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> *"The time will come when diligent research over long periods will bring to light things which now lie hidden. A single lifetime, even though entirely devoted to the sky, would not be enough for the investigation of so vast a subject … And so this knowledge will be unfolded only through long successive ages. There will come a time when our descendants will be amazed that we did not know things that are so plain to them … Many discoveries are reserved for ages still to come, when memory of us will have been effaced"* (Seneca, *Natural Questions*)

With the above extract from Seneca in mind, the editorial board of *De Jure* has pleasure in presenting the second volume of 2014. The volume contains contributions by various academics on a variety of topics. The volume also includes a focus section which contains contributions which interrogate and analyse Pretoria/Tshwane as a capital city from multiple perspectives; cities represented, cities lived, cities remapped and cities re-visioned. These contributions explore the various ways in which academics and social and political communities re-vision the city and, by so doing, provide an interesting and valuable interdisciplinary perspective on this important topic.

Moreover, the volume covers a wide array of topics, such as the role of the notion of *ubuntu* in constitutional law; market abuse under the Securities Act 36 of 2004; business rescue proceedings in the context of liquidation proceedings; and sperm donors' right to contact "their" children.

This volume of *De Jure* is the first to be published under a new editorial board, consisting of Dr Philip Stevens (editor), assisted by Prof Charles Fombad, Prof Annelize Nienaber, Dr Tino Bekker and Dr Serges Kamga. We would like to express our gratitude to our editorial assistant, Robert Steenkamp, for his assistance during the production of this volume.

Dr GP Stevens
Editor

Re-visioning space, justice and belonging in the capital city of Pretoria/Tshwane

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OPSOMMING

'n Herbeskouing van Ruimte, Geregtigheid en Tuiste in Pretoria/Tshwane as Hoofstad

Die hoofoogmerk van hierdie artikel is om tentatief te besin oor die moontlikhede van 'n herbeskouiïng van ruimte, geregtigheid en tuiste in Pretoria/Tshwane as hoofstad. Ten einde hierdie oogmerk aan te spreek fokus ek op drie kwessies: eerstens die nodigheid vir 'n teoretiese omgaan en intervensie in die proses van herskouiïng. Die opvatting soos geformuleer deur Henri Lefebvre, naamlik die 'reg op die stad' is sentraal tot meeste werk aangande die stad en onderlê al vier artikels wat volg op hierdie een. Tweedens beskou ek die benaderings van Hannah Arendt en Jacques Ranciere ten einde die reg op die stad te herbedink en derdens betrek ek idees aangaande herbeskouiïng, herbetowering en die verbeelding. Hierdie artikel asook die vier artikels wat hierop volg is navorsing voortvloeiend uit die "Capital Cities" Institusionele Navorsings Tema van die Universiteit van Pretoria.

Preface

During 2012 researchers in the Faculty of Humanities at the University of Pretoria initiated a project aimed to interrogate and analyse Pretoria/ Tshwane as capital city from multiple perspectives. The project was expanded to include capital cities as focus but also to broaden focus and the team to researchers from disciplines like Architecture, City planning, Theology and Law. An underlying aim is the development of an inter-disciplinary project and strengthening inter-disciplinary research. It was launched as an Institutional Research Theme at the University of Pretoria in 2013.

The four contributions following the present one were delivered, amongst others, at the launch conference in October 2013. In March 2014 the same researchers submitted a panel to the South African Cities Conference held at Wits during which the present paper aimed to respond to some of the themes that were raised in the other papers. At both occasions the papers were linked to subtheme four of the Capital Cities project namely "Cities re-visioned. Space, justice and belonging".

The broad aim of the Capital Cities project as set out in the Business Plan is as follows:

> "Given the attention cities have received as places of human habitation and cooperation, but also of exclusion and resistance, the project will focus on capital cities as a specific area of interrogation. … An overall theme emerges

> from the question how places of inclusion and exclusion are constructed as various forms of spatiality are made concrete in the landscape. We refer here to absolute space (the physical landscape, including nature and the built environment), relative space (the perspectivism of a particular location, as well as time-space or movement), and relational space (power relations implied in physical and social landscapes). Space can furthermore be material (real places), represented space (maps, plans, artistic representations), and spaces of representation (how we live space, meanings attached to cities, streets, etc.). … These multifaceted notions of space underscore the need for interdisciplinary approaches to studying and changing capital cities".[1]

Since its inception the project had four main themes as focus: Cities represented; Cities lived; Cities remapped; and Cities revisioned. As already mentioned above, the papers in this volume emanate from theme four, Cities revisioned. I refer to the description of the theme as set out in the Business Plan:

> "This sub-theme explores the multitude of ways in which academics and other social and political communities are revisioning the city – in their everyday lives and their professional practice. It takes as its starting point that the city was created by humans and is continually being recreated by humans – as they participate in, legitimise or try and obstruct structural forces shaping the life and direction of the city. It takes as axiom that there is no difference between academics and people out there, only different bodies of knowledge; we are all co-creators of knowledge".[2]

1 Introduction

The main aim of my contribution is to reflect tentatively on the possibilities of a re-visioning of space, justice and belonging in the capital city of Pretoria/Tshwane as set out by the other four papers. In order to address the main aim as stated above I address three different issues: firstly the need for theoretical engagements and interventions in the process of revisioning space, justice and belonging. For the purposes of research on spatial justice in the capital city of Pretoria/Tshwane I highlight the notion of the "right to the city" that stands central to most

1 Capital City Business plan of 19 July 2013 copy on file with author. The plan refers to the following sources: Harvey *Rebel Cities: From the Right to the City to the Urban Revolution* (2012); Harvey *Social Justice and the City: Revised Edition* (2009); Mbembe & Nuttall *Johannesburg: The Elusive Metropolis* (2009); Harvey *Spaces of Global Capitalism: Towards a Theory of Uneven Geographical Development* (2006); Lefebvre *The Production of Space* (1991).

2 Capital City Business plan. Some of the questions raised by the theme are: "What are the implicit moral visions of society and selves implied in various practices within the city as social laboratory? Which metaphors do planners, academics, activists and civil workers deploy in their talk about their city? How is the city envisioned by city planners? How does the vision of such planners coexist with those who live in the city? How have geographies of power, of inclusion and exclusion, shaped the city? How to best engage with the city so it can regenerate itself? What happens when we envisage the city as an ecosystem rather than a constellation of objects?"

engagements with spatiality and that in a sense underpins all four other contributions. Secondly, flowing from the first I address two theoretical approaches in order to rethink the right to the city; and thirdly I engage briefly with ideas on re-visioning, re-enchantment and the imagination.

I start off by focussing on certain dichotomies and themes that are central to some of the interventions in the city of Pretoria/Tshwane as presented in this volume as background. I then turn Henri Lefebvre's notion of "the right to the city". I want to tentatively consider the notion of "the right to the city" through two other theoretical interventions, Hannah Arendt's posing of the most important right as the "right to have rights" and then Jacques Ranciere's response to Arendt's notion and his insistence on "staging dissensus". I conclude by drawing on work done on the legal imagination and particularly the (im)possibility of the imagination to respond to the state of disenchantment by re-visioning and re-enchantment.

2 Re-visioning Mental Health Care, Legal Discourse, Spatial Justice and Urban Renewal

Linda Blokland in her contribution raises the complexities of mental health care nationally. As starting point she refers to section 27 of the Constitution that includes access to mental health care in its provision for health care and legislation on mental health care that resulted from the section 27 protection. However she points out that a national mental health care plan is lacking and that almost no budget is allocated to mental health care. She reflects on how the Itsoseng Community Clinic in Mamelodi has responded to the challenges by introducing alternative forms of therapy such as art projects. This initiative stands in the guise of re-visioning in its response to the limits of the institutional framework and support.

Danie Brand discusses two decisions of South African courts dealing with poverty in Tshwane and points out how the architecture of the judgments mirrors the geography of poverty. This illustrates how the law confirms and reinforces the othering of the poor. He envisions how the courts' approach could be adapted.

Isolde de Villiers investigates the numerous references to spatial justice in the *Tshwane 2055* policy document and unpacks the notion with reference to the work of Henri Lefebvre, Doreen Massey and Andreas Philippopoulos-Mihalopoulos. Against this theoretical background she investigates the aftermath of the *Schubartpark* decision and argues that the *Tswhane 2055* documents simultaneously holds the possibility and impossibility of spatial justice. Central to her revisioning is the recognition of the ongoing tension between urban regeneration and justice and a stronger theoretical engagement with the notion and ideal of spatial justice.

Stephan de Beer in his contribution focuses on the exclusion of local knowledges from processes envisioning a transformed city. He refers to various sites in the city of Tshwane that could provide rich sources and insight into the complexities of the city. As way of re-visioning he suggests the advancement of a community-based urban praxis to complement more conventional public and private sector led urban renewal processes.

There are a number of central themes and tensions running through all four papers. In all the instantiations from the treatment of mental health care, to legal discourse concerning law and poverty, to how policy documents deal with spatial justice to the knowledge recognised by urban renewal planning one sees a clear tension between an inside/outside, centre/margin. Linked to this is the tension between some form of official narrative, whether the constitution, legislation, legal decision, policy documents and knowledge and narratives coming from elsewhere that are othered at present. In each case there is a certain promise or vision held by for example the Constitution, or Mental Health Act, case law, Tshwane 2055 underpinned by institutional knowledge that could be countered by local knowledge. These tensions are further connected to, on the one hand, a monumental/grand narrative vision and what could be regarded as a memorial/ordinary/everyday re-visioning on the other. Two strong themes underpinning all the papers are also the notion of an in-between or liminal space that might hold potential for exactly the kinds of re-visioning involved. Related to this is the theme of relationality – all of the tensions mentioned disclose some kind of in-between space where people, discourse and knowledge can meet by way of a relationship. This of course also speaks to the inter-, or trans-disciplinary nature of the research project as such as creating a space between disciplines to come together in re-visioning issues pertaining to space, justice and belonging.

Below I tentatively turn to a notion central to not only the subtheme on Cities re-visioned but the Capital cities project as such, namely Henri Lefebvre's conceptualisation of "the right to the city". As underscored also by De Villiers in her article, I recall the argument of Philippopoulos-Mihalopoulos that the notion of spatial justice is quite often under-theorised and use this as framework also to address specifically the right to the city.

3 The Right to the City

Space does not allow me to provide an in depth discussion or even a thorough overview of the broad field of geography, spatial theory, law and spatiality, spatial justice and how the right to the city has been taken up in various ways in search for social justice. A starting point might be Edward Soja's focus on what he calls "the remarkable convergence of ideas" between Foucault and Lefebvre in their insistence that there are three rather than two fundamental or ontological qualities of human

existence: the social/societal, the temporal/historical and the spatial/geographical.[3] As Soja states this three way enquiry or analysis is a "vital starting point" for reflecting on a "critical perspective" and a "spatial consciousness".[4]

The notion of spatial justice has made a radical break with traditional legal concepts of justice, also John Rawls' liberal formulation of distributive justice.[5] The concept of the right to the city as formulated by Marxist thinker Henri Lefebvre is central to if not synonomous with spatial justice. The right to the city claims an "active presence in all that takes place in urban life under capitalism."[6] In the words of Lefebvre:

> "The right to the city, complemented by the right to difference and the right to information, should modify, concretize and make more practical the rights of the citizen as an urban dweller (citadin) and user of multiple services. It would affirm, on the one hand, the right of users to make known their ideas on the space and time of their activities in the urban area; it would also cover the right to the use of the center, a privileged place, instead of being dispersed and stuck into ghettos".[7]

Lefebvre and Foucault in the late 1960's and 1970's raised a concern about how spatial thinking in their view tended to be "straightjacketed into a tight dualism that limited its critical capacity".[8] A majority of spatial thinkers focused on a "materialist concept of space, characterised by concrete, mappable, and empirically defined geographies, or 'things in space'".[9] Writing resulting from this focus amounted to descriptive or highly empirical accounts. A minority of scholars were more interested in "'thoughts about space', how materialized space is conceptualised, imagined, or represented in various ways".[10] Lefebvre's well known distinction between perceived space (the focus on materiality) and conceived space (the focus on ideas) relates to this dualism. He suggested a different way that could combine the two approaches mentioned and include also an understanding of lived space. According to Lefebvre "[l]ived space like our lived time is never completely knowable … Beneath all surface appearances, there is always something mysterious, undercover, undiscoverable".[11] Foucault, in a lecture published after his death in 1984 entitled: "Of other spaces", described his understanding of a third or different way of looking at space, "hetero-topology".[12] By focussing on "heterotopias" arising from the intersection of space,

3 Soja *Seeking Spatial Justice* (2010) 101. See Lefebvre La production de l'espace (1974) that appeared in English in 1991 as *The production of space* and Foucault "Of Other Spaces" 1986 *Diacritics* 22.
4 Soja 102.
5 Rawls *A Theory of Social Justice* (1971). See also Rawls *Political liberalism* (1996).
6 Soja 96.
7 Lefebvre *Writings on Cities/Henri Lefebvre* (1996) 34; Soja 99.
8 Soja 101.
9 *Ibid.*
10 *Ibid.*
11 *Idem* 102.
12 Foucault "Of Other Spaces" 1986 *Diacritics* 22.

knowledge and power Foucault opened up new ways of thinking about space.[13]

Andreas Phillippopulos-Mihalopoulos, in a critical engagement with current literature on law and geography and arguing for a theoretical notion of spatial justice, invokes Foucault's lecture and his formulation of "the relations of proximity between points".[14] I find this phrase suggestive also for attempts taken up in this volume to relate a notion of spatial justice with a revisioning of the city. Phillippopulos-Mihalopoulos is concerned about what he perceives as a lack of theoretical engagement with spatiality in law's engagement with space. He sees three patterns: Firstly law and space is put together in a "narrow, legalistic way as jurisdiction".[15] Secondly space is constructed as a process – in contrast to the former, space here is "fluid, dynamic, ever-changing" but maybe over-idealized as a "panacea for social justice".[16] A third pattern is one of adding space and stirring. He draws on Lefebvre to counter this pattern: "space is not a thing among other things, nor a product among other products: rather, it subsumes things produced and encompasses their interrelationships in their coexistence and simultaneity – their (relative) order and/or (relative) disorder".[17] He recalls also Massey's description of space as a "product of interrelations and embedded practices, a sphere of multiple possibilities, a ground of chance and undecidability, and as such always becoming, always open to the future".[18] Space is of particular significance for law: "space embodies the violence of being lost, of being uncertain about one's direction, orientation, decision, judgement, crisis".[19] Law's engagement with space could and should result in a "law that keeps on questioning itself … Spatiality is an ethical position. … space is a demand for a radical conception of justice, a spatial justice".[20] He describes the radical call for spatial justice as: "the demand for a plural, emplaced oneness, the firm position of the body in space and the consequent thematization of the world, including the disorientation, the multiplicity of directions, the simultaneity of movement".[21]

David Harvey, one of the key theorists in the field notes that even though human rights have become centralised in our time this has not altered the "hegemonic liberal and neoliberal market logics or the dominant modes of legality and state action".[22] He states that this is of course because of the fact that the right to property and profit are

13 Soja 103.
14 Phillippopoulos-Mihalopoulos "Law's spatial turn: Geography, justice and a certain fear of space" 2010 *Law, Culture and the Humanities* 187.
15 *Idem* 190.
16 *Idem* 191.
17 *Ibid*.
18 *Idem* 194; Massey *For Space* (2005).
19 *Ibid*.
20 *Idem* 194-196.
21 Phillippopoulos-Mihalopoulos 199.
22 Harvey "The Right to the City" 2008 Sept Oct *New Left Review* 23.

regarded as stronger than any other right. In this context he turns to the right to the city as "another type of human right". He formulates it as follows:

> "The question of what kind of city we want cannot be divorced from that of what kind of social ties, relationship to nature, life styles, technologies and aesthetic values we desire. The right to the city is far more than the individual liberty to access urban resources: it is a right to change ourselves by changing the city. It is moreover, a common rather than an individual right since this transformation inevitably depends upon the exercise of a collective power to reshape the processes of urbanization. The freedom to make and remake our cities ourselves is, I want to argue, one of the most precious yet most neglected of our human rights".[23]

Harvey draws on Lefevbre's formulation of the right to the city in the context of the 68 uprising in Paris. He agrees with Lefebvre's insistence that the revolution "has to be urban, in the broadest sense of the term, or nothing at all".[24] For Harvey the adoption of the right to the city as "working slogan and political ideal" could be a way in which multiple struggles against capital, dispossession and class could be unified.

By drawing on two theoretical views on rights I want to continue the concern with a theoretical engagement with spatial justice and the right to the city. Below I consider Hannah Arendt's response to the turn to rights in her time by stating that the only right that matters is the right to have rights after which I draw on Jacques Rancierre's response to Arendt and his view on enactment.

4 The Right to have Rights/Enacting the Rights of the Subject

Hannah Arendt's view that the only right that matters is the right to have rights should be read in view of the distinction she drew between three human conditions – labour, work and political action – and between the private and public sphere.[25] In her 1951 work, *The origins of totalitarianism*, she laments the collapse of the nation-state in Europe during the two world wars. For Arendt statelessness meant not only the lack of citizenship but the loss of rights – the loss of citizenship rights for Arendt translated into the loss of human rights as such. She explains as follows:

> "The calamity of the rightless is not that they are deprived of life, liberty and the pursuit of happiness, or of equality before the law and freedom of opinion – formulas which were designed to solve problems *within* given communities – but that they no longer belong to any community whatsoever. Their plight is

23 *Idem* 23.
24 *Idem* 40.
25 Arendt *The Human Condition* (1958).

> not that they are not equal before the law, but that no law exists for them; not that they are oppressed but that nobody wants even to oppress them".[26]

She continues to argue that what is lost is "something more fundamental than freedom and justice":

> "They are deprived, not of the right to freedom, but of the right to action; not of the right to think whatever they please, but of the right to opinion … We became aware of the existence of a right to have rights (and that means to live in a framework where one is judged by one's actions and opinions) and a right to belong to some kind of organized community, only when millions of people emerged who had lost and could not regain these rights because of the new global political situation".[27]

For Arendt, "rights" is thus an illusion if it is not linked to citizenship. Human rights came apart in the context of statelessness, with the loss of political community. As is clear from her quotes above the state of statelessness brings one outside of humanity. This underscores a paradox of human rights: when you are without rights, at your most vulnerable, one should be able to draw on rights, but paradoxically they disappear at the moment you need them most. In this understanding of rights Arendt rejects the notion of natural rights; that rights exist prior to political community, but argue that rather they are a product of political community. She relies on the Aristotelian distinction between *zoe* and *bios*, the former being mere biological life and the latter public/political life.[28] For Arendt one can become fully human only in the realm of the public, in a political community. Accordingly the one primordial right, the most important right is the right to have rights.

In bringing this to bear, to the right to the city, I aim to broaden and deepen our theoretical engagement with the right and integral to it the issue of spatial justice. One obvious matter is the precarious position many refugees occupy in many cities, also the city of Tshwane concerning access to housing, social services, education amongst others. However, Arendt's description of statelessness of people who are un-homed has been expanded to include also those people, albeit "citizens" in name who have no right to action, opinion and more. Arendt has been criticised for her critique on the rise of the social, which denotes the importance of socio-economic conditions in favour of political action and speech.[29] The extent of her view on the social and also those of her critics are beyond the scope of this contribution. However, her understanding of the right to have rights as the most important right and to be part of a political community as central to having rights is central to her view on the social which brings me to Jacques Ranciere's response to Arendt and his view on "enactment".

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26 Arendt *The Origins of Totalitarianism* (1951) 295-296.
27 *Idem* 296-297.
28 Ranciere "Who is the subject of the rights of man" (2004) 103 *South Atlantic Quarterly* 297-310 at 299.
29 Christodoulidis and Schaap in Goldini and McCorkindale *Hannah Arendt an the law* (2012) 99-116.

Ranciere responds to Arendt's distinction between the realm of the political and the realm of private life by arguing that this very distinction opened the possibility of depoliticisation.[30] With reference to the work of Agamben he contends that "the radical suspension of politics in the exception of bare life is the ultimate consequence of Arendt's archipolitical position, of her attempt to preserve the political from the contamination of private, social, apolitical life.[31] The desire to keep politics pure, results in its disappearance, and creates what Ranciere calls an "ontological trap".[32] In order to get out of this trap he argues we should rephrase the question on the "rights of man" and in particular the question on the subject of politics. Following Arendt, according to Ranciere, the "rights of man" are either the rights of the citizen, meaning "the rights of those that have rights, which amounts to a tautology" or they are the rights of the stateless, those who have no rights which amount to a void.[33] Ranciere puts forward a third way: "the Rights of Man are the rights of those who have not the rights that they have and have the rights that they have not".[34] He unpacks this as follows: we should approach rights in two steps. Firstly as written rights, as "inscriptions of the community as free and equal … as configuration of the given".[35] Secondly they are "the rights of those who make something of that inscription", this means more than making "use" of the right, it means to build a case to enact whatever is promised by the inscription of the right. For Ranciere Arendt wrongly limits the sphere of politics and argues that the question of politics is exactly about the decisions of what politics entail: "The point is, precisely, where do you draw the line separating one life from another? Politics is about that border. It is the activity that brings it back into the question".[36] Ranciere invokes the example of Olympia de Gourges, a French woman in the time of the French Revolution who stated that "if women are entitled to go to the scaffold, they are entitled to go to the assembly".[37] Of course at that time women had no political rights, they were not regarded as equal citizens and they had no access to the public realm, being limited to the private. However, the fact that they could be sentenced to death meant that they were not totally excluded from politics, totally reduced to bare life. "If, under the guillotine, they were as equal so to speak, "as men", they had the right to the whole of equality, including equal participation to political life".[38] Ranciere notes that this kind of understanding could not have been "endorsed" or "heard" but it could have been "enacted" by way of voicing a "dissensus". "A dissensus is not a conflict of interests, opinions

30 Ranciere "Who is the subject of the rights of man" (2004) 103 *South Atlantic Quarterly* 299.
31 *Idem* 301; Agamben *Homo Sacer* (1998).
32 *Idem* 302.
33 *Ibid.*
34 *Ibid.*
35 *Idem* 303.
36 *Ibid.*
37 *Ibid.*
38 *Idem* 303-304.

or values; it is a division put in the 'common sense': a dispute about what is given, about the frame within which we see something as a given".[39]

What could this mean for our engagement with the city of Pretoria/ Tshwane, for an assertion of the right to the city? The aim of this paper is not to answer this question but by raising the question to underscore the politics of the reflections on the various instantiations, mental health in Mamelodi, access to housing in the city of Pretoria and community projects on social welfare. What underlies all of this is a dissensus, in other words a challenge to an enforced consensus which according to Ranciere amounts to "a reduction of democracy to the way of life of a society, to its *ethos* – meaning by this word both the abode of a group and its lifestyle".[40] The right to the city could then amount to the enactment of dissensus, the staging of dissensus: "putting two worlds in one and the same world".[41]

5 Re-visioning/Re-enchantment

As mentioned above, the five present articles are all linked to Research Theme Four of the Capital Cities research project, namely Cities re-visioned. At the heart of this theme is also a reflection of what such a revisioning should and could entail? In the previous section I attempted to underscore the importance of a thorough and in depth theoretical reflection for such a revisioning. In addition to the importance of theoretical engagements for the aim of revisioning is also the possible role of the imagination and an openness for the role of ideal. In the face of issues of poverty, social injustice, sexual and other violence many responses instinctively turn to mere instrumental/functional solutions to the detriment of the role of ideal. Marianne Constable following Nietzsche laments the loss of the search for justice by the shift to positivist and social-legal enquiry.[42] This is a great danger also for responding to numerous social concerns in the city. Instead of us being struck by the city's vulnerability it is researched, described, measured, weighed and calculated by empirical method. Mark Antaki considers to what extent the legal imagination could successfully respond to Max Weber's description of disenchantment as the fate of modernity.[43] For Weber at the root of this disenchantment is rationalization, and the idea that "one can, in principle, master all things by calculation".[44] As part of our re-visioning of the city we should consider to what extent could the

39 *Ibid.*
40 *Idem* 306.
41 *Ibid.*
42 Constable "Genealogy and jurisprudence: Nietzsche, nihilism and the social scientification of law" *Law and Social Inquiry* (1994) 551-590.
43 Antaki "The turn to imagination in legal theory: The re-enchantment of the world?" *Law and Critique* 2012 1-20; Weber "Science as a vocation" in Gerth and Mills (eds) from *Maw Weber: Essays in sociology* 1946 129-156.
44 Weber "Science as a vocation" in Gerth and Mills (eds) from *Maw Weber: Essays in sociology* 1946 139; Antaki "The turn to imagination in legal theory: The re-enchantment of the world?" *Law and Critique* 2012 4.

imagination respond to this state of disenchantment? What role could the imagination play in the search for justice, for a possible re-enchantment? However Antaki warns that most, if not all imaginary attempts, might fail for being too firmly rooted in the rationality and functionalism of modernity.[45]

Antaki considers four types of legal imagination, namely the theoretical imagination; the progressive imagination; the transformative imagination and the nostalgic imagination. He argues that many aesthetic turns, the turn to the imagination included, are part and parcel of disenchantment. For him the nostalgic imagination comes closest to the possibility of acquiring some distance from the endless rationalization of modernity because it is not a project that requires mastery, but rather asks "us to let go, and to cultivate the capacity to be struck, to be arrested, to be struck in wonder".[46] Antaki turns to the work of Simon Critchley who identifies "disappointment - and not wonder - as the primordial human attunement".[47] He explains that Critchley, although not letting go of a transformative imagination, accepts it as an imagination that understands its own limits and (im)possibility. He cites Critchley on Wallace Stevens:

> "Steven's undoubted romantic naïveté resides in his offer of a resistance to reality through the violence of the imagination. This offer is minimal. It is not the offer of a new place, new habitat, or Ur-Heimat. Nor is it the promise of a utopia, a new Pantisocracy on the banks of the Susquehanna River, or the promise of a New America … It is rather the offer of a new way of inhabiting this place …".[48]

The vision that we find here is not transformative in the sense that it puts forward a blue print or even framework for a "new place". However as Antaki states, "reality is still to be resisted, transfigured". In Critchley's words: "we have to expect less from the imagination and accustom ourselves to more minimal transfigurations of reality".[49] His response to nihilism and disenchantment is in the vein of "delineating" rather than "overcoming".[50] The reason for this is because the attempt to overcome, to transform, or to change almost inevitably originates from the same place as the disenchantment or nihilism. This does not mean that we shouldn't reflect on the possibility that things could be different.[51]

45 *Idem* 4.
46 *Idem* 15.
47 *Idem* 16; Crtichley *Very little … almost nothing: Death, philosophy, literature* (2004).
48 *Idem* 17.
49 *Ibid.*
50 *Ibid.*
51 *Ibid.*

6 Conclusion

What bearing could the above have for a research theme focused on Revisiong the city, in particular in terms of space, justice and belonging? In this short piece my aim was threefold: firstly to echo other calls for the importance of a theoretical engagement with the theme of spatiality and spatial justice; following from there I secondly raised two theoretical reflections that could open valuable questions on the notion of the right to the city, Arendt's intervention by naming "the right to have rights" as the most important right and Ranciere's response to Arendt and his call for "enactment". Thirdly I considered, following Antaki, the possibility of a re-visioning that doesn't aim to master and to transform by mimicking the misdirection of the disenchantment that it aims to challenge. We should indeed insist that things could be different. I would like to draw on Ranciere for this insistence, in other words by staging a dissensus and by enactment we could invigorate the imagination that things could be different. This doesn't entail an immediate recognition in an institutionalised sense but it could challenge the status quo, in Ranciere's terms an enforced consensus by putting two worlds together. Revisioning the city by way of enacting the right to the city might open up various paths to explore whether in the field of mental health, socio-economic discourse, the Tshwane 2055 plan or in the notion of a community-based urban praxis as set out in the four papers that follow.

Mental health care in Mamelodi: Disadvantaged geographical positioning in a South African township

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OPSOMMING

Geestesgesondheidsorg in Mamelodi: Benadeelde Geografiese Posisionering in 'n Suid-Afrikaanse Township

Hierdie artikel fokus op die huidige geestelike gesondheidsorglandskap in Suid-Afrika binne die konteks van die Suid-Afrikaanse Grondwet, sowel as die Wet op Geestesgesondheidsorg en die Millennium Ontwikkelingsdoelwitte vir Afrika. Teen hierdie agtergrond bespreek dit die werk wat gedoen word by die Itsoseng Gemeenskapskliniek in Mamelodi, 'n sielkunde dienspunt. Alternatiewe benaderings tot werk gedoen met kwesbare kinders word in die besonder aangebied en oor gereflekteer in terme van om moontlikhede uit te wys om die tekort aan hulpbronne aan te spreek vir voldoende en effektiewe geestesgesondheidsorg in die huidige Suid-Afrikaanse gesondheidsorg konteks. Die kliniek neem 'n sistemiese benadering tot dienslewering aan wat dikwels versorgers sowel as kinders in behandelingsplanne insluit. Met verloop van tyd het die kliniekpersoneel bevind dat verskeie groepwerkmetodes, wat nie-verbale behandelings betrek, effektief is. Die doeltreffendheid van hierdie behandelingsmetodes word tans ondersoek deur 'n deurlopende waglysstudie uit kommer oor die baie kinders wat op die waglys sit vir tot 8 maande.

1 Introduction

This article focuses on the mental health care landscape in South Africa at present within the context of the South African constitution as well as the Mental Health Care Act and the Millennium Development Goals for Africa. Against this backdrop it discusses the work done at the Itsoseng Community Clinic in Mamelodi, a psychology service outlet. In particular alternative approaches to work done with vulnerable children are presented and reflected on in terms of indicating possibilities to address the shortage of resources for adequate and effective mental health care in the current South African health care context. The clinic takes a systemic approach to service delivery often including caretakers as well as children in treatment plans. Over time, the clinic staff has found that various group work modes, involving non-verbal treatments, are effective. The effectiveness of these treatment modes are currently being explored through an ongoing wait-list study out of concern for the many children sitting on the waiting list for up to eight months.

2 Contextualising the Current Mental Health Landscape in South Africa

With its almost universal neglect globally, mental health care can be regarded as the poor step-sister of general health care, but especially so in Africa[1] where the consequences have a far reaching impact. Yet until recently, it remained a topic seldom debated in public or political fora. Anthea Gordon[2] refers to it as an "… invisible problem in Africa". She discusses several factors challenging progress in mental health care in Africa and these include poverty, a lack of recognition for western treatment concepts engaged in by psychiatrists and clinical psychologists, and the overshadowing by what misguidedly appear to be independently more pressing health care issues such as HIV/AIDS and infant mortality.[3]

Arguments have been presented that mental health care has a significant impact on both the prevalence of HIV/AIDS and infant mortality. Miriam Davis explains the interrelationship between HIV/AIDS and mental illness as a reciprocal and complex interaction involving factors such as persons with untreated mental illness are more likely to engage in risky sexual behaviour and also to adhere poorly to anti-retroviral treatment.[4] She states that some 50% of persons with HIV/AIDS also carry a mental illness diagnosis. This has grave implications for the contracting and transmission of HIV as well as significance for the effective treatment of mental illness.[5]

The link between maternal mental health and infant health is well documented,[6] leaving infants who are born to mothers with mental health issues, at risk in terms of adequate care and optimal development.

In their review of mental health services in South Africa in 2012, Lund, Petersen, Kleintjes, and Bhana state that "mental disorders rank third in their contribution to the burden of disease in this country, and approximately 1 in 6 South Africans are likely to experience a common mental disorder (depression, anxiety or substance use disorder) during

1 Olatawura *Mental healthcare for children: The needs of African countries World Psychiatry* (2005) 159.

2 Gordon "Mental health remains an invisible problem in Africa" (2011) available at http://thinkafricapress.com/health/mental-health-remains-invisible-problem-africa (accessed on 2014-05-06).

3 *Idem*; Lund *et al* "Mental health services in South Africa: Taking stock" (2012) African Journal of Psychiatry 402; Miranda & Patel "Achieving the Millennium, Development Goals: Does mental health play a role?" (2005) available at http://www.plosmedicine.org/article/info%3Adoi%2F10.1371%2Fjournal.pmed.0020291 (accessed on 2014-05-06).

4 Davis National Research Council. *Public Financing and Delivery of HIV/AIDS Care: Securing the Legacy of Ryan White* (2005) 250-256.

5 *Ibid*.

6 Field *et al* "Maternal mental health care: refining the components in a South African setting". In *Essentials of global mental health*, 173-186. Cambridge University Press.

the current year [2012]".[7] This review was a response to a paper presented at the first National Mental Health Summit convened by the Department of Health, Republic of South Africa from 12-13 April 2012. Other authors[8] confirm the high statistics of mental health cases in Africa generally, in a context lacking resources for treatment of such numbers of individuals needing treatment.

While globally the recognition of interrelationships between mental and physical health exists, efforts at addressing mental health issues forge ahead, albeit not with great strides. Lund *et al*[9] refer to a 2008 study conducted by Williams *et al*[10] in which it is estimated that up to 75% of people who live with mental disorders in South Africa do not receive adequate health care. Patel, a psychiatrist active in global mental health issues and based in New Delhi, suggests that in developing countries 90% of persons with mental illness do not receive the care they need.[11] There may be multiple reasons for this gap in this aspect of general health care and no doubt the stigma associated with mental health[12] continues to contribute to the cyclical effect of untreated mental health issues in communities with few resources of any kind. Working and writing in South Africa, Lund *et al* call for the "… development of evidence-based and culturally appropriate mental health services that can feasibly be delivered within available resource constraints …".[13] Miranda and Patel suggest that local communities may indeed have such resources necessary to treat mental health.[14] This call is certainly not new and for decades psychology professionals have been questioning the appropriateness of mental health models developed in the socio-economic environment of the middle class west and frequently transported undiluted to the developing world and other non-western or socio-economically disadvantaged contexts.[15]

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7 Lund *et al* 402.

8 Gordon available at http://thinkafricapress.com/health/mental-health-remains-invisible-problem-africa (accessed on 2014-05-06).

9 Lund *et al* 402.

10 William *et al Prevalence, Service Use and Demographic Correlates of 12-Month Psychiatric Disorders in South Africa: The South African Stress and Health Study. Psychological Medicine* (2008) 211-220.

11 Patel "Mental health for all by involving all" (2012) available at http://www.ted.com/talks/vikram_patel_mental_health_for_all_by_involving_all (accessed on 2014-05-06).

12 Miranda & Patel (2005). "Achieving the Millennium, Development Goals: Does mental health play a role?" available at http://www.plosmedicine.org/article/info%3Adoi%2F10.1371%2Fjournal.pmed.0020291 (accessed 2014-06-07).

13 Lund *et al* 402.

14 Miranda & Patel (2005). "Achieving the Millennium, Development Goals: Does mental health play a role?" available at http://www.plosmedicine.org/article/info%3Adoi%2F10.1371%2Fjournal.pmed.0020291 (accessed 2014-06-07).

15 Eskell-Blokland *Voice to the silent: An ecology of local knowledge in psychology* (doctoral thesis 2005 UP); Ruane "Obstacles to the Utilisation of Psychological Resources in a South African Township Community" (2010) *South African Journal of Psychology* 214-225.

3 Challenges in the Socio-historic Context of South Africa

The Western Cape Minister of Health, Theuns Botha, has referred to what he calls "the vicious cycle between poverty and mental ill health" in South Africa. He was speaking at the Mental Health Summit at Lentegeur Hospital in the Western Cape in 2012. This article will view a single site of mental health services in a South African township in Gauteng Province, Mamelodi, a marginalised section of the Tshwane greater metropolitan area.

Marginalisation of township life continues even after twenty years of democratic government. In Mamelodi, one of the largest townships in South Africa, few resources for mental health care are available. The population of Tshwane[16] stands at approximately 2,921,488, with about 25% under the age of fourteen. This figure includes the population of Mamelodi which is estimated at close to one million. Mamelodi is one of five major townships surrounding or within Pretoria and lying within the City of Tshwane boundaries. In townships access to health services in general is poor. For twenty years the Itsoseng Community Clinic has provided and continues to provide the only comprehensive psychology based mental health care service in Mamelodi. Sporadic psychiatric services can be located at one or two municipal sites in Mamelodi but there are almost no other psychological services and certainly no other psychological assessment centres in the township.

In line with section 27 of the Constitution of South Africa whereby every citizen is acknowledged the right to health care, the Mental Health Care Act was enacted in 2002 and promulgated in December 2004. The World Health Organisation – Assessment Instrument for Mental Health Systems (WHO-AIMS) report of 2007, reminds us that the Mental Health Care Act makes provision for:

> "(1) access to mental health care including access to the least restrictive care;
> (2) rights of mental health service consumers, family members, and other care givers;
> (3) competency, capacity, and guardianship issues for people with mental illness;
> (4) voluntary and involuntary treatment;
> (5) accreditation of professionals and facilities;
> (6) law enforcement and other judicial system issues for people with mental illness;
> (7) mechanisms to oversee involuntary admission and treatment practices; and
> (8) mechanisms to implement the provisions of mental health legislation".

16 Statistics South Africa available at http://beta2.statssa.gov.za/?page_id = 1021&id = city-of-tshwane-municipality (accessed on 2014-05-06).

However, in 2014 there remains no national mental health plan, and only Kwa-Zulu Natal has a separate mental health plan at provincial level. This makes it impossible to estimate expenditure on mental health care as national and provincial budgets are integrated into general health care. What is likely is that a minor fraction of general health care budgets goes into mental health care in all provinces. This seems to be typical of the picture seen in developing countries where it is stated that less than 2 % of national budgets are allocated to mental health care.[17]

Yet we should bear in mind that health care features significantly in the Millennium Development Goals (MDG)[18] which is described in the 2013 report as the "… most successful global anti-poverty push in history". However, although health sits squarely in the centre of the MDGs, no separate mention of mental health is made. Miranda and Patel (2005)[19] remind us that even, or especially, in Africa and other developing countries, mental health is closely associated with social determinants such as poverty and gender. Despite this mental health continues to be overlooked in policies and budgets and the result is as Vikram Patel states:

> "[I]n developing countries mental disorders are amongst the most important causes of sickness, disability, and, in certain age groups, premature mortality … Mental health–related conditions … contribute to a significant proportion of disability-adjusted life years (DALYs) and years lived with disability (YLDs) … [and are] closely associated with social determinants, notably poverty and gender disadvantage, and with poor physical health, including having HIV/AIDS and poor maternal and child health".[20]

4 The Township Socio-economic Context

Township culture typically blends traditional indigenous customs and rituals with modern western urban ways. Township areas were established in the latter half of the1940s to house the black population. Many of the original residents were relocated from traditional areas of living to provide workers to service the then white city. Inevitably there resulted a measure of disconnectedness from traditional ways of life. Nevertheless, over the 50 years since this process was initiated, a rich, distinctive township culture has emerged. The main language spoken in the Tshwane municipality is Sotho; local languages also spoken are Pedi, Afrikaans, Tswana, Tsonga, Zulu and English. Paradoxically, as suggested above, the majority of city populations live in these contexts: many

17 Gordon available at http://thinkafricapress.com/health/mental-health-remains-invisible-problem-africa (accessed on 2014-05-06).
18 The Millennium Goals Report (2013) available at http://www.un.org/millenniumgoals/pdf/report-2013/mdg-report-2013-english.pdf
19 Miranda & Patel (2005) available at http://www.plosmedicine.org/article/info%3Adoi%2F10.1371%2Fjournal.pmed.0020291 (accessed 2014-06-07).
20 Patel available at http://www.ted.com/talks/vikram_patel_mental_health-for_all_by_involving_all (accessed on 2014-05-06).

people living in the city centres by day and returning to townships on the outskirts by night.

Further movement of people have swelled the population of Mamelodi as they relocate to seek work and opportunity from rural areas and from across SA borders using the major roads from Botswana, Zimbabwe and Mozambique leading directly to Pretoria. Many of these immigrants remain "illegal citizens" and thus live under the radar of public health care services. The resulting picture is one of complex and diverse social networks.

However, few resources exist even today in the townships, with major resources being set in and around the inner city of Pretoria, requiring Mamelodi residents to travel long and costly distances to access them. Satellite branches of these resources offering supportive services are sometimes set in the township itself, frequently sporadically. For example, the Mamelodi Day Hospital provides services for routine procedures in short stays but any treatment requiring specialist services will have to be conducted in the major provincial hospitals in the city centre of Pretoria, or elsewhere, accompanied by a formal referral. Such services referred to include neurological, occupational therapy, speech and audiology, remedial educational, assessments and treatments, as well as clinical psychological and psychiatric care beyond the filling of repeat prescriptions. Few clinical psychological services are available in any public general hospital in South Africa and they are limited in public psychiatric hospitals.

In this context of inadequate resources, residents have formed their own ways of handling problems including health care problems and especially mental health care, relying much on indigenous traditional and church based helping methods.[21] A challenge that various clinical and other psychologists have acknowledged as a result of their work in South Africa in typical township contexts, is for the practitioner to integrate different perspectives into a useful framework.

The criticism of the form, role and relevance of modern mainstream clinical and other psychology in non-western countries has been a long on-going dialogue among such psychologists worldwide.[22] However, academic, clinical, and other therapeutic psychologies remain rigid to the underpinning principles of their roots and thus, Eurocentric.

21 *Ibid*; Eskell-Blokland 108.

22 Eskell-Blokland 27; Gordon available at http://thinkafricapress.com/health/mental-health-remains-invisible-problem-africa (accessed on 2014-05-06); Lund *et al* 402; Ruane 214-225.

5 Challenges Faced Delivering a Psychological Service in the Context

Some initiatives in the Itsoseng Clinic have been embarked on in attempts to meet the clientele appropriately and relevantly.[23]

5.1 Disease in the Clinic

Presenting problems seen in the Itsoseng Community Clinic frequently differ from those found in more western acculturated societies. In the township there is little awareness of what therapeutic psychology is, and certainly life challenges are seldom thought of in psychological terms by the local population. Presenting problems are more likely to take the form of psychosomatic symptoms; proclaimed spirit afflictions; or vague feelings of dis-ease, with many of these symptoms being accompanied by stigma.[24] Social problems of such magnitude often accompany psychological problems that the situation often appears to the practitioner as hopeless, and can ultimately overwhelm the practitioner. Within this relatively psychologically unsophisticated population, children are often referred for psychological services by the school. The school is one of the few formal systems where behavioural problems can be picked up. Teachers who refer these children tend to see failure to learn, change in school performance, and/or conduct challenges as "learning problems" and refer children in large numbers with this label. It takes experienced and alert practitioners to probe beyond the label. Children in any society do not typically express problems in any way other than through school performance signs.[25] Despite the fact that children in South Africa are rendered more vulnerable to mental illness by their exposure to a variety of factors such as HIV infection, substance use, and increased violence, there exist few mental health services for African children in Africa.[26] Prof Melvyn Freeman, the 2013 recipient of the Rhodes University Department of Psychology's social change award, spoke on mental health services in South Africa mentioning that there are "virtually no services for children".[27]

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23 Blokland "Marching to the Beat of a different drum: Ethical issues in intercultural professional practice." Unpublished paper presented at International Congress of Psychology, Cape Town, South Africa, June 23-27, 2012; Ruane 214-225; Visser "Expressive arts interventions in a socio-economically challenged environment in South Africa". Unpublished paper presented at University of Haifa, Arch of Arts in Health conference, Haifa, Israel, 17-19 March, 2013.

24 Lund *et al* 402.

25 Pastor *et al* Identifying emotional and behavioral problems in children aged 4–17 Years: United States, 2001–2007 (2012) *National Health Statistics Reports*.

26 Flisher *et al* "Child and adolescent mental health in South Africa" (2012) *Journal of Child and Adolescent Mental Health* 149-161.

27 Freeman "Mental Health in South Africa–A Luta continua" available http://www.ru.ac.za/psychology/speechespresentations/name,83630,en.html (accessed 2014-04-04).

At the Itsoseng Community Clinic in Mamelodi, some 400 plus sessions are held each month with the greatest category of clients being children as can be seen in tables 1 and 2 below, referred to as *school referrals*. Children are also present in several of the other categories of the table.

Table 1: Typical presenting problems in any one month (2012)

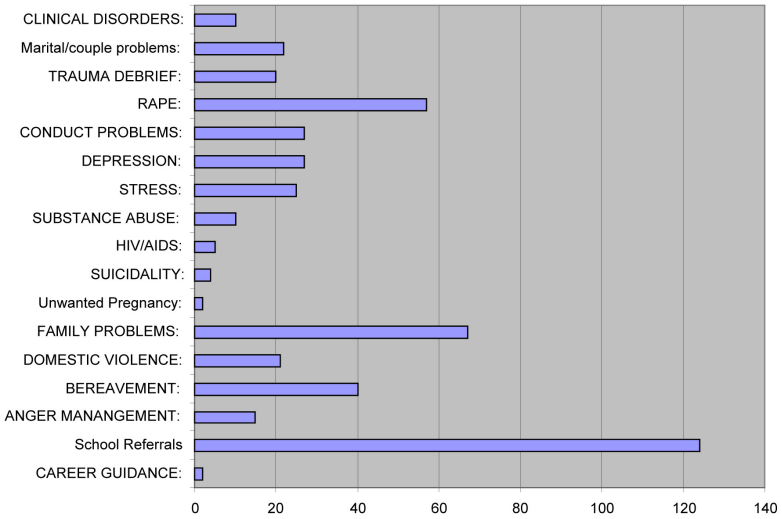

Table 2: Top four presenting problems (2013)

TOP PRESENTING PROBLEMS - 2013:				
	SCHOOL REFERRALS	FAMILY PROBLEMS	SEXUAL ASSAULT	CONDUCT PROBLEMS
JAN	17	7	1	2
FEB	71	30	25	18
MRCH	80	50	39	18
APRIL	124	67	57	27
MAY	115	64	50	25
JUNE	111	90	39	29
JULY	113	51	45	24
AUG	99	39	32	25
SEPT	61	26	43	10
OCT	78	39	39	18
NOV	104	30	25	13
TOTALS:	973	493	395	209

Table 2 above shows how pervasively children are affected by social problems and problems presenting at the clinic for mental health care. The categories "school referrals" and "conduct problems" refer specifically to children. However, children are also invariably affected by "family problems" and in the "sexual assault" category some of the victims seen at the clinic are as young as six months old, many are children, young boys, and pre-adolescent girls.

5.2 Practical Daily Challenges for Mental Health Care Service Providers

The challenges facing mental health care service providers in community settings threaten to interfere with effective treatment[28] unless these are integrated meaningfully into therapeutic programmes. A common response from service providers is to retreat to the comfort of in- patient treatment at psychiatric hospitals, leaving poorly resourced communities with little hope of services in their places of residence. The challenges can include any or many, if not all, of the following discussed.

Language barriers can present challenges to even local African language speakers as clients may originate from anywhere in South Africa or even from neighbouring countries as refugees. This then can also present cultural barriers in addition to those already being experienced.[29] Students who provide the services are often not familiar with the cultural ways confronting these barriers and can feel blocked from engaging with the clients especially as their training has most likely been largely western focussed and seldom addressing cultural issues in any depth.[30]

Stories of poverty and social disadvantage can distract service providers from thinking psychologically as a desire to rescue kicks in and clouds therapeutic judgement.[31] Because Itsoseng Community Clinic is the only comprehensive clinical psychology service point in this large geographical and heavily populated area, demand for services exceeds supply. The service providers in the clinic consist of masters students in professional training programmes in clinical and counselling psychology working under supervision, intern registered counsellors, psycho metrists, and volunteers having varying skills and experience. Clinical students deal with the clinical disorders and more serious pathologies while the counselling students handle the problems falling into the categories of adjustment disorders, career counselling and they also run self-help and preventative groups.

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28 Lund *et al* 404.

29 Geffen (2013) *The discursive practices of clinical psychologists in private practice in the Cape Metropole* Unpublished masters dissertation, UCT 3-6.

30 Ruane (2010) "Obstacles to the utilisation of psychological resources in a South African township community" *South African Journal of Psychology* 214-225.

31 Eskell-Blokland 78-79.

Waiting lists lengthen to months while crises often present in the interim, needing to be dealt with urgently, further interrupting and delaying services to those on the waiting list. Many of the children can sit on waiting lists for up to 8 months. The clinical diagnoses can vary greatly and among the more common diagnoses made we find trauma; depression, autism spectrum disorders, conduct disorder, neurological problems, developmental lags, substance abuse, and grief. Many present as co-morbidities.

In an attempt to ease the waiting, the clinic was able to draw on the skills of the team of dedicated and enthusiastic volunteers to develop non-therapeutic group activities to which children were invited to attend weekly. Some children manage to get to the clinic to engage in these activities which vary from year to year but generally include some form of expressive art such as music, art, dance, drama, and sport.

The groups have been led by a skilled or trained volunteer who was assisted by a second volunteer-in-training. Group leaders may or may not be students at different levels of training, or they may be community members interested in the clinic activities. The groups started out being open with fairly large numbers of children – up to 20 in each. Through a process of experimentation, observation, and reflection, the group size was whittled down to about 12 maximum and children were selected and invited to attend more structured closed programmes lasting 8 weeks each.

In the groups, instances of remarkable changes were being observed. In a specific instance a child coming from extreme circumstances of neglect and abuse, who had not spoken for years, started communicating spontaneously. Cases of encopresis and enuresis ceased without further intervention. Caretakers would accompany the children and report stories of changed behaviours. This was occurring through no specific therapeutic intervention as the groups were designed to be fun, creative, and containing, but not specifically therapeutic. Qualified therapists waited in the wings for referrals from the groups or to discuss concerns the volunteers might have with particular individual children.

6 Exploring Creative Arts Therapies

This process sparked an interest in exploring expressive arts therapies as a viable mode for treating not only the children, but sometimes also the adults in the clinic. The exploration resulted in two of the staff members registering for a master programme at Haifa University in Israel in expressive arts therapy. There is no such training programme in South Africa at present although a registration category does exist with the Health Professions Council of South Africa, interestingly enough falling under the category of *Occupational Therapy, Medical Orthotics/Prosthetics and Arts Therapy*. The two staff members have now returned to South Africa and have continued to make useful contributions to the treatment

models used in the clinic especially with children. Among the several beneficial factors to using this type of treatment mode is that it offers an alternative to the labour intensive and often slow pace of one-on-one therapies when appropriate. The use of expressive arts therapies through group modes has enabled the clinic staff to reach more children and adults in a shorter space of time and also to address issues of language and culture. The exact mechanisms of healing and effective treatment may be more challenging to identify as is the case in all psychotherapies, it being a largely intangible and invisible process. However, studies in terms of evidence based practice (EBP) have begun in this area both in the Itsoseng Clinic and elsewhere where art therapies are used. The ability to identify EBP outcomes, with EBP origins standing in medicine,[32] is in itself challenging for psychotherapy models but research has been reported as different models find different and appropriate ways to provide evidence of efficacy from within their differing paradigms.[33]

6.1 A Creative Arts Approach to Treatment with Children

There have been advances in the acceptance of art therapies as viable modalities of therapeutic treatments and a corresponding body of literature supports theoretical conceptions of the dynamics of the therapeutic effects. Research into the theoretical conceptualisation of art therapy benefits, as well as professional issues surrounding these practices, in therapeutic psychology and psychiatric practice have been more widely reported on in recent studies.[34]

The use of expressive art therapies have been suggested to be particularly useful in cross cultural settings of practice where practitioners typically face numerous challenges in their effective client engagement. Besides the advantage in possible group treatment modes, art therapies may become effective through the use of and reference to culturally appropriate symbols and mythologies.[35] Success through these processes has been reported on when working across cultures, and with

32 Lilienfeld (2014) "Evidence-based practice: The misunderstandings continue" available http://www.psychologytoday.com/blog/the-skeptical-psychologist/201401/evidence-based-practice-the-misunderstandings-continue (accessed 2014-04-04).

33 David & Montgomery (2011) "The scientific status of psychotherapies: A new evaluative framework for evidence-based psychosocial interventions" *Clinical Psychology: Science and Practice* 89-99.

34 Camic (2008) "Playing in the mud: health psychology, the arts and creative approaches to health care" *J Health Psychol* 287–298; Chapman, Morabito, Ladakakos, Schreier & Knudson (2001) "The effectiveness of art therapy interventions in reducing post traumatic stress disorder (PTSD) symptoms in pediatric trauma patients" *Art Therapy* 100-104; McNiff & Barlow (2009) "Cross-Cultural Psychotherapy and Art" *Art Therapy,* 100-106; National Coalition of Creative Arts Therapies Associations http://www.nccata.org/#!research/cihc.

35 McNiff & Barlow (2009) "Cross-Cultural Psychotherapy and Art" *Art Therapy* 100-106.

various age groups and disorders.[36] Indications of how art therapy brings about efficacy in treatment are beginning to emerge in recent studies.[37] Both randomised control trials as well as single-case studies are yielding results that can contribute to evidence-based models of art therapy.[38] Some studies have focussed specifically on the effectiveness of art therapies with children.[39]

Despite the evidence for the effectiveness of psychotherapy with children, the reality is that individual therapy services are not readily available for many socio-economically disadvantaged children who need help.[40]

Research at the Itsoseng Community Clinic is in the process of studying whether putting these children in experiential activities can provide therapeutic benefits or whether it is just a "fill-in the gap" for delayed therapy. There is also a need for more research into experiential activities to determine what these can offer to complement child psychotherapy for children who have to be on the waiting list until formal therapy interventions can be provided. Finally, to our knowledge, relatively few empirically designed studies with control samples have been conducted on university-run clinics with a primary focus on children's mental health in South Africa.

36 Camic (2008) "Playing in the mud: health psychology, the arts and creative approaches to health care" J Health *Psychol* 287–298; Chapman, Morabito, Ladakakos, Schreier & Knudson (2001) "The effectiveness of art therapy interventions in reducing post traumatic stress disorder (PTSD) symptoms in pediatric trauma patients" *Art Therapy* 100-104.

37 Gilroy (2006) "Art therapy, research and evidence-based practice" London:Sage 120-150; Slayton *et al* (2010) "Outcome studies on the efficacy of art therapy" *Journal of the American Art Therapy Association* 108-11.

38 Stuckey & Nobel (2010) "The connection between art, healing and public health: A review of current literature" *American Journal of Public Health* 254-263.

39 Lassetter (2006) "The effectiveness of complementary therapies on the pain experience of hospitalized children" *J Holist Nurs* 196–207; Moss (2009) *Art Therapy for Young Children: A Review of the Research and Literature* ERIC Document Reproduction Service No. ED367437.

40 Cartwright-Hatton, McNicol & Doubleday (2006) "Anxiety in a neglected population: Prevalence of anxiety disorders in pre-adolescent children" *Clinical Psychology Review* 817-833; Lucock *et al* (2008) "Controlled clinical trial of a self-help for anxiety intervention for patients waiting for psychological therapy" *Behavioural and Cognitive Psychotherapy* 36, 541–551; Silverman *et al* (2008) "Evidence-based psychosocial treatments for children and adolescents exposed to traumatic events" *J Clin Child Adolesc Psychol* 156-83; Weersing *et al* (2006) "Effectiveness of cognitive-behavioral therapy for adolescent depression: A benchmark investigation" *Behavioral Therapies* 36-48; Weisz & Kazdin (eds) (2010) *Evidence-Based Psychotherapies for Children and Adolescents* 204-206.

7 Extending Health Care Accessibility

Margaret Chan, Director-General of the World Health Organization, refers to alternative methods in health care practice in order to extend health care to greater numbers of people, many of whom would not normally have access to formal treatments. She mentions "task shifting" as a possible effective method of achieving this in specific circumstances, and several researchers in this field, such as Vikram Patel, have explored such ideas in their work in under resourced contexts and also in the mental health arena.[41] "Task-shifting" is defined as a strategy in resource-poor areas to maximise health care benefits for patients whereby community or lay health workers under professional supervision provide "front-line" care.[42] In the preface to the WHO document outlining global recommendations and outlines (2008), Chan suggests that "[t]he task shifting approach represents a return to the core principles of health services that are accessible, equitable and of good quality. These recommendations and guidelines on task shifting provide a framework that is informed by all we now know about the ways in which access to health services can be extended to all people in a way that is effective and sustainable."

