20113 SA 581 (SCA) at par 14.

17 For instance because the credit provider for some or other reason did not know about the debt review or simply because he chose to ignore it or because he was erroneously of opinion that the consumer applied for debt review in an instance where debt review was not competent.

18 S 86(10) NCA provides that if a consumer is in default under a credit agreement that is being reviewed in terms of s 86 NCA, the credit provider in respect of that credit agreement may give notice to terminate the review in the prescribed manner to the consumer, the debt counsellor and the National Credit Regulator at any time at least 60 business days after the date on which the consumer applied for the debt review.

where the consumer might have a problem with the termination and would want to carry on with the debt review.[19]

Section 85 of the NCA appears to provide consumers with yet another opportunity for debt review or a declaration of over-indebtedness and thus another opportunity at obtaining debt relief. It is entitled "Court may declare and relieve over-indebtedness" and provides as follows:[20]

> Despite any provision of law or agreement to the contrary, in any court proceedings in which a credit agreement is being considered, if it is alleged that a consumer under a credit agreement is over-indebted, the court may:
>
> (a) refer the matter directly to a debt counsellor with a request that the debt counsellor evaluate the consumer's circumstances and make a recommendation to the court in terms of section 86(7); [[21]] or
>
> (b) declare that the consumer is over-indebted, as determined in accordance with this Part,[[22]] and make any order contemplated in section 87[23] to relieve the consumer's over-indebtedness.

A few other aspects need to be noted in the context of section 85. Firstly, a consumer who has alleged in court that he is over-indebted is prohibited by section 88(1) to incur any further charges under a credit facility or enter into any further credit agreement,[24] other than a consolidation agreement until one of the following events has occurred:

> (a) The debt counsellor rejects the application and the prescribed time for direct filing in terms of section 86(9) has expired without the consumer having so applied.
>
> (b) The court has determined that the consumer is not over-indebted, or has rejected a debt counsellor's proposal or the consumer's application.
>
> (c) A court having made an order or the consumer and credit provider's having made an agreement re-arranging the consumer's obligations, all the consumer's obligations under the credit agreements as re-arranged are fulfilled, unless the consumer fulfilled the obligations by way of a consolidation agreement.

Section 88(3) further provides that, subject to section 86(9) and (10), a credit provider who *receives notice* of court proceedings contemplated in

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19 For instance because the credit provider did not co-operate in the debt review in good faith. See *Mercedes Benz Financial Services South Africa (Pty) Ltd v Dunga* 2011 1 SA 374 (WCC).

20 Emphases added.

21 See par 6 1 below.

22 Part D Ch 4 NCA.

23 See par 6 2 below.

24 S 88(4) NCA states that if a credit provider enters into a credit agreement, other than a consolidation agreement contemplated in s 88 NCA, with a consumer who has applied for a debt re-arrangement and that re-arrangement still subsists, all or part of the new credit agreement may be declared to be reckless credit whether or not the circumstances set out in s 80 NCA apply. In addition s 88(5) NCA provides that if a consumer applies for or enters into a credit agreement contrary to s 88 NCA, the provisions of Part D Ch 4 NCA will never apply to that agreement. See further *Scholtz et al* par 11.4.

section 83 *or* 85, may not exercise or enforce by litigation or other judicial process any right or security under that credit agreement until:

(a) the consumer is in default under the credit agreement; and

(b) one of the following has occurred:

(i) an event contemplated in section 88(1)(a) through (c);

(ii) the consumer defaults on any obligation in terms of a re-arrangement between the consumer and credit providers, or ordered by a court or the Tribunal.

The question however arises whether section 85 can only be used where the consumer has not applied for debt review prior to enforcement of a credit agreement or whether it has a wider scope of application than that. The nature of the remedy, the discretion of the court and the powers of the court under section 85 are also issues that require consideration. The purpose of this discussion is therefore to investigate the scope and nature of section 85 in order to determine when, under which circumstances and by whom it may be invoked and what its implications are in terms of relief and procedure.

2 Who May Invoke Section 85?

As indicated in the introduction, various scenarios may occur within the context of post-enforcement access (or re-access) to debt review. Scenario one is where the consumer did not at any stage prior to enforcement apply for debt review. In scenario two the consumer did apply for debt review but the credit provider proceeded to enforce the relevant credit agreement without first terminating the debt review: Thus the credit provider failed to comply with section 86(10)[25] at all. Scenario three is where the credit provider terminated a pending debt review in accordance with section 86(10) but the credit provider failed to act in good faith.

Scenario three appears to have a relatively straightforward solution: If a consumer has applied for debt review in terms of section 86 prior to receiving a section 129(1)(a)-notice in respect of a specific credit agreement, such debt review can be terminated by the credit provider in accordance with section 86(10) of the NCA and the credit provider may then proceed to enforce the agreement after the lapse of certain prescribed time periods.[26] A consumer who is aggrieved by such termination may then in terms of section 86(11)[27] request the enforcement court to order the debt review to *resume* on any conditions

25 See n 18 above.

26 See s 130(1) NCA.

27 S 86(11) NCA provides that if a credit provider who has given notice to terminate a debt review in accordance with s 86(10) NCA proceeds to enforce that agreement in terms of Part C Ch 6 NCA, 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.

the court considers to be just in the circumstances. It is submitted that the enforcement court can also *suo motu* make a section 86(11)-order.[28] It should further be noted that section 86(11) does not set out a list of reasons for concluding that the termination of the debt review justifies a resumption of the review – thus it appears that the section can apply where the termination was not *bona fide* but also where the termination itself was not procedurally sound, for example it was done prematurely or there was something wrong with the notice or the manner in which it was delivered.

However, when one has regard to the wording of section 85, it is clear that it contains no reference to the "resumption" of a debt review. It merely provides for two options, namely that the court may refer the matter directly to a debt counsellor for purposes of a debt review and recommendation in terms of section 86(7)[29] or that the court itself declares the consumer over-indebted and make an order contemplated in section 87[30] to relieve the consumer's over-indebtedness. There is of course also a third implied option, suggested by the use of the word "may", namely that the court has the discretion to refuse to exercise any of the aforementioned two options.[31]

In view of the aforementioned, it is submitted that section 85 obviously does not have the same purpose as section 86(11) as it would mean that the legislature duplicated a section in the NCA which is highly unlikely. In any event the wording of section 85 clearly differs from that of section 86(11) which provides an opportunity for a consumer whose debt review was terminated to re-access the debt review procedure by allowing for the resumption of a terminated debt review. It may thus be asked whether section 85 provides a remedy in the case of a debt review contemplated in scenarios one and two as indicated above or whether its reach is limited to one of those scenarios only.

Where a consumer has applied for debt review section 129(1)(b)[32] makes it clear that a credit provider may not enforce a credit agreement that is subject to such debt review before first delivering to the consumer a notice in terms of section 86(10). Where there was non-compliance with this requirement because the credit provider enforced the credit agreement without first terminating the debt review (thus as contemplated in scenario two above) such non-compliance is addressed by section 130(4)(c) which provides as follows:

> (4) In any proceedings contemplated in this section, if the court determines that …

28 See Scholtz par 11.3.3.3.
29 See the discussion in par 6 1 below.
30 See the discussion in par 6 2 below.
31 See the discussion of the court's discretion in par 5 below.
32 S 129(1)(b) NCA provides that subject to s 130(2) NCA, a credit provider "may not commence any legal proceedings to enforce the credit agreement before: first providing notice to the consumer, as contemplated in paragraph (a), or in section 86(10), as the case may be."

(c) the credit agreement is subject to a pending debt review in terms of Part D of Chapter 4, the court *may* (my emphasis) –

(i) adjourn the matter, pending a final determination of the debt review proceedings;

(ii) order the debt counsellor to report directly to the court, and thereafter make an order contemplated in section 85(b); or

(iii) if the credit agreement is the only credit agreement to which the consumer is a party, order the debt counsellor to discontinue the debt review proceedings, and make an order contemplated in section 85(b).

It is submitted that in this instance the discretion of the court as indicated by the word "may" refers to a discretion by the court to choose one of the three options set out in section 130(4)(c)(i),(ii) and (iii) respectively once it is evident that the credit agreement that is being enforced is still subject to a pending debt review (a debt review which has not been terminated in accordance with section 86(10)). Clearly where a court finds that a credit agreement that is being enforced[33] is actually still subject to a valid pending debt review[34] it would not be competent for such court to exercise a discretion to the effect that it has a choice whether to order that the consumer may not continue with the debt review anymore. In this instance the consumer voluntarily applied for debt review under section 86(1) and the fact that the NCA requires such debt review to be duly terminated prior to enforcement cannot just be negated by the court as such a situation would merely serve to facilitate abuse and encourage non-compliance with the required delivery of a section 86(10)-notice prior to enforcement. Sight should not be lost of the fact that section 129(1)(b) read with section 86(10) gives the consumer a right to notice of termination of a debt review prior to enforcement. What is at stake under section 130(4)(c) is the consumer's right to receive such notice of termination which is different from the situation where the court has to determine whether such termination should be allowed or whether there should be a resumption of the debt review, as is done under section 86(11). However, as will become more clear from the discussion below, the discretion in section 85 is in essence a discretion which entails choosing whether to tell a consumer that he cannot go for debt review or allowing him to access the debt review process whether before a debt counsellor under section 85(a) or having a "blitzreview" and subsequent declaration of over-indebtedness by the court under section 85(b).Thus it is submitted that the scope for application of section 85 is of necessity confined to those instances where there was no prior

33 It should be noted that s 130(4)(c) NCA is part of s 130 NCA which bears the title "Debt procedures in a court" thus signifying that the proceedings mentioned in s 130 NCA are enforcement proceedings.

34 Ie a debt review that was validly undertaken. Where it is clear that the consumer was never entitled to apply for debt review because for instance the credit agreement fell outside the scope of application of the NCA or because the consumer is a juristic person that is barred from applying for debt review it is submitted that such application is a nullity from its inception and it can thus not in such instance be regarded as a "pending" debt review.

debt review application before enforcement of a credit agreement. It is thus a consumer who did not or was unable to access the voluntary debt review process under section 86 before delivery of a section 129(1)(a)-notice who is afforded *locus standi* to invoke the provisions of section 85.

However, in *Standard Bank of South Africa Ltd v Kallides*[35] the court indicated that the process under section 85 is to be contrasted with that in terms of section 86 of the NCA "in which the consumer has the *right* (my emphasis), subject to the NCA, to initiate debt review proceedings, and ultimately to apply, in the manner expressly provided, for a debt rearrangement order."[36] The court pointed out that one of the considerations to which a court will have regard in determining whether to act in terms of section 85 will be the reason for the consumer's failure to have availed himself of section 86.[37] It emphasised that the scheme of the NCA is directed at striking a balance between the rights of credit providers and consumers and to encourage fulfilment by consumers of their contractual obligations.[38] According to the court it was not the intention of the legislature that the machinery of the NCA be used to provide a basis for consumers to wilfully or negligently delay, or unreasonably thwart the enforcement by credit providers of their contractual rights.[39]

The court remarked that the process contemplated in terms of both section 85 and section 86 is directed at obtaining the consideration of a recommendation by a debt counsellor in terms of section 86(7) and/or the making an order of the nature provided for in section 87.[40] Binns-Ward J then significantly stated:

> Notwithstanding the breadth of the opening words to s85 of the NCA, reference to the broader context of the statute impels the conclusion that the section was not intended to provide a repetition of the process already provided for in terms of s86, *or to draw back within the ambit of debt review debts already excluded therefrom by the operation of other provisions of the NCA, such as s86(2),86(10) or s88(3)* (my emphasis).[41]

In view of the abovementioned conclusion that section 85 is directed at situations where a debtor who has not previously accessed the debt

35 Unreported WCC case no 1061/2012.
36 Par 7.
37 *Ibid*.
38 *Ibid*.
39 *Ibid*. In this regard the court referred to s 86(2) NCA which precludes a credit agreement in respect of which a s129(1)(a)-notice was delivered from being included in a debt review and s 86(10) NCA which provides for termination of a credit agreement in certain circumstances. The court also referred to s 88(3) NCA which allows a credit provider to enforce it rights in respect of a credit agreement if a consumer is in default of a rearrangement order.
40 *Ibid*.
41 Par 8. The court indicated that to construe s 85 NCA otherwise would be conducive to the most unwholesome circularity, at odds with basic principle.

review process, it is submitted that the aforesaid *dictum* by Binns Ward J is correct insofar as it indicates that the legislature did not intend to provide a repetition of the process already provided for in section 86 or to draw back into the ambit of debt review debts already excluded therefrom by section 86(10) (for which section 86(11) is the appropriate remedy) or section 88(3)[42] (which implies that the consumer had already gone through a debt review which resulted in a debt restructuring order but the consumer failed to comply with the terms of such order). It can however not be agreed that a debtor who was precluded by section 86(2) to apply for debt review pursuant to delivery of a section 129(1)(a)-notice cannot use section 85 in order to attempt to access the debt review process for the first time.[43] It is submitted that in the context of the legislature's lenient approach to debt relief as evidenced by the provisions relating to voluntary debt review applications as well as the opportunity for resumption of a terminated debt review or continuance of a pending debt review that was negated, it could not have been the legislature's intention to provide such a small window of opportunity, namely the often brief period before a section 129(1)(a)–notice is delivered to a consumer, whereafter the debt relief remedy is forever foreclosed to a consumer who did not or was not able to voluntarily apply for debt review. Rather, it is submitted, the purpose of section 85 is to act as an "abuse-filter" to ensure that a consumer (who may or may not be actually over-indebted and who merely wants to delay enforcement) does not abuse his failure to voluntarily apply for debt review to perpetuate and compound delay of enforcement by attempting, at a later stage, to access the debt review process again in circumstances where it is clear that he is not entitled to debt relief – especially if such disentitlement is based on the fact that he is so over-indebted that debt review will not cure his debt problem.

3 Requirements for and Stage at Which Section 85 May be Invoked

From the wording of section 85 it is clear that the provisions of this section only apply in respect of credit agreement debt to which the NCA

42 S 88(3) NCA provides as follows: "subject to section 86(9) and 100, a credit provider who receives notice of court proceedings contemplated in section 83 or 85, or notice in terms of section 86(4)(b)(i), may not exercise or enforce by litigation or other judicial process any right or security under that credit agreement until –
(a) the consumer is in default under the credit agreement; and:
(b) one of the following has occurred:
(i) An event contemplated in subsection (1)(a) through to (c); or
(ii) the consumer defaults on any obligation in terms of a re-arrangement agreed between the consumer and the credit providers, or ordered by a court or the Tribunal.

43 See also the remarks by Malan JA in *Seyffert v Firstrand Bank Ltd* [2012] ZASCA 81.

applies[44] and may only be invoked in the course of court proceedings (thus action or application proceedings) in which a credit agreement *is being* considered.[45] Due to the use of the word "court" these proceedings may be high court or magistrate court proceedings.[46] The point is that there must be some or other kind of court proceedings during which section 85 can be invoked. It should also be noted that the provision refers to *any* proceedings in which a credit agreement *is being considered* which, it is submitted, is a wider concept than proceedings in which a credit agreement *is being enforced.* This begs the question whether these "proceedings" contemplated in section 85 should be confined to enforcement proceedings by the credit provider or whether the consumer may also bring a substantive application to court wherein he claims to be over-indebted but not having applied for debt review and then uses these self-initiated proceedings to request the court to make one of the orders provided for in section 85(a) or (b). It is submitted that the essence of a debt review or declaration of over-indebtedness as contemplated by section 85 is that it is preceded by a *decision by a court* allowing the debt review or declaring the consumer over-indebted. Such a decision may clearly be made by a court during enforcement proceedings in respect of a credit agreement to which the NCA applies if it is alleged that a consumer is over-indebted. There is however nothing in the wording of section 85 to suggest that this is an opportunity which is reserved for enforcement proceedings only unless one interprets the words "court proceedings in which a credit agreement is being considered" to be confined to enforcement proceedings. Where a consumer brings a substantive application indicating that he is a party to a credit agreement and provides detail of such credit agreement to the court and further indicates that he is over-indebted but has been foreclosed from voluntarily accessing the debt review process as a result of delivery of a section 129(1)(a)-notice, such proceedings may very well qualify as proceedings in which a credit agreement is "considered". It is thus submitted that a consumer who did not have the opportunity to apply for debt review prior to receipt of a section 129(1)(a)-notice would be able to bring a substantive application to court for relief in terms of section 85 and need not necessarily wait until he has been sued by the credit provider in order to raise his over-indebtedness during enforcement proceedings in a bid to obtain relief in terms of section 85. In any event, in terms of cost and delay it makes sense that a consumer who is really over-indebted and whose debt woes can be cured by debt review should be allowed to access the debt review process and/or obtain a declaration of over-indebtedness and concomitant debt relief sooner rather than later. However it is conceded that in practice an out-of-pocket consumer who is in arrears under a credit agreement will usually not be in a financial position to bring a substantive application prior to

44 *Standard Bank of South Africa Ltd v Hales* 2009 3 SA 315 (D).
45 Scholtz *et al* par 11.3.3.5.
46 See further *Scholtz et al* par 11.3.3.5.

enforcement but will rather invoke section 85 only once enforcement proceedings have been instituted in respect of that credit agreement.

It is further clear that the provisions of section 85 can only be invoked once there is an *allegation of over-indebtedness* in court proceedings in which a credit agreement is being considered. This means that in default judgment proceedings where there is no defence put forward by the defendant because he failed to file a notice of intention to defend to a summons or failed to enter a plea, there will be no allegation of over-indebtedness and section 85 can thus not be invoked *suo motu* by a court.[47] The fact that a credit agreement to which the NCA applies is being considered *together with* the aforesaid allegation of over-indebtedness thus becomes the trigger for the exercise of the discretion of the court to either refer the matter for debt review or to declare the consumer over-indebted and reschedule his debts itself or to dismiss the request for relief in terms of section 85. Both of these requirements, the application of the NCA to the credit agreement and the allegation of over-indebtedness, must be present before section 85 finds application.

Where a credit agreement to which the NCA applies is enforced it will generally imply that a section 129(1)(a)-notice was delivered to the consumer prior to such enforcement.[48] This means that a consumer who did not apply for debt review before delivery of the section 129(1)(a)-notice will have forfeited his opportunity to access the debt review process voluntarily via section 86 prior to debt enforcement. It may however be that such consumer is indeed over-indebted and has an acceptable explanation for his failure to voluntarily apply for debt review under section 86 prior to delivery of the section 129(1)(a)-notice. Section 85 then provides a procedure to enable him to access a court-sanctioned debt review which entails a "pre-approval process" that acts as an abuse-filter and that is absent in the case where the debtor voluntarily applies for debt review prior to delivery of a section 129(1)(a)-notice. Obviously this opportunity for a possible second chance to access the debt review process comes at a price given that by such time the consumer has usually already been drawn into the costly web of litigation and his over-indebtedness may have significantly increased. Furthermore, as indicated hereinafter, the consumer is not automatically entitled to an order in terms of section 85 and the fact that he has failed to voluntarily apply for a debt review may possibly be held against him in the absence of an acceptable explanation.

47 *Firstrand Bank Ltd v Maleke* 2010 1 SA 143(GSJ).
48 In instances where the consumer had not yet applied for debt review under s 86 NCA.

4 Initial Observations Regarding Section 85-proceedings

The allegations regarding the consumer's over-indebtedness during court proceedings may for instance be made in an opposing affidavit (in the event of a summary judgment application) or in a special plea or plea or it may apparently even be made whilst the consumer is testifying at trial. Section 85 gives no express indication of a cut-off point *during* court proceedings after which section 85 may no longer be invoked. An overview of the applicable case law suggests that section 85 is usually raised at summary judgment stage when the consumer files an opposing affidavit.[49] Section 85 however does not specifically require that a substantive application must be made to court to request it to invoke the relief under the section. It appears that if for instance, the consumer makes sufficiently substantiated allegations in his opposing affidavit during a summary judgment application, to the effect that he is over-indebted, a separate substantive application will not be necessary and the court can exercise its discretion whether to grant relief under section 85 or not, based on the allegations regarding over-indebtedness that are made in such opposing affidavit. It further appears that where an allegation of over-indebtedness is made during court proceedings the court does not necessarily have to wait for the consumer to request that the court invokes its discretion in terms of section 85 but that the court may *suo motu*, based on the allegation of over-indebtedness, decide to invoke such discretion. It is however submitted that in practice the consumer will usually request the court to make an order in terms of section 85 and as indicated, such request is usually made during summary judgment proceedings. It should be noted though that the power of the court to invoke its discretion *suo motu* is based on the fact that an allegation was made that the consumer is over-indebted: if there is no such specific allegation, such as in default judgment proceedings, there is no basis upon which the court can invoke its discretion in terms of section 85.

In this regard it was held by Binns-Ward J in *Standard Bank of South Africa Ltd v Kallides*[50] that there is nothing in the wording of section 85 that contemplates the making of an application to invoke its operation.[51] The court stated that on the contrary, the trigger to the operation of section 85 is the allegation in the context of any court proceedings in which a credit agreement is being considered that the consumer in terms of the agreement is over-indebted.[52] It indicated that the allegation in question would be one made integrally in the context of pending

49 See for example *First Rand Bank Ltd v Olivier* 2009 3 SA 353 (SE); *Standard Bank of South Africa Ltd v Hales* 2009 3 SA 315 (D): *Firstrand Bank Ltd v Kallides* unreported WCC case no 1061/2012.
50 Unreported WCC case no 1061/2012.
51 Par 6.
52 *Ibid*.

proceedings in which the terms or existence of a credit agreement is relevant.[53] The court remarked that the wording of the provision, which has a wide import, holds in contemplation the intervention of the courts in the course of court proceedings, incidentally and *mero motu,* in circumstances in which the criteria provided in terms of the section are present.[54] It indicated that a court would act in terms of the provision in such a case if it were of the view that the achievement of the object of the NCA and the just determination of the matter at hand would be assisted by such an intervention.[55] The court thus held that while it would be open to any party to the proceedings to argue and suggest that the court should act in terms of section 85, the provision does not contemplate a substantive application to that end.[56]

Where a consumer for instance merely raises the issue of over-indebtedness in his affidavit opposing summary judgment (which, as indicated, appears from case law to be the moment at which section 85 is usually invoked) without providing sufficient detail under oath regarding such over-indebtedness and the reasons why he failed to voluntarily apply for debt review under section 86, he runs the risk as discussed hereinafter, of the court either refusing to invoke the provisions of section 85 or exercising its discretion against and dismissing the request for debt review in terms of section 85(a) or a declaration of over-indebtedness in terms of section 85(b).

5 Discretion and Powers of the Court

Where there are court proceedings in which a credit agreement to which the NCA applies is being considered *and* there is an allegation that the consumer is over-indebted, the court is afforded a discretion to make an order in terms of section 85.[57] This means that a consumer does not have an automatic right to an order in terms of either section 85(a) or (b)

53 *Ibid*. The court indicated that such allegation may be made either in a pleading, or an affidavit, or even in the course of *viva voce* evidence.

54 Par 6 (with reference to *Ex parte Ford* 2009 3 SA 376 (WCC)).

55 Par 6.

56 *Ibid*. See however *SA Taxi Securitisation Pty Ltd v Ndobela* unreported GSJ case no 9162/2010 where the court refused to grant an order in terms of s 85 NCA because it indicated that there was no application before it.

57 S 85 NCA provides that the court "may" make an order in terms of s 85(a)/(b) NCA. See also *Firstrand Bank Ltd v Olivier* 2009 3 SA 353 (SEC); *Standard Bank Ltd v Hales* 2009 3 SA 315 (D) par 7. The earlier view I expressed in Van Heerden & Lotz "Over-indebtedness and discretion of debt counsellor to refer to debt counsellor: *Standard Bank Ltd v Hales* 2009 3 SA 315 (D)" 2010 *THRHR* 502 that the court has both a discretion to invoke section 85 and a discretion to make the orders contemplated in s 85(a)/(b) NCA has been revisited and I have amended my view. I am now of the opinion that once there are court proceedings in which a credit agreement is being considered and there is an allegation of over-indebtedness the court does not have a discretion to act in terms of s 85 NCA but must do so if so requested. Thus the discretion of the court is limited to the orders it may make or refuse under section 85(a)/(b) NCA.

merely because he is allegedly over-indebted in respect of a credit agreement to which the NCA applies and has for some or other reason not applied for voluntary debt review under section 86 before delivery of a section 129(1)(a)-notice.[58] Obviously the court's discretion must be exercised judicially[59] which means that the court must be appraised of sufficient facts on the basis of which it can exercise such discretion.[60] It is further submitted that this discretion should be exercised in the context of the purposes of the NCA which should act as a backdrop to the exercise of the discretion.[61] Here section 3(i) which provides that one of the purposes of the NCA is "providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements" is especially relevant.

In the context of the court's discretion it is further important to note that section 85(a) and (b) provide for distinct orders: In terms of section 85(a) the court may refer the matter directly to a debt counsellor for debt review and a subsequent recommendation to the court in terms of section 86(7), whereas section 85(b) requires the court itself to declare the consumer over-indebted and make any order contemplated in section 87 to relieve the consumer's over-indebtedness. The information required for the exercise of the discretion in terms of section 85(a) may thus in certain respects be different to the information required for exercising its discretion for purposes of section 85(b). Under section 85(a) the information should be of such a nature that it will enable a court to decide whether the consumer should be allowed to go for debt review whereas under section 85(b) the information should be such that the court can decide on the basis thereof whether to declare the consumer over-indebted. It is submitted that the fact that all the reported cases deal with section 85(a) indicates that the court itself will usually not be inclined to assess the consumers affairs and declare a consumer over-indebted and also that consumers who make use of section 85 usually have a number of credit agreements which necessitate a comprehensive debt review.

58 *Ibid*.

59 In *Standard Bank Ltd v Hales* 2009 3 SA 315 (D) par 12 the court, with reference to *Myburgh Transport v Botha t/a SA Truck Bodies* 1991 3 SA 310 (NmS) and *First National Bank of SA Ltd v Myburg* 2002 4 SA 176 (C) confirmed that the discretion in terms of s 85 NCA should not be exercised capriciously or upon any wrong principle or on the basis of conjecture or speculation, but for substantial reasons on the material before the court.

60 *Firstrand Bank Ltd v Olivier* 2009 3 SA 315 (D) 359D-H. See also *Standard Bank Ltd v Hales* 2009 3 SA 315 (D) where the court stated (par 12): "Therefore the party seeking the referral to a debt counsellor must provide as much as possible relevant information to assist the court in exercising its discretion as the court must have regard to a conspectus of the material."

61 See s 2(1) NCA which requires the NCA to be interpreted in a manner that gives effect to the purposes of the NCA as set out in s 3 NCA.

5 1 The Discretion of the Court in Terms of Section 85(a)

A court is not required, for purposes of section 85(a), to make an initial declaration regarding whether a consumer is over-indebted or not. All that is required is that the court should refer the matter to a debt counsellor to conduct a debt review and make a recommendation to court in terms of section 86(7). It must however be borne in mind that although over-indebtedness is not a defence on the merits to any claim by a credit provider in respect of a credit agreement, it has a dilatory effect which, if not properly controlled, may have very negative consequences in terms of time and costs and prospects of debt recovery for a credit provider who seeks to enforce a credit agreement.[62] The NCA has further introduced the voluntary debt review process under section 86 so that consumers can voluntarily and pro-actively deal with their debt situation outside the costly litigation process.[63] Unfortunately debt review is not a panacea for every consumer's debt predicament and there may be instances in which a consumer's debt situation is so dire that debt review will yield no solution. Regardless of the amount of sympathy one may feel for such a consumer, section 3(d) of the NCA promotes the striking of a balance between the interests of the consumer and the credit provider and it is submitted that in such an instance the credit provider should be allowed to enforce his debt failing which the stability of the South African economy may be threatened.

In *Standard Bank Ltd v Hales*[64] the court held that an admission of over-indebtedness *per se* will be unable to convince the court to exercise its discretion favourably by referring a matter to a debt counsellor in terms of section 85(a). The court held that if such admission of over-indebtedness constituted adequate evidence for a debt review referral, section 85(a) would have been worded differently by obliging the court to take the steps in section 85(a) instead of giving the court a discretion to do so.[65] Thus Gorven J held that the *fact* (as *in casu* where the parties were *ad idem* that the consumer was over-indebted), as opposed to the *allegation* of over-indebtedness, is a factor to be taken into account, but is not decisive.[66]

It is thus submitted that where it is clear that the NCA applies to a specific credit agreement and it is alleged in proceedings in which such

62 See Scholtz *et al* par 11.3.3.5. See also *Standard Bank of South Africa Ltd v Hales* 2009 3 SA 315 (D); *Nedbank Ltd v National Credit Regulator* 2011 3 SA 581(SCA).

63 In *Firstrand Bank Ltd v Olivier* 2009 3 SA 353 (SEC) the court indicated (359A-B) that as it appeared that the NCA would encourage a consumer to approach a debt counsellor before the credit provider approaches the court in terms of ss 129, 130 NCA, it is the duty of the court to discourage consumers from failing to approach a debt counsellor and to discourage them from waiting until the credit provider institutes court proceedings before applying to court for debt relief under the NCA.

64 2009 3 SA 315 (D) par 13.

65 *Ibid*.

66 *Ibid*.

credit agreement is being considered that the consumer is over-indebted, the court that is required to exercise its discretion in terms of section 85 or that itself invokes such discretion, will have to scrutinise the allegations of over-indebtedness made by the consumer to establish whether they are probably true. If the consumer appears to be probably over-indebted the court may then decide whether it would be appropriate to make an order in terms of section 85(a). In exercising its discretion the court must however not facilitate abuse of its own procedure by a debtor who alleges and indeed appears to be over-indebted but whose financial woes cannot be cured by debt review. A debt review must therefore not be ordered where it will serve no purpose other than to delay enforcement. Thus even where it is clear that a consumer is definitely over-indebted his over-indebtedness *per se* should not entitle him to a referral to a debt counsellor in the absence of an indication that the debt counsellor may probably come up with an economically feasible debt restructuring proposal.[67] If the legislature had intended that a mere allegation of over-indebtedness would be the consumer's post-enforcement ticket to debt review there would have been no need to provide a cut-off point in section 86(2) after which a consumer could no more voluntarily and without the initial scrutiny by a court enter the debt review process.

Section 85(a) itself is silent on any factors to be considered for purposes of exercising the discretion to refer a matter to a debt counsellor.[68] The discretion under section 85(a) has been addressed in a number of cases, most notably *Firstrand Bank Ltd v Olivier*;[69] *Standard Bank of South Africa Ltd v Hales*;[70] and to a limited extent in *Firstrand Bank Ltd v Kallides*.[71]

Firstrand Bank Ltd v Olivier[72] was decided quite some time before the decision in *Nedbank Ltd v National Credit Regulator* [73] which laid down the principle that the effect of section 86(2) of the NCA was that delivery of a section 129(1)(a)-notice constituted a bar to a voluntary debt review application under section 86. The consumer in the *Olivier*- matter failed to voluntarily apply for debt review prior to the issue of summons.[74] The court in the *Olivier*-case indicated that the following considerations are important in the exercise of the court's discretion under section 85(a):

(a) the fact that the consumer did not apply for debt review prior to the issue of summons

67 See *Firstrand Bank Ltd v Seyffert* 2010 6 SA 429 (GSJ); *Seyffert v Firstrand Bank Ltd* [2012] ZASCA 81; *BMW Financial Services v Mudaly* 2010 5 SA 618 (KZD); *Firstrand Bank Ltd v Evans* 2011 4 SA 597 (KZD).
68 Van Heerden & Lotz 2010 *THRHR* 502 511.
69 2009 3 SA 353 (SE).
70 2009 3 SA 315 (D).
71 Unreported WCC case no 1061/2012.
72 2009 3 SA 353 (SE).
73 2011 3 SA 581 (SCA).
74 Par 3.

(b) having failed to avail himself of that procedure the consumer must explain that failure to the court

(c) the consumer's action in awaiting legal debt enforcement by the plaintiff rather than voluntarily taking steps to have himself declared over-indebted, amounts to abuse of court in view of the following factors:

(i) the NCA provides a simple, inexpensive and effective procedure for debt restructuring in section 86;

(ii) these provisions were obviously designed to expedite and to simplify the procedure relating to debt restructuring;

(iii) these procedures are furthermore designed to avoid the necessity of parties having to resort to the far more costly procedure of applying to the high court for relief;

(iv) it is also undesirable that the high court has to deal with frequent applications for debt restructuring, very much along the lines of a sitting in terms of section 65 of the Magistrates Court Act[75]

However the court was not prepared to fail the consumer for not having acted timeously under section 86(1) of the NCA mainly because the NCA was still new at that stage and it was unclear whether the consumer had sufficient time before receiving the section 129(1)(a) notice to voluntarily apply for debt review.[76]

In *Standard Bank Ltd v Panayiotts*[77] the court agreed with the approach adopted in the *Olivier*-case. The court held that considerations of fairness require that the circumstances of both the consumer and credit provider be given equal consideration.[78] It cautioned that courts should be reluctant to assist the consumer when it is clear that the credit provider is likely to be greatly prejudiced where the protection measures afforded by the NCA is implemented.[79]

Standard Bank of South Africa Ltd v Hales[80] served before the court well after the NCA had come into operation but before the decision on section 86(2) in *Nedbank Ltd v National Credit Regulator*.[81] The court in *Hales* however accorded section 86(2) basically the same interpretation as it

75 32 of 1944.
76 Par 16. See further Van Heerden & Lotz 2010 *THRHR* 502.
77 2009 3 SA 363 (W).
78 375B-C. The court held that the NCA does not intend that a consumer may claim to be over-indebted whilst at the same time retaining possession of the goods that form the subject-matter of the agreement and held further that such goods should be sold. See also *Standard Bank of South Africa Ltd v Albert Campher* unreported ECG case no 5081/2009 (par 14) where the court held that it needed not consider whether an appropriate case has been made out for the exercise of its discretion in terms of s 85 NCA because *in casu* the credit provider's claim was for the return of a motor vehicle, the ownership of which vested in the credit provider in accordance with the terms of the agreement and which served as security for payment of the amounts due in terms of that agreement.
79 375E.
80 2009 3 SA 315 (D).
81 Par 4.

was later given in the *Nedbank*–matter.[82] In the *Hales*-matter the consumer had applied for debt review under section 86(1) approximately one month after the delivery of an application for summary judgment and it was conceded that the debt review application was a nullity due to the provisions of section 86(2).[83]

In addition to the factors raised in the *Olivier*-case, it was submitted on behalf of the credit provider in the *Hales*-matter that the court's discretion in terms of section 85(a) should be exercised *against* the defendant for the following reasons:

(a) there was no explanation for the delay in the application for debt review under section 86;

(b) there was no explanation for the dishonest defence (that the consumers did not receive a section 129(1)(a)-notice) which was raised in their affidavit resisting summary judgment;

(c) the defence raised was clearly designed to frustrate the plaintiff in obtaining judgment and foreclosing on the immovable property

(d) if one deducted from the monthly expenses of the consumers that amount which would be required to service the mortgage bond, they would be living within their means and would not be over-indebted, and

(e) the defendants had not paid any instalments for 14 months.

It was further submitted on behalf of the credit provider that the consumers failure to apply for debt review voluntarily after receiving the section 129(1)(a)-notice constituted an abuse of the court process as contemplated in the *Olivier*-case.[84] The court however disagreed because it interpreted section 86 and 129 to mean that after receipt of a section 129-notice, a consumer is barred by section 86(2) from applying for debt review under section 86(1).[85] Thus it concluded that if section 86 had been utilised no resort could (now) have been had to section 85 since the debt counsellor would already have made a recommendation in terms of section 86(7).[86] The court indicated that cogent reasons[87] may have been present why section 85(a) was raised only at the present stage of the proceedings and that there may be circumstances where, even if no referral to a debt counsellor was made in terms of section 129, one of the other steps mentioned in that section was taken which did not satisfy a genuine complaint of the consumer.[88]

82 *Ibid*.
83 *Ibid*.
84 *Hales* par 21.
85 It indicated that the referral could then only be one in terms of s 129(1) NCA and could not result in a declaration of over-indebtedness and the other steps as set out in s 86 NCA. The debt counsellor's attempts would then be limited to resolving the dispute or bringing the payments up to date, as provided for in s 129(1) NCA.
86 *Ibid*.
87 Such as the failure to reach an agreement after having referred the matter to a debt counsellor.
88 Par 21.