With the debates around new proposed National Health Insurance process in South Africa (NHI), the government places a heavy emphasis on primary health care in order to underpin this process. Van Zyl[43] reports on the inception of NHI as fundamentally a financial arrangement, and quotes Professor Morgan Chetty, chairman of the Independent Physicians' Association Foundation of South Africa and the KwaZulu-Natal Managed Care Coalition Limited referring to the success of primary healthcare management as the "fulcrum" of health care delivery under the NHI involving public-private partnerships.

The exploration of alternative approaches to mental health care at Itsoseng Clinic makes use of *gogos* (grannies) and retired teachers. Unemployed youth wanting to make a difference and pick up some skills in the process, students frustrated by the inability to further their studies, students looking for experience, and family members of patients and clients, can contribute in varying ways to providing services complementing the professional activities of the clinic. Such volunteers are trained in different skills such as translation, administrative work, informal group facilitation, front desk assistance to new and revisiting clients.

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41 Miranda & Patel (2012) available at http://www.ted.com/talks/vikram_patel_mental_health_for_all_by_involving_all (access on 2014-05-06); see also Miranda & Patel available at http://www.plosmedicine.org/article/info%3Adoi%2F10.1371%2Fjournal.pmed.0020291.

42 Buttorff *et al* (2012) "Economic evaluation of a task-shifting intervention for common mental disorders in India" 813-818.

43 Van Zyl (2013) "NHI: The nuts 'n bolts" *The Bulletin HPCSA* 9-13 available at http://www.hpcsa.co.za/Uploads/editor/UserFiles/downloads/publications/bulletin/2013/bulletin_magazine_2013.pdf.

Of particular interest at this point in time is the focus on service to children. Many of the children come from situations of poverty such that appointments are often not kept if the bus fare is not available. Some children walk several kilometres to visit the clinic to meet with their therapist or group. Stories of hunger preventing children from completing assessments have led to some therapists bringing sandwiches for children to eat prior to testing. An important objective of the waiting list study mentioned above, is to gather empirical data that can inform the development and delivery of effective mental health services for children in a university-run clinic. Preliminary considerations of some factors which influence the benefit of engaging children in expressive art therapies include:[44]

- Universal language of art in myths and symbols;
- Non-verbal expression;
- Catharsis in expression;
- Immediate impact;
- Element of fun, creativity in a non-threatening activity;
- Clients return for follow up;
- Can be done in groups;
- Draws from clients' cultural perspective.

8 Conclusion

The findings from the study could have implications for enhancing the clinic's programmes in formulating policies and developing new levels of service. The use of expressive arts especially with children, can move towards a task shifting process whereby clients and patients are able to access service alternatives to one-on-one expensive and time consuming processes in a geographic location where such services are not readily available or accessible.

The profession of psychology can be challenged to shift its framework from a one-on-one individual activity developed in a western last millennium period, to something more appropriate for the tremendous need in contexts such as the South African one. The psychology developed for an elitist population may still have notions and theories of some relevance but the practice may be very different. The courage to develop a practice for mental health care for our local populations may provide a shift toward a solution for the ever swelling tide of general health problems. In responding to local needs and in becoming more sensitive to socio-cultural issues, psychological practices, both therapeutically and diagnostically may provide a meaningful change to local communities while contributing to general health care.

44 Visser "Expressive arts interventions in a socio-economically challenged environment in South Africa". Unpublished paper presented at University of Haifa, Arch of Arts in Health conference, Haifa, Israel, 17-19 March, 2013.

Law and the city: Keeping the poor on the margins

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OPSOMMING

Die Reg en die Stad: Om Armes op die Marge te Hou

In hierdie artikel ontleed ek die *Tswelopele* beslissing van die Hoogste Hof van Appèl en die *Schubart Park* beslissing van die Grondwetlike Hof ten einde sommige van die kompleksiteite van die verhouding tussen die reg en armoede te illustreer. Ek fokus spesifiek op die keuse van die twee howe om direk op die Grondwet te steun eerder as op toepaslike gemenereg en op die wyse waarop daar in die twee beslissings met die feite omgegaan is. Ek wys uit dat beide hierdie aspekte van die beslissings, ten spyte van die positiewe praktiese uitkomste in die sake vir arm mense, die heersende ideologies-gelaaide siening van arm mense as anders, of abnormaal onderskraag en bevestig en so saamwerk in 'n ideologiese projek van depolitisering van armoede.

1 Introduction

A defining feature of Tshwane's cityscape is the extent to which poor people visibly live apart from the middle-class and more affluent residents of the city. Most poor (black) people in the city still live in the townships such as Atteridgeville, Mamelodi, Soshanguve and Hammanskraal to which they were officially relegated during apartheid, and in the large informal settlements that have over years developed there – in a ring around the city proper. But this visible apartheid of the poor is also a feature of the "new", post-apartheid Tshwane. The inner city and some of the surrounding suburbs such as Sunnyside have visibly become "poor" (mostly black) neighbourhoods, assiduously avoided by mainstream residents of Tshwane. Even there where poor people have managed to insert themselves into the general spaces of the rich – such as the new "estate" housing developments on previously open land to the east of the city where informal settlements have sprung up on tracts of land left open in between new developments (or had been there all along) or where poor people live in business or government precincts within the inner city – their separateness is graphically enforced through the enormous security walls and fences erected around the estates and in some cases the building of walls around the informal settlements themselves as well as constant attempts by the City and/or residents of the estates to remove them.[1]

The law is of course intimately involved in the separateness of poor people, most obviously when attempts are made to enforce this separateness through evictions of poor people. In this short article I focus on two such instances of the involvement of the law: I analyse two

ostensibly pro-poor eviction judgments that played out in the city of Tshwane – the cases of *Tswelopele Non-Profit Organisation*[2] and *Schubart Park*[3] – and illustrate how our Supreme Court of Appeal and Constitutional Court in the manner in which they reached their pro-poor outcomes in these judgments – in the geography or architecture of their judgments - unintentionally mirrored and so confirmed the geographical separateness of poor people in Tshwane.

I start, in part 2 below, by describing the two cases and their resolution in court. I then, in part 3, point out how the disputes underlying the two cases are examples of an enactment of the separateness of the poor. In part 4, I describe two ways in which the separateness of the poor was unintentionally mirrored in the two cases by our courts: through the choice of which body of law to apply to resolve the cases and through the use of settled approaches to dealing with evidence. I conclude, in part 5, with some tentative points about why this mirroring matters and is problematic.

2 The Cases

The Supreme Court of Appeal decision in *Tswelopele* dealt with a community of poor people who built and lived in their shacks next to a prominent upmarket housing estate in the suburb of Garsfontein in Tshwane. During the day, many of these people worked in the housing estate as gardeners and domestics; at night they returned to their shacks to sleep next to it. In collusion with members of the property owners association of the housing estate (who were concerned about the effect of having a "squatter camp" right next door on their property values and safety) officials of the City, the Metro Police, the police, the Department of Home Affairs and members of the local community policing forum in the early hours of the morning and without any recourse to law – *illegally*, therefore[4] – forcibly evicted the community from their shacks, demolishing and burning the shacks and all the possessions in them in the process. With the aid of a faith-based NGO the community turned to the law for protection, applying to court to be returned to the piece of land they had been ejected from and to have their shacks re-erected and their possessions restored to them by and at the expense of the City. They failed in their application in the High Court in Tshwane, but

1 For a scientific overview of the extent to which poverty is localised in Tshwane, see in general Cameron & Krynauw "City of Tshwane: Development challenges" (2001) available at http://www.repository.up.ac.za/bitstream/handle/2263/8190/5b3.pdf?sequence = 1 (accessed 2014-10-14).

2 *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality* 2007 6 SA 511 (SCA).

3 *Schubart Park Residents' Association v City of Tshwane Metropolitan Municipality* 2013 1 SA 323 (CC).

4 That is, not only unlawfully but illegally – the eviction was in clear contravention of section 8(1) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

obtained leave to appeal to the Supreme Court of Appeal in Bloemfontein. Two weeks after the first judgment in the High Court a number of the erstwhile residents returned to the land they had been evicted from, but they were again forcibly and illegally removed. This prompted a second turn to the High Court in Tshwane, where this time around a small group of the residents obtained an order that they be housed temporarily in the Garsfontein Police Station, until place was found for them in a City-run housing shelter and that they be assisted once there to apply for and receive a place on the housing list of the City. In this way five members of the original group of around 30 people eventually obtained a place on the housing list. In the meantime the community prosecuted their appeal to the Supreme Court of Appeal, still with the aim of being restored in possession of the land they had been evicted from and their homes on it. In the Supreme Court of Appeal they succeeded, obtaining an order that they be allowed to return to the land they were evicted from and that the City provide them with temporary habitable shelter to enable them to do so. The majority of the community was in fact returned to the land in question, with their shacks and possessions restored. Today the so-called "squatter camp" is on course to being developed as a low-cost housing project, still right next to the upmarket housing estate, with the assistance of the City.[5]

In turn, *Schubart Park* dealt with a City-owned apartment complex in downtown Pretoria, in which a large number of poor people lived. The complex, consisting of four buildings had over the years fallen into disrepair, prompting the City over time to make various attempts to evict the poor people living there. This created a response from these people, who stoutly resisted any attempts to remove them, which response included sometimes violent protest. A long and complicated history culminated one fateful day, after the water supply to some of the buildings had been cut off, in a spontaneous protest by some of the residents of one of the buildings, with stones being thrown and an old car wreck being set alight. This invited a response from the police who cordoned off the building in question, prevented those residents who had been at work and elsewhere from going back to their flats, and forced the vacation of the building through a room to room search – in effect, a complete eviction under the guise of police action, again wholly illegal, which resulted in almost 3000 people being out on the street, with nowhere else to go.

The residents again turned to the law, challenged their eviction first unsuccessfully in the Pretoria High Court,[6] unsuccessfully sought an

5 I draw for this description on the descriptions of the matter in Lawyers for Human Rights *LHR Casebook: Lawyers for Human Rights and Public Interest Litigation in South Africa* (2009) available at http://www.lhr.org.za/sites/lhr.org.za/files/LHR_case_book.pdf at 15 & 16.

6 The High Court in Pretoria was approached thrice in succession, but the residents were unable to obtain from the High Court an order requiring their return to the building, obtaining instead only an order that the City make good on a tender it had made to provide temporary habitable shelter

appeal to the Supreme Court of Appeal,[7] and then finally prevailed on appeal in the Constitutional Court. There they obtained an order that their eviction was unlawful and that the City should, through a process of "engagement" with them, either refurbish the buildings if that were feasible and allow them to return or provide suitable alternative accommodation, whilst housing the residents in the interim.[8]

3 Separating the Poor

What is striking about both the cases is how the disputes underlying them are stories illustrating how official society regards and treats poor people as other, as an excess, an abnormality to be removed from "ordinary" society – in short, how they are examples of attempted enforcement of the separation of the poor.

Most obviously, both cases involved poor people staying inside the city, as part of the city. In *Schubart Park* the "occupiers" lived in the inner city, at the heart of officialdom: the building complex is two blocks away from the North Gauteng High Court, the Palace of Justice, two sets of chambers of the Pretoria Bar[9] and close to a number of Government Departments.[10] In *Tswelopele* they lived inside rich suburbia, surrounded by upmarket housing estates, shopping centres (and ironically right next to a church, to boot).

Both cases originated from the impulse of "normal"/"official" society to eject the poor people living inside of it or as part of it, to get rid of them, to enforce the rigid apartheid of the poor that still characterises Tshwane and South African cities more generally so strikingly – to remove them to where "they" belong, which is not inside of "us".

Perhaps less obviously, both cases also represent an apartheid or separation of story, of narration. *Schubart Park*, most clearly, entails an official story and an unofficial one. The years long dispute is characterised by attempts of the City to tell one story to the exclusion of another – that the buildings are unsafe, dangerous and cannot be lived in, that the people living there harbour criminals or are criminals themselves – to the exclusion of the story of the residents, that the buildings are their homes, where despite difficult circumstances including official neglect and hostility they managed to make a life for themselves, do not feel unsafe and feel at home. Similarly, in *Tswelopele* officialdom in the form of the City, the Metro Police and the SAPS initially

to those who qualify for it while the prospects of refurbishing the building was investigated; and that should it be found possible the residents would be allowed to return once the refurbishment was complete.

7 Leave to appeal on special petition was denied.

8 I rely for this description of the development and current state of the case on the various updates on the case provided at http://www.lhr.org.za/search/node/Schubart.

9 High Court Chambers and New Court Chambers.

10 Among others, rather ironically, the National Treasury.

hear only the story of the wealthy surrounding property owners that the settlement in their midst is a threat to their safety, a lawless presence threatening to erupt and overwhelm the stable, proper society around it; to the exclusion of the story of the residents who in fact were a highly organised, settled community, most of whom worked in the surrounding areas and needed to remain where they were to continue doing so.

4 Othering in the Courts

What should be clear from the description of the two cases above is that, in practical, "outcomes" terms, they are both eminently pro-poor decisions – simply put, the poor people who brought these cases to court "won". In *Tswelopele* the residents' eviction was declared unlawful and the City was ordered to allow the residents to return to the land they had been removed from and to rebuild their shacks that had been destroyed (returning them to their position of previous disadvantage, as counsel for the residents laconically remarked after the legal "victory"). As a precedent, the decision has subsequently also often been relied on to ameliorate the effects of illegal, destructive evictions. In *Schubart Park* the eviction was also declared unlawful and the residents also eventually obtained an order that has the potential of, at the very least, returning them to their homes or something similar to that.

However, despite these positive practical outcomes, the two decisions also stand to be criticised for the ways in which, through the application of seemingly innocuous and neutral processes and conceptual structures, they participate in the othering and separation of the poor – how despite their pro-poor outcomes therefore, they implicitly reflect the very apartheid of the poor that they were explicitly intended to counteract.

This happened in the two cases in at least two ways.

4 1 Choice of Law

The first of these two ways has to do with the body of law upon which the courts in the two cases chose to decide the cases. In both cases the residents sought to fight their eviction through reliance on a remedy provided by the common law – that is, the body of "ordinary" law that regulates the day to day interaction between you and I and everyone else, developed by our courts over a century and a half on the basis of mostly Roman Dutch Law. The particular remedy is the *mandament van spolie*.

The *mandament van spolie* allows a court, upon application, to grant an order that anyone unlawfully evicted from property they had occupied (spoliated) may claim simple restoration of possession (occupation) without more (without the establishment of any rights to the property),

pending further litigation to determine the parties' rights to the property.[11] Where an unlawful eviction had in fact taken place (as was evident in both cases) it is very difficult for the unlawful evictor to resist an application for a spoliation order in terms of the *mandament* precisely because the *mandament* is not determinative of any rights. The common law recognises only a limited number of defences against the *mandament*. The most prominent of these is the defence of impossibility – a spoliation order will not be granted where it is impossible, for whatever reason, to restore possession of the property in question.[12] This may be the case, for example where, as in *Tswelopele* the property restoration of which is sought no longer exists (has been destroyed) or, as was asserted in *Schubart Park*, where it would be dangerous to allow return to the property in question.

To resist this defence in *Tswelopele*, the residents argued that the common law should be "developed" (ie changed) by the Court to allow for a spoliation order also there where the property in question had been destroyed – that is, that the *mandament* be developed to allow, in their case, an order not only that they be allowed to return to the vacant land from which they had been removed, but that they also be restored in possession of their homes, meaning that the City would have to reconstruct their homes in some way. This the Court was asked to do not only in exercise of its "inherent" power to develop the common law to allow it to adapt to changing circumstances, but also because it is, in terms of section 39(2) of the Constitution duty-bound when developing the common law to do so in a manner that promotes the "spirit, purport and objects" of the Bill of Rights – in short, to read the Constitution into the common law.

Judge Cameron in the Supreme Court of Appeal, declined the invitation to do so and then to decide the case on the basis of the (newly developed) common law.[13] Instead he developed a special remedy directly on the basis of the housing rights in the constitution – a remedy in terms of which *exactly as would have been the case had the* mandament van spolie *been used*, the occupiers were allowed to move back onto the land from which they were unlawfully evicted and the City was ordered to rebuild their shacks for them, but without their obtaining any rights to the land other than their right not to be unlawfully evicted.[14] In sum: the Court granted them in substance exactly the same relief that they had claimed in terms of the ordinary, common law remedy of spoliation that is at all of our disposal should we be dispossessed of property unlawfully; but on the basis of a special body of law, the Constitution, reserved so it seems for the special/abnormal circumstances of the poor.

11 Van der Merwe, 'Possession' in Joubert, The Law of South Africa vol. 27 (first reissue 2002), parr 263-277.
12 See e.g. *Rikhotso v Northcliff Ceramics (Pty) Ltd* 1997 (1) SA 526 (W).
13 Tswelopele par 24.
14 Par 28.

Cameron J's explanation of this choice is instructive. Running through his entire judgment on this point is the quite rigid assumption that the Constitution and the common law are two distinct sets of law, with two distinct sets of purposes and involving two distinct sets of interests and rights. This is indicated first by his view of what the relationship between the two bodies of law entails: He described it thus:

> "The Constitution preserves the common law, but requires the courts to synchronise it with the Bill of Rights. This entails that common law provisions at odds with the Constitution must either be developed or put at nought; but it does not mean that every common law mechanism, institution or doctrine needs constitutional overhaul; nor does it mean that where a remedy for a constitutional infraction is required, a common law figure with an analogous operation must necessarily be seized upon for its development".[15]

Obviously absent from this characterisation of the relationship is any indication that the ordinary law – the common law – must be progressively infused with the Constitution, with its underlying value system as in the past it has been accepted to be the case in terms of the so-called "one body of law"-principle.[16] The understanding is clear: the two bodies of law are separate, but with a hierarchy, so that where there is clear conflict between the common law and the Constitution, the former must be changed to remove that conflict, but no general "overhaul" is required.

From this point of departure, Cameron J's argument develops along the following lines: the eviction of the Tswelopele community was not an ordinary unlawful dispossession of property in which only the interest in bare possession of that property was at stake. Rather, the eviction occurred in such a way that not only the constitutional housing rights of the residents were breached, but also their rights to personal security, privacy and ultimately to dignity.[17] Where constitutional rights are breached a remedy for that breach is supposed not only to make good what was bad with respect to the particular people involved, but also to vindicate the constitutional rights in the abstract – that is, to remedy the injury done through the breach to *all of us*.[18] In his own words:

> "Essentially, the remedy we grant should aim to instil recognition on the part of the governmental agencies that participated in the unlawful operation that the occupiers, too, are bearers of constitutional rights, and that official conduct violating those rights tramples not only on them but on all. The remedy should instil humility without humiliation, and should bear the instructional message that respect for the Constitution protects and enhances the rights of all. It is a remedy special to the Constitution, whose engraftment on the mandament would constitute an unnecessary superfluity".[19]

15 Par 20.
16 See Van der Walt *Property and Constitution* (2012) 20.
17 Par 15.
18 Parr 26-27.
19 Par 27.

One would have to look far to find a clearer statement than the final sentence in this passage of the idea that, although related in a hierarchical fashion, the Constitution and the common law are distinct, the one catering for "special" rights and interests and the other for ordinary life.

Cameron J's decision not to develop the common law *mandament van spolie* but instead to craft a special constitutional remedy to deal with the perceived special nature of the case before him in *Tswelopele* is subsequently confirmed (and so set in stone) by the Constitutional Court in *Schubart Park*, when Judge Froneman confirmed that part of the High Court order in the case that rejected reliance on the *mandament* and, with reference to *Tswelopele,* explicitly held that it is inappropriate to develop the common law remedy of spoliation in cases such as these where constitutional housing rights are at stake.[20] After quoting extensively from Cameron J's judgment in *Tswelopele* (which he described as "upholding the distinction between the common law requirements for spoliation and that of constitutional relief under section 38 of the Constitution"),[21] he came to the conclusion that "it is conducive to clarity to retain the 'possessory focus' of the remedy of spoliation and keep it distinct from constitutional relief under section 38 of the Constitution".[22]

4 2 Conflicting Stories in Court

The second way in which our courts in these two cases confirm the rhetoric of the otherness of the poor, has to do with the manner in which the facts on which to decide cases is determined in cases such as these – the stories of the cases, so to speak.

When a group of poor people approach a court to remedy their unlawful eviction through the *mandament van spolie*, as happened in both these cases, they do so by way of an application. Application procedure in our courts (as distinct from so-called "trial" procedure) is a simplified procedure in terms of which cases are decided "on the papers" – on the basis that is, of evidence set out in sworn statements called affidavits – and on the basis of legal argument by counsel appearing for the two parties, rather than on the basis of evidence led at trial through testimony by witnesses. The way in which courts determine the facts on the basis of which a case must be decided on application, between the conflicting versions presented to it in the papers by the two parties, heavily favours the respondents. In terms of the so-called *Plascon Evans*-rule,[23] the court decides the case on the basis of those facts alleged by the respondent taken together with those facts alleged by the applicants that are accepted by the respondents, unless the respondents' version is patently

20 Par 28.
21 *Ibid*.
22 Par 29.
23 Named after the decision in which it was established, *Plascon-Evans Paints v Van Riebeeck Paints* 1984 (3) SA 623 (A) ("*Plascon-Evans*").

absurd in some way.[24] In sum, the respondent's story is accepted unless there is some exceptional reason not to do so.

Applications on the basis of the *mandament van spolie* that involve unlawful eviction from housing, are most often also brought on an urgent basis – the remedy is by its nature urgent. Urgency makes impossible the limited ways in which in application proceedings it is possible to resolve factual disputes that arise despite the *Plascon Evans*-rule, those being referral to oral evidence or referral to trial. For both these options in an urgent application there simply usually is not time.

In cases such as *Tswelopele* and *Schubart Park* the applicants are poor people evicted from their homes and the respondents a state agency (in both these cases the City of Tshwane) – the *Plascon Evans*-rule in these cases means that the version of the facts presented by the City is accepted as against that presented by the poor people who bring the case to court, unless they are able to persuade the court that the City's version is patently absurd. This is of course difficult for precisely litigants such as the applicants in these cases to do, given their relative access to resources and in particular in the context of cases brought on an urgent basis, with hastily prepared papers, decided before a judge in chambers who has hardly had time to read through the papers.

The effect of this scheme can be quite drastic in the extent to which the story told by poor people of their own predicament is excluded, as is best illustrated by *Schubart Park*. In *Schubart Park* in the High Court when the application for a spoliation order was decided the crucial issue was whether the buildings from which the occupants had been excluded illegally were structurally sound and otherwise safe for human occupation. Because of the urgency of the matter the City was allowed to present oral expert evidence about this issue, the gist of which was that the building was clearly structurally unsound and for other reasons also unsafe for human habitation. These "facts" were the basis for their defence against the *mandament van spolie* of impossibility – it was impossible to restore occupation of the building as it would be too dangerous to allow the applicants back, however illegal the eviction might have been. The applicants of course vigorously disputed this version – on their version, the buildings were not near as degraded as alleged by the respondents, but were in fact perfectly safe for human habitation and in addition, to the extent that there was degradation to be concerned about, this was caused by the City's neglect of its responsibilities of upkeep as landlord.

Due to the operation of the *Plascon Evans* rule and the urgent circumstances in which the case was argued, the High Court simply accepted the oral evidence presented in this respect for the City – accepted the City's story, that is, to the exclusion of that of the residents.

24 *Plascon-Evans* 643E-653C. See also Theophilopoulos, Van Heerden & Boraine *Fundamental Principles of Civil Procedure* (2d ed 2012) 131.

This acceptance formed the basis for the High Court's dismissal of the spoliation application, as is evident from the following passage from the judgment:

> "It turns out … that on judging the evidence as a whole, and the weight thereof, all these experts agree that to allow this application and to send these people, including elderly people and children found abandoned in locked rooms by the police, and the Metro Police, back into this building in the shocking condition in which it is, would be playing with their lives and endangering their very existence. I am asked by these applicants to sanction such a state of affairs and I am not prepared to do so". [25]

This is exacerbated when the case reaches the Constitutional Court on appeal. A court on appeal usually does not question the findings of fact made by a lower court – it rather assesses the lower court's holdings on the law, on the basis of the facts as determined by the lower court. In addition, the Constitutional Court, at least at the time that *Schubart Park* was decided, decides on appeal only matters that raise constitutional issues – disputes of fact and the questioning on appeal of factual findings of the lower courts usually do not raise any constitutional issues.[26] This means that the Constitutional Court in particular as court of appeal usually decides cases on the basis of the facts as established by the lower court.

And this is exactly what happened in the Constitutional Court. The residents had applied to be allowed to introduce additional evidence before the Constitutional Court to challenge the finding of fact on the basis of which their spoliation application was dismissed in the High Court, but Froneman J dismissed their application in this respect.[27] This meant that Judge Froneman really considered only the facts as presented by the City – the story of the case as told by the residents now was not even considered and rejected. It simply was not present.

5 Conclusion

Why do these two oddities of approach matter? Most lawyers' response to the illustration above of the implicit mirroring by the two courts of the separateness of the poor in Tshwane would be that the manner in which the outcomes in the two cases was reached does not really matter – the poor people who brought the cases to court won and obtained the relief they were seeking.

By way of conclusion I would venture that it matters at least in two ways: because it implicitly confirms, and so reinforces, a set of problematic cultural assumptions about the poor on the basis of which mainstream society deny their responsibility for poverty and their capacity to do anything about it – reinforcing, that is, the

25 As quoted by Froneman J in *Schubart Park* at par 13.
26 *Schubart Park* par 31.
27 *Ibid*.

"depoliticisation" of poverty; and because it insulates from scrutiny and change the very part of our law that is most obviously complicit in creating and maintaining poverty, being the basic rules of transaction, property and liability embodied in the common law.

5 1 Reinforcing Demonisation of the Poor

To distinguish poor people from the rest of "us" – which distinction is so graphically depicted in the separateness of the poor in the cityscape of Tshwane – is not ideologically or politically neutral. While the simple act of describing the poor as an abstraction, a category separate from those of us who are not poor is linguistically and otherwise unavoidable – to speak about the world at all, "we must resort to categories and abstractions"[28] – and often necessary,[29] it is also the first step in an ideological process through which the poor are depicted as not only other than us, but inferior to us, blameworthy for that reason – more accurately, to blame for their own predicament – and so not our responsibility. In short, it is the first step in the ideological project of depoliticisation of poverty.[30]

We see this process of demonisation of the poor and depoliticisation of poverty in operation quite graphically in both *Schubart Park* and *Tswelopele*. In *Schubart Park* the City engages in an on-going and conscious effort to demonise the poor people living in the buildings. They are routinely and mostly falsely *en bloc* described as rent defaulters and defaulters on their electricity and water accounts to justify the state of disrepair into which the buildings had fallen (while it is in fact the neglect of the property owner, the City itself, that caused these problems, despite ongoing attempts by the residents to persuade it to act). At the time of the police action, this demonisation is at its clearest, when the police effecting the removal, to justify their conduct recount how they found pets and children in a state of neglect in some of the apartments, while it was in fact the police themselves who had prevented the residents of those flats to retrieve their pets and their children upon returning from work as they do every day. In *Tswelopele*, similarly the illegal eviction is justified by the surrounding property owners by describing the community as lawless, a threat to safety and health, when many members of the community are in fact employed to work in their homes, gardens and shops and there is no actual evidence of crime directed at the surrounding housing estates from within the community.[31]

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28 Ross "The rhetoric of poverty: Their immorality, our helplessness" (1990-1991) 79 *G LJ* 1499 1499.

29 *Ibid*.

30 *Idem* 1499-1508; Williams "Welfare and legal entitlements: The social roots of poverty" in Kairys (ed) *The politics of law: A progressive critique* (3rd ed 1998) 569 569-571.

31 This "demonisation" is at its most cynical when the City in the High Court application attempts to describe the eviction as simply a by-product of its efforts to remove "alien vegetation" from the land.

The decisions of the Constitutional Court and the Supreme Court of Appeal in *Schubart Park* and *Tswelopele* unwittingly participated in this demonisation. The decision to forego reliance on the ordinary law that applies to all of us in favour of a "special" body of constitutional law clearly marks the two groups of poor people who brought the two cases as other – different and abnormal. For them, the implicit message seems to be, the ordinary law does not suffice. They are deficient in some way, so that a special law and special rights must be created for them.

This demonisation is even more directly and clearly confirmed through the redaction of the story of the *Schubart Park* residents as a result of the rules of evidence. Their story is rejected in the High Court in favour of a story that clearly depicts them as blameworthy and irresponsible. On the basis of the evidence presented by the City the judge there concludes not only that, neutrally, it would be unsafe for the residents to return to the building immediately, but also that they are suspect people in some way ("... children found abandoned in locked rooms by the police ...") and that they are irresponsible, even reckless to want to return ("... I am asked by these applicants to sanction such a state of affairs and I am not prepared to do so ..."). This characterisation of the residents and of the course of events is then simply accepted in the Constitutional Court. The effect of this is of course not only that the bare facts as presented by the City are privileged over those facts as they were presented by the residents. It is also that the rhetorical implications of the City's version is privileged over the rhetorical depiction of the events provided by the residents – the City's version of the applicants as irresponsible freeloaders, content to live with their children and pets in unhygienic, unsafe conditions caused by their own conduct is confirmed to the exclusion of the residents' depiction of themselves as desperately trying to scrape a decent living in trying circumstances and in the face of almost malignant official neglect.

5 2 Insulating the Private Law

The second reason why the two courts' mirroring of the separateness of the poor matters has to do with the participation of the law in the creation and maintenance of poverty.

In a private ownership economy such as the South African economy, common law background rules of property and transaction centrally determine access to and distribution of basic resources.[32] Although the development of constitutional rights so as to establish new and unique

32 Simon 'Rights and redistribution in the welfare system' (1986) 38 *Stanford Law Review* 1431 1433 - 1436; Williams 575 - 577. See in this respect also Sen *Poverty and famines: an essay on entitlement and deprivation* (1981) 166, who writes that access to food (and I would add other basic resources) is most importantly determined by "a system of legal relations (ownership rights, contractual obligations, legal exchanges, etc.)", and that these legal relations, or the law itself quite literally "stand between" such resources and those in desperate need of them.

constitutionally based remedies certainly is an important endeavour on its own, to account fully for the relationship between law and poverty, sustained critical engagement also with these common law background rules is crucial. Experience with welfare rights campaigning in the United States has shown how a focus on the development of constitutional protection for welfare rights[33] at the expense of an adequately critical engagement with the common law background rules has, in the struggle for social justice, been counter-productive in the longer term because it sublimates deep political questions regarding distribution of basic resources.[34] The Supreme Court of Appeal and Constitutional Court's explicit choice to rely on the Constitution and leave the common law alone, not only means that they miss the opportunity for the kind of necessary critical engagement with the background rules of transaction, liability and property referred to above. It also means that they implicitly confirm those rules as sound and unproblematic. The implication is that for ordinary life and ordinary people, these background rules and the ideology that they reflect are sufficient. It is only, so it seems, in exceptional circumstances and for abnormal people that the value system that underlies the Constitution becomes relevant.

33 The focus of this movement, which reached its zenith in the Supreme Court decision of *Goldberg v Kelly* (n 20 above), was obtaining for statutory welfare rights the same kind of due process protection as that afforded property and other basic personal rights. See Williams 571 - 575 for an overview.

34 Williams 581 - 582; Simon 1486 - 1489.

Tshwane 2055 and the (im)possibility of spatial justice

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OPSOMMING

***Tshwane 2055* en die (On)moontlikheid van Ruimtelike Geregtigheid**

Die *Tshwane 2055* beleidsdokument bevat verskeie verwysings na ruimtelike geregtigheid. Deur te steun op die werk van Henri Lefebvre en Doreen Massey verskaf die artikel 'n inhoud aan die konsep van ruimtelike geregtigheid en reageer daardeur op Philippopoulos-Mihalopoulos se kritiek dat ruimtelike geregtigheid onvoldoende teoretiese grondslag het en nie bloot kan dui op geregtigheid binne ruimtes nie. Teen die agtergrond van hierdie teorieë, tesame met die uitkoms en nadraai van die *Schubart Park* beslissing, is die sentrale argument dat *Tswhane 2055* beide die moontlikheid en onmoontlikheid van ruimtelike geregtigheid inhou. Die UN-HABITAT verslag van die verenigde nasies en *Joburg 2030* dien as voorbeelde van die spanning tussen stedelike opknapping-oogmerke en geregtigheid.

1 Introduction

In October 2012 the Constitutional Court ordered the Tshwane Metropolitan Council ("the City") to meaningfully engage with the residents of Schubart Park regarding their interim relocation and the restoration of the housing complex. This interfered with the City's plans to demolish the apartment blocks and the *Tshwane 2055* plan now includes the rejuvenation of the Schubart Park housing complex in phase 1 of the West Capital Project, at an estimated cost of R1.25 billion. In this article I critically consider the definition of, and references to, spatial justice in the *Tshwane 2055* plan. The central question is whether these references present the possibility of spatial justice as envisaged by Philippopoulos-Mihalopoulos. Spatial justice, understood from a radical geographical perspective, acknowledges that space produces and is produced by unequal social relationships and insists on inhabitance as opposed to habitat. Against the backdrop of spatial justice and with reference to the aftermath of the *Schubart Park* case I explore the relationship between law, space and justice. I take up in turn the history, present and future of the Schubart Park apartment complex and the *Tshwane 2055* plan. Thereafter, I look at what the concept of spatial justice could and should entail by referring to the work of Andreas Philippopoulos-Mihalopoulos, Doreen Massey and Henri Lefebvre and lastly, I compare the *Tshwane 2055* plan with *Joburg 2030* and the United Nation's UN-HABITAT policy, in order to illustrate a discord between the aims of gentrification and spatial justice.

2 Schubart Park and Meaningful Consultation

During September 2011 approximately 700 families were forcibly removed from the Schubart Park housing complex by the City of Tshwane Metro Police.[1] After a year of litigation, the Constitutional Court found in favour of the Schubart Park residents and against the City of Tshwane metropolitan municipality. The Constitutional Court ruled that the City's alleged evacuation of the residents actually constituted an eviction from their homes and, because the City had failed to enter into meaningful engagement prior to the removal, the evictions were unlawful. Another year after the judgment of the Constitutional Court, in 2013, Frank Chikane, facilitator of the negotiations between the City and the former residents, reported that 388 families were furnished with alternative accommodation and that 69 of the families that have been "verified as genuine former residents" were still awaiting accommodation.[2] While the more immediate relief of alternative accommodation is still pending, the City of Tshwane has published a longer-term vision for the Schubart Park housing complex in the *Tshwane 2055* policy. I read the rest of the references to spatial justice in the *Tshwane 2055* against the backdrop of the events that transpired around Schubart Park and the new plans for the rejuvenation thereof. The words of City of Tshwane Mayor Kgosientso Ramakgopa, "[e]fforts to clean up Pretoria city centre will be a painful process that must be tackled", aptly capture the tension between world-class city status and spatial justice within these so-called world-class cities.[3]

In terms of the order of the Constitutional Court, the former residents of Schubart Park were entitled to the occupation of their homes as "soon as [was] reasonably possible".[4] This order was based on the finding that the order of the North Gauteng High Court (the court *a quo* that heard the urgent application for an interdict to prevent the evacuation of the residents from Schubart Park) did not constitute an order for the eviction of the residents, as required by section 26(3) of the Constitution. In order for the residents to occupy their homes again, the Constitutional Court ordered the parties to enter into meaningful engagements and stipulated a number of aspects on which the parties should reach agreement.[5] These aspects included the identification of residents who occupied the apartment complex just prior to the evictions, the date when the occupants who were identified would be granted occupation of Schubart Park again, the way in which the City would restore occupation, how

1 *Schubart Park Residents' Association and others v City of Tshwane Metropolitan* 2013 (1) SA 323 (CC) par 2.
2 "Former Schubart Park residents unhappy with rehousing schedule" *Mail and Guardian* 21 October 2013 available at http://mg.co.za/article/2013-10-21-first-388-schubart-residents-rehoused (accessed 2014-02-25).
3 "Cleaning up Pretoria 'painful'" *Independent Newspaper* (16 June 2012) available at http://www.iol.co.za/news/south-africa/gauteng/cleaning-up-pretoria-painful [accessed 26 Feb 2014].
4 *Schubart Park v City of Tshwane* point 4 of the order.
5 *Schubart Park v City of Tshwane* points 5.1 – 5.6 of the order.

services will be paid for once residents occupy the flats again, the alternative accommodation that the City will provide pending the restoration of the complex, as well as a method according to which the consultations will take place and differences will be resolved. It is clear from this part of the Constitutional Court's order that the meaningful consultation between former residents and the City of Tshwane were not only on the issue of alternative accommodation, but definitely also on the fate of the dilapidated apartment complex. *Tshwane 2055* is, amongst other things, a policy directive on the future of Schubart Park.

Despite the *Tshwane 2055* document setting out the public consultation processes followed in drafting the plan, it is uncertain whether the policy is a result of the "meaningful consultation" that the Constitutional Court ordered. Newspaper reports suggest that the residents and the City do not share the same vision for Schubart Park. In April 2013, residents' committee coordinator Mashao Chauke, said that the City of Tshwane is merely "trying to … demolish the building to build cheaper flats, which would be private".[6] In the same newspaper report a spokesperson of the City of Tshwane, Blessing Manale opined that a "quick fix structural renovations and face lift of the building at current estimates of R700m with no costs shared by the Schubart Park residents was not equitable or fair to [the] rest of the city's ratepayers".[7] This report was in response to the state of the city address by the executive mayor of the City of Tshwane delivered on 4 April 2013. Under the heading "Promotion of Safe and Secure Communities", the mayor stated:

> "One of the burning issues on our agenda with respect to safe and secure living in the city was the situation at the Schubart Park flats. Arising from this, we have engaged with Schubart Park residents and used all means provided by our democratic system, including the decision by the highest court in the land, the Constitutional Court, to pursue meaningful discussion to resolve matters of dispute".[8]

The wording in the mayor's address almost suggests that the City was the party who approached the Constitutional Court for guidance on the matter, while the facts surrounding the Schubart Park case shows only unwillingness on the side of the City to follow the procedures prescribed by and a disregard for the rights that the Constitution afforded to the residents. Furthermore, according to the address the city and former residents are still engaged in consultations. According to press releases

6 *The New Age* (15 April 2013) available at http://www.thenewage.co.za/92002-1008-53-Schubart_Park_row_simmers (accessed 2013-10-15).

7 *Ibid*.

8 State of the city address (4 April 2013) available at http://www.tshwane.gov.za/AboutTshwane/NewsandEvents/news/Pages/State-of-the-City-Address-by-His-Worship-the-Executive-Mayor-of-the-City-of-Tshwane.aspx (accessed 2013-10-16). His address continued to explain that the City was still engaged in consultations with the residents and that a facilitator had been appointed to facilitate the discussions.

on the SERI and LHR websites,[9] consultations barely took place to secure alternative accommodation, let alone that the former residents had a say in the grand scheme for Schubart Park envisioned by the City. Schubart Park was again mentioned in the 2014 state of the capital address delivered on 3 April 2014. This time, the tone was slightly different and acknowledged that the order of the Constitutional Court was contrary to the original plans of the City:[10]

> "In order to comply with the Constitutional Court order regarding the former Schubart Park residents, the City's Mayoral Committee resolved to refurbish Schubart Park against the initial proposal of demolishing it. This is the result of a meaningful engagement required by the Constitutional Court between the City of Tshwane and the former Schubart Park residents. This refurbishment will be in line with the City of Tshwane's West Capital Precinct Development and the Inner City Regeneration initiative".[11]

In August 2013, the website of the City of Tshwane reported on the *Tshwane 2055* policy under a heading "Cash injection for the West precinct" that "plans are going ahead to redevelop and uplift the inner city, with R6-billion earmarked for the West Capital Project. It is an ambitious plan for housing, mixed land use, retail, commercial and health facilities". According to this report, the redevelopment will consist of different phases and the first phase will "start with the Schubart Park residential complex which, in light of the recent Constitutional Court decision, serves as a natural first phase that can be implemented over a relatively short period".[12] An October 2013 media release by the City claimed that there was meaningful consultation in accordance with the order of the Constitutional Court because the "parties held a series of intensive meetings in June 2013".[13] The report continues and states that the "buildings will be refurbished in terms of designs that will adapt the buildings to be a modern day mixed development precinct including both social housing and rental stock to cater for the returning residents".[14] The City "shared its broader vision of redevelopment of the site with a more futuristic thinking guided by a new growth trajectory and

9 http://www.seri-sa.org/index.php/2013-04-09-14-18-31/press-statement-archive & http://www.lhr.org.za/publications.

10 The opening lines of the state of the capital address: "To us, the people of Tshwane, ours is not merely a city but the capital city of democratic South Africa, reborn and remade out of the struggle. We declare for all to know that this address, therefore, is not just about the 'State of the City' but about the 'State of South Africa's Capital City' – a place where all South Africans want to be and many of them are."

11 State of the capital city address by his worship, the executive mayor of Tshwane, councillor Kgosientso Ramokgopa, (3 April 2014), city hall, 12. In the address the Mayor reported that the refurbishment cost is estimated at R900 million (the estimated cost of the development of Schubart Park, according to the 2013 address, was R1.25-billion) and that the project will be concluded within 24 months.

12 City of Tshwane website.

13 http://www.tshwane.gov.za/AboutTshwane/NewsandEvents/news/Pages/Schubart-Park-media-statement.aspx (accessed 2014-02-24).

14 *Ibid*.

the special development direction which takes the City development forward" with the former residents during the consultation sessions.[15] This mode of operation reflects the words of Froneman J in the Schubart Park decision:

> "[The City] proceeds from a 'top-down' premise, namely that the City will determine when, for how long and ultimately whether at all, the applicants may return to Schubart Park. Unfortunately the history of the City's treatment of the residents of Schubart Park also shows that they appeared to regard them, generally, as 'obnoxious social nuisances'[16] who contributed to crime, lawlessness and other social ills. If there were individuals at Schubart Park who were guilty of, or contributed to, these ills, they should have been dealt with in accordance with the provisions of the law relating to them".[17]

The plans for Schubart Park capture are representative of the tone of the *Tshwane 2055* policy.

3 *Tshwane 2055* and Spatial Justice

The *Tshwane 2055* policy envisages the "[r]emaking of South Africa's Capital City" It has in mind a city that "is liveable, resilient and inclusive, whose *citizens* enjoy a high quality of life, have access to social, economic and enhanced political freedoms".[18] The vision also refers specifically (exclusively) to "citizens" that should be "partners in the development of the African Capital City of excellence", while it acknowledges that one of the obstacles in the development of the city would be the "continued spatial imbalances of the past".[19] The vision is phrased within the metaphor of a "game":

> "These choices of action to influence the future will have to take into account the following options: Playing the game better: implementing incremental changes using the current rules of the game and becoming more efficient and effective; Playing the game differently: lessons from two decades of democracy therefore a need [for] rapid implementation; and [p]laying a different game: implementing strategic actions that are aimed at driving development, increasing the competitiveness of the economy and strengthening the city's sustainability capacity".[20]

Spatial justice is defined as one of the key terms used in the *Tshwane 2055* document:

15 *Ibid*.
16 He quotes from the *PE Municipality* (CC) case: *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) 41.
17 *Schubart Park v City of Tshwane* 23.
18 *Tshwane 2055*.Own emphasis.
19 The vision continues: "Further, the challenges include rising unemployment, urbanisation, population growth, inequality, poverty, and accommodation conundrum, huge infrastructure backlogs and continued spatial imbalances of the past, among others".
20 Tshwane 2055 7.

> "Spatial justice is about reversing the historic policy of confining particular groups to limited space, as in ghettoisation and segregation, and the unfair allocation of public resources between areas, to ensure that the needs of the poor are addressed first rather than last".[21]

The document acknowledges the historical development of spaces in South Africa and presents the possibility of spatial justice:

> "While the City of Tshwane is home to a number of government departments, embassies, tertiary and research institutions, and several heritage sites, the City's historical spatial development approach has resulted in the: *Apartheid-bound experience* of social and economic exclusion of the larger part of residents from the city space; *[p]ersistence of apartheid-bound* settlement patterns of residents in the City which continues to define the city space; and [the] *City's historical identity* as an unreachable social space".[22]

In light of this the process of remaking proposed by the *Tshwane 2055* plan claims to also intervene in the transformation of "human settlements, space economy as well as the creation of functioning nodes". The plan includes references to the Reconstruction and Development Programme and in reiterating the call for the "eradication of apartheid geography" states that Tshwane's remaking will be "premised on achieving the principles of spatial justice, spatial sustainability, spatial resilience, spatial quality, and spatial efficiency".[23] The doubt in the radical and transformative potential of the spatial justice espoused by *Tshwane 2055* comes with the other terms that it is used in conjunction with, apart from this combination of justice, sustainability, resilience, quality and efficiency it is also grouped with "Smart living"

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21 Tshwane 2055 14.

22 Tshwane 2055 83, Own emphasis.

23 These concepts are all defined in the document and categorised as "Spatial Transformation Principles" – see Box 3.1. The definitions are derived from the "National Development Plan Vision 2030: Our future – make it work" at page 277. "Spatial sustainability is about promoting living environments whose patterns of consumption and production does not damage the natural environment. Spatial resilience is about building the capacity to withstand vulnerability to environmental degradation, resource scarcity and climatic shocks. Spatial quality is about improving the aesthetic and functional features of housing and the built environment to create liveable, vibrant and valued places that allow for access and inclusion of people with disabilities. Spatial efficiency is about supporting productive activity and jobs and reducing burdens on business. Efficient commuting patterns and circulation of goods and services should be encouraged and ensure that regulatory procedures do not impose unnecessary costs on development". This combination also appears on page 26: "Coupled with this new paradigm is the implementation of spatial development approaches geared towards the realisation of spatial justice, spatial sustainability, spatial resilience, spatial quality and spatial efficiency". The rest of the context is as follows: "To achieve Tshwane Vision 2055, a new growth path resilient to future shocks must be adopted not only from government, but also sectors of society partnering with the City … Furthermore, the key message of the Freedom Charter is that working together, as the residents and communities of the City, the government, civil society as well as the private sector, we can mobilise our resources so that together we can achieve the visions of a better South Africa and Tshwane".

and "Informal settlements transformation". Marie Huchzermeyer exposes similar tensions in the United Nation's UN-HABITAT policy,[24] which, she claims, was aimed at improving the lives of slum dwellers, but instead led to forced removals in efforts to fulfil the misunderstood target of the policy, namely to free cities of slums.

Tshwane 2055 places emphasis on being a "citizen" in the city and connects spatial justice to the status of citizen: "Spatial justice and transformation is central to ensuring social inclusivity. This is about the City providing access to all the necessary services one needs to be an equal citizen in the City". [25]

Towards the end of the document, it is clear that *Tshwane 2055* has in mind a specific notion of spatial justice and one that will be "re-engineered" in order to give effect to the grand plans of the document.[26] As law has become more and more comfortable with the vocabulary of space, the idea of spatial justice emerged in various forms. My call in this article is for a radical and critical understanding of spatial justice that would not automatically fit with the other visions of *Tshwane 2055*.

4 Spatial Justice and the Right to the City

The co-option of geographical terminology in law and policy does not necessarily mean that law is spatialised.[27] On the contrary, Philippopoulos-Mihalopoulos suggests that law's spatial turn is a turn away from space and specifically away from the unique and unpredictable characteristics of geography. He specifically argues that this turning away from space can most clearly be discerned in the use of the notion of spatial justice.[28] This, he proposes, is partly due to a "fear" of space. Spatial justice should connote something more than social justice or regional justice with some regard to the spatial, and in fact, it is almost unthinkable that justice cannot be spatial when it is concerned

24 Huchzermeyer *Cities with 'Slums': From informal settlement eradication to a right to the city in Africa* (2011).

25 At page 110 of Tshwane 2055.

26 At page 114 of Tshwane 2055: "The City of Tshwane has undeniably been shaped by a legacy of apartheid urban form, space economy, and settlements that has resulted in spatial inequity and equality. In 2055, it will be South Africa's capital city, with an identity that represents the aspirations of South Africans. Spatial justice and urban form will be re-engineered. It will be Africa's most liveable, healthy, safe and sustainable capital city to live, work, visit and invest in. Mobility and public transport in the City of Tshwane is improved and significantly contributes to the City's high connectivity and low carbon status… As part of ensuring spatial justice and space economy, the City of Tshwane will continue to revisit its spatial vision to reverse the 'spatial divide' (see n 188 in Tshwane 2055) that dominates the country as a whole. In this chapter, the focus is on how the City of Tshwane provides quality infrastructure that will support its liveability concept."

27 See Massey *Ffor space* (2005) 16-18.

28 Philippopoulos-Mihalopoulos "Law's Spatial Turn: Geography, Justice and a Certain Fear of Space" *Law, Culture and Humanities* 2010 7(2) 187 – 202.

with the distribution of resources in a given area.[29] The critical potential of spatial justice can only fully be harnessed if it entails a fundamental rethinking of justice that encompasses the "peculiar characteristics of space".[30] What are the peculiar characteristics of space and to what extent can law, and policies such as *Tshwane 2055*, truly approach justice from and through these characteristics to move towards spatial justice?

4 1 Spatial Justice

Philippopoulos-Mihalopoulos, after rendering critique against the way in which spatial justice is perceived, suggests two characteristics in terms of which spatial justice should be radically rethought, the one ontological and the other epistemological. Ontologically speaking spatial justice should be conceptualised as radically different from its "habitual temporal" and "social conceptualisation".[31] This means that spatial justice is something different from justice viewed within the usual historical framework and also different from what has been established as social justice. Spatially situated justice is distinct from historically situated or socially situated justice. On an epistemological level the location of justice should be between law and space.[32] This raises the questions of point of departure and of where spatial justice itself is situated. If what Philippopoulos-Mihalopoulos says about the point of departure being placed somewhere on the meeting point of space and law, then a geographical understanding of space is integral in the understanding of a concept of spatial justice. The notion of spatial justice is in general insufficiently theorised. I rely on Henri Lefebvre's "right to the city" and Doreen Massey's relational conception of space to inform an understanding of spatial justice for the inner city of Tshwane, an understanding that is not necessarily in keeping with the way in which the term is used in the *Tshwane 2055* document.

4 2 The Right to the City

Lefebvre's "right to the city", in his 1967 essay of the same title, encompasses an urgent call for different intellectual tools to approach the city.[33] Theoretical engagements on cities merely serve the bureaucracy of controlled consumption. It perceives of cities as collections of needs for consumption, whereas, as Lefebvre highlights, needs are anthropological.[34] This includes the need for creativity and for information, for knowledge, art and play, physical activity and sexuality.[35] The right to the city can therefore not be reduced to a

29 *Idem* 189.
30 *Ibid.*
31 *Idem* 197.
32 *Idem* 200.
33 Lefebvre *Writings on Cities* Kofman and Lebas (translated and selected) (1996) 146-159. The Abahlali base Mjondolo movement (Durban) embraces the concept of the right to the city.
34 *Idem*147.
35 *Idem* 147-148.

cumulative right comprising a collection of existing human rights placed within an urban context,[36] just as spatial justice cannot simply be a spatial interpretation of social justice. Patrick Bond supports this by asserting that the right to the city is not primarily about liberal constitutionalism, but rather a vehicle for political empowerment.[37] He asks whether the right to water, within the broader right to the city can be radicalised when cast in the terms of, what Bond calls, "urban revolutionaries".[38] In Bond's view, the reason why the idea of a "'right to the city' as a rallying cry" has gained popularity, is because it can possibly present a "profound critique of neoliberal urban exclusion".[39] With reference to the well-known debate by critical legal scholars in South Africa that the rights narrative is not the optimal language for progress in South Africa,[40] and through reliance on the failure of the Soweto water case, he warns against "considering rights as a foundational philosophical stance".[41]

Specific urban needs should constitute specific places of "simultaneity and encounters, places where exchange would not go through exchange value, commerce and profit".[42] Lefebvre problematises the science of the city, which has the city as object of study, and the silence of the working class in conceiving of cities. Bringing this back to the Schubart

36 In a South African context Marius Pieterse has given content to the right to city with reference to justiciable socio-economic human rights Coggin and Pieterse "Rights and the city: An exploration of the interaction between socio-economic rights and the city" (2012) 23 *Urban Forum* 257 & Pieterse "Development, the right to the city and the legal and constitutional responsibilities of local government in South Africa" (2014) 131 *SALJ* 150-177.

37 Bond, "The 'Right to the city': Limits to rights talk and the need for rights to the *commons*" *Theomai: Perspectivas diversas sobre la problemática territorial y urbana* (2013) 42-63.

38 Bond 44. He lists Henri Lefebvre & David Harvey.

39 *Idem* 43.

40 Bond refers in particular to Brand "The politics of need interpretation and the adjudication of socio-economic rights claims in South Africa", in Van der Walt AJ (ed.) *Theories of social and economic justice* (2005), Madlingozi "Good victim, bad victim: apartheid's beneficiaries, victims and the struggle for social justice", in Le Roux and Van Marle (eds*.) Law, memory and the legacy of apartheid: ten years after AZAPO v President of South Africa* 2007, Pieterse "Eating socioeconomic rights: the usefulness of rights talk in alleviating social hardship revisited", in *Human Rights Quarterly* (2007) 29 796-822 and Roithmayr "Lessons from Mazibuko: persistent inequality and the commons", in *Constitutional Court Review* 2011 1.

41 Bond 52, with reliance on Roithmayr "Lessons from Mazibuko: persistent inequality and the commons", in *Constitutional Court Review*, 2011 and Desai "The state of the social movements" presented to the *CCS/Wolpe Lecture Panel Social Justice Ideas in Civil Society Politics, Global and Local: A colloquium of Scholar-Activists*, Durban, Centre for Civil Society, 29 July 2010: "As we have seen, however, critics point to the opposite processes in the water case, and consider a move through and beyond human rights rhetoric necessary on grounds not only that – following the Critical Legal Scholarship tradition – rights talk is only conjuncturally and contingently useful".

42 Lefebvre 148.

Park housing complex, the initial evacuation of the residents was the silencing of the working class, the continued operations around Schubart Park displays a further disregard for the working class, despite the claims to public participation and consultation processes during the drafting of *Tshwane 2055*. This silence, Lefebvre argues, brings about an absence of both the subject and the object and he suggests two ways to address this:[43] firstly a political programme of urban reform not defined by the framework of the current society, not limited to reform and not subject to a "realism", and secondly mature planning projects that do not shy away because of the feasibility of their utopian aspects. "Urban life has yet to begin" and the current imperative is to take up new intellectual tools and develop new theories.[44] Lefebvre envisages theories that will build towards the right to the city, without proposing the right to the city as an end goal that should (or could) be reached. The right to the city should not be understood as a "single visitation right", nor as a "return to traditional cities".[45] For Lefebvre space reflects social relationships and at the same time space also influences social relationships. Therefore space is what mirrors and replicates both justice and injustice. Spatial justice approached in this manner should therefore also include an engagement with spatial injustice. In this vein David Harvey explains Lefebvre's essay on the right to the city as both "a cry and a demand".[46] It was a cry that responded to the crushing state of everyday life in cities and it was a demand that was actually in the form of a "command to look that crisis clearly in the eye and to create an alternative urban life that is less alienated, more meaningful and playful but … conflictual and dialectical, open to becoming".[47] Harvey refers to the context and circumstances[48] within which Lefebvre wrote the essay and argues that the revival of the right of the city should not lead us to Lefebvre's intellectual legacy for an explanation, but rather "[w]hat has been happening in the streets, among the urban social movements, is far more important".[49] Chris Butler's book *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* places Lefebvre within legal studies and analyses the relevance of Lefebvre's thinking for the study of state power and of law. He offers a critical approach to the involvement of law and state power in struggles over the inhabitance of space. Through a discussion of the importance of the "everyday" in Lefebvre's work, Butler

43 *Idem* 155
44 *Idem* 150-151.
45 *Idem* 158.
46 Harvey *Rebel cities: From the right to the city to the urban revolution* (2012) x.
47 *Ibid*.
48 Harvey deems it "highly significant that The Right to the City was written before (*The Irruption* as Lefebvre later called it) of May 1968" and makes special mention of the fact that the essay was written for the centennial celebrations of the publication of Volume 1 of Marx's *Capital*.
49 *Idem* xi-xii.

highlights the fact that Lefebvre situates the everyday in the centre of the ethical and aesthetic aspects of Marx's project of social transformation.[50]

4 3 "Throwntogetherness"

The right to the city of Lefebvre requires a class-conscious understanding of community. Doreen Massey, in her most recent book *for space*, radically re-imagines space and argues (as she does in her book *Geography Matters*) that the manner in which we think about space matters and that space is gendered through and through.[51] She questions the distinction between space and place. For some place is the sphere of the everyday, of real and valued practices while for others a "retreat to place" represents a protective pulling-up of drawbridges and walls.[52] Place, on this reading is the locus of denial and attempted withdrawal. She therefore calls for refusing the distinction between place (as meaningful, lived and everyday) and space (as the outside, the abstract, the meaningless). A relational politics of the spatial is an "attempt to urge an understanding of place as permeable, to provoke a living of place as a constellation of trajectories, both natural and cultural, where the question of 'belonging' has to be framed in a different way".[53] Place as an ever-shifting gathering of lines of flight poses the question of our "throwntogetherness", as Massey explains. For her, space is the dimension of the social, radical simultaneity, multiplicity and it presents contemporaneous existence. Her understanding of the relationality of space relies on the premise that all things are flux, but this should not be construed as a general state of evanescence, because entities has the ability to withstand and bear.[54] Whereas Lefebvre's concept of the right to the city calls for an acute class-consciousness in thinking of urban spaces, Massey introduces the importance of a gender-consciousness. Both of these views of space/place and spatial justice relate the visions of urban space directly to the type of community that will be constituted by the space. What this means for *Tshwane 2055* is that the policy is not merely indicative of the kind of space envisioned by the document, or in the case of Schubart Park, the kind of social housing that will be built, but *Tshwane 2055* also reflects the sense of community and belonging that the city of Tshwane subscribes to.

In light of the theorists discussed above, I would suggest that spatial justice in South Africa should be open to the uncertainty introduced by the inclusion of a variety of different voices and knowledges. It should

50 Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2010) 104. Through the work of Lefebvre he investigates power's spatial dimensions, in particular legal and administrative power, he also considers different and contemporary forms of and struggles for spatial justice and looks at radical political movements and participatory models of reaching decisions.

51 Massey *For space* (2005) 6.

52 *Idem* 10.

53 *Idem* 149.

54 *Idem* 152-154.

take seriously the warning of Froneman J in the *Schubart Park* case, that inhabitants of the city should not be seen as nuisances and the voices of the poor and marginalised should not only be heard during scheduled consultations to appease the Constitutional Court, but should be "heard" in the very policies that will affect their futures. The *Tshwane 2055* document acknowledges only the right of the citizen of the city to the city. For Lefebvre the right to the city cannot be limited in this manner and spatial justice should open up to other inhabitants of the city and specifically engage and include the working classes in re-visioning the capital city. Such an understanding of spatial justice would be in tension with the modernist aims of rejuvenation and development tabled by *Tshwane 2055*. This tension is argued by Huchzermeyer with reference to the United Nation's UN-HABITAT policy and by Johan van der Walt with reference to the *Joburg 2030* policy.[55]

5 UN-HABITAT and *Joburg 2030*

Tshwane 2055 refers in many instances to the concept of spatial justice and presents the possibility of spatial justice for the City of Tshwane. However, amidst messages of upliftment, rejuvenation and gentrification, the concept of spatial justice is appropriated and co-opted in a larger project of spatial reform along capitalist, neo-lineral lines to the exclusion of the voices of the poor. The Schubart Park project serves as an example of this, exposing the impossibility of a radical and transformative concept of spatial justice.[56] The United Nation's UN-HABITAT 2010 plan envisioned lifting city dwellers out of slum-conditions without giving regard to those who rather want to defend the slums as their homes against relocation, forced removals and eviction, as was the case with Schubart Park, and not "escape" life in the slums.[57] For Huchzermeyer, the impossibility of spatial justice in the UN-HABITAT policy was due to "the unfortunate language, particularly as packaged in high-level press releases and introduction or forewords".[58] She seems to be saying that despite the use of certain keywords or concepts in policy documents, the broader intention reflects in discussions, summaries and the execution of these policies. It is for these reasons that the possibility

55 Huchzermeyer *Cities with 'Slums': From informal settlement eradication to a right to the city in Africa* (2011) & Van der Walt 'Johannesburg: a tale of two cases' in Philippopoulos-Mihalopoulos Andreas (ed.) *Law and the City* (2007) 221 – 235.

56 Tshwane 2055 at 215 refers to the UN-HABITAT report: "A[n] UN-HABITAT report indicated that despite government's attempt to address issues of poverty and underdevelopment, South Africa still remains one of the most unequal societies in the world. In most emerging economies, the levels of inequality have increased in both urban and rural areas, whereas in South Africa the level has increased more in urban areas than rural areas due to urban migration. Thus, while in comparison to other municipal areas in the Gauteng Province the City of Tshwane had the lowest level of poverty at 22% in 2010, it is unacceptably high".

57 Huchzermeyer 5.

58 *Ibid*.

of improving the living conditions of slum-dwellers encompassed simultaneously the impossibility thereof and was further made impossible by forced removals as the less carefully worded call for "Cities without Slums"[59] was adopted by the UN and construed to mean the eradication of slums in opposition to "slum upgrading" as suggested best practice by previous UN policies.

In the City of Tshwane context Huchzermeyer, and applicable to the *Tshwane 2055* vision, remarks that it is one of the unspoken premises of cities "*not* to attract a population that is superfluous to growth in the formal economy, or embarrassing to those aspiring to world-class city status".[60] A strategy, employed by cities in South Africa to keep this "unwanted population" out of cities, is to fail to provide adequate affordable living environments within cities and to then refuse to deliver services to the informal settlements that develop on the fringes of cities due to this lack of supply of accommodation for lower-income groups.[61] In this regard Huchzermeyer refers specifically to the way in which the poor are prevented from building new shacks and other metropolitan councils are also adopting the City of Tshwane's approach to outsource and privatise the control of informal settlements to security companies.[62] The issue of privatisation of services in the city is closely connected to that of exclusion of the poor.

In his commentary on the *Joburg 2030* policy van der Walt also raises concerns connected to privatisation.[63] Through the spatial history of Johannesburg he explains that the white population and black population of Johannesburg had been living apart for most of the city's history. Well-off citizens spend most of their lives within the highly secured enclaves of gated neighbourhoods and office parks with limited exposure to the city-life in general. Van der Walt is doubtful whether the regeneration of the central business district of Johanneburg will lead to the return of city life.[64] He suggests that the return of city life in Johannesburg "will ultimately turn on the cultivation of a public-minded concern with an exposure to otherness" and therefore proposes city life as public life

59 Slogan of the Cities Alliance as explained by Huchzermeyer 2010 1.
60 Huchzermeyer 53.
61 *Ibid*. With reference to Semeczi (2011) at 65 she calls this "'withdrawal or denial of basic services' in South Africa's informal settlements" a "new form of influx control".
62 *Ibid*. She mentions specifically the Ekurhuleni Metropolitan municipality as an example of a municipality that follows this approach to "the 'management' of informal settlements" and "finds no fault with this approach". She relies on a personal communication by Williamson dated 28 July 2010.
63 Van der Walt 'Johannesburg: a tale of two cases' in Philippopoulos-Mihalopoulos Andreas (ed.) *Law and the City* (2007) 221-235.
64 *Idem* 222-223.

based on the works of Jean-Luc Nancy, Iris Marion Young and Gerald Frug.[65] He laments the lack of political vision in *Joburg 2030* and the fact that it is, apart from mentioning fighting crime and poverty, devoid of any values other than economic growth.[66] The policy over-emphasises Johannesburg's economic importance at a national level and, Van der Walt argues, that the political confidence expressed by the document comes from the realisation that "Johannesburg is a formidable economic force" in South Africa. In terms of the executive summary of *Joburg 2030* the "historically black townships will be redeveloped and upgraded" so as to "become new suburbs designed like historically white suburbs".[67] Against the backdrop of *Joburg 2030* he then proceeds to consider two cases on public expression decided by the Johannesburg High Court: *Deneys Reitz v SA Commercial Catering and Allied Workers*[68] and *Four Ways Shopping Mall v SA Commercial Catering and Allied Workers*.[69] In the first case the court granted an interdict preventing members from the union to picket outside the building of the law firm in protest against the firm's anti-union practices. Van der Walt argues that the court's reasoning, based on the subjective comfort of clients and employees entering the building, illustrates an attempt to extend such private-sphere considerations of peace and quiet, as one expect in one's own home, to the public sphere.[70] In respect of the second case, he points out that the granting of the interdict against picketing in a public space was made subject to concrete evidence to be provided. The applicants had to prove that the picketing will lead to the wrongful infringements of others' rights.[71] On account of this last judgment he remarks that it is still open for the Johannesburg High Court to decide on the issue of public expression in the city. Van der Walt highlights the interaction between the policy of the city of Johannesburg and the decisions by its high court and speculates that the Constitutional Court will (hopefully) have the final say on public expression in the city and will then (hopefully) be influenced and lead by its architecture that encourages embracing city life, not as a concern with the comfort of the home, but as a concern with "the curiosity and courage that celebrate difference and alterity".[72] Schubart Park equally captures the interaction between a city policy and a city court case. According to *Tshwane 2055* the engagement process commenced immediately after the launch of the *Tshwane 2055*

65 Frug *City making. Building communities without building walls* (1999), & Frug "The geography of community" 48 (1996) *Stanford LR* 1047-1066, Nancy *la Communauté Désoeuvrée* (1999) and Young *Justice and the Politics of Difference* (1990). Through these theorists Van der Walt supports an understanding of community in terms of "the communality or 'in common' that does not precede, but results from the experience of difference and lack of community".

66 Van der Walt (2007) 229.

67 *Joburg 2030* (executive summary) 7-8 as quoted by Van der Walt (2007) 228.

68 1991 (2) SA 685 (WLD).

69 1999 (3) SA 752 (WLD).

70 Van der Walt 232.

71 *Ibid*.

72 *Idem* 235.

Discussion Document and the stakeholder consultation process started from 31 July. The document claims that this consultation process demonstrated the City of Tshwane's "commitment to being a progressive developmental metropolitan government capable of being a change partner and leader of society".[73] However, at the same time that these consultations were taking place, the Constitutional Court, on 23 August 2012, hear arguments from the City that attempted to justify the eviction of the Schubart Park residents in lieu of any consultation with the inhabitants. Schubart Park and Van der Walt's examples show how litigation by and within the city echo its policy and exposes the true sentiments of a city.

Similar to the UN's policy and *Joburg 2030*, the *Tshwane 2055* policy presents both the possibility and impossibility of habitat and therefore of justice and injustice. It seems as if a vigorous notion of spatial justice sits uncomfortably amidst the language of rejuvenation, gentrification and redevelopment and policies that primarily envisage these aims, despite references to spatial justice and aspirations of addressing South Africa's very unjust spatial history, in their uncritical application and high-level execution lead to spatial injustice instead. The founding narrative of the *Tshwane 2055* plan is that of renewal at the expense of inhabitants in the city. These kinds of policy documents should be informed more radically by alternative voices and knowledges in the city in order to change the dominant discourses that underlie them.

6 Conclusion

Tshwane 2055 is a policy document consisting of 135 pages. It contains several references to spatial justice and sets out the consultation process that was followed in its making. It envisages collaborative development based on the Freedom Charter slogan: "The people shall govern". Furthermore, it acknowledges spatial injustices of the past, the deep divides of the city and the need for "addressing the needs of the poor first, rather than last".[74] It states an awareness of how societal fragmentation is usually reflected in the manner in which opportunities and spaces are appropriated, transformed, produced and used. It calls for improved public spaces to enhance cohesion, civic identity and quality of life. These aspects all present the possibility of spatial justice as understood through the theories of Lefebvre and Massey. It acknowledges that unequal relationships produce and are produced by space and takes cognisance of our "throwntogetherness". What presents the impossibility of spatial justice in *Tshwane 2055* is not the fact that its implementation will not do justice to its aims. The argument is not that *Tshwane 2055* is a flawless policy, but that it will fail on implementation level. It is not in the future of the policy that the impossibility is lurking, but already in its present and in its past. The argument of this article is

73 Tshwane 2055 29.
74 *Ibid*.

therefore rather that spatial justice is an impossibility firstly because of the existing discrepancies between the aims of a city of excellence and spatial justice and secondly because the Schubart Park case illustrates that the claims to consultation that allegedly lead up to the policy did not encompass the involvement of the working class as envisioned by Lefebvre.

Whose knowledges shape our city? Advancing a community-based urban *praxis*

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OPSOMMING

Wie se Kennis(se) Vorm ons Stad? Op Soek na 'n Gemeenskapsgedrewe Stedelike *Praxis*

In die artikel word verskillende plekke van kontestasie en hoop in die middestad van Pretoria/Tshwane geidentifiseer, en die moontlike unieke kennis(se) wat vanuit hierdie kontekste gegenereer word, word oorweeg.

Ek neem 'n spesifiekeposisie in en argumenteer dat sodanige plaaslike kennis(se) meestal uitgesluit word van prosesse wat die stad nuut wil visioneer, ten koste van onsself. In plaas van die uitsluiting van plaaslike gemeenskappe met hulle unieke visies, ervaringe en kundigheid, suggereer ek die doelbewuste bevordering van 'n gemeenskaps gedrewe stedelike *praxis*.

Laastens bied ek die konsep van 'n Urban Studio as 'n moontlike trans-dissiplinere ruimte, in noue samewerking met plaaslike gemeenskappe, vir die generering van transformerende kennis, wat die moontlikheid van meer inklusiewe, regverdige en volhoubare stedelike woonbuurte kan verhoog.

1 Introduction: Rethinking our Epistemologies

In the Old Testament, there is a picture of a troubled city in the Book of Ecclesiastes (9:15). And it says, of this city, that there dwelled in the city a man, poor but wise, who saved the city; but no one remembered him.

This man, to me, represents an epistemological challenge raising the question of whose knowledges shape our city, which knowledges are regarded as valid, and who is remembered in the process of revisioning the city. I refer to all cities but in particular to Pretoria/Tshwane.

The absence of local and diverse knowledges from processes that shape our cities today, almost always inevitably leads to the absence of the very ones whose knowledges are not regarded. They might carry glimpses of vision and seeds of solution. But no one remembers them.

In this article, I will firstly do a brief mapping of different sites of struggle and hope in the inner city of Pretoria/Tshwane; secondly, I will argue that these sites offer local and unique knowlegdes to be utilised; thirdly, I will take a specific position, arguing for a community-based urban *praxis*; and, lastly, I will introduce the concept of an Urban Studio,

as a possible trans-disciplinary space for generating (and) transforming knowledge within local communities.

Whose knowledges shape our cities? Or, more fundamentally, in the words of David Harvey: "... whose rights and whose city?";[1] because whom does the city belong to and who has a right to the city, and whose knowledge has validity to contribute to a city revisioned?

In the next section, I locate my reflections in specific sites in the inner city of Pretoria/Tshwane. This will be followed by a reflection on epistemology from below or from within, and a proposal for a community-based urban *praxis*. Finally, the reflections of this article will be aligned to other research and a concrete space for trans-disciplinary urban engagement will be introduced.

2 Local Sites of Struggle and Hope: Unique Generators of Knowledge

In this section, I briefly outline a number of sites, all located in the inner city of Pretoria/Tshwane, and all representing local struggles and hopes of diverse communities in different ways.

2 1 Burgers Park

Burgers Park is a public open space situated in the old inner city core of Pretoria/Tshwane. It is in a neighbourhood that was all white in 1993 but 90% black by 2000.[2] The Park is a local asset well managed by the city, and increasingly owned and used by local people: by local residents on a daily basis; hosting the inner city's largest community festival, the Feast of the Clowns, annually; regularly used by the emerging artistic community; and weekly used by a range of churches and religious groups.[3] But Burgers Park also always had a shady side. At night it is home to people who find shelter under the bushes; over the years it was often a place where someone would be found in the morning having done an overdose of heroin or cocaine.

Alongside Burgers Park Lane, next to the Park, three faith-based organisations are present, two churches and a church-based community organisation: the Tshwane Leadership Foundation; City Methodist Mission; and the Doxa Deo Inner City Campus. All three have invested substantially in the inner city at a time when most businesses, churches and banks disinvested from these areas.

1 Harvey. *Rebel Cities: From the Right to the City to the Urban Revolutio*n (2012) London/New York, NY: Verso Books 236.
2 Hillis, 2004. Cities: playgrounds or battlegrounds. Tacoma: Leadership Foundations Press 90.
3 Feast of the Clowns 2014 http://www.feastoftheclowns.org.za.

Some of the interventions of these faith-based organisations included seven social housing projects in the area around the Park; recycling a church roof to develop 27 communal housing units; developing innovative HIV/AIDS care programmes, offering a refugee centre with practical assistance and English classes, and, in addition, assisting with the integration of refugees into local communities; providing a drop-in centre for homeless people and a 24-bed transitional housing programme for women at risk; a day-care centre for 60 neighbourhood children; and a conference centre used by churches, trade unions and whoever else.[4 5]

In this precinct, one learns that it is possible to upgrade so-called bad buildings without displacing existing tenants. One learns that churches have the potential to mediate social inclusions beyond what government is able to do. But one also learns that churches respond differently to vulnerability as one church tries to assist homeless people off the streets with services, whilst the other seeks to get them off their street by opening sprinklers on them.

This little precinct is today modelling the possibility of mixed-income housing, ranging from a women's shelter to communal housing to 3-star hotels and upmarket penthouse units selling at more than R 1,2m a piece, all within one city block. The precinct is illustrative of how investment in an area has the potential to arrest further decay and even reverse the trend of disinvestment or of gentrification at the expense of vulnerable people.

The Burgers Park precinct generated a wealth of local knowledge and expertise, from below and from within, which can be built upon in working for urban regeneration that is truly inclusive.

2 2 Salvokop

Just on the opposite side, behind the Tshwane Central Station is Salvokop, an old railway community with 174 houses but with almost every house having 4-5 backyard shacks, the approximate number of residents counting well over 2000 people. On the western border there is a growing informal settlement, named Baghdad by the residents, now having more than 200 informal structures.[6] At the foot of the Freedom Park Monument, only five minutes from the Central Business District, the Salvokop land is prime property, owned by the National Department of Public Works. To access the main gate of the Freedom Park Monument one has to drive through the Salvokop neighbourhood. On the one hand, the fibre of this community is slowly unravelling in terms of the physical conditions as expressed in the housing stock. On the other hand, there is

4 Tshwane Leadership Foundation 2011 http://www.tlf.org.za.
5 Yeast City Housing. n.d. http://www.yeastcityhousing.org.za.
6 Ramnarain. Conversation with Manisha Ramnarain on site in Salvokop; 15 January 2014.

significant social infrastructure that was created by different social partners in conjunction with the community.

An old church property in Salvokop was purchased by Yeast City Housing, a faith-based social housing company, who converted the space into a multi-purpose community centre in partnership with the Tshwane Leadership Foundation. It is now offering a community hall for community and church meetings, space for local churches to worship in, day care and after school programmes for neighbourhood children, a community hall for community meetings, and on this site a community-based social housing company recently completed an apartment building with 82 social housing units.[7]

Another faith-based organisation, Popup, runs a skills training and health care programme for people in the community who otherwise would lack access to affordable basic health care. Two shelters for homeless boys also function in this area. Across the road from the church, Crossroads is a shelter for boys coming off the streets. At the western entrance to Salvokop, under the thick trees, members of African initiated churches gather for worship, representing yet another local, indigenous asset.

The landlord of most of this land – previously Transnet and now Public Works – has given no indication for the past 20 years of what a re-imagined city would look like in Salvokop, in particular for those who have lived here for many years and are still living here. Residents feel particularly vulnerable as they are tenants and might be displaced. This becomes clear from conversations with people working for local faith-based organisations but also from concerns expressed in meetings of the local community forum.

And yet, despite the evident poverty, uncertain future and transitional nature of this area, significant social infrastructure has been created by different social partners, mostly in conjunction with the community. These partners included Popup, the Tshwane Leadership Foundation, Yeast City Housing, and the Jopie Fourie Primary School.

Engaging with this community raises critical questions such as: what can be learnt from the social partners in terms of social infrastructure development? Why does the physical deterioration happen as it does, and why does national government as landlord allow it? Why are the social partners and community unable to arrest decay? Why are there virtually no conversations and consultation with local residents and social partners about future plans and development of the area (the lack of such consultative and participatory processes is evident from conversations with social partners and community members)? Is it possible for local assets to be mobilised to build a healthy local

7 Yeast City Housing. n.d. http://www.yeastcityhousing.org.za.

neighbourhood in close proximity to the resources and infrastructure of the CBD, without displacement of current tenants?

2 3 Capital West

The area to the north and west of Church Square is framed as the Capital West Precinct in the city's long-term plans.[8] [9] This area hosts a number of challenges. The infamous Kruger Park and Schubart Park complexes are in this area. Once providing sub-economic housing, under the city's management these properties were allowed to degenerate to a point of no return. In 2011 the City of Tshwane evacuated 700 families from Schubart Park[10] and recently revealed their plans to renovate this complex into, what the mayor said, (the New) Jerusalem once they are done with it.[11] [12]

And yet, the theological vision of the New Jerusalem is a place where poor and rich will dine at the same table; a city where some will not build houses and others live in them; or plant gardens and others eat the fruit; but where people will benefit directly from the fruits of their hands.[13] The city's vision of a New Jerusalem for Schubart Park, to the contrary, first had to rid the place of 700 poor families in order to make way for a more "desirable" population.

Marabastad, just a few blocks away from Schubart Park, is a neighbourhood with an immensely rich history.[14] [15] Affected by forced removals in the late 1960s and early 1970s, Marabastad until today continues to be marginal. In 2002, 2000 informal residents were moved from here to Mamelodi Extension 6 to make way for new developments.[16] Twelve years later, the proposed developments never occurred. Those who lived informally in Marabastad still live informally in Mamelodi Extension 6, now twelve years later, and subsequently a new population of people started to live informally in Marabastad.

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8 City of Tshwane 2009-2010 *Tshwane launches West Capital Project* http://www.tshwane.gov.za. Published 13 August 2013.

9 Hlahla (2012) Schubart Park to be demolished, *Pretoria News*, 11 April 2012, http://www.iol.co.za/news/south-africa/gauteng/schubart-park-to-be-demolished-1.1273329#.U3sVTFWSyfo.

10 Brand, De Beer, De Villiers, Van Marle 2013 "Poverty as Injustice" *Law, Democracy and Development*, 17 273-297, http://dx.doi.org/10/4314/ldd.v17i1.13.

11 Esterhuyse (2013) "Schubartpark word luuks" *Beeld,* 14 August 2013 12.

12 Hlahla (2012) "Schubart Park to be demolished" *Pretoria News*, 11 April 2012, http://www.iol.co.za/news/south-africa/gauteng/schubart-park-to-be-demolished-1.1273329#.U3sVTFWSyfo.

13 See Brueggemann (1993) *Using God's Resources Wisely. Isaiah and Urban Possibility.* Westminster: John Knox Press.

14 Mphahlele (1959) *Down Second Avenue.*

15 Van der Waal & De Jong (1998) *Marabastad: fountain of life. A diversity of cultures creating new opportunities.* Pretoria: Pretoria Inner City Partnership.

16 De Beer (2008) Contesting inner-city space: global trends, local exclusion/s and an alternative Christian spatial *praxis*, in *Missionalia* 36:2/3; (Aug/Nov 2008) 181-207.

Also in the same area, just north of Schubart Park, land has been secured by a community-based social housing organisation, Yeast City Housing, for the development of 750 social housing units, as well as a small complement of retail and community facilities. This was after struggling for fourteen years to secure this land from the City of Tshwane, despite it being dedicated for this purpose. This development, to be known as the Thembelihle Village, has started in the second half of 2014.[17] It will be the first development of its kind since the forced removals of people from Marabastad at the end of the 1960s, and early 1970s. Although it will be the first infrastructure investment of its kind in this precinct, it is not even mentioned as part of the Capital West Initiative by the City of Tshwane.

This precinct raises its own set of questions or themes: does local government have the capacity and is it desirable for it to manage housing? Unless community-based responses become bold in claiming inner city space, private sector and government led developments will continue with regeneration that tends to be socially exclusive and urban gentrification that marginalises the poor even further. Innovative and bold community-based interventions in this area highlight the necessity for government to acknowledge and integrate such community-based interventions into integrated, inclusive strategies for urban regeneration.

2 4 Zoo Precinct

The Zoo Precinct is in the inner city north, anchored by the significant asset of the National Zoological Gardens. Adjacent is the Blood Street Mall, being one of the main transport hubs into the city. Along Struben Street, impressive new buildings have been built to house headquarters of national government departments. This precinct also hosts a number of community-based interventions. The Tau Village was the conversion of the old Transvaal Agricultural Union Building from a brothel – accommodating girls as young as eleven years old working as child prostitutes – into a social housing project with 80 apartments, a baby care centre, a safe space for girls at-risk, shop fronts, and an elderly care centre.[18] [19]

Next to the Zoo is the Rivoningo Care Centre.[20] [21] In the 1990s, homeless people died on the streets of the city with full-blown AIDS, not having had access to antiretroviral medication, and being discharged from public hospitals if their CD4 counts were low. In Rivoningo patients were accessing medication, nutrition and a caring environment. 60% of the people who came through this facility did not die but recovered well

17 Swart (2010) Urban church. Re-developing space within Pretoria's Schubart Park complex. Unpublished March-Thesis. Pretoria: University of Pretoria.
18 Jackson (2010) "Hool word 'n plek van heling" *Beeld*, 26 June 2010 9.
19 Yeast City Housing. n.d. http://www.yeastcityhousing.org.za.
20 Hillis 93.
21 Tshwane Leadership Foundation (2011).

enough to be discharged. Today this facility combines palliative care with frail care for the elderly.

Adjacent to the Rivoningo Care Centre, in this same precinct, is the Gilead Community House,[22] [23] home to people discharged from psychiatric hospitals, living with chronic mental illness, and often misunderstood by their families and society. Were it not for Gilead, they too would be homeless. In both Rivoningo and Gilead, people who often experience marginalisation, reclaim life and become part of the urban landscape, from below, with unique knowledges residing among them. They tend to see the city from a different angle, which needs to be considered in revisioning the city.

Many of the sites I mapped above, represent people who otherwise would be marginal, but within these sites found spaces of belonging and a sense of own agency. These sites, connected to each other, could form a rich tapestry from below, representing unique and not-to-be-discarded local knowledges. Viewed from one angle, they collectively look like a *catch net* for all those who tend to fall through the city's cracks. Viewed from another angle they are much more: they are *launching pads* for people and movements finding their voice and agency, engaging the city as participants, neighbours and citizens, with a deep sense of ownership.

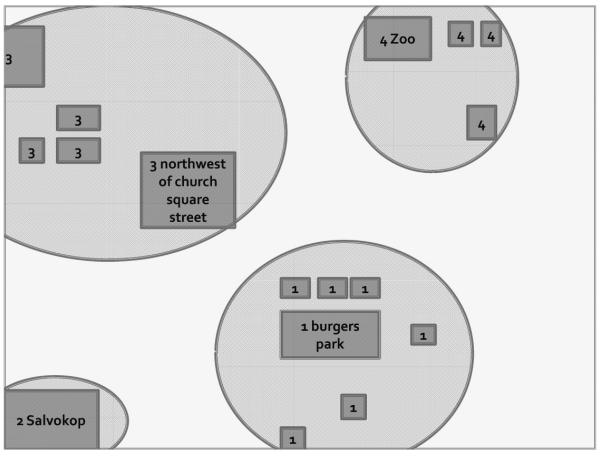

Fig 1: Inner City Sites[24]

[The sites identified in Figure 1 includes (1) Tswelelang Foster Care Home, Kopanong, Hofmeyr House, Living Stones, The Potter's House, Burgers Park and The Jubilee Centre; (2) Salvokop; (3) Schubart Park,

22 Hillis 93.
23 Tshwane Leadership Foundation(2011).
24 De Beer (2013) *Whose knowledges shape our city? Advancing a community-based urban praxis.* Unpublished panel presentation: seminar hosted by the Capital Cities IRT, University of Pretoria.

Kruger Park, Thembelihle Village and Marabastad; and (4) the Tau Village, Rivoningo Care Centre and Gilead Community House].

3 Epistemologies from Below and from Within

In their article *The View from Everywhere: Towards an Epistemology for Urbanites*, Foth, Odendaal and Hearn[25] offer "a critique of expert power and its claims to be universal and absolute". With reference to Eflin[26] and Hearn,[27] they specifically deconstruct the ways in which the knowledge constructs of white, educated, male experts dominate over women and other minorities, asserting the fact of knowledge being culturally constructed, always serving particular interests, and laden with "cultural baggage", therefore not as objective or liberating as it alleges to be.

Eflin[28] is concerned with epistemologies with their roots in "masculine preferences for decontextualised rationality"[29] lamenting the narrow confines of such knowledge generation.

In South African city-making the alliances between black political and administrative power and mostly white male consultants, do little to deconstruct these powerful, narrow and exclusive constructs of knowledge.

In contrast, Eflin[30] would propose "to broaden our view of what constitutes legitimate ways to create knowledge and vouch for its justifiability".[31] "Eflin asks that a range of epistemic voices be listened to; something like a democracy of ideas. This stance is consistent with a trend towards local, democratic, and alternative modes of knowledge production".[32]

The few sites I chose to map, represent diverse voices, people and needs, often marginality and vulnerability, but, importantly, also "other ways of knowing". It invites the knowledge (actions, experiences, struggles, solutions) of community-based organisations and vulnerable or marginal populations, often excluded from main stream knowledge

25 Foth, Odendaal & Hearn (2007) "The View from Everywhere: Towards and Epistemology for Urbanites", in Remenyi (ed) *Proceedings of the 4th International Conference on Intellectual Capital, Knowledge Management and Organizational Learning (ICICKM) (*October 15-16 2007, Cape Town, South Africa), Academic Conferences Limited.
26 Eflin (2008)"Women and Cognitive Authority in the Knowledge Economy". In Hearn& Rooney (eds) *Knowledge Policy: Challenges for the 21st Century.* Cheltenham, UK: Edward Elgar.
27 Hearn (2002) "Global Transformations in Knowledge: Social and Cultural Issues" *Encyclopaedia of Life Support Systems (EOLSS)* (Vol. 1.24: Capital resource issue III: Globalization and world systems). Oxford, UK: Eolss Publishers.
28 Eflin 3.
29 Foth *et al* p128.
30 Eflin 3.
31 Foth *et al* 128.
32 *Idem* 7.

production. As Foth, Odendaal and Hearn[33]suggest: "[w]e need to be sensitive to the needs and voices of the marginalised. We need to cultivate and recognise 'an epistemology of difference'".[34] It is such "an epistemology of difference" and "other ways of knowing" that the poor man of Ecclesiastes and the diverse sites of the inner city also represent.

4 Towards a Community-based Urban *Praxis:* From Below, and from within

This article seeks to advance a community-based urban *praxis*, proposing that – alongside the visions of consultants, politicians and private sector – cities need to be revisioned from below and from within. A community-based urban *praxis* suggests an on-going cyclical process of embedded and embodied immersions; generating local knowledges through collective action; critically reflected upon, refined and improved; and replicated and sustained over time.

An articulate community-based urban *praxis* can go a long way to foster authentic, locally owned, locally driven, and locally sustained interventions for change.

Such an approach is advocated for by diverse voices ranging from grass-root social movements such as Shack/Slum Dwellers International,[35] to academics such as Huchzermeyer,[36] Deakin and Allwinkle,[37] and Deakin,[38] to authors writing on behalf of international organisations such as UN-HABITAT.[39]

A community-based urban *praxis* is visible in smaller or bigger urban interventions facilitated by local civic groups, whether they be community organisations, non-profit organisations, faith-based communities and churches, citizens groups, informal traders, slum dweller organisations, cooperatives, or many others.

A community-based urban *praxis* is different from that which is government or private sector led. Such an approach is not firstly about monumentality or financial profit but about the common good of the

33 *Ibid*.
34 Sandercock (1995) "Voices from the Borderlands: A Meditation on a Metaphor" *Journal of Planning Education and Research,* 14(2) 77-88.
35 SDI South African Alliance (2012) http://www.sasdialliance.org.za.
36 Huchzermeyer (2011) *Cities with "slums". From informal settlement eradication to a right to the city in Africa*. Claremont, South Africa: UCT Press.
37 Deakin & Allwinkle (2008) *A Community-Based Approach to Sustainable Urban Regeneration. The LUDA Project*. The Social Sciences Collection.
38 Deakin (2012) "The Case for socially inclusive visioning in the community-based approach to sustainable urban regeneration" *Sustainable Cities and Society* 313-323.
39 Fisher (2001) *Building Bridges through Participatory Planning,* UN-HABITAT, http://www.gdrc.org/decision/BuildingBridges.pdf.

majority of people, and particularly those who are most vulnerable and excluded. It is *praxis*-based in as far as it results not primarily from top-down policy but from contextual, local and embedded/embodied immersions. In the process contextual knowledge is generated through action, refined through critical reflection, translated into improved action and sharing of good practice, in an on-going cyclical process.

This approach has the possibility, if acknowledged, to inform policy and strategy towards sustained urban change.[40] Huchzermeyer[41] refers to Murray's assertion of "informal settlements as incubators for inventive survival strategies where inhabitants have begun to reclaim available space for multiple uses, develop their own specific forms of collaboration and cooperation and reterritorialise their connections both inside and outside the city"; by affirming such an approach, policy makers could be steered from "aversion" and "elimination" to "respect" and "strategic support".

Instead, governments often criminalise those inhabiting informal settlements, or informal traders, or homeless communities. Terms such as "eradication, eviction, relocation and resettlement" are used, says Huchzermeyer[42] "to keep the poor out of the city" or "to remove them from it" in line with "world-class city aspirations".

Community-based approaches are critical to ensure humane and human-scale cities that build on the latent assets within them. In the context of capital cities monumentality often triumphs over people and facades of decency and sanitation over dignified spaces embracing vulnerability. An articulate community-based urban *praxis* could provide sane, decent and human-centred interventions and approaches to urban change and revitalisation making radical forms of social inclusion an imperative for assessing the quality of urban regeneration.

5 Aligned Research

The suggestions in this article are further explored in a research project entitled *"Faith in the city",* exploring the role of faith – and community-based organisations or movements in engaging urban fractures, with particular reference to the City of Tshwane.[43] The *"Faith in the city"* research project is aligned to a university-wide research project on Capital Cities, entitled *"Capital Cities: Space, Justice and Belonging",*[44] based at the University of Pretoria, exploring ways in which space, justice and belonging are sought, mediated or denied in capital cities of the

40 Deakin 13-23.
41 Huchzermeyer 26.
42 *Idem* 59.
43 De Beer (2012) *Faith in the city: a trans-disciplinary research programme.* Unpublished research proposal, University of Pretoria.
44 Faculty of Humanities, University of Pretoria (2013) *Capital Cities: Space, Justice and Belonging.* Institutional Research Theme (IRT) proposal, 15 March 2013, approved by the University Executive in April 2013.

global South. This article raises a specific concern with the city of capital in its *denial* of community-based voices and interventions.

The considerations of this article also seek to align itself to the Faculty Research Theme of the Faculty of Theology at the University of Pretoria, where I am based in the Centre for Contextual Ministry. The theme of the Faculty Research Theme is "*Ecodomy: life in fullness*".[45] Ecodomy comes from two Greek words which mean "to build the household". And the focus of the Centre for Contextual Ministry, within that broader theme, is to foster community and church leadership that will help build healthy communities.

Considering a community-based urban *praxis* is to consider the urban household in its (dis)connectedness, from below, and the multiple sites of struggle, hope and intervention that seek (i) to resist exclusionary forces of death and decay, (ii) to outwit the thief that is out to steal, kill and destroy – whether the thief of apathy, or numbness or market forces, and (iii) to craft spaces and processes that could possibly mediate life, from below and from within.

This article, and the *"Faith in the city"* research project, would argue that fullness of life in the context of the city cannot be attained without allowing local, diverse and marginal voices from urban places signifying profound (un)fullness to inform our urban practices and policies – critically, correctively and constructively.

6 Urban Studio: A Trans-disciplinary Space for Generating Transforming Knowledge

Since 2012 the Centre for Contextual Ministry at the University of Pretoria has embarked on a process, in collaboration with the Tshwane Leadership Foundation (a community-based organisation), to create an Urban Studio. It is doing so by drawing a virtual line around the precincts I mapped, acknowledging their value as sites of learning and affirming the city as classroom.[46] The Urban Studio, based in the inner city of Pretoria, is a collective of sites offering possible trans-disciplinary spaces for generating (and transforming) knowledge in close collaboration between researchers, students, community-based practitioners and ordinary citizens.[47]

45 Faculty of Theology, University of Pretoria (2013) *Strategic Plan: Faculty of Theology,* approved by the University Executive in August 2013.
46 Hillis 26-27.
47 De Beer (2013b) *Urban Innovation Hub: advancing community-based urban praxis through trans-disciplinary engagement*. Unpublished project proposal by the Centre for Contextual Ministry, University of Pretoria 2.

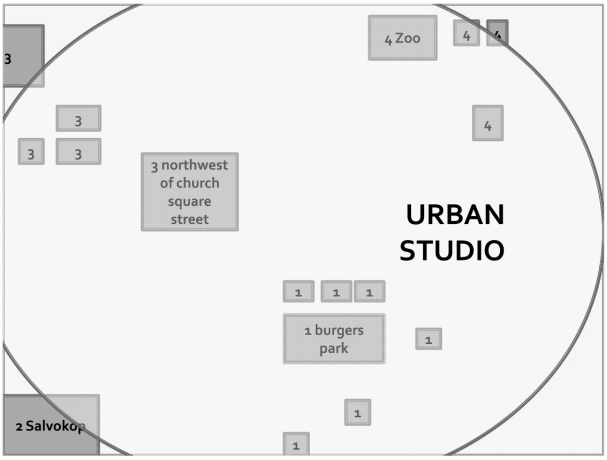

Fig 2: Urban Studio[48]

[See Figure 1 above for more details about the different sites represented here].

Aligned with the Capital Cities Project, the Urban Studio is focusing on engagement with local inner city communities, affirming them as sites of learning, inviting "a range of epistemic voices",[49] and "other ways of knowing", as we consider the city of capital in its relation to urban vulnerability.

Hearn[50] highlights the need to reconceptualise knowledge as embedded in networks of relationships, socially constructed and culturally mediated. The Urban Studio would like to learn from the networks of relationships and socially constructed knowledge from below. It would engage in concrete projects, offer diverse courses on site, and do research that is engaged with the communities represented in the Studio. As Klein[51] articulates it: "The core idea of transdisciplinarity is different academic disciplines working jointly with practitioners to solve a real-world problem".

In partnership with the different sites and organisations located in the Urban Studio, both the Tshwane Leadership Foundation and others, collaborations of mutuality are fostered. "Local urban communities would not merely be hosts for the different possible engagements, but would also serve as research partners, teachers, and collaborators in

48 De Beer (2013b) 10.
49 Foth *et al* 7.
50 Hearn 4.
51 Klein (2001) *Transdisciplinarity: Joint Problem Solving among Science, Technology, and Society.* Synthesebücher, SPP Environment, Basel, Birkhäuser Verlag.

articulating local challenges, research questions and proposed solutions".[52]

Research that seeks to advance a community-based urban *praxis* will involve "practitioners, people concerned, lay people or other identified groups of persons who are affected"[53] through participatory action research methodologies and action learning programmes. In the Urban Studio, such engagements are fostered, enabling shared learning and a deep sense of mutuality.

The work being done in the Urban Studio is closely connected to actual practice "helping to inform or shape practice, of both local communities and community practitioners, but also of researchers, students and the research community".[54] It is not only exploring conceptual or theoretical frameworks, but based on actual challenges and questions articulated by local participants and stakeholders, shared action, reflection, dialogue and research are engaged in to seek for real-life solutions and innovations.[55]

It is my assertion that such mutuality, from below and from within, could foster the kinds of knowledges that cities require: fostering an urban household from below, in which new kinds of belonging and new ways of knowing could help mediate new forms of justice and interconnectedness, more inclusive and more sustainable, because it is informed and owned by the people.

It would then be said that there dwelled in the city a woman or a man, a child or a migrant from a faraway place, poor but wise, who saved the city – and they will be remembered.

52 De Beer (2013b) 3.
53 Bergman (2005) *Qualitätskriterien transdisziplinärer Forschung. Leitfaden für die evaluation von Forschungsprojekte.* ISOE-Studienttexte, Nr. 13: Frankfurt am Main; Pohl& Hirsch Hadorn (*2006) Gestaltungsprinzipien für die transdisziplinäre Forschung.* München
54 De Beer (2013b) 3.
55 *Ibid*. Bergman (2005) & Pohl & Hirsch Hadorn (2006).

The suitability and unsuitability of *ubuntu* in constitutional law – inter-communal relations versus public office-bearing

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OPSOMMING

Die Toepaslikheid en Ontoepaslikheid van *Ubuntu* in die Staatsreg – Inter-gemeenskapsbetrekkinge Teenoor Openbare Ampsbekkleding

In hierdie artikel word aangevoer dat *ubuntu* in bepaalde kontekste in die staatsreg van besondere waarde kan wees, maar dat die toepaslikheid daarvan op ander gebiede onder verdenking is. Wat die toepaslikheid daarvan betref, word geredeneer dat daar 'n korpus van reg, genaamd die reg van inter-gemeenskapsbetrekkinge aan die ontwikkel is. Die grondslag hiervan is in die wesensaard van die staat self. Op die keper beskou is die staat die beliggaming van, en waarborg vir die openbare vrede (of behoort dit ten minste so te wees). Die openbare vrede is op sy beurt afhanklik van die instandhouding van gesonde betrekkinge tussen gemeenskappe, by gebreke waarvan die veiligheid van die gemeenskappe in die gedrang kom en die stabiliteit, en trouens die voortbestaan van die staat self, in die gedrang kom. In die bespreking word met verwysing na die beskouing in Suid-Afrikaanse regspraak oor *ubuntu* aangevoer dat *ubuntu* saam met die verbod op haatspraak en dergelike verbiedinge wat die openbare vrede kan ontwrig, sowel as die internasionale reg rakende volksmoord en verwante internasionale misdade, die ontluikende reg van inter-gemeenskapsbetrekkinge, beliggaam. Daarenteen kan *ubuntu* egter treffend ontoepaslik wees naamlik op die gebied van openbare ampsbekleding. Die kernvraag by openbare ampsbekleding is of die ampsbekleër vir die openbare amp waarin sy/haar aangestel is, geskik is en die pligte wat met die amp vereenselwig word, soos dit in die toepaslike reg beskryf word, getrou (kan) uitvoer. Openbare ampsbekleding hang juis nie primêr van die persoonlike verhoudings van die ampsbekleër met die publiek of met die hoofde of ondersgeskiktes van die ampsbekleër af nie. Inteendeel, warm verhoudings kan juis verkeerdelik voortspruit uit oorwegings wat allermins met die betrokke amp vereenselwigbaar is. Dit kan voorkom omdat die kunsmatige identiteit van openbare ampsbekleding met vermeende *ubuntu*-geïnspireerde knusse betrekkinge wat niks met die nakoming van openbare ampspligte te doen het nie, verwar word. Om hierdie rede is die aanwending van *ubuntu*-geïnspireerde goeie verhoudings in die konteks van openbare ampsbekding bevraagtekenbaar.

1 Introduction

The value of *ubuntu*, among other things encapsulating the notions of humaneness, human dignity, reconciliation, group solidarity, compassion, the establishment and the maintenance of warm relations and restorative justice is autochthonous to South African law, more in

particular South African constitutional law. Lately it has come to play an increasingly important part in South African constitutional jurisprudence. It is not possible to measure exactly how prominent the place is that *ubuntu* occupies in the public order and in the public service. However, judging by the Constitutional Court, who observed that the spirit of *ubuntu* is part of the deep cultural heritage of the majority of the population,[1] *ubuntu* might be far more important than one might generally tend to assume. This article assesses the relevance or otherwise of *ubuntu* in constitutional law. The discussion proceeds from the jurisprudence of the Constitutional Court on *ubuntu*, thus beginning in section 2 with an overview of the judicial pronouncements on *ubuntu*. This discussion casts light on the definition and the field of application of *ubuntu* as viewed by the courts. There is a corpus of South African academic literature on *ubuntu*.[2] In this corpus *ubuntu* is generally very favourably viewed. However, there is also stinging critique against *ubuntu* as for example in the thoroughly researched article by Ilze Keevy, who argues that ubuntu is fundamentally at odds with the values of equality and tolerance as endorsed by the South African constitution.[3] Moreover, even those who generally praised *ubuntu* as a lofty ethical-legal value complex, encounter serious difficulties in their attempts to offer a workable core-definition of *ubuntu*.[4] Moreover, some attempts to define *ubuntu* were to my mind so airy-fairy that they fail to communicate anything of value about *ubuntu*.[5] For that reason, but for a few exceptions such as the discussion by Bilchitz, the academic commentary is mainly left aside in this article. The focus instead is on *ubuntu* as assessed by the courts. In the next two sections of the article the rightful place that *ubuntu* should occupy in constitutional law is considered. Hence, if there is a place for *ubuntu*, as the affirming *dicta* of the courts clearly suggest, the question is how to delineate the

1 *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 517; 2004 (12) BCLR 1258 (CC) par 37.

2 See in this regard for example Bennett "*Ubuntu*: an African equity" 2011 *Potchefstroomse Elektronoese Regsblad (PER/PELJ)* (14); English "*Ubuntu*: the quest for an indigenous jurisprudence" 1996 *SAJHR* 641-648; Keevy "*Ubuntu* versus the core values of the South African Constitution" 2009 *Journal for Juridical Science* 34(2) 19-58; Mokgoro "*Ubuntu* and the law in South Africa" 1998 *Buff Hum Rts L Rev* (4) 15-23; Mokgoro "*Ubuntu* and the law in South Africa" 1998 *Potchefstroomse Elektronoese Regsblad (PER/PELJ)* 15-26; Cornell "*Ubuntu*, pluralism and the responsibility of legal academics to the new South Africa" 2009 (20) *Law and Critique* 43-58; Cornell "A call for a nuanced constitutional jurisprudence: *Ubuntu*, dignity and reconciliation" 2004 SAPR/PL 666-675; Bilchitz "Citizenship and community: explaining the right to receive basic municipal services in Joseph" 2010 *Constitutional Court Review* 45-78.

3 Keevy 2009.

4 Mokgoro 16.

5 The definition offered by Cornell 2009 47 is a striking example of, to my mind, such failed attempt which reads: "For now we may define *ubuntu* as the African principle of transcendence through which an individual is pulled out of himself or herself back towards the ancestors, forward towards the community, and towards the potential each one of us has".

boundaries of its applicability, and how to clarify where *ubuntu* should have a place and a role and where not.

It is argued in section 3, and this leads to the first conclusion, that *ubuntu* could be relevant and even of crucial importance in the sphere of inter-communal relations and for the maintenance of inter-communal peace, which is an essential condition for the very existence and survival of the state. In this context *ubuntu* may be playing an important part in what is here termed (an emerging) law of inter-communal relations, which is in fact a core issue of constitutional law and for the well-being of the state. However, in section 4 it is argued that there is a field of constitutional law where it would be inappropriate to allow *ubuntu* to play any part. This is in the context of certain aspects of public office-bearing, which is an essential aspect of constitutional law and on which the existence and well-being of the state depends. To allow *ubuntu* to play any part in this context could arguably be to the detriment of the state.

2 Judicial Pronouncements on *Ubuntu*

The value of *ubuntu* initially featured in the epilogue to the interim constitution (Constitution of the Republic of South Africa)[6] under the heading *National Unity and Reconciliation* where it was contrasted with victimization.

The epilogue proclaimed, amongst other things, that the (interim) constitution lays the secure foundation for the people of South Africa to transcend the divisions of the past. It continued to assert that the past divisions could be overcome on the basis of the value of *ubuntu*. The relevant portion of the epilogue reads: "These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *Ubuntu* but not for victimisation".[7]

Notwithstanding its central importance for achieving the avowed goal of the constitutional endeavour, namely of achieving unity and reconciliation, the notion of *ubuntu* was dropped from the text of the present constitution (Constitution of the Republic of South Africa, 1996.) However, its absence from the constitutional text did not foreclose the emergence of an *ubuntu*-based jurisprudence, particularly by the Constitutional Court (hereinafter the "Court"). In the judgments of the Court in which *ubuntu* has been referred to, *ubuntu* played an important part, particularly as a source of law, within the context of strained or

6 Act 200 of 1993 which entered into force in April 1994.

7 The "these" that can now be addressed is, what in the preceding paragraph of the epilogue is described as '… the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.

broken relationships among individuals or communities and as an aid for mending relations and crafting suitable remedies to that end.

The most important *dicta* on *ubuntu* appeared in *S v Makwanyane and Another;*[8] *Port Elizabeth Municipality v Various Occupiers;*[9] *Dikoko v Mokhatla;*[10] *Masethla v President of the RSA*[11] and *Union of Refugee Women v Private Security Industry Regulatory Authority*.[12] *Ubuntu* was also referred to, yet not really discussed, in any significant detail, in the judgments of *Hoffmann v South African Airways*;[13] *Barkhuizen v Napier*;[14] and *Bhe and Others v Magistrate, Khayelitsha, and Others,*[15] *The Citizen 1978 (Pty) Ltd and Others v McBride (Johnstone and Others, Amici Curiae),*[16] *Le Roux and Others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae),*[17] *Van Vuren v Minister for Correctional Services and Others,*[18] *Joseph and Others v City of Johannesburg and Others*[19] and *Koyabe and Others v Minister for Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae).*[20]

The judicial pronouncements on *ubuntu* in these cases are now dealt with. This forms the basis of a synopsis at the end of this section of what *ubuntu* in terms of this jurisprudence entails.

The first case where *ubuntu* featured prominently was in *S v Makwanyane* in which several justices of the Constitutional Court in part based their conclusions for holding capital punishment unconstitutional on *ubuntu*. Chaskalson P, as he then was, stated as follows with regard to *ubuntu* within the context of the death sentence:

> "Although this commitment has its primary application in the field of political reconciliation, it is not without relevance to the enquiry we are called upon to undertake in the present case. To be consistent with the value of *ubuntu*, ours

8 1995 (3) SA 391; 1995 (6) BCLR 665 (CC).
9 2005 (1) SA 517; 2004 (12) BCLR 1258 (CC).
10 2006 (6) SA 235; 2007(1) BCLR 1 (CC).
11 2008 (1) SA 566; 2008(1) BCLR 1 (CC).
12 2007 (4) SA 395; 2007 (4) BCLR 339 (CC).
13 2001 (1) SA 1; 2000 (11) BCLR 1211 (CC) par 38.
14 2007 (5) SA 323; 2007 (7); BCLR 691 (CC) par 50.
15 2005 (1) SA 580; 2005 (1) BCLR 1 (CC) parr 45 & 163.
16 2011 (4) SA 191 (CC); 2011 (8) BCLR 816 (CC) parr 164-5, 168, 210 & parr 216-8.
17 2011 (3) SA 274 (CC); 2011 (6) BCLR 577 (CC) par 200.
18 2010 (12) BCLR 1233 (CC) par 51.
19 2010 (4) SA 55 (CC); 2010 (3) BCLR 212 (CC) par 46, fn 39.
20 2010 (4) SA 327 (CC); 2009 (12) BCLR 1192 (CC) par 62. I leave aside the few judgments of the high courts in which *ubuntu* was mentioned by name. I also leave out judgments that might arguably have been informed by *ubuntu* but in which *ubuntu* was not expressly referred to. For reference to such cases see in general Cornell & Muvangua (2012) *Ubuntu and the law: African ideals and post-Apartheid jurisprudence* Fordham University Press.

should be a society that 'wishes to prevent crime ... [not] to kill criminals simply to get even with them".[21] [22]

In his judgment in *Makwanyane* Langa J, as he then was, underscored some of the main characteristics of *Ubuntu* and specifically the high regard of *ubuntu* for human life and dignity. He stated:

"An outstanding feature of *ubuntu* in a community sense is the value it puts on life and human dignity. The dominant theme of the culture is that the life of another person is at least as valuable as one's own. Respect for the dignity of every person is integral to this concept. During violent conflicts and times when violent crime is rife, distraught members of society decry the loss of *ubuntu*. Thus, heinous crimes are the antithesis of *ubuntu*. Treatment that is cruel, inhuman or degrading is bereft of *ubuntu*".[23]

Later on in the same judgment, Langa J noted that *ubuntu* called for the balancing of the interests of society against those of the individual, for the maintenance of law and order but not for dehumanising and degrading the individual.[24]

In her separate judgment Mokgoro J declared that *ubuntu* was a shared value of all South African communities. On the meaning of *ubuntu* she observed as follows:

"Generally, *ubuntu* translates as 'humaneness'. In its most fundamental sense it translates as personhood and 'morality'. Metaphorically, it expresses itself in *umuntu ngumuntu ngabantu*, describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation. In South Africa *ubuntu* has become a notion with particular resonance in the building of a democracy. It is part of our rainbow heritage, though it might have operated and still operates differently in diverse community settings. In the Western cultural heritage, respect and the value for life, manifested in the all-embracing concepts of 'humanity' and 'menswaardigheid', are also highly priced. It is values like these that section 35 requires to be promoted. They give meaning and texture to the principles of a society based on freedom and equality".[25]

In *Port Elizabeth Municipality v Various Occupiers* the Court dealt with issues concerning the constitutional rights to property and the right to housing (respectively sections 25 and 26 of the Constitution), as well as

21 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) par 131.
22 The commitment that is referred to here is the commitment to national unity and reconciliation spelt out in the epilogue to the interim constitution
23 1995 (3) SA 391; 1995 (6) BCLR 665 (CC) par 225.
24 1995 (3) SA 391; 1995 (6) BCLR 665 (CC) par 250.
25 1995 (3) SA 391; 1995 (6) BCLR 665 (CC) par 307 (s 35 refers the quoted passage to the interim Constitution. It was the interpretation clause of the Bill of Rights in that Constitution. Its counterpart in the present Constitution is s 39.)

the Prevention of Illegal Eviction Act (PIE).[26] The parties to the dispute were a local authority and a community of illegal occupiers. Sachs J, speaking for a unanimous court, expressed a strong preference for the open communication, mediation and settlement of disputes of this nature. This preference is founded on and motivated by, amongst others, the value of *ubuntu* which according to Sachs J, suffused the whole constitutional order and is the unifying motif of the Bill of Rights. The PIE Act was also read by the court also in this light. The court had the following to say in this regard:

> "Thus, PIE expressly requires the court to infuse elements of grace and compassion into the formal structures of the law. It is called upon to balance competing interests in a principled way and to promote the constitutional vision of a caring society based on good neighbourliness and shared concern. The Constitution and PIE confirm that we are not islands unto ourselves. The spirit of *ubuntu*, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern".[27]

Possibly the most important judgment on the role of *ubuntu* is that of *Dikoko v Mokhatla*. This was a defamation case, which involved two public figures – an executive mayor and the chief executive officer (CEO) of the same municipality. *Ubuntu* played an important part in the reasoning of the Court on the merits of the case and in the Court eventually reducing the *quantum* of the damages initially awarded by the High Court. Mokgoro J highlighted, amongst others, that *ubuntu* is closely related to respect for the humanity of another and to the emerging concept of restorative justice. Motivated by the concept of *ubuntu* the court stated that it should be a goal of our law to emphasise, in cases of compensation for defamation, the re-establishment of harmony in the relationship between the parties rather than pushing them apart. A remedy based on the idea of *ubuntu* or *botho* could go much further in restoring human dignity. In a defamation case such as the one the court dealt with here, courts should attempt, wherever feasible, to re-establish a dignified and respectful relationship between the parties. The Court added that this field of law should be developed in the light of the values of *ubuntu* emphasising restorative rather than retributive justice. The goal should be, the court said, to knit together shattered relationships in the

26 19 of 1998 (generally known by its acronym, "PIE").