The court however pointed out that *in casu* the consumers failed to provide it with certain relevant minimum information which one would have expected them to place before the court.[89]They did not explain how it came about that they defaulted under the agreement or whether their financial situation had changed or what steps they took to minimise or remedy their default.[90] They did not indicate whether before receipt of the section 129(1)(a)-notice, they were aware of the provisions of section 86, and if so, why they did not make application under section 86(1) for debt review.[91] They also did not mention whether they approached the credit provider at any stage with proposals to reschedule the debt or any other proposals.[92] They failed to explain when their indebtedness arose and did not indicate whether it arose after they had defaulted on their indebtedness to the credit provider and thus incurred further monthly expenses which further reduced their ability to service the mortgage bond.[93] The consumers also did not indicate how, when the excess of expenditure over income amounted to just more than the entire instalment due to the credit provider, it would be feasible to reschedule the debt, with or without the temporary suspension of instalments.[94]

In this matter the consumers also abruptly stopped making payments of their bond instalments and the court pointed out that there was no initial reduction in the payment of the instalment, giving an indication of an attempt to meet their instalments.[95] The court indicated that, in fact, it appeared from the monthly commitments of the consumers that, *even without the bond instalments,* they would be marginally over-indebted, thus evidencing little potential to successfully reschedule the indebtedness under the mortgage bond.[96] No evidence was presented on behalf of the consumers of how the term of the mortgage bond was to be increased if a far lesser amount than their monthly instalment was to be paid and it appeared that there was no feasible way of rescheduling the mortgage bond debt.[97] They already failed to pay any bond instalments for 14 months and according to the court a further suspension of instalments was only likely to increase their indebtedness in the absence

89 Par 22.
90 *Ibid*.
91 *Ibid*.
92 *Ibid*.
93 *Ibid*.
94 *Ibid*.
95 Par 23.
96 *Ibid*. The court indicated that it is further important to note that, even ignoring the other monthly amounts required to service their debt commitments, the defendants would only have an amount of R1,342.20 to pay towards their mortgage bond indebtedness. This would leave a shortfall to the plaintiff of R8,692.74 without taking into account their overdraft indebtedness as well as their indebtedness to the municipality and Wesbank.
97 *Ibid*.

of additional income.[98] The consumers further failed to mention any additional income as a possibility.[99] The court therefore held that if it was not feasible to extend the mortgage bond debt or for the consumers to recover financially after a further suspension of instalments, it was difficult to see how a debt counsellor could make one of the remaining recommendations in section 86(7).[100]

The court also found the credit provider's conduct to be relevant in the exercise of its discretion: The credit provider had scrupulously complied with the provisions of the NCA and did not even proceed as soon as it was entitled to do so but after the delivery of the section 129(1)(a)-notice to the consumers it waited some months before it instituted action.[101]

In *Standard Bank Ltd v Kallides*[102] a summary judgment application served before Binns-Ward J consequent upon an order made earlier by Dlodlo J that the summary judgment application be postponed *sine die* and that it must be reinstated only after the determination of an application in terms of section 85 of the NCA. It appeared that the credit agreement debt in issue had been the subject of a debt review in terms of section 86 of the NCA but that such debt review was terminated by the credit provider.[103] The consumer however alleged in his opposing affidavit that he and his debt counsellor had "caused an application in terms of section 85(a) [of the NCA] to be brought against" the credit provider which application would be issued and served simultaneously with his opposing affidavit to the summary judgment proceedings.[104] In brief the consumer indicated in his opposing affidavit in the summary judgment proceedings that his "bona fide defence"[105] was that he was over-indebted. He indicated that he had approached a debt counsellor who found him to be over-indebted and instructed him to make certain payments in accordance with a debt restructuring proposal but that the debt counsellor did not distribute these payments to his creditors.[106]

Binns-Ward J indicated that these allegations by the consumer did not make out a defence but they did however make out a basis for asking the court to exercise its discretion against granting summary judgment.[107] The purported section 85-application was brought by way of interlocutory proceedings in the action and the principal affidavit was

98 *Ibid*.
99 *Ibid*.
100 *Ibid*.
101 Par 24.
102 Unreported WCC case no 1061/2012.
103 Par 2. The court inferred this from the allegation that the credit provider had delivered notices in terms of s 86(10) NCA.
104 Par 3.
105 *Ibid*.
106 *Ibid*. The consumer indicated that he became suspicious and started making payments directly to his creditors and also approached a new debt counsellor.
107 *Ibid*.

filed by the new debt counsellor.[108] The latter affidavit set out the history of the matter at length pertaining to the previous debt counsellor's failure to distribute the consumers payments to his creditors.[109] It also indicated that the consumer was over-indebted and was a suitable candidate for debt review.[110]

As the court in the *Kallides*-matter was correctly of the opinion that the appropriate application that should have been brought in casu, was for the debt review to resume in terms of section 86(11),[111] it focused on the distinction between sections 85 and 86.[112] Apart from stating that the consumer who wants to invoke section 85 will have to explain why he did not avail himself of the procedure under section 86, the court did not deal with any further with the discretion of the court under section 85.

In *Andrews v Nedbank Ltd*[113] the court indicated that the fact that the legislature did not enumerate factors or circumstances which should be considered by the court when called upon to exercise its discretion in terms of section 85 must necessarily mean that the court should exercise a judicial discretion with due regard to all the relevant facts placed before it, including the purpose of the NCA. *In casu* the court pointed out that it was abundantly clear that the consumer's over-indebtedness was largely due to the relevant credit agreement and that his ability to satisfy all his peculiar financial obligations in the peculiar circumstances of the case was suspect.[114]

The aforementioned cases however illustrate that in order to enable the court to exercise its discretion judicially and to make sure the consumer is not merely raising the issue of over-indebtedness for purposes of delay with no real intention or feasible prospect of obtaining debt relief and eventually satisfying his obligations towards the credit provider, the consumer must as a minimum disclose the following information to the court (for instance either in his opposing affidavit at summary judgment stage or by way of a substantive application):

(a) facts that indicate that the consumer is *probably* over-indebted

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108 Par 4. The debt counsellor pointed out in his affidavit that the credit provider who instituted the enforcement proceedings *in casu* was the only credit provider who took action against the consumer as a result of the non-distribution of payments by the consumer's previous debt counsellor. No objections were received by the remaining credit providers to whom the consumer had personally started making payments after he became suspicious about his previous debt counsellor's failure to pay money over to his credit providers.

109 Parr 12-19 of the affidavit of the new debt counsellor (Barkhuizen).

110 Parr 23-29 of the new debt counsellor's affidavit.

111 Parr 10, 11. The court thus treated the application purportedly made in terms of s 85 NCA as one in substance made in terms of s 86(11) NCA.

112 Parr 7, 8.

113 2012 3 SA 82 (ECG) par 13.

114 Par 22. The consumer was not permanently employed – he had secured employment for six months only.

(b) an acceptable explanation of why the consumer did not access the voluntary debt review process prior to delivery of the section 129(1)(a)-notice (Here the credit provider's conduct may be relevant eg that the credit provider sent a section 129(1)(a)-notice immediately upon default and refused to entertain any submissions by the consumer)

(c) detail of how the consumer became over-indebted[115]

(d) the consumer must provide details of any payments or debt repayment proposals or debt restructuring proposals he has made to the credit provider or any other interactions he had with the credit provider in an attempt to address his default and debt position

(e) details of the consumer's total debt situation

(f) details of the consumer's income

(g) the stage of the proceedings at which section 85 is invoked (a consumer who is over-indebted and genuinely wishes to access debt relief via debt review will usually at least raise the issue at summary judgment stage – if it is raised at a much later stage such as at trial, the court should consider the possibility of abuse).

(h) a reasonable explanation as to why he did not access the voluntary debt review procedure (for example because the credit provider acted promptly upon his the consumer's first default and sent him a section 129(1)(a)-notice before he could approach a debt counsellor)

(i) facts that indicate that his financial position is such that in all probability the debt counsellor who conducts the debt review will be able to come up with an economically feasible debt rescheduling proposal.

All these factors play a role but, absent clear abuse, it is submitted that the possibility that a debt review will yield an economically feasible debt restructuring proposal is pivotal in the exercise of the court's discretion under section 85(a). Obviously the fact that a consumer is employed or has a source of income from which he is able to service his debt is important but not decisive. Lack of employment or a steady income may however lead to the exercise of the section 85(a) discretion (and also the discretion in terms of section 85(b) as discussed below) against the consumer.

5 2 The Discretion of the Court in Terms of Section 85(b)

Section 85(b) envisages a different situation than section 85(a). It does not require a prior referral by the court to a debt counsellor but entitles the court to go ahead and declare that the consumer is over-indebted and to make any order contemplated in section 87 to relieve the consumer's over-indebtedness. It should thus be clear to the court that the consumer is actually over-indebted as opposed to probably over-indebted. It may consequently be asked in which circumstances the court will make a

115 To make sure that the consumer is not abusing credit and then attempting to rely on the debt relief measures in the NCA to facilitate further abuse. This detail regarding how the consumer became over-indebted may also serve to reveal any reckless credit granting.

section 85(b) order? It is submitted that the courts, and especially the high courts where no such procedures as those in terms of section 65 or 74 of the Magistrates Court Act[116] exist, are not equipped to conduct a comprehensive debt review on the same scale as a debt review conducted by a debt counsellor. Judges and magistrates do not have the time to phone credit providers or engage in correspondence with them or to busy themselves with all sorts of calculations. However it appears that the legislature has contemplated that there may be an instance where a court can declare a consumer over-indebted without first referring the matter to a debt counsellor for a debt review. Although not explicitly stated, when regard is had to section 130(4)(c)(iii) (which also empowers a court to make an order as contemplated in section 85(b) in the instance that a pending debt review in respect of one credit agreement is disregarded by a credit provider who seeks to enforce the credit agreement) such situation appears to be where a consumer has only one credit agreement. It is doubtful whether section 85(b) will be used much in practice. The reported cases all deal with requests in terms of section 85(a).This is probably because it is very unlikely that a consumer who is over-indebted will have only one credit agreement – usually they have quite a number thereof. It is also likely that it is because a court, which is not equipped to be doing debt reviews, will rather use its discretion to make a referral under section 85(a) where the consumer's debt position can be properly reviewed by a debt counsellor in accordance with a process that requires extensive engagement with the consumer and credit providers. In any event, declaring a consumer over-indebted, even if that consumer only has one credit agreement, is a far wider exercise than merely considering that one specific credit agreement and actually entails an evaluation of the consumer's total debt position and repayment ability. It is actually not the type of task that a judge or magistrate who is a judicial officer and not a debt investigator, should busy themselves with.

Although it is submitted that section 85(b) will find limited, if any, application in practice, this discussion will be incomplete without considering the situation further should it happen that a court decide to act in terms of section 85(b). Thus, insofar as the exercise of the court's discretion in terms of section 85(b) is concerned, it is submitted that the followings aspects are relevant:

(a) Information from which it is clear that the consumer is over-indebted.

(b) The consumer must provide an acceptable explanation of why he did not use the voluntary debt review process under section 86 (Here the credit provider's conduct may be relevant, for instance that the credit provider sent a section 129(1)(a)-notice immediately upon default and refused to entertain any submissions by the consumer).

(c) The consumer must provide an explanation of how his indebtedness arose.[117]

116 32 of 1944.
117 See the remarks at n 105 above.

(d) The consumer must provide details of any payments or debt repayment proposals or debt restructuring proposals he has made to the credit provider or any other interactions he had with the credit provider in an attempt to address his default and debt position.

(e) Details of the consumer's total debt situation.

(f) Detail of the consumer's income.

(g) The stage of the proceedings at which section 85 is invoked.

(h) The consumer must only have one credit agreement.

(i) It must be clear to the court that the consumer is over-indebted and that it is not necessary to refer the matter to a debt counsellor to determine whether the consumer is over-indebted because the debt counsellor will come to the exact same conclusion and it will just create unnecessary delay.

(j) The debtor's indebtedness must be such and his financial position must be such that the court will be able to do an economically feasible restructuring of the consumer's credit agreement debt.

Also in the context of the discretion in terms of section 85(b) the question whether the over-indebted consumer's credit agreement debt can be economically restructured, is pivotally important.

6 Powers of Court

6 1 Powers of the Court Under Section 85(a)

Where the court decides to exercise its discretion against a referral under section 85(a) it can then grant the relief sought by the credit provider in the specific proceedings if otherwise all the requirements for such relief are met. Thus, in summary judgment proceedings a court can then grant summary judgment in the absence of any *bona fide* defence on the merits.

Where the court however exercises its discretion in favour of a referral in terms of section 85(a) it is submitted that the court proceedings in which the consumer's over-indebtedness was alleged and section 85 was invoked will have to be postponed either *sine die* or preferably for a specified time period pending the finalization of the debt review by the debt counsellor. There is only one section in the NCA that describes the process that the debt counsellor will have to follow to conduct a debt review, namely section 86 and it is submitted that in the case of a referral in terms of section 85(a) the debt counsellor will thus have to follow the procedure as set out in section 86. This submission appears to be strengthened by the statement in section 85(a) that the debt counsellor must make a recommendation to the court in terms of section 86(7)(c). It further appears that section 85(a) contemplates that the debt counsellor, after having conducted the debt review, must make his recommendation to the same court that made the section 85(a) order.

A recommendation by a debt counsellor in terms of section 86(7)(c) may either be that the consumer is not over-indebted[118] or that he is not yet over-indebted but nevertheless experiencing, or likely to experience, difficulty satisfying all his obligations under his credit agreements in a timely manner[119] or that he is definitely over-indebted. Where the debt counsellor finds that the consumer is not over-indebted it appears that such consumer would then have the right to approach the court, with leave, for a declaration of over-indebtedness as envisaged by section 86(9) of the NCA.[120] If the consumer fails to approach the court for a declaration of over-indebtedness within the time period allowed for such application by the consumer, the court may then grant the relief to which the court proceedings in which the over-indebtedness was raised pertains, such as for instance summary judgment against the consumer. Where the debt counsellor finds that the consumer is not yet over-indebted but likely to become over-indebted in the near future as contemplated in section 86(7)(b) he is obliged to first attempt to obtain a voluntary debt rescheduling agreement between the consumer and his credit providers which agreement must then be made a consent order.[121] If such a voluntary agreement cannot be reached the debt counsellor must refer the matter to the court together with his debt rescheduling proposal.[122] Where the debt counsellor's determination reveals that the consumer is already over-indebted the NCA requires that the matter be referred to court with a debt rescheduling proposal.[123] Thus in the case of a determination in terms of section 86(7)(b) that does not result in a consented rescheduling agreement as well as in the event of a finding of over-indebtedness as contemplated in section 86(7)(c), the court has the discretion[124] to make a debt rescheduling order as contemplated in section 86(7)(c), namely:

(i) that one or more of the consumer's credit agreements be declared to be reckless credit, if the debt counsellor has concluded that those agreements appear to be reckless;

(ii) that one or more of the consumer's obligations be re-arranged by

(aa) extending the period of the agreement and reducing the amount of each payment accordingly;

(bb) postponing during a specified period the dates on which payments are due under the agreement;

(cc) extending the period of the agreement and postponing during a specified period the dates on which payments are due under the agreement; or

118 S 86(7)(a) NCA.
119 S 86(7)(b) NCA.
120 See Scholtz *et al* par 11.3.3 for a discussion of the position where the debt counsellor finds that the consumer is not over-indebted.
121 S 86(7)(b) NCA read with s 86(8)(a) NCA.
122 S 86(8)(b) NCA.
123 S 86(7)(c) NCA.
124 It is submitted that the use of the word "may" points toward a discretion.

(dd) recalculating the consumer's obligations because of contraventions of Part A or B of Chapter 5, or Part A of Chapter 6.

The rescheduling powers in terms of section 86(7)(c)(ii) does however not enable a court to write off interest.[125] With regard to the power of the court to declare a credit agreement reckless as contemplated in section 86(7)(c)(i) it is submitted that this order implies that the court can also grant relief in respect of such reckless credit agreements in view thereof that section 130(4)(a) provides that where a court determines that a credit agreement was reckless it *must* make an order contemplated in section 83 (being the section that sets out the various forms of debt relief in regard to reckless credit).

In *Collett v Firstrand Bank Ltd*[126] the court observed that one of the differences between section 85 and section 86 is that in terms of section 85 a credit provider does not have the right to terminate the debt review. This view was also taken in *Standard Bank of South Africa Ltd v Kallides*[127] where the court remarked that it is no cause for surprise as the process under section 85(a) occurs at the instance and under the direction of the court and once an order is made under section 85(b), enforcement proceedings by the credit provider might ensue only in the circumstances provided in terms of section 88(3) of the NCA. Although this statement appears to be correct in the context of a declaration of over-indebtedness and debt rescheduling pursuant to section 88(3), it can however not be agreed that merely because a debt review is conducted as a result of a section 85(a) order it means that such debt review cannot be terminated by a credit provider. In essence, as indicated above, the debt counsellor conducting the debt review will follow the very same process as under section 86 unless specifically directed otherwise by a court. As indicated above, section 88(3) indicates specifically that when a credit provider receives notice of court proceedings contemplated in section 85 the credit provider may not enforce the credit agreement until the consumer is in default and one of the events contemplated in section 88(1) has occurred. This provision is however subject to section 86(10) and it is therefore submitted that where a debt counsellor is conducting a debt review pursuant to section 85(a) which in essence entails the same procedure as under section 86, that termination of such review would be competent should the debt counsellor for instance fail to make a recommendation timeously or should the debt counsellor and /or consumer act in bad faith.

It is thus submitted that where the court exercises its discretion in favour of a referral to a debt counsellor it would be prudent for the court to indicate a specific date by which the debt counsellor should make its

125 See Scholtz *et al* par 11.3.3.3. Where the court recalculates the consumers obligations under s 86(7)(c)(ii)(dd) NCA it may however have a bearing on the amount of interest charged.

126 2011 4 SA 508 (SCA) par 11. See also *Seyffert & Seyffert v Firstrand Bank Ltd* [2012] ZASCA 81.

127 Unreported WCC case no 1061/2012.

recommendation to court and to postpone the proceedings during which section 85 was raised to such date. The court should then indicate in its order that if the debt counsellor fails to make its recommendation to the court on the date as indicated, the credit provider may terminate the debt review and approach the court for relief in terms of the postponed proceedings on the same papers. Where the court makes no order indicating the date by which the debt counsellor should make his recommendation to court but merely postpones the proceedings *sine die* it is submitted that it will have the effect that the debt counsellor will be afforded the normal time period for the debt review as contemplated in section 86(6) read with regulation 24(6) and section 86(10) and that the credit provider will then be able to terminate such debt review in accordance with section 86(10) within 60 business days after the court referred the matter for debt review and set the postponed proceedings down for hearing.

6 2 Powers of Court Under Section 85(b)

Where a court exercises its discretion against making an order in terms of section 85(b), it can grant the relief sought by the credit provider if all the requirements for such relief are met. If for instance the credit provider has applied for summary judgment the court may then grant the summary judgment in the absence of *a bona fide* defence on the merits.

As indicated, a court will only be able to declare a consumer over-indebted if it is appraised of sufficient information to support such finding of over-indebtedness. A declaration of over-indebtedness thus has to be supported by the facts of a specific matter. It appears that section 85(b) implies that in such instance the court can make an assessment of whether the debtor is actually over-indebted and can also make a declaration regarding reckless credit where applicable and grant relief appropriate to such reckless credit granting and/or over-indebtedness.[128] Section 87(b) is relevant with regard to the powers that a court can exercise in terms of section 85(b) and provides that a court may

> (b) make:
>
> (i) an order declaring any credit agreement to be reckless, and an order contemplated in section 83(2)[129] or (3)[130]

128 S 87 NCA.

129 S 83(2) NCA provides that if a court declares that a credit agreement is reckless in terms of s 80(1)(a) NCA or s 80(1)(b)(i) NCA, the court may make an order (a) setting aside all or part of the consumer's rights and obligations under *that* agreement, as the court determines just and reasonable in the circumstances; or (b) suspending the force and effect of *that* credit agreement in accordance with subs (3)(b)(i).

130 S 83(3) NCA provides for the suspension of the reckless credit agreement and an order for re-arrangement of the consumer's obligations under any other credit agreements in accordance with s 87 NCA.

(ii) an order re-arranging the consumer's obligations in any manner contemplated in section 86(7)(c)(ii);[131] or

(iii) both orders contemplated in subparagraph (i) and (ii).

Thus where the court finds that reckless credit granting occurred it can set the specific "reckless" credit agreement aside in whole or in part in terms of section 83(2) or it can suspend the force and effect of that credit agreement in accordance with section 83(2) read with section 84 of the NCA.[132] In addition it may also make a debt restructuring order re-arranging any of the consumer's obligations in any manner contemplated in section 86(7)(c)(ii). However, it is submitted that given that section 85(b) appears to envisage a declaration of over-indebtedness in respect of one agreement only it means that if the court decides that the over-indebtedness of the consumer was the result of reckless credit granting then the court can only either make the order in section 87(b)(i) relating to setting aside or suspension *or* it can make the order in section 87(b)(ii) – because if the court makes the order in respect of section 87(b)(i), there is no other credit agreement debt left that can be rearranged.

It is further submitted that in the instance where the consumer has only one credit agreement but has been unable to access the voluntary debt review process under section 86, such consumer will be able to ask the court for relief in terms of section 85(a) alternatively in terms of section 85(b).

Where the court has, however, exercised its discretion in favour of declaring the agreement over-indebted in terms of section 85(b) the matter does not follow the debt review path set out in section 86 and termination in terms of section 86(10) is not competent. Once the court has made a debt re-arrangement order as contemplated in section 87 the effect of section 88(3) of the NCA kicks in with the result that the court proceedings during which the allegation of over-indebtedness was made will be suspended for as long as the consumer abides by the terms of the debt rearrangement order. It is submitted that it would be prudent for a court to make an order that the aforesaid proceedings are suspended pending compliance by the consumer with the re-arrangement order or that it is postponed *sine die* pending compliance with such order and that upon non-compliance the credit provider may approach the court on the same papers for an order in terms of the said court proceedings.

7 Conclusion

Section 85 of the NCA serves to facilitate access to debt review and debt restructuring alternatively a declaration of over-indebtedness and

131 See par 6 1 above.

132 For a detailed discussion of these powers of the court to deal with reckless credit granting see Boraine & Van Heerden 2010 *THRHR* 1; Van Heerden & Boraine 2011 *De Jure* 392.

subsequent debt relief by the court without the necessity of debt review by a debt counsellor. It appears that the section is limited in its application insofar as it is only to the avail of a consumer who has not yet applied for debt review prior to delivery of a section 129(1)(a)-notice by the credit provider. Essentially the section gives effect to the legislature's intention that the debt relief measures relating to over-indebtedness should be available to consumers even after enforcement of a credit agreement has commenced. Sight should however not be lost of the fact that the NCA also has the purpose of educating consumers and promoting responsibility in the credit market. Encouraging consumers to pro-actively deal with their over-indebtedness outside the cost confines of debt enforcement proceedings contribute towards consumer education and a sustainable credit market and it is for this reason that consumers are encouraged to make use of the voluntary debt review process in section 86 of the NCA.

Section 85 however also acts as a filter to prevent abuse of process by consumers and thus the discretion afforded to the court under both section 85(a) and section 85(b) requires the consumer to explain why he did not use the voluntary debt review process under section 86 and to present information that indicates that his credit agreement debt can be economically restructured. The invocation of section 85 should thus not be yet another dilatory feat in the consumer's attempts to delay enforcement but should be used as a tool in attaining the purpose of satisfying the consumer's debt obligations. It should not serve to perpetuate the consumer's debt predicament whilst frustrating the credit provider's legitimate debt enforcement attempts but should be used responsibly to attain a balanced debt relief solution which observes the interest of the consumer as well as that of the credit provider.

The continued relevance of the *mandament van spolie*: recent developments relating to dispossession and eviction

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OPSOMMING

Die Voortgesette Relevansie van die *Mandament van Spolie*: Onlangse Verwikkelinge met betrekking tot Uitsetting en Onteiening

Ten spyte daarvan dat artikel 26(3) van die Grondwet die uitsetting van persone in die afwesigheid van 'n hofbevel verbied, het drie onlangse hofsake aangedui dat sulke uitsettings steeds plaasvind. Hoewel verskeie opsies vir die applikante (staatsorgane) beskikbaar was om persone uit geboue en skuilings te verwyder, (nood-, gesondheids- en rampmaatreëls en die Uitsettingswet 19 van 1998), is uitsetting in die gevalle onder bespreking effektiewelik bewerk deur spoliasie – van die gebou of skuiling as 'n geheel of van elemente wat integraal tot die skuiling was (ontneming van dakplate). Om besitsherstel te bewerkstellig (en uitsetting om te keer), is die *mandament van spolie* deur die respondente geopper. Hoewel die feite en omstandighede soortgelyk (maar nie identies nie) was, is die uitsprake taamlik uiteenlopend. In twee van die drie sake was die *mandament* onsuksesvol en is 'n grondwetlike besitsherstelremedie ontwikkel. In die derde geval was die *mandament* inderdaad suksesvol, hoewel die dakplate met plaasvervangende materiaal herstel moes word.

Die bydrae ontleed die drie sake in die lig van (a) die basiese beginsels van die *mandament* en die redes vir die remedie in die algemeen; en (b) die noodsaaklikheid (al dan nie) om die remedie te ontwikkel. Dit wil voorkom of die *mandament* toenemend aangewend word om ander oogmerke, byvoorbeeld grondwetlike beskerming teen uitsetting, te bereik. Dit is problematies in die lig daarvan dat die *mandament* nooit beoog het om substantiewe regte of, soos in hierdie gevalle, veilige grondbeheer ("secure tenure") daar te stel nie. Wat egter duidelik na vore kom, is dat (a) die Uitsettingswet nie persone beskerm wat in dieselfde posisie as die respondente is nie omdat die Wet te reaktief is; en (b) dat die *mandament* steeds relevansie het deurdat alle rolspelers gedwing om aan 'n formele proses wat by 'n openbare forum afspeel, deel te neem. Solank as wat die leemtes in die Uitsettingswet voortbestaan, is die *mandament* relevant, nie net as besitsherstelremedie nie, maar ook as meganisme om die belange van kwesbares – veral by onwettige uitsetting – uit te lig.

1 Introduction

Section 26(3) of the Constitution provides that no person may be evicted from his or her home or have his or her home or shelter demolished without a court order and that a court order may only be granted after all relevant circumstances had been considered.[1] In all instances the granting of an eviction order has to be just and equitable. Yet, persons still lose their shelter or homes without a court order being granted. Three recent cases illustrate that the loss of a home or shelter, thereby effectively constituting eviction, may result from acts of dispossession, either of the home or shelter as a whole (total destruction), or some distinctive integral elements thereof (such as removal of parts of a roof). These acts of dispossession occurred unlawfully, in the absence of due process. Because they were effectively evicted without a court order being granted, the dispossessed and therefore effectively evicted, wanted restoration of their homes and shelters. But how are persons so dispossessed and often displaced to be restored to their former living environments? On what basis can they return, speedily, to their homes or can their shelter be restored to them? What options are there when there is nothing left to return to, shelters and structures having been destroyed or demolished? It is in this process of reclaiming homes and shelters that the restorative possessory remedies, in particular the *mandament van spolie,* may come into play.

The aim of the article is to ascertain to what extent, if at all, the *mandament van spolie* is still relevant today – in a post-Constitutional South Africa – within the context of vulnerable occupiers and their housing and accommodation arrangements. The question is important on two levels: Firstly, on a theoretical level, the role and function, as well as the limitations of the mandament as possessory remedy, need to be clarified. Judgments in terms of which possessory remedies were claimed, with very similar facts and surrounding circumstances have resulted in dissimilar, divergent decisions. Is there a "true" application of the *mandament van spolie* and if so, what is it? Is it possible to adjust or extend its application? Should the plight of vulnerable occupiers be highlighted more in this process or should other relief, aimed at embodying constitutional imperatives, be developed instead? Are there any differences, theoretically and practically, between the common law and constitutional remedies in these circumstances? Secondly, on a practical level, it is crucial to ascertain what options are available to persons who find themselves dispossessed (evicted) from their homes and shelters without the Prevention of Illegal Eviction from and Unlawful

1 See generally Liebenberg *Socio-economic Rights* (2010) 344-350; Van der Walt *Property in the Margins* (2009) 146-160; Pienaar & Muller "The impact of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 on homelessness and unlawful occupation within the present statutory framework" 1999 *Stell LR* 370; Pienaar "'Unlawful occupier' in perspective: history, legislation and case law" in *Essays in honour of CG van der Merwe* (eds Mostert & De Waal) (2011) 309.

Occupation of Land Act[2] (PIE) having been instituted against them. Therefore, the role of PIE and other possible options and their practical relevance within this context also needs further elaboration.

The aims of the article are achieved by firstly providing an overview of the general principles pertaining to the *mandament van spolie*, as well as its general applicability and the underlying reasons for employing it. The *mandament* has been employed differently in case law – especially with regard to vulnerable occupiers. Of importance for this contribution, are the instances where case law development had occurred in relation to non-restoration or the impossibility of repossession. Accordingly, special emphasis will be placed on these instances. The focus thereafter shifts to establish the link between dispossession and resultant eviction. In this regard the applicability of PIE and its present shortcomings in this context are identified.

Inevitably, the exposition underlines that PIE, contrary to the underlying aim of section 26(3) of the Constitution, is essentially reactive and responsive and is, where unlawful occupiers are concerned, not helpful where eviction has effectively already been orchestrated by way of dispossession or spoliation. Within this context the *mandament van spolie* remains crucially relevant, though not necessary as a restorative remedy.

2 Setting the Scene

In *City of Tshwane Metropolitan Municipality v The Mamelodi Hostel Residents Association*[3] the municipal body ("the City") became aware that a hostel complex situated in the City's municipal area was badly dilapidated, unsafe and uninhabitable. The occupiers of the hostels had mostly been employed as migrant labourers in the mines during the colonial and apartheid periods and have occupied the hostels ever since. As a result of the appalling state of the hostels, the City began addressing the problem in line with its general obligation in terms of section 26 of the Constitution, and its specific mandate according to the national housing plan. It was clear that the hostel was in a deplorable state and that redevelopment was required. Consequently, the City entered into negotiations with the hostel residents in order to ensure that redevelopment of Block J of the hostels took place. It was agreed that the residents would evacuate the premises and demolition of Block J would occur as the first step in the redevelopment process. The City arranged alternative accommodation for the residents to ensure that they were not left displaced during the renovation of the hostels. However, the residents refused to vacate the hostels when the City wished to commence with the redevelopment. Nonetheless, with the help of the police and private contractors the City proceeded with the

2 19 of 1998.
3 [2011] ZASCA 277.

redevelopment by removing the roof covering and roof structures as the first step in the demolition of the building. This was done while residents were still occupying the buildings. Accordingly, the residents applied for the *mandament van spolie* to ensure repossession of the property destroyed as a result of the demolition. The order was granted in the court *a quo* and confirmed in the North Gauteng High Court. The result of the court order was that the City was precluded from any further demolitions without an eviction order in terms of PIE. The City was also ordered to restore the roof structures and roof covering to the condition it was in prior to the destruction thereof.[4]

On appeal, the main defence raised by the City was that the residents had consented to the demolition of the hostels. The City conceded that the residents were in peaceful and undisturbed possession of the property when the dispossession took place; and it was also willing to acknowledge that dispossession did in fact occur. However, the City argued that the dispossession was lawful because the residents had consented to the demolition during the negotiations about the redevelopment.[5]

The Supreme Court of Appeal dismissed the contention that the dispossession was lawful on the basis of consent. The Court emphasised that all demolitions and evictions must be effected in terms of court orders in line with PIE, which was enacted to give effect to section 26(3) of the Constitution. It was clear that a court order to that effect was not obtained. In the end, the Court concluded that the requirements for the *mandament* – namely peaceful and undisturbed possession and unlawful dispossession – had been complied with in the case and the remedy was granted. Consequently, the City was ordered to *restore the roof structures and roof covering of Block J* of the Mamelodi hostels to at least an equivalent of the condition they were in prior to destruction thereof.[6]

The *Mamelodi* case was not the only case that has dealt with the *mandament van spolie* and vulnerable, indigent occupiers in recent years. Instead, dispossession (and therefore effective eviction) had also occurred earlier, in 2007, in relation to the destruction of shelters and building materials of unlawful occupiers in *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality*[7] and more recently with the disconnection of water and electricity, followed by violence and resultant evictions from a residential complex in *Schubart Park Residents' Association v City of Tshwane Metropolitan Municipality*.[8] The binding factors in each of these cases were that (a) dispossession had occurred, either *in toto* or partially by the removal or dispossession of elements constituting shelter, and (b) that the *mandament van spolie* was claimed. In none of these cases official eviction proceedings had been

4 *Idem* par 3.
5 *Idem* par 6.
6 *Idem* par 11. (Emphasis added).
7 2007 6 SA 511 (SCA).
8 2013 1 SA 32 (CC).

embarked on. Though raised in all three cases mentioned here, the *mandament van spolie* was only successful in one, despite the facts being similar, though not identical. In the first case that had dealt with the *mandament*, *Tswelopele*, the *mandament* was unsuccessful on the basis that the original building materials had been utterly destroyed and that nothing existed that could be restored. For the claimants, the unlawful occupiers, there was nothing left to return to. A constitutional remedy was granted instead. In the most recent case, *Schubart Park*, the *mandament* was likewise unsuccessful and a constitutional remedy was granted in its stead. But in the *Mamelodi* case, set out above, the *mandament* was indeed successful, despite the roof having to be reconstructed with alternative constituents.[9] So why the different results? Which is the correct one? Can and should the *mandament* be "developed"? When and how, if at all, do measures prohibiting unlawful eviction come into play? Before the connection between spoliation and eviction within this context is explored in more detail, the basic principles of the *mandament,* its application and the issue of replacement materials are scrutinised first.

3 Application of the *Mandament van Spolie*

3 1 General Principles of the Remedy

The *mandament van spolie* is a remedy available in South African law to protect possession of property. The remedy results in the restoration of possession to persons who have been unlawfully dispossessed of their property. It has been described as the only true possessory remedy that remains in modern South African law.[10] The reason for its real possessory status can be ascribed to the fact that the remedy requires no *ius possidendi*. Bare possession is enough to satisfy the *locus standi* in the case of the *mandament van spolie*. Furthermore, courts should generally disregard the merits of the dispute when deciding whether the remedy should be granted. Therefore, it has been repeatedly stressed that considerations other than the remedy's requirements are inappropriate in the decision of whether the remedy should be granted.[11] From this perspective the *mandament van spolie* is an ideal remedy for unlawful occupiers as the absence of a basis in law for their occupation is

9 Although the roof coverings were not destroyed in this case, the authorities were unable to use the roof coverings because it was made of asbestos, which was prohibited. The court ordered that the City use alternative materials to ensure that the premises was reconstructed to at least the equivalent of the condition as it was before the destruction thereof. See *Mamelodi Hostel Residents Association supra* par 10.

10 Price *The possessory remedies in Roman-Dutch law* (1947) 107; Taitz "Spoliation proceeding and the 'grubby handed' possessor" 1981 *SALJ* 36 37; Kleyn "Die mandament van spolie as besitsremedie" 1986 *De Jure* 1 8; Badenhorst, Pienaar & Mostert *Silberberg & Schoeman's The Law of Property* (2006) 288.

11 Taitz 1981 *SALJ* 36 37, 40-41; Van der Walt "Naidoo v Moodley 1982 SA 82 T" 1983 *THRHR* 238 239; Kleyn 1986 *De Jure* 1 5-10.

irrelevant. Irrespective of the unlawful status of their occupation, constituting possession, this is a possessory remedy that is indeed at their disposal.

It is trite law that there are two requirements that need to be complied with in order to be successful with the spoliation remedy.[12] In the first place, the person who asserts the remedy – referred to as the *spoliatus* – must prove peaceful and undisturbed possession of the property. Secondly, unlawful dispossession (or deprivation) by the spoliator must be proven. However, even if the initial question concerning whether the remedy should be granted is answered in the affirmative on the basis of the two requirements, there are nonetheless instances where the remedy's application may still be denied. This will occur in cases where a valid defence can be raised against the *mandament van spolie*.[13] In this regard, it is clear that the question surrounding the defences against the spoliation order should logically be asked after the *facta probanda* have been proven.[14] Therefore, it should first be questioned whether the requirements of the remedy have been complied with after which the possibility of a defence may be explored. Impossibility of restoration is commonly recognised as a defence against a spoliation order.[15] Impossibility implies that repossession of the spoliated property is not likely for some reason. In some instances, it might be impossible to return the thing because it does not exist anymore. In other cases, the defence may take the form of irreparable damage or harm that makes restoration of the property impossible. Clearly, impossibility as a purported defence against the *mandament van spolie* needs to be revisited in light of the tendency recently by courts – including the *Mamelodi Hostel Residents* court – to apply the defence in an inconsistent

12 *Nino Bonino v De Lange* 1906 TS 120; *Yeko v Qana* 1973 4 SA 735 (A) 739. Interestingly, in Sonnekus "*Fredericks and another v Stellenbosch Divisional Council* 1977 3 SA 113 K" 1978 *TSAR* 168 168-172, the author asserts that there are in fact four requirements four requirements for the *mandament van spolie*. He argues that the possibility of restoration must exist before the *mandament* can be ordered. See specifically Sonnekus 1978 *TSAR* 168 169-170.

13 Taitz 1981 *SALJ* 36 37, 40-41; Taitz "A spoliation order is a robust and unique remedy" 1982 *SALJ* 351 354; Van der Walt "Defences in spoliation proceedings" 1985 *SALJ* 172 179-180; Van der Merwe *Sakereg* (1989) 134-137.

14 This is unless the defence raised is directly raised against one of the *facta probanda*. Price *The possessory remedies in Roman-Dutch law* (1947) 108 indicates that "[g]enerally speaking, the only defence open to the respondent is a denial of the facts alleged." It is also indicated by the authors of Silberberg & Schoeman that the spoliator may plead that the spoliatus was not in possession of the property or that the dispossession was not unlawful, either of which may constitute a valid defence against the spoliation order. However, Van der Walt 1985 *SALJ* 172 points out that jurisprudence has opened up the possibility that there may be other defences against the *mandament van spolie*. See also Taitz 1981 *SALJ* 36 41, where Taitz indicates that the defences against the *mandament* are limited. He also argues that there is no conceivable reason why it may be necessary to extend the defences that would be available to the respondents.

15 Van der Walt 1985 *SALJ* 172 179-180; Van der Merwe (1989) 134-137.

manner.[16] For occupiers who find themselves in the identical position as the *Mamelodi* residents the end result would mean the difference between restoration in the exact same position as before, or being unsuccessful with their claim. To that end the rationale behind the defence of impossibility due to destruction or irreparable harm has to be examined with reference to the modern developments in case law. This examination is linked to the question whether cogent reasons are evident in contemporary case law (and commentaries on that case law) that might call for reconsideration of the way in which the defence is applied. It is clear that the defence has not had smooth application in case law and has been the topic of much discussion and debate. With this in mind, the following section deliberates impossibility in its modern application as a defence against the spoliation order.

3 2 The Rationale Behind the Defence of Impossibility Due to Destruction

The *crux* of the dispute concerning whether the *mandament van spolie* is still a feasible remedy in instances where the spoliated property suffered irreparable damage seems to be grounded in the question of the justification for the remedy.[17] On the one hand, there are those who argue that the most important element of the remedy is repossession of the spoliated property. Therefore, if repossession of the same property is not possible then the *mandament* can in principle not be applied.[18] According to these critics, the remedy is primarily aimed at protecting possession. The following examples illustrate the arguments made in this regard:

> *[D]ie* mandament van spolie *is 'n regsmiddel wat besitsverhoudinge beskerm ten einde te verhoed dat die reg in eie hande geneem word en die regsorde sodoende versteur word nie.*[19]

> *By besitsbeskerming gaan dit in wese oor die beskerming van 'n beheerverhouding tussen 'n regsubjek en 'n saak.*[20]

16 We recognise that there may be other instances of impossibility which we specifically refrain from discussing; for example impossibility that results because the property has been alienated to a third party subsequent to the dispossession and consequently repossession is impossible. For a discussion of this, see De Waal "Die *mandament van spolie* as remedie vir besitsherstel" (LLM dissertation 1984 US) 36-54. Interestingly it was decided in *Schubart Park* that it was impossible to use the *mandament van spolie* because of the appalling state of the property. The Court emphasised that the *mandament* would in itself not determine constitutional rights and therefore its application was impossible in that instance, even though the two requirements could strictly be complied with.

17 *Fredericks v Stellenbosch Divisional Council* 1977 3 SA 113 (K).

18 Sonnekus 1978 *TSAR* 168 172; De Waal "*Naidoo v Moodley* 1982 4 SA T" 1984 *THRHR* 115 118.

19 De Waal 1984 *THRHR* 115 118.

20 Kleyn 1986 *De Jure* 1 10.

On the other hand, there are authors who believe that it should be possible in some instances to require the spoliator to restore or reconstruct what he has demolished; and this restoration or reconstruction can be done in terms of the *mandament van spolie*. Furthermore, proponents arguing in favour of this standpoint also foresee the possibility that the *mandament* can be applied in cases where alternative or replacement materials are required in order to restore possession. In this regard, the following examples are interesting:

> *Die skrywer hiervan wil dus aan die hand doen dat die* mandament *nie 'n remedie vir die beskerming van besit genoem moet word nie, omdat die* mandament *(a) in die eerste plek op die berskerming van die regsorde ingestel is, en nie op die beskerming van die individuele reg op besit nie; en (b) nie net deur besitters van die remedie gebruik kan word nie.*[21]

The *raison d'être* for the remedy was to restrain persons from taking the law into their own hands and to induce them to submit the matter to the jurisdiction of the court.[22]

> The fundamental principle of the remedy is that no one is allowed to take the law into his own hands.[23]

The decision of *Fredericks v Stellenbosch Divisional Council*[24] ("*Fredericks*") may assist in best illustrating the dispute. *Fredericks* sparked considerable interest with regard to the application of the *mandament van spolie* specifically with regard to the above mentioned arguments.[25] The facts of the case can roughly be summarised as follows: The applicants were unlawful occupiers who had erected homes on property belonging to the respondent council. The respondent demolished the applicants' homes and discarded the building materials on the basis that the applicants did not have permission to occupy its property and their rudimentary homes did not comply with building regulations. Furthermore, it was contended on behalf of the respondent that the applicants were in violation of the then Prevention of Illegal Squatting Act[26] (PISA). The applicants applied for the *mandament van spolie* for the restoration of all their possessions and building materials. They also sought an order directing the respondent to rebuild their homes. The respondent argued that it was impossible to use the spoliation remedy in these instances. However, the court rejected the

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21 Van der Walt "Nog eens *Naidoo v Moodley* – 'n Repliek" 1984 *THRHR* 429 435.

22 Taitz 1981 *SALJ* 36.

23 *Yeko v Qana supra*. See also Scholtens "Law of Property (including mortgage and pledge)" 1996 *ASSAL* 222, where the author argues that the primary function of the remedy is to prevent persons from taking the law into their own hands.

24 1977 3 SA 113 (K).

25 Sonnekus 1978 *TSAR* 168 172; De Waal "Die mandament van spolie – meer as besitsherstel?" 1978 *Responsa Meridiana* 275 275-278; De Waal (1984) 3, 32-34; Sonnekus & De Waal "Plakkery en die *mandament van spolie*" 1990 *TSAR* 514 514-527.

26 52 of 1951.

respondent's claim and granted the *mandament van spolie*. Consequently, the respondent was ordered to re-erect the homes of the applicants, even though the original materials – with which the applicants' homes were initially built – were destroyed. The court relied on *Zinman v Miller*[27] and *Jones v Claremont Municipality*[28] to come to the conclusion that the remedy could be used in instances where restoration required something to be done in addition to repossession of the thing. The court in *Fredericks* even went as far as ordering that if the original sheets of corrugated iron could not be found, the respondent should use sheets of similar size and quality as the original ones.[29] There are different ideas regarding this decision.

Blecher commends the judgment.[30] He recognises that there may be instances where repossession of the property is unrealistic or impractical; but he argues that a court may in these particular instances have the discretion to order restoration of the *res* to its prior condition. To this end, he lists factors that should be taken into consideration when the court exercises its discretion in this regard.[31] Therefore, he approves of the outcome reached in the *Fredericks* decision, but it is clear that his view on the issue is not shared by all.

De Waal criticises the judgment.[32] He maintains that the most important element of (and rationale behind) the remedy is repossession of the spoliated property. He further asserts that in some instances a second element may be added; namely that the spoliator may be required to perform certain acts in order to ensure that repossession can in fact take place. However, he states that if the first element (repossession of the property presumably in its broken state) is not possible, then the second element cannot be ordered.[33] To this end, he concludes:

> *By die aanwending van die* mandament van spolie *moet onder 'besitsherstel' dus in beginsel teruggawe van die gespolieere saak wees en nie die teruggawe van 'n plaasvervanger saak verstaan word nie.*[34]

Therefore, the extent of the meaning of *besitsherstel* (or restoration of possession) is limited according to De Waal and additional reparation

27 1956 3 SA 8 (T). In *Zinman*, the court stated that the *mandament van spolie* may allow in some instances for something to be done in addition to repossession of the thing to the spoliated person. Therefore, the remedy does not only provide for restoration of the thing; sometimes repossession can require restoration of the thing to its former state.

28 (1908) 25 SC 651. Here, the court granted the *mandament van spolie* and ordered the spoliator to re-erect the wire fence on the applicant's property in order to restore the fence to its former condition.

29 *Fredericks* 117.

30 Blecher "Spoliation and the demolition of legal rights" 1978 *SALJ* 8 9, 11.

31 Blecher 1978 *SALJ* 8 11-12.

32 De Waal (1984) 33, 35, 56.

33 De Waal 1978 *Responsa Meridiana* 275 277; De Waal (1984) 35, 56.

34 De Waal (1984) 57-58. See also De Waal 1978 *Responsa Meridiana* 275 277; Sonnekus 1978 *TSAR* 168 170.

actions by the spoliator is permitted only in so far as it will ensure reconstruction of damaged property in order to restore possession. In other words, the *mandament van spolie* would not be available in cases like *Potgieter v Davel*[35] and *Fredericks* where the property was completely destroyed and/or not in the possession of the spoliator because in those instances the spoliator would not be able to return the property at all.[36] Correspondingly, Sonnekus agrees with De Waal.[37] He confirms that if repossession of the *specific* property is not possible then the *mandament van spolie* cannot be applied in the particular case.[38] Sonnekus emphasises that the spoliation remedy is primarily a possessory one and if repossession of the identical property is not possible (either because the thing was destroyed or because it had subsequently been alienated to a third party) the *mandament van spolie* is not the appropriate remedy.

In contrast with the views of De Waal and Sonnekus, but comparable to Blecher's take on the issue, Van der Walt provides a different outlook concerning the ambit of the field of application of the *mandament*. In Van der Walt's initial work on the topic he reasoned that case law indicated that the *mandament van spolie* was seen as an action with which legal order was preserved.[39] In his later work, he clarifies that the *mandament* is not a remedy which is aimed at the function of *general* peace-keeping.[40] Rather, the remedy fulfils the function of peace-keeping as far as *unlawful dispossession of property* is concerned. In this regard, it is asserted that the remedy should not be absolutely precluded in instances where the property was suspiciously destroyed or alienated so as to ensure that repossession could not take place; and ultimately to specifically exclude the possibility of instituting the remedy in those instances. Accordingly, the argument is that if the property is fungible and can in principle easily be replaced – as was illustrated in *Fredericks* (and more recently in *Mamelodi Hostel Residents*) – the application of the *mandament* should not be completely barred. The support for these contentions concerning the remedy is found in cases like *Fredericks*, which is seen as a "judicial triumph and not as an (arguably) doctrinal aberration or a (logical) mistake".[41] Accordingly, Van der Walt condemns the judgment of *Tswelopele*[42] not so much for its outcome – which he is willing to concede is laudable – but rather for the uncertainty that it causes with regard to remedies in general.

35 1966 3 SA 555 (O).
36 De Waal (1984) 57-58.
37 Sonnekus 1978 *TSAR* 168 168-172.
38 *Idem* 170.
39 1983 *THRHR* 238 238-239; 1984 *THRHR* 429 435.
40 Van der Walt "Squatting, spoliation orders and the new Constitutional order"1997 *THRHR* 522 525.
41 Van der Walt "Developing the law on unlawful squatting and spoliation" 2008 *SALJ* 24 35.
42 *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality supra*.

In *Tswelopele* the Supreme Court of Appeal tried to rectify the supposed anomaly concerning the appropriate field of application of the *mandament van spolie*. The Court held that in order for the *mandament van spolie* to apply in cases where reconstruction of destroyed property had to occur using replacement materials, the remedy would have to be stretched beyond its normal field of application.[43] In this regard, it was solidified in *Tswelopele* that the *mandament* is not available in instances were substitute materials are required in order to restore the *status quo ante*.[44] In this decision, occupiers of a vacant piece of land in Garsfontein were evicted from their homes and their homes demolished by the nature conservation division of the Tshwane Metropolitan Municipality, the immigration control office of the Department of Home Affairs and the South African Police Services. On behalf of the occupiers, the Tswelopele Non-Profit Organisation applied for restoration of possession of the homes to the occupiers in terms of the *mandament van spolie* and for provision of temporary shelter to the desolate occupiers in terms of their rights under sections 25 and 26(3) of the Constitution. The High Court relied on *Rikhotso v Northcliff Ceramics*[45] ("*Rikhotso*") and held that the *mandament* was appropriate only for restoration of possession and not for reparation of the property.[46] Therefore, the reasoning in *Tswelopele* was that if the property was destroyed the *mandament* was not a suitable remedial option.

In the Supreme Court of Appeal, the Court reflected on whether the spoliation remedy was available as contended by the appellants. However, it was found that the doctrinal barrier for allowing the *mandament* in these instances was too great and the Court accepted the analysis set out in *Rikhotso* as undoubtedly correct.[47] It confirmed in line with *Rikhotso* that the main objective of the *mandament* is to temporarily restore physical control and enjoyment of property and not its reconstructed equivalent.[48] Having decided that none of the existing remedies provided the occupiers with suitable protection, the *Tswelopele*-court decided instead to create a constitutional remedy to provide the type of relief, which according to the court, the *mandament* was unable to do in the particular instance. The court stressed that a development of the nature required in order for the *mandament* to be applicable in these instances would amount to forcing the common law – specifically the common law remedies – to perform a constitutional function.[49] Interestingly, it seems as though that is exactly what the court in *Mamelodi Hostel Residents* did without even considering the doctrinal arguments against and the policy arguments for the development of the *mandament* for purposes of rebuilding the destroyed property using

43 *Idem* 20-26.
44 *Idem* 24.
45 1997 1 SA 526 (W).
46 *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality supra* 24.
47 *Rikhotso v Northcliff Ceramics supra* 24.
48 *Ibid*.
49 *Idem* 26.

substitute materials. Despite the doctrinal difficulty with the application of the *mandament* in these instances as illustrated in *Tswelepele* – which ostensibly was enough justification for denying the spoliation order in that decision – the court in *Mamelodi Hostel Residents* simply applied the *mandament*. This debate concerning whether the spoliation remedy is available in instances where restoration of destroyed or demolished goods is required, was not re-evaluated in *Mamelodi Hostel Residents*. This was the case even though the result of the judgment was that the roof would have to be re-erected or rebuilt so that the City could comply with the order.

Accordingly, from *Mamelodi Hostel Residents* the conclusion may be drawn that the *mandament van spolie* is available in instances where parts of property have been destroyed and the spoliator is required to do something to ensure that the *status quo ante* is restored. In other words, the *mandament van spolie* can apply in cases where reconstruction is required to place residents in the same position they were in prior to the dispossession.

In must be contended that up to this point, the decision provides nothing new. In fact, the judgment simply confirms that in some instances the spoliator might be required to do more than merely returning possession of the spoliated property. Both *Zinman v Miller*[50] and *Jones v Claremont Municipality*[51] provide authority in this regard. Moreover, based on the literature, it would appear as though even authors who are religiously in favour of the narrower confinement of the *mandament* would be willing to concede that in some instances the *mandament* might require the spoliator to do something more than mere repossession of the thing to restore the *status quo*.[52] However, these authors would no doubt place the qualification that this can only be done if the *same* property still exists and can be given back (evidently in its damaged or broken state); thereafter, some form of rebuilding may be required so that the situation is reverted to the state before the dispossession took place. However, where the spoliator is required to use replacement or substitute materials in order to restore possession, the path of agreement once again separates. At this point the doctrinal authority becomes silent, the body of case law becomes divergent and the writers' opinions become conflicting. Yet, *Mamelodi Hostel Residents* took the application of the *mandament* to exactly this level.

The City was ordered not only to rebuild the roof, but also to use *alternative constituents* because the initial roof structures and coverings were made of asbestos, which was prohibited by the authorities.[53]

50 *Zinman v Miller supra* 11.
51 *Jones v Claremont Municipality supra* 655.
52 De Waal (1984) 35; De Waal 1978 *Responsa Meridiana* 275 275-278. See also Van der Walt 1985 *SALJ* 172 180. This position also confirms the earlier *Zinman* and *Jones* decisions. See *Zinman v Miller supra* 11; *Jones v Claremont Municipality supra* 651.
53 *Mamelodi Hostel Residents supra* 10.

Importantly, as illustrated above, the issue of the development of the *mandament* to allow it to apply in instances of restoration using substitute materials was by no means settled before the *Mamelodi*-judgment was handed down. In fact, according to *Tswelopele* and the arguments discussed in that decision,[54] the *mandament* was not available in instances where different materials had to be used to restore the *status quo ante*.[55] Therefore, the outcome in *Mamelodi Hostel Residents* is dissimilar to the outcome reached in *Tswelopele*. Though restoration was ordered in both instances, different remedies were employed.

In *Mamelodi Hostel Residents*, the common law remedy was enforced. On the basis of the *mandament van spolie* the dwellers of the hostel complex obtained repossession of the hostels and an order to the effect that the City was compelled to rebuild the damaged property using replacement materials. Therefore, although the building materials were not completely destroyed, it is clear from the judgment that the City would have to restructure parts of the property using alternative building supplies. The *mandament van spolie* was nonetheless granted. In contrast, the common law remedy was denied in *Tswelopele* because it was contended that the remedy is not available in instances where the property was destroyed and substitute materials are required in order to restore possession of the property. Rather, a constitutional remedy was created so as to ensure that adequate effect was given to the constitutional rights of the occupiers as a result of non-compliance with PIE. The Court in *Tswelopele* held that the *mandament van spolie* was unsuitable in this regard.

4 Acts of Dispossession and Resultant Eviction

In both *Mamelodi Hostel Residents* and *Tswelopele* the occupiers were evicted and their homes seized upon without the respective Municipalities having obtained the required court orders in terms of PIE. In fact, in both instances it was the *initial acts of spoliation* that triggered the inevitable eviction. This result is in line with the PIE's definition of "evict" as meaning "[t]o deprive a person of occupation of a building or structure, or the land on which such building or structure is erected, against his or her will, and 'eviction' has a corresponding meaning".[56]

Accordingly, the loss of home or shelter can directly be ascribed to the spoliation that occurred. It is therefore not surprising that the Supreme Court of Appeal in *Mamelodi Hostel Residents* and *Tswelopele* emphasised the importance of court orders *before* demolitions and evictions may be effected. Furthermore, it was stressed that if court orders were not obtained in this regard, the evictions and demolitions would be unlawful

54 See Kleyn *Die* Mandament van Spolie *in die Suid-Afrikaanse Reg* (LLD thesis 1986 UP) 396-406.

55 *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality supra* 24.

56 S 1 PIE.

in terms of PIE[57] and the Constitution.[58] Therefore, the absence of formal eviction proceedings was consequently contradictory to statutory measures (PIE), Constitutional provisions (section 26(3)) and the common law (prohibition on self-help), thereby constituting unlawfulness on many levels. Though the interaction between the ordinary requirements of spoliation as a common law remedy and the legislative framework of PIE is apparent, it is essential to consider what the implications are of non-compliance with PIE in so far as it relates to an occupier's position in terms of common law, statutory and/or constitutional law remedies.[59]

The unlawful dispossession of homes and shelter or components thereof was a tool used extensively during the pre-Constitutional era.[60] This occurred rather regularly despite the general point of departure that self-help may not be resorted to. In *De Jager v Farah & Nestadt* for example[61] the court found that the respondents had to follow the procedure as set out in terms of the then Slums Act[62] in order to eject residents. This had to occur even in the case where the applicants were committing an offence by remaining on the premises without the consent of the landowner.[63] In this regard, the court stated:

> The fact that the appellants have no legal right to continue to live in this slum and would have no defence to proceedings for ejectment, does not mean that proceedings for ejectment can be dispensed with, nor does it make any difference to the illegality of respondent's conduct that the occupation by the applicants carries with it penal consequences.[64]

This line of thinking was made clear even earlier in the decision of *Nino Bonino v De Lange*[65] where the court also highlighted that no person is entitled to take the law into their own hands; and if they do, the *status quo ante* should be restored and possession returned, implicating the

57 S 4(1) PIE states specifically that, notwithstanding anything to the contrary contained in any law or the common law, the provisions of PIE apply to the eviction of an unlawful occupier. S 8(1) PIE furthermore provides that no person may evict an unlawful occupier except on the authority of an order of a competent court, while s 8(3) PIE states that the contravention of s 8(1) PIE constitutes an offence.

58 As explained, s 26(3) Constitution prohibits eviction or demolition of homes and shelters, except in pursuance of an order of court after all relevant circumstances had been considered.

59 Van der Walt *Property and the Constitution* (2012) 35-37.

60 See especially Van der Walt *Property in the Margins* (2009) 60-61; Pienaar "'Unlawful occupier' in perspective: history, legislation and case law" in Mostert & De Waal (2011) 309-330.

61 1947 4 SA 28 (W).

62 See also Pienaar 309-330.

63 The argument that the applicant was in unlawful possession (ie without the consent of the landowner) is in any event not a valid defence against the *mandament van spolie*. This is because the merits of the dispute are irrelevant in the spoliation proceedings. See Taitz 1981 *SALJ* 36 37, 40-41; Van der Walt 1983 *THRHR* 238 239; Van der Walt 1985 *SALJ* 172 173.

64 *De Jager v Farah & Nestadt supra* 35.

65 1906 TS 120.

mandament van spolie as the appropriate remedy in such instances.[66] Likewise, the court in *Jones v Claremont Municipality*[67] emphasised its abhorrence at public bodies taking the law into their own hands and not following the recourse of the law in instances where an alleged right exists.[68] In these instances, the existence of the *mandament van spolie* may serve "as a warning to any person who can assert a real right in terms of a particular thing to rather take recourse to the courts of law and not to succumb to the allure of self-help."[69]

While land owners and relevant authorities often employed self-help (dispossession and spoliation) to effect eviction, the dispossessed resorted to possessory remedies to restore the balance. Until about 1977 squatters generally used the *mandament van spolie* to claim restoration of possession of their building materials with which they had constructed their homes.[70] However, the remedy's application was sometimes precluded because impossibility could be used as a valid defence against the use of the *mandament* in instances where the property was destroyed.[71] In this regard, the tendency by the municipalities of the time was to deliberately destroy the building materials so as to prevent the use of the *mandament van spolie* in these instances. The 1977-amendment to PISA[72] further strengthened the position of local authorities, in that it precluded claimants from applying for civil remedies in response to demolitions of buildings or structures or the removal of materials or contents from the structures, unless the claimants could prove lawful title or a right to the land.[73] This severely limited the courts' power to grant the *mandament van spolie* in favour of unlawful occupiers whose properties were seized upon and destroyed. It is thus clear that the link between dispossession and eviction and subsequent possessory remedies and statutory responses thereto has been part-and-parcel of the South-African landscape for many years.

The landscape changed when PISA's successor, PIE, commenced.[74] Again, the question of the applicability of the *mandament van spolie* arose. In contrast to the PISA-case law, the first judgment that dealt with the co-existence of PIE and the *mandament van spolie*, did so from a different perspective. In *City of Cape Town v Rudolph*,[75] the tables were

66 *Nino Bonino v De Lange supra* 122.
67 *Jones v Claremont Municipality supra*.
68 *Idem* 654-655.
69 Muller *The impact of section 26 of the Constitution on the eviction of squatters in South African law* (LLD thesis 2011 US) 60.
70 *Idem* 63.
71 *Ibid*.
72 Prevention of Illegal Squatting Amendment Act 72 of 1977. Blecher 1978 *SALJ* 8 13 writes that this legislative intervention was a "swift and harsh" intervention by the legislative authority in response to the *Fredericks* decision.
73 S 3B(4)(*a*) Prevention of Illegal Squatting Amendment Act 72 of 1977.
74 Van der Walt *Property in the Margins* (2009) 6-3; *PE Municipality v Various Occupiers* 2005 1 SA 217 (CC).
75 2004 5 SA 39 (C).

turned in that the applicants, the City, were the claimants instituting the *mandament*. This was based on the notion that the squatters, the respondents, had resorted to self-help in order to jump the housing queue by spoliating (dispossessing) a park that the City had up to that stage possessed peacefully and undisturbed. Therefore, of importance here is that the *mandament* was used as the *eviction tool to effect* eviction and not, as in the other cases under discussion, as a *defence* against eviction. To some extent, the findings of the Court in relation to the relative scope of the *mandament* and PIE, respectively, do not assist here as the findings are related to these mechanisms as *eviction tools*. Nevertheless, the Cape Provincial Division ruled that the *mandament van spolie* was not available where PIE was applicable. The court highlighted that an applicant municipality was not free to choose to invoke common law remedies to evict unlawful occupiers because PIE was specifically enacted to regulate eviction law. Instead, it must follow the measures set out in PIE to ensure that section 26(3) of the Constitution is given effect to.

Clearly, an interplay exists between PIE and the "normal" principles of the *mandament van spolie,* especially given the availability of recourse to PIE in order to protect occupiers against evictions and demolitions. This interplay between common law, statutory and constitutional remedies was emphasised again in *Mamelodi Hostel Residents* where the SCA stated that, even if the occupiers had at the outset consented to relocate and later withdrew their consent, the summary (unlawful) deprivation of possession of their property would still be untenable.[76] An eviction order would still have to be obtained in terms of PIE, which requires judicial oversight in the form of a court order before occupiers can be evicted from land.[77] To this end, the court relied on *Tswelopele*, in which it was also stressed that eviction proceedings in terms of PIE must first be obtained before evictions take place.[78] Without a court order, the eviction will always be in violation of the law and the Constitution; but it would also inevitably cause unlawful deprivation of possession in terms of the second requirement for the spoliation remedy. The question concerning what would be the appropriate remedy in these instances should therefore be scrutinised.

5 In Search of an Appropriate Remedy

As explained, in line with the *Rikhotso*-judgment, the *mandament van spolie* was found to be unsuitable in the *Tswelopele* case as restoration of the *status quo ante* was impossible. On the basis that the common law *mandament van spolie* could not be developed or extended, the search for an appropriate remedy or suitable relief, began.[79] The determination of

76 *Mamelodi Hostel Residents supra* 9.
77 *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality supra* 2.
78 See also *Mamelodi Hostel Residents supra* 9.
79 *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality supra* 26-28. See specifically s 38 Constitution.

"appropriate relief" for purposes of section 38 of the Constitution is a much broader question than whether the requirements of the *mandament* were complied with. What is more, the considerations for granting the *mandament* differ substantially from the considerations for determining appropriate relief for the occupiers under section 38. Systematically, the first question in a *mandament* case should be whether the requirements necessary to succeed with the remedy have been complied with. Thereafter, if there are defences that can be raised against the remedy – like impossibility because the property no longer exists – that should be considered. The court in *Tswelopele* – in which a constitutional remedy was finally crafted – considered the rights that were infringed and emphasised that the warrant against unauthorised eviction; the occupiers' right to personal security; the right to privacy and the occupiers' property rights had all been interfered with in this case. The court then proceeded to question whether any existing relief could remedy the wrong suffered by the occupiers. It considered an award of damages, criminal charges, an interdict and the possibility of the occupiers joining the *Grootboom* emergency relief[80] and housing queue.[81] However, the court came to the conclusion that none of these remedies were adequate to grant the relief that the court was seeking to provide to the occupiers. In this regard, the anticipated remedy had to be a speedy one, aimed at addressing the consequences of the breach of the above-mentioned rights of the occupiers. In terms of how the remedy should go about doing that, the court indicated that the remedy should vindicate the occupiers' salvage claim and require the respondents to re-create the occupiers' shelters. The appellants argued that the *mandament van spolie* should be adapted or developed so that it could afford the occupiers the relief outlined by the court.[82] In the alternative, it was argued and accepted by the court that if the foreseen remedy was not available among the existing ones (which included the *mandament*) it should be developed under the Constitution.

Ultimately, the Court found that the *mandament van spolie* was not the appropriate remedy when the property that was spoliated was destroyed or demolished. The court specifically denied that the *mandament van spolie* can (or should) be developed to allow for restoration of property that was unlawfully demolished or destroyed by the spoliator.[83] Rather,

80 *Grootboom v The Government of the Republic of South Africa* 2000 11 BCLR 1169 (CC).

81 *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality supra* 18.

82 *Idem* 20.

83 The court in *Tswelopele* relied on (and accepted as correct) the doctrinal analysis in *Rikhotso v Northcliff Ceramics (Pty) Ltd supra* to come to the conclusion that the *mandament* could not be granted if the property had ceased to exist. The court also considered the earlier case of *Fredericks v Stellenbosch Divisional Council supra* in which it was found that the *mandament* was available even in the case that involved the use of replacement materials. However, in the end, the *Tswelopele* court came to the conclusion that the *mandament* was not the appropriate remedy to do what the applicants were asking for.

the court opted for the crafting of a new constitutional remedy, because it was found that it would be inappropriate to "seize upon a common law analogy and force it to perform a constitutional function".[84] It must be remembered that the Court granted a constitutional remedy in an application that was brought purely on the basis of a spoliation order. Therefore, the Court upheld the distinction between the common law requirements of the *mandament van spolie* and the constitutional relief that claimants would be entitled to in terms of section 38 of the Constitution. Similarly, the Constitutional Court later in *Schubart Park*[85] denied the application of the *mandament van spolie* on the basis that mere restoration of possession would not constitute an appropriate remedy according to section 38 of the Constitution.[86]

Schubart Park is a residential complex situated in Pretoria and owned by the first respondent (the City of Tshwane). The City rented units of the complex to various occupiers, but during the period from 1999 (when the City became owner of the complex) to 2011 (when the litigation in this matter began) the building had become badly run-down and significantly deteriorated. Furthermore, the City was unaware of exactly who occupied the property. On 21 September 2011 the City disconnected the water and electricity supply to the complex and it resulted in protest by the occupiers. The protests quickly erupted into violence and even resulted in a fire flaring up in one the blocks of the complex. As a result, the police and fire brigade officers intervened and cordoned off the streets. They also removed some of the residents from the complex. Legal representatives acting on behalf of the residents sought to negotiate with City officials, but the negotiations were unsuccessful. When residents were unable to return to their homes the following day, they brought an urgent application in the North Gauteng High Court for an order allowing them to return to their homes. They sought restoration on the basis that they were spoliated of possession of their homes.[87] The application for reoccupation of possession was dismissed.[88] The North Gauteng High Court came to the conclusion that the *mandament van spolie* was not the appropriate remedy in these instances, because restoration would require that the residents would return to the complex, which possibly endangered their lives and the court was unwilling to make an order of that nature. Therefore, the *mandament van spolie* could

84 *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality supra* 26.
85 *Schubart Park Residents' Association v City of Tswhane Metropolitan Municipality supra*.
86 *Idem* 30.
87 *Schubart Park Residents' Association v City of Tshwane Metropolitan Municipality supra* 22.
88 *Idem* 9. The following day the order concerning the provision of temporary arrangements was kept in place and parties were ordered to "take further steps in an attempt to reach agreement on unresolved issues".

not be granted because reoccupation of their homes was impossible as a result of the deteriorated and unsafe state of the complex.[89]

In the Constitutional Court the applicants again sought restoration on the ground that they were spoliated of possession of their homes.[90] Therefore, section 26(3) considerations were brought into proceedings which would otherwise have been normal spoliation proceedings. The Court recognised that if the *mandament van spolie* was not the appropriate remedy, and could not be developed to be the appropriate remedy, the occupiers would be without a remedy in a case where there was clearly an infringement of section 26(3) rights. In this regard, it followed the approach adopted in *Tswelopele*. Therefore, it upheld the distinction between the spoliation remedy (with its possessory function) and the constitutional relief under section 38 of the Constitution. Froneman J correctly stated that a spoliation order would only give the occupiers factual possession and possible return of the *status quo* and it would not in itself directly determine constitutional rights.[91] Therefore, the spoliation remedy would not vindicate the occupiers' rights in terms of section 26(3). Their rights were clearly infringed and therefore restoration of factual possession of the property would not be *appropriate relief* according to section 38. In this respect, the court emphasised that spoliation proceedings merely set the scene for the subsequent determination of the constitutional rights in relation to property.[92] Therefore, the *mandament van spolie* could not be granted.[93] However, if the Court had stopped here it would have allowed an order which fell short of section 26(3) of the Constitution and the rights of the applicants would have been disregarded.[94]

6 Discussion

In order to determine whether appropriate relief had indeed been granted, it is necessary to step back for a moment. Two questions come to the fore: (a) why had the initial acts of dispossession or spoliation occurred (thus, conduct pre-dating the present *mandament* proceedings); and (b) what was it that the respondents (persons claiming the *mandament*) wanted in the present proceedings? In other words: what was the result that they had in mind? In the first case in 2007, in *Tswelopele,* authorities wanted to evict or remove the unlawful occupiers, essentially because of their unlawful occupation of land, of which the location was especially unsuitable for human occupation. In relation to

89 *Schubart Park Residents' Association v City of Tshwane Metropolitan Municipality supra*.
90 *Idem* 22.
91 *Idem* 29.
92 *Ibid*.
93 *Idem* 29-30.
94 *Idem* 18, 34, 40. This is especially in light of the fact that PIE was not given effect to and none of the legislative mechanisms that allow for removal, evacuation or eviction of people from their homes was applied.

both the *Mamelodi Hostel* dwellers and the *Schubart Park* residents, the buildings had become so unsafe and uninhabitable that occupiers had to be evacuated for their own safety. In all of these circumstances other suitable channels were open to effect relocation, other than resorting to self-help or spoliation. In all three cases PIE could have been employed, either under section 5, which provides for urgent eviction proceedings, or section 6 that enables an organ of state to institute eviction proceedings if it is in the public interest.[95] Apart from these options set out in PIE other emergency relief or health and safety measures could have been employed as well. These include the Disaster Management Act[96] and the National Building Regulations and Building Standards Act.[97] None of these available measures were employed to effect the relocation so desperately sought. To be fair to the authorities involved, in both the *Mamelodi Hostel* and the *Schubart Park* cases, some attempts had been made to enter into negotiations in order to reach some kind of agreement. Despite these attempts, however, acts of dispossession or spoliation were finally resorted to. Consequently, in all three instances, dispossession had effectively resulted in eviction. Therefore, because *dispossession* had occurred, it was a "normal reaction" to claim a *restorative remedy*, resulting in a claim for the *mandament van spolie*. Though dispossession was the legal issue, in reality much more was at stake, namely the *constitutional right not to be arbitrarily evicted* from property or to have property demolished without a court order. Inevitably therefore, the *means* employed on the one hand and the *objective* to be achieved on the other, were somewhat disjointed. *A possessory remedy was sought to meet constitutional imperatives*. From the outset thus, common law and constitutional remedies and objectives, were conjoined, leaving it to the courts to unravel the matter. It is exactly here where the courts encounter difficulty. In both *Tswelopele* and *Schubart Park* the respective courts rejected the applicability of the *mandament van spolie* – with the aim of upholding the possessory focus of the remedy – and granted constitutional relief instead.[98] A new remedy was thus crafted, not so much to restore lost possession – although that had indeed occurred as well – but to ensure that correct eviction proceedings, based on fairness and due process – would follow forthwith. The rights of the occupiers that were supposed to be given effect to in terms of PIE, were enforced in *Tswelopele* despite the application being brought purely on the basis of the *mandament van spolie*. On the other hand, the common law remedy in the form of the

95 *Silberberg & Schoeman* 653-655.
96 57 of 2002. Especially s 54.
97 103 of 1977. S 12 and reg A15 – see also *City of Cape Town v Hoosain* [2012] ZAWCHC 180. Alternative remedies also included: GN R 2378 *GG* 127 1990-10-12; the City of Tshwane Metropolitan Municipality, Fire Brigade Services By-Laws, published under LAN 267 in *Gauteng Provincial Gazette* 42 of 2005-02-09 (specifically s 11(2)).
98 *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality supra* 24; *Schubart Park Residents' Association v City of Tshwane Metropolitan Municipality supra* 29.

mandament van spolie was granted, without more, in the *Mamelodi Hostel* case, even though it meant reconstruction with alternative materials.