27 2005 (1) SA 5 17; 2004 (12) BCLR 1258 (CC) par 37 237E-238A. In terms of the *amende honourable*, a remedy that was known the Roman-Dutch law, which is now reviving in South African law of defamation (see for example *Mineworkers Investment Company v Modibane* 2002 (6) SA 512 (W)) the plaintiff withdraws his defamation claim on condition that the defendant would retract the defamatory utterances as in fact being untrue and apologised for the publication, acknowledging that he acted wrongful and that asked to be forgiven.

community and encourage across-the-board respect for the basic norms of human and social interdependence.

Paragraphs 68-69 contain the most elaborate exposition of *ubuntu* and are quoted in full:

> "In our constitutional democracy the basic constitutional value of human dignity relates closely to *ubuntu* or *botho*, an idea based on deep respect for the humanity of another. Traditional law and culture have long considered one of the principal objectives of the law to be the restoration of harmonious human and social relationships where they have been ruptured by an infraction of community norms. It should be a goal of our law to emphasise, in cases of compensation for defamation, the re-establishment of harmony in the relationship between the parties, rather than to enlarge the hole in the defendant's pocket, something more likely to increase acrimony, push the parties apart and even cause the defendant financial ruin. The primary purpose of a compensatory measure, after all, is to restore the dignity of a plaintiff who has suffered the damage and not to punish a defendant. A remedy based on the idea of *ubuntu* or *botho* could go much further in restoring human dignity than an imposed monetary award in which the size of the victory is measured by the quantum ordered and the parties are further estranged rather than brought together by the legal process. It could indeed give better appreciation and sensitise a defendant as to the hurtful impact of his or her unlawful actions, similar to the emerging idea of restorative justice in our sentencing laws.
>
> The focus on monetary compensation diverts attention from two considerations that should be basic to defamation law. The first is that the reparation sought is essentially for injury to one's honour, dignity and reputation, and not to one's pocket. The second is that courts should attempt, wherever feasible, to re-establish a dignified and respectful relationship between the parties. Because an apology serves to recognise the human dignity of the plaintiff, thus acknowledging, in the true sense of *ubuntu*, his or her inner humanity, the resultant harmony would serve the good of both the plaintiff and the defendant. Whether the *amende honorable* is part of our law or not, our law in this area should be developed in the light of the values of *ubuntu* emphasising restorative rather than retributive justice. The goal should be to knit together shattered relationships in the community and encourage across-the-board respect for the basic norms of human and social interdependence. It is an area where courts should be proactive, encouraging apology and mutual understanding wherever possible".[28]

In a separate minority judgment, Sachs J elaborated on the impact and value of *ubuntu* and amongst others, stated the following:

> "In jurisprudential terms, this would necessitate reconceiving the available remedies so as to focus more on the human and less on the patrimonial dimensions of the problem. The principal goal should be repair rather than punishment. To achieve this objective requires making greater allowance in defamation proceedings for acknowledging the constitutional values of *ubuntu-botho*".[29]

28 2006 (6) SA 235; 2007(1) BCLR 1 (CC) parr 68-69.
29 *Idem* 112.

Sachs J likened the principles of restorative justice to that of *ubuntu* and stated that these principles should not be restricted to the field of criminal law.[30] Specifically within the context of the law of defamation, more particularly in relation to appropriate remedies for defamation, Sachs J compared *ubuntu* and the Roman-Dutch remedy of *amende honourable* and said:

> "Although *ubuntu-botho* and the *amende honorable* are expressed in different languages intrinsic to separate legal cultures, they share the same underlying philosophy and goal. Both are directed towards promoting face-to-face encounters between the parties, so as to facilitate resolution in public of their differences and the restoration of harmony in the community. In both legal cultures, the centrepiece of the process is to create conditions to facilitate the achievement, if at all possible, of an apology honestly offered, and generously accepted".[31]

In his own separate judgment in *Masethla,* in support of the main judgment of Moseneke DCJ that dealt with the implied power of the President in terms of section 209(2) of the Constitution to dismiss the director-general of the National Intelligence Agency, Sachs J stressed the importance of civility and civilized dialogue as values closely linked to *ubuntu-botho*. According to Sachs J, it was also precisely as a result of civilised dialogue that a peaceful constitutional transition could be achieved in South Africa. Sachs stated:

> "In this regard it is my view that fair dealing and civility cannot be separated. Civility in a constitutional sense involves more than just courtesy or good manners. It is one of the binding elements of a constitutional democracy. It presupposes tolerance for those with whom one disagrees and respect for the dignity of those with whom one is in dispute. Civility, closely linked to *ubuntu-botho*, is deeply rooted in traditional culture, and has been widely supported as a precondition for the good functioning of contemporary democratic societies. Indeed, it was civilised dialogue in extremely difficult conditions that was the foundation of our peaceful constitutional revolution".[32]

The core content and salient features of *ubuntu,* gleaned from the above pronouncements in judgments of the Constitutional Court, may be summarised as presenting the following salient characteristics:

- *Ubuntu* is contrasted to vengeance;
- *Ubuntu* dictates that a high value be placed on the life of human beings;
- *Ubuntu* is inextricably linked to the values dignity, compassion, humaneness and respect for the humanity on which it places a high premium;
- *Ubuntu* dictates a shift from confrontation to mediation and conciliation;
- *Ubuntu* dictates good neighbourliness and shared concern;
- *Ubuntu* favours the re-establishment of harmony in the relationship between parties on that such harmony should restore the dignity of the plaintiff without ruining the defendant;

30 *Idem* 115.
31 *Idem* 116.
32 *Idem* 238.

- *Ubuntu* favours restorative rather than retributive justice;
- *Ubuntu* operates in the direction of reconciliation and not estrangement of disputants;
- *Ubuntu* works towards sensitizing a disputant or a defendant in litigation to the hurtful impact of his actions to the other party and on changing of such conduct accordingly rather than merely punishing the disputant;
- *Ubuntu* promotes mutual understanding rather than punishment;
- *Ubuntu* favours face-to-face encounters of disputants with a view to facilitating differences being resolved rather than conflict and victory for the most powerful;
- *Ubuntu* favours civility and civilized dialogue premised on mutual tolerance.

The mentioned salient features of *ubuntu*, summarized and subscribed to in the High Court judgment of *Afriforum and Another v Malema and Others*[33] could be described as the core content of the value of *ubuntu* in South African positive law (though not necessarily in philosophical theorising about *ubuntu*).[34]

Ubuntu, as stated in *Dikoko*, is also related to the concept of restorative justice[35] which is specifically relevant in the context of sentencing in the criminal courts (but also in other contexts, specifically the law of delict). It is particularly relevant in situations where the offender and the victim are well-known to each other, especially when they are members of the same family and where sentencing is aimed at repairing the damage done to the victim, the victim's family and whoever might have been harmed by the offence. It aims at voluntary compensation of the victim by the offender and eventually restoring the relationship between the victim and the offender and the community. This approach has also recently also been resonated in the South African criminal courts.[36]

Ubuntu might arguably also be associated with effective public service delivery where the needs of the people take centre stage, that is, with an approach that is sensitive to responds to the needs of the public in general and to that of individual citizens in question.[37]

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33 2011 (6) SA 240; 2011 (12) BCLR 1289 (EqC) par 19.

34 For discussions on the meaning of *ubuntu* outside the jurisprudential context see for example Prinsloo "*Ubuntu* culture and participatory management" in Coetzee and Roux (eds) (1998) Philosophy from Africa: A text with reading Thomson 41-51, more in particular 41-43 and in general Cornell and Muvangua (2012) Ubuntu *and the law: African ideals and post-Apartheid jurisprudence* Fordham University Press.

35 See the remark by Sachs J in *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) par 114.

36 See for example *S v Saayman* 2008 (1) SACR 393 (E), *S v Shilubane* 2008 (1) SACR 295 (T) and *S v Maluleke* 2008 (1) SACR 49 (T).

37 See in this regard the observations in *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC) par 46; 2010 (3) BCLR 212 (CC) par 46 & fn 39 and *Koyabe and Others v Minister for Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae)* 2010 (4) SA 327 (CC); 2009 (12) BCLR 1192 (CC) par 62. In this context *ubuntu* is related to the notion of *Batho Pele,* a SeSotho phrase which means that the people must.

In the final analysis, the core content of *ubuntu* emanating from the jurisprudence of the South African courts are compassion, group solidarity, the establishment and maintenance of warm relations, mutual understanding and tolerance and reconciliation instead of retribution and punishment.

3 The (Emerging) Law of Inter-Communal Relations and the Pertinence of *Ubuntu*

3 1 The Concept of the Law of Inter-Communal Relations

The argument presented here is that there is locally and internationally an emerging law of inter-communal relations. This law originates from the very nature of the state. On proper analysis. the state is (or at least ought to be) the embodiment and the guarantor of the public peace. In its turn public peace depends on sustained sound more in particular inter-communal relations among the communities. If such inter-communal relations break down the safety of the communities that together constitute the state population is placed in danger and, moreover, the stability and survival of the state is jeopardised at the same time.[38] Hence, the stability and eventually the survival of the state depend on sound inter-communal relations buttressed by the law of inter-communal relations. It might be argued that all law in a sense, either directly or indirectly contribute to the public peace. However, there are certain bodies of law which, in contrast to the rest, are directly and more exclusively designed and developed towards guaranteeing the public peace. These bodies of law are not concerned in the first place with individuals or their rights but with broader communal concerns, that is, with the inter-communal peace and sound inter-communal relations, thus setting them apart from the rest as the building blocks of the law of inter-communal relations.

The most important bodies of law (and there might in fact be more) that constitute the law of inter-communal relations are:

The notion of *Batho Pele* is required the way in which public services are rendered in a way which accounts for their best interests. In this context *ubuntu* also corresponds with s 195 of the Constitution that sets out the values and principles of the public administration which includes in ss (d) that services must be provided impartially, fairly, equitably and without bias; and (e) that people's needs must be responded to, and the public must be encouraged to participate in policy-making. See further Bilchitz 2010 62-67.

38 This construction of the state is not only based upon a Hobbesian view of the state, but appears on proper analysis to be one of the general prerequisites for the existence and maintenance of the state. See the discussion by Malan "The unalienable right to take the law into our own hands and the faltering state" 2007 *TSAR* 642-654 at 646-652.

"(1) The constitutional prohibition of hate speech and incitement to imminent violence, read with the right to freedom from violence (in the case of South Africa, protected in section 12(1)(c) of the Constitution);
(2) The prohibition of genocide and crimes against humanity, recognised in international law and subscribed to by South Africa;
(3) The locally cultivated value of *ubuntu* as recognised and rehearsed above in South African constitutional jurisprudence".

My contention is that these bodies of law should not be separately interpreted and understood, but understood and interpreted together as branches of a single broader complex of law of inter-communal relations. Approached as branches of the law of inter-communal relations, securing a common aim – namely sound inter-communal peace and the stability of the state – each of these bodies of law assumes a mutually supporting meaning and function that they otherwise would not have had or would not have had to the same extent. Informed by its interpretation as part of the law of inter-communal relations, in concert with the other bodies of law, serving the same end, the suitable place and function of *ubuntu* will also clearly emerge.

The bodies of law comprising the law of inter-communal relations will now be discussed from the perspective of their belonging to this law of inter-communal relations and of simultaneously buttressing sound inter-communal relations and the stability of the state.

3 2 The Prohibition of Hate Speech and Other Forms of Expression Endanger the Public Peace and the Right Against Freedom from Violence

The prohibition of hate speech is generally not a measure for the protection of individuals in their individual capacity. On the contrary, it emerges primarily from the concern with and protection of communities and for the promotion of the public peace.[39] Groups, not so much individuals, are targeted by hate speech. If specific individuals are in the immediate firing line of hate speech, they are targeted in their capacity as members of communities and presenting communal traits such as race, religion, ethnicity, language etc. Thus, even though hate speech may in given circumstances constitute an offence for example *crimen iniuria*, criminal defamation or a statutory offence requiring *mens rea*[40] or may be specifically prohibited by provisions of criminal law as in the

39 See in general the leading Canadian judgment of *R v Keegstra* (1990) 3 S.C.R. 697, the US judgment of *Virginia v Black et al* 538 U.S. 343 (2003) 359 as well as the South African judgment of *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (4) SA 294; (2002 (5) BCLR 433 (CC).

40 The Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 (PEPUDA) itself also acknowledges that hate speech (or any of the other conduct over which it exercises jurisdiction) may constitute a criminal offence. This in s 21(2) it provides that the court may make an appropriate order that may include an order directing the clerk of the equality court to

case of some foreign jurisdictions[41] or may attract delictual liability, if the requirements for such liability are met, the prohibition of hate speech should essentially be viewed as a constitutional-law measure, sustaining sound inter-communal relations and safeguarding the stability of the state. This construction of the prohibition of hate speech (and related forms of socially repugnant expression) is borne out also by section 16(2) of the Constitution and by the prohibition of hate speech in section 10 of the Promotion of Equality and Elimination of Unfair Discrimination Act, 4 of 2000.

Section 16(2) of the Constitution of the Republic of South Africa excludes certain forms of speech from the general guarantee of the right to freedom of expression, namely (a) propaganda for war; (b) incitement of imminent violence; or (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

The aim and effect of denying constitutional protection of these forms of expression are quite clearly to sustain and promote sound inter-communal relations and in doing so, to safeguard the stability of the state. The advocacy of hatred that is based on the specifically mentioned communal characteristics of race, ethnicity, gender and religion, (and which constitutes incitement to cause harm) clearly underscores this contention because such hatred could easily erupt into open inter-communal violence, affecting entire communities, thus destabilising the state. The two other forms of non-protected expression namely propaganda for war and incitement of imminent violence also guard against inter-communal conflict and the disruption of the state, since war (interstate or civil) obviously involves inter-communal violence, while the

submit the matter to the Director of Public Prosecutions for the possible institution of criminal proceedings in terms of the common law or relevant legislation.

41 In England, Wales, and Scotland, the Public Order Act of 1986, prohibits expressions of racial hatred. Racial hatred means "… hatred against a group of persons defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins.
S 18 of the Act provides:
"A person who uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting, is guilty of an offence if–
(a) he intends thereby to stir up racial hatred, or
(b) having regard to all the circumstances racial hatred is likely to be stirred up thereby".
Part 3A of the Racial and Religious Hatred Act of 2006, which provides for freedom of expression further provides in s 29J that:
"Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system".
The Criminal Justice and Immigration Act of 2008 includes the offence of inciting hatred on the ground of sexual orientation.

notion of incitement of imminent violence encompasses both violence against individuals and communities.

The prohibition of hate speech by section 10 of the Promotion of Equality and the Elimination of Unfair Discrimination Act[42] (PEPUDA) also reveals that hate speech, even though in given conditions it may constitute an offence and/or a delict,[43] is primarily a measure for the sustenance of inter-communal relations and safeguarding the stability of the state. Section 10 provides that:

> "(1) Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, *that could reasonably be construed* to demonstrate a clear intention to–
> (a) be hurtful;
> (b) be harmful or to incite harm;
> (c) promote or propagate hatred." (Own emphasis added).

The emphasised phrase "*that could reasonably be construed,*" clearly shows that intent is not a requirement for hate speech (and the presence or absence thereof should come into play only when an appropriate remedy is considered). The emphasis is therefore not on the subjective state of mind of the utterer/s of the impugned matter but on the way it might be understood and reacted to by anyone taking notice of the utterances (irrespective of the actual *mens rea* of the utterer/s), and regardless of the consequences of the utterances. Hence, if the utterances could reasonably be construed by the target group of the utterances, or by anyone else, as showing a clear intention to be hurtful, harmful or to incite harm or to promote or propagate hatred, prohibited hate speech as envisaged in this section is established, regardless of the actual (subjective) intention of the utterer/s and regardless of the fact that there might be other persons or groups who interpret the utterances differently.

The fact that intent is not required, but rather that the matter hinges on whether the utterances are reasonably susceptible for the interpretation as described in the provision, makes it demonstrably clear that the emphasis of the prohibition is not the individual *mens rea* of the utterer in question, but the way in which it is understood by the addressees of the utterances or by third parties. It should also be clear

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42 Act 4 of 2000.

43 For example the delicts of *iniuria* and defamation and the crimes of *crimen iniuria*, criminal defamation and incitement to commit crimes such as murder and other violent crimes. The fact that hate speech may constitute crimes such as these is also acknowledged in PEEPUDA itself, with s 10(2) providing that:
"(2) Without prejudice to any remedies of a civil nature under this Act, the court may, in accordance with section 21(2)(n) and where appropriate, refer any case dealing with the publication, advocacy, propagation or communication of hate speech as contemplated in subsection (1), to the Director of Public Prosecutions having jurisdiction for the institution of criminal proceedings in terms of the common law or relevant legislation".

that there need not be general interpretive consensus that the utterances fall within the scope of the prohibition.

This shows that the prohibition of section 10 of PEPUDA is not primarily aimed at the criminal or delictual liability of the utterer (in which case intent would obviously have been required) but rather generally at the maintenance of public peace and the prevention of the breakdown of inter-communal relations. As such, the provision also gives expression to the state guaranteeing the public peace and safeguarding itself against the destabilising consequences of the breakdown inter-communal peace. This construction also shows that the prohibition of hate speech has the character rather of a preventative than a remedial measure.

This interpretation of the prohibition of hate speech is supported by section 15 of the PEPUDA, which provides that in cases of hate speech (and harassment) considerations of fairness do not apply. Hence, a defendant in a hate-speech matter whose utterances may reasonably be construed to demonstrate a clear intention to be hurtful, harmful or to incite harm or to promote or propagate hatred, cannot escape liability on account of other considerations that point to the fairness of such speech. This once again underscores that the prohibition of hate speech is not designed in the first place to establish individual liability of the utterer/s of alleged hate speech, in which the fairness or the unfairness of the utterances might be relevant as it is in the law of defamation. The emphasis is on the maintenance of sound inter-communal relations, the public peace and the stability of the state. The measure is therefore a fully-fledged public law, more pertinently constitutional law measure, not concerned with the particulars and intricacies of individual criminal or delictual liability, but with the well-being of the commonwealth.[44] South African jurisprudence also construes the prohibition of hate speech as a measure aimed at the maintenance of public peace, sound relations among communities and the maintenance of the constitutional order. Hence in *Islamic Unity Convention v Independent Broadcasting Authority and Others*[45] the Constitutional Court emphasised that there are categories of expression not compatible with the values of an open en democratic society. The Court stated:

> "The pluralism and broadmindedness that is central to an open and democratic society can, however, be undermined by speech which seriously threatens democratic pluralism itself. Section 1 of the Constitution declares

44 The discussed interpretation rejects by implication that afforded De Vos & Freedman (eds) 2014 *South African Constitutional Law in Context* Cape Town Oxford 546. It stand to reason that care should be exercised not to abuse the prohibition of hate speech in such a way that causes undue infractions of the right to freedom of expression, more in particular of political speech. However, I do not subscribe to the view that s 10 of PEPUDA is incompatible with the right to freedom of expression under s 16 of the Constitution as the prohibition of hate speech is susceptible for an interpretation that conforms with s 16.

45 2002 (4) SA 294; (2002 (5) BCLR 433 (CC) par 29.

that South Africa is founded on the values of 'human dignity, the achievement of equality and the advancement of human rights and freedoms'. Thus, open and democratic societies permit reasonable proscription of activities and expressions that pose a real and substantial threat to such values and to the constitutional order itself".

In *Freedom Front v South African Human Rights Commission*[46] it was noted that by accentuating racial divisions, the impugned slogan in that case (*Kill the Boer*) which was held to be hate speech, exacerbates the fault lines in this society and by so doing runs counter to the spirit and the vision underlying our constitutional order. It is precisely for that reason as Langa CJ observed in *Du Toit v Minister of Safety and Security*[47] that sound inter-communal relations as an on-going and not a mere transitional project.

This construction of hate speech as a measure preventing the breakdown of inter-communal relations and safeguarding the state finds strong support in comparative foreign case law.

A survey of international and comparative law reveals that there is a general trend among democratic states to prohibit hate speech and other forms of expression that could lead to inter-communal conflict and the disruption of the public peace and the instability of the state. This trend is in step with the prohibition of hate speech as outlined in article 20 of the International Covenant on Civil and Political Rights (ICCPR), a treaty signed and ratified by the majority of states.

In the Canadian judgment of *R v Keegstra,*[48] the court had to decide on the constitutionality of the prohibition of hate speech in section 319(2) of the Canadian Criminal Code,[49] more particularly, whether it was compatible with the constitutional right of freedom of expression in the Canadian Charter of Rights and Freedoms of 1982.[50] The majority of the Court held the prohibition compatible with the right to freedom of expression. The majority stated that the international commitment to eradicate hate propaganda and, most importantly, the special role given to equality and multiculturalism in the Canadian Constitution necessitate a departure from the view, prevalent in the United States at that stage,

46 2000 (11) BCLR 1283 (SAHRC) 1299F.
47 2009 (12) BCLR 1171; 2009 (6) SA 128 (CC) par 15.
48 [1990] 3 S.C.R. 697.
49 S 319 of the Canadian Criminal Code provides as follows:
"(2) Everyone who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of
(a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
(b) an offence punishable on summary conviction".
(In this section, "identifiable group" means any section of the public distinguished by colour, race, religion or ethnic origin).
50 This right is provided for in s 2(b) of the Charter providing that everyone has freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication

that the suppression of hate propaganda is incompatible with the guarantee of free expression.[51] The majority also made the following statement which is of particular importance for the construction of hate speech as an element of the law of inter-communal relations:

> "The derision, hostility and abuse encouraged by hate propaganda therefore have a severely negative impact on the individual's sense of self-worth and acceptance. *This impact may cause target group members to take drastic measures in reaction, perhaps avoiding activities which bring them into contact with non-group members or adopting attitudes and postures directed towards blending in with the majority.* Such consequences bear heavily in a nation that prides itself on tolerance and the fostering of human dignity through, among other things, respect for the many racial, religious and cultural groups in our society".[52] (Own emphasis added).

The interpretation of the prohibition of hate speech as part of the law of inter-communal relations proposed in the present argumentation is clearly echoed and supported in *Keegsta* as it appears from the emphasised passage of the *dictum* above. The prohibition has to prevent communities from antagonistically being pitted against one another in a manner that could ignite communal conflict, thus disrupting the inter-communal peace and the stability of the state.

Significantly, notwithstanding the exceptionally high premium on freedom of speech in the United States and the accompanying reluctance to prohibit utterances on the basis of hate speech, the US courts have on various occasions ruled that prohibitions of certain utterances were in fact not inconsistent with the First Amendment right to freedom of speech. Of particular importance is the judgment of the US Supreme Court in *Virginia v Black et al.*[53] in which the court stated that it has also long been recognised in the US that the protection rendered by the First Amendment is not absolute. The court referred to its own jurisprudence that the state may legitimately punish words which by their very utterance inflict injury or tend to incite an immediate breach of the peace

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51 [1990] 3 S.C.R. 697 743g-i. The court found psychological harm to be sufficient to constitute hate speech and also noted that the failing to control hate speech might cause the target group to take drastic measures in defence of itself.

52 [1990] 3 S.C.R. 697 at parr 746h-747a. The court also highlighted that the prohibition of hate propaganda does not restrict the democratic credentials of a society but support and protect it when it stated that (par 764):
"Nonetheless, expression can work to undermine our commitment to democracy where employed to propagate ideas anathemic to democratic values. Hate propaganda works in just such a way, arguing as it does for a society in which the democratic process is subverted and individuals are denied respect and dignity simply because of racial or religious characteristics. This brand of expressive activity is thus wholly inimical to the democratic aspirations of the free expression guarantee. Indeed, one may quite plausibly contend that it is through rejecting hate propaganda that the state can best encourage the protection of values central to freedom of expression, while simultaneously demonstrating dislike for the vision forwarded by hate-mongers" (parr 746h-747a).

53 538 U.S. 343 (2003).

and that the state is therefore not prohibited by the First Amendment, to proscribe the advocacy of the use of force or of the violation of the law where such advocacy is directed to incite or produce imminent lawless action and is likely to produce such action. Threats of violence are therefore outside the protection of the First Amendment.[54]

The prohibition of hate speech as an ingredient of the law of inter-communal relations is closely interwoven with the state's obligation to protect its inhabitants against violence and threats of violence, which is an essential obligation and characteristic of the state itself.[55] In South African law this obligation is positivised in section 12(1)(c) of the Constitution which provides that for the right to be free from all forms of violence from either public or private sources. This right places a corresponding obligation on the state to protect its inhabitants effectively against actual violence or threats of violence, caused by, so it is submitted here, also by the prohibited forms of expression envisaged in section 16(2) of the Constitution and in section 10 of PEPUDA. Failure by the state on this score entails failure to protect the rights of inhabitant and failure to uphold the law of inter-communal relations. Its failure to maintain the law of inter-communal relations also entails that the state fails itself as the guarantor of the public peace, since the target community of hate speech, as the Canadian Supreme Court also notes in *Keegstra* above, in the face of the defaulting State is left with no option but to take the law into their own hands in order to protect themselves. In this way the state places its own stability in jeopardy. This argumentation resonates in the statement by Ackermann J in *S v Makwanyane and Another* who stated as follows:

> "I refer to the fact that in a constitutional State individuals agree (in principle at least) to abandon their right to self-help in the protection of their rights only

54 The jurisprudence that the court referred to was *R.A.V. v City of St Paul* 505 US at 382. *Virginia v Black et al* 538 U.S. 343 (2003) 359. Also see the discussion by Rosenfeld "Hate Speech in Constitutional Jurisprudence: A Comparative Analysis" 2002-2003 (24) *Cardozo Law Review* 1523-1567 at 1528 who underscored the need to curb hate speech especially in inter-communal situations (present in most modern states) where the effect of such speech could be much more serious than in intra-communal situations.

55 See in this regard the discussion Malan "The inalienable right to take the law into our own hands and the faltering state" *TSAR* 2007 (4) 642- 654. These provisions reflect one of the features of the modern constitutional state which should be regarded as part of the basic structure of the contemporary constitutional state. The constitutional state, including the South African constitutional order, is (supposed to be) the embodiment and the guarantor of the public peace, in which inhabitants have relinquished any rights to take to law into their own hands in order to protect life, limb and property in favour of the State, which bears the obligation to guard over the these rights on behalf of the inhabitants. It is on this basis that individuals are not entitled to take the law into their own hands, since governments through the effective administration of the law protect life, body and property on behalf of the individuals. On this basis the State has a monopoly over the exercise of legitimate force in order to guard over the rights of its inhabitants.

because the State, in the constitutional State compact, assumes the obligation to protect these rights. If the State fails to discharge this duty adequately, there is a danger that individuals might feel justified in using self-help to protect their rights. This is not a fanciful possibility in South Africa."[56]

3 3 The International Law Relating to Genocide and Related Offences

The international law relating to genocide and related offences may be regarded as the second ingredient of the law of inter-communal relations. Pertinent in this regard are relevant provisions of the Convention on the Prevention and Punishment of the Crime of Genocide (1948), which should be read with the Rome Statute of the International Criminal Court (1998); the Convention on the Elimination of All Forms of Racial Discrimination (CERD) (1965); and the International Covenant on Civil and Political Rights (ICCPR) (1966).[57]

Having provided for the right to freedom of expression in article 19, the International Covenant on Civil and Political Rights proceeds to prohibit hate speech in article 20, providing that any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

In its turn article 4 of the Convention on the Elimination of All Forms of Racial Discrimination provides that state parties must declare as a punishable offence racial hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin. The provision reads as follows:

"State Parties condemn all propaganda and all organizations.... which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:
(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as

56 1995 (3) SA 391 (CC) 459 par 168. The obligations on the state emanating from s 12(1)(c) have been interpreted quite broadly by the Constitutional Court. See in this regard: *S v Baloyi* 2000 (2) SA 425 (CC) par 11 (93C-F); *Christian Education South Africa v Minister of Education* 2000 (10) BCLR 1051 (CC) 1070E-F; *Carmichele v Minister of Safety and Security* 2001 (10) BCLR 995 (CC) par 44 (1009F-G) and *Law Society v of South Africa v Minister of Transport* 2011 (2) BCLR 150 (CC) par 63, 175C.

57 These instruments are of general importance, but specifically pertinent to South Africa having signed and ratified all of them thus incurring international obligations under these conventions as recently explained expounded in detail in the judgment of *Glenister v President of the RSA (Helen Suzman Foundation, Amicus Curiae)* 2011 (7) BCLR 651; 2011 (3) SA 347 (CC) parr 179-202.

well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof".

Article 3 of The Convention on the Prevention and Punishment of the Crime of Genocide, defines genocide as follows:

"In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group".

Article 4 then proceeds to provide the following acts to be punishable: Genocide; conspiracy to commit genocide; direct and public incitement to commit genocide; attempt to commit genocide; and complicity in genocide.

These provisions of the Genocide Convention should be read with article 6 and 7 of the Rome Statute of the International Criminal Court, which defines the crime of genocide and crimes against humanity (two of the crimes over which the International Criminal Court exercises jurisdiction).

Article 6 provides that for the purpose of the Statute, "genocide" includes, amongst others, killing members of the group with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. Genocide basically denies the right of existence of an entire human group in the same way as homicide is a denial of the existence of an individual human being. It is a crime committed simultaneously against individual victims as well as the group to which they belong (and against human diversity).[58] As such, it represents the most extreme failure of the law of inter-communal relations.

Article 7 provides that for the purpose of this Statute, "crime against humanity" means amongst others murder when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. This crime represents almost as extreme a failure of the law of inter-communal relations as genocide.

The above mentioned treaty provisions on genocide and related international crimes reveal a close affinity with the prohibition of hate speech and incitement to commit violence. The hate speech prohibitions and the prohibition of genocide and related crimes are premised on the common realisation that sound inter-communal relations are the core

58 Cryer, Friman, Robinson & Wilmshurst (2007) *An Introduction to international criminal law and procedure* Cambridge at 165.

condition for the public peace and the maintenance of the stability of the state, and that the eventualities that could disrupt the public peace and the stability of the state should therefore carefully be guarded against. The hate speech prohibition and the law relating to genocide and related crimes in international law may therefore be regarded as mutually strengthening bodies of law that together each in its own way and its own domain, contribute to the same end, namely the maintenance of healthy inter-communal relations and fending against the same threat, namely the breakdown of these relations. The Appeal Judgment of the International Criminal Tribunal for Rwanda (ICTR) in *The Prosecutor v Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze*[59] (often referred to as the *Media case*) renders further support for this argument.

3 4 The Pertinence of *Ubuntu*

The above account of the law of inter-communal relations clarifies the interpretive context of *ubuntu*. Apart from its importance as is apparent from some of the referred cases in individual relations, the discussion reveals that the value of *ubuntu* should be viewed as an additional ingredient of the law of inter-communal relations. With respect to content, more particularly in terms of detail, the judicial pronouncements in 2 above reveal that *ubuntu* might arguably not add much to the existing branches of the law of inter-communal relations.[60] This, however, does not detract from its importance, which is contained in the fact that it is a locally coined notion, phrased moreover in conspicuously indigenous terms, thus arguably commanding a distinctive legitimacy and making a singularly persuasive rhetorical appeal.

Of particular interest in the present discussion, that deals with the place of *ubuntu* in constitutional law, is that even though *ubuntu* has hitherto, as the brief rehearsal in 2 above shows, been employed in a variety of contexts, it has, as Chaskalson P, quite correctly pointed out, its primary application in the field of political reconciliation,[61] thus, in the phraseology of the present argument, in the field of inter-communal relations. It is precisely its political significance that renders it of great importance to constitutional law. It is a significant legal, more in particular constitutional notion buttressing inter-communal harmony, which is one of the vital prerequisites for the maintenance of a

59 ICTR-99-52-A, International Criminal Tribunal for Rwanda (ICTR), 28 November 2007 available at: http://www.refworld.org/docid/48b5271d2.html par 988 (accessed 2014-03-04).

60 *Ubuntu*, as it appears from these *dicta* of the Constitutional may also play an important part in interpersonal relations and therefore in private law. That, however, does not detract from its core inter-communal function.

61 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) par 131. The political applicability is based in the first place in the postscript to the interim constitution, quoted in 2 above. The political value of *ubuntu* also resonates in Mokgoro J's statements in 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) par 307 and, though much less pronounced, in a number of the other citations in 2 above.

constitutional dispensation. That is not to say that it will necessarily feature that prominently in litigation, but the importance of a matter for constitutional law is not necessarily to be gauged by its prominence in disputes and more in particular in litigation. After all, constitutional law, including the law of inter-communal relations and thus also *ubuntu*, is regulatory and preventative in nature rather than adversarial or litigious. To the extent that *ubuntu* may play a part in actual (inter-communal) disputes, it is enlisted with the view to restore and to mend disturbed relations and to lay a solid basis for sound future relations rather than producing a winner as opposed to a loser on account of successful litigation. This, on close analysis and as illustrated in the rehearsed judicial pronouncements and the summary of *ubuntu* in 2 above, is essential to *ubuntu* irrespective of the context in which it is featuring (thus also applicable in individual relations within the purview of private law).

The pertinence of *ubuntu* in the context of inter-communal relations – a core constitutional matter as we have argued – was vividly illustrated in the much publicised hate speech case of *Afriforum and Another v Malema and Others*.[62] The dispute in this matter was a full-fledged inter-communal dispute. It did not only involve one individual in the person of Malema as the then leader of the Youth League of the African National Congress in opposition to one or a few individuals feeling aggrieved of Malema's uttering of inflammatory phrases during public occasions in the song known as *Dubula Ibhunu* (Shoot the Boer).[63] On the contrary, on close analysis two communities were in fact clashing as a result of the uttering of the impugned slogans. On the one end there were the African National Congress (who was the second respondent in the matter) and Malema. They were representing large numbers of black people claiming to legitimately use the slogan as part of the heritage of the erstwhile campaign against the minority white government and who claim to use the slogan not to incite violence but purely for commemorative purposes. On the opposite side were sizable numbers of Afrikaners aggrieved and feeling threatened by the slogan and whose feelings and interests were articulated by the applicants in the matter. Hence, being inter-communal in nature, this dispute clearly called for application of and resolution in accordance of the law of inter-communal relations as outlined in the present argumentation.[64] The inter-communal nature of the dispute also made it next to impossible to resolve the matter by way of a court order. A court order would have to be enforced against large numbers of people – the constituents and supporters of the respondents, instead of one or a

62 2011 (6) SA 240; 2011 (12) BCLR 1289 (EqC).

63 The offensive phrases apart from the offensive name of the song were *Awudubula iBhunu, dubula amabhunu baya raypha*. The English translations of the phrases are: "They are scared the cowards you should 'Shoot the Boer' the farmer! They rob these dogs").

64 This was the view argued on behalf of the amicus curiae in *Afriforum and Another v Malema and Others* 2011 (6) SA 240; 2011 (12) BCLR 1289 (EqC) set out in the heads or argument of the amicus on file with the author.

few persons,[65] which is practically impossible and legally inappropriate. The dispute needed to be resolved in a manner that enjoyed the voluntary support of all the parties concerned (and the constituencies represent).

In this judgment, the Court strongly, and to my mind quite aptly, subscribed to the applicability of *ubuntu* as a relevant source governing the dispute and also based its judgment to a considerable extent on *ubuntu*.[66] The court also drew to a considerable extent on the international law that was in the present discussion cited as an important part of the law of inter-communal relations. The order of the court was nevertheless flawed in that it precisely amounted to the kind of enforceable order made against a numberless amount of people. Hence, although the court's argumentation was correct to the extent that it was premised on dealing with the matter as an inter-communal dispute, the outcome in the form of the unenforceable order was still undesirable because it did not bring this fundamentally constitutional dispute involving strained inter-communal relations to a generally acceptable conclusion in the form of restored inter-communal relations.

On appeal and shortly before the matter was to be heard by the Supreme Court of Appeal (SCA), the President of the SCA instructed the parties to submit the matter to mediation. The mediation process proved successful and lead to an agreement reached between the parties that was also made an order of the Supreme Court of Appeal.[67] To my mind, the settlement bears all the essential ingredients of the resolution of an inter-communal dispute in terms of the law of inter-communal relations presently discussed, including *ubuntu*. The parties agreed to a full and final settlement of their dispute on the basis that it is crucial to mutually recognize and respect the right of all communities to celebrate and protect their cultural heritage and freedom. They further recognized that certain words in certain struggle songs may be experienced as hurtful by members of minority communities. They further agreed as follows:

> "Therefore, in the interests of promoting reconciliation and to avoid intercommunity friction, and recognizing that the lyrics of certain songs are often inspired by circumstances of a particular historical period of struggle which in certain instances may no longer be applicable, the ANC and Mr Malema commit to counselling and encouraging their respective leadership and supporters to act with restraint to avoid the experience of such hurt".

The parties also commit themselves to deepening dialogue among leaders and supporters of their respective organizations and formations to promote understanding of their respective cultural heritages and for the purpose of contributing to the development of a future common

65 This would be a *brutum fulmen* not capable of enforcement and thus contrary to the procedural-law principle of effectiveness.

66 *Afriforum and Another v Malema and Others* 2011 (6) SA 240; 2011 (12) BCLR 1289 (EqC).

67 Supreme Court of Appeal Case number 815/2011, order made on 1 November, 2012.

South African heritage. They further committed themselves to continued formal dialogue amongst leaders of the ANC and leaders of Afriforum and TAU-SA and other role players to promote understanding of their respective cultural heritages and aspirations. In conclusion the parties agreed that the mediation agreement be made and order of court.[68]

4 Public Office-Bearing and the Inappropiate Application of *Ubuntu*

Thus far I have sought to illustrate the relevance of *ubuntu* for constitutional law. In doing so the importance of *ubuntu* as an aspect of the law of inter-communal relations has specifically been dealt with. It was noted that *ubuntu* could be playing a part as a value, guiding the way in which organs of state render services to the public in a manner that is sensitive to and responds to the needs of the public in general and to that of individual citizens in question.[69] In this context, *ubuntu* is pertinent for the way in which public office should be discharged – public services are rendered. However, *ubuntu* should not be applicable to all aspects of public office. In fact, there is one crucial aspect of public office where it would be inappropriate to allow a role for *ubuntu*. That is that ubuntu should not be allowed to serve as an excuse or justification for countenancing the execution of public office-bearing outside the description of the office in question.[70]

Hence, as appropriate and important as *ubuntu* is in the context of inter-communal relations, so impertinent would it to be to allow core characteristics identified with *ubuntu* (as outlined towards the end of 2 above) to play any part in the above mentioned context of public office-bearing. These core characteristics are:

> "Compassion, humaneness, reluctance to confrontation and an inclination towards mediation and conciliation, good neighbourliness, the re-establishment of harmony in the relationship between individuals, a favouring of restorative, rather than a retributive approach to justice, reconciliation instead of estrangement, the promotion of mutual understanding and the reparation rather than punishment and dialogue premised on mutual tolerance".

These ingredients of *ubuntu* are crucially important for inter-communal and individual relations, as well as for the way in which public services are rendered. Further, when an incumbent of a public office is being dealt with in his personal capacity, that is, in relation to issues that

68 Para 3(a)-(g) of the Mediation Agreement which was made an order of the Supreme court of Appeal Case number 815/2011, order made on 1 November 2012.

69 See n 33.

70 There are indications of exactly this inappropriate application of *ubuntu* within the context of public office-bearing in South Africa. See for example Malan "The rule of law versus *decisionism* in the South African constitutional discourse" *De Jure* 45 (2012) 272-305 at 296-300.

fall outside his (official) responsibilities as a public office-bearer, *ubuntu* might be relevant in the same way as ordinary well-mannered civilised conduct is relevant. However, these factors should be of no consequence when a public office-bearer who has acted outside the description of the office concerned, is to be dealt with. I now proceed to demonstrate why this is so.

The terms of each public office describes the responsibilities that the office-bearer owes to the public in general in pursuance of the public good. Public office-bearing creates a new *artificial* relationship between the office-bearer and the public. This relationship is governed by the terms of each position of office-bearing. In this relationship the office-bearer ceases to be a private individual and acts solely in accordance with the description of his public office. Individuals with whom the public office-bearer engages in the execution of his office also assume a different, more particularly, public identity. They are also in an official relationship with the office-bearer. This official relationship is not governed by any inter-individual (private) categories that could range from utter animosity to passionate intimacy; it is governed solely by the description of the office-bearing concerned.

The state is premised on this notion and practice of public office-bearing for the common good. Unlike the inherently particularist and voluntary nature of formations of the private domain and the particularist, voluntary and often partisan formations of commerce and civil society, the state is overarching, non-voluntary and non-particularist, serving the common good. Public office-bearing is the essential instrument embodying this salient feature of the state and giving effect to its pursuing of the common good instead of partial or segmental concerns or interests.

All public office-bearers from the president, the chief justice, ministers, directors general, judges right down to the most junior public servant or police officer are to fulfil their duties in terms of the Constitution and legislation (and often in terms of agreements by virtue of empowering legislation). Their suitability as public office-bearers, the terms of their duties of public office and the evaluation of the quality of their discharging of their public duties are regulated by and evaluated in terms of the description of the legal instruments governing the public office concerned. Each position of public office sets its own requirements for those aspiring to fill that particular position of public office and defines the duties and responsibilities attached to such public office and assigned to the incumbent. Public office-bearing demands public office-bearers to adopt an artificial public identity as it were, in terms of which the public office concerned has to play an (artificial) role in terms of the script, that is, in terms of the legally defined duties attaching to the public office concerned.

Ubuntu as a value for promoting the sound interpersonal relations might be constructive in the law of defamation, the assessment of

sentence, etc. Likewise *ubuntu* is important as argued above, as an ingredient of the law of inter-communal relations. *Ubuntu* might also enhance the quality of public service of a public office-bearer who acts within the description of her/his office to all members of the public. Public office-bearing, however, is not relationally-centred in the first place: neither individually nor inter-communally. In contrast, public office-bearing, based on the description of each public office, is duty-based. The rationale for appointing someone to a position of public office is the ability of the appointee to meet the demands of such office; and his/her remaining in that office depends on his/her acting in terms of the prescribed script – the relevant law regulating the execution of that office.

There might be a close pre-existing relationship between the office-bearer authorised to make the appointment and the appointee. That, however, should clearly not be decisive for making the appointment. The decisive factor is the ability of the appointee to comply with the responsibilities of the public office concerned and actually conducting himself in accordance with the requirements of the public office concerned. The way in which a public office-bearer executes his duties may give rise to his cultivating of excellent relations with colleagues, government and (sectors of) society that are to be served by the execution of such public office. This will enhance the quality of the discharging of the office.[71] However, that is not essential to the suitability or otherwise for public office-bearing. The pertinent question from the point of view of public office-bearing, is whether or not the duties associated with each position of public office, as set out in the applicable law governing such public office, are faithfully discharged. If sound relations emanate from the devoted *ubuntu*-orientated way in which the public office is executed and if the office-bearer cultivates sound relations in the process of executing such public office, and if, moreover, he earns himself the trust of the public and respect of colleagues, that, it is a certainly a bonus as its amounts not the office-bearer discharging his/her office in an exemplary way. However, sound relations and popularity may sprout lavishly for the opposite, and often incorrect, reasons. There might be very warm relations, mutual understanding, compassion, solidarity and a sense of tolerance between a corrupt government and the incumbents of anti-corruption agencies, who are reluctant to confront such corruption and who prefer rather to turn a blind eye to it; there will be companionship, mutual understanding and obviously no estrangement between a crooked police commissioner or police force co-operating with or acquiescently responding to the machinations of the criminal underworld; there will be a pleasing comradeship between political-minded senior office-bearers in the public service appointing likeminded, yet professionally incompetent friends not fit for the office concerned; the senior public servant repeatedly failing to act against his lazy and inept juniors, may possibly be hailed for his humaneness,

71 See the observations made in n 36 above.

compassion and tolerance; if office-bearers who have made well-founded accusations of serious misconduct in contravention of their office-bearing each other, decide to settle the acrimony arising from (well-based) accusations and if a tribunal that was supposed to adjudicate the matter accept their settlement, it would once again give rise to good relations between the parties among themselves and the parties and tribunal.

In all these cases there will be sound and cordial relations, yet a complete failure of public office. The essential reason for this is that public office-bearing and private relations are conflated instead of being kept apart. In all these cases the desire for warm private relations are allowed to contaminate the standards for faithful public office-bearing. The artificial identity of public office-bearing governed by the terms of each public office (and for the sake of the common good) is side-lined for the sake of cordial individual relations and private benefit.

In all these and the many more examples that might be cited the standards of public office-bearing are contaminated and public office-bearing destroyed by private relational considerations that are of no relevance to public office-bearing. Precisely on account of this there should in fact be no room for the kind of relational considerations mentioned above in the context of public office. The crucial point is that (*ubuntu*-inspired) sound relations are not decisive for public office-bearing. What is crucial is the description of the office-bearing that sets out the duties of each office for the benefit of the general public and with a view of promoting the public good.

If *ubuntu* is understood to allow these relationally private-inspired assault and destruction of public office-bearing, *ubuntu* is nothing less than a noxious value that undermines the very foundations of the state - a highway to the destruction of public office-bearing and the undermining of the state. In that case it must be vigorously resisted for the menace it is. The immediate indignant retort to this view however, is that *ubuntu* does not permit all these instances of malfunctioning of public office and therefore does not pose a danger to the state. Thus, this malfunctioning and corruption do not flow from any of *ubuntu*'s salient attributes, but from a grave misinterpretation of these attributes and therefore of an egregious misuse of *ubuntu*. This retort is justified. *Ubuntu* is certainly not inherently to blame for the malfunctioning of public office and to undermining the state. On the contrary, in a different context, namely in the field of inter-communal relations (as the discussion in 3 above has shown) *ubuntu,* as an important element of the law of inter-communal relations, is an essential prerequisite for the state and thus particularly relevant for constitutional law.

However, *ubuntu* can easily be misused with very grave consequences for the state if it is enlisted to play a part in the wrong place – in the context of judging public office-bearers who have acted unlawfully, that is outside the description of the public office that he/she occupies. That

amounts assessing persons suitability for public office-bearing in terms of considerations of cordial inter-personal relations instead of in terms of the description and criteria of each public office concerned.

In the final analysis, two of the vital characteristics of the state clarify the appropriate place of *ubuntu* in constitutional law. The first is that the state is the embodiment of the public peace and as such is premised on the principle and reality of inter-communal relations. The second is that the state is premised on the notion and proper functioning of public office-bearing based on the description of and compliance with each public office. *Ubuntu* is pertinent with regard to the first, yet inapposite in the second.

A tale of two expropriations: *Newcrestia* and *Agrizania*

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"(I)t was the age of wisdom, it was the age of foolishness …"
(Charles Dickens)

OPSOMMING

'n Verhaaltjie Omtrent Twee Onteienings: *Newcrestia* en *Agrizania*

'n Regsvergelyking word getref tussen die destydse belangwekkende uitspraak van *High Court* van Australië in *Newcrest Mining (WA) Ltd v The Commonwealth* en die onlangse *Agri SA* reeks van sake teen die Departement van Minerale in Suid-Afrika. Beide die geskille het gehandel oor die vraag of die mineraalregte/mynregte deur wetgewing, wat die bedryf van mynbou of vervreemding van regte op een of ander wyse verbied het, onteien word. Die artikel fokus op die betekenis wat aan die begrippe "ontneming" en "verkryging", as synde elemente van onteiening, toegedig word. Ondanks soortgelyke feitestelle en regsbeginsels rondom onteiening word verskillende resultate in die beslissings bereik. Daar word gepoog om die verskillende resultate te verklaar. By afloop van 'n regsvergelykende analise word tot 'n slotsom geraak omtrent die juistheid en wysheid van die onderskeie beslissings.

1 Introduction

A comparison will be made between the decision of the High Court of Australia in *Newcrest Mining (WA) Ltd v The Commonwealth*[1] ("Newcrest") and the decisions of the South African Courts in the *Agri South Africa* line of cases.[2] Although the mineral law systems of the two countries differ insofar as historical development and content,[3] the simplified facts of the *Newcrest* and *Agri SA* decisions and principles of expropriation law are similar enough to draw an interesting comparison between the respective cases. Both cases dealt with the issue of whether the mineral rights/mining rights of private holders were expropriated by legislation which prohibited mining in one way or another. A comparison between the cases shows the approaches towards the issues and what exactly

1 (1997) 190 CLR 513.

2 *Agri South Africa v Minister of Minerals and Energy; Van Rooyen v Minister of Minerals and Energy* 2010 1 SA 104 (GNP) (hereafter "*Agri SA I*"); *Agri South Africa v Minister of Minerals and Energy* 2012 1 SA 171. (GNP) (hereafter "*Agri SA II*"); *Minister of Minerals and Energy v Agri SA 2012 5 SA 1 (SCA)* (hereafter "*Agri SA III*"); *Agri SA v Minister of Minerals and Energy* 2013 4 SA 1 (CC) (hereafter "*Agri SA IV*").

3 See, Badenhorst "Ownership of minerals *in situ* in South Africa: Australian darning to the rescue?" 2010 *SALJ* 646.

constitutes deprivation and/or acquisition of property for purposes of expropriation and whether deprivation and/or acquisition actually took place.

The differences between the mineral law systems of Australia and South Africa (before the enactment of the Mineral and Petroleum Resources Development Act 28 of 2002 (hereafter "MPRDA")) and the protection afforded against the resumption/expropriation of mineral rights or mining rights will be set as background information for a better understanding of the respective decisions. The facts of the two cases will first be set out and simplified for comparative purposes before the respective decisions are discussed. At the end, a comparison will be made between the decisions and a conclusion reached about the similarity of principles and the correctness of the respective decisions.

2 Differences Between the Two Legal Systems

The mineral law systems and the protection afforded against expropriation/resumption of mineral rights/mining rights in the two systems differ and will be explained below.

2 1 Australia

The English doctrine of tenure applies to Australian law.[4] This doctrine is based on the principle that all land is owned by the Crown, whilst the land is occupied by tenants holding it directly or indirectly of the Crown by virtue of an estate in land.[5] By virtue of the maxim *cuius est solum eius est usque ad coelum et ad inferos*,[6] all mines[7] and minerals that lie beneath the soil are presumed to belong to the owner of an estate in fee simple.[8] This principle is, however, subject to qualifications. First, all mines of gold and silver, on private or public land, belong to the Crown by royal

4 *Attorney-General NSW v Brown* (1847) 2 Legge 312; *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141; *Mabo v Queensland (No 2)* (1992) 175 (CLR) 1 47; Bradbrook, MacCallum, Moore and Grattan (2011) 41.

5 See Harpum, Bridge & Dixon *The Law of Real Property* (2012) 22; Butt *Land Law* (2010) 83.

6 As to the origin of the *cuius est solum* maxim in English law, see Gray and Gray *Elements of Land law* (2009) par 2.16; Griggs "*Cujus est solum* – an unfortunate scrap of Latin, doctrine in disarray or a brocard of relevance? Its applicability to the subterranean and the United Kingdom Supreme Court decision in *Star Energy v Bocardo*" (19) 2011 *Australian Property Law Journal* 155 156.

7 The word "mine" is used in English law either as a synonym for a vein, lode or ore (body of material) or the location where the mineral is recovered (*Cadia Holdings (Pty) Ltd v New South Wales* [2008] NSWC 528 par 21). At present it is used as body or material.

8 *Commonwealth of Australia v New South Wales* (1923) 33 CLR 1 22 23 38; Forbes and Lang *Australian Mining and Petroleum Laws* (1987) 14.

prerogative.[9] Secondly, ownership in minerals and mines (other than the royal mines) could, however, have been reserved in favour of the Crown upon the grant of a freehold estate[10] which became the practice or policy of the Crown upon the grant of freehold estates.[11] Thirdly, statutes of the Australian States reserved ownership of all or the remaining minerals in the Crown (in right of the state).[12] Thus, in Australia, the general though not universal rule is that the Crown owns all minerals beneath the soil.[13] The Crown can grant rights to third parties to explore or mine for minerals from the land and to vest ownership of minerals in such third parties upon severance of minerals from the land.[14] Exploration rights are rights to enter land to explore for minerals and take minerals for non-commercial purposes. Mining rights are rights to enter land to mine or drill for minerals and take them away for commercial purposes.[15] Upon separation of minerals from the land in accordance with the authorising statutory right, ownership of minerals is obtained.[16] In the exceptional instances where ownership of minerals is vested in the holder of an estate in land, a *profit à prendre* could be granted to another to enter the land and mine the minerals.[17] A *profit à prendre* is a right to take something, such as (a) soil and minerals, (b) natural vegetation, or (c) wild animals, from the land belonging to another person.[18] A *profit à prendre* is, thus, similar to a servitude in South African law.

In Australia constitutional protection of property does take place on the federal level. The Commonwealth (Federal Government of Australia) is empowered by virtue of section 51(xxxi) of the Commonwealth Constitution to make laws for the acquisition of private property on just

9 *The Case of Mines (R v The Earl of Northumberland*) (1568) 1 Plowden 310 336; *Q v Wilson* (1874) 12 SCR (L) NSW 258 269-271 280 281; *Millar v Wildisch* (1863) W&W (E) 37 43; *Woolley v Attorney-General* of Victoria (1877) 2 App Cas 163 166-167; *Cadia Holding (Pty) Ltd v New South Wales* (2010) 269 ALR 204 parr 13, 80 & 106.

10 Forbes & Lang 17; Bradbrook *et al* 794.

11 Forbes & Lang 17; Crommelin "Australian Mineral Law as a Resource Management Regime" 14 (1981) *Australian Journal of Forensic Science* 2 8; Crommelin "Resources Law and Public Policy" (15) 1983 *University of Western Australia Law Review* 1 3.

12 S 9(1)(b) of the Mineral Resources (Sustainable Development) Act 1990 (Vic); s 8(3) and 8(2) of Mineral Resources Act 1989 (Qld); s 16(1) of Mining Act 1971 (SA); s 16(3) of Crown Lands Act 1976 (Tas); s 6(2)-(5) of the Mineral Resources Development Act 1995 (Tas); s 9(1)(b) of the Mining Act 1978 (WA); s 16 of the Mining Act 1991 (SA). In the Northern Territory reservation of ownership of all minerals was in the Crown (in right of the Commonwealth)(i.e., the federal government) (s 3 of Minerals (Acquisition) Act (NT)).

13 Hunt *Mining Law in Western Australia* (2009) 2 36.

14 See Christensen, Durrant, O'Connor and Phillips, "Regulating greenhouse gas emissions from coal mining activities in the context of climate change" (28) 2011 *Environmental and Planning Law Journal* 381 387.

15 Chambers *An Introduction to Property Law in Australia* (2013) 216.

16 See Christensen, Durrant, O'Connor and Phillips (28) 2011 *Environmental and Planning Law Journal* 387-388.

17 Hunt 38 216.

18 Chambers 184-185.

terms for any purpose in respect of which the Parliament has power to make laws.[19] The compensation payable in respect of the acquisition must satisfy the requirement of "just terms".[20] The Australian States are, by virtue of their sovereignty, empowered to take or acquire land with or even without payment of compensation.[21]

2 2 South Africa

South African law adheres to the civilian notion of full ownership (*dominium*) of land (allodial title). By virtue of the maxim *cuius est solum eius est usque ad coelum et ad inferos*[22] the owner of the land is the owner of unsevered minerals.[23] Prior to the enactment of the MPRDA, mineral rights could, however, have been separated from the ownership of land and acquired by another person by the creation of a separate mineral right.[24] A holder of a mineral right was entitled to go upon the land to which the rights relate, to search for minerals, and, if he finds any, to sever the minerals and dispose of them.[25] Holders of mineral rights could freely transfer mineral rights[26] and grant prospecting or mining rights to others by virtue of a prospecting contract or a mineral lease, respectively.[27] Before prospecting rights or mining rights could be exercised, the necessary authorisation in the form of a prospecting permit or a mining authorisation had to be obtained from the state in accordance with the Minerals Act 50 of 1991 (hereafter "Minerals Act").[28] Holders of mineral rights were not obliged to exploit the minerals.[29] Upon severance of minerals from the land, ownership of

19 See, for instance, the Lands Acquisition Act 1989 (Cth).
20 See *Commonwealth v Tasmania* (1983) 158 CLR 1 289; Jacobs *Law of Compulsory Land Acquisition* (2010) 23.
21 *New South Wales v Commonwealth* (1915) 20 CLR54 77; Jacobs 23.
22 As to the origin of this maxim in the South African common law, see Franklin and Kaplan *The Mining and Mineral Laws of South Africa* (1982) 4.
23 *London and SA Exploration Co v Rouliot* (1891) 8 SC 74 91; *Rocher v Registrar of Deeds* 1911 TPD 311 315; *Vanston v Frost* 1930 NPD; *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 2 SA 363 (SCA) 371D; *Agri SA III* par 32.
24 See further, Badenhorst & Mostert, *Mineral and Petroleum Law of South Africa* (2004) Revision Service 9 ch 3.2.
25 *Van Vuren v Registrar of Deeds* 1907 TS 289 294 295; *Rocher v Registrar of Deeds* 1911 TPD 311 316; *Ex parte Pierce* 1950 3 SA 628 (O) 634C-D; *Erasmus v Afrikander Property Mines Ltd* 1976 1 SA 950 (W) 956E; *Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd* 1996 4 SA 499 (A); 509G-H; *Agri SA II* par 23.
26 *Lazarus and Jackson v Wessels, Oliver and the Coronation Freehold Estates, Town and Mines Ltd* 1903 TS 499 510; *Van Vuren v Registrar of Deeds* 294; *Ex parte Pierce* 634C; *Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd* 509H.
27 *Bengwenyama Minerals (Pty) Ltd* v *Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC) par 65.
28 *Agri SA II* parr 34-36.
29 *Idem* 29.

minerals was acquired by the holder of the mineral right or mining right.[30]

In South Africa mineral rights (or ownership of land) could have been expropriated in terms of the Expropriation Act 63 of 1975 against payment of compensation.[31] Constitutional protection of property was, in addition, afforded by the property clause in section 28 of the (interim) Constitution, 200 of 1993.[32] Since the expiry of the term of the interim Constitution and upon enactment of the MPRDA on 1 May 2004, section 25 of the Constitution of the RSA 1966 protects property,[33] such as ownership of land and mineral rights, as a fundamental right. Protection of property is provided in the sense that deprivation of property may only take place (a) in terms of law of general application, and (b) by law which does not permit arbitrary deprivation of property.[34] Expropriation, as subspecies deprivation, of property can only take place (a) in terms of law of general application, (b) for public purpose or in the public interest, and (c) subject to the payment of compensation.[35] Compensation must be "just and equitable" reflecting an equitable balance between the public interest and the interest of the expropriated owner.[36] Land reform and reform to bring about equitable access to all natural resources is included under the notion of "public interest".[37] Section 25(5) to (9) have a reform purpose and promote the transition of the prevalent system of property holdings.[38] In particular, the state is empowered by section 25(8) to enact legislation to "achieve land, water and related reform, in order to redress the results of past racial discrimination", provided it complies with the requirements of the general limitations clause of section 36.[39] The enactment of the MPRDA by the legislature is a prime example of such legislation. Item 12(1) of the transitional arrangements in Schedule II of the MPRDA provides that any person who can prove

30 *Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd* 509G-510A 534F-I.

31 *Agri SA IV* parr 41, 43 & 46; see also *De Villiers v Stadsraad van Mamelodi* 1995 4 SA 347 (T); Badenhorst & Van der Vyver "Mineraalregte as voorwerp van onteiening - *De Villiers v Stadsraad van Mamelodi"* 1996 *TSAR* 800.

32 See Badenhorst, Pienaar & Mostert *Silberberg and Schoeman's The Law of Property* (2006) 521.

33 In terms of s 25(4) of the *Constitution of the Republic of South Africa, 1996* (hereafter "the Constitution") property is not restricted to land.

34 *S* 25(1).

35 S 25(2) and (3).

36 S 25(3). See further s 25(3) as to the relevant circumstances that need to be taken into account in the balancing of the respective interests.

37 S 25(4).

38 Badenhorst, Pienaar & Mostert 522.

39 In terms of s 36 of the *Constitution* fundamental rights may be limited only in terms of "law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom". During such determination, the following factors are taken into account: (a) the nature of the right, (b) the importance of the purpose of the limitation, (c) the nature and extent of the limitation, (d) the relation between the limitation and its purpose, and (e) less restrictive means to achieve the purpose.

"that his or her property has been expropriated" in terms of any provision of the MPRDA, may claim compensation from the state.

3 Facts

3 1 *Newcrest*

The facts of *Newcrest Mining (WA) Ltd v The Commonwealth* were briefly as follows:[40] In the Northern Territory of Australia ownership of all minerals was reserved in favour of the Crown in right of the Commonwealth.[41] The Commonwealth granted mining leases to Newcrest Mining (WA) Ltd over parcels of land in the Northern Territory. When self-government was accorded to the Northern Territory in 1978 the Commonwealth, broadly speaking, conferred its ownership of minerals upon the Northern Territory,[42] but retained the fee simple and mineral interest (ownership) in the lands, over which Newcrest's mining leases had been granted, subject to the mining leases.[43] The Commonwealth government extended the boundaries of the Kakadu National Park by proclamations under section 7(8) of the National Parks and Wildlife Conservation Act 1975 (Cth) to include the parcels of land covered by the mining leases.[44] The federal statute prohibited "operations for the recovery of minerals" in the Kakadu National Park and provided that compensation is not payable to any person by reason of enactment of the Act.[45]

3 2 *Agri South Africa*

The facts of *Agri South Africa v Minister of Minerals and Energy* were briefly as follows:[46] Prior to enactment of the MPRDA, Sebenza Mining (Pty) Ltd ("Sebenza") was the registered holder of mineral rights to coal in respect of two properties situated in Mpumalanga which it acquired for R1048 000. After enactment of the MPRDA the company did not exercise its exclusive right to apply for a prospecting or mining right and the "unused old order right",[47] accordingly, ceased to exist. The company, by then in liquidation, lodged a claim for compensation in terms of item 12(1) of Schedule II of the MPRDA contending that the MPRDA expropriated its coal rights. The claim of compensation was ceded to Agri South Africa for R250 000. Agri South Africa claimed compensation in a

40 Badenhorst "Towards a theory on publicly-owned minerals in Victoria" (2014) 22 *Australian Property Law Journal* 157 177.
41 S 3 of the Minerals (Acquisition) Act 1953 (NT).
42 S 69(4) of Northern Territory (Self-Government) Act 1978 (Cth).
43 *Newcrest Mining (WA) Ltd v The Commonwealth* 526 546. Acquisition actually took place in terms of s 70 of the Northern Territory (Self Government Act) 1978 (Cth).
44 *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 525-526.
45 *Idem* 530-531.
46 See *Agri SA II* par 16 & parr 17-20; *Agri SA III* par 2.
47 See item 8 of Schedule II of the MPRDA.

"test case" for the alleged expropriation of the coal rights in amount of R750 000. The claim was rejected by the Department of Mineral Resources.

3 3 Simplified Facts

For purposes of a comparative analysis the facts of both cases can be simplified as follows:

> "In *Newcrest,* the holder of a mining right was prohibited by statute from mining for minerals. For all intents and purposes the mining right could not be alienated and conveyed to another person. *In other words, the holder of a mining right was not entitled to mine or alienate its mining right because of a (federal) statute.* The statute did not provide for payment of compensation".

In *Agri SA* the holder of a mineral right was prohibited by statute from (prospecting or) mining for minerals,[48] unless the mineral right was converted into a (prospecting right or) mining right in terms of the MPRDA. A company in liquidation, like Sebenza, could not have applied for new prospecting or mining rights because it would not have been able to meet the financial requirements for the application of a prospecting right[49] or mining right,[50] and even if such a right were granted it would have been terminated automatically because the holder is in liquidation.[51] The particular holder was thus prohibited by the statute to apply for new rights because it was under liquidation. Alienation and transfer of the mineral rights and granting of prospecting or mining right were also prohibited by statute as these transactions could no longer be registered in the Deeds Office.[52] *In other words, the holder of a mineral right was not entitled to (prospect) or mine for minerals and to alienate or convert its mineral rights because of a (national) statute.* The statute did provide for compensation.

Despite the similarity of the simplified facts and legal principles regarding the elements of expropriation of property, the outcomes of the respective decisions differ vastly.

4 Decisions

The respective decisions were as follows:

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48 A holder of the unused old order right could only have prospected or mined during the one-year interim period if it had statutory authorisation to do so in terms of the Minerals Act, which was absent in the case of Sebenza. In other words, upon enactment of the MPRDA Sebenza could no longer prospect or mine.

49 S 17(1)(a) of the MPRDA requires inter alia that the applicant has access to financial resources to conduct the proposed prospecting operations optimally.

50 S 23(b) requires inter alia that the applicant has access to financial resources to conduct the proposed mining operations optimally.

51 S 56(d).

52 *Southern Era Resources Ltd v Farndell* 2010 4 SA 200 (SCA) par 4.

4 1 *Newcrest Mining (WA) Ltd v The Commonwealth*

One of the issues before the High Court in *Newcrest*[53] was whether the extension of the boundaries of the Kakadu National Park at the time of the proclamations amounted to an acquisition of Newcrest's mining leases without just terms in breach of section 51(xxxi) of the Commonwealth Constitution.

It was conceded by the Commonwealth that the mining leases were property within the meaning of section 51(xxxi) of the Constitution.[54] By a majority, the High Court decided that the extension of the boundaries amounted to an acquisition of property without just terms in breach of section 51(xxxi) of the Constitution.

Gummow J decided that the inclusion of the mineral lease areas amounted to (a) "an effective sterilisation" of the mining rights,[55] and (b) a denial of Newcrest's ability to exercise its rights under the mining leases, even though the mining leases were not extinguished.[56] Gummow J accepted that the Commonwealth acquired "identifiable and measurable advantages", namely, the minerals were freed from the rights of Newcrest to mine them.[57] Gummow J accordingly decided that there were acquisitions of property from Newcrest contrary to the constitutional requirement of acquisition of property on just terms.[58] Toohey[59] and Gaudron JJ[60] agreed with Gummow J. Kirby J held that the outcome of the prohibition on "operations for the recovery of minerals" in the Kakadu National Park was an acquisition of Newcrest's mining rights.[61] Kirby J reasoned that despite the fact that Newcrest's interests were not expressly acquired or extinguished by any federal law, the creation and extension of the Kakadu National Park by federal law effectively deprived Newcrest of "the benefit of its property in the mining tenements, principally the right to recover minerals".[62] Brennan CJ decided when the land was included in the Kakadu National Park by proclamation, the rights of Newcrest to carry on operations for the recovery of minerals were extinguished. The Commonwealth acquired property from Newcrest in the form of a "benefit of relief from the burden of Newcrest's rights to carry on 'operations for the recovery of minerals'".[63] Dawson J merely assumed that the proclamations together with the statutory prohibition against mining operations "constituted the

53 *Newcrest Mining (WA) Ltd v The Commonwealth (1998)* 190 CLR 513 526; Badenhorst (2014) 22 *Australian Property Law Journal* 177.
54 *Idem* 531 (Brennan CJ) & 573 (McHugh J).
55 *Idem* 635.
56 *Ibid*.
57 *Idem* 634.
58 *Idem* 635.
59 *Idem* 560.
60 *Idem* 561.
61 *Idem* 639.
62 *Idem* 638.
63 *Idem* 530.

acquisition otherwise than upon just terms of property held by Newcrest in the form of the mining leases".[64]

In dissent McHugh J, however, decided as to date of judgement there has been no acquisition of property.[65] According to McHugh J the proclamations adversely affected Newcrest's right to mine[66] and merely impinged on Newcrest's rights to exploit their property interests,[67] which statements seem contradictory. McHugh J reasoned that even if there was a diminution or extinguishment of all or part of the Newcrest's property interest, there was no gain by the Commonwealth.[68] According to McHugh J the Commonwealth gained nothing which it did not already have.[69] The Commonwealth already "owned the interests in reversion in the minerals and the land".[70] This statement will be explained in more detail in 5 below. According to McHugh J in "colloquial terms, Newcrest lost but the Commonwealth did not gain". [71]

4 2 *Agri SA Series of Cases*

At issue in *Agri SA* series of cases was whether the mineral rights of holders of unused old order rights were expropriated by the MPRDA on 1 May 2004 (in *Agri SA III* the majority of the SCA considered a broader issue, namely, did the MPRDA on 1 May 2004 expropriate *all* mineral rights in South Africa?)[72] The *Agri SA* series of cases will now be revisited.[73]

These cases started with an exception being raised in proceedings before the North Gauteng High Court in *Agri SA I*.[74] The Department of Minerals raised an exception against Agri SA's claim of compensation as not disclosing a cause of action. Hartzenberg J dismissed the exception[75] and decided that "it is possible for holders of old order rights to prove that their rights had been expropriated".[76] According to the court, the MPRDA could be interpreted as admitting that "holders will be deprived

64 *Idem* 547.
65 *Ibid*.
66 *Idem* 573.
67 *Ibid*.
68 *Ibid*.
69 *Ibid*.
70 *Ibid*. See also *idem* 527 (Brennan CJ).
71 *Idem* 573.
72 *Agri SA III* par 4. As to the reasons for such a broad sweep, see parr 3, 81 & 90.
73 See Badenhorst and Olivier "The Agri South Africa Constitutional Court decision 2014 *Australian Resources and Energy Law Journal* 230-232.
74 *Agri SA I* parr 1 & 4; Badenhorst, "Expropriations by virtue of the Mineral and Petroleum Resources Development Act: Are there some more trees in the forest? *Agri South Africa and Van Rooyen v Minister of Minerals and Energy"* 2009 *TSAR 600*. See also, Van Niekerk and Mostert, "Expropriation of Unused Old Order Mineral Rights: The Courts have its first say" 2010 *Stell LR* 158; Leon, "Compensation for expropriation of 'old order mineral rights'" July 2011 *De Rebus* 47.
75 *Agri SA I* par 19.
76 *Ibid*.

of their rights and that such deprivation, coupled with the State's assumption of custody and administration of those rights, constitutes expropriation thereof".[77] The features of (common law) mineral rights were correctly indicated[78] by the court and the position of holders of unused old order rights before and after the enactment of the MPRDA was compared[79] in order to arrive at the decision that it is possible for holders of "old order rights" to prove that their rights have been expropriated.[80]

The merits of the dispute between the parties was subsequently decided by the North Gauteng High Court. The High Court accepted in *Agri SA II*[81] that coal rights constituted property for purposes of section 25 of the Constitution. The content of a mineral right was clearly indicated by the court.[82] Du Plessis J construed a deprivation as an act which interfered with the use, enjoyment and exploitation of property.[83] The content of a mineral right before and after the MPRDA[84] was compared by the court to arrive at its decision that upon enactment of the MPRDA[85] the holder of the mineral rights was deprived of its entitlements[86] and the coal rights.[87] According to the court the holders of mineral rights have, since the enactment of the MPRDA, not retained one of the entitlements by virtue of the mineral right.[88] Only the right to acquire a new prospecting or mining right was conferred to holders of unused old order rights by the MPRDA. [89]

For an act of expropriation to have occurred, the court in *Agri SA* II required appropriation by the expropriator of the substance of a right, and abatement or extinction of any other right held by another which is

77 *Idem* 17.
78 *Idem* 7-9.
79 *Idem* 5.
80 *Idem* 19.
81 *Agri SA II* par 62; Badenhorst "Large-scale Expropriation of Mineral Rights in South Africa: The *Agri South Africa* saga" (2011) *Australian Resources and Energy Law Journal* 261; Badenhorst and Olivier "Expropriation of 'unused old order rights' by the MPRDA: You have lost it!" 2012 *THRHR* 329.
82 Du Plessis J stated that a holder of a mineral right was entitled to: (a) go upon the land to prospect for minerals; (b) mine the minerals and to carry them away; (c) alienate and transfer mineral rights, (d) bequeath mineral rights to his heirs; (e) grant to a third party against consideration, by way of a prospecting contract or a mineral lease, the right to prospect for or to mine the relevant minerals; and (f) deal with it to his benefit (see par 23 & parr 28-30). Du Plessis J did not regard the list as exhaustive and also referred to the list of entitlements indicated in Badenhorst and Mostert 3-12 to 3-14 (par 29).
83 *Agri SA II* parr 72 & 65.
84 *Idem* 22. As to the before-part of the comparison, see parr 23-36. As to the after-part of the comparison, see parr 37-58.
85 *Idem* 75.
86 *Idem* 50-51.
87 *Idem* 77.
88 *Idem* 50.
89 *Ibid*.

inconsistent with the appropriated right.[90] The court decided that the State acquired the substance of the former mineral rights.[91] The court concluded that the coal rights had been expropriated by the MPRDA.[92] The court reasoned that, from a reading of sections 3 and 5 of the *MPRDA*, the Minister was, upon commencement of the Act, "vested with the power to confer rights, the contents of which were substantially the same as, and in some respects, identical to, the contents of common law mineral rights".[93] The court found that (a) the former holder of the mineral right in respect of coal, which did not apply for new prospecting or mining rights in terms of item 8(2) of the transitional arrangements, was expropriated by provisions of the *MPRDA*, and (b) Agri SA, as cessionary of the compensation claim, was accordingly entitled to compensation.[94]

The Minister appealed the finding of the North Gauteng High Court in *Agri SA II* to the Supreme Court of Appeal (hereafter "SCA"). In *Agri SA III*[95] Wallis JA (with whom Heher and Leach JJA concurred) (majority of the court) decided that *all* mineral rights that existed under the (repealed) Minerals Act were not expropriated by the enactment of the MPRDA.[96] A "deprivation"[97] and "acquisition"[98] of property by the state were identified as defining features of an act of expropriation for purposes of section 25(2) of the Constitution. In order to be constitutionally compliant it was required that a deprivation had occurred in terms of a law of general application and it should not be arbitrary.[99] It was accepted by the majority of the SCA that expropriation is a form or subset of deprivation of property.[100] In order to be constitutionally compliant an expropriation had to be for public purpose or in the public interest and subject to the payment of compensation.[101] Wallis JA regarded compensation as a prerequisite for a valid expropriation and a necessary consequence thereof but not a feature to distinguish it from a deprivation.[102] According to Wallis JA the presence or absence of a provision in a statute for compensation cannot be determinative of whether there is an expropriation or not: "The absence of an obligation

90 *Idem* 78 & 80.
91 *Idem* 82.
92 *Idem* 9, 87 & 88. See, however, Van der Walt *Constitutional Property Law* (2011) 438-443.
93 *Idem* 82.
94 *Idem* 88.
95 *Agri SA III* par 99; Badenhorst "Large-scale Expropriation of Mineral Rights in South Africa: The *Agri South Africa* fiasco" 2012 *Australian Resources and Energy Law Journal* 205; Badenhorst, "Expropriation of 'Unused Old Order Rights' by the MPRDA: You had nothing!" 2013 *THRHR* 472. See further Van der Vyver "Nationalisation of Mineral rights in South Africa" 2012 *De Jure* 125.
96 *Idem* 90 & 99.
97 *Idem* 85.
98 *Idem* 24.
99 *Idem* 12.
100 *Idem* 14.
101 *Idem* 12.
102 *Idem* 18.

to pay compensation is necessarily neutral, whilst its presence can never be more than a factor that may point to an expropriation".[103]

According to the majority of the SCA, deprivation is determined by comparing the position of holders of mineral rights before and after the changes brought about by the MPRDA.[104] Wallis JA later explained: "The comparison is between two statutory grants, namely, the rights enjoyed under the previous statutory dispensation and those enjoyed under the present dispensation".[105] The court *a quo*'s before-and-after comparison of the position of common law holders of mineral rights was rejected as being incorrect.[106] The majority of the SCA reasoned that deprivation, as the first element of expropriation, of property was not established[107] because the right to mine was never vested in the holders of mineral rights,[108] but rather in the State.[109] The majority of the SCA accepted as the basic philosophy that "the right to mine is under the suzerainty of the State and its exercise is allocated from time to time, as the State deems appropriate".[110]

Wallis JA was of the view that if only expropriation is contended, a court only has to determine whether the deprivation constituted an expropriation.[111] Wallis JA accepted that acquisition of property (in its constitutional sense) by the expropriator (or on behalf of others), "whether directly or indirectly, that bears some resemblance to the property that was the subject of expropriation" is one of the identifying characteristics of an act of expropriation.[112] It was regarded as undesirable to adopt a categorical approach in determining what constitutes acquisition for purposes of expropriation.[113] Determination of acquisition was said to take place by comparing the rights the State held before and after the enactment of the MPRDA.[114] We have seen that the majority of the SCA was of the view that prior to the MPRDA the right to mine was vested in the State, whilst section 3(1) MPRDA affirmed the "principle that the right to mine is controlled by the State, and allocated by those who wish to exercise it."[115] In other words, before and after the MPRDA the State had the right to mine and, therefore, acquired nothing. They accordingly found that acquisition of rights by the State, as the second element of expropriation, also did not take place.[116] The right to

103 *Ibid*.
104 *Idem* 76.
105 *Idem* 87.
106 *Ibid*.
107 *Idem* 85.
108 *Ibid*.
109 *Idem* 48, 84-87 & 99.
110 *Idem* 69.
111 *Idem* 14.
112 *Idem* 18 & 24.
113 *Idem* 24. As to the difficulties which warranted this approach, see par 23.
114 *Idem* 76.
115 *Idem* 85.
116 *Idem* 90 & 94.

mine (or mineral rights) could not, therefore, have been expropriated by the State.[117]

Wallis JA found that holders of unused old order rights were not deprived of their rights under the Minerals Act (which required authorisation for the exercise of rights) because they not only retained a preference to apply for a prospecting right or a mining right for a year, but "would acquire more extensive rights if they sought and obtained a prospecting right or mining right".[118] Deprivation would take place according to the court upon "failure to apply for a right to exercise them."[119] The imposition of a time limit of one year to apply for new rights was not perceived as a deprivation of rights.[120]

Wallis JA found, albeit *obiter*,[121] that holders of old order prospecting rights[122] or old order mining rights[123] who applied for conversion of their rights were not deprived of the right to prospect or mine because of the continuation of their prospecting or mining activities and the similar content of present rights and previous rights.[124] Expropriation of so-called common law mineral rights did not take place due to the absence of both the elements of deprivation and the acquisition of property.[125] The fact that the involvement of the state (unlike before) is now required by section 11(1) of the MPRDA for the transfer of converted rights and the duration of converted rights may be less than former rights did not influence the question whether expropriation took place.[126] The reason for this, according to the court was that the new rights are transferable and renewable.[127] Upon failure to convert these rights, the absence of rights, rather than absence of transmissibility, was regarded by the court as the source of loss.[128]

Nugent JA (with whom Mhtlantla JA concurred) concurred with the majority of the court for different reasons.[129] Despite his acceptance that the MPRD Act extinguished common law mineral rights,[130] Nugent JA denied that common law mineral rights had as their content the "right of exploitation".[131] According to Nugent JA, the right to prospect and mine

117 *Idem* 85 & 90.
118 *Idem* 97.
119 *Ibid*. If so, why did the court not find that a deprivation took place in the case of unused old order rights where there was a failure to apply for new rights?
120 *Ibid*
121 *Idem* 103.
122 See item 6 of Schedule II of the MPRDA.
123 See item 7 of Schedule II of the MPRDA.
124 *Idem* 89-90.
125 *Idem* 90 & 94.
126 *Ibid*.
127 *Ibid*.
128 *Ibid*.
129 *Idem* 117.
130 *Idem* 112.
131 *Idem* 113.

for minerals was stripped from the beginning by legislation.[132] Only the right to unsevered minerals was said to have remained as part of the ownership of land.[133] Although Nugent JA decided that there "can be no doubt that the MPRD Act divested unused [old order] mineral rights of the value that they had while the 1991 Act held sway"[134] the loss of the value of common law mineral rights was not attributed to the abolishment of common law mineral rights.[135] Nugent JA was of the view that the extension of exploitation rights to others by the MPRDA, which were earlier under the exclusive control of mineral right holders, did not constitute a deprivation of property.[136]

Agri SA appealed against this decision of the SCA to the Constitutional Court (hereafter "CC"). In *Agri SA IV*[137] Chief Justice Mogoeng (Moseneke DCJ, Jafta J, Nkabinde J, Skweyiya J, Yacoob J and Zondo J concurring) (majority of the CC) it was accepted that pre-existing mineral rights constitute constitutional property.[138] Mogoeng CJ, to a large extent, recognised the true content[139] and features[140] of mineral rights. Apart from the power of parliament during the period of parliamentary supremacy to legislate on mineral matters, it was held that the state did not have any residual competence (or substantive power) to exploit minerals.[141] Deprivation was perceived by the court as the

132 *Idem* 92.
133 *Idem* 104. It would only be correct if the mineral rights had been separated from the ownership of land.
134 *Idem* 111.
135 *Idem* 114-115.
136 *Idem* 117.
137 Badenhorst "Onteiening van onbenutte ou-orde regte: Het iets niets geword? *Agri South Africa v Minister of Minerals and Energy* (2013 (4) SA 1 (CC)" 2014 *THRHR;* Badenhorst and Olivier "Large scale Expropriations of Mineral rights in South Africa: The Agri SA finale" 2014 *Australian Resources and Energy Law Journal.*
138 *Agri SA IV* par 50. See also *National Credit Regulator v Opperman* 2013 2 SA 1 (CC) par 61.
139 The following "incidents" (par 7) or "essential components" (par 43) of mineral rights were recognised by Mogoeng CJ, namely, the entitlement: (a) to prospect, mine and dispose of minerals (*ius utendi*) (parr 7 & 51); (b) to sell, lease or cede mineral rights (*ius disponendi*) (parr 51 & 66); (c) not to mine or to sterilise minerals (*ius abutendi*) (parr 2, 43 & 66); and (d) to encumber minerals by mortgage (parr 10 & 50). As to a list of more entitlements of holders of minerals rights, see Badenhorst and Mostert 3-12 to 3-13; Mostert *Mineral Law Principles and Policies in Perspective* (2012) 136.
140 The following features of mineral rights were recognised by Mogoeng CJ, namely, mineral rights were: (a) registrable in the deeds office (par 12); (b) recognised as limited real rights that are enforceable against the whole world (par 9); (c) assets (par 10); (d) alienable by sale or lease (par 10); (e) alienable by the grant of a prospecting contract or mining lease (par 10); (f) transferable (par 10); (g) capable of encumbrance by mortgage or usufruct (see par 10); (h) capable of inheritance (par 10); (i) valuable (par 41); and capable of expropriation upon payment of compensation (see par 41 & 43). As to a list of more features of mineral rights, see Badenhorst and Mostert 3-23 to 3-24.
141 *Agri SA IV* par 35.

extinguishment of a "right previously enjoyed" or the taking away of rights or property or a significant interference with rights or property.[142] Mogoeng CJ decided that holders of unused old order rights were deprived of (a) the "free or unregulated right to sterilise mineral rights", (b) the "right to sell or lease mineral rights" (if such suspended right was not revived in terms of transitional arrangements),[143] and (c) their mineral right/unused old order right (for which a prospecting right or mining right could not be acquired in terms of the transitional arrangements).[144] It was reasoned that deprivation took place because the MPRDA "brought about a substantial interference and limitation that went beyond the normal restrictions on the use or enjoyment of its property found in an open and democratic society".[145] The majority of the CC further decided that upon failure to apply for new rights or an unsuccessful application for new rights, the loss of mineral rights was total and permanent.[146] The possibility of Agri SA recouping the purchase price of the mineral rights was also found to have been lost.[147] The majority of the CC, thus, decided that entitlements or components of the pre-existing mineral right were deprived by the MPRDA.[148] The assumption by the state of custodianship and the power to grant rights which previously could only be granted by holders of mineral rights were described as a deprivation.[149] Froneman J (Van der Westhuizen J concurring) in a separate judgement (minority judgement) also decided that a deprivation of property took place and that such deprivation was not of an arbitrary nature.[150]

For an expropriation, acquisition of entitlements or rights of property was required by the majority of the CC.[151] Determination of an acquisition on a case-by-case basis was regarded as the most appropriate method.[152] Mogoeng CJ required that a claimant must establish that the state has acquired the substance or core content of what it was deprived of or similar rights.[153] Exact correlation between what was lost and what was acquired was, however, not required.[154] Mogoeng CJ found that despite the "assumption by the State of custodianship of mineral resources on behalf of 'all the people of South Africa'[155] and the power to grant to others rights[156] that could previously have been granted by

142 *Idem* 48.
143 *Idem* 51. See also parr 2 & 66.
144 *Idem* 66.
145 *Idem* 67.
146 *Idem* 52.
147 *Ibid*.
148 *Idem* 53.
149 *Idem* 68.
150 *Idem* 92.
151 *Idem* 48.
152 *Idem* 64.
153 *Idem* 58.
154 *Ibid*.
155 In terms of s 3(1) of the MPRDA.
156 In terms of s 3(2) of the MPRDA prospecting rights or mining rights can *inter alia* be granted by the Minister.

holders of mineral rights", the state did not acquire any mineral rights (including those of Sebenza) at commencement of the MPRDA.[157] Mogoeng CJ found that "(n)either the state nor other entities or people acquired the rights to sterilise, monopolise the exploitation of minerals or sell, lease or cede Sebenza's old order rights on 1 May 2004".[158] Despite the termination of the right by the state, a transfer to the state did not take place.[159] The appeal was dismissed.[160] Cameron J also concurred with the majority of the CC but decided that acquisition by the state is not a necessary feature of an expropriation under section 25 of the Constitution.[161]

Froneman J, however, did decide that the state acquired the "power of disposition that private mineral ownership entailed",[162] "power to allocate and dispose of the exploitation rights"[163] or "at least some of the powers and competencies"[164] of holders of unused old order rights. The minority of the CC also decided that acquisition of property by the state is not an essential requirement for expropriation.[165] The appeal was, however, also dismissed by the minority of the CC who decided that the transitional arrangements, as "compensation in kind", constituted "just and equitable compensation" as required in terms of section 25(3) of the Constitution.[166]

5 Comparison

The courts in *Newcrest* and the *Agri SA* line of decisions recognised mineral rights/mining rights worthy of protection under their respective Constitutions. These courts required deprivation and acquisition as elements of an act of expropriation/resumption. We have seen that only the minority of the CC in *Agri SA IV* and Cameron J did not require acquisition as an element of expropriation.

Deprivation, as perceived by these courts, varied from interference with the exercising of entitlements, sterilisation of entitlements, prohibition of the exercising of entitlements and extinguishment of entitlements of mineral rights/mining rights. The views of the respective courts as to what constitutes a deprivation were basically the same. In order to determine whether deprivation has taken place, one has to be able to identify the content of the mineral right or mining right and do a

157 *Agri SA IV* parr 68 & 71.
158 *Ibid*.
159 *Ibid*. Insofar as expropriation is an original mode of acquisition of rights, transfer of rights does not, strictly speaking, take place.
160 *Idem* 76.
161 *Idem* 78.
162 *Idem* 80.
163 *Idem* 81.
164 *Idem* 106.
165 *Idem* 79 & 102.
166 *Idem* 79, 88 & 90.

proper before-and-after analysis of the content of such right with reference to the statute in question.

The content of a mineral right was determined or largely recognised by the respective courts in *Agri SA I*, *II* and *IV*. The same can be said for the determination of the content of a mining right in *Newcrest*. The majority of the High Court in *Newcrest,* in effect, decided that the holder of the mining right was deprived of the entitlements of a mining right, and more particularly the entitlements to mine or recover minerals. A similar approach was followed in *Agri SA I* and *II and IV*. The denial by (a) the majority of the SCA in *Agri SA III* that: (i) the "right" to mine base minerals in the former Transvaal prior to[167] and during[168] the existence

167 *Idem* 48. Wallis JA ascribed to the view of Mostert (20) that: "The right to seek for and extract minerals was, however, in many respects, the prerogative of the state" (par 48). In her discussion of the period of 1860 to 1964 Mostert clearly indicates that the right to prospect and mine for base minerals in the Transvaal remained vested in the owner of land (see parr 29-30). Mostert's statement is only applicable to the right of the state to prospect and mine for natural oil and the right to mine for precious stones and precious metals. Only those rights, held by governments of the Republics and Colonies, were vested in the Governor-General-in-Council by s 123 Union of South Africa Act 1909 (see par 53) and not the right to mine all minerals (including base minerals) in the Union of South Africa. The same can be said about other Union mining legislation to which Wallis JA referred (parr 53-56). Those statutes did not vest the right to mine base minerals in the state. The general statements of Wallis JA about the right to mine minerals did not reflect the correct position in respect of base minerals. If Mostert's use of the term prerogative can be construed as a prerogative power it can be noted that it was recently decided in *General Council of the Bar v Mansingh* (2013 3 SA 294 (SCA) par 18) that the royal prerogative power was retained in Union of South Africa by s 8 of the Union of South Africa Act 1909 and s 4 of the Status of the Union Act 69 of 1934 and its ambit had to be determined by English law. The prerogative power was partially codified by s 7(3) of the Constitution of the Republic of South Africa Act 32 of 1961, whilst the uncodified prerogative powers were preserved by s 7(4) (par 20). Even if the English prerogative to minerals was retained in South Africa (and not changed by mining legislation) the Crown's prerogative right did not extend to base metals (see *Commonwealth v New South Wales* (1923) 33 CLR 1 58; *Cadia Holdings (Pty) Ltd v New South Wales* (2010) 269 ALR 204 par 17).

168 According to Wallis JA, only the "entitlement to exercise the right to mine" was vested in the holder of a base mineral right by the Mining Rights Act, whilst the state held the "entitlement to control and allocate the right to mine" par 61. It is submitted that this would mean if the State had such entitlement it must have been the holder of the right to mine base minerals, which is clearly not correct. Wallis JA relied on a statement by Mostert (55) that: "The philosophy of state control over minerals during the period 1964 to 1990 resulted in a system whereby the state, in which the right to mine was vested, conferred rights to mine and prospect to mineral rights holders" (par 61). Mostert, in turn, relied on Kaplan and Dale A *Guide to the Minerals Act 1991*(1992) 5. Kaplan and Dale referred to such philosophy in regard to natural oil, precious metals and precious stones where the right to mine was indeed vested in the State. They indicated that in these instances the state granted subordinated rights (and not mere licences or authorisations) to third parties to mine. The statement of Mostert does not apply to all minerals during this period. It is only

of the Mining Rights Act 20 of 1967; (ii) the "right" to mine minerals during the existence of the Minerals Act;[169] and (b) the minority of the SCA that the entitlements of mineral rights[170] were vested in the holder of mineral rights, was used as a basis for its decision that no deprivation (or acquisition) of property took place. The denials were not only contrary to the express provisions of the relevant statutes,[171] but also more than a hundred years of case law[172] which recognised the content of mineral rights. We have seen, in determining the question of whether expropriation took place, that features of former mineral rights, such as being unrestricted in duration and transferable, were also disregarded by Wallis JA in *Agri SA III*. Once the well-established content and some of the features of a mineral right were disregarded by the SCA, the question of whether deprivation took place becomes nonsensical because the former mineral right becomes devoid of much of its content and features. For argument's sake, even if the content of a mineral right or mining right is restricted to the entitlement to prospect, mine and remove minerals and to alienate or dispose of the mineral right or mining right, it is clear that a statute which prohibited the mining of minerals and the

applicable to the right to mine precious metals and precious stones and the right to prospect and mine natural oil. It is not applicable to base minerals in which case the right to mine was vested in the holder of mineral rights. Mostert (48) clearly maintained earlier that the common-law position applied to base minerals.

169 Even though the vesting of the right to mine was recognised by Wallis JA it was said to be subject to obtaining statutory authorisation (parr 64 & 66). Unfortunately, Wallis JA did not distinguish between the vesting of a right and the exercise of a right (although regulation during the exercise of a right is recognised at par 66). Only the exercise of the (acquired) right was regulated by the Minerals Act. The rejection by Wallis JA (parr 63-67) of the view that s 5(1) of the Minerals Act amounted to a privatisation of state-held rights to precious metals, precious stones and natural oil (or a restatement of the common law position) (see Kaplan and Dale 5-6 46-48; Badenhorst "The revesting of State-held entitlements to exploit minerals in South Africa: Privatisation or deregulation?" 1991 *TSAR* 113 124–125) did not apply to base minerals. The vesting of the entitlements to prospect for and mine base minerals in the holder of a base mineral right remained unchanged. Only the regulation of the exercise of the right to base minerals was increased by the Minerals Act (see further, Badenhorst 2013 *THRHR* 479).

170 *Agri SA III* par 104.

171 For the wording of statutes of the former South African Republic, Transvaal colony and province, see Badenhorst and Mostert 1-16 to 1-20. S 2(1)(b) of the Mining Rights states expressly that "the right of and mining for and disposing of base minerals on any land is vested in the holder of the right to base minerals in respect of the land". S 5(1) of the Minerals Act states: "[T]he holder of the right to any mineral in respect of land shall have *the right to enter upon such land* ... together with such persons, plant or equipment as may be required for purposes of prospecting or mining and *to prospect and mine for such mineral on or in such land and to dispose thereof*" (italicised).

172 See 2 2 above and cases cited in n 25 above.

alienation/transfer of the underlying right[173] is interfering to such an extent with such rights that it constitutes a deprivation. It is submitted this happened in *Newcrest* and the *Agri SA* line of cases.

For purposes of acquisition it seems that the cases required that the state acquires some entitlements of a mineral right/mining right or something which resembles these entitlements or some form of property. For present purposes the question as to what constitutes property in Australia and South Africa is not further discussed. The views of the respective courts as to what constitutes acquisition were basically the same. The majority in *Newcrest* found that such acquisition took place. In *Agri SA II* it was correctly found that an acquisition of former entitlements of the holders of mineral rights took place in favour of the state. It was shown that some of these entitlements were now vested in the state. The majority in *Newcrest* used a further criterion which could have been useful in the *Agri SA* line of decisions, namely, whether the advantages or benefits of a right or property were acquired by the expropriator.[174] In *Newcrest* it was found that the advantage or benefit lies therein that the mineral interest of the Commonwealth was no longer burdened by a mining right in favour of Newcrest. It was consequently correctly decided that a resumption (expropriation) took place.

As indicated above, the minority of the High Court in *Newcrest* also decided that even if there was a deprivation of entitlements of a mining right, acquisition thereof did not take place because the Crown already owned the "interest in reversion in the minerals and the land". This reminds one of the thinking of the SCA in *Agri SA III*: the state cannot acquire something which it already holds. This minority view in *Newcrest* requires some further explanation of the English tenurial system:[175] If, for instance, the holder of a fee simple title (which endures indefinitely in time) grants a life estate (which only endures for the duration of a life) for the life of a grantee and the surplus of the life estate is not dealt with, a so-called reversion interest is created presumptively in favour of the original grantor. In short, the grantee holds a life estate whilst, the grantor holds a reversion interest in the estate. Upon death of the grantee, the grantor regains the (full) fee estate simple because he was holding the reversion interest. The same construction applies to the grant of a mining right by the owner of the mineral interest in the land. In the present case the Commonwealth granted a mining right to Newcrest but retained the reversion interest in the minerals. In short, the grantee holds

173 We have seen that Wallis JA, in *Agri SA III,* disregarded transferability of rights in the determination of whether expropriation took place because converted rights are capable of transfer with ministerial consent (par 91). Due to it being in liquidation, however, it was not possible for Sebenza to convert its mineral rights.

174 This test was, however, rejected by Wallis JA in *Agri SA III* because it "ignores the reality that deprivations of property can take different forms and be effected in various different ways" (par 23).

175 See Hepburn *Australian Property Law Cases, Materials and Analysis* (2012) 231-233.

a mining right (for the duration of the mining lease), whilst the grantor holds a reversion interest in the minerals. Only upon expiry of the term of the mining lease would the mining right or entitlements have been regained by the Commonwealth due to it holding the reversion interest in the minerals.[176] Whilst, McHugh J was correct in deciding that the Commonwealth retained the reversion interest in the minerals, he was incorrect in deciding that no acquisition took place. At issue was not the acquisition of the reversion interest in the minerals but the entitlements (or incidents) of the mining right which was granted by the Commonwealth to Newcrest. As correctly indicated by the majority of the High Court, the holder of the mining lease was deprived of the entitlements of the mining right which were acquired by the Commonwealth. There was, indeed, a gain by the Commonwealth. The Commonwealth no longer had the mining right or entitlements by virtue of such a right during the duration of the lease. Because of the statute the mining right was acquired (prior to the expiry of the term of the lessee's mining right). The existence of the Newcrest's mining right (or entitlements thereof) was (incorrectly) not perceived or recognised by McHugh J.

Wallis JA did refer to and provided a brief summary of the *Newcrest* decision in *Agri SA III*. The decision of McHugh J is summarised as follows:

> "(I)n dissent, McHugh J pointed out that the Commonwealth gained nothing thereby. It was not enabled to exploit the minerals and, had the [statutory] prohibition [on the recovery of minerals] been lifted, the claimant could have exploited them under the mineral leases. He accordingly held that there was no acquisition". [177]

It is submitted that, as seen before, McHugh J rather reasoned that acquisition was absent because of the presence of the Commonwealth's mineral interest reversion and not because of a statutory prohibition. Just like McHugh J, Wallis JA denied that acquisition by the State had taken place because the State always had the right to mine. As indicated before, in the case of *Newcrest* the mineral interest reversion was held by the Commonwealth but the right to mine was deprived and acquired by the Commonwealth because of the statutory prohibition against mining in the National Park. Whilst McHugh J was correct about the Commonwealth already holding the mineral interest reversion, Wallis JA was not correct in holding that the right to mine has always vested in the State. Even if the right to mine was vested under the (newly discovered)

176 In passing, it can be mentioned that in identifying the content of a mineral right in the South African system the grant of a prospecting or mining right to another person by a mineral right holder was explained by reference to a reversionary entitlement that was held by the holder of a mineral right. Upon termination of the prospecting right or mining right, the mineral right expanded back to its original content by virtue of the residuary entitlement.

177 *Agri SA III* par 22.

suzerainty or public power of the State,[178] allocation and vesting of mineral rights and or entitlements thereof took place by virtue of deeds registration legislation and mining legislation. Whilst, a form of a right to mine may have been under the suzerainty of the State, the allocated mineral rights or entitlements (to base minerals) were not vested in the State, and holders were deprived thereof and these allocated rights or entitlements were acquired by the State upon enactment of the MPRDA. Just as McHugh J failed to recognise acquisition of Newcrest's mining right by the Commonwealth because he erroneously focussed on the mineral interest reversion, Wallis JA failed to see the deprivation and acquisition of Sebenza's mineral right because he erroneously focussed on the so-called right to mine which was claimed to have been vested in the State by virtue of its suzerainty.

We have seen that the CC in *Agri SA IV* recognised a deprivation of entitlements, but the majority of the CC could not recognise the acquisition of these entitlements by the State (on behalf of future applicants). It was reasoned that acquisition does not take place in terms of the construction that the state is merely the custodian and allocator of mineral resources. The view of the majority of the CC can be attributed to its view on the need for transformation of the mining industry due to the inability of the majority of black South Africans to benefit directly from the exploitation of mineral resources by reason of their landlessness, exclusion and poverty caused by apartheid.[179] The transformative nature of the MPRDA[180] and section 25 of Constitution[181] was indicated by the court. According to the majority of the CC, section 25 imposed an obligation not to over-emphasise property rights at the expense of the state's social responsibilities.[182] Mogoeng CJ was of the view that if a proper meaning is given to the notion of acquisition for purposes of section 25(2) of the Constitution, it "should pose no threat to the possibility of maintaining a sensitive balance between existing private property rights and the pursuit of transformation that s 25 was designed to facilitate".[183] Such proper meaning should, according to Mogoeng CJ, not be too narrow or too wide. If the meaning is too narrow, it could work against the constitutional protection sought to be given to property; if the meaning is too wide it could: (a) blur the line drawn by the Constitution between deprivation and expropriation;[184] (b) "undermine the constitutional imperative to transform our economy with a view to opening up access to land and natural resources to previously disadvantaged people" as

178 In *Agri SA IV,* Mogoeng CJ, however, correctly stated: "It is, however, not clear what is meant by the proposition that the 'right to mine' is a matter of the 'substantive powers' of the state, or something under its 'suzerainty'" (par 35).
179 *Agri SA IV* par 1. See further par 22.
180 *Idem* 2, 26 & 65-66.
181 *Idem* 60-61.
182 *Idem* 62.
183 *Idem* 63.
184 *Ibid*.

envisaged by section 25(4) of the Constitution;[185] (c) "affect the need to create jobs, grow the economy by developing these resources in a sustainable way", and (d) "guarantee security of tenure to those prospecting for or exploiting mineral and petroleum resources".[186] The MPRDA does have security of tenure[187] of prospecting and mining operations as one of its objectives.[188] Mogoeng CJ reasoned that a finding of expropriation would have disregarded the public interest and constitutional imperative to transform and facilitate equitable access to mineral resources.[189] It is not explained why expropriation with compensation cannot take place during constitutionally mandated transformation which provides for compensation.

The minority of the CC acknowledged that the state acquired some of the entitlements of holders of unused old order rights[190] which is in line with the *Newcrest* decision and in line with legal reality. The attempt by the minority of the CC to dump acquisition of entitlements as a requirement of expropriation is not serving much of a purpose, given that they did recognise the acquisition of entitlements by the State but reasoned that the loss was, in any event, compensated. The fact that the majority of the CC was not able to recognise the acquisition by the State is more a cause for concern, which is apparent from the following statement by Froneman J:

> "If private ownership of minerals can be abolished without just and equitable compensation – by the construction that when the state allocates the substance of old rights to others it does not do so as the holder of those rights – what prevents the abolition of private ownership of any, or all, property in the same way?"[191]

The denial by the CC of any acquisition whatsoever defies legal reality and logic insofar as an entitlement without an encompassing right, whether public or private in nature, or a right not being held by anybody is not possible. The fact that the State is, since enactment of the MPRDA, capable of granting rights to minerals to applicants can only mean that the State acquired former rights or entitlements or (as a conduit) is holding them on behalf of future successful applicants.[192] Or, in the words of Mogoeng CJ, there was actually some correlation between what was lost and what was indeed acquired. The entitlements to exploit mineral rights that were lost do correlate with the rights to minerals that

185 *Ibid*.
186 *Ibid*.
187 According to Otto "Security of Mineral Tenure: Time-Limits", in Bastida, Wälde and Warden-Fernandez (Eds) *International and Comparative Mineral Law and Policy* (2005) 353 362, security of mineral tenure broadly means the stability of rights granted to an investor to implement the three phases of the mining sequence, namely, exploration, development and mining.
188 S 2(g) and item 2(a) of Schedule II of the MPRDA.
189 *Agri SA IV* par 69.
190 *Idem* 106.
191 *Idem* 105.
192 See Badenhorst 2014 *THRHR*.

the State is empowered in terms of the MPRDA to grant to applicants. If the advantage test of *Newcrest* had been applied, the majority of the CC would have had to recognise that the State has acquired the benefit of Sebenza's former "mining land" free from the encumbrance of its mineral rights and could now grant new prospecting rights and mining rights to applicants. That advantage had clearly shifted because the MPRDA prohibited Sebenza from mining unless its mineral right was converted (which was not legally possible). The same decision as the one in *Newcrest* should have been arrived at in *Agri SA III* and *IV*. The compensation provided for in the Constitutional property clause and item 12 of schedule *II* of the MPRDA should have made it even easier to arrive at such a decision.[193] We have seen that the majority of the SCA in *Agri SA III* accepted that the presence of compensation is a factor that may point to an expropriation.[194] The fact that item 12 of the transitional arrangements made provision for compensation was, however, dismissed as follows by Mogoeng CJ in *Agri SA IV*:

> "That the MPRDA does make provision for expropriation was, in my view, more of a cautious approach to provide for unforeseeable eventualities, than an acknowledgment or reinforcement of an accepted reality that the MPRDA necessarily has signposts of expropriation".[195]

Despite the absence of a provision of compensation, the High Court in *Newcrest* nevertheless recognised that resumption took place. Such recognition enhanced the security of mineral tenure on the federal level in Australia. Despite the presence of a property clause and a statute authorising payment of compensation, the SCA and CC in the *Agri SA* line of decisions did not recognise that expropriation took place. These decisions do not enhance security of mineral tenure[196] nor the sanctity of constitutional property in South Africa.

6 Conclusion

Despite differences between the Mineral law of Australia and South Africa (prior to the MPRDA), a useful comparison can be drawn between the *Newcrest* decision and the *Agri SA* line of decisions. Both cases dealt with the issue of whether holders of mineral rights/mining rights were expropriated by a statute which in effect prohibited mining of minerals and alienation of rights. The Australian statute did not provide for a claim of compensation, whereas, the South African statute did. The decisions were arrived at by looking at the content or entitlements (or incidents) of mineral rights or mining rights, and the meaning of deprivation and

193 Van der Vyver 2012 *De Jure* 142 states: "Since the MPRDA was enacted for a noble cause, one would have expected a court of law to lean toward a finding of expropriation, as indeed dictated by the provisions of s 25 of the Constitution" (see also Froneman J (par 80)).

194 *Agri SA III* par 18.

195 *Agri SA IV* par 74.

196 See further, Badenhorst "Security of mineral tenure in South Africa: Carrot or stick?" 2014 (32.1) *Journal of Energy & Natural Resources Law* 5.

acquisition as elements of an act of expropriation under both systems. The views as to what constitute acts of deprivation and acquisition were similar. Deprivation was perceived as an interference with/prohibition of the exercise of entitlements, sterilisation of entitlements, or extinguishment of entitlements of mineral rights/mining rights. For purposes of acquisition, it was required that the State acquires some entitlements of a mineral right/mining right, something which resembles these entitlements, benefits or some form of property. Even though the simplified facts of the two cases and views about deprivation and acquisition were largely the same, the views of the courts differed as to whether deprivation and/or acquisition of property actually took place.

In *Newcrest* the majority of the High Court recognised that deprivation and acquisition of entitlements, rights or advantages by the Commonwealth took place. The findings and reasoning of the majority of the High Court in *Newcrest* cannot be faulted. The object of the statute was achieved, namely, nature conservation by prohibiting mining in a National Park. A National Park was extended for the benefit of all Australians. Despite the absence of a statutory compensation claim, security of mineral tenure was enhanced.

In *Agri SA II* the content of mineral rights and deprivation and expropriation of mineral rights by the State were recognised. The outcome of the decision was that the object of the statute was achieved, namely, transformation of the mineral right holding of the past, whilst the expropriation of holders of mineral rights was recognised and compensated. Fair transformation was achieved.

However, in *Agri SA III* the Supreme Court of Appeal sadly refused to recognise the existence of the well-defined content of mineral rights, or the deprivation and acquisition of rights or entitlements which took place. These aspects should have been apparent to a reader of Mineral law. In *Agri SA IV* the content of mineral rights was largely resurrected and the deprivation of entitlements or mineral rights was not denied by the CC. Nevertheless, the majority of the CC still denied that acquisition thereof by the State took place because of the transformation objectives of the MPRDA and the property clause itself. Denial of acquisition entitlements was based upon the adoption of the custodian construction. Apart from cost implications, it is unclear why expropriation with compensation, as provided for in item 12(1) of Schedule II to MPRDA and section 25 of the Constitution, cannot take place during such transformation. Security of mineral tenure of unused old order rights and new prospecting and mining rights was also not enhanced. Even if the acquisition of entitlements or rights could not have been recognised by the CC, a sound principle could have been derived from the *Newcrest* decision, namely, that the State acquired the benefit of "mineral land", freed from the former unused old order rights in respect of which new prospecting and mining rights could be granted by the State. The objective of the statute was achieved by the outcomes of *Agri SA III* and *IV*, namely, as part of the transformation of the former mineral holding

in South Africa by imperceptible enlargement of the *fiscus* for eventual "distribution" by the State to "worthy" applicants. Transformation was, however, achieved at the expense of former holders of unused old order mineral rights and security of mineral tenure despite the protection afforded by the constitutional property clause and item 12(1) of Schedule II to the MPRDA. Valuable assets were taken without compensation and the fine balance between protection of property and transformation was not maintained. Rectifying the injustices of the past by denying the expropriations of today did not further the protection of property under the property clause in South Africa. The true content of mineral rights of the old order and the value of the academically much-vaunted property clause of the South African Constitution has largely been undermined by the SCA and the CC, respectively.

Reflective journals as an assessment method in clinical legal education

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OPSOMMING

Refleksiejoernale as 'n Assesseringsmetode in Kliniese Regsopleiding

Almal is dit eens dat die kliniese regsopleidingskursus nougeset geassesseer moet word indien dit kredietdraend is vir die verwerwing van die LLB-graad. Alhoewel verskeie vorme van assessering met welslae in kliniese regsopleiding toegepas kan word, konsentreer hierdie artikel bepaald op die gebruik van oordenkingsjoernale as assesseringsmetode. As agtergrond word daar eerstens in die breë tussen formatiewe en summatiewe assessering onderskei, waarna die riglyne vir assessering en puntetoekenning sowel as studente se ondervindings in dié verband bespreek en geëvalueer word. Oordenkingsjoernale word algemeen in buitelandse jurisdiksies as assesseringsmetode gebruik, maar die aanwending daarvan in Suid-Afrika is tot dusver nog beperk. Nadat regstudente aan die regskliniek van die Universiteit van die Witwatersrand, Johannesburg, aan die einde van die akademiese jare 2009, 2010 en 2011 met behulp van vraelyste gevra is om hulle mening oor die moontlike ingebruikneming van sulke joernale te lug, is 'n proefprojek met oordenkingsjoernale dan ook in 2012 by dié instelling onderneem. Die terugvoering van die studente wat aan die proef deelgeneem het, word dus hier bespreek, en die beweegrede en metodes vir die gebruik van oordenkingsjoernale word voorts aangedui. Verdere kwessies wat aanboord kom, is terugvoering aan studente oor hul joernaalinskrywings, sowel as die vraag of hierdie inskrywings inderdaad geassesseer behoort te word. As 'n praktiese, waardebelaaide element, wat ook as grondslag vir verdere ondersoek en ontwikkelingswerk kan dien, doen die navorsers boonop 'n konsepstruktuur vir 'n instruktiewe refleksiejoernaal aan die hand. Die outeurs kom uiteindelik tot die gevolgtrekking dat hierdie vorm van assessering gepas sou wees vir gebruik in Suid-Afrikaanse kliniese regsopleidingsprogramme, veral ook gedagtig aan die unieke omgewings waarbinne ons regsklinieke funksioneer.