Theoretically and dogmatically differences exist between the *mandament* and a constitutional remedy. This is the case because different requirements and considerations (common law as opposed to constitutional) come into play. Despite having pointed out the differences and having alluded to the disjointedness of the means employed and the objectives to be achieved concerning common law and the newly crafted constitutional remedy above, the question still remains as to what *practically* are the differences between these different sets of remedies, especially with regard to the occupiers themselves. In all three instances the unlawful occupation of the occupiers remained unchanged. Nowhere in the process had they become lawful or had they acquired *substantive rights*. If the *mandament* had been successful, as it had indeed been in *Mamelodi Hostel*, the end result would still have been restoration of possession only, after which eviction proceedings under PIE would have to be lodged. Irrespective therefore whether the *mandament* or the constitutional remedy was employed, a formal eviction process would have to follow in order to remove occupiers from buildings or land unlawfully occupied. Effectively, in both instances, the relief granted would only provide *temporary respite:* in the case of the successful *mandament* restoration is ordered after which the merits of the case are queried – possibly followed by eviction proceedings; in the case of a constitutional remedy a temporary basis for occupation only (such as alternative accommodation in *Schubart Park*) is provided, after which formal eviction applications would have to follow.

Where does PIE fit into the picture? PIE is generally initiated by the owner or person in charge of the property or organs of state in particular instances in order to evict (an) unlawful occupier(s).[99] The only way in which respondents (unlawful occupiers) can benefit from procedural and substantial measures incorporated under PIE,[100] is to fall within the ambit of PIE. To that end unlawful occupation must be paramount and an eviction application must have been lodged. Accordingly, *from the perspective of the occupier*, PIE is inherently *reactive* and *responsive* and not instigative or pro-active. In this regard PIE may fall short of protecting section 26(3) rights. Despite providing that no eviction may occur, other than under the provisions of PIE[101] these three judgments illustrate quite plainly that such evictions do occur. Clearly, various other options – apart from unlawful eviction – were available to the relevant landowners and authorities to effect relocation, as set out above. Conversely, what are the options for occupiers that find themselves in similar positions to the respondents in the three cases under discussion? If the respondents are

99 *Silberberg & Schoeman* 250-252, 653-656; Van der Walt & Pienaar *Introduction to the Law of Property* (2009) 148. See Pienaar "'Unlawful occupier' in perspective: history, legislation and case law" in Mostert & De Waal (2011) 325-327 for an analysis of "unlawful occupier".

100 See especially Van der Walt *Property in the Margins* (2009) 147-149.

101 S 4(1) PIE; see also s 8(1), (3) PIE.

still in possession (in occupation) of the building or property, an interdict may assist them in preventing their unlawful eviction and to force authorities to comply with the provisions of PIE.[102] If the occupiers have effectively already been evicted, like the cases under discussion here where acts of dispossession occurred, they can apply for a constitutional remedy in light of section 38 of the Constitution or claim the *mandament*. In none of these scenarios described here PIE is of assistance to the occupiers. The benefits, being the procedural and substantive protections, as explained, only surface once PIE had been invoked. In instances where PIE was not employed, a long and arduous process has to be followed by occupiers to be placed in re-possession of their shelter or home. These processes may include a private prosecution of the alleged offender under section 8(4) of PIE[103] or, as explained, a claim for a constitutional remedy or the *mandament van spolie*. However, the cases under discussion here illustrate that in relation to the latter two options, the outcome of the process is somewhat uncertain as courts follow different approaches with correspondingly different end results.

It is crucial that role players offer due consideration to the broad spectrum of eviction or relocation possibilities available to them. Depending on the situation at hand, emergency or disaster management measures may be more suitable than eviction proceedings under PIE. Recent case law, *City of Cape Town v Hoosain*[104] has confirmed that in any event, irrespective of the particular emergency or other measures utilised to effect eviction, no eviction may occur except after a court order had been granted. With regard to PIE, it may be fruitful to pursue an amendment of the Act that forces all role players to comply with eviction processes and procedures. One possibility may be the insertion of a provision similar to section 14 of the Extension of Security of Tenure Act[105] (ESTA). That section is aimed at restoring the *status quo ante* if an occupier for purposes of ESTA had been evicted in contravention of ESTA. Such a restoration order may also include the repair, reconstruction or replacement of any building, structure, installation or

102 This is exactly what happened in the recent decision of *Motswagae v Rustenburg Municipality* [2013] ZACC 1. In *Motswagae*, the applicants were occupiers of municipal land which the municipality wanted to rejuvenate in line with its constitutional obligation. After failed attempts at negotiations about the relocation of the occupiers during the redevelopment, the municipality began construction work next to the applicants' homes thereby leaving their foundations exposed. The applicants applied for an interdict in the High Court, which was denied on the basis that the applicants failed to prove a clear right in terms the first requirement for an interdict. They were refused leave to appeal to the High Court and to Supreme Court of Appeal. However, leave was granted in the Constitutional Court and the Court also granted the interdict because all three requirements for an interdict were proven.

103 A private prosecution is available in light of s 8(1) PIE that provides that no person may evict another except on the authority of an order of a competent court and s 8(3) PIE that confirms that a contravention of PIE constitutes an offence.

104 [2012] ZAWCHC 180.

105 62 of 1997.

thing.[106] In *Agrico Masjinerie (Edms) Bpk v Swiers*[107] the SCA formulated the underlying purpose of section 14 as follows:

> It would seem that the Legislature intended that such a person should be regarded as one who was deprived 'against his or her will of residence in terms of' ESTA. That equation is by no means unduly strained and it is consistent with the overall purpose of the legislation to which I have earlier referred because it has the effect of bringing the parties together in a controlled judicial environment in order to resolve the dispute. It also follows that resort to self-help is at odds with the means provided.[108]

Presently PIE does not allow for such a possibility, apart from the private prosecution option alluded to above.[109] Though the ESTA provision is not unproblematic as evicted occupiers may be untraceable or simply do not raise the provision as a remedy, it is possible that the provision could function better within a PIE context if occupiers, the relevant authorities and land owners are aware of and sensitised to its applicability. In light of the dire need for accommodation and shelter, the continued backlog in the provision of housing and the continuing growth of unlawful occupation[110] (even within the new constitutional paradigm and the existing responsibilities of the state and other authorities to effect access to housing),[111] shelter and housing matters will remain burning issues for years to come yet. Within this paradigm unlawful eviction, be it by way of forceful, violent removals or by way of acts of dispossession and spoliation, has no place.

7 Conclusion

In the pre-Constitutional era when *apartheid* was at its height and the application of PISA was draconically enforced, the *mandament van spolie* was regularly resorted to in order to restore possession and effectively return people to their homes and shelters. Where the demolished structures could be reconstructed with the original material, the *mandament van spolie* was an effective remedy from the view of the dispossessed. However, when building materials had been destroyed and structures demolished irreparably, legal gymnastics were sometimes employed to still make use of the *mandament van spolie*. Divergent judgments were handed down in the latter respect. Irrespective however of the actual outcome of the *mandament* proceedings during the pre-constitutional era, issues of vulnerability and homelessness were pronounced when courts were forced to deal with claims for restoration

106 S 14(3) ESTA.
107 2007 5 SA 305 (SCA).
108 *Agrico Masjinerie (Edms) Bpk v Swiers supra* 30.
109 Occupiers who find themselves in a similar position to the respondents in the three cases under discussion rarely have the resources to pursue private prosecutions. The effectiveness of this provision is questionable.
110 Van Wyk *Planning Law* (2012) 457-459.
111 See also Pienaar "Access to housing in South Africa: An overview of dimensions and mechanisms" 2011 *J Juridical Science* 119 119-139.

following dispossession. Therefore, even if the *mandament* had not been successful in restoring a home or shelter in a particular case – depending on the facts and approach followed by the court, eviction and the consequences thereof, were highlighted and brought to the fore.

This was supposed to have changed after 27 April 1994. Not only did the Constitution, by way of section 26(3), specifically provide for a right not to be arbitrarily evicted from one's home or have one's shelter demolished, but an additional measure, constituting PIE, was enacted in 1998 to give further effect to the principle. Apart from these measures, a broad range of options, aimed at relocation following emergency, disaster or other health and safety considerations, emerged. It is therefore ironic that, nineteen years after the new constitutional era dawned, the *mandament van spolie* is still resorted to in order to bring issues of vulnerability and homelessness to the fore. In this regard not much seems to have changed: PIE is too reactive and only comes into play once an eviction application had been lodged, formally. If no eviction application was lodged and the *mandament van spolie* was not claimed by the occupiers, their plight would probably remain invisible and eviction may be the inevitable result. The *mandament van spolie*, being robust and speedy, was never aimed at providing substantive rights. Its relevance in modern-day South Africa is therefore not aimed at securing tenure for unlawful occupiers. Neither, it seems, is its relevance restricted to restoration of possession only. Instead, it seems as if the *mandament van spolie* is still relevant in *highlighting the plight of vulnerable occupiers* who stand to be evicted, unlawfully, by various acts of dispossession. In light of PIE's shortcomings in this context, and the limited resources of unlawful occupiers generally, one sure way to force all role players to participate in a legal process, to be played out in a formal, legal forum, is to claim with the *mandament van spolie*.

A new role for crime victims? An evaluation of restorative justice procedures in the Child Justice Act 2008

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OPSOMMING

'n Nuwe rol vir Slagoffers? 'n Ondersoek na Herstellende Geregtigheidsprosedures in die Wet op Kinderberegting 2008

Hierdie artikel ontleed die herstellende geregtigheidsprosedures in die Wet op Kinderberegting 75 van 2008. Die oogmerk hiermee is om te evalueer in welke mate slagoffers ingesluit is en of, in lyn met vorige akademiese opinie, hulle werklik 'n sentrale posisie in so 'n benadering tot die strafregstelsel beklee. Vervolgens word voordele vir slagoffers wat 'n groter rol speel ondersoek, sowel as kritiek daarteen. Alhoewel bevind word dat slagoffers van kinderoortreders nie sentraal staan in hierdie nuwe regsparadigma nie, word aanbevelings gemaak vir die optimale uitleg en toepassing van herstellende geregtigheidsprosedures in die Wet op Kinderberegting. Op so 'n wyse kan die terapeutiese uitkomste wat vir slagoffers in die wet beoog word, verwesenlik word.

1 Introduction

Since April 2010,[1] restorative justice has been entrenched as the basis for the approach in all criminal proceedings involving child offenders. Apart from focusing on the best interest of the child offender, the Child Justice Act[2] (CJA) indicates that this approach to justice also strives to involve, *inter alia*, the victim and to identify and address harms caused by the commission of the crime. Unlike the Criminal Procedure Act,[3] (CPA) the CJA explicitly provides for victims' recognition during all stages of the child offenders journey through the justice system.

Within the South African context, restorative justice was earlier described as a new way of doing justice, either as an alternative or within the criminal justice system, *and* that, while offenders are held accountable, the victim is always central.[4] Such a lofty description, coupled with the victim-orientated objectives of the CJA,[5] raised the

1 The Child Justice Act 75 of 2008 (CJA) came into operation on this date.
2 75 of 2008. See s 1.
3 51 of 1977 (CPA). Except for a few instances where victims' participation and views are recognised, such as s 105A(b)(iii) CPA (referring to the consultation of victims during plea bargaining) and s 299A CPA (referring to the rights of victims to make presentations at the parole hearing), they are perceived as mere witnesses for the prosecution.
4 Skelton & Batley "Restorative justice: a contemporary South African review" 2008 *Acta Criminologica* 37 49.
5 See s 2(b)(ii), (iv) CJA.

expectation of victims. The aim of this article is to analyse the provisions in the CJA in order to determine the precise way in which victims have been incorporated and whether they indeed occupy a central position within the child criminal justice system. In addition, the advantages of victims' envisaged involvement *via* restorative justice processes, as well as criticism against these practices, are evaluated. Suggestions are made to optimally interpret and apply the CJA, aimed at realising the therapeutic outcomes for victims envisaged by the Act.

2 Child Justice Act 75 of 2008

2 1 Definitions

Being the underlying philosophy of the CJA,[6] the particular *definition* of "restorative justice" adopted in the legislation is of importance, and reads as follows:

> [A]n approach to justice that aims to involve the child offender, the victim, the families concerned and community members to collectively identify and address harms, needs and obligations through accepting responsibility, making restitution, taking measures to prevent a recurrence of the incident and promoting reconciliation.

Within the above definition it is clear that the involvement of the victim forms part of the bigger picture, allowing also for family and community involvement. The next component of the definition deals with the identification of issues such as harms and needs (of the victim, amongst others) and addressing those issues via various methods. These methods refer to three components, namely, making restitution,[7] protecting victims through the prevention of re-offending and lastly, promoting reconciliation. In aiming to address harms, which would include the victim's psychological harm, the CJA signals a general therapeutic perspective.[8] However, within the child justice system the first attempt will be to address the offender's harm and the victim's recovery will, most likely receive secondary focus. Addressing the more concrete or pecuniary needs flowing from crime, such as compensation, might also, as indicated below, be problematic.

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6 Preamble CJA. See Skelton *Theory and Practice of Restorative Justice* (LLD theses 2005 UP) for a study that focusses on the child offender within the CJA.

7 Other meanings include "giving back, reparation and compensation" (*Collins English Dictionary* (2003)).

8 A therapeutic "lens" (a mindfulness that the law and its application should strive to positively affect the well-being of the people involved) forms the underlying impetus behind the implementation of restorative justice procedures (see http://www.innovatingjustice.com/innovations/integrating-the-healing-approach-to-criminal-law (accessed 2013-10-10)). See also Daicoff "Growing pains: the integration vs specialization question for therapeutic jurisprudence and other comprehensive law areas" 2008 *T Jefferson LR* 551 570.

Victims of crime are not defined in the CJA, therefore it is suggested that the broad approach advocated in the *Service Charter for Victims of Crime in South Africa 2007* (hereafter *Victims' Charter*),[9] is accepted in all child justice matters. A victim is described as follows:

> [A] person who has suffered harm, including physical or mental injury; emotional suffering, economic loss; or substantial impairment of his or her fundamental rights, through acts or omissions that are in violation of our criminal law. The term 'victim' also includes, where appropriate, the immediate family or dependants of the direct victim.[10]

The definition encompasses different types of harm suffered by victims and acknowledges not only direct victims but also indirect ones. Victims of child offenders may range from small children themselves, to peers, adults, and elderly people. Unlike some forms of victim participation such as parole presentations,[11] no category of crime victims is excluded from participation in child justice matters. Yet, as indicated below, restorative justice processes are often not applicable in serious crimes, and victims' participation in such matters may be restricted to giving impact evidence in court whereby the after effects of the crime is explained for sentencing purposes.[12] In serious matters parallel restorative justice processes, which run alongside the mainstream justice process, are, however, not excluded. An opportunity for dialogue may thus be created between the victim and offender while the latter serves imprisonment.[13]

2 2 *Ubuntu*

One of the *objects* of the CJA linked to victim involvement and -interest is the promotion of the spirit of *ubuntu* in the child justice system.[14] This concept underscores the recognition and furtherance of the dignity and wholeness of all people.[15] By holding child offenders accountable for the crimes committed, the human rights and fundamental freedoms of

9 Available at http://www.justice.gov.za/VC/docs/vc/2007%20Service%20charter%20ENG.pdf (accessed 2011-05-20).

10 Department of Justice *Minimum standards on services for victims of crime* (2007) 1 available at http://www.justice.gov.za/VC/docs/vcms/2007%20MIN%20STAND%20ENG_V2.pdf (accessed 2011-05-20). The definition of victims of crime in the CJA is in line with the United Nations *Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power* (GA/Res/40/30).

11 S 299A CPA. See Van der Merwe "Justice 'outside' the law in *The secret in their eyes*: victim and offender rights in the post-sentencing phase' in *Beyond the law: Multidisciplinary perspectives on human rights* (ed Viljoen) (2012) 239-248 for a critical analysis of victim participation in parole procedures.

12 See the discussion below in par 2 5 on victim impact statements as legislated by s 70 CJA.

13 The need for confrontation and explanation may be expressed by either the offender or victim(s) – see discussion in test to note 99.

14 S 2(b) CJA.

15 Mokgoro "*Ubuntu* and the law in South Africa" 1 at http://www.ajol.info/index.php/pelj/article/ viewFile/43567/27090 (accessed 2011-11-30).

victims are upheld.[16] It also signifies respect towards victims of crime. Further, it has been held that accommodating victims more effectively in the (child) criminal justice system reaffirms the democratic value of human dignity and that "it enables us … to vindicate our collective sense of humanity and humaneness".[17] Apart from acknowledging the victim's dignity, victim involvement is promoted in the specific context of encouraging the reintegration of child offenders[18] who are often found to have been some sort of victim themselves.[19] Lastly, the promotion of *ubuntu* is envisaged through possible reconciliation by means of restorative justice procedures available to victims.[20]

Ultimately, by breaking child offenders' cycles of crime, victims will indirectly benefit from living in safer communities.[21] The interests of victims and the community may then in the long run, as envisaged by the CJA, be safe-guarded.

2 3 Diversion

Though the process of *diversion* is not an entirely new concept within the child justice context,[22] it is now formally introduced as one of the central features of the CJA. It is an alternative way of dealing with a child offender who takes responsibility for his or her actions.[23] The legal consequences of a successful diversion order are not only the avoidance of a criminal record[24] but also no possible risk of future prosecution on the same facts,[25] either by the state or instituted privately.[26] The decision to divert is made by the prosecutor or Director of Public Prosecutions (DPP), and based on certain requirements.[27] The information obtained during the preliminary inquiry is of import in this

16 S 2(b)(ii) CJA.
17 *S v Matyityi* 2011 1 SACR 40 (SCA) par 16. The case dealt with adult offenders but the *ratio* is equally applicable to the child justice system where victim recognition is legislated.
18 S 2(b)(iv) CJA.
19 Hargoven "Restorative approaches to justice: 'compulsory compassion' or victim empowerment?" 2007 *Acta Criminologica* 113 118.
20 S (2)(b)(iii) CJA. In *S v Makwanyane* 1995 6 BCLR 665 (CC) par 308 Mokgoro J emphasised that the spirit of *ubuntu* signifies a shift from confrontation to conciliation. See further a discussion on the general meaning of *ubuntu* in Church "Sustainable development and the culture of *ubuntu*" 2012 *De Jure* 511 523-529.
21 S 2(c) CJA.
22 See Gallinetti "Child Justice in South Africa: the Rights of Children Accused of Crime" in *Child Law in South Africa* (ed Boezaart) (2009) 656 for a discussion of the history of diversion since the 1990's.
23 Other requirements for diversion to be considered entail that the child has *not been unduly influenced* to acknowledge responsibility, that a *prima facie case* exists against the child, and that the child has *consented* to the diversion along with his or her parent, guardian or appropriate adult if available.
24 S 59(1)(b) CJA.
25 S 59(1)(a) CJA.
26 S 7 CPA. Also S9 and 59(2) CJA.
27 S 52(2), (3) CJA as discussed below.

regard, but the information provided by the victim during this stage is, unlike that obtained from the child offender, not considered as privileged. This resulted in prosecutors being instructed to object to victims being called to such proceedings.[28] The involvement of victims at preliminary investigations may, however, be unlikely in most cases since the inquiry usually takes place within 48 hours of the crime being committed, leaving too little time for the victim to be prepared for the encounter. But unprepared involvement is not excluded, especially in smaller communities.

Before a prosecutor can indicate to the inquiry magistrate that a diversion order is suitable in a Schedule 1 or 2 offence,[29] the views of the victim or any other person who has direct interest in the affairs of the victim has to be considered, unless it is not reasonably possible to do so.[30] For the most serious offences listed in Schedule 3 the DPP has to afford victims the opportunity to express their views, and only after its consideration,[31] may authorise diversion in writing.[32] They may comment on the possibility and nature of diversion, and any condition relating to compensation or the rendering of a specific benefit or service.[33] The prosecution is, however, not bound by the victim's viewpoint.[34] Once again, the DPP's duty to obtain the victim's views is linked to it being reasonable to consult the victim. It is submitted that the process of victim consultation should be followed as a matter of principle unless it is proved that they are untraceable. This consultation would also provide a valuable opportunity for exchange of information and answering any questions from the victim.

The CJA[35] instructs the DPP to allow the diversion of a child offender in the most serious offences, as per Schedule 3, only in those cases where *exceptional circumstances* exist. This concept is further explored in the Directives accompanying the Act. Apart from factors focusing on circumstances relevant to the child offender,[36] other factors take into account the victim's attitude and circumstances. The first factor referring to the victim is where he or she wants to avoid giving testimony in court and, instead, prefers diversion.[37] Secondly, the decision to divert may be

28 Directive H(5) s 97(4) CJA GN R 252 *GG* 33067 2010-03-31.
29 S 52 (2) CJA. Note that minor offences (in terms of Sch 1 CJA) may be diverted by the prosecutor before a preliminary inquiry is held.
30 S 52(2) CJA.
31 S 52(3)(b)(i) CJA.; Directive O(3)(C) CJA GN R 252 *GG* 33067 2010-03-31.
32 S 52(3)(a) CJA.
33 S 52(3)(b)(i) CJA.
34 Directive F(9) s 97(4) CJA GN R 252 *GG* 33067 2010-03-31. Prosecutors are, however, reminded that the avenue of private prosecution falls away in the event of successful diversion.
35 S 52(3)(a) CJA.
36 The presence of the following factors: Young age; low developmental level; hardship suffered, for example being the head in a child headed household; compelling mitigating circumstances, such as diminished responsibility; and undue influence.
37 Directive J(2)(d) s 97(4) CJA GN R 252 *GG* 33067 2010-03-31.

influenced by a witness for the prosecution who is fragile or unwilling to testify, and lastly, when proceeding within the trial would be potentially damaging to a child witness/victim.[38] The power to decide whether a Schedule 3 matter may be diverted or not, may not be delegated. In addition, the DPP's consent must be in writing and in consultation with the investigation officer. Based on the above, it appears that victims, while taking their own well-being into account may influence the increased use of non-adversarial procedures in child justice matters.

The range of options available as possible diversion orders further allows for specific involvement of the victim.[39] The possibility of ordering an oral or written apology to the victim[40] is legislated for the first time. It applies to lesser Schedule 1 offences, such as theft and fraud involving amounts below R2 500, malicious injury to property involving amounts below R1 500, common assault, trespassing, and statutory rape or sexual assault. The following orders apply to any type of offence (listed in either Schedule 1, 2 or 3): Restitution of a specified object to the victim(s) where the object concerned can be returned or restored,[41] some service or benefit by the child to a victim,[42] and payment of compensation.[43] It is suggested that an apology could be of value to victims of any type of offence and should not be restricted to lesser offences.[44]

Minimum standards have been set to guide the selection and creation of diversion options.[45] Firstly, they should be balanced according to the circumstances of the child, the nature of the offence and the interests of society.[46] One of the five pointers in the latter regard refers to being

38 Directives J(2)(g), (h) s 97(4) CJA GN R 252 *GG* 33067 2010-03-31.

39 S 54 CJA – one factor to be considered for selection of the particular diversion option(s) is the proportionality of the option to the child's circumstances, the nature of the offence and the interests of society.

40 S 53(3)(a) CJA.

41 S 53(3)(m) CJA.

42 S 53(3)(o) CJA. Payment of compensation (not to victim, but) to a specified person, persons, group of persons or community, charity or welfare organisation or institution where the child or his or her family is able to afford this.

43 S 53(3)(p) CJA.

44 See for example *S v Maluleke* 2008 1 SACR 49 (T) par 24 where the deceased's mother welcomed the apology order that was made as a condition to a suspended sentence in the case of murder. See also *News24* (2009-02-04) available at http://www.news24.com/SouthAfrica/News/Najwa-earned-a-packet-20090204 (accessed 2013-10-01) where the offender apologised in court to the father of the deceased who viewed it as "decency at last".

45 S 55 CJA.

46 These are the factors of the traditional sentencing triad and have, as laid out in *S v Zinn* 1969 2 SA 537 (A) 540G, become trite since 1969. They reflect the practice of the time during the determination of an appropriate sentence. See, however, the development of this approach in s 69 CJA, as discussed below. See also Müller & Van der Merwe "Squaring the triad: The story of the victim in sentencing" 2004 6 *Sexual Offences Bulletin* 17.

sensitive to the circumstances of the victim.[47] Further, where reasonably possible, diversion programmes should be devised, not only to impart useful skills to the child offender[48] but also to include a restorative justice element which aims at healing relationships, including the relationship with the victim.[49] Lastly, they should include an element which seeks to ensure that the *child understands the impact* of his or her behaviour on others, including the victims of the offence, and once again the inclusion of compensation or restitution is a possibility.[50] The focus on the healing of relationships and the child's understanding of the impact of the crime underscores the therapeutic perspective of the CJA towards victims.

An accreditation system is further required for diversion programmes and, to achieve the objectives of diversion, one of the criteria for the evaluation of the content of such programmes is to ensure that they reflect a meaningful and adequate response to the harm caused by offences committed by children.[51] Monitoring of any court order with regards to diversion or other sentence is of importance and progress reports must be compiled regarding restorative justice sentences.[52] Any positive outcome not only for the child but also for the victim is of relevance for this report.[53] It may create a greater workload for those role players involved, but will contribute to further acknowledgement of victims and their input with regards to diversion as well as sentence options and conditions.

2 4 Interactions

In addition to the stipulated diversion options, other measures may be implemented across all levels.[54] These include family group conferences,[55] victim-offender mediation,[56] or any other restorative justice option.[57] It should always be appropriate to the case and could substitute any of the diversion options or be in combination with any of them. Victims should always understand what these processes entail and that their decision to participate is voluntary.

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47 S 55(1)(e) CJA. The other pointers focus on the child offender and are the following:
(a) may not be exploitative, harmful or hazardous to the child's physical or mental health;
(b) must be appropriate to the age and maturity of the child;
(c) may not interfere with the child's schooling;
(d) may not be structured in a manner that completely excludes certain children due to a lack of resources, financial or otherwise.

48 S 55(2)(a) CJA.

49 S 55(2)(b) CJA.

50 S 55(2)(c) CJA.

51 S 56(2)(ii) CJA. .

52 S 73(4)(a) CJA.

53 Reg 42(2)(d) Regulations relating to Child Justice GN R 251 *GG* 33067 2010-03-31.

54 S 53(7) CJA.

55 S 61 CJA.

56 S 62 CJA.

57 S 53(7) CJA.

Probation officers provide an important link between the prosecution and victims since they are tasked with setting up family conferences. When the victim does not turn up for any of these procedures the danger exists that indifference or consent to diversion may, by implication, be (wrongly) accepted. Mere notification of the victim is insufficient as he or she also needs to be prepared by the probation officer. The question is whether the probation officer is really trained for this and whether he or she can focus on both the offender and the victim in diversion procedures. There is no other support for the victim in this regard and it is likely that the probation officer would consider the child offender as the main client. In the instance of low victim participation it is probably, in part, due to the lack of appropriate preparation. Proper preparation in all instances, especially in serious cases seems essential.

The aim of these informal interactions is to develop a plan on how the child will redress the effects of the offence.[58] In order to address this any of the Level 1 diversion options,[59] such as an apology, symbolic restitution or compulsory family time, or any other suitable measure may be agreed upon.[60] A mechanism must further be decided upon as to how the probation officer will monitor the child offender's execution of these measures.[61] As argued below,[62] the envisaged aim for victim-offender interactions is too ambitious and does not take into account the reality or limits of the child offender.

It is also possible for the court to order a family group conference or other interaction during the sentencing process and any recommendation emanating from it will be considered by the court. The child justice court may impose a sentence by confirming, amending or substituting these recommendations.[63] Given the inherent adversarial nature of criminal trials and the sentencing discretion belonging to the court, it is unlikely that the courts will often utilise this option, especially in serious matters.[64]

2 5 Victim Impact Statements

Though having been debated since 1997[65] and proposed in earlier draft

58 Ss 61(1)(a), 62(1)(a) CJA.
59 S 53(3) CJA.
60 S 61(6)(a) CJA.
61 S 61(6)(b)(vii) CJA. Other guidelines focus on the child offender per se (s 61(6)(b)) CJA).
62 Par 4.
63 S 73(2) CJA.
64 In *DPP, North Gauteng v Thabethe* 2011 2 SACR 567 (SCA) par 20, the trial court was criticised for implementing this procedure following the child victim's non-custodial recommendation in an adult rape case.
65 South African Law Reform Commission Issue Paper 7 *Sentencing: Restorative Justice (Compensation for Victims of Crime and Victim Empowerment)* Project 82 (1997).

legislation,[66] the use of *victim impact statements* during the sentencing process has only finally been legislated in the CJA. A victim impact statement is defined as:

> [A] sworn statement by the victim or someone authorised by the victim to make a statement on behalf of the victim which reflects the physical, psychological, social, financial or any other consequences of the offence for the victim.[67]

Whether to submit a victim impact report during the sentencing process of a child offender remains, as in adult trials,[68] optional. Issues of practicality may influence the prosecutor's decision in this regard such as a change in the contact details of the victim or the victim him or herself not being interested.[69] A victim impact statement must be under oath and if the contents are not disputed, it is admissible as evidence on its production.[70] The CJA fails to provide guidance as to the format of an impact statement but it may certainly vary. It may be made verbally, in writing, or by audio or video recording.[71] In view of the broad approach to the definition of victims advocated above, and the fact that the effect of crime extends much wider than the direct victim, it is submitted that the impact on immediate family such as the spouse, parents, siblings or children may also be included. Overly sentimental or irrelevant evidence will, however, certainly be objected to by the defence.

It is not clear to what extent the legislative recognition of impact statements influences this practice in child justice matters. Despite prosecutors being encouraged to obtain victim impact statements,[72] the utilisation often depends on the views and attitudes of role-players. Recent judgments, such as *S v Matyityi* [73] underscore this practice as part of an increasing awareness of crime victims' interest and dignity. Apart from acknowledging victims and the personal dimension of harm suffered, these statements are useful during the sentencing process. Firstly, child offenders who did not get diversion, but had a trial, may now have the opportunity to gain (some)[74] insight into the harm caused by his or her offence.[75] The in-court dialogue may contribute to his or her understanding of the impact of the crime. Secondly, for the imposition of the sentences of compulsory residence and imprisonment the severity

66 South African Law Reform Commission *Report on Sentencing (A New Sentencing Framework)* Project 82 (2000) (s 47); S 17(1)(b) Criminal Law (Sexual Offences) Amendment Bill 2003.
67 S 70(1) CJA.
68 S 274 CPA provides for the introduction of any relevant information before sentence.
69 S 70(2) CJA.
70 S 70(3) CJA.
71 Guidance can be taken from Directive 4 *Directives regarding complainant participation in Correctional Supervision and Parole Boards*, 2006 GN R 248 *GG* 28646 2006-04-07.
72 Directive Q 3 CJA GN R 252 *GG* 33067 2010-03-31.
73 2011 1 SACR 40 (SCA) par 16.
74 See text to note 109 below.
75 S 69(1)(a) CJA.

and degree of harm should be considered.[76] The child justice court is instructed, when deciding on imposing imprisonment, to consider as one of the factors the severity of the impact of the offence on the victim.[77] This means that victim impact statements must be presented in all serious crimes such as murder, rape and robbery committed by children. When the victim is reluctant to make such a statement someone may be authorised to do it on his or her behalf. It could be a family member, teacher, or friend. A professional impact assessment by a behavioural scientist such as a psychologist, criminologist or social worker may also be submitted.

The legislative platform for the use of impact statements during sentencing entrenches the focus on victims' harm in criminal matters. However, the victims' roles in this regard is sometimes perceived as one of a mere "expressor" of additional information and emotions,[78] with no clarity on whether, and how this input may influence the court's sentencing decision. As, highlighted above, the information and emotion provided by victims, nevertheless, assist the court in its understanding of the crime in all its dimensions.[79] Victims, themselves, also often encounter therapeutic benefits during this process.[80]

3 Benefits for Victims Participating in Restorative Justice Procedures

As stated above, family group conferences and victim-offender mediation are important restorative justice procedures advocated by the CJA.[81] It appears that the nature of victim-offender encounters in the child justice context is predominantly within family group conferences and not that of victim-offender mediation *per se*.[82] The aim of both these procedures is, under the guidance of a probation officer, firstly, to arrange and facilitate informal meetings between the child offender, the victim, their families and other support persons[83] and, secondly, as mentioned above, to develop a plan to address the effects of the offence.

76 Compulsory residence and imprisonment (ss 69(3)(b), 69(4)(a), (c) CJA respectively).
77 S 69(4)(c) CJA.
78 Edwards "An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making" 2004 *British J Criminology* 967 979.
79 See also Müller & Van der Merwe "Recognising the victim in the sentencing phase: the use of victim impact statements in court" 2006 *SAJHR* 647 662-663.
80 Roberts "Victim impact statements and the sentencing process: Recent developments and research finding" 2003 *Crim LQ* 365 371-372.
81 See ss 61, 62 CJA respectively.
82 Personal communication Hamandi & Pilusa (Probation officers at Child Justice Courts in Attridgeville and Mamelodi, Pretoria) (2011-08-26). A family-group conference in this context usually comprises of one sitting.
83 S 61(3)(b) CJA provides for a wider attendance to family group conferences, such the prosecutor, police, community members and anybody authorised by the family group conference facilitator.

These effects should include not only those relevant to the offender's life and that of his or her family, but also the consequences experienced by the victim. These are highlighted in section 70, namely, the physical, psychological, financial and social after-effects of the offence. Victims who appear traumatised should be referred to other existing avenues for counselling and empowerment. This is on the assumption that there is a service provider in the vicinity and that the victim can get there. The plan alluded to in the CJA[84] for addressing the effects of the offence allows for a wide range of options. Steps may include any level one diversion option[85] or other appropriate actions, taking into account the child offender, his family and local circumstances, and within the legislative restorative justice framework. The victim will evidently receive direct benefit from the option allowing for an apology.[86] For optimum benefit the human process should, however, always be allowed to naturally evolve.[87] Neither an apology nor forgiveness is ever guaranteed and it should not be forced either.[88] Other options of direct benefit to the victim are restitution, performance of some service and the payment of compensation. Where victims are the parents of the child offender, as highlighted below, they may further benefit from diversion orders such as family time or good behaviour.[89] Indirectly, they and other family members will also benefit from any of the orders involving counselling, therapy or education, as the child may change in a positive way.[90]

It is of importance that both procedures require the consent of the victim and offender. Both should therefore be properly briefed in order to make informed decisions. Victims who are willing to participate and are well prepared may take the lead in mediation sessions. Adult victims may also be more interested to be involved in the decision-making process about the child offender's future and how the diversion plan or sentence will achieve better outcomes.