1 Introduction

Although many different forms of assessment can be successfully applied in clinical legal education (CLE),[1] this article particularly focuses on the use of reflective journals as an assessment tool that, in the

1 Du Plessis "Assessment challenges in the clinical environment" 2009 *JJS* 91.

authors' view, is well placed for use in CLE courses. Prior to discussing this particular assessment tool, however, certain general parameters within which assessment takes place will be explored.

The general purposes of assessment are all too familiar to legal educators, and are, for example, set out in the University of the Witwatersrand, Johannesburg, Senate Policy on the Assessment of Student Learning. It prescribes that student assessment should be designed to achieve a number of listed purposes, including:[2]

> "… to be an educational tool to teach appropriate skills and knowledge, … to determine whether students are meeting, or have met, the educational aims and outcomes of a course (including qualification exit-level outcomes where appropriate) and to give students continuous feedback on their progress, … to determine levels of competence and to inform students on their current competence, … to provide a measure of student ability for future employers, … to inform teachers about the quality of their instruction [and] … to allow evaluation of a course."

However, within these general purposes of assessment, specifics need to be established. The primary reason for administering assessments should be to ascertain whether students are indeed learning what their educators want them to learn. This necessitates the use of different assessment methods for the various components of the course,[3] as well as giving due consideration to both formative and summative assessment tools from the outset.

2 Formative and Summative Assessments

Stuckey maintains that there are at least three types of assessments in CLE – "evaluating overall competency, helping students understand what they learn from individual, unique experiences, and determining whether students are learning what we are trying to teach".[4] He illustrates this by posing three questions, namely how well the student performed as a lawyer, what the student learned (which is established by using the student's reflection journal, among other things), and whether the student learned that which the educator had intended. (Of course, this implies that the CLE programme has clear educational outcomes, with which both the educator and student are familiar).[5] Stuckey goes on to emphasise the importance of credible assessments for the institution

2 See http://share.ds.wits.ac.za/DeptRegistrarsIntranetPublished/SenatePolicyOnAssess mentOfStudentLearning.doc (accessed 2014-03-12) 2.

3 Haupt & Mahomed "Some thoughts on assessment methods used in clinical legal education programmes at the University of Pretoria Law Clinic and the University of the Witwatersrand Law Clinic" 2008 *De Jure* 276.

4 Stuckey "Can we assess what we purport to teach in Clinical Law courses" 2006 *Int'l J. Clinical Legal Educ.* 9-10.

5 *Idem* 10, 11.

as well as the student. He stresses the importance of specificity, fairness, reliability, articulation and communication of assessment criteria.[6]

Formative assessments should be conducted throughout the semester to enable students to understand and monitor their own learning and to develop, for example, classroom assessment techniques such as general or pertinent class questions. Several summative assessments should also be administered in the course of the semester. This will increase the accuracy of the final grade. Summative assessments must be both valid (evaluating what was taught) and reliable (accurately measuring who has learned and who has not). Students should be evaluated on how well they achieved the outcomes (criteria-referenced assessments) rather than on their own performance in relation to other students (norm-referenced assessments). Summative assessment results should be returned to students accompanied by appropriate comments to enable students to understand how to improve their performance. In this way, a summative assessment also serves a formative purpose. The use of rubrics can assist in informing students. The current revisions of the American Bar Association (ABA) Standards for Approval of Law Schools, for example, require law schools to provide "a variety of formative and summative assessment methods across the curriculum to provide meaningful feedback to students".[7]

3 Laying Down the Parameters for Assessment and Mark Allocation, and Students' Experience of these

Two aspects of CLE assessment that this article will be dealing with are the composition of the predicate in CLE programmes and – based on empirical data gained from the University of the Witwatersrand, Johannesburg, Law Clinic (WLC) – students' experience of the composition of the predicate mark.

In planning the following academic year, cognisance must be taken of written feedback received from students by means of questionnaires or "course evaluations" as they are sometimes called. As a result of this feedback, there may be slight differences in the structure of the curriculum and, specifically, the make-up of assessments from one year to the next. The authors' experience has however always been that the course evaluation information obtained in this manner provides continued credibility to clinical programmes.

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6 *Idem* 28.

7 Fisher "Putting students at the center (sic) of legal education: how an emphasis on outcome measures in the ABA standards for approval of law schools might transform the educational experience of law students" 2001 *S. Ill. U. L. J.* 225; Stuckey *et al Best practices for legal education* (2007) 239, 241, 243–245, 255–261.

Apart from using course evaluations to plan and structure assessments, though, the weighted percentage associated with each of the components of the CLE programme in composing the predicate is also vital to consider.

3 1 Predicate Composition and Empirical Results of Student Feedback for the Period 2009–2011 at the WLC

3 1 1 Composition of the Predicate Mark

In 2007, the WLC CLE programme assessment structure was made up of a file assessment constituting 50%, a written test accounting for 20%, a written assignment/case report contributing 10%, and an oral examination representing 20%. In the following year, the assessment structure changed to a file assessment constituting 50%, a written test accounting for 10%, a second written test accounting for 20%, a written assignment/case report contributing 10%, and an oral examination representing 10%. For the period 2009 to 2011, the following composition of the predicate was adopted: file work constituting 50%, written test 1 accounting for 10%, a written assignment on the attendance and review of a court case contributing 10%, written test 2 on the drafting of court pleadings counting 10%, an oral examination representing 15%, and trial advocacy skills constituting 5%.[8] This assessment structure remained the same for 2012, save for the introduction of spot tests, which counted 10% towards the year mark, while file work assessments were reduced to 40%.

3 1 2 Results of Student Feedback

At the end of the 2009, 2010 and 2011 academic years, students at WLC were requested to voluntarily and anonymously complete a questionnaire on the composition of the predicate of the CLE programme at the clinic. Altogether 27 students completed the questionnaire in 2009, seventeen students in 2010, and sixteen students in 2011.[9]

In respect of 2009, fifteen students (55,5%) found the allocation of marks for the different components to be fair, while twelve students (44,5%) indicated that the allocation was not fair. Some of the reasons cited for these respondents' dissatisfaction were: "We study for tests and they count for so little" (three students); "Going to court for the case report is time-consuming, for little marks" (four students); "We put a lot of time, effort and organisation into preparation and execution for trial advocacy, for very small group marks" (fourteen students), and "The file

8 Haupt & Mahomed 2008 *De Jure* 279; *WLC Manuals 2007–2013*; Mahomed "United in our challenges – Should the model used in clinical legal education be reviewed?" 2008 *JJS Special Issue* 59, 60.

9 2009, 2010 & 2011 WLC data developed, compiled and reviewed by Riëtte du Plessis from the University of the Witwatersrand, Johannesburg, for purposes of a PhD study.

work assessment should count less, as it does not reflect what we know" (three students).

For 2010, eight students (47%) found the allocation of marks for the different components to be fair, while nine (53%) students indicated that the allocation was not fair. Again, their reasons cited were: "We study for tests and they count for so little" (four students); "Going to court for the case report is time-consuming, for little marks" (two students); "We put a lot of time, effort and organisation into preparation and execution for trial advocacy, for very small group marks" (six students); "The unit-based test is irrelevant" (one student); "The court report is irrelevant" (two students); "File work should count more than 50%" (two students); "The oral should count 10%" (one student), and "The drafting test is too late in the year" (two students).

With regard to 2011, nine students (56%) found the allocation of marks for the different components to be fair, while seven students (44%) indicated that the allocation was not fair. The latter seven cited the following reasons for their dissatisfaction: "We study for tests and they count for so little" (two students); "Going to court for the case report is time-consuming, for little marks and we missed some other lectures" (three students); "We put a lot of time, effort and organisation into preparation and execution for trial advocacy, for very small group marks" (ten students); "The unit-based test is irrelevant" (one student), and "The file work assessment should count less, as it does not reflect what we know" (one student).

3 2 What do these Results Tell Us?

For the period under review, the average satisfaction rate with the composition of the predicate mark was 52% and the dissatisfaction rate 47%. Considering that the various components constituting the predicate mark form part of the summative assessment efforts at the WLC, the results can hardly be described as an overall student endorsement of this part of the assessment practice. Two possible interpretations of the survey results above may be offered.

Firstly, the reasons cited by students for their dissatisfaction reveal that they are generally unaccustomed to a summative assessment of substantial weighting other than the formal test. This may be taken as confirmation that apart from CLE programmes, few (if any) other modules in the South African undergraduate LLB programme make use of any alternative summative assessment methods besides the formal test. However, keeping in mind the tendency among students to "cram" information for mere "regurgitation" during tests, there are very real concerns about the overall sensibility of attaching too much weight to formal tests in terms of predicate composition.

Secondly, the objection to the weighting of the court report assignment and the trial advocacy mark obtained at moot and mock court assignments required by this particular CLE programme – apart

from further validating the abovementioned first interpretation of the survey results – makes one ponder the desirability of cramming vast amounts of course content into CLE programmes, instead of having less content but ensuring a greater-quality learning experience.

The authors' experience of the LLB curriculum in the South African context is that too much is expected from CLE programmes, both institutionally and from students' perspective. The large student numbers[10] experienced in South Africa and the general unpreparedness of learners who enrol for legal studies without any academic background other than a Grade 12 National Senior Certificate are but a few of the valid reasons why a CLE programme cannot hope to achieve its objectives within one academic semester, or even an academic year. Clearly, CLE programmes need to be "staggered" and implemented over a number of years to achieve optimum results.[11] In addition, students often struggle to de-compartmentalise the different subjects of the substantive law as taught to them in their first three years of study.[12]

Against this backdrop, it seems apt to explore the use of an alternative assessment tool that is not currently employed at scale or at all in CLE in the South African context, and which may serve not only to address the many challenges briefly alluded to before, but ultimately also to cement "deeper" learning of the law as well as the skills required by lawyers. Therefore, the following section is devoted to a study of the use of reflective journals as such an alternative assessment tool that should be considered in the South African setting.

4 Reflective Journals

It has been stated that "educational theory supports the notion that the formula for learning begins with experience plus reflection".[13] Reflection allows students to discover methods for merging their personal and professional identities, without the need to compartmentalise views and perspectives.[14]

10 On the issue of large student numbers, see Du Plessis "Closing the gap between the needs of students and the community they serve" 2008 *JJS* 11. Student registration, excluding externs, for the CLE course at WLC was 250 for 2005, 280 for 2006, and 308 for both 2007 and 2008. For the years 2009 to 2013, registration numbers were respectively 228, 258, 297, 306 and 408.

11 Swanepoel, Karels & Bezuidenhout "Integrating theory and practice in the LLB curriculum: Some reflections" 2008 *JJS Special Issue* 99.

12 Du Plessis "Access to justice outside the conventional mould: creating a model for alternative clinical legal training" 2007 *JJS* 59.

13 Levy-Pounds & Tyner "The principles of Ubuntu: using the legal clinical model to train agents of social change" 2008 *Int'l J. Clinical Legal Educ.* 18.

14 *Ibid*.

In addition to these sentiments, reflection is an effective learning tool, as it enables students to identify any problems and to think of ways of how to improve. Macfarlane and McKeown[15] maintain that even though students often say that they struggle with reflection, their experience shows that most students are indeed able to demonstrate deep learning in their reflective papers, showing maturity and insight.

Reflection is the intentional consideration of an experience in light of particular learning objectives.[16] Outside the South African context, the use of reflective journals by students has been widely adopted as an assessment tool.[17] Australia, for example, has widely embraced reflective journals as assessment tool in CLE.[18] At Deakin University in Geelong, the student journal constitutes 30% of the clinical assessment.[19] At the Queensland University of Technology in Brisbane, a professional journal and essay constitutes 40% of students' total mark.[20] At Sydney's Macquarie University, the reflective report also accounts for 40%,[21] and at the University of Western Sydney, 50% of students' marks is made up of the reflective journal, which is described as "a reflective diary which requires students to critically consider his or her actions, experiences and responses in light of the objectives of the unit".[22] At Monash University in Melbourne, students are offered the

15 "10 lessons for new clinicians" 2008 *Int'l J. Clinical Legal Educ.* 69.

16 Bender, Daniel, Lazarus, Naude & Sattar *Service-Learning in the Curriculum. A resource for Higher Education Institutions* (2006) 58, see http://www.che.ac.za/documents/d000121/ (accessed 2009-10-06).

17 For an in-depth discussion on reflection and assessment, see Hyams "Student assessment in the clinical environment – what can we learn from the US experience?" 2006 *Int'l J. Clinical Legal Educ.* 85; Ledvinka "Reflection and assessment in clinical legal education: Do you see what I see?" 2006 *Int'l J. Clinical Legal Educ.* 29–56.

18 Hyams 2006 *Int'l J. Clinical Legal Educ.* 84; UNSW Kingsford Legal Centre *Clinical Legal Education Guide* (2011), see http://www.klc.unsw.edu.au/sites/klc.unsw.edu.au/files/doc/eBulletins/CLE_GUIDE_2011_12.pdf (accessed 2013-08-12).

19 The remaining 70% is made up of clinical performance in the course Law Clinic MLL351, which is a unit taken by approximately 20 students each trimester. UNSW Kingsford Legal Centre *Clinical Legal Education Guide* (2009), see http://www.law.unsw.edu.au/centres/klc/doc/CLE_GUIDE_09_10.pdf (accessed 2013-08-07) 9.

20 Seminar attendance accounts for 5%, clinical performance represents 15%, while the remaining 40% is made up of a further item of assessment to be negotiated between the facilitators and each student. Their legal clinic (organised programme) runs over a standard semester. See UNSW Kingsford Legal Centre (2009) 25.

21 An assignment makes up the remaining 60%. The additional components are assessed on a scale of "satisfactory" to "fail". The legal centre programme runs for a period of ten weeks during a semester, with attendance required on a designated day. See UNSW Kingsford Legal Centre (2012).

22 A seminar presentation accounts for a further 20%, while a research paper represents the remaining 30%. The clinical legal education programme is undertaken in partnership with the Macquarie Legal Centre. See UNSW Kingsford Legal Centre (2009) 41.

option of writing a reflective journal instead of an assignment, contributing 20 % towards the assessment mark.[23]

Law students must ask themselves the following questions as part of the reflective process: How and why does the client find him/herself in this situation? What is the policy rationale that might explain it? How can the effects be mitigated? What can I do to ensure that the injustice does not happen again? From whose perspective is it unjust? How did this affect me? Why did it affect me so much, or why did it not affect me at all? [24]

Although the benefits are plenty, especially for aspiring lawyers, the risk remains that students may end up manipulating entries in pre-empting what they believe the clinician would want to hear,[25] or making entries in a mechanical fashion. The main challenge may therefore be the difficulty in establishing how to assess true insight.[26] In this regard, a short (ten-minute) oral may prove useful to reveal whether the reflections in reflective diaries are feigned or genuine. In the Australian setting, these journals have to be updated and submitted either weekly or fortnightly. The students submit their reflections of about 500 words per entry via e-mail, and the clinicians generally also respond in that way.[27]

4 1 South African Student Feedback

The WLC never used reflective journals prior to 2013. At the end of the 2009, 2010 and 2011 academic years, students at the clinic were however requested to voluntarily and anonymously complete a questionnaire on the assessment of the CLE course called Practical Legal Studies, which was rigorously assessed.

As mentioned earlier, the questionnaire was completed by 27 students in 2009, seventeen students in 2010, and sixteen students in 2011.[28] Students were inter alia asked: "Do you feel that a reflective journal, in which you, for example, set out your strategies for cases or note how a

23 Hyams 2006 *Int'l J. Clinical Legal Educ.* 85.
24 *Ibid*.
25 According to Mennon, when substantive knowledge is assessed, "exams follow fairly standard formats that are not dependent upon the sort of 'insider', tacit or inchoate knowledge that the legal practitioner possesses". These exams are usually administered anonymously, cushioning teachers from subjectivity. "This protection", he points out, "is absent in a clinical setting". See *Clinical Legal Education* (1998) 286–287. Students may therefore strive to please the clinician with their entries, instead of conveying their true experiences.
26 Hyams 2006 *Int'l J. Clinical Legal Educ.* 85.
27 *Ibid*. In an e-mail to the authors dated 2009-10-07, Hyams confirmed this as still correct in respect of 2009/2010, and it was subsequently also confirmed as still valid during a discussion with the authors in Brisbane during July 2013.
28 2009, 2010 & 2011 WLC data developed, compiled and reviewed by Riëtte du Plessis from the University of the Witwatersrand, Johannesburg, for purposes of a PhD study.

specific case affected you, will merit the allocation of marks towards your year mark?" In 2009, seven students (26%) replied "yes" and 20 (64%) replied "no". In 2010, six students (35%) replied "yes" and eleven (65%) replied "no". In 2011, seven students (43%) replied "yes" and an equal number replied "no". Two students left the answering space blank.

Consequently, in 2012, two of the WLC clinicians introduced reflective journals informally and voluntarily within their respective specialised units.[29] These were not assessed. Still, this informal introduction of reflective journals revealed more than expected. One student commented as follows on her first two weeks in the clinic consulting with real-life clients:[30]

> "If I had to describe my first two weeks in the law clinic in a word, that word would be INTENSE. I walked in on day one with my nerves forcing my heart somewhere in the vicinity of my shoes, and was already taken aback by the number of people still in the waiting area at 10 am.[31] It struck me that these people had either had to wake up early, take a day off work (if they had any) or make transport arrangements so that they could get to the clinic on time. All that effort, just to get to a bunch of nervous fourth-years with minimal real-world experience? They really think we can help them? Wow. The thought of that alone is enough to make me want to turn tail and run! But, I didn't. [My partner] and I met with our first client, and initially, my confidence failed me. I tried to remember what we'd been taught in lectures about interviewing skills. Don't ask too many questions at first. Listen actively. Try not to interrupt. All of that went out of the window pretty quickly, as instinct kicked in. Our client didn't need prompting to tell his story. I've noticed that many of them are so desperate for help that you barely get to sit down before they start giving you details of their situation".

Students also commented on the emotional aspects of clinic duty:

> "I also had a bit of difficulty with having to inform clients that we cannot take on their cases. It's hard not to get a bit emotional when clients detail how badly they've been treated by someone who owes them money, or by the legal system itself. Even though you know you have to be objective and focus on the issues, these are still real people, with real problems. I feel like we owe them a duty to do as much as we can for them. Having to tell them that we can't help them has hit me hard".

Other comments from students included:

> "The emotional aspect is giving me the greatest difficulty at the moment. I know that a sense of detachment will be developed with experience and exposure to more clients over the weeks. I just hope that I don't become too detached – focused so much on getting a good mark that I forget that we're dealing with real lives here".

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29 The WLC currently operates through the specialised units of family law, refugee law, consumer law, labour law, land and urban evictions, delict ("tort") as well as a general law unit.

30 See Du Plessis 2009 *JJS* 96 for a full discussion on the nature of the clinic's client pool.

31 *Idem* 96–98.

and:

> "Our clients come stressed, scared, worried and desperately seeking for someone to help. We really get heart sore, listening to all and hearing their problems. Yet, as students, we realise there is only so much we can do".

Students did not hesitate to comment on blatant mistakes made by legal representatives:

> "Mr X's (a candidate attorney) nonchalance concerned me a bit. He didn't seem bothered that he had in his hands a closed file that was missing an important piece of documentation. We've had quite a few clients who had had bad experiences with legal representatives before they came to the clinic. To think that the law clinic could be guilty of similar crimes frustrates me just as much".

They also showed appreciation:

> "The best part of being in the consumer unit[32] is that we are open to a lot of scenarios and learn more than average about cases. We are taught by our professor to see more 'into' cases, to cross-question and, most importantly, to read in between the lines and not only go on the initial word of the client. We learnt that life is practical, not a textbook, and facing day-to-day problems no book can teach you how to solve".

Even though an attempt was made to introduce reflective journals at the WLC during 2013 as part of the course work assessment, it proved to be unsuccessful and therefore, such journals still do not form part of the 2014 assessment regime. However, at that time, the introduction of reflective journals was not properly structured, which is why it is hoped that the suggestions below will inspire the reintroduction of this assessment method.

4 2 Probing the Essence Behind the Use of a Reflective Journal

Reflection can assist in supplementing mediated learning (i.e. teacher-aided learning) by helping individuals to make connections with the theory and constructs they have formally learned.[33] Prompt questions in a personal development journal help students to reflect on and make sense of their understanding.

At the University of Gloucestershire Business School, the following three simple questions are used to prompt students to reflect: (a) Describe the event/experience. (b) How did it make you feel/how did you respond to the event or the experience? (c) How would you respond

32 One of the specialised units within the broader clinical structure. Also see Du Plessis "A consumer clinic as a specialised unit" 2006 *De Jure* 284–294 on the establishment of a specialised unit.

33 Laurillard *Rethinking university teaching: a framework for the effective use of educational technology* (1993) 5-10

to a similar event in the future/what would you do differently?[34] Such prompts generally comprise four types of questions, mainly focusing on: (a) The development of supposition and hypothesis; (b) The development of personal feelings; (c) Future action or projection; and (d) The development of critical assessment or value judgments.[35]

Dewey, Kolb and Boud[36] developed a model of experiential learning following the four basic stages of: (a) Taking stock of existing knowledge (what do I know?); (b) Identifying any gaps in learning (what do I need to know?); (c) Feedback and evaluation (how does what I now know contribute to what I already knew?); and (d) Evaluation of the integration of new knowledge with existing knowledge (how well and how much do I now understand?).

In probing reflection as a method to enable deeper learning, Moon[37] highlights that, in itself, the language involved in reflection already implies a deep approach. In her "map of learning", she identifies the following five stages: noticing, making sense, making meaning, working with meaning, and transformative learning. Students are aided in clarifying and making sense of what has been learned and to locate it within an individual framework, forcing them to be self-sufficient and to rely on their own investigative powers. Through reflection, what may have appeared to be acceptable situations are transformed into problems requiring further investigation and finding an answer to a question.[38] In addition, reflection supports deep learning by promoting independent thought, as students are required to provide evidence of their reflection, forcing them to focus their thoughts and articulate the results of their reflection.[39]

4 3 Designing a Workable and Progressive Structure for a Student Reflection and Progress Journal in CLE

The manner in which the student is guided or instructed in his/her reflection is of the utmost importance. The following represents a proposed draft of an instructive reflective journal:[40]

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34 See http://www.glos.ac.uk/uogabout/content.asp?rid = 1 (accessed 2014-03-03). These are very similar to the types of questions used by a number of personal development schemes (see http://www.ltsn.ac.uk/genericcentre/index.asp?id = 16911 for more details (accessed 2014-03-03)).

35 Morgan & Saxon *Teaching Questioning and Learning* (1991).

36 See http://www.infed.org/biblio/b-reflect.htm (accessed 2014-09-03).

37 *Reflection in Learning and Professional Development, Theory and Practice* (1999). 15"In its use of words and phrases such as 'relating ideas', 'looking for patterns', 'checking' and 'examining cautiously and critically', it implies the involvement of reflective activity in the process of learning."

38 *Ibid*.

39 Hinett "Improving learning through reflection – part one", see www.heacademy.ac.uk/.../id485_improving_learning_part_one.pdf (accessed 2014-02-14).

STUDENT NAME **STUDENT NUMBER** **DATE**

Dear student

Your reflective journal serves as a regular, written communication with your clinician regarding your clinical and other experiences in clinical legal education (CLE). Your clinician will also respond in writing. The purpose of your journal is to record observations and reflections, and to encourage deeper, more critical thought about the work and cases that you deal with at the clinic. Your reflections in this journal should help you to take more responsibility for your own learning and should offer you an environment in which to raise your questions and concerns. Your clinician will provide you with periodic feedback. You will be dealing with a number of cases. Please make journal entries to address the following five questions in respect of each case you deal with every week: What did you do? Why did you do it? How did you respond? What did you learn? What goals have you set for the future?

CLE PROGRESS AND REFLECTIVE JOURNAL

For your consideration	Case number & details	Case number & details	Case number & details
WHAT Make brief notes of what you did: the consultations you had with your client or any of the other parties involved in the case; letters you wrote; telephone calls you made; documents and correspondence you perused; research and reading you have done, and/or any other attendances pertaining to the specific case.	Student reply	Student reply	Student reply

40 For further reference, see Balsam *Reflecting well: guided journaling to improve transfer of learning* (conference paper delivered at the Institute for Law Teaching and Learning's summer conference 2011 NY) 1–10. Also see Burns & Sinfield *Essential Study Skills* (2012) 3rd ed.

WHY Make brief analytical notes, answering the following questions: Why did you perform the actions described above? How was it useful? What learning outcomes did it cover? With which part of the case is it helping/has it helped you? NB: Knowing why you did something helps you move from being a passive to an active student.	Student reply	Student reply	Student reply
REACTION Make brief notes on your emotional response to the activity. This sensitises you to the affective dimension of your learning. It allows you to build a picture of yourself as a learner and as a student. NB: This reflection allows you to identify what and how you like to learn – the aspects of the case and the topics that you enjoy, and those you do not; whether you like clinic duty, case file work, lectures, or research and reading; whether you enjoy group work or independent study.	Student reply	Student reply	Student reply

LEARNED Make brief notes on all that you think you learned from clinical experience, the lecture, consultation, or research and reading and/or anything related to the case on which you worked. NB: Through these notes, you will be making your learning a conscious process, which improves both learning quantity and quality. When we fail to do this, we run the risk of leaving all learning behind as soon as we walk away from that clinical consultation or lecture or close that book. Feel free to make this section of your review as detailed and/or concise as you wish.	Student reply	Student reply	Student reply
GOAL SETTING Make brief notes about what you will do next. As no exercise will ever teach you all there is to know on a subject, you should always be thinking: What next?	Student reply	Student reply	Student reply
Clinician's response			

4 4 Feedback on Reflection

It is essential to provide students with feedback on the assessment of their reflective journals, irrespective of whether such assessment is formative or summative, as this will increase their understanding of professionalism, which is a valuable pedagogical tool in itself. Hyams insists that reflective work should be assessed, as graded assessment provides a structure for feedback, which builds and improves students' skills as insightful learners.[41]

Puga[42] in turn states that "the aim of adding a [c]linical component to legal education is to offer a true reflective training academy on th[e] [legal] practice, in a structured legal education laboratory, with *academic*

41 Hyams "On teaching students to 'act like a lawyer': What sort of a lawyer?" 2008 *Int'l J. Clinical Legal Educ.* 30.

42 "Challenges for legal clinics in Argentina" 2003 *Law Teacher* 245, 246.

supervision of students' reflective practice" (own emphasis), which also implies a certain measure of feedback.

4 5 Should Reflection Indeed be Assessed?

The authors agree with Ledvinka's view[43] that for many students, learning is driven largely by assessment and that students will view reflection as less important and potentially expendable if not assessed. Her explanation is sensible and well-founded:

> "[N]ot only are we assessing the student's substantive knowledge and skills, but also the learning journey he or she has taken from the beginning to the end of the course. In order to assess the learning journey, we must have some evidence that it took place and what it encompassed. [Written] reflection provides this evidence".[44]

Thus, where students are required to keep regular reflective journals, these journals need to be assessed rigorously in order to ensure academic integrity.[45]

5 Conclusion

It is common cause that rigorous assessment of the CLE course is mandatory if it bears credits towards the LLB degree.

This article started out by indicating the difference between summative and formative assessment, as well as its appropriate application, followed by a discussion of the parameters for assessment and mark allocation, and students' experience of these. Against that backdrop, an alternative form of assessment not widely used in South Africa at present, namely reflective journals, was proposed. Considering that this is a fairly new concept in the South African context, the authors set out to explore students' views on the use of reflective journals, and to determine the essence behind and methods for their application. Further issues touched on included feedback to students on their journal entries and the question of whether reflective journal entries should indeed be assessed. As a practical value-added element of the research, a suggested draft of an instructive reflective journal was also proposed.

Therefore, after diligent scrutiny of the applicability of reflective journals as a form of assessment, and being mindful of the unique environments within which our legal clinics operate, it is submitted that reflective journals can be successfully introduced in South African CLE courses. It is hoped that this research will motivate and inspire action in this regard.

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43 2006 *Int'l J. Clinical Legal Educ.* 39, 40.
44 *Ibid.*
45 Bender *et al* 78.

Regional harmonisation of international sales law *via* accession to the CISG and the importance of uniform interpretation of the CISG*

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OPSOMMING

Streeksharmonisering van Internasionale Koopreg via Toetrede tot die Weense Koopverdrag en die Belangrikheid van Eenvormige Interpretasie van die Verdrag

Internasionale unifisering of harmonisering van substantiewe reg is in die afgelope paar dekades primêr deur middel van internasionale verdrae teweeggebring. In die veld van internasionale koopkontrakte vir roerende goedere, is die Weense Koopverdrag 'n invloedryke internasionale verdrag wat die internasionale unifisering van die reg in dié veld ten doel het. Unifisering of harmonisering van substantiewe reg by wyse van 'n internasionale verdrag kan egter slegs bewerkstellig word indien die verdrag eenvormig in die verskillende lidlande geïnterpreteer word. Artikel 7(1) van die Weense Koopverdrag is die verdrag se interpretasieklousule en vereis dat, eerstens, die internasionale karakter van die Weense koopverdrag, tweedens, die noodsaaklikheid daarvan om eenvormigheid van die verdrag se toepassing na te streef en derdens, die behoud van goeie trou in internasionale handel, in die interpretasie van die verdrag in ag geneem moet word. Die eerste interpretasievoorskrif het tot inhoud dat daar aan die verdrag se bepalings 'n outonome betekenis geheg moet word – sonder verwysing na regskonsepte en instellings van nasionale jurisdiksies. Die tweede interpretasievoorskrif bevestig die feit dat eenvormige toepassing van die verdrag slegs by wyse van eenvormige interpretasie van die verdragsbepalings bewerkstellig kan word. In hierdie verband is dit van kardinale belang dat jurisdiksies in die interpretasie van die verdrag se bepalings, interpretasies van ander jurisdiksies in ag neem. Op die wyse ontstaan daar 'n internasionale gesprek ten aansien van die interpretasie van die verdrag wat eenvormige interpretasie bevorder. Daar bestaan verskeie omvattende elektroniese databasisse waarop nasionale Weense Koopverdraguitsprake beskikbaar gestel word en hierdie feit maak dit daagliks makliker vir nasionale howe om relevante uitsprake van ander jurisdiksies in ag te neem. Die derde interpretasievoorskrif in artikel 7(1) vereis dat die verdrag se bepalings op so 'n wyse geïnterpreteer moet word dat die toepassing van die bepalings tot redelike en billike resultate lei. In lig van die feit dat artikel 7(1) van die Weense Koopverdrag nie 'n

* This article is based on research conducted for the author's thesis *The Vienna Sales Convention and Private International Law* (2010 UJ). An abbreviated version of this article was presented at the Unisa International Conference on the Use of UNCITRAL Instruments in Promoting Regional Harmonization of Trade Law held from 26-27 May 2014.

teoretiese interpretasiemetodologie voorskryf nie, is dit van belang dat daar na die relevante bepalings van die 1969 Verdragsregkonvensie verwys word. Die interpretasiemetodologie soos toegepas op die Weense Koopverdrag word in hierdie bydrae ontleed. Die gevolgtrekking word gemaak dat eenvormige interpretasie van die Weense Koopverdrag inderdaad moontlik is indien daar aan die vermelde interpretasie voorskrifte gehoor gegee word. Waar dit die geval is, sou die Weense Koopverdrag 'n geskikte instrument wees om internasionale en regionale harmonisering van die reg aangaande internasionale koopkontrakte teweeg te bring. Daar word dus aan die hand gedoen dat alle SAOG-lede lidlande van die Weense Koopverdrag word.

1 Introduction

The main criterion for evaluating the success of any instrument purporting to bring about international or regional harmonisation of legal norms within a certain field is the degree to which this instrument enhances certainty in the particular field.

A method of harmonising law employed frequently over the past several decades is the international convention.[1] There are advantages and disadvantages to harmonising or unifying substantive law *via* conventions. The main advantage is the fact that a contracting state is under an international law obligation to give effect to an international convention and it would require all contracting states to adapt their domestic law to comply with this obligation. This clearly promotes international or regional harmonisation of substantive law in a certain field. It is in this context that the adoption of the United Nations Convention on Contracts for the International Sale of Goods (CISG)[2] by all SADC states is supported in order to effect regional harmonisation of international sales law.

However, "the adoption of the CISG is only the preliminary step towards the ultimate goal of unification of the law governing the international sale of goods. The area where the battle for international unification will be fought and won, or lost, is the interpretation of the CISG's provisions".[3] Article 7(1) is the CISG's interpretation provision and requires that "[i]n the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity

1 Diamond "Harmonization of Private International Law Relating to Contractual Obligations" *Recueil des Cours. Collected Courses of the Hague Academy of International Law* 1986 IV (1987) 241 243; Rose "The challenges for uniform law in the twenty-first century" 1996 *Revue de Droit Uniformel Uniform Law Review* 9 12.

2 United Nations Convention on Contracts for the International Sale of Goods, 1980-04-11, Vienna, UN Document A/CONF.97/18: 1489 UNTS 3; 1980 *International Legal Materials* 668.

3 Felemegas *The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation* (2000) 13, available on the Pace CISG website at http://www.cisg.law.pace.edu/cisg/biblio/felemegas.html (accessed 2014-06-02).

in its application and the observance of good faith in international trade". In this contribution, article 7(1) of the CISG will be analysed in detail in the context of the fact that uniform interpretation of the Convention's provisions is necessary to bring about effective harmonisation of international sales law.

2 Article 7(1) of the CISG

2 1 General

Article 7(1) establishes the principle of autonomous interpretation[4] which requires the CISG to be interpreted "free from any preconceptions based on domestic law".[5] Article 7(1) of the Convention does not prescribe a method of interpretation, it merely provides aims[6] or goals and principles[7] of its interpretation.

According to one commentator, article 7(1) emphasises the fact that the CISG remains an autonomous body of law even after its incorporation into the different national legal systems of the contracting states.[8]

It has also been stated that article 7(1)'s principles create two rules of interpretation, namely that the "homeward trend" in interpretation should be eliminated and that foreign CISG precedents should be considered.[9]

2 2 International Character of the CISG

Firstly, article 7(1) requires that the international character of the CISG has to be taken into account when interpreting its provisions. This instruction refers to the autonomous interpretation requirement[10] of the CISG, the fact that the Convention "constitutes its own legal cosmos"[11] and is to be interpreted without reference to the concepts and legal institutions of domestic legal systems.[12] It has also been remarked that

4 Eiselen in Janssen & Meyer (eds) *CISG Methodology* (2009) 61 74; Schwenzer and Hachem in Schwenzer (ed) *Schlechtriem and Schwenzer. Commentary on the UN Convention on the International Sale of Goods (CISG)* (2010) 120 122 (par 5).
5 Eiselen 74.
6 Magnus in Janssen & Meyer (eds) *CISG Methodology* (2009) 52.
7 Eiselen 74.
8 Bonell in Bianca and Bonell *Commentary on the International Sales Law. The 1980 Vienna Sales Convention* (1987) 65 73.
9 Eörsi in Galston & Smit (eds) *International Sales. The United Nations Convention on Contracts for the International Sale of Goods* (1984) 2-1 2-5.
10 Schwenzer & Hachem 123 (par 8).
11 Magnus 40.
12 Enderlein and Maskow *International Sales law. United Nations Convention on Contracts for the International Sale of Goods. Convention on the Limitation Period in the International Sale of Goods* (1992) 55.

this provision prohibits recourse to methodological theories of interpretation of domestic texts.[13]

Instead of having regard to domestic legal concepts for interpretation, taking the international character of the CISG into account entails that one should rather look to other international documents as interpretational aids.[14] In this regard, reference may be made to other relevant conventions as well as other international instruments such as the UNIDROIT Principles.[15]

Another aspect of the international character of the CISG is the fact that the Convention employs its own set of "neutral" or a-national terminology in order to enhance its autonomous interpretation.[16] This terminology reflects the fact that the CISG governs international transactions. An example of such terminology may be found in the CISG provision governing the transfer of the risk.[17] According to article 67(1), "the risk passes to the buyer when the goods are *handed over* to the first carrier for transmission to the buyer in accordance with the contract of sale".[18]

Honnold argues that taking the international character of the CISG into account also requires one to have due regard to its legislative history.[19]

2 3 Promotion of Uniformity of the CISG's Application

Secondly, article 7(1) mandates that the promotion of uniformity of the CISG's application has to be borne in mind during its interpretation.

It is widely acknowledged that uniform application of the CISG is dependent on its uniform interpretation by various fora.[20] In turn, uniform interpretation of the CISG depends upon the extent to which fora take cognisance of foreign "precedents" in this regard.[21] Certain authors

13 Schwenzer & Hachem 123 (par 8).
14 Enderlein & Maskow 55.
15 The current edition of the UNIDROIT Principles is the 2010 edition. An electronic copy may be accessed at http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf (accessed 2014-05-18).
16 Felemegas in Felemegas (ed) *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law* (2007) 1 20-21.
17 Felemegas (2007) 20.
18 Own emphasis.
19 Honnold *Uniform Law for International Sales under the 1980 United Nations Convention. Edited and updated by Harry M Flechtner* (2009) § 88 (hereinafter referred to as Honnold–Flechtner).
20 Bonell 866; Magnus 41; Note "Unification and certainty: The United Nations Convention on Contracts for the International Sale of Goods" 1983/1984 *Harvard Law Review* 1984 1998.
21 Note 1998; see Andersen "Uniform international sales law and the global *jurisconsultorium*" 2004/2005 *Journal of Law and Commerce* 159 for a general discussion in this regard.

are of the opinion that the latter does not and will not happen.[22]

However, article 7(1) of the CISG directs that in its interpretation, "regard is to be had to its international character and to the need to promote uniformity in its application". Several authors deduce from this provision that fora in contracting states are under a treaty obligation to take foreign CISG jurisprudence into account when interpreting the Convention.[23] Lookofsky states more broadly that contracting states are under the obligation to interpret the CISG with regard to its international character.[24]

It has been stated that, in taking foreign decisions into account, a forum "engages in an international dialogue"[25] on the CISG which will promote uniform interpretation and application of the Convention. In order to take foreign decisions into account, it will require willingness by fora to discard the sanctity of their national legal precedents.[26] There exists no international rule of *stare decisis*, however, foreign CISG decisions should at least be regarded by courts as of persuasive value.[27]

An analysis of reported case law on the CISG shows that very few courts up to date have analysed and taken the decisions of foreign courts into account.[28] Fora in CISG contracting states should be encouraged to take cognisance of relevant foreign decisions, since this would be the only manner in which the aim of uniform application of the CISG can be reached. Online CISG databases are expanding on a daily basis and make an ever-growing number of judgments available to judges at the click of a button. Mention may be made of UNCITRAL's case law information system, known under the acronym CLOUT (Case Law on UNCITRAL

22 See, for example, Bridge "Unification and certainty: The United Nations Convention on Contracts for the International Sale of Goods" 1983/1984 *Harvard Law Review* 55 77 and Note 1998.

23 Bridge 87 points out that CISG contracting states have committed themselves to uniform application of the Convention. See also Magnus 41.

24 Lookofsky *Understanding the CISG. A Compact Guide to the 1980 United Nations Convention on Contracts for the International Sale of Goods* (2008) 30.

25 Cook "The UN Convention on Contracts for the International Sale of Goods: A mandate to abandon legal ethnocentricity" 1996/1997 *Journal of Law and Commerce* 257 262.

26 Bridge 78 states that "[t]he skill lies in being able to stand outside one's national legal culture when applying the CISG". Cook 263 states in this regard that the CISG requires courts to "abandon legal ethnocentricity".

27 Felemegas (2007) 16.

28 Two examples of cases that refer to foreign case law extensively are the decisions by the *Tribunale Civile di Monza* (Italy), 1993-01-14: case number 21 (UNILEX) and the *Tribunale di Vigevano* (Italy), 2000-07-12: case number 387 (UNILEX). In this article reference will be made to UNILEX CISG cases. It is, however, not possible to search the UNILEX CISG case law database by UNILEX case number only. The following Uniform Research Locator needs to be utilised: http://www.unilex.info/case.cfm?pid = 1&do = case&id = 387&step = Fulltext. The "387" in the URL refers to the UNILEX case number. The UNILEX cases referred to in this article may be accessed by substituting the "387" in the URL provided with the relevant case number.

Texts). CLOUT functions on the basis of reporting offices in CISG contracting states transmitting decisions to the Commission's Secretariat. The original decisions are then made available at the Secretariat and an abstract of the decision is translated into all the CISG's working languages. The CLOUT information system may be accessed online[29] and the *UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods* was first published in 2004 – updated versions were subsequently published in 2008 and 2012. The completeness of this information system depends on the input of the national reporters. A possible suggestion for ensuring that all relevant decisions are submitted to the Secretariat is including a Protocol in the CISG akin to Protocol II to the Lugano Convention,[30] imposing a treaty obligation upon contracting states to provide details of CISG judgments to the Commission.[31]

Several other comprehensive CISG case law databases are also available online. The UNILEX database also deserves mentioning.[32] The advantage of UNILEX is the fact that most decisions are available in full text in their original language. The Pace University CISG website[33] provides translations of a large and constantly growing number of CISG decisions through the Queen Mary Case Translation Programme.[34] Lastly, mention may be made of CISG-online,[35] the referencing system used in the Schlechtriem/Schwenzer[36] commentary.

In light of the ready availability of CISG case law, it is possible to cultivate and enhance uniform interpretation and application of the CISG.[37]

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29 The internet address is http://www.uncitral.org/uncitral/en/case_law.html (accessed 2014-05-14).

30 Convention of 16 September 1988 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. The text of the Lugano Convention and its protocols are available at http://curia.europa.eu/common/recdoc/convention/en/c-textes/lug-idx.htm (accessed 2014-05-15).

31 Bridge 76.

32 Available at http://www.unilex.info (accessed 2014-05-15). The editor-in-chief is Prof MJ Bonell. UNILEX is based on a research project started in 1992 by the Centre for Comparative and Foreign Law Studies – a joint venture of the Italian National Research Council, the University of Rome I La Sapienza and the International Institute for the Unification of Private Law (UNIDROIT). The project has been financed by the Italian National Research Council. Printed versions of UNILEX are available from Transnational Publishers.

33 Accessible at http://www.cisg.law.pace.edu (accessed 2014-05-14).

34 Accessible at http://www.cisg.law.pace.edu/cisg/text/queenmary.html (accessed 2014-04-14).

35 Accessible at http://www.cisg-online.ch (accessed 2014-05-15). It is currently edited by Prof Ingeborg Schwenzer of the University of Basel, Switzerland.

36 See 4 *supra*.

37 De Ly *International Business Law and the Lex Mercatoria* (1992) 12 remarks that the CISG is in the process of maturing "into a more reliable and more self-contained system where uniform patterns of interpretation and application prosper".

Uniform interpretation and application of the CISG would be greatly aided by the creation of a supranational commercial court charged with the task of interpreting the Convention. Unfortunately, there exists no realistic chance of such a court ever coming into being.[38]

Several commentators argue that it is not only case law that has a part to play in uniform interpretation of the CISG. Academic literature, even though not a formal source of law and not mentioned in article 7(1), is also influential.[39] In this regard, special reference needs to be made to the work of the CISG Advisory Council,[40] which has set itself the aim of promoting uniform interpretation of the CISG.

2 4 Observance of Good Faith in the CISG's Interpretation

Thirdly, article 7(1) requires the observance of good faith in the interpretation process. It is a matter of controversy whether good faith in the context of the CISG refers only to its interpretation[41] or whether it constitutes a general principle underlying the CISG and places a general duty of good faith upon parties.[42] Furthermore, the meaning and use of the principle of good faith differ in common law and civil law jurisdictions.[43] Therefore it is all the more important that good faith should be awarded an "autonomous" meaning in the context of the CISG. It has been stated that the good faith requirement in article 7(1) "is the commandment to interpret the provisions of the CISG in a way that their application leads to reasonable and fair solutions".[44] Several authors regard this requirement as being linked to the "pervasive Convention standard of reasonableness"[45] – in other words, the observation of goods faith in the Convention's interpretation requires a reasonable interpretation.

3 The Role of the Vienna Convention on the Law of Treaties in the Interpretation of the CISG

In light of the fact that article 7(1) of the CISG does not prescribe the theoretical method of interpretation to be utilised, guidance on this

38 Bridge 75.
39 Bridge 77-78; Felemegas (2007) 18; Honnold–Flechtner § 92; Schwenzer and Hachem 125 (par 12).
40 The CISG Advisory Council is a group of CISG scholars, first established in 2001. The Council publishes opinions on certain CISG matters in order to promote proper understanding and uniform interpretation of the CISG. More information may be accessed on the Council's website, http://www.cisgac.com (accessed 2014-04-16).
41 This view is supported by Honnold–Flechtner § 94; Schwenzer and Hachem 127 (par 16).
42 A view supported by Bonell 84-85; Enderlein and Maskow 54-55; Lookofsky 37.
43 Magnus 43.
44 *Ibid*.
45 See Lookofsky 37 for this phrase.

matter would have to be obtained elsewhere. Bearing in mind that uniform interpretation of the CISG is of utmost importance for its uniform application, regard must be had to a universally accepted framework of interpretational guidelines. These guidelines are to be found in the Vienna Convention on the Law of Treaties.[46]

Several scholars contest the application of the 1969 Vienna Convention's provisions to the CISG. One argument in this regard is that articles 31–33 of the 1969 Convention only apply in respect of the interpretation of articles 89–101 of the CISG, but that the interpretation of the remainder of the Convention is governed by article 7.[47]

However, article 1 of the Treaties Convention provides that it is applicable to treaties between states and that the CISG therefore falls under its scope of application. Contracting states to both the 1969 Convention and the CISG are therefore certainly bound by the provisions of the Treaty Convention when interpreting the CISG. Furthermore, numerous non-contracting states to the 1969 Convention also adhere to its provisions. It has been argued that the Treaties Convention codifies principles of customary international law.[48] Indeed, several decisions handed down by the International Court of Justice regard the principles embodied in articles 31–32 of the Treaties Convention as customary international law.[49] A number of commentators also support reference to the 1969 Treaties Convention to provide guidelines for the interpretation of the CISG.[50]

Articles 31–33 of the 1969 Treaties Convention therefore provides the "outer frame" of the method to be employed in interpreting the CISG.[51]

Article 31 of the Treaties Convention contains the general rule of interpretation. According to article 31(1), "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". This provision contains three elements to be considered in the interpretation of a treaty: its text, context and object and purpose.[52] It may be assumed that the ordinary meaning of words most likely reflects what the parties intended – unless the contrary is proven.[53] The ordinary meanings of terms are to be established in the context of the treaty and in light of its object and purpose. According to Aust, the good faith requirement for interpretation entails that, if the ordinary meaning of the

46 Vienna Convention on the Law of Treaties, 1969-05-23, Vienna, 1155 UNTS 331, 1969 *International Legal Materials* 679.
47 Volken in Volken & Šarčević (eds) *International Sale of Goods: Dubrovnik Lectures* (1986) 19 34-35.
48 Aust *Modern Treaty Law and Practice* (2007) 12-13; Magnus 47.
49 See Aust 232 n 10 for references to ICJ cases regarding articles 31–32 of the Treaties Convention as an embodiment of customary international law.
50 Eiselen 62; Lookofsky 32; Magnus 47.
51 Magnus 52.
52 Aust 234.
53 *Idem* 235

words seems clear, but its application would lead to a result that would be "manifestly absurd or unreasonable", another interpretation needs to be found.[54] Article 31(1) refers to two methods of interpretation: the literal or textual method and the purposive or teleological method.

Article 31(2) provides more information on the context of the treaty to be taken into account during the interpretation process. The important principle in this regard is the fact that one must look at the treaty as a whole, including its preamble and annexes.[55]

Article 31(4) allows for a special meaning to be attached to a term if it is proved that the parties intended a certain term to bear a special meaning instead of its literal meaning.

Article 32 authorises the use of supplementary means of interpretation in cases where following the rules in article 31 leaves the meaning ambiguous or obscure or if it leads to a result which is manifestly absurd or unreasonable. Such supplementary means of interpretation include, but are not limited to, *travaux préparatoires* and the circumstances of the treaty's conclusion. The CISG has a well-documented legislative history, which may therefore be consulted as a supplementary means of interpretation.

Article 33(1) provides that the text of a treaty authenticated in two or more languages is equally authoritative in each language, unless the treaty contains a provision to the contrary. The CISG has six official languages, which are all equally authoritative.[56]

4 A "CISG-specific"[57] Interpretation – a Method of Interpretation for the CISG

The Treaties Convention provides general rules of interpretation that may be used in respect of any convention. It remains necessary to contextualise and individualise these general rules for purposes of the CISG's interpretation.

It is argued that article 7(1) of the CISG takes precedence over articles 31–33 of the Treaties Convention in matters concerning the CISG's interpretation.[58] However, it has been noted that article 7(1) of the CISG does not specify a method for interpretation.

It is generally accepted that, in the interpretation of the CISG, the starting point is the wording of the disputed provision or term.[59] At the

54 *Idem* 234.
55 *Ibid.*
56 The official languages of the CISG are Arabic, Chinese, English, French, Russian and Spanish. See the declaration at the end of the official CISG text.
57 See Magnus 52 for this wording.
58 Magnus 51.
59 *Idem* 53, Lookofsky 31.

outset, the wording should be accorded its "ordinary meaning"[60] – "the meaning generally used and understood in the CISG Community".[61] If it is possible to establish the "ordinary meaning" of such a term or provision, several commentators regard the task of interpretation as having been completed.[62] It has been argued that, only if literal interpretation provides no answer, should one attempt to establish the purpose of the provision and this should be done with reference to the *travaux préparatoires*.[63]

However, there are authors who criticise the strict literalist approach and argue that compliance with article 7(1) requires that interpreters approach the text of the CISG "with as many interpretational aids as possible to ensure that they take sufficient notice of the international context of the Convention and the underlying purposes".[64]

When taking the context of the CISG into account, the text of the Convention as a whole needs to be considered. In doing so, the interpreter would, *inter alia*, examine the preamble of the CISG, which contains the Convention's object and purpose. In this way, the teleological method of interpretation is also applied.[65]

In the context of the CISG, supplementary means of interpretation would primarily include the Convention's documentary history and relevant case law on the provision to be interpreted. It is submitted that, in light of the obligation placed on the interpreter by article 7(1) to take the CISG's international character and the need to promote uniformity in its application into account, international CISG jurisprudence is elevated to a primary source of interpretation. Other relevant international conventions[66] and instruments also form part of the CISG's context and constitute important supplementary means for its interpretation. It has been argued that contextual interpretation of the CISG should even allow reference to the UNIDROIT Principles.[67]

5 Exclusion of Article 7(1)

Bonell[68] raises the question whether the provisions of article 7(1) may be

60 Compare article 31(1) of the Treaties Convention.
61 Magnus 53.
62 *Ibid*, Schwenzer & Hachem 130 (par 21).
63 Schwenzer & Hachem 130 (par 22).
64 Eiselen 88-89.
65 Also referred to in article 31(1) of the Treaties Convention alongside the literalist approach.
66 Magnus 55 refers to an "interconventional" interpretation that is helpful when interpreting uniform law conventions on private law.
67 Magnus 55.
68 Bonell 93.

derogated from or excluded in terms of article 6.[69] Bonell argues that derogation from or exclusion of article 7(1) should not be allowed. He advances the argument that, allowing parties to agree on rules of interpretation applicable to domestic legislation disregards the CISG's international character and would detract from the Convention's main aim of providing uniform rules for the international sale of goods.[70]

Article 6 permits derogation of any provision except article 12 (if applicable). At first glance it therefore seems as though article 7(1) may indeed be excluded or its effect varied by the parties. However, even if this is done, the preamble to the CISG echoes the goals and aims enunciated in article 7(1). It is submitted that, if the CISG is applicable and parties exclude or vary article 7(1), a forum charged with the interpretation of the contract is still bound to interpret the CISG in line with its purpose of providing uniform rules for the international sale of goods.

6 Conclusion

It is submitted that article 7(1) indeed requires the interpreter to venture beyond a narrow literalist approach. An integrated approach to the interpretation of the CISG is supported in which the wording, object and purpose and context of the provision are analysed before a conclusion is reached. This approach to interpretation would enhance uniform application of the CISG.

Magnus remarks "that under an overall perspective a rather far-reaching, self-induced uniformity of application of the CISG of reasonable quality has been achieved".[71]

It is reasonable to conclude that the future uniform interpretation and application of the CISG seems decidedly possible in view of the CISG's well-documented history, constantly growing body of case law and abundance of commentaries and the fact that most jurisdictions regard these aids as admissible in interpreting conventions.[72]

Accession to the CISG by all jurisdictions in a certain region would certainly improve regional harmonisation of international sales law. As has been argued previously, all states in the SADC region should therefore be encouraged to accede to the CISG.[73] However, regional harmonisation of international sales law by accession to the CISG will

69 Article 6 of the Convention provides that the parties may exclude the application of the CISG or, subject to article 12, derogate from or vary the effect of any of its provisions. See Wethmar-Lemmer "Party autonomy and international sales contracts" 2011 *TSAR* 431 for an analysis of article 6.
70 Bonell 94.
71 Magnus 38.
72 Eiselen 89.
73 Wethmar-Lemmer "The important role of private international law in harmonising international sales law" 2014 *SA Merc LJ* 93 94.

only be achieved if the Convention's provisions are interpreted uniformly in the relevant jurisdictions. It is concluded that, if heed is paid to the interpretation directives in the CISG, harmonised or possibly even uniform interpretation is indeed possible.

A historical overview of the regulation of market abuse under the Securities Services Act 36 of 2004*

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OPSOMMING

'n Historiese Oorsig van die Regulering van die Mark Misbruik Onder die Securities Services Act 36 van 2004

Die gevolge van die misbruik van die mark word reeds in 'n aantal van die wêreld se finansiële markte gevoel. Suid-Afrika is nie 'n uitsondering nie. 'n Reputasie van hoë vlakke van die mark misbruik praktyke wat verband hou met die Suid-Afrikaanse finansiële markte in die middel van die 1990's is 'n goeie voorbeeld. In 'n poging om die misbruik van die mark in Suid-Afrika te bekamp, is die Securities Services Act 36 van 2004 verorden ten einde al die gebrekkige bepalings van die Wet op Binnekennistransaksies 135 van 1998, te herroep en te verbeter. Dit is teen hierdie agtergrond dat hierdie artikel 'n oorsig bied sowel as 'n ontleding van die doeltreffendheid van die mark misbruik regulerende raamwerk in terme van die Securities Services Act 36 van 2004 te ondersoek ten einde vas te stel of dit openbare vertroue van beleggers in die Suid-Afrikaanse finansiële markte herstel het. Laasgenoemde word gedoen om bewustheid te verhoog aan die kant van die betrokke rolspelers ten aansien van die vraag of die Suid-Afrikaanse mark misbruik wetgewing behoorlik toegepas word. Die artikel bespreek ook ander maatreëls wat aangewand kan word, waar nodig, ten einde die betrokke Suid-Afrikaanse mark misbruik wetgewing sowel as die toepassing daarvan te verbeter.

1 Introduction

The effects of market abuse have been felt in a number of financial markets globally.[1] South Africa is not an exception.[2] A reputation of high

* Influenced in part, by Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* (LLD Thesis 2012 NMMU) 51-71. In this regard, I wish to thank Professor Lawack.

1 Myburgh & Davis "The Impact of South Africa's Insider Trading Regime: A Report for the Financial Services Board" (2004-03-25) 8 http://www.genesis-analytics.com/public/FSBReport.pdf (accessed 2013-02-09); generally see Bhattacharya & Daouk "The World Price of Insider Trading" http://www.faculty.fuqua.duke.edu/~charvey/Teaching/BA453_2004/BD_Theworld.pdf (accessed 2013-06-19) & Van Deventer "Anti-Market Abuse Legislation in South Africa" (2008-06-10) 1-5 http://www.fsb.co.za/public/marketabuse/ FSBReport.pdf (accessed 2013-05-05).