Participation in victim-offender mediation may have significant positive psychological or emotional consequences for the victim, in particular where respect is shown to the victim.[91] It lessens feelings of

84 S 61(6) CJA read with s 62(2) CJA.
85 As set out in s 53(3) CJA.
86 A child victim of assault to do grievous bodily harm at school was initially enraged and demanded punishment. However, a public apology read out at school was perceived as genuine and made her feel empowered again. The child offender's letter of apology was towards the victim, the school, the community and the offender himself (Hamandi & Pilusa *op cit*).
87 Rossner "Emotions and Interaction Ritual: A Micro Analysis of Restorative Justice" 2011 *British J Criminology* 95 analysed a video recording of a conference and indicated the gradual emergence of successful interactions.
88 Skelton & Batley 2008 *Acta Criminologica* 37 39.
89 S 53(3)(f), (h) CJA.
90 S 53(3)(j), (k) CJA.
91 Spies "Restorative Justice: A Way to Support the Healing Process of a Child Exposed to Incest" 2009 *Acta Criminologica* 15 22 highlights that, particularly in the case of sexual offences against children, respect will contribute to the child's healing: "Time does not cure the effects of sexual abuse on children but rather the way their healing process was facilitated".

violent revenge and thereby reduces the desire for revenge.[92] The victims' anger towards his or her offender is reduced and post-traumatic stress disorder (PTSD) symptoms are lessened, indicating that the long-term negative impact on his or her well-being would be minimised.[93] In general, victims who choose to participate in victim-offender mediation are more satisfied with the justice process.[94] Hargovan,[95] however, highlights that such a finding is of little value to the more complex question whether victims really benefit from a shift from punitive to restorative justice. It is submitted that the above findings show significant impact on victims' well-being and is indicative of some victims who benefit from the shift.

Victim-offender mediation can either take place in a full diversion or non-custodial context or form part of a parallel process, particularly in serious matters. In the United States, in the case of violent crimes, victim-offender mediation is often used in the latter context, aimed at giving victims a sense of vindication, rather than for designing non-custodial sentences.[96] The greater the psychological impact of the crime on the victim the greater is the need for healing.[97] Recently, based on his right to a healing interaction with the offender, a victim, ten years after the commission of the crime, brought an application to stay the execution of the death penalty against his offender.[98] Another recent example signalling victims' need for healing interactions with their offenders comes from the fact that all 81 survivors of a 1996 right-wing bombing incident voted unanimously to get the offender (aged-18 at the time) transferred to a prison closer to them.[99] This would enable them to interact with the offender, at any time the need would arise, without high cost and time implications. It is contended that victim-offender

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Though victim-offender mediation is only part of the child's healing process, it can play a significant role in addressing the following needs of a victim of child abuse: To regain self-power and self-acceptance; to let go of guilt feelings and to confirm that the victim was not responsible for the abuse; to establish his or her innocence as a child; to regain the right to make decisions; to regain trust in others; and, to establish personal boundaries.

92 *Pretoria News* (2013-03-25) 3.

93 Rugge & Scott "Restorative Justice's Impact on Participant" 2009 available at http://www.publicsafety.gc.ca/res/cor/rep/2009-03-rjp-eng.aspx *Psychological and Physical Health* 2009-03 (accessed 2012-09-18).

94 *Rethinking Crime and Punishment* (2011-06-15) available at http://www.scoop.co.nz/stories/PO1106/S00181/restorative-justice-works-for-both-victims-and-offenders.htm (accessed 2012-09-18).

95 2007*Acta Criminologica* 113 118.

96 Umbreit *et al* "Victim-offender dialogue in violent cases: A multi-site study in the United States" 2007*Acta Juridica* 22 23.

97 McElrea "Twenty years of restorative justice in New Zealand – Reflections of a judicial participant" 2011 *J Commonwealth Crim L* 44 49 found that "the greater the harm the greater the need for healing and the greater the potential for restorative justice (encounters)".

98 *Pretoria News* (2011-07-14) 21.

99 www.times.live.co.za (2011-07-03) available at http://www.khulumani.net/khulumani/in-the-news/item/498-stefaans-coetzee-is-the-face-of-restorative-justice.html (accessed 2013-08-20).

encounters in serious matters can only become a possibility after considerable time has lapsed.[100] Meeting the offender and linking their pain to the person who caused it can assist victims to make more sense of an incident.[101] The offender is also the only one that can answer questions such as "What happened?" and "Why did it happen to me?"[102] In a homicide matter involving teen dating violence the parents of the deceased were provided a space to ask questions that would not necessarily be asked in a trial – as to what really happened and what had they missed in the relationship, since the offender had been known to them.[103] When part of a parallel process, victim-offender mediation could be set up in the format of plea negotiation, where a privileged situation is created conducive for the truth to come out.[104]

Sometimes the victim may also be the parent of the child offender.[105] In these instances a lack of parental skills may be picked up during the family group conference and such a person could be sent to attend a parenting skills program. A separate session conducted with such a parent-victim can be utilised to address underlying personal issues or family dynamics.

4 Criticism and Challenges

The first point of criticism against victim participation in restorative justice processes arises from scepticism about an apology to the victim as a way of dealing with criminal matters. The perception sometimes exists as to it simply being a way to get away with the crime.[106] Members of the public should thus be educated to understand that restorative

100 In *DPP, North Gauteng v Thabethe* supra victim-offender mediation before sentencing became a possibility between a rape victim and her step-father more than two years after the incident.

101 During 2011, one of the survivors of a right-wing bomb attack in 1996, travelled from Worcester to Pretoria to meet the offender. She recounts, that, apart from having forgiven him for her own sake, it helps her to know the face behind the pain in her legs (www.timeslive.co.za op cit).

102 Hargovan 2007*Acta Criminologica* 113 119.

103 Baliga "Victims confront offenders, face to face" 2010-07-28 available at http://www.npr.org/2011/07/28/138791912/victims-confront-offenders-face-to-face (accessed 2011-07-29); Kershen "Restorative justice can reach the parts that criminal justice can't" 2010-09-17 available at http://www.guardian.co.uk/commentisfree/2010/sep/17/restorative-justice-cuts-crime (accessed 2011-01-08).

104 *Ibid*.

105 Within the South African context a significant percentage of cases referred for diversion involve victims who are also parents (in the broader sense) of the child offender. Over the first 15 months from the implementation of the CJA, parents were victims in about 70% of cases in two urban magistrates' districts (Hamandi & Pilusa *op cit*). Malicious injury to property is one example of crimes directed against parents. For example, the child offender becomes angry with the mother when she refuses to buy the desired new shoes and a door or window will be broken. Other frequent offences include theft from the home or assault.

106 Kershen *op cit* 5, 8.

justice is more than a mere saying sorry, but in the context of victim-offender mediation or family group conferences it rather affords the victim the opportunity to confront the child offender with the real and human cost of his or her criminal actions. Another concern deals with the possible secondary victimisation of the victim in the case where the offender pretends to be serious about the apology, but in truth only "goes through the motions for self-serving purposes".[107] Though the legislative incorporation of restorative justice processes and the possibility of an apology as a diversion option are important developments, neither the process nor the apology itself is a simple "magic bullet" or "panacea" applicable to all child offenders and their victims.[108] The individuals involved will always determine the interactions and shape the outcomes.

An important further point of concern is that research shows that child offenders often lack sufficient maturity to engage in empathic processes.[109] This raises questions about the meaningfulness of mediation encounters between victims and child offenders and whether the process would really impart some understanding of the impact their offences had on the victims, as envisaged by the CJA. Attaining this insight will not only make the victim being felt heard, but certainly contribute to curb re-offending, thereby indirectly benefiting victims in general. Research indicates further that victim participation in is low in matters involving young offenders. In only 9% of cases evaluated for the study in another jurisdiction, victim-offender mediation took place.[110] In an effort to address the situation probation officers may involve other victims from similar crimes to participate in interactions or panel discussions with child offenders.[111] This appears to be beneficial and assist child offenders in processing and understanding the consequences of their actions to victims.

In the case of sexual offences by child offenders against other children, the suitability of restorative justice processes is contentious. The intimate (and often violent) nature of these offences influences the willingness of victims to participate. Victims might further be in the offender's peer group, attending the same school or even be friends. Lack of insight and the offender's attitude would make victim-offender mediation undesirable.[112] The younger the child victim, the more unlikely any

107 *Idem* 10, 14.
108 *Idem* 11.
109 King et al *Non-Adversarial Justice* (2009) 58.
110 Davies *et al Criminal Justice: An Introduction to the Criminal Justice System in England and Wales* (2010) 87.
111 A victim impact panel is a group of victims who speak to an offender about the impact that a crime has had on their lives. The panel does not pass judgment on the offender, but provides a chance for the offender to consider the pain and suffering that has been caused by their actions (Lord "A How to Guide for Victim Impact Panels: A Creative Sentencing Opportunity" 2001 available at http://www.nhtsa.dot.gov/PEOPLE/INJURY/alcohol/VIP/VIP_index.html (accessed 2012-10-11)).
112 In *S v N* 2008 2 SACR 135 (SCA) par 26 the child offender, aged 17-years, displayed blatant disregard towards the victim (a close female friend, also

informal interaction with the offender will be. As highlighted earlier, when sufficient time passes, such an encounter might become a reality, particularly where the parties belong to the same familial structure.[113] Skelton[114] points out that many sexual offences committed by child offenders are not of a violent nature: "Children sometimes have wrong perceptions about sex and act inappropriately, and in those situations restorative justice can work."

Inadequately trained facilitators/probation officers may cause victim-offender mediation or a family-group conference to fail. Poor facilitation may thus lead to parties abusing each other. In addition, grossly disproportionate conditions may be set and even recommended to the court.[115] Davies *et al*[116] highlights another valid concern, namely that role-players working with the child offender[117] may find it difficult to accept their role in relation to the victim as well.

As far as challenges are concerned, the CJA introduces and promotes new therapeutic values (in its objective to identify harm and to promote healing) and processes allowing for victim participation. King[118] highlights that such values and processes create new professional roles where role players are expected to be more involved. Secondly, it requires new skills such as intra- and interpersonal communication skills which demands awareness of a person's own emotions as well as those of other participants. A new function of court personnel in cases dealing with child offenders and their victims is thus envisaged. In handling these matters emotional literacy is expected from professional role players involved. The question remains to what extent the role-players qualify in this regard.[119] Some form of training might be essential in many instances in order to foster awareness, sensitivity and enhance personal skills such as empathy, respect and active listening.[120]

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112 aged 17)) after the incident and victim-offender mediation was not even considered.

113 *DPP, North Gauteng v Thabethe supra*.

114 Personal communication Director Centre for Child Law UP 2012-10-09.

115 King *et al* 58.

116 87.

117 As it was stated by one probation officer "My job is to help the child offender getting out of trouble" (Hamandi & Pilusa *op cit*.)
King "Restorative justice, therapeutic jurisprudence and the rise of emotionally intelligent justice" 2008 *Melbourne U LR* 1096.

119 Daicoff 2008 *T Jefferson L Rev* 551 570 highlights that the 'lawyer personality' *per se* tends to shun interpersonal relationships and emotions in deciding legal matters in favour of logic, analysis, rights, duties and obligations.

120 Daicoff 2008 *T Jefferson L Rev* 551 571. See also Goldberg *Judging for the 21st century: a problem-solving approach* (National Judicial Institute Canada) (2005) 5 available at *http://www.nji.ca/nji/Public/documents/Judgingfor 21scenturyDe.pdf* (accessed 2008-01-14) who describes judicial officers interested in pursuing a more therapeutic approach as follows: "[They] should be interested in the party as a person, open to communicate and willing to listen to the party (over and above communication with counsel); be perceptive to nuance or sensitive to special needs (such as limited

Lastly, in an effort to obtain redress for the physical and financial harm experienced by the victim, the issue of compensation frequently arises during restorative justice procedures, specifically with regard to money for medical cost spent or needed.[121] It appears to be an empty promise made in the CJA as children are seldom in a position to pay any compensation or often come from very poor families. However, despite the perception that children will not benefit if parents, who can, simply pay for loss or damage caused by their children,[122] victims may receive justice if families take collective responsibility to pay the compensation. The child can always do household chores to "pay back" to their parents who took responsibility for paying compensation. It is suggested that the options of symbolic restitution or a benefit or service to the victim *and* parents, are always investigated. In addition, if the child is old enough to work, some effort should be made to earn part-time money in order to pay at least a portion of the damage or loss.

5 Conclusion

The CJA endeavours to address the needs of two very different groups in the South African society who are both inherently vulnerable and historically neglected, namely, child offenders and crime victims. It is not surprising that the main focus of the CJA is on child offenders, as the legislation is primarily designed for them. As elsewhere, the outcome in child justice matters in South Africa is not contingent on securing the engagement or agreement of victims.[123] Victims are, however, expected to play a role in the process of reforming and reintegrating child

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language skills, emotional disturbance and cultural issues); be pro-active, look wider than purely punitive measures, empower others and accept information from other disciplines."

121 Two cases serve as examples: The *first matter* involved the victim (the mother's boyfriend) and offender having an argument after he refused to give permission for her to go out. The child then poured boiling water over him before running away. He sustained serious injuries on his stomach. The victim was ambivalent about the idea of diversion and adamant about payment of his medical cost. After six life skills sessions … the offender apologized to the victim, then the mother (against general practice, in an effort to facilitate diversion) reimbursed the victim for his medical cost and he finally agreed to diversion.
Another instance involved an assault where the victim's front tooth was broken. She insisted on being paid the money to get the tooth fixed. The offender was from a very poor family. He completed an anger management program which culminated in an apology. No compensation materialized (Hamandi & Pilusa *op cit*. Hora *Smart Justice* (2010) 42 available at http://www.thinkers.sa.gov.au/lib/pdf/Hora/smartjustice_LO.pdf (accessed 2012-09-26) refers to Southern Australia where victims prefer shorter sentences with restitution to longer prison sentences without any restitution).

122 In about 30% of the cases parents do indeed pay compensation on the child's behalf. Though some children may earn money by, for example, washing cars, there is no general culture of doing part-time work while at high school in the so-called townships (Hamandi & Pilusa *op cit*).

123 Haines *et al* "The Swansea Bureau: A model of diversion from the Youth Justice System" 2013 *Int J Law Crime & Justice* 1 7 available at http://

offenders into society. Though the main objective in the CJA is the management of children at risk, victims are given opportunities to participate and by doing that they may simultaneously benefit in some way or another. For those who thus choose to participate in encounters with offenders or give impact statements during sentencing, there will more often than not be some therapeutic dimension in the outcome.

The possibility of ordering an apology to the victim, as well as the use of victim impact statements during sentencing, have been legislated for the first time. Core restorative justice procedures, such as family group conferences and victim offender mediation, are further described in a way to provide detailed guidance for those officials involved. The extent to which these mechanisms may be used depends on role-players' attitudes and skills, and victims' willingness and preparation to participate. The promise of compensation, however, seems to be less secure within the South African context. Nevertheless, the provisions in the CJA are a step in the right direction of recognising crime victims' dignity and their potential role in the justice system.

123 www.justice.gov.uk/downloads/youth-justice/effective-practice-library/swansea-bureau-evaluation.pdf (accessed 2013-09-26).

Infringement of the right to goodwill; the basic legal principles in relation to South African case law

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OPSOMMING

Skending van die Reg op Werfkrag; Die Basiese Regsbeginsels in Verband met Suid-Afrikaanse Regspraak

Onregmatige mededinging in die Suid-Afrikaanse gemenereg is gegrond op die algemene beginsels van die deliktereg. Aanspreeklikheid word dus slegs bevind indien al die elemente bevredig word. Die beoordeling van aanspreeklikheid word gewoonlik gedoen teen die agtergrond van die ageerbare ommstandighede wat in respraak oorweeg is. Die gronde vir aanspreeklikheid vorm egter nie 'n *numerus clausus* nie. Aangesien die tempo waarteen nuwe gronde geïdentifiseer word in pas is met die gereeldheid van geskille wat voor die howe kom, is dit maar 'n stadige proses. Dit sou dus voordelig wees om 'n benadering gegrond op beginsels te ontwikkel om vas te stel watter handelinge of soorte gedrag tot aanspreeklikheid kan aanleiding gee. 'n Benadering gegrond op beginsels moet dus fokus op die indetifikasie van regtens afkeurenswaardige gedrag wat die reg op werfkrag skend en die bewys dat sodanige gedrag ondermatig is.

1 Introduction

Infringement of the right to goodwill as a requirement in proving a conduct of unlawful competition under South African common law has been dealt with under a variety of situations in South African case law. The courts have accordingly identified a number of circumstances that give rise to liability. The most well-known of these is an infringement of a symbol such as a mark or device by way of an action of "passing off".

A finding of liability on the grounds of unlawful competition requires as first step an act or conduct by a person that is alleged by another to be actionable. Assessing whether a specific act will give rise to liability, naturally if all the other delictual requirements are met, will normally involve its assessment against the backdrop of the actionable circumstances that have been identified in case law.

It is apparent that the situations that can give rise to liability on the ground of unlawful competition do not form a *numerus clausus* but are ever expanding as interpreted by the courts in the light of legal principles. Forming part of the common law, the rate of expanding interpretation as tying in with the frequency of disputes that come before courts, is naturally slow.

It would consequently be advantageous to develop a principles based approach for use in pre-assessing acts or conduct that would give rise to liability when all the delictual requirements are met. It is accordingly an object of this article to examine the possibility of identifying such acts or conduct in the light of the concepts of goodwill, the entrepreneurial components and unlawfulness.

2 Goodwill in the Light of the Entrepreneurial Components of an Enterprise

An existing enterprise can and will normally also have an additional immaterial value over and above the sum of the value of its substrate constituting components.[1] This value ties in with its objective to attract customers and to create a favourable attitude on the part of suppliers, service providers, creditors and other persons with whom the enterprise comes into contact in the business environment.[2] This value is known as its "goodwill". Goodwill consequently relates to the advantage that arises from the beneficial disposition that for some or other reason exists in entrepreneurial context towards an enterprise.

Being of non-registrable immaterial character the existence of goodwill can only be established from extraneous factors. It is submitted that the entrepreneurial components of an enterprise can be used as aid in assessing for the existence of goodwill.[3] To this effect the running of an enterprise as a human creation in the economic sphere is based on the functioning of one or more entrepreneurial components in business context that serve as substrates for the functioning of such an enterprise.[4] A number of entrepreneurial components are naturally involved in the functioning of an enterprise. They can be as divergent as the name of the enterprise, the information that is made available about the enterprise, trade secrets, its creditworthiness and a multitude of other components as tying in with the kind of enterprise.[5]

1 Van Heerden & Neethling *Unlawful Competition* (1995) 95. Naturally in relation to such components that have their own financial value.

2 *Ibid*.

3 The functioning of such components can consequently at least contribute to the maintenance of goodwill if not to its enhancement.

4 Van Heerden & Neethling 95. Entrepreneurial components are simply the various facets that are involved in the running of an enterprise such as the goods sold or services rendered, the name, the people that work for the enterprise, business secrets and a multitude of other facets.

5 *Ibid*. *Caterham Car Sales & Coatchworks Ltd v Birkin Cars (Pty) Ltd* 1998 3 SA 938 (SCA) 947. While the court talks of "reputation" as the "component of goodwill" the reputation is in essence a characteristic of a component that results in the creation and maintenance, if not enhancement, of goodwill. The court may however have used it in the sense of the components for proving liability under a passing off claim being reputation and deception or confusion.

The functioning of entrepreneurial components in business context, however, does not automatically imply the existence of goodwill. This will only be the case when one or more of such components have characteristics that create a beneficial disposition in entrepreneurial context towards an enterprise.

It is consequently not the existence of premises from which the business is run, as entrepreneurial component, that indicates the existence of goodwill but its location as relevant characteristic. Such a location will cause customers for whom it is convenient to make use of the services of a relevant enterprise. The same applies, for example, to the information that an enterprise makes available about itself, typically such as the kind of goods or the type of service in which it deals. The beneficial disposition will arise because of the accuracy and truthfulness of such information being the relevant characteristic. In the case of the name of an enterprise the characteristic that creates the beneficial disposition will be found in its having become distinctive of such an enterprise that has for some or other reason generated a positive reputation in the market place. Such a name will naturally have to have the ability to individualise the enterprise.

Goodwill is no exotic concept. It can be as down to earth as being generated by the choice of persons to use a certain shop because of its convenient location.

3 Goodwill and the Subjective Right in Entrepreneurial Context

According to doctrine of subjective rights, the value of such a right is found in the power or entitlement over the legal object under such a right.[6] The power or entitlement includes the use and enjoyment and the ability to dispose or otherwise alienate the legal object of such a right.[7] The use and enjoyment in the appropriate case involves the gaining of financial benefit while the power over such a right is naturally enforceable against alleged infringers.

Under the above doctrine goodwill has been identified to be adequately independent, of properly defined existence and of adequate value to be recognised as an (immaterial) object in law in relation to which a legal subject can hold a subjective right. To the same effect it is also able to satisfy a legally recognised need. The subjective right is

6 The doctrine of subjective rights was accepted to form part of South Africa law in *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 4 SA 376 (T). Under this doctrine a legal subject holds a subjective right over a legal object.

7 Neethling, Potgieter, Visser & Knobel *The Law of Delict* (2001) 51: Du Plessis *An Introduction to Law* (2011). Both books refer to Joubert "Die Realiteit van die Subjektiewe Reg en die Betekenis van 'n Realistiese Begrip daarvan in die Privaatreg" 1958 *THRHR* 110 111.

accordingly called the "right to goodwill".[8] The holder of the right to goodwill in an enterprise, amongst others, has the right to gain financial benefit from such a right.

Any goodwill that becomes associated with an enterprise requires, amongst others, effort from the person or persons that are involved in its launching. Although (hopefully) only existing for a brief period of time, an enterprise that has just been launched cannot be said to necessarily already have generated goodwill (in the sense of the existence of a beneficial disposition in entrepreneurial context) right from the outset, though depending on a campaign of pre-advertisement.[9]

Rights in entrepreneurial context can consequently also come into consideration under conditions of the non-existence of goodwill such as possibly at the commencement of an enterprise or even prior thereto during its planning phase. The concept of "an attractive force that brings in custom" has been referred to in case law in relation to the interaction in the business environment between an enterprise and other persons.[10] The associated right has been identified as "the right to attract custom".[11] Such a right must naturally relate to a legal object, perhaps dealing with the creation, maintenance or enhancement goodwill.[12] While the right to goodwill implies the existence of goodwill, the right to attract custom can be more extensive, also dealing with situations during the creation of goodwill. If a legal object cannot be identified in an enterprise planning phase it can at least be said that a legal duty exists on the part of other persons, including potential competitors not to take any steps that are harmful to the efforts of a person that is involved on such planning.[13]

8 Van Heerden & Neethling 99.

9 This view, however, contrasts with the approach of accepting the existence of goodwill once substrate-defining entrepreneurial components are bound together in an organisational unit. See Van Heerden & Neethling 100 and further references cited by the authors. The moment of goodwill coming into existence naturally depends on the way in which it is defined. If thus defined as "the attracting force that brings into custom" then goodwill will already exist prior to the establishment of enterprise to client relationships. The right to create goodwill can even exist where an enterprise is in the process of being wound down owing to having lost its goodwill. Such enterprise can, for example, be sold to another person who can generate goodwill afresh.

10 *Atlas Organic Fertilizer (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 2 SA 173 (T) 182.

11 Webster & Page *SA Law of Trademarks* (1997) par 15.1. It is thus said that "[t]he right to attract custom may involve the right to exploit an existing goodwill, but its existence does not depend on nor does it consist of an existing goodwill".

12 See as comparison the proposal by Neethling that a person's earning ability should qualify as a legal object generally categorised as "personal immaterial property"; Neethling "Persoonlike immaterieelgoedreregte: 'n Nuwe Kategorie Subjektiewe Regte" 1987 *THRHR* 316.

13 Neethling *et al* 55-57.

Whatever the case, an existing enterprise that continues with its business activities can be accepted to have goodwill. An infringement in such a case will deal with the existing goodwill consequently residing in an infringement of the "right to goodwill" or "the right to attract custom" being the broader concept.

4 Infringement of the Right to Goodwill

As with other subjective rights an infringement of the right to goodwill is a delict if all the delictual requirements are met. It is known as "unlawful competition". In accordance with the general requirements for proving a delict under the doctrine of subjective rights, the first step in proving unlawful competition is the identification of a voluntary act or conduct that violates a subjective right[14] – in the appropriate case being the right to goodwill.[15] When the power of the holder of a subjective right to, amongst others, have beneficial enjoyment of the legal object under such a right is harmed, an act of violation is identified. This naturally also applies to a violation of the right the goodwill.

It is said that the fundamental premise of the doctrine of the infringement of subjective rights is that wrongfulness is found where such a right is infringed.[16] It is further said that wrongful infringement involves a two step assessment, the first being a violation of a subjective right and the second that such violation has taken place in a legally reprehensible manner.[17] An act that is *prima facie* found wrongful may on such interpretation be found to be in accordance with the legal norms of society because of the existence of a ground for justification.

Perhaps the first step can be used to assess an allegedly infringing act for the violation of a subjective right while the second step can deal with the aspect of wrongfulness. When approached in such a way the aspect of a step being legally reprehensible will deal with its wrongfulness in the light of the legal convictions of the community, the *boni mores*. Situations can consequently arise where a violation of a subjective right is not wrongful owing to it being in accordance with the legal convictions of society without having to resort to grounds of justification.[18]

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14 *Idem* 54.
15 Van Heerden & Neethling 54.
16 *Clarke v Hurst* 1992 SA 630 (D) 651.
17 Neethling *et al* 54-55.
18 As an example when the location of the premises from which an enterprise is run contributes to the existence of its goodwill (which will often be the case) and another person opens a similar enterprise in its immediate vicinity, the ability of this entrepreneurial component of the pre-existing enterprise will be harmed by the creation of a direct alternative for clients in the environment that was previously "monopolised" by the pre-existing enterprise. The deduction is consequently that the right to goodwill of the pre-existing enterprise is violated. To establish wrongfulness the second leg of the step requires the assessment whether such conduct is legally reprehensible. This is not the case in the given example.

Approached in whichever way, the proving of wrongfulness in the case where a subjective right is involved requires as a first step the proving of an act that violates such a subjective right.

As proposed above, the existence of goodwill in relation to an enterprise can usefully be done in the light of those entrepreneurial components that have characteristics that create the beneficial disposition towards such an enterprise in the market place. By expanding the argument the violation of the subjective right to goodwill should consequently also involve these entrepreneurial components. It is suggested that the right to goodwill is violated when the ability of an entrepreneurial component that has a characteristic that creates a beneficial disposition towards the enterprise in the market place, thus contributing to, if not fully supporting, its goodwill, is harmed by the conduct of another person.

5 Selected Case Law in the Light of the Principle Based Approach

The proposed principles based approach will be of little use to aid in the assessment of an act of unlawful competition if it cannot be reconciled with the positive law. It is accordingly in the subsequent discussion applied to disputes under the most common situations of alleged unlawful competition that have served before the courts. The cases discussed are selected to be generally representative of the various "types" of unlawful competition in the case of the so called acts of "indirect infringement".[19] Under this form of unlawful competition the primary object of the alleged infringer is to promote its own goodwill, though having the accompanying effect of also harming the right to goodwill of another enterprise.

The use of another enterprise's established symbol (name, mark, get-up or common law trade mark) in relation to a business name, merchandise or services has become the most prevalent form of the infringement of the right to goodwill where such use gives rise to deception or confusion on the part of persons exposed to the symbols. The same applies to a symbol that is substantially the same as another's established symbol. A claim under such conduct is dealt with under the well known "passing off" action.

19 Van Heerden & Neethling 145. It should also be applicable in the case of so called "acts of direct infringement" once *the* or at least *one* relevant entrepreneurial component has been identified. Where, for example, derogatory information, such as dealing in stolen goods, is spread about an enterprise, its name will be *the* or at least *one* of the entrepreneurial components in issue.

In *Capital Estates v Holiday Inns*[20] the plaintiffs obtained an order restraining the defendants from using the name "Holiday Inn" in connection with a shopping centre. The plaintiffs operated an international hotel chain under the same name. The order was confirmed on appeal.

The court said that the wrong of passing off deals with

> [t]he representation by one person that his business (or merchandise as the case may be) is that of another, or that it is associated with that of another, and, in order to determine whether a representation amounts to passing off, one enquires whether there is a reasonable likelihood that members of the public may be confused into believing that the business of the one is, or is connected with that of another.[21]

While an act of unlawful competition involves an infringement of the right to goodwill the court in *Premier Trading Company v Sporttopia*[22] found that the goodwill in the context of passing off resides in the "reputation"[23] of the complaining party in association with the distinctiveness of a symbol.[24] In this case the symbol in issue was the word "Bladeline" as used in conjunction with roller skates. In the light of the facts, both the courts of first instance and appeal found against passing off. The court again confirmed the requirements for successfully proving a claim of passing off by way of the proof of an own reputation in relation to a symbol and the likelihood of at least confusion on the part of a not insignificant segment of the buying public.

As applied in numerous cases the requirements for proving an action of passing off are twofold. The first is, as said, the proof of a reputation in relation to a symbol. The second is proving that the conduct of an alleged infringer in using the symbol or a symbol that is deceptively or confusingly the same will give rise to the likelihood of deception or confusion in the market place.[25]

In assessing a conduct that can give rise to a passing off action in the light of the requirements of a delict it is clear that the conduct revolves around the use of a symbol in the market place (in relation to a business, merchandise or services). An allegedly infringing symbol must be at least

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20 *Capital Estates & General Agencies (Pty) Ltd v Holiday Inns Inc* 1977 2 SA 916 (A).

21 *Idem*, reconfirmed in *Premier Trading Co (Pty) Ltd v Sporttopia* 2000 3 SA 259 (SCA) 266.

22 *Premier Trading Co (Pty) Ltd v Sporttopia* 2000 3 SA 259 (SCA) 267.

23 Reputation is naturally not an abstract stand alone concept but is a function of "the opinion which the relevant section of the community holds of the plaintiff or its product", thus being based on some or other positive aspect of an enterprise such as being known for quality products.

24 See the criticism of the *Premier Trading Co* decision in relation to the coupling of "goodwill" to "reputation" in the case of passing off by Neethling "The Passing-Off Action: Requirements and Protected Interests – A Conceptual and Critical Analysis" 2007 *SALJ* 459 461 *et seq*.

25 Webster & Page parr 15.10, 15.19 and the discussion of the detail in the subsequent pars.

deceptively or confusingly the same if not identical to that of an aggrieved party that has, in turn, become distinctive in relation to a business, merchandise or services to be successful in court.

As discussed above, an infringement of a subjective right in the case of goodwill requires that the voluntary conduct of one person must violate the right to goodwill of another person. Such assessment can, as proposed, be dealt with by involving the one or more entrepreneurial components that give rise to the goodwill on the part of the aggrieved party. The right to goodwill is accordingly violated when the ability of an entrepreneurial component that has a characteristic that creates a beneficial disposition towards the enterprise in the market place is harmed by the conduct of another person. The entrepreneurial component in the case of passing off is the symbol. The characteristic that causes it to contribute to the goodwill of the complaining party is its distinctiveness in conjunction with the reputation of the enterprise with which it is associated.

The ability of the symbol to contribute to goodwill is harmed by the conduct of the alleged infringer creating deception or confusion in the market place. This is manifested in the creation of the belief amongst members of the public that the different enterprises, goods or services involved in the symbol or symbols in issue are the same or are in some or other way connected to one another. The deduction is that the conduct of the allegedly infringing party results in a violation of the right to goodwill of the complaining party. This is in essence the first step in the two step assessment for wrongfulness, if not the proof of violating the subjective right to goodwill.

In the normal course of events the aspect of the conduct under a passing off claim being *contra bonos mores* is implicit on meeting the conventional requirements in proving passing off. It is consequently legally reprehensible owing to competing unjustly and unfairly leading to the conclusion of wrongfulness.[26]

It is clear that the two aspects that require proof in the assessment of wrongfulness in such a kind of dispute, are the existence of a reputation in association with a distinctive symbol (name, mark or get-up) and the likelihood of deception or confusion in the market place. These are the aspects that at any rate require proof in a passing off action. It seems apparent that use of the principles based approach results in the same

26 In using the "competition principle" as discussed in Van Heerden & Neethling par 2.4, in so far as the conduct of the alleged infringer is based on "performance competition", such conduct is lawful even if harming the business standing of a competitor. In the typical "passing off" situation, the use of another person's symbol that has become so distinctive of its business, merchandise or services or a symbol that is deceptively or confusingly the same is not in the form of "performance competition" and consequently unlawful.

conclusion as found in the positive law bearing in mind proof of the aspect of wrongfulness.

Another form of infringement of the right to goodwill that has often been dealt with in case law is the provision of incorrect information by an enterprise about its business, goods or services with the object of attracting customers.

In *Elida Gibb v Colgate Palmolive*[27] the aggrieved party brought an application for an interdict on the ground of unlawful competition by alleging that the infringer falsely averred by way of advertisements that its toothpaste possessed tartar growth inhibiting qualities. As fault is not a requirement for obtaining an interdict the court found the conduct to be wrongful and granted the interdict. Wrongfulness was based on the "public weals" and the "morals of the market place". It was said that certain forms of conduct that "when tested against the *boni mores* of the market place remained untenable".[28] This was typically found in the case of a misstatement of fact as regards the quality of wares sold in the market place that gives a party a(n undeserved) competitive advantage.

In *William Grant v Cape Wine Distillers*[29] the impression was created by the alleged infringer that its whisky, going under the name of Macleans Gold Label Whisky, was of purely Scottish origin while it was in fact a blend of South African and Scotch whisky. The name Macleans being a typical Scottish name, created the impression. The court found that using the name in the market place (in a deceptive way) was against the *boni mores* and consequently wrongful owing to competing unjustly and unfairly.[30]

In *Spinner Communications v Argus Newspapers Ltd*[31] the alleged infringer was said to have exaggerated circulation figures. In distinguishing between puffing and false representation the court found that this person knowingly made a false representation that was material in causing the aggrieved party to lose business. The loss was brought about by the false representation of the defendant. The exception of the defendant that the claim did not disclose a cause of action was rejected.

In the *Elida Gibb, William Grant* and *Spinner Communications* cases the conduct complained of is of an alleged infringer making incorrect information in some or other way dealing with such a person's business activities available to the public. The provision of incorrect information in entrepreneurial context can naturally take on a multitude of forms.

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27 *Elida Gibb (Pty) Ltd v Colgate Palmolive (Pty) Ltd* 1988 2 SA 350 (W).
28 *Idem* 358.
29 *William Grant & Sons Ltd v Cape Wine Distillers Ltd* 1990 3 SA 897 (C).
30 The same type of dispute arose in *Long John International Ltd v Stellenbosch Wine Trust (Pty) Ltd* 1990 4 SA 136 (D) where the defendant sold its whisky under the name "Ben Nevis Scotch Whisky Liqueur" which was neither a whisky nor a liqueur.
31 *Spinner Communications v Argus Newspapers Ltd* 1996 4 SA 637 (W).

The assessment of the conduct complained of against the basic delictual requirements in establishing unlawfulness requires again as a first step, a violation of the right to goodwill of an aggrieved party. Such assessment can, as proposed, be dealt with by involving the relevant entrepreneurial component or components of the aggrieved party. In this case the relevant component is found in the corresponding information that is in entrepreneurial context made available to the public by the complaining party. The characteristic of such entrepreneurial component in causing it to contribute to the beneficial disposition that exists in entrepreneurial context towards the complaining party, is found in its accuracy, truthfulness or similar value.[32] The ability of such information to contribute to this beneficial disposition is harmed by the incorrect information given out by the alleged infringer. Such conduct creates the likelihood of persons that are in business context so exposed not being able to objectively compare the performances of the enterprises. The deduction is again that the right to goodwill of the complaining party is violated. Whether investigating wrongfulness by way of a two step procedure or whether using the allegedly infringing step as violating the subjective right of the complainant, the subsequent step is to assess if such a violation has taken place in a legally reprehensible manner.[33]

It seems clear that when, amongst others, the violation is against the "public weals" and the "morals of the market place",[34] it is *contra bonos mores*. This is the case when someone falsely ascribes a characteristic to its products, creates a false impression in respect of the origin of its goods or makes a false representation about circulation figures. In all cases, if such conduct is material in causing the plaintiff to lose business, it will be unlawful. The deduction is that such conduct takes place in a legally reprehensible manner resulting in an act of wrongfulness.

Again the application of the principles based approach results in the same conclusion as regards liability as was reached in the discussed cases.

While copying of matter that is not otherwise protected is not unlawful, a conduct that involves the copying of matter and going into competition with the creator by way of the copied matter has also drawn the attention of the courts.

In *Schultz v Butt*[35] the court said that

32 The functioning of the information made available to the public as entrepreneurial component will rather deal with the maintenance and not enhancement of goodwill; defective information made available and becoming known to the public will alienate customers.

33 Neethling et al 54-55.

34 Owing to, for example, being by way of a misstatement of fact as regards the quality of wares sold in the market place that gives a party a(n undeserved) competitive advantage.