2 Myburgh & Davis 8-13, Van Deventer 1-4.

levels of market abuse practices associated with the South African financial markets in the mid 1990s is a case in point.[3] In an attempt to effectively combat market abuse in the South African financial markets, the Securities Services Act[4] was enacted to repeal all the flawed provisions of the Insider Trading Act[5] and improve the enforcement of the market abuse prohibition in South Africa. It is against this background that this article provides an overview analysis of the effectiveness of the market abuse regulatory framework under the Securities Services Act to investigate whether it has enhanced market integrity and public investor confidence in the South African financial markets. This is done by examining whether the relevant market abuse legislation is being properly enforced.[6] This is also aimed at increasing awareness on the part of the relevant stakeholders. To this end, the article discusses other additional measures that can, where necessary, be incorporated into the relevant South African market abuse legislation to improve its enforcement.[7] Notably, three forms of market abuse, namely insider trading, prohibited trading practices (trade-based market manipulation) and the publication of false, misleading or deceptive statements relating to listed companies (disclosure-based market manipulation), are prohibited in South Africa.[8] However, notwithstanding the anti-market abuse efforts introduced by the Securities Services Act, more may still need to be done to increase the number of convictions and settlements in cases involving market abuse in South Africa.

3 *Idem* 11.

4 36 of 2004, hereinafter referred to as the Securities Services Act and it came into effect on 1 February 2005.

5 135 of 1998; hereinafter referred to as the Insider Trading Act.

6 See sub-paragraphs under paragraphs 2 1 & 2 2 below.

7 In spite of the paucity of convictions and settlements in civil and criminal cases involving market abuse, the legislature has relatively managed to improve and raise the South African financial markets up to a level that would make them more comparable to the highest standards of similar markets in the developed world and international best practice by enacting some definitions as well as civil and administrative sanctions against market abuse.

8 Ss 73; 75; 76 & 77 of the Securities Services Act; also see clauses 82; 84; 85; 86 & 87 of the Financial Markets Bill B-2011 (hereinafter referred to as the Financial Markets Bill); clauses 80; 82; 83 & 84 of the Financial Markets Bill B12-2012, hereinafter referred to as the Financial Markets Bill 2012 (I have employed the term "clause" to refer to the provisions of both the Financial Markets Bill & the Financial Markets Bill 2012) & ss 78; 80; 81 & 82 of the Financial Markets Act 19 of 2012, hereinafter referred to as the Financial Markets Act and it came into effect on 03 June 2013.

2 The Regulation of Market Abuse under the Securities Services Act 36 of 2004

2 1 Definitions of Selected Terms and Concepts

2 1 1 The Concept of Market Abuse

"Market abuse" was not expressly defined in the Securities Services Act. However, a number of practices that could give rise to criminal and civil liability for market abuse were simply stated in the Securities Services Act.[9] Three forms of market abuse, namely insider trading, trade-based market manipulation and disclosure-based market manipulation relating to listed securities were prohibited under the Securities Services Act. These market abuse practices were also outlawed in the Financial Markets Bill, the Financial Markets Bill 2012 and the Financial Markets Act but nonetheless the concept of market abuse was not defined in this Act and the afore-said Bills.[10]

Insider trading was specifically prohibited in the Securities Services Act.[11] For example, any person who knew that he had non-public price-sensitive information and who improperly disclosed it or encouraged or discouraged another person from dealing or who dealt directly or indirectly for his benefit or for the benefit of any other person in securities to which such information relates or where the price of such securities was likely to be affected by such dealing could incur criminal or civil liability for insider trading.[12] The same practices were outlawed in the Financial Markets Bill, the Financial Markets Bill 2012 and the Financial Markets Act.[13]

Trade-based market manipulation was further prohibited in the Securities Services Act.[14] Examples of activities that were deemed to be manipulative include executing a transaction with no beneficial change of ownership of the securities and entering orders into the market near the close of the market or during the auctioning process for the purpose of creating a deceptive appearance in that market.[15] The same approach was employed in the Financial Markets Bill, the Financial Markets Bill 2012 and the Financial Markets Act and accordingly, similar conduct that

9 Ss 73; 75; 76 & 77.
10 Clauses 81; 82; 84; 85; 86 & 87 of the Financial Markets Bill; clauses 80; 82; 83 & 84 of the Financial Markets Bill 2012 & ss 78; 80; 81 & 82 of the Financial Markets Act.
11 Ss 73 & 77; also see clauses 82 & 86 of the Financial Markets Bill; clauses 80 & 84 of the Financial Markets Bill 2012 & ss 78 & 82 of the Financial Markets Act.
12 Ss 73 & 77 respectively.
13 Clauses 82 & 86 of the Financial Markets Bill; clauses 80 & 84 of the Financial Markets Bill 2012 & ss 78 & 82 of the Financial Markets Act.
14 S 75.
15 A brief discussion on each of the sub-sections under s 75 will be carried out later.

amounts to, or that may be deemed to constitute trade-based market manipulation is outlawed.[16] Disclosure-based market manipulation was also prohibited under the Securities Services Act.[17] This prohibition on the making or publication of false, misleading or deceptive statements, promises and forecasts can be welcomed because such information often distorts the market price of securities, giving rise to direct or indirect prejudice to innocent market participants. The same practices were prohibited in the Financial Markets Bill, the Financial Markets Bill 2012 and the Financial Markets Act,[18] but nonetheless Internet-related manipulative disclosures were still not expressly outlawed in the aforementioned Act and Bills.

Notwithstanding the relatively new changes briefly stated above and the fact that the Securities Services Act was enacted as a separate piece of legislation that consolidates all previous market abuse laws, the regulation and enforcement of the market abuse ban in South Africa have remained scant and inconsistent to date.[19] This could have been *inter alia* aggravated by the fact that it would only amount to market abuse if the accused person knew that he contravened, directly or indirectly, the relevant provisions of the Securities Services Act. This suggests that the knowledge of the market abuse offence in question was required on the part of the offenders before any liability can be imputed on them. Nonetheless, the Securities Services Act, the Financial Markets Bill, the Financial Markets Bill 2012 and the Financial Markets Act did not provide any presumptions which could be used to enhance the prosecution of market abuse cases in South Africa. It is suggested that enacting a statutory provision for a definition of the concept of "market abuse" involving all the elements of this offence (how it is committed), many types of market abuse and presumptions could improve the enforcement of the market abuse prohibition in South Africa. Moreover, notwithstanding the difficulties that might have been encountered in relation to factors like repetition of same provisions, double jeopardy and over-criminalisation of market abuse practices in different statutes, the mere consolidation of the market abuse provisions into the Securities Services Act on its own did not sufficiently improve the enforcement of the market abuse ban in South Africa.[20] Given the fact that the Financial Markets Bill, the Financial Markets Bill 2012 and the Financial Market Act's market abuse provisions duplicated some of the flaws contained in the Securities Services Act, it remains to be seen whether the Financial Markets Act's market abuse prohibition will enhance the combating of market abuse in South Africa.

16 Clause 84 of the Financial Markets Bill; clause 82 of the Financial Markets Bill 2012 & s 80 of the Financial Markets Act.
17 S 76.
18 Clause 85 of the Financial Markets Bill; clause 83 of the Financial Markets Bill 2012 & s 81 of the Financial Markets Act.
19 Van Deventer 1-4.
20 *Ibid*.

2 1 2 The Meaning of "Market Corner" and "Market Abuse Rules"

"Market corner" was defined as any arrangement, agreement, commitment or understanding involving the purchasing, selling or issuing of securities listed on a regulated market by which a person, or a group of persons acting in concert, acquires direct or indirect beneficial ownership of, or exercises control over, or is able to influence the price of securities listed on a regulated market; and where the effect of the arrangement, agreement, commitment or understanding is or is likely to be that the trading price of the securities listed on a regulated market, as reflected through the facilities of a regulated market, is or is likely to be abnormally influenced or arbitrarily dictated by such person or group of persons in that the said trading price deviates or is likely to deviate materially from the trading price which would otherwise likely have been reflected through the facilities of the regulated market on which the particular securities are traded.[21] This definition discourages market manipulation through the creation of a false impression of the volumes traded in securities or abnormal and artificial trading prices in listed securities. Even so, a "market corner" could only be formed after an arrangement or agreement in respect of the selling, issuing or purchasing of securities listed on a regulated market was made by a person or the persons involved. Instances where a "market corner" could have been formed in respect of, and/or influenced by securities traded in the over the counter markets were not expressly outlawed under the Securities Services Act. This flaw was retained in the Financial Markets Bill, the Financial Markets Bill 2012 and the Financial Markets Act.[22]

"Market abuse rules" was defined to include the duties of the Financial Services Board to make relevant rules concerning the administration of market abuse by the Financial Services Board and the Directorate of Market Abuse; the manner in which investigations of market abuse are to be conducted; the notification of any civil monetary compensatory amounts received; the procedure for the lodging and proof of claims; the administration of trust accounts and the distribution of payments in respect of claims; the meetings of the Directorate of Market Abuse which are generally designed to ensure that the Financial Services Board and the Directorate of Market Abuse are able to perform their functions dealing with the manner in which inside information should be disclosed and with the conduct expected of persons with regard to such information.[23] The Financial Services Board has discretion to make such "market abuse rules" only after consulting with the Directorate of Market

21 S 72 of the Securities Services Act; also see clause 81 of the Financial Markets Bill; clause 79 of the Financial Markets Bill 2012 & s 77 of the Financial Markets Act.

22 Clause 81of the Financial Markets Bill; clause 79 of the Financial Markets Bill 2012 & s 77 of the Financial Markets Act.

23 S 82(2)(g)(i) – (vi) of the Securities Services Act; also see clause 91(2)(f)(i) – (vi) of the Financial Markets Bill; clause 86(2)(f)(i) – (vi) of the Financial Markets Bill 2012 & s 84(2)(f)(i) – (vi) of the Financial Markets Act.

Abuse. Besides this, no express provision was made in the Securities Services Act to empower the Financial Services Board to make its own market abuse rules pertaining to the enforcement of criminal and administrative sanctions for market abuse offences. This flaw was retained in the Financial Markets Bill, the Financial Markets Bill 2012 and the Financial Markets Act.[24]

2 1 3 The Meaning of "Person" and "Regulated Market"

The term "person" was defined in the Securities Services Act to include a partnership and any trust.[25] This implies that market abuse offences could now be committed by an insider or a "person" as defined who misuse inside information and not by "individuals" alone. Accordingly, an "insider" means a person who has inside information through being a director, employee or shareholder of an issuer of securities listed on a regulated market to which the inside information relates;[26] or having access to such information by virtue of employment, office or profession;[27] or where such person knows that the direct or indirect source of the information was an insider as contemplated in the Securities Services Act.[28] Inside information means specific or precise information which has not been made public and which is obtained or learned by an insider and which, if it were made public, would be likely to have a material effect on the price or value of any security listed on a regulated market.[29] However, Jooste argues that the definition of "person" leaves some doubt as to whether it also includes a corporate[30] or any other legal entity.[31] The author agrees in part with Jooste, and submits that the confusion is caused by the employment of the phrases "he or she" in some market abuse provisions of the Securities Services Act.[32] This employment of the phrases "he or she" could imply that the definition of "person" is still limited to natural persons alone. This flaw

24 Clause 91(2)(f)(i) – (vi) of the Financial Markets Bill; clause 86(2)(f)(i) – (vi) of the Financial Markets Bill 2012 & s 84(2)(f)(i) – (vi) of the Financial Markets Act.

25 S 72; also see clause 81 of the Financial Markets Bill; clause 79 of the Financial Markets Bill 2012 & s 77 of the Financial Markets Act.

26 S 72(a)(i); also see clause 81(a)(i) of the Financial Markets Bill; clause 79(a)(i) of the Financial Markets Bill 2012 & s 77(a)(i) of the Financial Markets Act.

27 S 72(a)(ii); clause 81(a)(ii) of the Financial Markets Bill; clause 79(a)(ii) of the Financial Markets Bill 2012 & s 77(a)(ii) of the Financial Markets Act.

28 S 72(b); also see clause 81(b) of the Financial Markets Bill; clause 79(b) of the Financial Markets Bill 2012 & s 77(b) of the Financial Markets Act.

29 S 72; also see clause 81 of the Financial Markets Bill; clause 79 of the Financial Markets Bill 2012 & s 77 of the Financial Markets Act.

30 S 332(1) of the Criminal Procedure Act 51 of 1977 in this regard.

31 See the definition of "person" in s 2 of the Interpretation Act 33 of 1957. This doubt was probably caused by the reference to "he or she" in some provisions like ss 73 & 77 of the Securities Services Act. Also see Jooste "A Critique of the Insider Trading Provisions of the 2004 Securities Services Act" 2006 *SALJ* 437 438.

32 Ss 73 & 77.

remains unresolved in the Financial Markets Bill, the Financial Markets Bill 2012 and the Financial Markets Act.[33]

"Regulated market" means any market, whether domestic or foreign, which is regulated in terms of the laws of the country in which the market conducts business as a market for dealing in securities listed on that market.[34] This suggests that market abuse provisions had extra-territorial application. For example, any person who commits market abuse on a regulated foreign market say, by manipulating share prices or dealing on the basis of non public price-sensitive information relating to securities listed on such market while domiciled in South Africa, could be prosecuted in South Africa.[35] The application of the market abuse prohibition under the Securities Services Act was surprisingly not limited to situations where there is a territorial link between the actual commission of market abuse offences and South Africa. This status quo was retained under the Financial Markets Bill, the Financial Markets Bill 2012 and the Financial Markets Act.[36] Thus, even though this extra-territorial application appears to be a sound move for curbing cross-border market abuse activities, it has not been used more regularly, probably due to lack of adequate resources.[37] From a comparative perspective, one can argue that a restricted and more practical approach should have been adopted to meritoriously combat market abuse in South Africa.[38] Moreover, the market abuse prohibition should apply to transactions on foreign markets where a territorial link is present by virtue either of the fact that the offender is at the time physically present in South Africa, or was acting through an intermediary who is in South Africa or by virtue of the prohibited conduct occurring in South Africa.[39]

Nonetheless, the timeous enforcement and recognition of foreign judgements in cross-border market abuse cases is another challenge that could be associated with the extra-territorial application of market abuse provisions in South Africa. Consequently, it is submitted that the South African courts should recognise, where necessary, the relevant international law and foreign law as enshrined in the constitution.[40] Apparently, if a South African citizen who is an insider but is domiciled in New York, contacted a broker in South Africa to purchase any security

33 Clauses 82 & 86 of the Financial Markets Bill; clauses 80 & 82 of the Financial Markets Bill 2012 & ss 78; 80 & 82 of the Financial Markets Act.
34 S 72; also see clause 81 of the Financial Markets Bill; clause 79 of the Financial Markets Bill 2012 & s 77 of the Financial Markets Act.
35 Jooste 2006 *SALJ* 453.
36 Clause 81 of the Financial Markets Bill; clause 79 of the Financial Markets Bill 2012 & s 77 of the Financial Markets Act.
37 Loubser "Insider Trading and other Market Abuses (Including the Effective Management of Price-sensitive Information)" in the *Insider Trading Booklet* final draft (2006-10-02) 26-27 http://www.jse.co.za/public/insider/JSEbooklet.pdf (accessed 2012-10-10).
38 Jooste 2006 *SALJ* 453.
39 Cassim "Some Aspects of Insider Trading – Has the Securities Services Act 36 of 2004 Gone too Far?" 2007 *SA Merc LJ* 44 67.
40 S 39(1)(b) & (c) of the Constitution.

listed on the Johannesburg Stock Exchange Limited (the JSE) in order to conceal the illegal nature of such dealing, the Financial Services Board and/or the relevant court can co-operatively rely on the United States Securities and Exchange Commission to investigate and prosecute such person for market abuse. Moreover, when a judgement relating to such market abuse is handed down in South Africa, it will have extra-territorial force in the United States of America.

2 2 Prohibited Trading Practices and Penalties

2 2 1 Prohibition on "Trade-based Market Manipulation"

A number of trade-related manipulative practices were prohibited under the Securities Services Act.[41] For example, any person who directly or indirectly used or knowingly participated in the use of any manipulative, improper, false or deceptive practice of trading in a security listed on a regulated market, either for such person's own account or on behalf of another person, where such practice creates or might create a false or deceptive appearance of the trading activity in connection with or an artificial price for that security could be guilty of an offence.[42] Additionally, any person who placed an order to buy or sell listed securities which, to his knowledge could, if executed, have the effect of creating a false or deceptive appearance of the trading activity in connection with or an artificial price for such securities could be guilty of an offence.[43] Other examples of trading practices that were deemed to be manipulative include, among others, executing a transaction with no beneficial change of ownership of the securities;[44] entering an order to buy or sell a security on a regulated market knowing of a similar opposite order that has been entered, or will be entered,[45] with the intention of creating a deceptive appearance of active public trading in connection with or an artificial market price for that security;[46] entering on a regulated market, orders to buy or sell a security listed on that market at successfully higher or lower prices for the purpose of improperly

41 S 75; also see clause 84 of the Financial Markets Bill; clause 82 of the Financial Markets Bill 2012 & s 80 of the Financial Markets Act.

42 S 75(1)(a)(i) & (ii); also see clause 84(1)(a)(i) & (ii) of the Financial Markets Bill; clause 82(1)(a)(i) & (ii) of the Financial Markets Bill 2012 & s 80(1)(a)(i) & (ii) of the Financial Markets Act.

43 S 75(1)(b) & (2); also see clause 84(1)(b) & (2) of the Financial Markets Bill; clause 82(1)(b) & (2) of the Financial Markets Bill 2012 & s 80(1)(b) & (2) of the Financial Markets Act.

44 This practice is sometimes called a "wash trade". S 75(3)(a); also see clause 84(3)(a) of the Financial Markets Bill; clause 82(3)(a) of the Financial Markets Bill 2012 & s 80(3)(a) of the Financial Markets Act. See further Alcock "Market Abuse" 2002 *The Company Lawyer* 142 143.

45 S 75(3)(b); also see clause 84(3)(b) of the Financial Markets Bill; clause 82(3)(b) of the Financial Markets Bill 2012 & s 80(3)(b) of the Financial Markets Act.

46 The false trading practice need only create the false appearance of trading or artificial price and it need not actually have had the defined effect. See Luiz "Market Abuse II – Prohibited Trading Practices and Enforcement" 2002 *Juta's Business Law* 180 180 for related comments.

influencing the market price for that security;[47] entering on a regulated market an order at or near the close of the market to change or maintain the closing price of a security listed on that market;[48] entering on a regulated market an order to buy or sell a security listed on that market during any auctioning process or pre-opening session and cancelling such order immediately prior to the opening of the market to create a deceptive or false appearance of demand for or supply for that security;[49] maintaining an artificial price for dealing in securities listed on a regulated market;[50] employing any device, scheme or artifice to defraud other persons as a result of a transaction effected through the facilities of a regulated market;[51] engaging in an act, practice or course of business in respect of dealings in any listed securities which is deceptive or which is likely to have such effect[52] and effecting a market corner.[53]

The offender was required to know that he was taking part in a prohibited trading practice on a regulated market and the effect or possible effect of such practice before he could incur any liability.[54] This may imply that persons who engage in trade-based market manipulative practices in respect of any listed securities in South Africa could evade their liability if they prove that they ignorantly dealt in the affected securities.[55] Moreover, the prohibition on trade-based market manipulation was generally limited to transactions relating to securities listed on a regulated market.[56] Trade-based market manipulative practices are difficult to detect, investigate and prosecute.[57] Enforcement authorities around the world have surveillance systems and other

47 S 75(3)(c); also see clause 84(3)(c) of the Financial Markets Bill; clause 82(3)(c) of the Financial Markets Bill 2012 & s 80(3)(c) of the Financial Markets Act.

48 S 75(3)(d); clause 84(3)(d) of the Financial Markets Bill; clause 82(3)(d) of the Financial Markets Bill 2012 & s 80(3)(d) of the Financial Markets Act.

49 S 75(3)(e); also see clause 84(3)(e) of the Financial Markets Bill; clause 82(3)(e) of the Financial Markets Bill 2012 & s 80(3)(e) of the Financial Markets Act.

50 S 75(3)(g); clause 84(3)(g) of the Financial Markets Bill; clause 82(3)(g) of the Financial Markets Bill 2012 & s 80(3)(g) of the Financial Markets Act.

51 S 75(3)(h); clause 84(3)(h) of the Financial Markets Bill; clause 82(3)(h) of the Financial Markets Bill 2012 & no similar provision is found in the Financial Markets Act.

52 S 75(3)(i); also see clause 84(3)(i) of the Financial Markets Bill; clause 82(3)(i) of the Financial Markets Bill 2012 & no similar provision is found in the Financial Markets Act.

53 S 75(3)(f); also see clause 84(3)(f) of the Financial Markets Bill; clause 82(3)(f) of the Financial Markets Bill 2012 & s 80(3)(f) of the Financial Markets Act.

54 Cassim "An Analysis of Market Manipulation under the Securities Services Act 36 of 2004 (Part 1)" 2008 *SA Merc LJ* 33 33-43.

55 S 75; also see clause 84 of the Financial Markets Bill; clause 82 of the Financial Markets Bill 2012 & s 80 of the Financial Markets Act.

56 S 75; also see clause 84 of the Financial Markets Bill; clause 82 of the Financial Markets Bill 2012 & s 80 of the Financial Markets Act.

57 Cassim 2008 *SA Merc LJ* 46-49; Barnes *Stock Market Efficiency, Insider Dealing and Market Abuse* (2009) 19-125.

measures in place to detect and combat market manipulation.[58] Likewise, South Africa has mainly empowered the Financial Services Board and other bodies like the JSE to enforce the prohibition on market manipulation. For example, the JSE requires its members to comply with certain requirements to *inter alia* prevent all the forms of market manipulation by mandating them to give consideration to the circumstances of orders placed by clients before entering such orders in the JSE equities trading system and to be responsible for the integrity of such orders.[59] The JSE's Surveillance Division operates a system that identifies unusual price and trading volumes and when possible market manipulation is detected, an initial investigation is carried out and the results are handed over to the Directorate of Market Abuse. Regardless of this, up until now, very little success has been achieved in respect of the settlements and prosecutions of cases involving trade-based market manipulation.[60] Moreover, the Securities Services Act did not provide a civil remedy for trade-based market manipulation. Trade-based market manipulation was only treated as a criminal offence. This flaw was addressed by the Financial Markets Bill which provided a civil remedy for market manipulation[61] but nonetheless this provision was not included in the Financial Markets Bill 2012 and the Financial Markets Act.[62]

2 2 2 Prohibition on Insider Trading

2 2 2 1 Criminal Liability for Insider Trading

As earlier stated,[63] insider trading was prohibited in the Securities Services Act.[64] Any person who violated the relevant provisions of the Securities Services Act was liable for a criminal offence of insider trading.[65] For instance, actual dealing directly or indirectly or through an agent in securities listed on a regulated market by an insider who knew that he had inside information to which such securities relates or which

58 Barnes 19-125.
59 Rule 7.10.1 of the JSE's Listing Requirements.
60 Statutory administrative sanctions have been successfully obtained in minimal cases of trade-based market manipulation such as iFour Properties Limited (R2 million penalty), SA Retail Properties Limited (2) (R2 million penalty), Stratcorp Limited (R10 000 penalty), New Rand Warrants Limited (R750 000 penalty), Imperial Holdings Limited (R25 000 penalty), King Consolidated Holdings Limited (R10 000 penalty), SilverBridge Holdings Limited (R10 000 penalty) and Sunflower December 2007 to January 2008 Contract (R50 000 penalty). This information was obtained from an interview that was conducted at the Financial Services Board by the author, with Mr Gerhard van Deventer (the Executive Director of the Directorate of Market Abuse "the DMA") on 05 May 2009.
61 Clause 87.
62 See the relevant clauses under Chapter X entitled "Market Abuse" in both the Financial Markets Bill 2012 & the Financial Markets Act.
63 See 2 1 1 above.
64 Ss 73 & 77; also see clauses 82 & 86 of the Financial Markets Bill; clauses 80 & 84 of the Financial Markets Bill 2012 & ss 78 & 82 of the Financial Markets Act.
65 S 73; also see clause 82 of the Financial Markets Bill; clause 80 of the Financial Markets Bill 2012 & s 78 of the Financial Markets Act.

are likely to be affected by it for his own personal benefit could give rise to a criminal offence of insider trading.[66] Nevertheless, it is not certain whether this prohibition applied to any unlawful transactions that related to other money market instruments such as derivatives. This obscurity was not addressed by the Financial Markets Bill, the Financial Markets Bill 2012 and the Financial Markets Act.[67] The words "through an agent" were introduced in some insider trading provisions under the Securities Services Act.[68] Therefore, any insider who knowingly and indirectly practised insider trading through an agent for his personal benefit could be expressly liable for a criminal offence. The extension of the criminal liability to dealing through an agent was a positive development, but it was not clear who exactly could be regarded as an agent for the purposes of this prohibition.[69] This confusion could have enabled other persons who knowingly dealt in listed securities through agents as well as such agents to escape liability for their insider trading offences. This flaw was retained in the Financial Markets Bill; the Financial Markets Bill 2012 and the Financial Markets Act.[70]

Actual dealing in securities for the benefit of another person was further prohibited.[71] Therefore, any insider who knew that he had inside information and who dealt directly or indirectly for the benefit of any other person in any listed securities to which such inside information relates or which were likely to be affected by it was liable for a criminal offence.[72] Conspicuously, the absence of the words "through an agent" in this regard indicates the inconsistencies found in some of the insider trading provisions contained in the Securities Services Act.[73] This might have contributed to the skimpy convictions achieved in criminal cases involving insider trading in South Africa to date. The afore-said flaw is addressed in the Financial Markets Bill, the Financial Markets Bill 2012

66 S 73(1)(a); also see clause 82(1)(a) of the Financial Markets Bill; clause 80(1)(a) of the Financial Markets Bill 2012 & s 78(1)(a) of the Financial Markets Act.

67 Clause 82 of the Financial Markets Bill; clause 80 read with clause 82 of the Financial Markets Bill 2012 & s 78 read with s 80 of the Financial Markets Act.

68 S 73(1)(a); also see clause 82(1)(a) of the Financial Markets Bill; clause 80(1)(a) of the Financial Markets Bill 2012 & s 78(1)(a) of the Financial Markets Act.

69 S 73(1)(a); also see clause 82(1)(a) of the Financial Markets Bill; clause 80(1)(a) of the Financial Markets Bill 2012 & s 78(1)(a) of the Financial Markets Act. Also see Cassim 2007 *SA Merc LJ* 67. The term "agent" is defined in other jurisdictions like Australia and the United Kingdom, see s 1042B of the Australian Corporations Act 50 of 2001(C'th) & s 62(1) & (2) of the English Criminal Justice Act 1993 (c 36).

70 Clause 82(1)(a) of the Financial Markets Bill; clause 80(1)(a) of the Financial Markets Bill 2012 & s 78(1)(a) of the Financial Markets Act.

71 S 73(2)(a); also see clause 82(2)(a) of the Financial Markets Bill; clause 80(2)(a) of the Financial Markets Bill 2012 & s 78(2)(a) of the Financial Markets Act.

72 S 73(2)(a); also see clause 82(2)(a) of the Financial Markets Bill & clause 80(2)(a) of the Financial Markets Bill 2012 & s 78(2)(a) of the Financial Markets Act.

73 *Ibid*.

and the Financial Markets Act, which expressly includes the words "through an agent" in the prohibition on dealing in securities for the benefit of another person.[74]

An insider who knew that he had inside information and who encouraged or caused another person to deal, or discouraged or stopped another person from dealing in the securities listed on a regulated market to which the information relates or which were likely to be affected by it was liable for a criminal offence.[75] As earlier stated,[76] the accused must know that he has inside information and it was possible for an accused to plead that he was ignorant of the price-sensitive nature of the inside information at the time when he encouraged or discouraged others to deal in the securities concerned. This status quo was retained in the Financial Markets Bill, the Financial Markets Bill 2012 and the Financial Markets Act.[77] An insider who knew that he had inside information and who disclosed such information to another person could be liable for a criminal offence.[78] Nonetheless, improper disclosure of confidential inside information that relate to juristic persons by their agents who are not necessarily insiders appears not to be expressly covered under the Securities Services Act.[79] This flaw was not resolved in the Financial Markets Bill, the Financial Markets Bill 2012 and the Financial Markets Act.[80]

2 2 2 2 Civil Liability for Insider Trading

Any insider or person who was involved in insider trading activities could incur civil liability.[81] This civil liability could be imposed on an insider who knew that he had inside information and who dealt directly or indirectly or through an agent for his own account in securities listed on a regulated market to which the information relates or which were likely to be affected by it and who made a profit or would have made a profit if he had sold the securities at any stage, or avoided a loss through such dealing unless he proved one of the defences outlined in the Securities

74 Clause 82(2)(a) & (3)(a) of the Financial Markets Bill; clause 80(2)(a) & (3)(a)of the Financial Markets Bill 2012 & s 78(2)(a) & (3)(a) of the Financial Markets Act.

75 S 73(4); also see clause 82(5) of the Financial Markets Bill; clause 80(5) of the Financial Markets Bill 2012 & s 78(5) of the Financial Markets Act.

76 2 1 1 above.

77 Clause 82 of the Financial Markets Bill; clause 80 of the Financial Markets Bill 2012 & s 78 of the Financial Markets Act.

78 S 73(3)(a); also see clause 82(4)(a) of the Financial Markets Bill; clause 80(4)(a) of the Financial Markets Bill 2012 & s 78(4)(a) of the Financial Markets Act.

79 S 73(3)(a).

80 Clause 82(4)(a) of the Financial Markets Bill; clause 80(4)(a) of the Financial Markets Bill 2012 & s 78(4)(a) of the Financial Markets Act.

81 S 77 of the Securities Services Act; also see clause 86 of the Financial Markets Bill; clause 84 of the Financial Markets Bill 2012 & s 82 of the Financial Markets Act.

Services Act.[82] Such a person was then liable at the suit of the Financial Services Board, in any court of competent jurisdiction, for the administrative or civil compensatory fine as stipulated in the Securities Services Act.[83] Moreover, an insider who engaged in insider trading and made a profit or avoided a loss for personal benefit or for the benefit of any other person could incur civil liability.[84] Therefore, the person involved was liable to pay the Financial Services Board an amount equivalent to the profit made or loss avoided or a penalty for compensatory and punitive purposes,[85] but not exceeding three times the amount of the profit made or loss avoided plus any other amount for interest and legal costs as determined by a competent court.[86]

The person or insider who indulged in insider trading activities for the benefit of another person could be jointly and severally liable together with that other person to pay the Financial Services Board a penalty for compensatory and punitive purposes plus interest or costs as determined by the relevant courts.[87] This joint and several liability was contingent upon a tippee's liability as an insider. Apparently, there was no liability for a party who deals in the securities in question for another person who was not an insider as defined in the Securities Services Act.[88] This shortcoming was not resolved in the Financial Markets Bill, the Financial Markets Bill 2012 and the Financial Markets Act.[89] Civil liability was further imposed on an insider who knew that he had price-sensitive inside information and improperly disclosed such information to other

82 S 77(1); also see clause 86(1) of the Financial Markets Bill; clause 84 of the Financial Markets Bill 2012 & s 82 of the Financial Markets Act.

83 S 77(1); also see clause 86(1) of the Financial Markets Bill; clause 84(1) of the Financial Markets Bill 2012 & s 82(1) of the Financial Markets Act.

84 S 77(1)(b) & (2)(b); also see clause 86(1)(b) & (2)(b) of the Financial Markets Bill; clause 84 of the Financial Markets Bill 2012 & s 82(1); (2) & (3) of the Financial Markets Act.

85 S 77(1)(c); (2)(c); (3)(b); (4)(a) to (e) read with subsections (5) & (6); also see clause 86(1)(c); (2)(c); (3)(b); (4)(b); (5)(a) – (e) read with sub-clauses (6) & (7) of the Financial Markets Bill; clause 84(1) & (4) of the Financial Markets Bill 2012 & s 82(1); (2); (3) & (6) of the Financial Markets Act.

86 These are the High Courts and regional courts, see s 79 of the Securities Services Act. Notably, the Financial Markets Bill only provides that a court of competent jurisdiction includes a court within whose jurisdiction the regulated market has its principal place of business or head office or in which any element of the dealing or offence occurred, and there is no need to make any attachment to found or confirm its jurisdiction. See clause 81 of the Financial Markets Bill. However, no similar provision is made in clause 79 & s 77 of the Financial Markets Bill 2012 & the Financial Markets Act respectively.

87 S 77(5); also see clause 86(6) & (7) of the Financial Markets Bill; clause 84 of the Financial Markets Bill 2012 & s 82(3) of the Financial Markets Act.

88 S 72; also see clause 81 of the Financial Markets Bill; clause 79 of the Financial Markets Bill 2012 & s 77 of the Financial Markets Act. See further Jooste 2006 *SALJ* 454–455.

89 Clause 86(6) & (7) of the Financial Markets Bill; clause 84 of the Financial Markets Bill 2012 & s 82(3) of the Financial Markets Act.

persons.[90] However, the Securities Services Act did not expressly provide how companies could lawfully disclose price-sensitive inside information to relevant persons such as investment analysts so that they could not practise or fall victims to insider trading.[91] This shortcoming was not resolved in the Financial Markets Bill, the Financial Markets Bill 2012 and the Financial Markets Act.[92] Additionally, any person who knowingly encouraged or caused another person to deal in securities listed on a regulated market could incur civil liability.[93] The discouragement of others from dealing in such securities by any person who knew that he had inside information was not expressly prohibited under the civil provisions of the Securities Services Act.[94] This disparity left room for some persons to evade their civil insider trading liability. Amazingly, this flaw was not resolved in the Financial Markets Bill.[95] However, this flaw was addressed in the Financial Markets Bill 2012 and the Financial Markets Act.[96]

2 2 3 Prohibition on "Disclosure-based Market Manipulation"

Publication of false or deceptive statements, promises and forecasts was prohibited under the Securities Services Act.[97] Consequently, any person who directly or indirectly made or published in respect of listed securities, or in respect of the past or future performance of a public company, any statement, promise or forecast which was, at the time and in the light of the circumstances in which it was made, false or misleading or deceptive in respect of any material fact and which the person knew, or ought reasonably to have known was false, misleading or deceptive could be guilty of an offence.[98] Likewise, any person who directly or indirectly, made or published in respect of listed securities, or in respect of the past or future performance of a public company, any statement, promise or forecast which was, by reason of the omission of a material fact, rendered false, misleading or deceptive and which the person knew, or ought reasonably to have known was rendered false, misleading or deceptive by reason of the omission of that fact could be liable of an

90 S 77(3); also see clause 86(4) of the Financial Markets Bill; clause 84(1) of the Financial Markets Bill 2012 & s 82(2) read with subsection (3) of the Financial Markets Act.

91 Jooste 2006 *SALJ* 452-453; Loubser 14-15.

92 Clause 86(4) of the Financial Markets Bill; clause 84 read with clause 80(4) of the Financial Markets Bill 2012 & s 82(2) & (3) read with s 78(4) of the Financial Markets Act.

93 S 77(4); also see clause 86(5) of the Financial Markets Bill; clause 84(1) of the Financial Markets Bill 2012 & s 82(2) read with subsection (3) of the Financial Markets Act.

94 S 77(4); also see clause 86(5) of the Financial Markets Bill. Also see Jooste 2006 *SALJ* 455.

95 Clause 86(5).

96 Clause 84(1) of the Financial Markets Bill 2012 & s 82(2) read with subsection (3) of the Financial Markets Act.

97 S 76; also see clause 85 of the Financial Markets Bill; clause 83 of the Financial Markets Bill 2012 & s 81 of the Financial Markets Act.

98 S 76(1)(a); clause 85(1)(a) of the Financial Markets Bill; clause 83(1)(a) of the Financial Markets Bill 2012 & s 81(1)(a) of the Financial Markets Act.

offence.[99] This indicates that disclosure-based market manipulation was, and still is discouraged in South Africa.[100] Thus, the issuing of false, deceptive or misleading statements reduces public investor confidence and can harm the integrity of the financial markets and is as such prohibited in South Africa.[101] For example, incorrect published information regarding the financial state of a listed company may discourage or encourage investors to trade in the company's shares at prices that would not be sustainable when the true facts are later known.[102]

The making or publication of false statements regarding matters that are not directly associated with the company's current performance, but which may nevertheless artificially inflate the share prices was prohibited under the Securities Services Act.[103] For example, the publication or making of false claims regarding orders purchased or products developed by the company concerned could give rise to an offence under the Securities Services Act. The prohibition on disclosure-based market manipulation also applied to matters relating to the non-publication of price-sensitive information or the omission of material facts, often done to conceal the negative effect it could have on the share prices.[104] Nevertheless, no provision was made in the Securities Services Act for any presumptions that provide insight as to when a fact or an omitted fact would be material for the purposes of disclosure-based market manipulation.[105] Furthermore, no such provision was made in the Financial Markets Bill; the Financial Markets Bill 2012 and the Financial Markets Act.[106] Further liability was imposed on persons who either intentionally or negligently published or made incorrect statements.[107] For example, a company director who allowed a trading statement to be published without taking reasonable steps to ensure that such statement was correct could be liable for causing a false statement to be made or published negligently and recklessly. Nonetheless, the Securities Services Act did not impose civil liability on disclosure-based market manipulation offenders.[108] However, the JSE's Listing Requirements that prohibit false

99 S 76(1)(b); clause 85(1)(b) of the Financial Markets Bill; clause 83(1)(b) of the Financial Markets Bill 2012 & s 81(1)(b) of the Financial Markets Act.
100 Cassim "An Analysis of Market Manipulation under the Securities Services Act 36 of 2004 (Part 2)" 2008 *SA Merc LJ* 177 177-178.
101 Loubser 24; Cassim 2008 *SA Merc LJ* 177-183.
102 *Ibid*.
103 S 76; clause 85 of the Financial Markets Bill; clause 83 of the Financial Markets Bill 2012 & s 81 of the Financial Markets Act. Also see Loubser 24.
104 S 76(1)(b); clause 85(1)(b) of the Financial Markets Bill; clause 83(1)(b) of the Financial Markets Bill 2012 & s 81(1)(b) of the Financial Markets Act. Also see Cassim 2008 *SA Merc LJ* 180.
105 S 76.
106 Clause 85 of the Financial Markets Bill; clause 83 of the Financial Markets Bill 2012 & s 81 of the Financial Markets Act.
107 S 76(1); also see clause 85(1) of the Financial Markets Bill; clause 83(1) read with sub-clauses (2) & (3) of the Financial Markets Bill 2012 & s 81(1) read with subsections (2) & (3) of the Financial Markets Act.
108 S 76.

or misleading statements by the JSE's member companies are usually used to extend civil liability to such companies or other relevant entities and their agents.[109] The aforesaid flaw was addressed in the Financial Markets Bill which provided a civil remedy for market manipulation.[110] Nevertheless, this provision was omitted in the Financial Markets Bill 2012 and the Financial Markets Act.[111] Moreover, disclosure-based market manipulation on the Internet was not expressly prohibited in the Securities Services Act.[112] This flaw was not addressed in the Financial Markets Act. Therefore, the Internet could be providing unscrupulous persons in South Africa with opportunities to participate in disclosure-based market manipulation activities more easily and faster.[113] Additionally, the words "directly or indirectly"[114] which are employed[115] do not seem to extend liability to secondary offenders who do not directly engage in disclosure-based market manipulation practices but who simply aided and abetted others to commit such practices. This obscurity remains unresolved in the Financial Markets Bill; the Financial Markets Bill 2012 and the Financial Markets Act.[116]

2 2 4 Available Penalties

Criminal penalties can be imposed on all the three forms of market abuse which are outlawed in South Africa.[117] Consequently, persons who engage in market abuse activities could be sentenced to a fine not exceeding R50 million or imprisonment for a period not exceeding ten years or both such fine and imprisonment.[118] Notably, with regard to insider trading, the criminal sanctions were increased significantly from a fine of R2 million (previously stipulated in the Insider Trading Act)[119] to R50 million under the Securities Services Act.[120] While the introduction of new market abuse penalties is a positive improvement, it is submitted that standing alone, even the R50 million fine and a ten

109 Rules 8.20.2; 8.20.3 & 8.20.6 of the JSE Listing Requirements.
110 Clause 87.
111 See the relevant clauses and sections under Chapter X entitled "Market Abuse" in the Financial Markets Bill 2012 & the Financial Markets Act respectively.
112 S 76; also see clause 85 of the Financial Markets Bill; clause 83 of the Financial Markets Bill 2012 & s 81 of the Financial Markets Act.
113 S 76(1); also see clause 85(1) of the Financial Markets Bill; clause 83(1) of the Financial Markets Bill 2012 & s 81(1) of the Financial Markets Act. Also see Cassim 2008 *SA Merc LJ* 178.
114 Cassim 2008 *SA Merc LJ* 178.
115 S 76(1) of the Securities Services Act.
116 Clause 85(1) of the Financial Markets Bill; clause 83(1) of the Financial Markets Bill 2012 & s 81(1) of the Financial Markets Act.
117 Loubser 28.
118 S 115(a) of the Securities Services Act; also see clause 115(a) of the Financial Markets Bill; clause 111(a) of the Financial Markets Bill 2012 & s 109(a) of the Financial Markets Act.
119 S 5 of the Insider Trading Act.
120 S 115(a); also see clause 115(a) of the Financial Markets Bill; clause 111(a) of the Financial Markets Bill 2012 & s 109(a) of the Financial Markets Act.

year imprisonment term cannot be an effective deterrent.[121] It is possible that prospects of enormous profits may outweigh the deterring effect of the stipulated fine and/or prison sentence. For example, companies may simply regard it as just another cost of doing business, especially where profits gained exceed the penalty imposed.[122] Moreover, the fact that the actual perpetrators may plead guilty and be convicted of lesser offences may also have a negative effect on any impact a criminal sanction might have. Furthermore, the difficult burden of proof needed in the criminal prosecution of market abuse offences has, to some extent, marred the prosecution of such offences in South Africa to date and this is unlikely to be different in future.[123] Civil penalties for insider trading could be imposed on offenders for the profit made or loss avoided or as a penalty for compensatory and punitive purposes, an amount as determined by a competent court but not exceeding three times the amount of the profit made or loss avoided plus interest and legal costs as determined by the court or the Enforcement Committee.[124] Nevertheless, prejudiced persons who proved their claims as provided for in the Securities Services Act could only get their compensation after the Financial Services Board had recouped its expenses in relation to a successful litigation.[125] This approach was also employed in the Financial Markets Bill, the Financial Markets Bill 2012 and the Financial Markets Act.[126] It is submitted that if not properly executed, this approach may give rise to bureaucracy and unnecessary delays before the affected persons receive their compensation.

Furthermore, administrative penalties were provided for all the three forms of market abuse that were prohibited by the Securities Services Act. The Enforcement Committee could, on a referral basis, impose administrative penalties on persons who indulge in market abuse activities.[127] Therefore, administrative penalties, namely a civil monetary penalty, an order for remedial action, costs orders, separate

121 Cassim 2008 *SA Merc LJ* 194; Jooste 2006 *SALJ* 453–454.

122 Ibid.

123 Only 32 cases of insider trading, 8 cases of trade-based market manipulation and no cases for disclosure-based market manipulation were reportedly investigated by the Financial Services Board during the period between January 1999 and December 2007. No convictions were obtained in all these criminal cases of market abuse. This information was obtained from an interview that was conducted at the Financial Services Board by the author, with Mr Gerhard van Deventer on 05 May 2009. Also see Jooste 2006 *SALJ* 453–454.

124 S 77; clause 86 of the Financial Markets Bill; clause 84 of the Financial Markets Bill 2012 & s 82 of the Financial Markets Act. See 2 2 2 2 above.

125 No civil penalties may, however, be levied against the culprits who indulge in market manipulation practices. See further Whiting "Civil Liability for Insider Trading: A Comparison of the Insider Trading Act of 1998 with the Securities Services Act of 2004" 2005 *Responsa Meridiana* 99 116-117.

126 Clause 86 of the Financial Markets Bill; clause 84 of the Financial Markets Bill 2012 & s 82 of the Financial Markets Act.

127 S 94(e) & ss 102 to 105 of the Securities Services Act; generally see clause 86 of the Financial Markets Bill; clause 84 of the Financial Markets Bill 2012 & s 82 of the Financial Markets Act.

order for legal costs, remuneration costs orders, a fine for punitive purposes and other appropriate disciplinary sanctions could be imposed on the offenders.[128] The Enforcement Committee could impose an administrative compensatory amount payable to the Financial Services Board for distribution to the victims only in respect of insider trading.[129] No similar provision was made for market manipulation. This might be caused by the fact that it would be very difficult to accurately calculate the amount of loss incurred by the victims of market manipulation.[130] Moreover, the Financial Markets Bill, the Financial Markets Bill 2012 and the Financial Markets Act did not provide any specific administrative functions of the Enforcement Committee in detail.[131] Nonetheless, it is submitted that the introduction of additional and/or sufficient administrative penalties might have the effect of increasing the compliance with, and the enforcement of the market abuse provisions in South Africa.[132]

3 Concluding Remarks

Numerous amendments to the market abuse legislation were introduced from time to time in a bid to *inter alia* restore public investor confidence and improve the regulation of market abuse practices in South Africa. However, the Insider Trading Act,[133] like its predecessors, failed to expressly provide for other alternative enforcement methods like whistle-blowing, private rights of action and specialised insider trading courts to complement the Financial Services Board. Eventually, the Securities Services Act was introduced and it brought more elaborate civil remedies, new criminal penalties, administrative sanctions and additional regulatory bodies such as the Enforcement Committee, the Board of Appeal and the Directorate of Market Abuse in a bid to enhance the enforcement of the market abuse ban in South Africa.[134] However, the Securities Services Act's market abuse prohibition also had some flaws and it was recently repealed by the Financial Markets Act. Be that as it may, various gaps that were previously embedded in the Securities Services Act were re-duplicated in the Financial Markets Act's relevant market abuse provisions and it remains questionable whether such provisions are robust enough and/or going to be effectively implemented to prevent market abuse in the South African financial markets. It is,

128 S 94(e) & ss 102 – 105; generally see clause 86 of the Financial Markets Bill; clause 84 of the Financial Markets Bill 2012 & s 82 of the Financial Markets Act. Also see Van Deventer "Harnassing Administrative Law in Encouraging Compliance" 2009 *FSB Bulletin* 3 3-4.

129 Cassim 2008 *SA Merc LJ* 195.

130 Ibid.

131 See clauses 105 & 101 & other relevant clauses under Chapter X entitled "Market Abuse" in the Financial Markets Bill & the Financial Markets Bill 2012 respectively & s 99 & other relevant sections under Chapter X entitled "Market Abuse" in the Financial Markets Act.

132 Van Deventer 2009 *FSB Bulletin* 3-4.

133 See 2 2 4 above.

134 See sub-parr under 2 1 & 2 2 above.

therefore, hoped that the flaws exposed above will be addressed and the recommendations enumerated in this article will be utilised in the future to enhance the combating of market abuse in South Africa.

Aantekeninge/Notes

When does an application for business rescue proceedings suspend liquidation proceedings?

1 Introduction

Section 131 of the Companies Act 71 of 2008 (the "Act") regulates the commencement of business rescue proceedings by an order of court. In terms of section 131(1) an affected person may apply to court at any time for an order placing a company under supervision and commencing business rescue. "Affected person" is defined in section 128 as a shareholder or creditor of the company, a registered trade union representing employees of the company or the representatives of employees not affiliated to a trade union. It may happen that affected persons would wish to approach the court with an application to commence business rescue proceedings after liquidation proceedings had already commenced. The Act makes provision for this circumstance in section 131, which states amongst other things that such an application, if brought, would have the effect of suspending the liquidation proceedings.

Just more than three years have passed since the Act became operational. The application of the provisions of section 131, innocuous as they may seem at first glance, is cause for concern. The contention centres around the meaning and interpretation of the term "liquidation proceedings" and the crux of the matter is whether this refers to proceedings in court (up to the point where a liquidation order has been granted), whether it encompasses winding up proceedings after a liquidator has been appointed and put in control of the company's assets, or indeed whether it refers only to that part of the proceedings that follows upon the liquidation order to the exclusion of proceedings preceding it.

The Act does not define the concept "liquidation proceedings" and court decisions that grappled with its meaning in this context have reached divergent conclusions. This note seeks to highlight the discrepancies that have arisen because of this. With reference to the stated aims and outcomes of the Act, the law of insolvency and the law governing the interpretation of statutes, an appropriate solution to the inconsistencies will be debated.

2 The Relevant Statutory Provisions

Business rescue can be initiated either by means of a company resolution (s 129), or by court order (s 131). A company resolution may however not be adopted once liquidation proceedings have been

initiated by or against the company (s 129(2)(a)). I If liquidation proceedings have already commenced business rescue can only be initiated by means of a court order obtained either by an affected person that brings the necessary application in terms of section 131, or by the court during the course of liquidation proceedings (s 131(7)).

In terms of section 131(4) the court may, on application brought by an affected person, make an order placing the company under supervision and commencing business rescue proceedings, if it is satisfied that the company is financially distressed, the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation or contract with respect to employment related matters, or it is otherwise just and equitable to do so for financial reasons. In addition, there must be a reasonable prospect for rescuing the company. Alternatively, the court may dismiss the application and make any further necessary and appropriate order which includes an order placing the company under liquidation.

Should the court decide to place the company under supervision and to commence business rescue proceedings as provided for in section 131(4), it has the power to make an order for the appointment of an interim practitioner nominated by the affected person who brought the application.

Section 132 (1) (c) confirms that:

> "Business rescue proceedings begin when during the course of liquidation proceedings, or proceedings to enforce a security interest, a court makes an order placing the company under supervision".

Section 131(6) provides as follows:

> "If liquidation proceedings have already been commenced *by or against the company* at the time an application is made in terms of subsection (1), the application will suspend those liquidation proceedings until – (a) the court has adjudicated upon the application; or (b) the business rescue proceedings end, if the court makes the order applied for". (Own emphasis added).

Section 131(7) in turn provides as follows:

> "In addition to the powers of a court on an application contemplated in this section, a court may make an order contemplated in subsection (4), or (5) if applicable, at any time *during the course of any liquidation proceedings* or proceedings to enforce any security against the company". (Own emphasis added).

3 Application of Section 131

The first noteworthy decision to consider the interpretation of and interaction between the subsections of section 131 is *Van Staden v Angel Ozone Products CC (In Liquidation)* (2013 4 SA 630 (GNP)). In this instance, a final liquidation order had been obtained prior to 1 May 2011 (the latter being the date on which the 2008 Companies Act became operational).

The applicant, as the only member of the close corporation in liquidation, approached the court as an affected person in terms of section 131(4) of the Act for an order to initiate business rescue. The close corporation was at that stage not yet finally wound up and deregistered. The court was thus called upon to determine whether the term "liquidation proceedings" found in section 131 of the Act could be interpreted to include the winding up process after a liquidator had been appointed. It was argued on behalf of the respondent that "liquidation proceedings" should not be equated with "winding up proceedings" and that an application to place a company under business rescue could be brought during the course of the former but not during the course of the latter. In other words, the respondent contended that liquidation proceedings come to an end once a final liquidation order had been granted, whereas winding up proceedings conclude once the Master approves a final liquidation and distribution account.

Legodi J agreed that a distinction could be made between liquidation and winding up proceedings, where the former denotes legal proceedings before a court of law and the latter the process as overseen by the Master. He concluded however that the winding up proceedings should be seen as a continuation of the liquidation proceedings and that "put simply, you do not grant a final liquidation order and execute on it. You execute on a confirmed liquidation and distribution account. Winding up proceedings are part and parcel of the liquidation proceedings" (par 27 at 625). The court would therefore be able to convert liquidation proceedings into business rescue proceedings regardless how far the liquidation and winding up proceedings might have progressed. This was unlikely to prejudice creditors as the court had the authority to appoint an interim business rescue practitioner to take control of the company amongst other things.

The legal consequences of an application for business rescue itself were not discussed and nowhere did the court conclude outright, that winding up proceedings are suspended by the bringing of the application for business rescue *ex lege* even after the final liquidation order had been awarded. However, the decision seems to have been based on subsection 131(7), as the court clearly envisaged the appointment of an interim practitioner which is done in terms of this subsection.

Following this, a slightly different set of facts presented themselves in the matter of *ABSA Bank Ltd v Summer Lodge (Pty) Ltd, ABSA Bank Ltd v JVL Beleggings (Pty) Ltd, ABSA Bank Ltd v Earthquake Investments (Pty) Ltd* (2014 (3) SA 90 (GP).

In this instance the applicant applied for the liquidation of the three respondents who were all hopelessly insolvent. On the day of the hearing an application to place the company under business rescue was brought by affected persons in terms of section 131 of the Act. The court was then asked to suspend proceedings as per section 131(6) of the Act.

As far as the meaning of the phrase "[i]f liquidation proceedings have already commenced" is concerned, the respondents argued that it should be regarded to mean "[i]f an application for the liquidation of a company has already been filed, but not yet considered" (par 10). Apart from this, a second question was whether an application for a liquidation order which has not been adjudicated upon could be seen to have "commenced" liquidation proceedings, or whether such proceedings are only seen as having been commenced after the order had been obtained (par 13).

The court (per Van der Bijl AJ) concluded that "what section 131(6) means is that once liquidation proceedings have commenced by the granting of a liquidation order, whether provisional or final, the mere issue and service of a business rescue application would suspend the liquidation process" (par 18). In other words, an application for business rescue, as referred to in section 131(6), would only suspend liquidation proceedings if a provisional or final order had previously been granted. In support of this the court relied on *Firstrand Bank Ltd v Imperial Crown Trading* 143 (*Pty) Ltd* 2012 (4) SA 256 (KZD), where Swain J considered the interpretation of the word "initiated" as used in section 129 (which bars a company from initiating business rescue proceedings by means of a company resolution once "liquidation proceedings had been initiated by or against the company").

Importantly Van der Bijl AJ expressly stated that it was not the intention of the section to discharge or set aside a liquidation order but merely to suspend the order so as to delay the implementation thereof. The judge emphasised that the section cannot have the effect that the company can proceed carrying on business (par 19).

On the return date the matter was heard by Makgoba J, who agreed with this conclusion *(ABSA Bank Ltd v Summer Lodge (Pty) Ltd, ABSA Bank Ltd v JVL Beleggings (Pty) Ltd, ABSA Bank Ltd v Earthquake Investments (Pty) Ltd*, unreported judgment, neutral citation [2013] ZAGPPHCS44 (23 May 2013). The judge concluded that the outcome of proceedings would turn on the interpretation of the phrase "liquidation proceedings" as found in section 131(6). The court considered the ordinary grammatical meaning of the words "liquidation" and "proceedings" and concluded that "'liquidation proceedings' in section 131(6) of the Act is concerned with the actual process of winding-up followed by the liquidator and the master after the winding-up order has been granted. It therefore excludes the legal action and/or process taken in order to obtain such a state of affairs". (par 11)

In further support of this conclusion the court pointed out that the legislature chose to use the word "commence" as opposed to the word "launch" or "start". The court distinguished the term "commence" as it is used in section 131(6) from its use in section 348 of the Companies Act 61 of 1973. The latter was a deeming provision, dependent on a final liquidation order being granted. Makgoba J concluded that:

> "[i]n the context of the present case I am of the opinion that section 131(6) of the Act means that once the liquidation proceedings have commenced by the granting of a liquidation order, whether provisional or final, the mere issue and service of a business rescue application in terms of section 131(1) of the act would suspend the liquidation process" (par 16).

ABSA Bank v Summer Lodge (Pty) Ltd was followed in *ABSA Bank Ltd v Makuna Farm CC* 2014 (3) SA 86 (GJ), even under circumstances where it was uncontested that the respondent was "profoundly insolvent and liable to be wound up" (par 3). Boruchowitz J specifically agreed with the court *a quo*'s conclusion that the effect of the suspension could not be such that the company would continue to do business (par 8).