35 *Schultz v Butt* 1986 3 SA 667 (A).

> the question to be decided in this case is not whether one may lawfully copy the product of another but whether, in making a substantially identical copy, with the use of B's mould, of an article made by B, and selling it in competition with B, is engaging in unfair competition.

In this case the allegedly infringing party made boat hulls from a mould that was copied from a hull "plug" of the aggrieved party and sold it in competition with the latter. The hull design of the aggrieved party was of a unique character. The aggrieved party's uniquely designed boat hull was in effect indirectly copied.

The court found the conduct of the appellant wrongful by remarking that the community would condemn as unfair and unjust Schultz' conduct in using one of Butt's hulls to form a mould that would be used for making boats in competition with Butt.[36] The deduction of wrongfulness was in fact strengthened by conduct of the alleged infringer in obtaining a design registration for the copied hull to deny others access to this field of activity, thus adding impudence to dishonesty.

In *Premier Hangers v Polyoak*[37] the Appellate Division in reversing the decision of the court of first instance in finding unlawfulness said that if statutory protection, where available, is not used or has expired or is otherwise lost then anyone is free to copy. The dispute dealt with a copying by the alleged infringer of clothes hangers that were designed by the aggrieved party. While the various hanger shapes were designed by the aggrieved party, they most probably lacked uniqueness (or in the requirements under design protection, novelty and originality). To this effect the court also found that where a particular shape of hanger has found its way into the market and became widely used with its features being a matter of common knowledge, it may be copied.

In using the relevant entrepreneurial component in investigating a violation of a subjective right to goodwill, it seems clear that this component in both the *Schultz* and *Premier Hangers* cases is found in the relevant products as commercialised. In at least *Schultz*, the characteristic that gave rise to goodwill is found in its uniqueness. Again, if the ability of such a component to contribute to goodwill is harmed by the actions of the alleged infringer, this gives rise to a violation of the subjective right to goodwill. The harm arose from the fact that the copied product enabled potential purchasers to have an additional source from which it was available in the market place. As regards legal reprehensibility the observation by the court in relation to the unfairness and unjustness of the other party's conduct that was amplified by this person's dishonesty in attempting to obtain design protection for the product, clearly identifies this act as *contra bonos mores* and consequently wrongful.

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36 *Idem* 683.
37 *Premier Hangers CC v Polyoak (Pty) Ltd* 1997 1 SA 416 (A).

In *Premier Hangers* the lack of wrongfulness can perhaps be attributed to either a lack of violation of subjective rights or to not being legally reprehensible. If the hangers cannot be said to have had a characteristic that created or at least contributed to goodwill then the conduct of the alleged infringer did not even violate the subjective right to goodwill of the complainant. If not the case, the conduct was at any rate not legally reprehensible owing to the failure to use available statutory protection.[38]

It again seems apparent that in invoking the basic legal principles coupled with the use of the relevant entrepreneurial component, the same result as regards wrongfulness as reached in the discussed case law can be achieved.

The unlawful acquisition of confidential information and business secrets is a matter that has often been dealt with in case law. While the unauthorised obtaining of any type of confidential information or business secrets can give rise to a delictual claim in general, the aspect of relevance to this discussion deals with confidential information or business secrets that is of value in the sense of contributing to the goodwill of an aggrieved party.

In *Atlas v Pikkewyn Ghwano*[39] persons that were previously associated with the aggrieved party formed an own enterprise operating in the same business environment as complainant. Amongst others, a process that was allegedly used by the aggrieved party in its operations was taken over by the enterprise of the alleged infringer. In relation to the value of the process, the court said that "[t]hat which is sought to be protected should in my view not only differ from what was previously generally known, but be of value as well".[40]

The court consequently found that the plaintiff could not succeed in so far as the claim was based on the unlawful filching of business secrets and know-how. This is because the process was not secret or confidential and also not of value owing to it even having been rejected by the plaintiff.

Very much the same factual situation prevailed in the dispute dealt with in *Waste Products Utilisation v Wilkes*.[41] The important difference was that the technology copied by the defendants in this case was apparently confidential and of value. The court interdicted the defendants from continuing with their conduct.

38 Interestingly enough, trademarks are actionable under both "passing off" and statutory trade mark protection although the legal object in the first instance is goodwill.

39 *Atlas Organic Fertiliser (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 2 SA 173 (T).

40 *Idem* 194.

41 *Waste Products Utilisation (Pty) Ltd v Wilkes* 2003 2 SA 515 (W).

But confidential information need not only deal with technical subject matter. The dispute in *Telefund Raisers v Isaacs*[42] amongst others dealt with confidential client lists. The court found that the information was worthy of legal protection, amongst others confirming a provisional *Anton Piller* order.[43]

A distinction must be drawn between a situation where confidential information and business secrets are obtained by another party under a situation of breach of trust and otherwise. The latter situation is found where such information is, for example, stolen or even obtained from an employee that was not in a relationship of trust as regards such information with a former employer. A conduct leading to a breach of trust often involves a former employee or person under a duty of confidentiality.[44]

In assessing the cases in the light of basic legal principles the conduct complained of deals with the obtaining and use by another person of the confidential information or business secrets of an aggrieved party in the competition environment. Confidential information or business secrets naturally form part of the entrepreneurial components of the aggrieved party. But to enable their use in the assessment of an infringing conduct, such confidential information or business secrets must have a characteristic that contributes to goodwill.

As said in *Atlas Organic Fertiliser* in *Waste Products*, the confidential information or business secret must be of value in the competition environment. Owing to not having had such a value there was no violation of the right to goodwill in *Atlas Organic Fertiliser* – the entrepreneurial component did not contribute to the maintenance or enhancement of the goodwill of the plaintiff. This contrasts with the situation in *Waste Products* where its uniqueness gave the plaintiff a competitive edge over competitors. Its copying and use by the alleged infringer enabled this person to compete on an equal footing with the aggrieved party thus harming the ability of the confidential information to give the aggrieved party the competitive edge. This resulted in a violation of the right to goodwill of the aggrieved party.

Wrongfulness is found when such violation has taken place in a legally reprehensible manner. While wrongfulness can be based on actions such as plain theft of confidential information by way of industrial espionage, the breaching of a relationship of trust is also a legally reprehensible conduct. Information received under an obligation of confidentiality imposes a duty on the receiver to maintain such confidentiality while also

42 *Telefund Raisers CC v Isaacs* 1998 1 SA 521 (C).

43 The unauthorised obtaining and use of confidential information is not necessarily always in the form of unlawful competition. Where the information for example, deals with accounting material, is may not relate to goodwill. But it will still be a delict if fulfilling all the requirements.

44 Such as a former director of a company that has initiated an own business in competition with the former company.

refraining from improperly using it despite the lack of a contractual obligation. As in *Waste Products Utilisation* an employee in possession of confidential information that leaves such employment and commences to compete with the previous employer by also involving such confidential information, does so in a legally reprehensible manner. This gives rise to wrongful conduct that is also in breach of a relationship of trust.[45]

The confidential list of clients dealt with in *Telefund Raisers* is an entrepreneurial component. In being compiled for its beneficial disposition to the goods or services of the proprietor the information of such a list is naturally of value thus contributing to the goodwill of the aggrieved party. The harming of this component is found in giving the alleged infringer direct access to clients that have a preference for the type of goods or services associated with the aggrieved party. This dilutes such a party's beneficial access to such clients. The deduction is thus that the conduct of the alleged infringer results in a violation of the aggrieved party's right to goodwill. The theft of the list is obviously legally reprehensible and consequently *contra bonos mores*.

6 Application of the Proposed Approach to a Situation Not Yet Dealt with in Case Law

The cases discussed in the previous section were not pre-selected to obtain a desired outcome. It consequently appears that the proposed principle based method of assessing for wrongfulness in the competition environment can yield a useful result. A situation that has been extensively discussed in the literature but not yet dealt with judicially, deals with the advertising value of a symbol. It has been coined as a conduct of "leaning on"[46] or "assimilation".[47]

According to the literature leaning on deals with a dilution of the advertising value of a symbol in relation to the repute of an enterprise, goods or services associated with such a symbol.[48] While not yet dealt with in case law an allusion to leaning on is found in *Federation*

45 The court set out the requirements to identify wrongfulness. It required that the aggrieved party must have had an interest in the confidential information and that a relationship of trust must have existed between the parties imposing a duty to preserve such confidentiality on the information receiving party, who must have proceeded in making use of it in gaining an unfair advantage having the consequence that the aggrieved party suffering damages.

46 Van Heerden & Neethling ch 8.

47 Klopper *et al Law of Intellectual Property in South Africa* (2011) 38.

48 *Ibid*. This contrasts with "passing off" that deals with deception or confusion in relation to the distinguishing value of a symbol. The aspect of dilution is also dealt with in the South African Trademarks Act 194 of 1993. S 34(c) which deals with the unauthorised use in the course of trade in relation to goods or services of a mark that is identical or similar to a registered well-known SA mark to the effect of such use unfairly benefiting

Internationale de Football v Bartlett.[49] It has also been argued that if the decision in *Union Wine Ltd v E Snell & Co Ltd*[50] was considered on the basis of advertising value the court would have found the alleged infringer liable.[51]

A distinction is drawn between "open leaning on"[52] and "concealed leaning on".[53] Under comparative advertising, as an example of open leaning on, an alleged infringer openly compares such person's business, goods or services with that of another as identified by such other enterprise's symbol or mark. This is naturally done with the object of gaining advantage from such symbol's positive business connotation. Where the symbols are at least substantially the same while the enterprises are not active in a competitive field, such conduct can still give rise to an action of passing off.[54] Where the symbol of a complaining party has also generated an advertising value such circumstance should also give rise to a claim of leaning on even where a passing off claim cannot be identified.

Whatever the case, the aspect under this part of the discussion concentrates on the advertising value of a mark or symbol whether used openly or in concealed way.[55]

In applying the basic principles in assessing whether such conduct is of a delictual character its violation of the right to goodwill of the aggrieved party must, as a first step, again be examined. Once a symbol

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the user or otherwise be detrimental to the distinguishing character or reputation of such registered mark despite not giving rise to deception or confusion.

49 *Federation Internationale de Football v Bartlett* 1994 4 SA 722 (T). In this case the plaintiff succeeded with a claim on the basis of both "passing off" and of "unlawful competition" in interdicting the defendant to use world football insignia during the 1994 Football World Cup tournament. The details of the aid on the basis of "unlawful competition" were identified.

50 *Federation Internationale de Football v Bartlett* 1994 4 SA 722 (T), *Union Wine Ltd v E Snell & Co Ltd* 1990 2 SA 189 (C).

51 Neethling "Die Reg Aangaande Onregmatige Mededinging sedert 1983" 1991 *THRHR* 554.

52 Such as by way of comparative advertising.

53 *Federation Internationale de Football v Bartlett* 1994 4 SA 722 (T). Under concealed "leaning on" an alleged infringing rival in an overt way misappropriates the advertising value of a symbol. Such concealed "leaning on" often takes place under conditions of "passing off". In such case the "leaning on" deals with a misappropriation of the advertising value in relation to the source, origin or business connection in the case of a non-competing performance.

54 *Capital Estates & General Agencies (Pty) Ltd v Holiday Inns Inc* 1977 2 SA 916 (A).

55 Once a symbol has generated an advertising value the dilution of such value in the entrepreneurial environment should theoretically give rise to a situation of "leaning on" irrespective of whether deception or confusion is found. It can be argued that some members of the public will still distinguish the enterprises involved from one another. As "passing off" had been extensively developed in case law it will preferably be used once it is identified as basis for possible liability.

has established a characteristic in the form of an advertising value that contributes to the maintenance, if not enhancement, of an enterprise's goodwill, its ability to perform such a function can naturally be harmed. Harming will be found in the dilution of its advertising value by the action of another enterprise giving rise to a violation of the subjective right to goodwill.

The subsequent step is again to assess if such a violation has taken place in a legally reprehensible manner. It is apparent that a conduct of using another enterprise's symbol that has generated an advertising value in causing its dilution is under appropriate circumstances *contra bonos mores* resulting in the unlawfulness of a conduct.[56]

The proposed approach in identifying a conduct of infringement of the right to goodwill under a leaning on situation still yields a meaningful result in identifying liability while also concurring with views expressed in the literature as referred to above.

7 Conclusion

The proof of delictual liability, including that of unlawful competition, requires as a first step the identification of a legally reprehensible conduct. As the function of the court is to establish liability at least to the extent of granting an interdict its interest mainly deals with the *boni mores* while automatically accepting that a relevant conduct is in voilation of the right to goodwill. Typically such an appoach is found in *Schultz* where it was said that "the community would condemn as unfair and unjust Schultz' conduct in using one of Butt's hulls to form a mould used for making boats in competition with Butt".

Legal principles in the case of the existence of subjective rights however require as a first step in assessing liability the violation of such a right. Without such a violation an assessment of unlawfulness is irrelevant.

Unlawful competition, being based on common law principles, cannot be limited to only those forms of conduct that have been dealt with under case law. A proper investigation of case law in fact indicates that the courts are stepwise expanding the boundaries of unlawful competition by identifying new situations of application as relevant disputes come before the courts.

It is submitted that the approach developed above as based on legal principles in assessing whether a specific conduct of an alleged infringer is in violation of the right to goodwill of another can serve as aid in identifying conduct that is so in violation. The identification of the relevant entrepreneurial component, the assessment in its contribution to goodwill and the identification of the harm done to its ability to so

56 Klopper *et al* 39 par 5.2.3.

contribute by the conduct of an alleged infringer, is at any rate just pure logic.

The court naturally has the final say as to whether a specific conduct, once it also meets the other delictual requirements, will give rise to liability. Even so the court's decision must always meet the relevant legal principles.

Aantekeninge/Notes

Share issues and shareholder protection

1 General

The issue of shares, and the power to issue the shares is an important power in a company. For the company it is important as the shares are used to acquire capital for the company, or for that matter in the pursuit of a legitimate company purpose, like issuing a sufficient number of shares to enable an eventual listing on the Johannesburg Stock Exchange Ltd or to facilitate Broad Based Black Economic Empowerment ownership, to name but a few of many. For the (existing) shareholder this power is also important, as it can be used to change the existing shareholding in a company with the consequential effect on the balance of control in the company (accepting all shares in issue and to be issued have voting rights) in respect of existing shareholders or even shifting control to persons outside the company who were not shareholders prior to the issue. There are a myriad of other issues that come into play, but those mentioned above are perhaps the most important ones. With the perfect division between ownership and control in a company format, there needs to be some control over who issues the shares (see Berle & Means *The Modern Corporation and Private Property* (1968) 66). As the management and control of the business and affairs of the company is usually (whether by charter such as the Memorandum and Articles under the Companies Act 61 of 1973 (1973 Act) or by statute such as in Companies Act 71 of 2008 (2008 Act), with the board, it follows that the powers of the board must be regulated. There is a certain level of control in this respect in terms of the (erstwhile as well as present) common law, but statutory intervention and control was also deemed necessary (see Delport *Die verkryging van kapitaal in die Suid-Afrikaanse maatskappyereg, met spesifieke verwysing na die aanbod van aandele aan die publiek* (LLD thesis University of Pretoria (1987) 228). This note is intended to highlight the most important issues in the control over the power of the directors to issue shares. While most, if not all of these issues warrant a study on its own, especially in light of the 2008 Act, it will be attempted to merely point out the more pertinent of the potential problems.

2 The 1973 Act – an Excursus

In terms of the 1973 Act, the power of the board to manage was, based on the superiority of the shareholders in general meeting, delegated under the provisions of the articles of association of the company (see Delport (ed) *Henochsberg on the Companies Act 71 of 2008* 248; Pretorius, Delport, Havenga & Vermaas *Hahlo's company law through the cases* (1999) 336-337; Havenga "Directors' exploitation of corporate

opportunities and the Companies Act 71 of 2008" 2013 *TSAR* 257 on the significance of the source of the delegation). The Model articles in Table B of Schedule 1 to the 1973 Act provided for example in article 60: "The business of the company shall be managed by the directors …".

This power of the directors, also to issue shares, was however restricted by the 1973 Act. The most important sections of the 1973 Act that regulated the issue of shares were sections 221 and 222. Section 221 basically provided that irrespective of any provision in the Memorandum or Articles, the directors shall not have the power to allot or issue the shares without the prior permission of the company in general meeting. This applied only in respect of shares and convertible instruments other than shares were excluded. This authority could be conditional or unconditional general authority to allot shares in their discretion, or it could be a specific authority in respect of a particular allotment or issue. If it was a general authority, which was usually a standard term in the agenda of the annual general meeting, it was only effective until the next general meeting but it could be varied or revoked at any time by a general meeting.

Section 222 sought to regulate "insider" issues, and applied in addition (or actually to the exclusion) of section 221. Therefore, if the shares (or debentures convertible into shares at the option of the directors or entities under their control) were allotted to directors, or to a body corporate that is accustomed to act in accordance with the directions of the directors (of the issuing company) or if the directors of such a body corporate is accustomed to act in that manner, or if the directors of the issuing company is entitled to control 20% of the voting rights in that body corporate or to a subsidiary of such a body corporate, special provisions apply. This allotment and issue had to be approved by a prior special resolution specifically approving the allotment or issue unless the allotment or issue is in terms of an underwriting contract, or on the same terms and conditions as have been offered to the public, or if it is on a *pro rata* basis in accordance with existing holdings to *all* the shareholders or debenture holders in the company and the same terms and conditions apply to all the offerees (s 222(1)(a)-(d) 1973 Act). Section 222 applied to the exclusion of section 221, in the sense that if the section 222 circumstances were present, section 222 applied. However, section 222 was wider than section 221 because the former included the issue of debentures convertible into shares, while the latter only regulated the issue of shares. Therefore, the power to issue shares is subject to the authority in section 221, but not if debentures convertible into shares were issued.

Although the provisions of sections 221 and 222 are now history, some remarks may be necessary to place the 2008 Act in context. It is interesting to note that provision is made in section 222 for companies under the control of "shadow directors", one of two provisions in the 1973 Act recognising and regulating these "directors" (see Locke "Shadow directors: Lessons from abroad" 2002 *SA Merc LJ* 420; Idensohn

"The regulation of shadow directors" 2010 *SA Merc LJ* 326; *Henochsberg* 28). A *pro rata* issue was excluded from the requirements of section 222, but only if the offer was made to all shareholders of the company. An issue in a particular class or multiple classes but not all of the shareholders did not fall within this exclusion. Section 222 provided for shares or debentures convertible into shares, which was much wider than the ambit of section 221. Options on shares or debentures convertible into shares were also covered in insider issues, albeit in section 223.

Any other (additional) regulation of the issue of shares was either in terms of the common law, or in terms of the Memorandum or Articles or a contract, express or implied, between the company and shareholders. Regulation in terms of the common law was mainly on the level of the fiduciary duties of directors. The board was tasked to act *bona fide* in the best interests of the company and for a proper purpose. Issue of shares to change power bases in a company or to frustrate a takeover was a breach of fiduciary duties (see Delport (1987) 273; *Henochsberg* 295). In respect of these duties it may be mentioned that the take-over Code reconfirmed the unacceptability of frustrating take-over through share issues in the case of companies that fell within the ambit of the Code (see r 19 of the *Securities regulation code on take-overs and mergers* under the 1973 Act and similar provisions in s 126 2008 Act). This was *ex abundanti*, as the common law clearly already provided for it.

It should, however, be noted that in terms of the common law as under the 1973 Act, the fiduciary duties (except for the duty to act *bona fide*, could be excluded as opposed to the liability for non-compliance with the duty which could not be excluded (see s 247 1973 Act. But *cf Movitex Ltd v Bulfield* 1988 BCLC 104 (Ch)). The requirement that the allotment had to be authorised by a general meeting (whether by ordinary resolution in terms of s 221 1973 Act or a special resolution under the circumstances as in s 222 1973 Act), created the opportunity that the authorisation could be seen as an exclusion of the fiduciary duties. Therefore, if the general meeting gave specific authority to issue shares for the purpose other than to acquire capital, the fiduciary duty on the directors to use their power for a proper purpose, that is to acquire capital, was clearly excluded.

The effect of non-compliance with sections 221 and 222 was that the directors committed an offence (ss 221(4), 222(2)(a) 1973 Act). Whether the issue was void (or voidable) was not certain. It would seem that the mere fact that section 221 or 222 was not complied with would not make the contravening issue impeachable. The hindsight of *Dulce Vita v Chris van Coller* ([2013] ZASCA 22) would seem to suggest that this view was correct if the focus was on the fact that non-compliance was an offence (see also *Lupacchini v Minister of Safety and Security* 2010 6 SA 457 (SCA) for the principles in respect of voidness of an action contrary to an Act). However, the non-compliance with fiduciary duties in respect of an issue to a *mala fide* allottee could have had the effect that the issue was void

(*Letseng Diamonds Ltd v JCI; Trinity Asset Management (Pty) v Investec Bank Ltd* 2007 5 SA 564 (WLD); confirmed on appeal in *Trinity Asset Management (Pty) Ltd v Investec Bank Ltd* 2009 4 SA 89 (SCA)). This was a contradiction as committing an offence is *per se* non-compliance with fiduciary duties. In respect of *bona fide* allottees there was much debate whether the *Turquand* rule would protect them in the situation where no authority was given in terms of section 221 (or s 222 for that matter, but because insiders are involved in the latter situation, the possible application of the *Turquand* rule was very limited) (*Levy v Zalrut Investments* (*Pty*) *Ltd* 1986 4 SA 479 (W) 485; *Ben-Tovim v Ben-Tovim* 2001 3 SA 1074 (C); *Farren v Sun Service SA Photo Trip Management* (*Pty*) *Ltd* [2003] 2 All SA 406 (C) 441. And see *Ally NO v Courtesy Wholesalers* (*Pty*) *Ltd* 1996 3 SA 134 (N)). The matter was eventually settled in *Stand 242 Hendrik Potgieter Road Ruimsig* (*Pty*) *Ltd v Gobel* (2011 5 SA 1 (SCA)) where it was decided that *Turquand* does not apply. The effect of this would be that the directors did not have the authority to issue the shares and the purported act for and on behalf of the company would be void due to lack of authority (see Blackman *et al Commentary on the Companies Act* (2002) 301; Delport (1987) 238). The allottee was, however, not without remedy as against the company, as section 97 authorised the Court to validate an allotment and issue that was invalid by virtue of any provision of the 1973 Act, or any other law or of the Memorandum or articles of the company or otherwise (see *Ex parte Durban Deep Roodepoort Ltd* 2002 6 SA 537 (W)).

3 The Companies Act 71 of 2008

The 2008 Act brought about various changes, some of them rather surprising, to the position in terms of the 1973 Act and the common law that applied then. Section 7 of the 2008 Act provides that the purposes of the Act are, *inter alia*, to:

> (i) balance the rights and obligations of shareholders and directors within companies;
>
> (j) encourage the efficient and responsible management of companies …

This is presumably based on the Department of Trade and Industry (DTI) policy paper, *South African Company law for the 21st century – Guidelines for Corporate Law Reform* (*GG* 26493 20040623) that stated that the mission, as far as transparency is concerned is that: "(c) The law should protect shareholder rights, advance shareholder activism, and provide enhanced protections for minority shareholders." These sentiments were stated as follows in the explanatory memorandum of the 2007 Bill (11):

> In addition, the interests of minority shareholders continue to be protected by requiring shareholder approval for share and option issues to directors and other specified persons, or financial assistance for share purchase, or any financial assistance to a director or related person.

Section 7 is an important basis for the application of the 2008 Act because the courts (and any institution administering the 2008 Act) must

promote the spirit, purpose and objects of the 2008 Act and if any provision of the 2008 Act, or other document in terms of the 2008 Act, read in its context, can be reasonably construed to have more than one meaning, the meaning that best promotes the spirit and purpose of this 2008 Act must be preferred, and will best improve the realisation and enjoyment of rights (see ss 5(1), 158(1)(b) 2008 Act; see also *inter alia Swart v Beagles Run Investments 25 (Pty) Ltd* 2011 5 SA 422 (GNP) parr 18, 41; *Welman v Marcelle Props 193 CC* [2012] ZAGPJHC 32 parr 16, 25; *Employees of Solar Spectrum Trading 83 (Pty) Ltd v Afgri Operations Ltd* unreported case 6418/2011 2012-05-08 (GNP) par 12; *Mouritzen v Greystone Enterprises (Pty) Ltd* 2012 5 SA 74 (KZD) par 18; *Henochsberg* 46(1).

This purpose was clearly not kept in mind with section 38 that provides:

> (1) The board of a company may resolve to issue shares of the company at any time, but only within the classes, and to the extent, that the shares have been authorised by or in terms of the company's Memorandum of Incorporation, in accordance with section 36.

The fact that s 36 provides:

> (2) The authorisation and classification of shares, the numbers of authorised shares of each class, and the preferences, rights, limitations and other terms associated with each class of shares, as set out in a company's Memorandum of Incorporation, may be changed only by –
>
> (a) an amendment of the Memorandum of Incorporation by special resolution of the shareholders; or
>
> (b) the board of the company, in the manner contemplated in subsection (3), except to the extent that the Memorandum of Incorporation provides otherwise.

makes it even more surprising as the board has virtually total power over the capital of the company. The one redeeming feature of section 36 that is not present in section 38 is that the former is an alterable provision (see s 15 (2) 2008 Act).

Section 38 (2) further provides:

> If a company issues shares –
>
> (a) that have not been authorised in accordance with section 36; or
>
> (b) in excess of the number of authorised shares of any particular class,
>
> the issuance of those shares may be retroactively authorised *in accordance with section 36 within 60 business days after the date on which the shares were issued*.

The words in italics were added by s 26 of the Companies Amendment Act 3 of 2011 which would have the effect that not only the shareholder, but also the directors can ratify the "void" issue, which further extends the power of the directors over the share issues, unless it is excluded as being an alterable. The apparent indiscriminate use of the words "board

of a company may resolve" in section 38(1) and "a company issues shares" in section 38(2) further complicates the issues (see s 66 2008 Act; *Henochsberg* 248 in respect of the "board" and the "company").

Whether the restrictions in the 2008 Act on the power of the directors are effective in regulating the powers of the directors will be addressed below.

The power to issue shares is restricted by the 2008 Act based on qualitative (s 41(1), (2) 2008 Act) and quantitative criteria (s 41(3) 2008 Act). The qualitative criteria addresses the type of allottee and provides that if shares or securities convertible into shares is issued or any options (in terms of s 42 2008 Act) or rights exercisable for securities is granted to a director, future director or prescribed officer of the company or any person related or inter-related to such a person or any nominee of such a person, the action must be approved by a special resolution of the company (s 41(1) 2008 Act). In respect of the use of "securities" in section 41(3) it is submitted that the category is too wide. All shares are securities, but not all securities are shares. Securities is defined in section 1 as any shares, debentures or other instruments, irrespective of their form or title, issued or authorised to be issued by a profit company. There are also securities other than shares, as defined in section 43 that presumably, according to previous versions of the 2007 Bill, are debentures. If one accepts that all shares have voting rights, which is not always the case, then the inclusion of shares is, possibly, understandable. The inclusion of securities, which includes shares in any case, does not make much sense, as these can be any "instrument", debentures and otherwise. While debentures can have voting rights (see s 43(3) 2008 Act), this is not the default position, and the overbreadth of section 41 must be questioned as the shareholder concurrence by way of a special resolution if there is no issue about control is unnecessary. The logical and sensible solution would have been to use only "voting" securities in the qualitative category. While these restrictions are much wider than that in terms of section 222 of the 1973 Act, the reference to related or interrelated parties has the opposite effect, as in terms of section 222 of the 1973 Act only *de facto* control was required while section 41 of the 2008 Act now requires *de iure* control (see *Henochsberg* 28(1)). A special resolution is not required in terms of section 41(1) or (2), in broadly similar situations as in section 222 of the 1973 Act, if:

> the issue of shares, securities or rights is –
>
> (a) under an agreement underwriting the shares, securities or rights;
>
> (b) in the exercise of a pre-emptive right to be offered and to subscribe shares, as contemplated in section 39;
>
> (c) in proportion to existing holdings, and on the same terms and conditions as have been offered to all the shareholders of the company or to all the shareholders of the class or classes of shares being issued;
>
> (d) pursuant to an employee share scheme that satisfies the requirements of section 97; or

(e) pursuant to an offer to the public, as defined in section 95 (1) (*h*), read with section 96.

These exclusions cause some more uncertainty, however. It refers to "shares, securities or rights", but shares are included in the definition of securities in any case. Section 41(2)(c) refers to "holdings", and the context would indicate that "shareholding" is intended, but the syntax of the sentence leaves room for doubt. If a non *pro rata* offer is made to existing shareholders, without the right to renounce that offer, the issue in terms of the offer will be subject to a special resolution, as the particular offer will not be an offer to the public (s 96(1)(c) 2008 Act).

The quantitative criteria in s 41(3) provides that an issue of shares, securities convertible into shares, or rights exercisable for shares in a transaction, or a series of integrated transactions (as defined in s 41(4)(b)), requires approval of the shareholders by special resolution if the voting power of the class of shares that are issued or issuable as a result of the transaction or series of integrated transactions will be equal to or exceed 30% of the voting power of all the shares of that class held by shareholders immediately before the transaction or series of transactions (as calculated as provided for in s 41(4)(c)). The "securities" category has been left out of this provision – although its makes sense to a certain extent, it is a mistake, as securities such as debentures can have voting power. So an issue of debentures that can dilute the voting to the same extent as shares is not included. Again, the logical and sensible solution would have been to include "voting" securities as is suggested in respect of s 41(3). Issues of shares within classes cannot exceed the 30% threshold, but the special resolution must apparently be taken by all the shareholders, which can clearly lead to shareholders in a class or classes taking the special resolution to the detriment of a particular class. This is the only logical explanation as the Act does not provide for "special resolutions of a class" (see s 65). The remedy for this type of abuse could be s 163 (see Henochsberg 568; *Grancy Property Limited v Manala* (665/12) [2013] ZASCA 57 (10 May 2013); *Count Gotthard SA Pilati v Witfontein Game Farm (Pty) Ltd and Others* [2013] 2 All SA 190 (GNP); *Peel v Hamon J&C Engineering (Pty) Ltd* 2012/00994 16 November 2012 (GSJ)), but in common law the remedy is not as clear, especially because the majority shareholder, or any shareholder for that matter, does not have a fiduciary duty towards the minority.

Non-compliance with the share issue requirements in terms of the 2008 is somewhat more complicated than in terms of the 1973 Act. The basic principle in the new Act is that: "Subject to any provision in this Act specifically declaring void an agreement, resolution or provision of an agreement, Memorandum of Incorporation, or rules of a company, nothing in this Act renders void any other agreement, resolution or provision of an agreement, Memorandum of Incorporation or rules of a company that is prohibited, voidable or that may be declared unlawful in terms of this Act, unless a court has made a declaration to that effect regarding that agreement, resolution or provision (s 218(1)). This would

obviously not affect ordinary authority situations, like in the case of s 41. Therefore if a board issues shares without the approval of the shareholders because it is either issued to insiders (s 41(1)) or it exceeds the voting restriction (s 44(3)), the validity of the share issue is in question on the basis of the lack of authority as it would seem that s 41 restrictions are in respect of authority rather than capacity. This is the only logical deduction as s 38 provides that "[t]he board of the company may resolve to issue shares" and the references in s 41 to an issue of shares must be read in this context.

On the basic principles of *Turquand*, a common law rule that (apparently) survived the transition from the 1973 Act to the 2008 Act as s 20 (8) would want us to believe, one could have argued that the issue is valid. However, *Stand 242 Hendrik Potgieter Road Ruimsig (Pty) Ltd v Gobel* 2011 5 SA 1 (SCA) is a persuasive argument against this. It could have been and interesting argument, as the related parties in s 44(1) may or may not, depending on the particular relationship, be *bona fide*. Section 20(7), which may be termed a statutory reincarnation of the common law *Turquand* rule provides: "(7) A person dealing with a company in good faith, other than a director, prescribed officer or shareholder of the company, is entitled to presume that the company, in making any decision in the exercise of its powers, has complied with all of the formal and procedural requirements in terms of this Act, its Memorandum of Incorporation and any rules of the company unless, in the circumstances, the person knew or reasonably ought to have known of any failure by the company to comply with any such requirement." (see *Henochsberg* at 96 and also Richard Jooste "Issues relating to the regulation of "distributions" by the 2008 Companies Act" 2009 *SALJ* 627 at 647).

This rule has serious consequences for companies with careless drafters of Memorandums of Association, but what is at issue here is rather the effect on the holder of a (purported) share issue without shareholder authorisation under s 41. If the (insider) persons to whom the shares are issued and in respect of which a special resolution is required in terms of s 41(1) are directors, then that person can obviously not use s 20(7). However, s 41(1) also requires the resolution if it was issued to future directors, prescribed officers, of future prescribed officers or any person related or interrelated to the company, the directors of prescribed officers of the company (not incumbents) and to nominees of the company. There is an argument that as least some prescribed officers will be privy to the issue process, but clearly this will not apply to all (see *Henochsberg* 27 on prescribed officers). For these "outside" prescribed officers, related companies etc, *bona fides* is required, unless they knew or should reasonably have known that there is no authority to issue the shares. Whether one could be *bona fide* on the one hand but reasonably could have known on the other is perhaps not possible. The question then remains why the legislature has deemed it necessary to include both the requirements of *bona fides* and knowledge (see definition of "knows" in s 1. If the elements of that definition that

incorporates reasonableness are added to the "reasonably ought to have known" in s 20(7), then it becomes an almost impossible double objective test). It will be a question of fact, but to prove *bona fides* and/or lack of knowledge in a related or interrelated company would not be difficult. Fortunately an attempt to give an answer on these issues falls outside the scope of this note, but it must be added that the wording of s 20(7) may well have an application totally different from that of the common law Turquand rule (see *Henochsberg* 96(1)).

In respect of s 41(3) the same principles apply, except that the application of s 20(7) will be more clinical, as s 41(3) does not categorize the allottees according to insider status – it is merely a mathematical calculation in respect of voting power. However, the fact that ss 41(1) and 41(3) operate conjunctively makes for complicated situations. Section 41 provides for approval by the shareholders of the particular share issues. Unless ratification is expressly excluded it is submitted that it would be possible, as non-compliance does not void the transaction (see also discussion in *Henochsberg* at 404 in respect of a disposal of assets in terms of s 112).

An aspect in terms of the 2008 Act that could lead to inequitable results, is that there is no possibility to apply to Court to validate a share issue that is otherwise not valid as was the case under s 97 of the 1973 Act. There are many share issues that may potentially be void, as illustrated above in respect of s 41(1) and (3) where neither s 20(7) or 20(8) will apply (in addition to other potentially void issues such as a contravention of s 38 without subsequent ratification). If the common law *Turquand* could have applied, the contract would have been valid. Section 20(7) on the other hand apparently merely creates a presumption of validity/regularity and is therefore possibly rebuttable. Ratification in terms of the common law would, as was argued above, be possible, but if that is not the case, the transaction would be void as the directors did not have the authority to issue the shares due to lack of authority. As this is a lack of authority due to provisions of the Act, and not due to restriction in the Memorandum of Incorporation, the provisions of s 20(2) which allows a ratification in respect of the latter, will not be applicable.

The consequences of an issue of shares in contravention of fiduciary duties is, on the other hand, clearer in terms of the 2008 Act, but this is not good news for directors. While an exclusion of fiduciary duties, but not liability for contravention of those duties as provided for in s 247 of the 1973 Act was possible, neither is possible in terms of the 2008 Act. Section 78 provides in this respect that any provision of an agreement, the Memorandum of Incorporation or rules of a company, or a resolution adopted by a company, whether express or implied, is void to the extent that it directly or indirectly purports to relieve a director of a duty contemplated in s 75 or s 76 or of liability contemplated in s 77. The exception in *Movitex Ltd v Bulfield* 1988 BCLC 104 (Ch) is therefore well and truly gone.

4 Conclusion

The power of directors to issue shares (or certain securities) is important for the company as well as for the (existing) shareholders. Abuse of this power can have serious consequences on the existing power balance in a company. The protection of shareholder interests and minority shareholder rights are, at best, marginally better than that of the 1973 Act. However, some of the protections will only be effective if the powers of the board is excluded in alterable provisions of the Act, and this is only possible if the shareholders know and understand their rights. If the alterable provisions are left unaltered, the shareholders have little pro-active protection.

PA DELPORT
University of Pretoria

Onlangse regspraak/Recent case law

A (Pty) Ltd v The Commissioner for the South African Revenue Service
ITC 12644 (2012)

Capital loss incurred on the redemption of redeemable shares: a clogged loss or not?

1 Introduction

It is said that the reasons for the taxation of capital gains are enthused by the fundamental notions of fairness, a need for economic efficiency and the improvement of tax administration (Brooks *Taxing Capital Gains is Good for the Tax System, the Economy and Tax Administration* (2001) 2). This report was drafted for the Portfolio Committee on Finance and presented before Parliament. It is used to substantiate the introduction of CGT in the *Comprehensive Guide to Capital Gains Tax*). The Income Tax Act 58 of 1962 (ITA) provides for the inclusion of capital gains or the limited deduction of assessed capital losses made by a taxpayer in determining its tax liability. The determination of such capital gains or assessed capital losses is governed by the Eighth Schedule to the ITA (the Eighth Schedule). The Eighth Schedule sets out provisions that determine a taxpayer's capital gains or capital losses (De Koker *Silke on South Africa Income Tax* (2011) par 24.1).

Brooks stated in his report that the then draft South African Capital Gains Tax Legislation was impressively clear, precise and comprehensive. However, tax legislation is inherently abounded with complexities and controversy as to its application, interpretation and purpose. The interpretation of the Eighth Schedule has led to a degree of uncertainty where the tax treatment of the redemption of redeemable preference shares is concerned. This matter was dealt with in the recent case of *A (Pty) Ltd v Commissioner for the South African Revenue Services* ITC 12644 (2012). In this matter, the court addressed the nature of a disposal and the essential nature of the redemption of redeemable preference shares. Due to the nascence of the taxation of capital gains in South Africa, it was the first time that the courts dealt with this aspect of the taxing statute. In this case the application of Paragraph 39(1) of the Eighth Schedule to the redemption of redeemable preference shares was placed under scrutiny. It is worth noting that this case is of importance not only for taxation purposes, but also for the purpose of the statutory interpretation.

2 The Law

Paragraph 39(1) was introduced at the inception of the capital gains tax as an anti-avoidance provision to prevent a taxpayer from avoiding tax

liability, by creating a capital loss through the disposal of an asset to a connected person (a connected person is defined in s 1 ITA as a company that holds more than 50 per cent of the equity shares or voting rights in another company, and forms part of the same group of companies). Were it not for Paragraph 39(1), a taxpayer would be able to avoid CGT by disposing of an asset to a connected person at a loss (whilst effectively still retaining control of the asset and its benefit through the relationship with the said connected person). Paragraph 39(1) provides for the "clogged-loss" rule in respect of capital losses incurred as a result of disposals made to certain connected persons. This clogged loss rule disallows a set off or deduction of losses on disposals to connected persons or group companies. The salient provisions of Paragraph 39(1) state as follows:

> A person must, when determining the aggregate capital gain or aggregate capital loss of that person, disregard any capital loss determined in respect of the disposal of an asset to any person –
>
> (a) who was a connected person in relation to that person immediately before that disposal; or
>
> (b) which is immediately after the disposal –
>
> (i) a member of the same group of companies as that person ...

The capital loss disregarded in terms of this paragraph can only be set off against capital gains made on the disposal which was made to the same person in that year or a subsequent year if the person to whom the asset is disposed is still a connected person to the taxpayer (par 39(2)).

3 Facts

The appellant was a company, part of a group of companies (a group of companies is defined in s 1 ITA as companies where at least one of the companies holds 70 per cent of the equity shares or more in another company), which held shares in a second company (the issuer company) that was part of the same group of companies. The shares held by the appellant were redeemed by the issuer company and as a result thereof, the appellant suffered a capital loss. In its 2003 year of assessment, the appellant claimed the capital loss incurred as a deduction from its tax liability and the Commissioner for the South African Revenue Services (the Commissioner) disallowed the deduction on the grounds that the capital loss suffered was a clogged loss as envisaged in Paragraph 39(1). Consequent to the disallowance, the appellant raised an objection against the Commissioner's assessment which the Commissioner dismissed. The appellant then lodged an appeal against the Commissioner's assessment to the Tax Court. The Commissioner sought to have the assessment confirmed and contended that Paragraph 39(1) was applicable to the transaction and the redemption of the preference shares was a disposal as contemplated by the said Paragraph. The appellant, however, expressed the view that because the redemption of the shares was not a disposal "to any other person", as contemplated by

Paragraph 39(1), it did not amount to a clogged loss and thus the deduction should have been allowed. The Commissioner also sought to have the preference dividend and the redemption premium received by the appellant deducted from the base cost of the preference shares on the grounds that these amounts constituted a recovery in terms of Paragraph 20(3) of the Eighth Schedule.

There were therefore two primary issues brought before the court. The first being the interpretation of Paragraph 39(1) and whether that Paragraph applied to the redemption of preference shares and accordingly, rendered the appellant's capital loss a clogged loss due to the fact that the appellant and the said company were connected persons. The second issue before the court was whether the preference dividend and premium received in the redemption of the redeemable shares amounted to a recovery of the base cost (the cost at which the appellant acquired the preference shares).

4 Judgment

In relation to the first issue, the court held that the word "disposal" had to be given a narrow meaning in light of its context, particularly because it was used in conjunction with the preposition "to" (11). The court made reference to *Van Heerden v Joubert* (1994 4 SA 793 (A) 795) where it was held that the golden rule of statutory interpretation was that words had to be given their ordinary literal meaning and if it is clear and unambiguous, it is this grammatical meaning that must be adhered to. Departure from such a grammatical interpretation is only permissible if not doing so would lead to an absurdity that could never have been envisioned by the legislature.

The court also referred to *Cape Brandy Syndicate v England Revenue Commissioners* (1 KB 64 71), where the court stated that: "… one has to look at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied" (par 12). Further, reference was made to the *Concise Oxford Dictionary* which stated that the word "to" means "in the direction of" and "so as to reach" (par 19). In light of its reasoning, the court held that in order for a transaction to amount to a disposal as envisaged in Paragraph 39(1), the asset represented therein had to be transferred to the connected person. Since, in the transaction in question, no shares were transferred to the connected person but were extinguished instead, the redemption did not amount to a disposal and thus Paragraph 39(1) did not apply.

With regard the second issue the court held that the same principles of interpretation which applied to the first issue also applied in the interpretation of Paragraph 20(3) of the ITA. The court further held that when the company paid the appellant the dividend and the redemption premium, it did not intend for the amounts to constitute a reimbursement for the expenditure incurred for the acquisition of the

preference shares. In calculating the appellant's capital loss, the respondent had erred in treating the dividend portion and the redemption premium portion as recoveries of the acquisition cost as envisaged in Paragraph 20(3) of the ITA. As a result, the appeal was upheld.

5 Analysis of the Court's Judgment

The effect of the court's decision is that Paragraph 39(1) does not apply to the redemption of shares. As a result any loss incurred due to the redemption transaction upon a disposal to a connected person is not ring-fenced. Therefore, a taxpayer is allowed to take into account any capital loss determined in respect of the redemption of preference shares held in a connected company when calculating its aggregate capital gain or loss for the year of assessment. It should be noted that a redemption does constitute a disposal as a general matter; however, it is not a disposal "to any person" for the purposes of Paragraph 39(1).

5 1 Application of Paragraph 39(1) to a Redemption of Shares

5 1 1 Statutory Interpretation

As stated above, Paragraph 39 was introduced as an anti-avoidance measure to combat the avoidance of tax by loss making transfers of capital assets between connected parties. In applying the anti-avoidance provisions, the courts should look at the objectives of the provision and give effect to what the provision seeks to achieve.

The courts have predominantly accepted the practise of applying a grammatical interpretation to legislation in order to determine its meaning. However, regard must be had to the fact that the purpose of interpreting statutes is to ascertain the intention of the legislature. This principle was affirmed in *Glen Anil Development Corporation Ltd v Secretary for Inland Revenue* (1975 4 SA 715 (A) 727), where the court confirmed the view in the *Commissioner for Inland Revenue v Delfos* (1933 AD 242), and stated "… even in the case of fiscal legislation the true intention of the Legislature is of paramount importance, and, I should say, decisive". In *R v Hildrick Smith* (1924 TPP 68 81) the court stated "[t]here is only one kind of interpretation with one definite object, and that is, to ascertain the true intention of the legislature as expressed in the Act".

It is notable that in *Natal Joint Municipal Pension Fund v Endumeni Municipality* (2012 (4) SA 593 (SCA) 605) the court stated that in interpretation, the expression "intention of the legislature" should be avoided because this creates the misnomer that interpretation entails an enquiry into the mind of the legislature. However, what remains significant is that the judge recognised the necessity of taking the purpose for which the legislation was created into account in

interpretation, despite his caution against the use of the phrase "intention of the legislature". (As for instances where the intention of the legislature is in inconsistent with constitutional provisions see *Matiso v The Commanding Officer, Port Elizabeth Prison* 1994 4 SA 592 (SE) 596 in which the court states that in a constitutional state and in constitutional matters, it is not the intention of the legislature that should prevail but the constitutionality of the particular provision in question).

Notwithstanding the fact that the "golden rule" of adopting the grammatical interpretation of statutes is a widely accepted practice in our courts, the development of law has seen a progression in methods of interpretation which are far more effective in the pursuit of ascertaining the intention of the legislature. This progression from the use of a narrow grammatical method of interpretation of statutes to a more holistic approach that encompasses the use of a wider range of interpretative methods can be depicted in the South African Law Reform Commission's Discussion Paper 112 *Statutory Revision: Review of the Interpretation Act 33 of 1957* (Discussion Paper 112 (Project 25)) (the Discussion Paper). This paper was drafted during the Law Reform Commission's task of revising the Interpretation Act 33 of 1957 in order to align it with the Constitution and contains the Commission's research results. The Discussion Paper encompasses a draft Interpretation of Legislation Bill (the Bill). Chapter Two of the Bill attempts to codify a comprehensive method of interpretation that should be adopted in the interpretation of legislation. Clause 5 of Chapter Two currently reads as follows:

> (1) When interpreting legislation –
>
> (a) the meaning of a provision in that legislation must be determined by –
>
> (i) its language; and
>
> (ii) its context in the legislation read as a whole and
>
> (b) any reasonable interpretation of a provision in accordance with paragraph (a) that is consistent with the purpose and scope of that legislation must be preferred over any alternative interpretation of that provision that is inconsistent with the purpose and scope of legislation.

The clause read with the rest of Chapter Two recognises all the interpretative methods of the classical Von Savigny quartet (Du Plessis "Learner Staatsrecht from the Heartland of the Rechtstaat" 2005 *PELJ* 3 paragraph III), which are; grammatical interpretation, systematic interpretation, purposive interpretation and historical interpretation (Le Roux "The Law Reform Commission's Proposed Interpretation of Legislation Bill: Critical Comments" 2007 *SAPL* 528). It is evident in clause 5(1)(a) of the Bill that even where a grammatical interpretation is adopted, the court is required to interpret the provision in light of the legislation read as a whole.

In Du Plessis & Corder *Understanding South Africa's Transitional Bill of Rights* (1994), the authors recognise that there are several principles of interpretation which must be used collectively in order to truly interpret statutes in accordance with the legislature's intention. These principles of

interpretation, similar to the Von Savigny quartet, are (in no particular hierarchical order); a grammatical interpretation which encompasses giving words their ordinary meaning, a systematic interpretation which entails the interpreting of statutes as a whole and not interpreting a provision in isolation, a teleological interpretation which entails the consideration of the purpose and values that underpin the legislation, a historical interpretation which encompasses the interpretation of statutes in light of the historical background they were created in, and also a comparative interpretation in instances where such an interpretation would be appropriate (73-74).

These principles of interpretation identified by Du Plessis were also given recognition in our courts in *Minister of Land Affairs v Slamdien* (1999 4 BCLR 413 (LCC) 422) where the court stated that in interpreting legislation it is imperative that its purpose be analysed, regard must be had to the historical origin of the statute, the statute's broad objects and values which underlie it must be considered and regard must also be given to the part of the statute to which the provision appears or those provisions with which it is interrelated. The principles were further entrenched by the Constitutional Court in *S v Makwanyane* 1995 3 SA (CC) 154 where Mahomed J stated:

> What the Constitutional Court is required to do in order to resolve an issue, is to examine the relevant provisions of the Constitution, their text and their context; the interplay between the different provisions; legal precedent relevant to the resolution of the problem both in South Africa and abroad; the domestic common law and public international law impacting on its possible solution; factual and historical considerations bearing on the problem; the significance and meaning of the language used in the relevant provisions; the content and the sweep of the ethos expressed in the structure of the Constitution; the balance to be struck between different and sometimes potentially conflicting considerations reflected in its text; and by a judicious interpretation and assessment of all these factors to determine what the Constitution permits and what it prohibits.

The interpretation principles entrenched in *Makwanyane* apply, not only where the interpretation of the Constitution is at issue but, also to instances where other forms of statute are interpreted. This *dictum* in *Makwanyane* re-enforces the subsequent contention that a grammatical approach on its own, as adopted by the Tax Court in *A (Pty) Ltd*, is insufficient to truly ascertain the true meaning of Paragraph 39(1).

It is submitted that the Tax Court erred in its finding that Paragraph 39(1) did not apply to the redemption of shares. Albeit the relevance of a grammatical interpretation is recognised, such an interpretation should not result in the fragmentation of the legislative instrument as a whole (Du Plessis *Re-interpretation of statutes* (2002) 224). In the *Executive Council of the Western Cape v Minister for Provincial Affairs and Constitutional Development of the RSA; Executive Council of KwaZulu Natal v President of the RSA* (1999 12 BCLR 1360 (CC) 33), the court stated that it is an accepted principle of interpretation that where two subsections of

an Act deal with the same subject matter, these subsections should be read together.

In *A (Pty) Ltd* the court failed to interpret Paragraph 39(1) in light of Paragraph 11(1). Paragraph 11(1)(b) of the Eighth Schedule expressly includes a redemption in its definition of a disposal. It clearly states that a disposal includes the redemption of an asset. When the legislature included "a redemption" in its definition of a disposal, it was fully aware of the nature of a redemption and that it could not result in the shares, or the rights attached thereto, transferred to the redeeming company because a company cannot hold shares in itself. The court failed to take into account that in interpreting statutes, the statute must be read in its entirety and thus the construction of the word "to" should have been interpreted in light of the entire Eighth Schedule, and particularly, the expressed inclusion of redemptions in Paragraph 11(1).

5 1 2 Reasons Behind Introduction of CGT

It cannot be said that the court's interpretation of the word "to" and thus the entire Paragraph 39(1) provision was consistent with the legislature's intention. In the Briefing by the National Treasury's Tax Policy Chief Directorate to the Portfolio and Select Committees on Finance on Wednesday, 24 January 2001, reasons for the introduction of the CGT system are provided. Amongst others, the reasons stated for the introduction of the CGT system are in order to attain "horisontal" and "vertical" equity. The system sets out to achieve "horisontal equity" by ensuring that individuals in similar economic circumstances bear a similar tax burden irrespective of the form of accretion the economic power takes. *Id est*, irrespective of the fact that the economic accretion takes the form of wages or capital gain. Thus the exclusion of the CGT system would essentially undermine the "horisontal equity" of the tax system (10).

The CGT system aspires to achieve "vertical equity" by imposing a greater tax burden on individuals with a greater capacity to bear such a burden of tax. The introduction of CGT is also aimed at creating a disincentive for taxpayers who would opt to characterise their income as capital in order to avoid a tax burden. Lastly, CGT was introduced to enable the tax base to be broadened in an attempt to eventually lower the overall tax rates. It was introduced in order to bring more taxpayers within the "taxation net" (Briefing by the National Treasury's Tax Policy Chief Directorate to the Portfolio and Select Committees on Finance on 20010124 2).

As discussed above, it is imperative that in interpretation of legislation, the legislature's intention should be ascertained. In light of the reasoning for the introduction of the CGT system, it is clear that the court's construction of Paragraph 39(1) is inconsistent with the legislature's intention. The interpretation of the word "to" as stated by the court, has the effect of excluding a capital loss incurred as a result of the redemption

of redeemable shares from the ambit of Paragraph 39(1). This in turn limits the "taxation net" by allowing taxpayers to deduct from their taxable income every capital loss made from the redemption of shares. This is in direct contradiction to the intention of the legislature as indicated in the *Comprehensive Guide to Capital Gains Tax*.

If merit is given to the court's argument that the word "to" means "in the direction of" and that this implies that the shares must have been transferred to the connected person for the redemption to constitute a disposal, as envisaged by Paragraph 39(1), then it is submitted that in order for the asset to be able to move "in the direction of" a connected person, it must surely first "move away from" the other party. It is common knowledge that the taxpayer, after the redemption of the shares, no longer held shares in the company and in return, acquired a capital loss. It is the taxpayer's state of affairs that must be considered in determining its tax liability and not the effect a particular transaction has on the reciprocating party.

5 1 3 Contra Fiscum-rule

It is worth mentioning that in the case of ambiguity arising during the interpretation of fiscal legislation, the *contra fiscum* rule will be applicable. The *contra fiscum* rule is a common law principle stipulating that should a taxing statutory provision reveal an ambiguity, the ambiguous provision must be interpreted in a manner that favours a taxpayer (*Badenhorst v CIR* 1955 (2) SA 207 (N) 215). In other words, when a provision of ITA is reasonably capable of two constructions, the court will adopt the construction that imposes the smaller burden on the taxpayer. In *Glen Anil Development Corp* (1975 4 SA 715 (A) 727), the court held that an anti-avoidance provision must be interpreted in a robust manner in order to "… suppress the mischief against which the section is directed." In *Commissioner for Taxes v Ferreira* (1976 2 SA 653 (RAD) 657), the court held that a wide interpretation that gives effect to the legislature's intention should be employed when interpreting anti-avoidance legislation "… in order to suppress subtle inventions and evasions for the continuance of mischief and add force and life to the … remedy". Therefore, as to whether the *contra fiscum* rule could be applied in this case in favour of the taxpayer, the answer has to be in the negative. This is because Paragraph 39(1) is essentially an anti-avoidance provision; the *contra fiscum* rule will not be of assistance to the taxpayer. Furthermore, the rule would not find application if, as it appears, the court finds that there is no ambiguity as to the interpretation of Paragraph 39(1).

5 1 4 Steps in a Redemption

The court avoided analysing the distinction between a redemption and a share buy-back. The distinction could have changed the decision that the court arrived at. A buy-back of shares entails a two-step event. The first step is a reacquisition of the shares followed by a cancellation of those

shares. In a redemption, the company reacquires the shares, however, the shares revert back to authorised but unissued shares. The first step, the reacquisition, is a common characteristic between a redemption and a buy-back. In a buy-back, the reacquisition of the share is followed by a cancellation thereof. On the other hand, in a redemption, the company may retain the shares in the authorised unissued share capital account. The distinction is thus, in what follows after the reacquisition (s 48 Companies Act 71 of 2008, which sets out requirements for the reacquisition by a company of its own shares, specifically excludes a redemption from its operation. This is an indication that the Companies Act recognises a distinction between a redemption and a share buy-back). What the company does with the shares does not determine whether the shares have been transferred to the issuer company or from the shareholder company. It is therefore submitted that the reacquisition of the shares by the company is a transfer by A to B, and therefore Paragraph 39(1) would apply regardless of what the second leg of the transaction requires, that is what company B does with the shares post acquisition of the shares in question.

5 1 5 Result of the Redemption

As stated in the decision a "redemption of shares *results in the extinction* and not in the transfer of rights embodied in the states to the company redeeming them, or to any other person" (emphasis added). The court refers to the *result* of the redemption. This does not necessarily mean that a redemption is a cancellation. An action happens, which is a disposal of the shares by the shareholder to the company and a result of that disposal is that the company extinguishes the rights by cancelling the shares. These are two actions by two different entities. The determining factor should be whether the shareholder disposed of the share.

If the decision in *A (Pty) Ltd* is to be followed, unintended tax consequences would result. Connected persons would be able to redirect transfers using various contracts. In this regard an illustration can be made with regards to a cession. Suppose the transaction required that B would transfer the shares to C, an unrelated third party in terms of a cession agreement between A and C. The first part of the transaction would be that B transfers the shares to A, but due to the cession agreement the transfer then passes on to C (*Grobler v Oosthuizen* [2009] ZASCA 51 12). If C compensates A at market value, then A and B would be able to manipulate the process to generate a loss by A compensating B at an amount that would generate a loss in the hands of B.

5 1 6 No Purpose Requirement

In the language of Paragraph 39(1) a person must "disregard any capital loss determined in respect of the disposal of an asset to any person" who is a connected person. A disposal is an action that results in the creation, variation, transfer or extinction of an asset by the person disposing of the

asset. Paragraph 39(1) makes no reference to what the person receiving the asset should do with the asset upon receipt thereof. Should the person to whom the asset is disposed order the asset to be destroyed at or prior to delivery, the person disposing of the asset would still have disposed of the asset. Once again, the determination of whether the asset has been disposed of or not should be based on the action of the person disposing of the asset and not what the recipient of the asset does with it.

By its very nature, and as used in the salient parts of Paragraph 39(1), the word "to", is a preposition. A preposition is "a word or group of words used before a noun or pronoun to relate it grammatically or semantically to some other constituent of a sentence" (*Collins Concise Dictionary*). The purpose of the word "to" in "disposal of an asset to any person" is to introduce the counterparty to the transaction. There is no reference to what the counterparty should do with the asset in order for Paragraph 39(1) to apply. Therefore, the fact that the asset, being the share, is cancelled and ceases to exist is of no impact on the transaction transferring the share to a connected person.

5 2 Redemption Premium

Regarding the second issue before the court, it is submitted that the court correctly held that the redemption premium and dividend declared did not amount to the recovery of the base costs. It is notable that the *Comprehensive Guide to Capital Gains Tax* clearly states that the post-acquisition of a dividend does not constitute a recovery as contemplated by Paragraph 20(3) of the Eighth Schedule (148). The Commissioner's contention that the dividend and premium received constituted a recovery of the base cost was contradictory to the *Guide* issued by SARS. Section 1 of the ITA defines a dividend as including a redemption premium. Therefore, it is submitted that the court correctly decided that the redemption premium and dividend acquired by the taxpayer did not amount to a recovery of the base cost. Therefore, the second issue before the court will not be discussed any further.

5 2 1 Substance Over Form?

The facts of the case provide several factors to indicate that the transaction was entered into with the purpose of resulting in a return of the acquisition price of the preference shares to company A. The Commissioner submitted that it was important to take into account the following five aspects of the transaction:

(a) the purchase agreement for the shares was entered into on the 5th of November 2003;

(b) B Ltd's preference dividend was payable, in arrears, on or about the 30th of June and 31st of December every year; at the time of the conclusion of the purchase agreement the preference dividend for 31 December 2003 was not due and payable, but the parties agreed that this would be deducted from the purchase price;

(c) the purchase price (in terms of the agreement) was only paid on the 25th of February 2004, but the parties had already agreed that that amount (i.e. the December dividend) which was not due and payable at the time of the conclusion of the agreement, would be deducted from the purchase price;

(d) the evidence (i.e. given by Mr X) established that the benefits referred to in clause 7.1.2 of the purchase agreement were limited to dividends which would accumulate from 1 January 2004 onwards as well as the premium which accumulated on the nominal redemption value of the preference shares and it was those benefits which the appellant wished to acquire in terms of the purchase agreement;

(e) it was no co-incidence that the preference shares were redeemed within a short period after the implementation date; the directors (i.e. of B Ltd) only passed a resolution on the 12th of March 2004, but there is a very close connection between that date and the implementation date (i.e. even if one accepts for the purpose of argument that the implementation date was the 5th of February 2004) and that this is confirmed by the language used in the letter of the 8th of November 2004.

Based on the above, a question arises as to whether the intention of the parties was to ensure that company A effectively receives the purchase price of the preference shares. In this regard, if the intention of the parties as reflected in the substance of the transaction is different from the form of the transaction, the substance over form principle would apply. The Commissioner did not attempt to apply the substance over form principle in this case. The substance over form doctrine entails two elements: The label principle and the simulation principle (Surtees & Millard "Tax Avoidance" November/December 2004 *Accountancy SA* 14). In terms of the label principle parties attach a wrong label to a transaction but act in good faith and intend to give effect to the transaction. On the other hand, in terms of the simulation principle parties enter into a sham transaction or a transaction that is *in fraudem legis* (Surtees & Millard 15). In terms of the simulation principle the transaction is designedly disguised to escape the tax, whilst in truth it falls within the provisions (*Dadoo Limted v Krugersdorp Municipal Council* 1920 AD 530 547).

The Appellate Division elaborated in *Commissioner of Customs and Excise v Randles, Brothers & Hudson Ltd* (1941 AD 369 395-396) that (emphasis added):

> [a] transaction is not necessarily a disguised one because it is devised for the purpose of evading the prohibition in the Act or avoiding liability for the tax imposed by it. A transaction devised for that purpose, *if the parties honestly intend it to have effect according to its tenor, is interpreted by the Court according to its tenor*, and then the only question is whether, so interpreted, it falls within or without the prohibition or tax.

The court has recently extended the application of the substance over form doctrine in *Commissioner, South African Revenue Service v NWK Limited* 2011 (2) SA 67 (SCA), 73 SATC 55 2010. The effect of this decision is that a transaction will be regarded as a sham if the transaction

lacks commercial sense. The mere fact that a transaction was implemented in accordance with its terms would not preclude a finding that it was a sham. If there is no real commercial reason for a particular arrangement other than the additional tax benefit obtained, the transaction would be regarded as a sham. It could be argued that the five aspects of the transaction in *A (Pty) Ltd* referred to above are irregular in their nature as well as the manner in which they are executed. Therefore, the Commissioner should have at least pondered the application of the doctrine.

6 Conclusion

In interpreting fiscal legislation it is imperative that the correct methods of interpretation be applied in order to truly ascertain the intention of the legislature. A restrictive interpretation method could lead to a resolution that the legislature could not have intended in light of the circumstances prevailing when the legislation was created. Taxation should not be viewed as a peril towards a taxpayer's financial comfort. Instead, tax legislation should be construed in a manner that realises the objects for which it was created, which are often beneficial to the tax system as a whole.

In *Venter v R* (1907 TS 910 915), the court held that words must be given their ordinary meaning unless such an interpretation would lead to a result contrary to the legislature's intention or a glaring absurdity that could never have been contemplated by the legislature. It is clear that the introduction of the CGT regime was introduced in order to broaden the "taxation net". The court's interpretation of the provision in the Eighth Schedule in this instance is contradictory to the legislature's intention and thus amounts to a glaring misconstruction as a result of the narrow approach of interpretation it imposed on itself. Such a misconstruction of Paragraph 39(1) results in the absurd consequence that a taxpayer may elect to have its shares redeemed at a loss in order to reduce its taxable capital gains without actually incurring an economic loss due to the fact the taxpayer and the redeeming company are connected persons or part of the same group of companies. It may elect to reduce its taxable liability by creating what is essentially a fictitious loss.

The tax treatment of the redemption of redeemable shares should thus be in accordance with the provisions set out in the Act and in accordance with the proper interpretation of those provisions. It is therefore a capital loss incurred in the redemption of redeemable shares and thus amounts to a clogged loss as envisaged by the legislature in Paragraph 39(1) of the Eighth Schedule to the ITA and should therefore not be deductible in determining a taxpayer's taxable capital gains.

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Modjadji Florah Mayelane v Mphephu Maria Ngwenyama [2013] ZACC 14

The effect of lack of consent of a spouse of a customary marriage on the validity of a further or subsequent customary marriage of her husband. Lack of such consent renders the subsequent marriage invalid in terms of Xitsonga customary law.

1 Introduction

The effect of failure to comply with the provisions of section 7(6) of the Recognition of Customary Marriages Act 120 of 1998 (RCMA) on the validity of a subsequent or further customary marriage has been finally settled by the Constitutional Court in *Modjadji Florah Mayelane v Mphephu Maria Ngwenyama* ([2013] ZACC 14), which will hereinafter be referred to as *Mayelane*. The court held that failure to comply with these provisions did not lead to the invalidity of a subsequent or further customary marriage and that the said marriage must be regarded as being out of community of property (*Mayelane* 41 par 83). It was further held that the consent of an existing first wife of a customary marriage was a requirement for the validity of the second or further customary marriage, that is, in the absence of such consent, the subsequent customary marriage wold be invalid (*Mayelane* 21 par 41).

Before the decision in *Mayelane*, conflicting decisions were reached by the North Gauteng High Court and South Gauteng High Court respectively as to the effect of failure to comply with the provisions of section 7(6) of the RCMA. The North Gauteng High Court had held that non-compliance with these provisions led to the invalidity of the subsequent customary marriage (*MM v MN* 2010 4 SA 286 (GNP) 290 parr 24-25). In *MG v BM* (2012 2 SA 253 (GSJ)), the South Gauteng High Court concluded that failure to comply with these provisions did not lead to the invalidity of the subsequent customary marriage (264-268 parr 18-23). An appeal was lodged with the Supreme Court of Appeal against the decision of the North Gauteng High Court (*MM v MN* (GNP)). On appeal, it was held that the subsequent customary marriage was valid despite failure to comply with section 7(6) of the RCMA and that this marriage was out of community of property (*MN v MM* 2012 4 SA 527 (SCA) 533-534 parr 16-18, 536-537 parr 21-23, 543 par 38).

2 Questions for Determination by the Constitutional Court

The main issue for determination before the North Gauteng High Court and the Supreme Court of Appeal was the validity of a further customary marriage entered into by a husband who was already married by

customary law to another wife where such husband had failed to obtain a written contract aimed at regulating the future matrimonial property system of his marriages in terms of section 7(6) of the RCMA.

On appeal, the Constitutional Court indicated that two other legal issues, which were closely related to the dispute in this case, had to be dealt with in order to provide an answer as to the validity or otherwise of a further or subsequent customary marriage entered into in terms of the RCMA. These legal issues were:

(i) Whether the consent of an existing wife in a customary marriage has a role to play in the determination of the validity of her husband's subsequent polygynous customary marriage; and

(ii) The manner in which the content of an applicable rule of customary law has to be ascertained and, if necessary, developed in a manner that gives effect to the Bill of Rights (*Mayelane* 2 par 1).

It has to be noted that the court *a quo* in *MM v MN* (GNP) did not decide whether the consent of the existing spouse of a customary marriage was a requirement for the validity of her husband's subsequent customary marriage (*Mayelane* 3-4 par 5). Although this was the position, the applicant in this case had alleged that "she was unaware of the fact that her husband had entered into another marriage according to customary law until after his passing" (*MM v MN* (GNP) 287 par 111). With regard to this issue and the question of consent as a requirement, the court *a quo* remarked that:

> The Act is silent on the question whether the consent of the first or earlier spouses to the proposed further marriage is required, or whether their views on the proprietary and economic considerations only need to be considered by the court. The absence of a specific reference to the consent of an earlier spouse would at first glance, suggest that the legislature intended to leave this question to the determination by the provisions of the relevant customary legal system in this respect. If so, the compatibility with the Bill of Rights enshrined in the Constitution of such an approach may in future have to be considered – it clearly does not arise in this case.
> (*MM v MN* (GNP) 291-292 par 29).

The court *a quo* did not therefore determine whether the relevant applicable customary law in this case required the consent of the existing wife to be obtained as, in its opinion, this question did not arise. The matter was therefore determined on the basis of the effect of failure to comply with the provisions of section 7(6) of the RCMA. It was thus found that non-compliance with these provisions led to the invalidity of the subsequent customary marriage (*MM v MN* (GNP) 290 par 24, 292 par 31).

The South Gauteng High Court on the other hand, although dealing with the validity of a second or subsequent customary marriage contracted before the coming into operation of the RCMA went on to determine the question relating to the validity of a customary marriage entered into without complying with the provisions of section 7(6)

thereof (*MG v BM* 2012 2 SA 253 (GSJ) 265-267 parr 20-21), The second or subsequent customary marriage was held to be valid on the ground that it had complied with all the requirements for a valid customary marriage (*MG v BM* 260-262 parr 12-14). After finding this customary marriage valid, the court dealt with "... what appears to be the most contentious aspect of the matter," namely, failure to comply with the provisions of section 7(6) of the RCMA (*MG v BM* 262 parr 15-17). The court then held that this failure did not affect the validity of the second or subsequent customary marriage (*MG v BM* 264 par 18). It is, however, clear from this case that the first wife appears to have granted consent to her husband to enter into a second customary marriage (*MG v MB* 262-264 parr 16-17).

The decision in *MM v MN* (GNP) was reversed on appeal (*MN v MM* 2012 4 SA 527 (SCA)). The Supreme Court of Appeal held that non-compliance with the provisions of section 7(6) of the RCMA did not lead to the invalidity of the subsequent or further customary marriage but that the said marriage was out of community of property while the matrimonial property system of the first customary marriage remained or continued (*MN v MM* (SCA) 543 par 38).

The determination by the Constitutional Court of the disputes or legal issues mentioned above is dealt with below.

3 Requirements for Validity

A customary marriage entered into after 15 November 2000 must comply with the requirements prescribed by the RCMA (s 3). The second customary marriage in *Mayelane* was entered into on 26 January 2008 while the first was contracted on 1 January 1984 (*Mayelane* 3 par 4). A customary marriage entered into after this date (which was the case with the second customary marriage) therefore has to comply with the following requirements:

(a) the prospective spouses –

(i) Must both be above the age of 18 years; and

(ii) Must both consent to be married to each other under customary law; and

(b) the marriage must be negotiated and entered into or celebrated in accordance with customary law

(s 3(1) RCMA).

The validity of the first customary marriage was not in dispute. The dispute in *Mayelane* concerned the question as to whether the requirements for a valid customary marriage were complied with in relation to the second customary marriage which was entered into on 26 January 2008 (*Mayelane* 3-4 parr 4-5). This customary marriage was entered into after 15 November 2000 and therefore had to comply with the requirements prescribed by the RCMA (*Mayelane* 16-17 par 28-29).

Compliance with the requirements laid down in section 3(1)(a) of the RCMA was not in dispute (*Mayelane* 51 par 102). There was as such no doubt that the parties to this marriage were above the age of eighteen years and had consented to be married to each other under customary law (s 3(1)(a) RCMA). The other question dealing with consent as a requirement related to whether the consent of an existing spouse of a customary marriage was a requirement for the validity of a subsequent or further customary marriage with another woman (*Mayelane* 35 par 71, 51 par 102). The answer to this question, according to the court, entailed determining whether the RCMA or Xitsonga customary law prescribes consent as a requirement for validity (*Mayelane* 18 par 34, 21 par 42). Flowing from this, that is, if consent is not prescribed as a requirement by the RCMA and Xitsonga customary law, the next question was whether the Constitution required that customary law be developed so as to include the consent of an existing wife as a requirement for a subsequent valid customary marriage (*Mayelane* 6-7 par 12).

There was no doubt that the dispute in this case, that is, the validity of the second customary marriage with the first respondent (Mrs Ngwenyama) was to be determined by the application of customary law in light of the Constitution and legislation that specifically deals with customary law. The principles of customary law regarding consent as a requirement for the validity of a polygynous customary marriage in Xitisonga customary law also had to be explored (*Mayelane* 7-8 par 13).

A distinction was made between the provisions dealing with the requirements for the validity of customary marriages on the one hand and their proprietary consequences (*Mayelane* 21 par 41). This distinction was made in an earlier judgment of the South Gauteng High Court where it was held that the provisions dealing with failure to obtain a written contract envisaged by section 7(6) of the RCMA had nothing to do with the requirements for the validity of a subsequent customary marriage and that failure to comply therewith did not lead to the invalidity of such marriage (*MG v BM* 264-268 parr 18-22). The Supreme Court of Appeal also made this distinction in *MN v MM* (SCA) (536-538 parr 22-24).

The Constitutional Court found that the consent by the existing wife of a customary marriage to a second or subsequent customary marriage of her husband could be interpreted as a requirement for validity from the provisions of section 3(1)(b) of the RCMA, which state that "the marriage must be negotiated and entered into or celebrated in accordance with customary law" (*Mayelane* 16-17 par 29). Therefore, besides the requirements relating to consent as prescribed in section 3(1)(a) of the RCMA, the validity of a customary marriage would depend on whether or not it was "negotiated and entered into or celebrated in accordance with customary law" as required by section 3(1)(b) of the RCMA. Among the essential requirements envisaged by this subsection would be the negotiations relating to *lobolo* and its delivery in anticipation of a customary marriage and any other ceremony or tradition that normally

precedes the entering into of a customary marriage (Jansen "Family Law" in *Introduction to Legal Pluralism in South Africa* (eds Rautenbach, Bekker & Goolam) (2010) 53-54).

According to *Mayelane* (16-17 par 29), section 3(1)(b) of the RCMA has to be interpreted as meaning that:

> Customary law may thus impose validity requirements in addition to those set out in subsection (1)(a). In order to determine such requirements a court would have to have regard to the customary practices of the relevant community.

The interpretation aforementioned, it was pointed out, would make it possible for the development of customary law in accordance with the changing circumstances and the values enshrined in the Constitution to make it (customary law) living law among the communities in which it is observed (*Mayelane* 17-18 par 32).

Relying on section 3(1)(b) of the RCMA, the Constitutional Court concluded that the consent of an existing spouse of a customary marriage was a requirement for the validity of a subsequent customary marriage of her husband with another woman in accordance with living Xitsonga customary law (*Mayelane* 41 par 83, 43 par 87). This conclusion was reached by interpreting section 3(1)(b) of the RCMA in light of the provisions of the Constitution dealing with the right to equality and dignity (*Mayelane* 32-35 parr 62-69; ss 9, 10 Constitution). It was also concluded that if the applicable Xitsonga customary law did not prescribe consent as a requirement for a further customary marriage, such law "… [m]ust be developed … to include a requirement that consent of the first wife is necessary for the validity of a subsequent customary marriage" which "[i]s in accordance with the demands of human dignity and equality" (*Mayelane* 37 par 75).

The above is a brief exposition of the approach of the main judgment of Froneman J, Khampepe J and Skweyiya J with whom Moseneke DCJ, Cameron J and Jacoob J concurred (*Mayelane* 1-44). Zondo J penned down a separate but concurring judgment, as did Jafta J (*Mayelane* 44-81). Although both addressed the main issue in this case, namely, the consent of the existing spouse of a customary marriage as a requirement for the validity of a subsequent or further customary marriage, they adopted different approaches in coming to the conclusion that such consent was a requirement. These approaches are hereinafter discussed.

4 Ascertainment, Proof and Development of Customary Law

It was common cause in this case (*Mayelane*) that customary law had to be applied to determine whether the consent of the existing spouse of a customary marriage was a requirement for the validity of a subsequent customary marriage (*Mayelane* 11-15 parr 21, 25). The court therefore had to look at all the provisions of the Constitution which affect the

application of customary law in order to arrive at a decision (ss 211(3), 9, 10, 39(2) Constitution; *Mayelane* 12-15 parr 23-25, 32 parr 62-69). As the RCMA is legislation that specifically dealt with the issues raised in this case, its relevant provisions to these issues were also considered (ss 3,6, 7 RCMA). The main judgment also relied on additional evidence which was presented in the form of affidavits deposed by individuals who were involved in polygynous customary marriages under Xitsonga customary law, evidence from an advisor to traditional leaders, evidence from various traditional leaders, expert evidence as well as affidavits that were prepared for the proceedings in the court *a quo* (*Mayelane* 27-32 parr 54-61). Further evidence relating to the role of living Xitsonga customary law to determine whether the consent of the existing spouse of a customary marriage was a requirement for the validity of a subsequent customary marriage was also explored (*Mayelane* 21-27 parr 42-53, 35-44 parr 70-84). The court therefore had to ascertain the existence of the rule of customary law relating to consent as a requirement for the validity of a subsequent customary marriage by means of evidence relating to such rule.

After finding that the consent of the existing spouse of a customary marriage was a requirement for the validity of a subsequent customary marriage from the evidence contained in all the affidavits before it, the court considered whether the RCMA could be interpreted as providing this as a requirement (*Mayelane* 31-32 par 61). Reference was made to various sections of the RCMA, *inter alia*, sections 3(1)(a) and (b), 6 and 7 before concluding (*Mayelane* 41 par83) that:

> The Recognition Act is thus premised on a customary marriage that is in accordance with the dignity and equality demands of the Constitution. A customary marriage where the first wife has consented to the further marriage conforms to the principles of equality and dignity as contained in the Constitution. Where the first wife does not give consent, the subsequent customary marriage would be invalid for non-compliance with the Constitution.

The development of customary law was also considered in determining its consistence with the Constitution (s 39(2)). It was concluded that Xitsonga customary law had to be developed, to the extent that it did not as yet do so, to include a requirement that the consent of the first wife was necessary for the validity of a subsequent customary marriage (*Mayelane* 37 par 75).

The separate concurring judgment of Zondo J relating to the determination of the consent of the existing spouse of a customary marriage as a requirement for the validity of a subsequent customary marriage is also instructive (*Mayelane* 44-67 parr 90-131). The question for determination was phrased as whether "... that marriage was valid despite the fact that the first respondent did not give her consent to that marriage" (*Mayelane* 46 par 93). According to this judgment, it was not necessary to call for additional evidence to determine whether the consent of the first wife was a requirement for validity but that the matter

could be dealt with by having regard to the effect of the definitions of "customary law" and "customary marriage" as well as the provisions dealing with the recognition of and requirements for the validity of customary marriages (*Mayelane* 55 par 111, 47-55 parr 95-109).

In the same manner as in the main judgment, it was pointed out that the provisions of section 3(1)(a)(i) and (ii) of the RCMA could not be used to determine whether the consent of an existing spouse of a customary marriage was a requirement for the validity of a further customary marriage. Instead such interpretation could be justified by section 3(1)(b) of the RCMA, that is, to arrive at the conclusion that such consent was a requirement for the validity of a further customary marriage (*Mayelane* 51 par 102). The second or further customary marriage was thus held to be invalid on the basis of the allegations contained in the applicant's founding affidavit, the supporting affidavit of the deceased's older brother as well as the fact that the respondent had failed to challenge the allegations that the applicant did not consent to the said customary marriage (*Mayelane* 52-54 parr 104-107). The conclusion was therefore that the respondent had failed to prove the existence of a valid customary marriage between herself and the deceased (*Mayelane* 65-66 par 128). Although disagreeing with the relevance of the additional evidence, Zondo J concluded that even if regard is had to this evidence the same conclusion could still be reached, namely, that no valid customary marriage existed between the respondent and the deceased at the time of the latter's death (*Mayelane* 55-65 parr 110-127). The effect of the approach to this judgment is best captured by the following (*Mayelane* 67 par131):

> Whether I deal with the matter on the basis of the affidavits that were before the High Court and the Supreme Court of Appeal or on the basis of those affidavits plus additional affidavits, I would grant leave to appeal, uphold the appeal, set aside the relevant part of the Supreme Court of Appeal and replace it with an order declaring that there was no valid customary marriage between the first respondent and the deceased at the time of the latter's death.

Jafta J, with whom Mogoeng CJ and Nkabinde J concurred, also delivered a separate concurring judgment concerning the determination of whether the consent of a spouse of an existing customary marriage was a requirement for the validity of a subsequent customary marriage of her husband (*Mayelane* 68-81). He held that the subsequent customary marriage was invalid as it was not "negotiated and entered into or celebrated in accordance with customary law that applied to the community to which the 'spouses' in that marriage belong" (*Mayelane* 68 par 132). According to this judgment, it was not necessary to develop customary law to include the consent of an existing spouse of a customary marriage as a requirement for a subsequent valid customary marriage (*Mayelane* 68 par 133). The reason for the refusal to do so was that the issue of the development of customary law was not raised before the High Court and the Supreme Court to Appeal and none of the parties had shown any special circumstances which could justify such

development by the Constitutional Court as a court of first and last instance (*Mayelane* 72-77 parr 142-150). Jafta J therefore held that it was not necessary to embark upon such development to come to a decision in this case.

5 Proprietary Consequences and Requirements for Validity

The proprietary consequences of customary marriages entered into after 15 November 2000 are regulated in terms of the RCMA. Such consequences are the same as those of civil marriages (Jansen 63). Except as may otherwise be provided for in an ante-nuptial contract, monogamous customary marriages are in community of property (s 7(2) RCMA). This applies also to monogamous customary marriages contracted before 15 November 2000 (*Gumede v President of the Republic of South Africa* 2009 3 BCLR 243 (CC)). It is possible, however, to change or alter these consequences (Jansen 62).

The RCMA provides that the proprietary consequences of polygynous customary marriages contracted before 15 November 2000 shall continue to be regulated in terms of customary law (s 7(1)). This implies that these marriages are presumed to have created "houses" where each "house" has its own separate and distinct property (Jansen 61-62). For polygynous customary marriages entered into after 15 November 2000, the procedure prescribed in section 7(6) of the RCMA may be used to settle or determine their proprietary consequences. Where section 7(6) of the RCMA is not adhered to, that is, where no contract was approved by a court to regulate proprietary consequences, the resultant customary marriage remains valid but is out of community of property (*Mayelane* 21 par 41; *MN v MM* (SCA) 543 par 38; *MG v BM* 266-268 parr 21-23).

Proprietary consequences of customary marriages, monogamous or polygynous, entered into before or after 15 November 2000, may be changed or altered (s 7(4)(a), (b) RCMA). To achieve this, spouses to such customary marriages have to apply jointly for leave to change the matrimonial property system applicable to their marriage or marriages and the court may order that such matrimonial property system will no longer apply and authorise the parties to the said marriage or marriages to enter into a written contract which will govern the future matrimonial property system of such marriage or marriages on conditions determined by the court (s 7(4)(a) RCMA). In the case of a polygynous marriage, all persons having a sufficient interest in the matter (especially the existing spouse or spouses) have to be joined in the proceedings (s 7(4)(b) RCMA). The proprietary consequences of customary marriages entered into after 15 November 2000 may, in the same manner, be altered in terms of section 21(1) of the Matrimonial Property Act 88 of 1984 (s 7(5) RCMA).

Proprietary consequences of polygynous customary marriages entered into after 15 November 2000 are dealt with in terms of section

7(6) of the RCMA. The section requires a husband who wishes to enter into a further customary marriage to apply to court to have a written contract approved which will regulate the future matrimonial property system of his marriages. Before the decision in *Mayelane*, the effect of failure to comply with this provision was uncertain. It is now clear that the effect of failure to comply with it does not affect the validity of the subsequent or further customary marriage. The Constitutional Court expressed this as follows (*Mayelane* 21 par 41):

> On a more fundamental level, section 7 does not deal with the validity requirements for a marriage at all – it deals with the applicable matrimonial property regime. To interpret it as imposing validity requirements over and above those set out in section 3 would undermine the scheme of the Recognition Act. For these reasons we endorse the Supreme Court of Appeal's interpretation of section 7(6).

These provisions are therefore not additional requirements for the validity of a further marriage in the case of polygynous customary marriages.

6 Decision

The main issue for determination in *Mayelane* was the question of the role that the consent of an existing spouse of a customary marriage plays in the determination of the validity of her husband's further or subsequent customary marriage (*Mayelane* 2 par 1, 46 par 93, 68 par 132). The North Gauteng High Court had earlier declared a further customary marriage entered into without complying with the provisions of section 7(6) of the RCMA as invalid (*MM v MN* (GNP) 290 par 24). The invalidity of this marriage was confirmed on appeal by the Supreme Court of Appeal (*MN v MM* (SCA) 542 par 38). In a further appeal to the Constitutional Court, the main issue for determination was whether the consent of an existing spouse of a customary marriage was a requirement for the validity of a subsequent or further customary marriage of her husband (*Mayelane* 2 par 1). A further issue related to the manner in which a rule of customary law had to be ascertained and, if necessary, developed to give effect to the Bill of Rights (*Mayelane* 2 par 1, 67 par 130, 68 par 132).

The Constitutional Court held that the consent of the existing wife of a customary marriage was a requirement for the validity of a customary marriage of her husband according to Xitsonga customary law (*Mayelane* 43-44 par 89, 67 par 131, 79 par 153). The main judgment was reached by having regard to the provisions of section 3 of the RCMA and interpreting it in light of the equality and dignity provisions of the Constitution (ss 9, 10 Constitution). The court also pointed out that if the said law was not as yet developed to prescribe this consent as a requirement for the validity of a subsequent customary marriage, it had to be developed to give effect to the Bill of Rights (*Mayelane* 37 par 75).

All the judges of the Constitutional Court concurred that a further customary marriage entered into without the consent of the first wife was invalid as a result of failure to comply with section 3(1)(b) of the RCMA. This means that such customary marriage was not "negotiated and entered into or celebrated in accordance with customary law" (*Mayelane* 37-38 par 76. See also *Mayelane* 57 par 102, 77-78 par 151).

The above decision was reached, as pointed out earlier, by invoking the equality and dignity provisions of the Constitution and developing customary law in accordance with the Bill of Rights (*Mayelane* 44 par 89). The separate concurring judgment did not, however, deem it necessary to develop customary law to reach the same conclusion that the consent of the existing spouse in a customary marriage was a requirement for the validity of a further customary marriage in Xitsonga customary law but relied on the evidence that was placed before both the High Court and the Supreme Court of Appeal (*Mayelane* 67 par 131, 68 parr 133-134).

The effect of failure to comply with the provisions of section 7(6) of the RCMA was also dealt with. A distinction was made between the requirements for the validity of customary marriages and their proprietary consequences (ss 3, 7 RCMA). It was then held that failure to comply with the provisions of section 7(6) does not lead to the invalidity of the subsequent or further customary marriage but that such marriage was out of community of property (*Mayelane* 21 par 41).

7 Conclusion

Before the Constitutional Court decision in *Mayelane*, it was uncertain as to whether the consent of the existing spouse of a customary marriage was a requirement for the validity of a further customary marriage of her husband. The effect of failure by a husband of a customary marriage to comply with the provisions of section 7(6) of the RCMA when entering into a further or another customary marriage was also not certain. It is now clear that failure to comply with these provisions has nothing to do with the validity of a further customary marriage as they relate only to proprietary consequence of a polygynous customary marriage. The consent of the wife of a customary marriage as a requirement for the validity of a second or further customary marriage of a husband in Xitsonga customary law has been placed beyond doubt. Although this is the position, the decision in *Mayelane* does not have retrospective effect and the validity of Xitsonga customary marriages contracted before 30 May 2013 is not affected if such consent was not obtained (*Mayelane* 43-44 par 89).

The *Mayelane* decision has far reaching implications and considering the reasons advanced for the decision, it can be concluded that the consent of the existing wife of a customary marriage as a requirement for the validity of a subsequent customary marriage will apply to the whole field of customary law and not only Xitsonga customary law. It is submitted that this conclusion is justified by the duty of the South African

courts to interpret and develop customary law in accordance with the "spirit, purport and objects of the Bill of Rights" (s 39(2) Constitution; see also *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) 656-657 parr 215-219).

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Baker Tilly (a firm) v Makar [2010] EWCA Civ 1411

Tacit terms and the common unexpressed intention of the parties to a contract

1 Introduction

When parties conclude a contract, there is a glimmer of consensus and when that contract is reduced to writing, at least in the English tradition, elaborate terms are crafted with much care and precision from established precedents and the skilled use of language to reflect the agreement reached by the parties. But the glimmer of consensus obscures the fact that there can hardly ever be complete agreement on every minute detail of the contract and no matter how carefully or with how much elaboration a contract is drafted, the ideal of a perfect contract remains eternally beyond the reach of the drafter. No matter how clearly the parties express themselves and no matter how well drafted a contract may be, it is never beyond the realm of possibility that the contract may yet contain some omission. There are various reasons why an omission may occur: Unforeseen circumstances may arise; circumstances change; parties change; needs change; conflicts of interest are ever present. Whatever the reason, omissions arise with sufficient frequency to warrant the existence of legal rules which explain in which circumstances a court may supply an omission. This is often done by the implication of certain unexpressed terms in a contract. The aim with this analysis is to consider the various kinds of unexpressed terms that can be implied in a contract from a comparative perspective against the backdrop of the judgment of the England and Wales Court of Appeals (Civil Division) in *Baker Tilly (a firm) v Makar* ([2010] EWCA Civ 1411).

2 Facts

The defendant was the chief executive officer, executive deputy chairperson and finance director of Triad Group PLC and held almost 30 per cent of the shares in Triad. In 2005, a major boardroom dispute arose

because the defendant believed that there had been serious financial irregularities in the company and breaches of fiduciary duties by officers of the company. This eventually led to her removal from the positions she had held in the company. As a result, she instituted action in the Employment Tribunal against Triad, claiming unfair dismissal and victimisation. Triad eventually accepted that the defendant had reasonable grounds for her concerns and that the circumstances of her dismissal were unfortunate. As a result, the claim in the Employment Tribunal was settled shortly before proceedings were to commence (par 2).

The defendant had engaged the services of the claimant, a firm of accountants, to provide forensic accounting services in support of her claim in the Employment Tribunal. The claimant agreed to conduct a forensic investigation, prepare an independent expert report and, if necessary, present expert evidence before the Employment Tribunal. The contract was formed by two letters, the formal instruction sent by the defendant's solicitors to the claimant and the letter of acceptance returned by the claimant on the same day. The fee payable was, however, not specified in the letters, but negotiated directly between the defendant herself and the claimant (par 3 *et seq*).

The claimant claimed payment for services rendered on the grounds that the contract came to an end as soon as it was informed of the settlement, since the occasion for providing a report to the Employment Tribunal had disappeared. The defendant, however, resisted the claim on the basis that this was not a contract merely to provide an expert report for the Employment Tribunal, but a contract to provide a report in accordance with the solicitors' instructions. In other words, the defendant's case was that the claimant was still contractually bound to provide the independent expert report and that it had not fulfilled this duty yet (parr 4-5).

3 Judgment

The Queen's Bench, per Seymour J, held that the contract contained an implied term to the effect that the contract would be terminated if the claim was settled and that the defendant would be liable for reasonable fees incurred up to that time. In the Court of Appeal, Hughes LJ upheld the judgment of Seymour J and explained (parr 15-16) that

> [h]is critical holding ... is his conclusion that the contract contained the implied term, representing the common unexpressed understanding of the parties, that the client commissioning the report could terminate the engagement at any time, on the basis that she would be liable for reasonable fees incurred up to that point. ... [T]his critical holding of the judge cannot stand with the existence of an entire contract. This, I am quite satisfied, was not an entire contract.

4 Discussion

The judgment in *Baker Tilly* is significant in a South African context, since the South African law relating to the unexpressed terms of a contract is based on English law (*Minister van Landbou-Tegniese Dienste v Scholtz* 1971 3 SA 188 (A); *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 3 SA 506 (A)). The way in which the English courts deal with the implication of terms can therefore also provide some insight into our own law regarding implied terms in South Africa.

The law with regard to the implication of terms in English law has been restated by the courts repeatedly. In *Equitable Life Assurance Society v Hyman* ([2000] 3 All ER 961 (HL) 970) Steyn LJ explained that

> a term can be implied by law in the sense of incidents annexed to particular forms of contracts. Such standardised implied terms operate as general default rules; ... If a term is to be implied it could ... [also] be a term implied from the language ... in its particular commercial setting. Such implied terms operate as *ad hoc* gap fillers. ... Such a term may imputed to the parties: It is not critically dependent on proof of an actual intention of the parties. The process 'is one of construction of the agreement as a whole in its commercial setting': ... This principle is sparingly and cautiously used and may never be employed to imply a term in conflict with the express terms of the text. The legal test for the implication of such a term is a standard of strict necessity.

The consensus among English judges seems to be that a term can be implied in a contract in one of two instances only: Firstly, a term can be implied *ex lege* as a general default rule which applies to all contracts of a particular form. Secondly, a term can be implied on an *ad hoc* basis in a contract between particular parties if it is strictly necessary to fill a gap in order to arrive at the objective meaning of the contract. (See also *McCarthy v McCarthy & Stone Plc* [2006] 4 All ER 1127 (Ch); *Hilton v Barker Booth and Eastwood (a firm)* [2005] 1 All ER 651 (HL); *Crest Nicholson Residential (South) Ltd v McAllister* [2003] 1 All ER 46 (Ch); *Ashworth Frazer Ltd v Gloucester City Council* [2002] 1 All ER 377 (HL).)

This also seems to be the predominant view amongst the authors of textbooks on the interpretation of contracts in English law. Lewison (*The Interpretation of Contracts* (2011) 269) explains that

> [t]he implication of terms into a contract depends on the presumed intention of the parties. In some cases that intention is collected merely from the express words of the contract or from a combination of the express words of the contract and the surrounding circumstances; in others it is collected from the nature of the legal relationship into which the parties have entered.

(For a comprehensive discussion of English law relating to the implication of terms, see Austen-Baker *Implied Terms in English Contract Law* (2011). See also McMeel *The Construction of Contracts – Interpretation, Implication, and Rectification* (2007) 113 *et seq*, 225 *et seq*.)

This distinction between a term implied *ex lege* as a general default rule which applies to all contracts of a particular form and a term implied

on an *ad hoc* basis in a contract between particular parties if it is strictly necessary to fill a gap in order to arrive at the objective meaning of the contract, has also apparently found favour in South Africa. In *Seven Eleven Corporation of SA (Pty) Ltd v Cancun Trading No 150 CC* ([2005] 2 All SA 256 (SCA)), Lewis JA explained (265) that

> [t]he distinction between implied and tacit terms is now trite. The former is a term implied by the law, the latter a term implied by the facts. ... The principle applied over many years is that the term to be incorporated in the contract must be necessary, not merely desirable. The classic tests used to give effect to this principle do not, however, take into account the actual intentions of the respective parties. They require the court to consider whether the term contended for would give 'business efficacy' to the contract or to ask what the 'officious bystander' – a person who is not a party to the contract but asked whether the term is necessary – would say. These are objective tests. On either test, when one asks whether it was necessary to incorporate a term in the franchise contract ... the answer must be that such a term was not necessary [in this case]. ... Whether one looks at the matter on a subjective basis – what the parties actually thought at the time of entering into the contract – or on the objective tests applied over many decades, the answer is clear. There was no tacit term that the respondent was entitled to the benefit of early settlement discounts or of rebates.

But the clause implied in *Baker Tilly* does not fit into either of these categories. Neither the Queen's Bench, nor the Court of Appeals seem to have based the implication of the term concerned on the principle that the term can be implied *ex lege* as a general default rule which applies to all contracts for the commissioning of forensic reports. It is not a term which one would necessarily read into every contract for the rendering or commissioning of forensic reports. Not all reports are commissioned when the dispute is already heading to court. Often, a forensic report is commissioned to uncover any impropriety and determine whether any legal action is in fact warranted. Furthermore, the term implied was not strictly necessary to fill a gap in order to arrive at the objective meaning of the contract – the contract would have been perfectly operational and executable in the absence of such a term. Instead, both the Queen's Bench and the Court of Appeals based the implication of the term on the common unexpressed understanding of the parties, and this seems to fly in the face of common wisdom as explained above.

There is, though, according to *Chitty* (Beale *Chitty on Contracts Volume 1* (2012) 992) in the case of an incomplete contract

> yet another situation where a term may be implied. This is where the court is simply concerned to establish what the contract is, the parties not having themselves fully stated the terms: 'In this sense the court is searching for what must be implied'.

The contract in *Baker Tilly* seems to fit squarely into this category of an incomplete contract and the term concerned was implied to complete the contract. This also seems to accord with the view of Salmond and

Williams (*Principles of the Law of Contracts* (1945)), expressed almost eighty years ago, when they explained (36) that

> implied terms of a contract, meaning thereby the terms devised and implied by the law itself and imported into the contract as supplementary to the express terms which have their origin in the actual intention of the parties, must be distinguished from those terms inferred as a matter of fact to have been actually, though tacitly, declared or indicated by the party or parties whose declared will constitutes the contract. These latter terms may be described as tacit terms. It is regrettable that the word *implied* is ambiguous and is frequently applied not only to terms implied in law but also implied in fact, *i.e.*, tacit terms.
>
> ... Indeed, a complete contract may be made by such conduct, as when a purchaser takes a newspaper from a bookstall and thereby incurs an obligation to pay for it. In such cases the contractual intention or will is considered to be an actual fact inferable from the conduct of the persons concerned. Such cases, therefore, do not differ in essence from those where the intention or will is expressed in spoken or written words, for speaking and writing are themselves merely particular forms of human conduct. In both kinds of case, the essential thing is that there is considered to be in the minds of the parties an actual intention or will manifested or declared by the parties by their overt acts, whether those acts take the form of written or spoken words, or other conduct. Both tacit and express terms are considered to represent the actual intention of the parties. Implied terms, on the other hand, are introduced by the law in default of the manifestation by the parties of any such actual intention ...

Around the same time, the position in English law was summarised by Williams ("Language and the law" 1945 *LQR* 71 401), where he explained that there are three kinds of unexpressed terms that may be implied in a contract:

(i) terms that the parties probably had in mind but did not trouble to express;

(ii) terms that the parties, whether or not they actually had them in mind, would probably have expressed if the question had been brought to their attention; and

(iii) terms that, whether or not the parties had them in mind or would have expressed them if they had foreseen the difficulty, are implied by the court because of the courts view of fairness or policy or in consequences of rules of law.

Lewison (271-272) seems to dismiss the distinction between the first and second kind of terms mentioned by Williams since

> the actual intention of the parties is not what the court is trying to ascertain. What the court seeks to ascertain is the presumed intention of the parties (or more accurately the meaning that the contract would convey to a reasonable reader). It is, therefore, more accurate to describe case (i) as an effort to arrive at the presumed intention of the parties, rather than their actual intention; or what the reasonable reader would understand the contract to mean. Both case (i) and case (ii) involve a search for the presumed intention of the parties,

> although case [(i)] requires the further assumption that the subsequent difficulty was foreseen at the date of the contract.

(There seems to be an error in the text which I have corrected above. Case (i) refers to terms which the parties probably had in mind, while case (ii) (as referred to in the original text) refers to terms which the parties would probably have expressed if the question had been brought to their attention.)

Although it is often said that the purpose of interpretation is to ascertain the intention of the parties, it is trite that it is the objective meaning of the contract, rather than the subjective intention, which is being determined. In *Attorney General of Belize v Belize Telecom Ltd* ([2009] 2 All ER 1127 (PC) 1132) the Privy Council, per Hoffmann LJ, explained that

> [t]he court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed ... It is this objective meaning which is conventionally called the intention of the parties, or the intention of Parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument.

Lewison is therefore correct in stressing that case (i) involves a search for the presumed intention of the parties, rather than an attempt to arrive at their actual subjective intention. But there is an important difference between case (i) and case (ii). In case (ii), the contract completely reflects the consensus between the parties, but the contract fails to address an unforeseen eventuality. A term is then implied, if it is strictly necessary to give business efficacy to the contract, on the basis of what the parties, as reasonable people, would have agreed to if that eventuality had been brought to their attention at the time when the contract was concluded. In case (i), on the other hand, there is clearly an incomplete expression of consensus in the contract. The unexpressed consensus must then be gathered objectively from the conduct of the parties and the background knowledge which is reasonably available, and one or more terms are implied to complete the contract. In case (i), the reader looks at the various verbal and non-verbal expressions of consensus to ascertain the terms that have been omitted, whereas in case (ii), the reader looks beyond the expression of consensus to find a solution for an unforeseen eventuality.

In South Africa, there is similarly authority for the view that there are three kinds of unexpressed terms that can be implied in a contract. Firstly, there are implied terms. These terms are inferred *ex lege* in a contract, despite the fact that the parties did not reach or would not have reached agreement on the matters involved. These terms, often referred

to as *naturalia*, are derived from the common law, statute, precedent, custom or trade usage and are not dependent on the actual or presumed intention of the parties (*AA Farm Sales (Pty) Ltd (t/a AA Farms) v Kirkaldy* 1980 1 SA 13 (A) 17C). They are duties imposed by law.

Implied terms must be distinguished from tacit terms. But not all tacit terms are alike. In *Wilkins NO v Voges* (1994 3 SA 130 (A)) Nienaber JA explained that

> [a] tacit term, one so self-evident as to go without saying, can be actual or imputed. It is actual if both parties thought about a matter which is pertinent but did not bother to declare their assent. It is imputed if they would have assented about such a matter if only they had thought about it – which they did not do because they overlooked a present fact or failed to anticipate a future one.

Secondly, therefore, there are actual tacit terms. For reasons that will become apparent below, these terms can also be referred to as "consensual tacit terms". These are terms relating to matters concerning which the parties had actually reached agreement or with regard to which the parties had some common expectation, but failed to express in writing or speech. According to McEwan J (*Cardoso v Tuckers Land and Development Corporation (Pty) Ltd* 1981 3 SA 54 (W) 61G) a consensual tacit term "is found, if at all, in the unexpressed common intention of the parties as determined from the surrounding circumstances or any other proper source". Because consensual tacit terms are derived from the actual intention of the parties, the test to determine whether a consensual tacit term can be read into a contract is subjective. It is a question of fact decided by analysing the conduct of the parties and other indicators of their actual states of mind.

Thirdly, there are imputed tacit terms. These are terms concerning matters which the parties had not considered, but they would have agreed to the term concerned had their attention been drawn thereto at the time when they concluded the contract. Terms of this nature are based on the assumed intention of the parties. The officious bystander test is often applied to determine whether or not a term should be implied into a contract. The classic formulation of this test remains the dictum of Scrutton LJ in the English case of *Reigate v Union Manufacturing Co (Ramsbottom)* (1 KB 592) (cited in *Alfred McAlpine* (533B) and *Seven Eleven* (266A)):

> [I]f at the time the contract was being negotiated someone had said to the parties, 'What will happen in such a case', they would both have replied, 'Of course, so and so will happen; we did not trouble to say that; it is too clear'.

The test to determine whether an implied term can be inferred in a contract, is objective – what would the parties, as reasonable people have agreed to? (*Trollope & Colls v NWMR Hospital Board* [1973] 1 WLR 601 613C.) Inferring an implied term into a contract is based on a legal fiction and is consequently a question of law.

The distinction between consensual and imputed tacit terms was eloquently explained by Wunsh J in *Bezuidenhout v Otto* (1996 3 SA 339 (W) 344A-E).

> What is not always appreciated in some of the books is the difference between the following:
>
> 1. A tacit term, which is sometimes called an implied term
>
> In earlier cases also described as an implied term, which a court will find to exist when:
>
> (a) it is necessary to import it to give business efficacy to the contract; or
>
> (b) the parties did not, in fact, apply their minds to it, but if an officious bystander had asked them if it should have been in the contract, they would unhesitatingly have responded in the affirmative. ...
>
> 2. A tacit term proper
>
> That is to say one which the parties actually agreed upon, but did not articulate; a term they did agree to, as distinguished from one they must have agreed to. The inquiry is whether on the basis of the proved facts and circumstances it was probable that a tacit agreement had been reached.

Consensual tacit terms, therefore, are based on fact – what the parties had actually intended with regard to a matter which they had considered, but failed to express. Imputed tacit terms are based on fiction – what the parties would have agreed to if they had considered the matter at the time when the contract was concluded.

This threefold approach is also generally followed in other jurisdictions with a Common law tradition. In *Byrne v Australian Airlines Ltd* (185 CLR 410) the High Court of Australia distinguished between different kinds of terms that can be implied in a contract. The court firstly referred to terms that can be implied into a contract in terms of the officious bystander test (440). Secondly, there are terms that can be implied if it is necessary to give business efficacy to a contract (441). However, the court questioned whether there is any real distinction between these two kinds of terms (447). Thirdly, the court referred to incidental terms which the law imports into contracts of a particular kind irrespective of the parties' intention (447). Lastly, an Australian court can imply into a contract a "'tacit term' to identify the latent unexpressed intentions of the parties" (447). (See also *Shepherd v Felt & Textiles of Australia Ltd* 45 CLR 359 378).

In *Canadian Pacific Hotels Ltd v Bank of Montreal* (77 NR 161) the Supreme Court of Canada distinguished between terms that can be implied by law and are incidental to a particular kind of contract, as opposed to terms that are necessary to give business efficacy to a contract. A further distinction was made by the British Columbia Court of Appeal in *Petro-Canada v Disco Oil & Gas Ltd* (96 BCLR (2d) 174) where the court indicated that a term can firstly be implied where it is necessary to give business efficacy to the contract and secondly, where the term implied represents the obvious, but unexpressed, intention of the parties.

In the United States, the Supreme Court of Texas explained in *Danciger Oil & Refining Co of Texas v Powell* (154 SW 2d 632) that an implied term (635)

> must appear that it was so clearly within the contemplation of the parties that they deemed it unnecessary to express it, and therefore omitted to do so, or it must appear that it is necessary to infer such a covenant in order to effectuate the full purpose of the contract as a whole as gathered from the written instrument. ... However, covenants will be implied in fact when necessary to give effect to the actual intention of the parties.

In *Grimes v Walsh & Watts Inc* (649 SW 2d 724) the Texas Court of Appeals refined the position somewhat when it explained that "a court can declare implied covenants to exist only where it appears such covenants were clearly contemplated by the parties or were necessary to effect the purpose of the contract". (For terms actually contemplated by the parties, see also *Universal Health Services Inc v Renaissance Women's Group PA* 121 SW 3d 742; for terms necessary to effect the purpose of the contract, see also *WesternGeco LLC v Input/Output Inc* 246 SW 3d 776.)

A similar approach is followed in other US states (see eg *Percoff v Solomon* 67 So 2d 31 (Alabama); *Walgreen Arizona Drug Co v Plaza Center Corp* 647 P 2d 643 (Arizona); *Kroger Co v Bonny Corp* 216 SE 2d 341 (Georgia); *Bobenal Investment Inc v Giant Super Markets Inc* 260 NW 2d 915 (Michigan); *Tuttle v WT Grant Co* 171 NYS 2d 954 (New York); *Mercury Investment Co v FW Woolworth Co* 706 P 2d 523 (Oklahoma)).

A seminal aspect of the implication of terms which is emphasised in all Common law jurisdictions, is that courts only have a limited discretion to compliment the terms of a contract with implied terms. Courts cannot imply terms into a contract merely because it would be reasonable, fair or expedient. In addition, courts are generally reluctant to interfere with the terms of a contract which parties had entered into freely.

5 Conclusion

The significance of *Baker Tilly* lies in the apparent recognition of a kind of unexpressed term other than those mentioned by Steyn LJ in *Equitable Life Assurance* or Lewis JA in *Seven Eleven*. It is a kind of term which occurs seldom in the context of written contracts, because, as Hughes LJ stressed (par 16) it "cannot stand with the existence of an entire contract". This is firstly because the parol evidence rule would exclude evidence to add to, vary or detract from the terms of a contract, but secondly, because most well-drafted written contracts contain "entire contract" clauses which would exclude the possibility of reading consensual tacit terms into the contract (for more in this regard, see my previous discussions in Cornelius "Background Circumstances, Surrounding Circumstances and the Interpretation of Contracts" 2009 *TSAR* 767; "Die toelaatbaarheid van ekstrinsieke getuienis by die uitleg van kontrakte" 2013 *TSAR* 805). As a result, this kind of unexpressed

term is also frequently ignored by courts and authors writing on the construction or interpretation of contracts. But not all written contracts are entire integrated contracts. The seminal aspect of the judgment in *Baker Tilly* (and, for that matter, in *Wilkins*) is that it is to a substantial extent based on inclusion of an implied (or tacit) term in the contract, representing the common unexpressed understanding of the parties. It is not a term which the law implies as general default rule in a particular kind of contract. Nor is it a term which is strictly necessary to give business efficacy to the contract. It is a term implied in the contract simply because it reflected the actual intention or common understanding of the parties which they had failed to express where the written contract did not constitute a complete integration of the agreement between the parties.

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3. Contributions in both English and Afrikaans are published and may consist of articles, notes, discussions of recent cases and book reviews. A translated title and a brief summary of approximately 300 words in Afrikaans must accompany an article written in English. In the case of Afrikaans articles a similar requirement applies regarding an English title and summary.

4. In order to be considered for publication a contribution must be the result of original research by the author(s), meet with all applicable legal principles in respect of publication (such as copyright, etcetera), contribute something sufficiently new to the existing legal literature and conform to the linguistic, technical and stylistic requirements for publications in *De Jure*. Authors are personally responsible to ensure that their submissions meet all these requirements.

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