A most recent decision, *Richter v Bloempro CC and Others* 2014 (6) SA 38 (GP), interprets the provisions differently. Bam J held that business rescue proceedings and a final liquidation order are different and mutually exclusive concepts. He concluded that subsection (6) could not have the effect of suspending liquidation proceedings after a final liquidation order had already been obtained for a number of reasons. Firstly, section 131 demands that business rescue should have the likely result of the company being able to continue as a viable concern or alternatively at least that it should result in a better return for creditors. The court giving the final liquidation order has already concluded that the company is in fact insolvent and at the moment unable to pay its debts. This is incompatible with the definition of 'financial distress' in section 128 which clearly states that a company is financially distressed when it is likely to become insolvent or unlikely to be able to pay its debts as they become due in the ordinary course of business in the near future (par 18).

Secondly, the Bam J concluded that the legislature would have stated clearly that section 131(6) refers also to a company under liquidation. He was therefore reluctant to accept that liquidation proceedings could effectively be converted into business rescue even after a final liquidation order was granted because of the absence of an express provision for such a process. The court finally pointed out that a final liquidation order strips a company of its original status; "[t]he company, in itself, has no locus standi anymore. It cannot operate without an order of court, or the Master's rulings or decisions of the liquidators. If it was the intention that a final liquidation order can be suspended by business rescue proceedings, it would mean that an interim order of business rescue may substitute the final liquidation order. This seems to be untenable" (par 18).

4 Analysis of the Current Position

In summation, the courts seem to have accepted that an application for business rescue will serve to suspend liquidation proceeding even after a final liquidation order had already been granted and the company placed in the hands of a liquidator. This is not necessarily the most desirable outcome and the divergent stance taken by Bam J in *Richter v Bloempro*

CC and Others is perhaps to be preferred (for the reasons given by the court along with those discussed hereafter).

Section 132(1)(c) states that business rescue proceedings will commence only when a court makes an order placing the company under supervision. To accept that a mere application for business rescue would suspend liquidation proceedings *ex lege* could yield manifestly unjust results. Such an interpretation would create an unforeseen chasm in instances where a liquidation order had already been granted and an application for business rescue is brought, as will be explained below.

It is contended that the wording of section 131 leans itself toward a more realistic interpretation. Section 131(6) refers to liquidation proceedings that have been commenced *by or against the company*. Proceedings "by or against the company" logically cannot refer to liquidation proceedings by the liquidator. The words more likely refer to proceedings by or against the company *before a court* as contemplated in section 81 of the Act (in the case of a solvent company) or in terms of Schedule 5, Item 9 (in the case of an insolvent company).

The wording of section 131(6) differs significantly from that of section 131(7). The latter refers to an application that is brought "during the course of any liquidation proceedings". This stands in contrast to section 131(6) which refers to "liquidation proceedings by or against the company". Section 131 thus seems to draw a distinction between liquidation proceedings by or against the company (which may or may not lead to a liquidation order being granted), and liquidation proceedings that gave rise to a final winding-up order and the winding-up process thereafter (which is a continuation of the liquidation proceedings).

Thus interpreted, in terms of section 131(6) the bringing of an application in terms of section 131(1) will suspend liquidation proceedings that are pending before court: The application for winding-up will stand over until the business rescue application had been heard.

This view is shared by Meskin and explained by the author as follows:

> "The question that arises is whether the term 'at any time during the course of any liquidation proceedings' in subsection (7) refers only to the time during which an application for the liquidation of a company is before the Court, i.e. prior to the Court granting a final liquidation order (as the reference to 'liquidation proceedings' in subsection (6) clearly envisages …" (Henochsberg on the Companies Act 2008 at page 474).

Once a liquidation order has been granted, the bringing of an application for business rescue will not be suspended; liquidation proceedings will continue until such time as the court grants an order as contemplated in section 132(1)(c). In the absence of such an order, the court does not have the power to hand control of the business to a business rescue practitioner. This also accords with the use of the term "liquidation proceedings" in section 129.

The interpretation of section 131 was also considered by the Kwazulu-Natal High Court in *Taboo Trading 232 (Pty) Ltd v Pro Wreck Scrap Metal CC and others; Charles Theodorus Joubert and Pro Wreck Scrap Metal CC* (2013 (6) SA 141 (KZP)). The court did not consider at which stage of the process an application commencing business rescue would suspend liquidation proceedings, but focussed instead on what could be considered circumstances that would render liquidation proceedings suspended. The question identified by the court was how to interpret the phrases "at the time an application is made" as per section 131(6), and "an affected person applies" as per section 132(1)(b). Hartzenberg AJ pointed out that two possible interpretations present themselves, namely that the mere lodging with the Registrar and issuing of the business rescue application constitutes a triggering event suspending liquidation proceedings or alternatively, that due compliance with the service and notification requirements of subsections 131(2)(a) and (b) is also required.

The court concluded that the latter interpretation is the correct one, and that a business rescue application is only to be regarded as having been made once the application has been lodged with the Registrar, duly issued, a copy thereof served on the Commission and each affected person has been properly notified of the application. After considering a number of relevant decisions, the judge correctly, in my respectful opinion, points out that the:

> "Suspension of the liquidation proceedings as contemplated by s 131(6) of the Companies Act, has significant consequences, in the context where liquidation proceedings had already commenced. Clearly, such suspension may and probably will in most instances have a disruptive effect on the liquidation proceedings. Any delay of the hearing of a pending liquidating application, may in some instances have the result that a company or close corporation continue trading in insolvent circumstances. The purpose of the notification required by section 131(2)(b), is to facilitate participation in terms of s 131(3), by affected persons in the hearing of the business rescue application. Creditors, being affected persons, in the business rescue application, also have a material interest in the liquidation proceedings … There is a strong policy justification for interpreting these provisions in a way which would not facilitate a dilatory or supine approach by an applicant in business rescue proceedings" (par 11).

This is a sound approach to interpreting section 131 in general. To some extent, business rescue must surely override liquidation proceedings to give effect to the accepted idea that it is preferable to save a viable enterprise rather than to liquidate it (Cassim et al *Contemporary Company Law* 790). This seems to be what the courts are currently focussed on, and it is indeed commendable (see for example *Cardinet (Pty) Ltd v Wedgewood Golf and Country Estate (Pty) Ltd and others* (unreported case No 19599/2012 Western Cape High Court)). However a regime that would sacrifice certainty and business efficiency at the altar of business rescue does not present a viable alternative. Most recently, the Supreme Court of Appeal reiterated the role of the court when

interpreting the language of legal documents. The following remarks are of particular significance to the discussion at hand:

> "Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alter to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in the contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document" (*Natal Joint Municipal Pension Fund v Edumeni Municipality* 2012 4 SA 593 (SCA) par 18 at 603 F – 604 D).

5 Conclusion

One of the clear purposes of the Act was to provide for the efficient rescue and recovery of financially distressed companies, in a manner *that balances the rights and interests of all relevant stakeholders*" (s 7(k), emphasis added). On the one hand, this necessarily means a system that encourages corporate management and a return thereto sooner rather than later. It would also require agility and accessibility to the greatest extent possible. On the other hand, the legislature was clearly careful to avoid a regime that would allow defaulting debtor companies to use business rescue proceedings in an underhanded manner in order to defraud or frustrate their creditors. This is apparent if one considers, amongst other things, the fact that affected persons may oppose a company resolution to initiate business rescue (s 130) and the extensive degree of oversight that creditors are given during the course of proceedings (See in general: Richard Bradstreet *The New Business Rescue: Will Creditors Sink or Swim* 2011 (2) *SALJ* 352). Clearly this is also why a company may no longer initiate business rescue proceedings by means of a company resolution after liquidation proceedings have been commenced.

Naturally an application brought during the process of liquidation proceedings prior to the granting of a final liquidation order should suspend same. The court has not yet ruled whether or not a liquidation order should be granted and might well conclude that business rescue is to be preferred. The initial managers of the company are at this stage still

in control of the business and the creditors as affected persons are given the necessary opportunity to convince the court of the most preferable outcome (even if an application for business rescue is brought subsequent to an application for liquidation). After the liquidation order has been obtained the matter effectively, is no longer before the court. If the court decides to make an order to initiate business rescue after a final liquidation order had been obtained, this has to be done in terms of section 131(7) which provides for the appointment of an interim practitioner and therefore does not create the unfortunate limbo currently in place. An application is at times brought weeks, if not months, before it is heard. Should the mere lodging and servicing of the application suspend liquidation proceedings *ex lege*, the consequences would be that the assets would revert to the initial managers which could have an extensive and potentially devastating impact on the rights of creditors.

It is noteworthy that this exact type of abuse came before the court in *Janse van Rensburg NO and another v Cardio Fitness Properties (Pty) Ltd and others* [2014] JOL 31979 (GSJ), where Kgomo J held that the suspension of liquidation proceedings will not divest the liquidator of control over the assets of the company. The judge agreed with the applicants in the matter that the suspension of the liquidation proceedings did not also suspend the appointment of the joint liquidators therein. This was due to the fact that section 131(6) was silent as to its effect on the powers of the liquidators and in the view of the court the legislature would have stated "clearly and unambiguously" if it intended that the provisional liquidators should be relieved of control before the appointment of a business rescue practitioner (par 52). In the words of Kgomo J "it was not the intention of the legislature that the first respondent at any stage be a rudderless ship or ship without captain" (par 56). This interpretation would indeed address some of the concerns that the current position brings to the fore. However, the fact that the liquidators might be left unable to act and the delays and costs of abusive litigation might be every bit as detrimental, as Sutherland J rightly points out in *ABSA Bank Ltd v Newcity Group (Pty) Ltd, Cohen v Newcity Group (Pty) Ltd and Another* [2013] 3 All SA 146 (GSJ).

It would be naïve to imagine that desperate managers (who are often also shareholders or creditors and thus "affected persons") would not be tempted to use a business rescue application in an abusive manner and perhaps to approach the court only to frustrate a viable application to have the company liquidated. In fact, even a misguided application that has no merit, brought by a *bona fide* affected person could undermine the integrity of liquidation proceedings. Such abuses would be difficult if not impossible to rectify. In contrast, , the potentially negative consequences of successful liquidation proceedings where a company is a prime candidate for business rescue could be addressed by bringing the application for business rescue on an urgent basis. No prejudice could result from this, as the court would then, on an urgent basis, be able to make an order as envisaged in section 131(7). The creditor that obtained

the liquidation order would be at liberty to make out a case for liquidation and the court would be able to consider the merits of the business rescue application before it has a significant impact on liquidation proceedings.

Finally, the much talked about failure of 1Time Airlines early in 2013, following unsuccessful business rescue proceedings, emphasises the stark reality that the business rescue regime introduced by the Act is no silver bullet. Although heralded as an improvement on its predecessor, there will likely be numerous companies who will not survive in spite of attempted rescues. It is for this reason that it is perhaps wise to remember one of the underlying principles of the law of insolvency, and to consider the impact that the current position might have in the light thereof. Innes CJ explains the concept of a *concursus creditorum* as follows:

> "The object of the [Insolvency Act] is to ensure a due distribution of assets among creditors in the order of their preference ... The sequestration order crystalizes the insolvent's position; the hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered into with regard to estate matters by a single creditor to the prejudice of the general body. The claim of each creditor must be dealt with as it existed at the issue of the order" (*Walker v Syfret NO* 1911 AD 141 166).

Once the hand of the law is laid upon the estate, surely a mere application should not be able to dislodge it? It is submitted that the current interpretation of section 131 should be reconsidered to ensure that the existing dissonance is better addressed. It is respectfully submitted that the conclusion reached by Bam J in *Richter v Bloempro CC and Others* appears to be the correct one.

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Die bekende spermskenker se reg op kontak met die kind: Tendense in die Nederlandse en breër Europese familiereg

1 Inleiding

In 'n vroeëre bydrae (Van der Linde "Right of contact of known sperm donors in case of artificially conceived children" HR 11 April 2008 2010 *THRHR* 690) word die regsposisie in die Nederlandse en breër Europese reg ingevolge artikel 8 van die Europese Verdrag vir die Regte en Vryhede van die Mens, 1953 (hierna EVRM), rakende die bekende spermskenker

se reg op kontak met die kind wat deur kunsmatige inseminasie verwek is, bespreek. In daardie bydrae word gefokus op die regsposisie van die bekende spermskenker wat "noue persoonlike bande", oftewel 'n "gesinslewe", met die kind gehad het. Die skrywer huldig die mening dat daar in Suid-Afrika voorsiening gemaak moet word vir die bekende spermskenker om "outomatiese" ouerlike verantwoordelikhede en regte te bekom indien hy aan artikel 21(1)(a) van die Kinderwet, 38 van 2005 voldoen. Alternatiewelik moet dit ook vir hom moontlik wees om die kind te "erken" en geïdentifiseer te word as die kind se biologiese vader ingevolge artikel 26 van die Kinderwet, sou daar "gesinslewe" tussen hom en die kind bestaan (2010 *THRHR* 690 694). Dit sou in ooreenstemming wees met ontwikkelinge in die Nederlandse reg. Die stelling word egter gemaak dat die argumente ten gunste van sodanige erkenning gebaseer op "gesinslewe" nie sal stand hou indien die bekende spermskenker nooit die geleentheid gehad het om 'n gesinslewe met die kind op te bou nie, omdat die moeder hom die geleentheid om dit te doen, ontsê het (2010 *THRHR* 690 695). Hierdie aspek word hieronder (par 5) verder bespreek.

In 'n verdere bydrae (Van der Linde "Weerlegging van die vermoede van vaderskap en die beskerming van 'beoogde gesinslewe' binne konteks van die ongetroude biologiese vader se reg op kontak met sy kind" 2013 *LitNet* Jaargang 10(2) 45) word die regsposisie van die ongetroude biologiese vader (waar die kind op natuurlike wyse verwek is) bespreek. Gemelde bydrae fokus op daardie geval waar die biologiese vader nie in staat was om 'n "gesinslewe" met die kind te ontwikkel nie, vanweë die feit dat die moeder (of bepaalde wetgewing) hom verhinder het om dit te doen. Die vraag of sy "beoogde gesinslewe" beskerming verdien ingevolge artikel 8 EVRM word soos volg deur die Europese Hof vir die Regte van die Mens (hierna EHRM) beantwoord (*Schneider v Germany* aansoek no 17080/07 van 15-09-2011 par 81):

> *"[I]ntended* family life may, exceptionally, fall within the ambit of Article 8, notably in cases where the fact that family life has not yet fully been established is *not attributable to the applicant ... In particular, where the circumstances warrant, 'family life' must extend to the potential relationship which may develop between a child born out of wedlock and the natural father".*

En verder (par 90):

> "In view of the foregoing, the Court *does not exclude that the applicant's intended relationship with F. fell within the ambit of 'family life' under Article 8*. In any event, the determination of the legal relations between the applicant and F. – that is, whether the applicant had a right of access to F. and information about his personal circumstances – *even if they fell short of family life, concerned an important part of the applicant's identity and thus his 'private life' within the meaning of Article 8(1).* The domestic courts' decision to refuse him contact with and information about F. thus interfered with his right to respect, at least, for his *private life*". (Eie beklemtoning).

Indien die "beoogde" of bedoelde verhouding tussen die biologiese natuurlike vader en kind dus nie onder die vereistes vir 'n "gesinslewe"

binne konteks van Artikel 8 EVRM tuisgebring kan word nie, het die bepaling, vasstelling, of definiëring van die (regs)verhouding tussen hulle wel betrekking op 'n belangrike aspek van die biologiese vader se "identiteit" en gevolglik sy "privaatlewe" binne die betekenis van laasgenoemde begrip in die konteks van artikel 8 EVRM. Skrywer beveel in vermelde bydrae aan dat die Suid-Afrikaanse howe ook van hierdie ontwikkeling kennis moet neem. "Beoogde gesinslewe", oftewel (so kan geargumenteer word) 'n beoogde voldoening aan artikel 23(2)(b), (c) en (d) van die Kinderwet (38 van 2005), behoort deur die howe by 'n artikel 23-aansoek om kontak in aanmerking geneem te word. Alternatiewelik, soos deur die EHRM beslis, behoort die biologiese vader van 'n kind op natuurlike wyse verwek se "reg op identiteit" en dus sy "privaatlewe" oorweging te geniet (2013 *LitNet* 45 49).

In 'n onlangse beslissing van die Hoge Raad (HR 2 November 2012 *NJ* 2013 122) kom 'n verdere aspek, en in 'n mate 'n *kombinasie* van die feite in bovermelde twee bydraes uiteengesit, na vore. Die verhouding behels egter dié tussen die sogenaamde bekende spermskenker en die kind deur kunsmatige inseminasie verwek. Die verhouding voldoen nóg aan die vereistes vir 'n "gesinslewe" soos vereis deur artikel 1:377a *BW*, nóg aan die vereistes vir die bestaan van 'n "beoogde gesinslewe". *Die omstandighede en verhouding tussen die bekende spermskenker en kind behels egter tog (ietwat) meer as die blote feit dat hy die biologiese vader is.* Voorsiening is gemaak dat hy die kind (1) af en toe mag sien; (2) af en toe 'n geskenkie mag gee; en (3) af en toe "mee mag nemen". Hy het die kind ook nie erken nie. 'n Bespreking van hierdie beslissing is om verskeie redes van belang: Eerstens, word daar in die aanloop tot die beslissing waardevolle riglyne verskaf, aan die hand waarvan beoordeel word of daar van "nauwe persoonlijke bande", oftewel 'n "gesinslewe" tussen die bekende spermskenker en die kind, sprake is. Indien daar 'n "gesinslewe" sou bestaan, bepaal artikel 1:377a lid 1 *BW* soos volg:

> "Artikel 377a
> (1) Het kind heeft het recht op omgang met zijn *ouders* en met degene die in een nauwe persoonlijke betrekking tot hem staat. *De niet met gezag belaste ouder heeft het recht op en de verplichting tot omgang met zijn kind*". (Eie beklemtoning).

'n Wedersydse reg op omgang, oftewel kontak, vloei dan vir die partye tot so 'n verhouding voort. Dit kan egter deur die hof ontsê word in die lig van redes vervat in Artikel 1:377 lid 3, waaronder die "zwaarwegende belangen van het kind". Tweedens, alhoewel deur die Hoge Raad (HR) bevind word dat daar *nie* 'n "gesinslewe" aanwesig was nie en daarmee volstaan word, kom die vraag aan die orde of die HR dan nie vervolgens die bestaan al dan nie van 'n "beoogde gesinslewe" moes ondersoek het nie. Derdens, selfs indien die verhouding nie aan die vereistes vir die bevinding van 'n "beoogde gesinslewe" voldoen het nie (welke nie ondersoek is nie), verdien die vraag of die verhouding tussen die bekende spermskenker en die kind, wat tog meer ingesluit het as blote biologiese bande (hy sou van tyd tot tyd kontak hê), nie aldus beskerming

verdien as synde 'n belangrike aspek van die bekende spermskenker se "identiteit" en gevolglik sy "privaatlewe" binne betekenis van híerdie begrip in artikel 8 EVRM nie. Hierdie aangeleentheid is eweneens nie deur die HR oorweeg nie.

Die bespreking hieronder fokus veral op die situasie waar daar onvoldoende bykomende omstandighede aanwesig is om "nauwe persoonlijke bande", oftewel 'n "gesinslewe", daar te stel, maar die verhouding, of potensiële verhouding, *tog meer behels as die bestaan van 'n blote biologiese bloedband*. Veral die aangehaalde stelling deur die EHRM hierbo, dat die reg op kontak slaan op die aansoeker (bekende spermskenker) se "identiteit" en dus sy "privaatlewe", word in die konteks van die feite onder bespreking van nader beskou. Die bydrae ondersoek bovermelde aangeleenthede en die redes hoekom die HR nagelaat het om dit te oorweeg. Die vraag wat verder oorweging geniet, is in welke mate die Suid-Afrikaanse reg by die breër benadering wat die EHRM volg, baat kan vind.

2 Feite van HR 2 November 2012 *NJ* 2013 122

Dit gaan in hierdie saak om die vraag of die biologiese vader, in hierdie geval 'n bekende spermskenker, geregtig is op kontak met die kind. Op grond van artikel 1:377a lid 1 *BW* sal sy aansoek alleen slaag indien hy in 'n "nauwe persoonlijke betrekking" tot die kind staan. Dié Nederlandse begrip stem ooreen met die begrip "family life", oftewel "gesinslewe", in artikel 8 EVRM. Die moeder en haar vroulike lewensmaat is "geregistreerd partners" (par 3). Met die oog op die verwekking van 'n kind, kom hulle met die biologiese vader ooreen dat hy as spermskenker sal optree. Vervolgens word by die (biologiese) moeder 'n kind verwek deur kunsmatige inseminasie. 'n Dogtertjie is in 2003 gebore. Die biologiese moeder en die biologiese vader (bekende spermskenker) het geensins 'n verhouding vóór of ná die geboorte van die kind gehad nie. Die biologiese vader was nie by die geboorte betrokke nie en het die kind ook nie formeel as sy kind erken soos daar in die Nederlandse reg daarvoor voorsiening gemaak word nie. 'n Ooreenkoms tussen hom en die moeder (alhoewel aanvanklik in geskil) behels dat hy die kind van tyd tot tyd mag sien, af en toe vir die kind 'n geskenkie kan gee, en die kind soms mag uitneem. Die biologiese vader het wel gedurende die swangerskap kontak met die biologiese moeder gehad en hy is ingelig aangaande die kind se geboorte. Hy het die kind en biologiese moeder kort na die geboorte besoek en 'n geskenkie vir die kind gegee. Die biologiese moeder ontsê hom egter daarna enige kontak met die kind.

Die regbank Rotterdam wys die aansoek om kontak van die hand (par 3 1389). In hoër beroep na die (gerechts)hof's – Gravenhage word daar egter bevind dat daar wel voldoende bykomende omstandighede tot die blote biologiese bande bestaan (par 3 1391). Tussen die bekende spermskenker en die kind bestaan gevolglik 'n "nauwe persoonlijke betrekking" (oftewel 'n "gesinslewe" binne konteks van artikel 8 EVRM)

soos vereis deur artikel 1:377a lid 1 *BW*. Hy is dus in beginsel op kontak geregtig. Kontak word die bekende spermskenker egter ingevolge artikel 1:377 lid 3 d deur die hof ontsê, omdat dit in stryd met die "zwaarwegende belangen van het kind" (par 6 1393) sou wees. Die redes hiervoor was die kwaai meningsverskil tussen die moeder en die spermskenker aangaande laasgenoemde se toekomstige "ouerskaprol" en betrokkenheid in die kind se lewe wat sou lei tot sware spanning wat 'n bedreiging vir die stabiliteit in die kind se lewe sou inhou (par 6 1393). Omdat sulke omstandighede egter van tyd tot tyd heroorweeg behoort te word (aldus die regspraak van die EHRM in *Nekvedavicius v Germany* aansoek nr 46165/99 van 19-06-2003), wil die moeder hierdie bevinding (van voldoende bykomende omstandighede tussen spermskenker en kind) in die Hoge Raad ter syde laat stel (par 23 n 20 1400).

3 Beslissing van die Hoge Raad

Die bykomende omstandighede (bykomend tot blote biologiese vaderskap) soos deur artikel 1:377(a) lid 1 *BW* vereis, moet geleë wees in – (a) die aard van die verhouding tussen die biologiese moeder en biologiese vader (spermskenker) en laasgenoemde se betrokkenheid by die kind vóór en ná die geboorte (in welke geval die omstandighede wys op 'n voorgenome gesinslewe); of (b) die moontlike band wat na die geboorte tussen hom as biologiese vader en kind ontstaan het (par 4 1 1403). Die omstandighede soos hierbo uiteengesit (selfs met inagneming van die terme van die beweerde ooreenkoms tussen die partye), is *on*voldoende om die vereiste "nauwe persoonlijke betrekking" aan te neem (par 4 2 1403). As rede hiervoor verklaar die Hoge Raad (par 4 3 1403): "Uit die omstandighede volgt immers niet dat het voornemen of de bedoeling bestand een familieband te doen ontstaan tussen [de verwekker] en het kind".

4 Bespreking

4 1 Oorsig van Huidige Regsposisie insake Kontak

In 'n nota oor die beslissing som Wortmann die heersende regsposisie in Nederland (soos in 'n groot mate teweeg gebring deur die beslissings van die EHRM aangaande artikel 8 EVRM) soos volg op (1403):

> "(1) "*Family life*", oftewel "gesinslewe", is nie beperk tot huweliks- of "geregistreerd partnerschap"-gebaseerde verhoudings nie. Dit kan ook uit die feitelike samelewing tussen die partye voortvloei (par 2 1403). Blote biologiese bande (bloedverwantskap) alleen, sonder enige verdere regsbasis of feitelike faktore wat op die bestaan van noue persoonlike bande dui, is onvoldoende om die beskerming ingevolge artikel 8 EVRM te geniet (*Lebbink v The Netherlands* aansoek no 45582/99 van 01-06-2004 *NJ* 2004 667).
> (2) In uitsonderings gevalle kan "beoogde nauwe persoonlijke betrekking" "gesinslewe" meebring, veral in gevalle waar die feit dat "nauwe persoonlijke" bande *nie* kan ontstaan tussen biologiese vader en kind nie, nie aan enige versuim of toedoen van die biologiese vader

toegeskryf kan word nie (maar aan die optrede van die moeder). Indien omstandighede dit noop, moet "gesinslewe" ook insluit die potensiële verhouding wat tussen 'n kind, wat buite die eg of geregistreerde "partnerchap" gebore is en sy biologiese vader *kan* ontwikkel (*Schneider* par 81). Relevante faktore om in hierdie tipe sake voldoende "gesinslewe" aan te toon, is (par 2 1403) (a) die aard van die verhouding tussen die biologiese ouers; en (b) die mate van belangstelling in en toewyding aan die kind deur die biologiese vader (sien *Nyland v Finland* aansoek no 27110/95 van 29-06-1999; *Anayo v Germany* aansoek no 20578/07 van 21-12-2010; *Schneider v Germany* aansoek no 17080/07 van 15-09-2011).

(3) In sogenaamde "afstammingsake", en in die besonder waar dit gaan om die vasstelling van vaderskap, beslis die EHRM dat selfs al sou die verhouding tussen die biologiese vader en kind tekort skiet aan bovermelde vereistes vir "beoogde gesinslewe", daar nog altyd ruimte bestaan vir die erkenning en beskerming van die biologiese vader se "privaatlewe" (*Kautzor v Germany* aansoek no 23338/09 van 22-03-2012). Dieselfde standpunt word deur die EHRM gehuldig in sake wat handel oor aansoeke om kontak (sien *Anayo; Schneider*). Die volgende belangrike vraag word vervolgens deur Wortmann gestel (par 4 1401): "Nog open light de vraag of deze jurisprudentie ook geldt als het gaat om een bekende donor en er meer is dan 'uitsluitend' biologisch vaderschap." Met ander woorde, sou die biologiese vader, waar die omstandighede meer behels as blote biologiese bande (maar tekort skiet aan die vereistes vir 'n "gesinslewe"/"beoogde gesinslewe"), geregtig wees op kontak met die kind op die basis van sy reg op identiteit en dus privaatlewe?"

4 2 Kritiek op die HR se Versuim om Regte wat Voortspruit uit Artikel 8 EVRM "Ambtshalve" toe te Pas

In 'n advies aan die HR kom A-G mr Huydecoper (par 28 1401) tot die volgende slotsom:

> "Ik merk de klachten van het principale middel – de mede op de hiervóór besproken kwesties zijn toegesneden – daarom aan als gegrond. Ik wil daarbij niet onvermeld laten dat in de rechtspraak van het EHRM inmiddels is aanvaard, dat ook in gevallen waarin géén 'family life' tussen een (beweerdelijke) natuurlijke vader en een kind bestaat, art. 8 EVRM toch van toepassing kan zijn omdat de desbetreffende kwestie het privéleven van de betrokkenen (of van één van beiden) raakt. *Of dat zich in het onderhavige geval voordoet is in deze zaak niet geopperd, en is dus ook in cassatie niet aan de orde".* (Eie beklemtoning).

Dit behoort dus aldus Huydecoper nie deur HR oorweeg te word nie, omdat dit nie deur die partye as geskilpunt geopper is nie. Volgens Wortmann (in die nota oor die beslissing par 6 1404) gaan dié standpunt nie op nie. Die biologiese moeder betoog bloot (voor die HR) dat die hof 's Gravenhage ten onregte bevind het dat daar 'n "gesinslewe" tussen die biologiese vader (spermskenker) en kind bestaan op sterkte van die feite en omstandighede hierbo uiteengesit. Hy is dus na haar mening ten onregte ontvanklik verklaar in sy aansoek om kontak. Die biologiese moeder het egter geen belang daarby gehad om die reg op "privéleven"

(privaatlewe of private lewe) in verband met die reg op kontak na vore te bring nie. Moes die biologiese vader (spermskenker) andersyds formeel betoog het dat indien die HR, anders as die hof 's Gravenhage, sou bevind het dat daar nie 'n gesinslewe bestaan het nie, sy reg op respek vir sy privaatlewe (identiteit) beskerming verdien en dat hy ook om daardie rede op kontak geregtig is (par 6)? Wortmann meen dat die HR verplig is om die regte wat uit artikel 8 EVRM voortvloei "ampshalwe" toe te pas en die vasgestelde feite te toets aan die volledige spektrum van regte wat uit artikel 8 voortvloei (par 6 1404). Wortmann kom tot die slotsom dat die bekende spermskenker wat weliswaar nie in een "nauwe persoonlijke betrekking" tot die kind staan nie, maar ook nie uitsluitlik die biologiese vader is nie (soos in die feite in *casu*) wel ontvanklik is in sy aansoek om kontak. Hy motiveer dit op grond van beskerming van die bekende spermskenker se *privéleven*, maar vermeld dat dit hom ontneem kon word op grond van die "zwaarwegende belangen van het kind" indien dit van toepassing sou wees op die feite. Die HR kon dus om 'n heel ander rede, die beslissing van die hof 's Gravenhage bekragtig het.

4 3 Die Betekenis van "Private life" Binne Konteks van Artikel 8 EVRM

4 3 1 Algemeen

Artikel 8 EVRM lui soos volg:

> "(1) *Everyone* has the right to respect for his *private* and *family life,* his home and his correspondence.
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." (Eie beklemtoning).

Die EHRM het nog geen allesomvattende definisie van die begrip "private life" gegee nie (*Costello-Roberts v United Kingdom* 19 EHRR 112 par 6). Harris *et al* (*Law of the European Convention on Human Rights* (2009) 364) verklaar soos volg:

> "The case law concerning the meaning of private life has been distinguished neither by its clarity nor its discipline. There is no single formula to apply in determining whether the private life interest is involved, other than to take each case on its individual merits".

Gevalle waar bepaalde feite onder die begrip "private life" tuisgebring is, is op 'n *ad-hoc* basis hanteer en die hof hom beperk tot die bepaalde probleem voor hande (Reid *A Practitioner's Guide to the European Convention on Human Rights* (2007) 481; Harris *et al* 364). Die rede hiervoor is dat die EVRM as 'n "lewende instrument" beskou word. Die feit dat die interpretasie van die regte wat daarin vervat word oor 'n tydperk van jare plaasvind, beteken dat nuwe regte onder die konsep "private life" tuisgebring kan word wanneer en soos deur die

omstandighede vereis (Loucaides "Personality and Privacy under the European Convention on Human Rights" 1990 *BYIL* 175 178). Dit is egter beslis wyer as die "reg op privaatheid" (Reid 482; Harris *et al* 364). Reeds in 1976 beslis die Europese Kommissie vir die Regte van die Mens (die Kommissie) soos volg in *X v Iceland* (aansoek no 6825/74 van 1805-1976 (1976) 5 DR 86; sien ook Doswald-Beck "The Meaning of the 'Right to respect for Private Life' under the European Convention on Human Rights" (1983) 4 *HRLJ* 283; Loucaides 1990 *BYIL* 175):

> "For numerous Anglo-Saxon and French authors the right to respect for 'private life' is the right to privacy, the right to live as far as one wishes, protected from publicity … In the opinion of the Commission however, the right to respect for private life does not end there. *It comprises also, to a certain degree, the right to establish and develop relationships with other human beings especially in the emotional field, for the development and fulfilment of one's own personality*". (Eie beklemtoning).

Loucaides (1990 *BYIL* 175 178) meen die effek van hierdie beslissing is dat die "persoonlikheid" van die individu vir die eerste keer as die basis vir die vasstelling van die inhoud en trefwydte van sy "private life" aanvaar is. Die Kommissie bevestig hierdie siening in *Bruggeman and Scheuten v Germany* (aansoek no 6959/75 DR 10 100) in die volgende woorde:

> "The right to respect for private life is of such a scope as to secure to the individual a sphere within which he can freely pursue the development and fulfilment of his *personality*. To this effect, he must also have the possibility of establishing relationships of various kind …" (Eie beklemtoning). (Sien ook *X and Y v Belgium* aansoek no 8962/80 DR 2 (1982) 112 124).

Cohen-Jonathan merk soos volg op ("Respect for private and family life" in MacDonald, Matcher and Petzold *The European System for the Protection of Human Rights* (1993) 404 405):

> "One can consider anything to do with personal health, philosophical, religious or moral beliefs, family and *emotional life*, friendships and, subject to reservations, professional and material life as part of private life". (Eie beklemtoning).

Clayton and Tomlinson (*The Law of Human Rights* (2000) paras 12.85-12.94) stel voor dat die begrip "private life" insluit "respect for a person's moral and physical integrity, *personal identity*, personal information, personal sexuality, and personal or private space". (Eie beklemtoning). Reid (495) merk op dat "close relationships *short of family life* will generally fall within the scope of private life …". (Eie beklemtoning). Die EHRM het egter deur regspraak belangrike riglyne neergelê wat die betekenis en omvang van hierdie konsep binne die konteks van artikel 8 EVRM betref. Die reg is uiteraard nie absoluut nie (art. 8(2) EVRM). Die bespreking hieronder word vervolgens beperk tot daardie aspekte van die privaatlewe wat op die onderwerp van hierdie bydrae betrekking het, alhoewel die konsep "private life" ook ander regte insluit (waaronder

morele en fisiese integriteit, private omgewing, seksuele aktiwiteite, ander aspekte van die sosiale lewe ens).

4 3 2 Die Reg om Verhoudings met Ander Mense tot Stand te Bring en Verder te Ontwikkel

In *Niemietz v Germany* ((1992) 16 EHRR 97 par 29) verklaar die hof soos volg (sien ook *Pretty v United Kingdom* (2002) 35 EHRR 1 par 29):

> "... it would be too restrictive to limit the notion [of private life] to an 'inner circle' in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. *Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings*". (Eie beklemtoning).

Waar die behoefte aan verhoudingsvorming egter slaan op *gesinslede* onderling word dit hoofsaaklik hanteer onder die "right to respect for family life" in artikel 8 EVRM. Waar die verhouding egter tekort skiet aan die vereistes vir die bestaan van 'n "gesin" en "gesinslewe" is die applikant se reg op respek vir sy privaatlewe dikwels 'n alternatief vir die erkenning en beskerming van 'n bepaalde verhouding (*Anayo; Schneider).* "Privaatlewe" strek dus wyer as die enger benadering van die reg op privaatheid met die klem op geheimhouding van sekere inligting en die idee van afsondering en afgesonderheid of terugtrekking (Harris *et al* 364; Reid 482). Die hof erken selfs verder dat die waarborg verskaf deur artikel 8 EVRM primêr daarop gemik is om die ontwikkeling, sonder inmenging van buite, van die persoonlikheid van elke individu in sy verhouding met ander mense te verseker (*Niemietz v Germany* par 29; *Botta v Italy* (1998) 26 EHRR 241 par 32; *Van Hannover v Germany* (2004) 43 EHRR 1 par 50). In *McFeely v United Kingdom*, (aansoek no 8317/78 20 DR 44 91) beklemtoon die Kommissie vroeër reeds die belangrikheid van verhoudingvorming met ander mense en bepaal dat "private life" (ook) toepassing vind op gevangenes en 'n mate van assosiasie vir gevangenes met ander mense vereis en insluit. Die vryheid om met ander te assosieer (sien egter par 6 hieronder) is gevolglik 'n verdere sosiale verskyningsvorm of element van "private life" (Harris *et al* 364; vir 'n volledige bespreking sien Janis *et al European Human Rights Law* (2008) 426).

4 3 3 (Persoonlike) Identiteit

Indien die biologiese vader se aansoek om kontak met die kind misluk omdat die aard van die verhouding tussen hulle nie aan die vereistes vir 'n "gesinslewe" of "beoogde gesinslewe" voldoen nie, slaan dit nietemin wel op 'n belangrike aspek van die biologiese vader se "identiteit" en gevolglik sy "privaatlewe" binne die konteks van Artikel 8 EVRM (*Anayo; Schneider*). Harris *et al* (366) verklaar:

> "The fundamental interest within the sphere of private life is the capacity of the individual to determine his *identity* ... At stake here is not merely privacy

> with regard to one's identity, ... but an interest in having one's *identity given official recognition*". (Eie beklemtoning).

Ten einde sy (korrekte) identiteit as biologiese vader van die kind uit te leef en verder te ontwikkel, staan die reg op kontak en reg op inligting tot die kind sentraal. Kontak met die kind en die ontvangs van inligting aangaande die kind, so kan geargumenteer word, is belangrik vir die biologiese vader (spermskenker) se (verdere) identiteitsontwikkeling en die (verdere) ewewigtige ontplooiing van sy persoonlikheid. Daar kan geargumenteer word dat sy status as biologiese vader (verwekker) deur die toestaan van 'n reg op kontak 'n mate van "amptelike" erkenning verkry, alhoewel hy steeds nie as juridiese ouer aangemerk kan word nie.

In *Rasmussen v Denmark* ((1985) 7 EHRR 371) is die man na egskeiding gelas om onderhoud te betaal vir die vrou en hul twee kinders. Na afloop van die egskeiding wou die man sy vaderskap van die een kind betwis. Hy het reeds gedurende die huwelik vermoed dat hy nie die vader van die kind is nie, maar het ten einde sy huwelik te red, geen stappe gedoen om vaderskap te laat bepaal nie. Dit is egter deur die hof geweier omdat sy aansoek buite die statutêre tydslimiet vir die betwisting van vaderskap sou val. Geen sodanige tydslimiet het gegeld vir vroue wat die vaderskap van hul kind wou laat vasstel nie. Die man beweer dat dié wetgewing in stryd is met sy reg op 'n gesinslewe ingevolge artikel 8 saamgelees met artikel 14 EVRM. Die staat voer aan dat artikel 8 nie van toepassing is nie, "maintaining that its object was the protection of the family and not the dissolution of existing family ties" (377 par 31). Die EHRM gee die staat gelyk, maar beslis dat artikel 8 tog ter sprake is en beslis (378 par 33):

> "[T]hough the paternity proceedings which the applicant wished to institute were aimed at the dissolution in law of existing family ties, the determination of his legal relations with Pernille undoubtedly concerned his *private life*". (Eie beklemtoning).

Dit is dus belangrik vir sy persoonlike identiteit as aspek van sy "privaatlewe" om *nie* langer as die biologiese vader van die kind bekend te staan nie (sien ook *Airey v Ireland* (1979) 2 EHRR 305 vroeër ten opsigte van die reg op geregtelike skeiding tussen man en vrou in Ierland). Dit wil sê, anders as in paragraaf 4 3 2 hierbo, het dit nie slegs op die totstandbring en verdere ontwikkeling van 'n verhouding tussen partye betrekking nie, maar selfs op die beëindiging daarvan. Hierdie kort bespreking kan saamgevat word in die volgende stelling van Loucaides (1990 *BYIL* 175 196):

> "Modern legal trends seem to acknowledge the necessity of the individual as a prerequisite for the meaningful and effective protection of the freedom of the person ... [C]ase law has expounded and upheld the protection of privacy to such a degree that, for all practical purposes, the right of privacy has become a functional equivalent of a right of personality, potentially embracing all those constituent parts of the personality of the individual that are not expressly safeguarded by the European Convention".

5 Suid-Afrika: Bondige Uiteensetting van Belange ter Sprake

Die doel van hierdie kort bespreking is nie om opnuut die onderskeie persoonlikheids- en fundamentele regte in diepte te bespreek nie, maar om aan te dui in welke mate die begrippe in breë trekke moontlik 'n ander inhoud het as hierbo in paragraaf 4 deur die EHRM daaraan toegedig. Aan die een kant kan geargumenteer word dat die betekenis van die "reg op privaatheid" in die Suid-Afrikaanse reg 'n enger betekenis het as die begrip "privaatlewe" binne die konteks van die regspraak van die EHRM aangaande artikel 8 EVRM. Die reg op privaatheid as persoonlikheidsreg is reeds vroeër kernagtig soos volg omskryf: (Neethling *Persoonlikheidsreg* (1998) 39 en gesag aldaar aangehaal in n 330 40. Hierdie definisie word deur die regspraak aanvaar - sien o.a. *National Media Ltd v Jooste* 1996 3 SA 262 (A) 271; *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 4 SA 376 (T) 384; *Bernstein v Bester* 1996 2 SA 151 (KH) 789; Neethling *et al Neethling's Law of Personality* (2005) 32)

> "Privaatheid is 'n individuele lewenstoestand van afsondering van openbaarheid. Hierdie lewenstoestand omsluit al daardie persoonlike feite wat die belanghebbende self bestem om van kennismaking deur buitestaanders uitgesluit te wees en ten opsigte waarvan hy 'n privaathoudingswil het".

In teenstelling met die gedagte dat die begrip "privaatlewe" volgens die EHRM die reg op identiteit en die reg om verhoudings met ander mense tot stand te bring en te ontwikkel, insluit, lê die begrip "privaatheid" in die Suid-Afrikaanse persoonlikheidsreg klem op die idee van afsondering en terugtrekking. Die begrip "persoonlike of privaatlewe" is egter nie totaal onbekend in die Suid-Afirkaanse persoonlikheidsreg nie. Joubert (*Grondslae van die Persoonlikheidsreg* (1953) 135) stel dit duidelik dat "privaatheid alleen betrekking [het] op die persoonlikheid van die reghebbende, op sy *persoonlike lewe* en sy lewe in sy private huis, ensovoorts". Volgens Neethling (*Persoonlikheidsreg* 38) behels dit in wese dat privaatheid alle persoonlike feite wat op die reghebbende in sy *afgesonderdheid* betrekking het, omvat. Dit wil egter voorkom of die klem weer val op die idee van afgesonderdheid en terugtrekking. Aangesien privaatheid slegs betrekking het op persoonlike feite wat die reghebbende self bestem om van kennismaking deur buitestaanders uitgesluit te wees, is dit voor-die-hand-liggend dat privaatheid *slegs* deur 'n *kennismaking* met sodanige private feite deur buitestaanders in stryd met die bestemming en wil van die reghebbende geskend kan word (Neethling *Persoonlikheidsreg* 40).

Die begrip "privaatlewe" kom andersyds verkeerdelik ter sprake binne konteks van die aantasting van 'n persoon se vrye wilsluiting of outonomie, soos waar die staat aan 'n individu voorskryf hoe om sy privaatlewe te reël (Neethling *Persoonlikheidsreg* 43). Hier is egter geen privaatheidskending nie, omdat 'n kennismaking met private

persoonlike feite strydig met die reghebbende se bestemming en wil ontbreek (Neethling *Persoonlikheidsreg* 43; vir 'n volledige bespreking hiervan sien Neethling "Die reg op privaatheid en die Konstitusionele Hof: Die noodsaaklikheid vir duidelike begripsvorming" 1997 *THRHR* 137).

Interessant genoeg, egter, bepaal die Konstitusionele Hof in *NCGLE v Minister of Justice* (1998 12 BCLR 1517 (KH); 1999 1 SA 6 (KH) par 32 asook parr 116 & 117) juis dat "[*p*]*rivacy* recognises that we all have a right to a sphere of *private intimacy* and *autonomy* which allows us *to establish and nurture human relationships"* (eie beklemtoning). Hierdie standpunt word egter deur Rautenbach ("Introduction to the Bill of Rights" in *Bill of Rights Compendium* 1A 173) gekritiseer. Hy meen dat vermelde aspek tuis hoort onder die reg op die vryheid van assosiasie in artikel 18 van die Grondwet, 1996 en dat die hof die kern van dit wat deur hierdie reg beskerm word, ignoreer (sien ook Neethling *Persoonlikheidsreg* 43 n 361).

Soms word die verband tussen "privaatheid" en "die reg op menswaardigheid" weer beklemtoon. In *Khumalo v Holomisa* (2002 5 SA 401 (KH) par 27) verklaar die Hof:

> "In our new constitutional order, no sharp line can be drawn between these injuries to personality rights. *The value of human dignity in our Constitution is not only concerned with an individual's sense of self-worth, but constitutes an affirmation of the worth of human beings in our society.* It includes the intrinsic worth of human beings shared by all people as well as the individual reputation of each person built upon his or her own individual achievements. The value of human dignity in our Constitution therefore values both the *personal sense of self-worth* as well as the public's estimation of the worth or value of an individual. It should also be noted that there is a close link between human dignity and privacy in our constitutional order. The right to privacy entrenched in [section] 14 of the Constitution, recognises that human beings have a right to a sphere of intimacy and autonomy that should be protected from invasion. This right serves to foster human dignity. No sharp lines then can be drawn between reputation, *digitas* and privacy in giving effect to the value of human dignity in our Constitution". (Eie beklemtoning). (Sien egter Neethling *et al Law of Personality* 242 n 40. Sien verder *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (KH) par 30).

Die "reg op identiteit" as persoonlikheidsreg word as afsonderlike selfstandige persoonlikheidsreg beskou en dogmaties van die "reg op privaatheid" onderskei (Neethling *Persoonlikheidsreg* 44; Neethling "Die Hoogste Hof van Appèl verleen erkenning aan die reg op identiteit as persoonlikheids- en fundamentele reg" 2007 *TSAR* 834). Met verwysing na Amerikaanse gesag verklaar die Konstitusionele Hof egter in *Bernstein v Bester* (1996 2 SA 751 par 65) dat:

> "The scope of privacy has been closely related to the concept of identity and it has been stated that 'rights, like the right to privacy, are not based on a notion of the unencumbered self, but on the notion of what is necessary to

have one's own autonomous identity'". (Sien McQuoid-Mason "Privacy" in Chaskalson *et al Constitutional Law of South Africa* 38-1).

Die dogmatiese onderskeid tussen identiteit en privaatheid bring egter nie mee dat 'n privaatheidskending nie met identiteitsaantasting gepaard kan gaan nie (Neethling *Persoonlikheidsreg* 46). Dit word bevestig in *Wells v Atoll Media (Pty) Ltd* ([2010] 4 All SA 548 (WC)) waar die hof onlangs binne die konteks van 'n gepubliseerde foto van 'n meisie sonder haar toestemming soos volg verklaar (par 49): "When the photograph is employed ... for the benefit of a magazine sold to make profit, it constitutes an unjustifiable invasion of the personal rights of the individual, including the person's *dignity and privacy*". (Eie beklemtoning).

"Identiteit" kan omskryf word as daardie uniekheid of eieaardigheid van 'n persoon wat hom as bepaalde individu identifiseer of individualiseer en hom sodoende van ander onderskei (Neethling *Persoonlikheidsreg* 44). Identiteit manifesteer sigself in verskeie *indicia* waaraan die betrokke persoon herken kan word. Dit behels fasette van sy persoonlikheid wat kenmerkend van of eie aan hom is, soos sy lewensgeskiedenis, karakter, naam, stem, *gestaltebeeld* ensovoorts (Neethling *Persoonlikheidsreg* 44). 'n Persoon het 'n besliste belang daarin dat die eie aard van sy wese en handelinge, oftewel sy persoonlike identiteit, deur buitstaanders gerespekteer moet word (*ibid.* Sien ook *Grütter v Lombaard* [2007] (KH) 2 20-02-2007 en *Wells v Atoll Media (Pty) Ltd* [2010] 4 All SA 548 (WC) parr 48 & 49). In *Bernstein* (par 73) verwys die hof na Forst ("How not to speak about identity: the concept of a person in a theory of justice" in *Philosophy and Social Criticism* (1992)) se beskouing van die konsep "identiteit" as synde "the ability of a person to relate to him - or herself and to be able to relate to others in a meaningful way". Na my mening kan, eerstens, die behoefte om as die biologiese vader van 'n kind erken en aangemerk te word (onder feitelike omstandighede soos in GR 2 Nov 2012 *NJ* 2013 uiteengesit) hieronder tuisgebring word. Tweedens is kontak met die kind noodsaaklik vir die biologiese vader (bekende spermskenker) se identiteitsontwikkeling, hoe hy homself sien, die ontplooiing van sy persoonlikheid en sy vermoë om betekenisvol met ander mense om te gaan in vermelde omstandighede waar daar meer as blote biologiese bande aanwesig is.

Daar word verder aanvaar dat ofskoon die reg op identiteit nie by name in die Grondwet beskerming geniet nie, dit wel onder die reg op menswaardigheid (art. 10) tuisgebring kan word (Neethling *Persoonlikheidsreg* 95; Neethling "Die reg op kennis van die eie afstamming" 2012 *LitNet* Jaargang 9(2)). Die reg op menswaardigheid word in effek gesien as die hoeksteen vir die beskerming van alle ander regte. Hierdie reg skyn ook die tuiste te wees van die reg om verhoudings met ander tot stand te bring, in stand te hou en (verder) te ontwikkel. Hierdie uitgangspunt word egter gekritiseer. In *Nokontyana v Ekurhuleni Metropolitan Municipality* (2010 BCLR 312 (KH) par 50) is daar reeds beslis dat waar daar 'n meer spesifieke reg in die Grondwet bestaan

waaronder 'n bepaalde reg ressorteer dit daaronder hanteer moet word eerder as onder die reg op menswaardigheid. Rautenbach ("Introduction to the Bill of Rights" in *Bill of Rights Compendium* 1A 173) kritiseer die *dictum* in *Dawood, Shalabi, Thomas v Minister of Home Affairs* (2000 3 SA 936 (KH) par 35) waar die Konstitusionele Hof verklaar dat "it cannot be stated that there is a more specific right that protects individuals who wish to enter into and sustain permanent intimate relations than the right to dignity in section 10". Ook hier huldig Rautenbach die siening dat dit onder die reg op die vryheid van assosiasie tuisgebring moet word.

Oor die algemeen blyk die reg op vryheid van assosiasie die tuiste te wees vir enige handeling gemik op die totstandkoming en handhawing van verhoudings met ander mense. Waar die verhoudings egter op gesinslede onderling betrekking het, word dit in breër Europese konteks onder die "right to respect for family life" in artikel 8 EVRM tuisgebring. Alhoewel die Grondwet geen uitdruklike reg op die "gesin" en "gesinslewe" bevat nie, het die Konstitusionele Hof reeds vroeër (*Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (KH) parr 98-103, 807-8) bevind dat die Grondwet voldoende direkte en indirekte beskerming daaraan bied. (Sien in die verband o.a. art. 10, 14, 18, 21, 28(1)(b), 15(3)(a), 35(2)(f)(i) & (ii)).

Ter samevatting blyk dit dat die reg op verhoudingsvorming (oor die algemeen) en die reg op identiteit deur die EHRM in die breër Europese konteks onder die begrip "private life" hanteer word. Die reg op privaatheid ('**n** enger begrip as "private life") en die reg op identiteit is, dogmaties beskou, afsonderlike persoonlikheidsregte. Tog is daar ook aanduidings in ons regspraak wat 'n definitiewe verband tussen díe begrippe aantoon. Die reg op privaatheid word ook uitdruklik in die Grondwet verskans, terwyl daar geargumenteer word dat die reg op identiteit onder die reg op menswaardigheid ressorteer. Die reg op verhoudingsvorming word oënskynlik verkeerdelik onder "privaatheid" en soms onder die reg op menswaardigheid hanteer. Die aangewese tuiste is egter waarskynlik die reg op vryheid van assosiasie. Die reg op respek vir die gesinslewe word onder verskeie artikels in die Grondwet hanteer. Reeds vroeër betoog skrywer dat waar dit verhoudinge tussen gesinslede behels, die mate van indirekte beskerming wat hulle geniet groter effektiwiteit sal verkry indien uitdruklike regte ten aansien van die gesin en gesinslewe wel in die Grondwet vervat sou word. Pogings om aspekte van die gesinslewe onder artikels wat indirekte beskerming verleen, tuis te bring (*Dawood, Shalabi, Thomas*), is dikwels geforseerd, terwyl sodanige aspekte internasionaal met groot gemak hanteer word deur dit onder 'n uitdruklike reg op respek vir die gesinslewe tuis te bring (soos die "right to respect for family life" ingevolge art. 8 EVRM). Waar die verhouding ter sprake tekortskiet aan die omskrywing van "gesinslewe"/"family life" val dit in die breër Europese reg onder die "right to respect for private life" in artikel 8 EVRM. In Suid-Afrika, so kan betoog word, sou dit onder 'n meer bepaalde persoonlikheidsreg tuisgebring kan word.

6 Toepassing en Slot

Ingevolge artikel 1 van die Kinderwet word enige persoon wat biologies aan die kind verwant is slegs weens die feit dat hy 'n gameetskenker was vir doeleindes van kunsmatige inseminasie, nie as 'n "ouer" aangemerk nie. Dit doen egter geen afbreek aan die feit dat hy biologies aan die kind verwant is nie. Verder kan hy nie ingevolge artikel 26 van die Kinderwet aansoek doen om as "biologiese vader" van die kind geïdentifiseer te word nie. Artikel 26 geld nie vir 'n persoon wat (soos in die definisie van "ouer" in art. 1) biologies aan die kind verwant is slegs omdat hy 'n gameetskenker vir doeleindes van kunsmatige inseminasie was nie (art. 26 (2)(b)). Artikel 40(3) van die Kinderwet bepaal verder dat geen reg, verantwoordelikheid, plig of verpligting tussen dusdanige spermskenker en die kind ontstaan nie, aldus sekere uitsonderingsgevalle (art. 40(3)(a)(b)). Die feit dat die bekende spermskenker nie as (a) 'n "ouer" volgens die Kinderwet bekend staan nie, en (b) nie as die "biologiese vader" aangemerk kan word nie, en (c) daar verder geen outomatiese verantwoordelikhede en regte tussen hom en die kind ontstaan nie, beteken na my mening nie dat die bepalings van die Kinderwet tot gevolg het dat die bestaan van biologiese bande tussen hulle ontken word nie.

In die feitestel hierbo (HR 2 Nov 2012) is daar met die man (aansoeker om kontak) ooreengekom om as spermskenker op te tree. Hy was nie by die geboorte betrokke nie en het die kind nie formeel erken, soos dit wel in die Nederlandse reg moontlik is nie. 'n Ooreenkoms tussen hom en die moeder behels dat hy die kind van tyd tot tyd mag sien, af en toe vir die kind 'n geskenkie mag gee en die kind soms mag uitneem. Hy het wel gedurende die swangerskap kontak met die biologiese moeder gehad en hy is aangaande die geboorte van die kind ingelig. Hy het die moeder en kind kort na die geboorte besoek en 'n geskenkie vir die kind gegee. Hier is dus 'n "verhouding" tussen hom en die kind wat "ietwat meer" behels as blote biologiese of bloedbande, maar aan die ander kant weer tekortskiet aan die vereistes van "gesinslewe" of "beoogde gesinslewe" binne konteks van artikel 8 EVRM.

Dit is nie vergesog om te redeneer dat 'n soortgelyke feitestel (soos in HR 2 Nov 2012) homself in die toekoms hier te lande kan voordoen nie. In Suid-Afrika, so kan geargumenteer word, sou die bekende spermskenker in soortgelyke omstandighede ingevolge artikel 23 van die Kinderwet aansoek kan doen om 'n reg op kontak, soos enige ander derde party. Wat die faktore betref wat die hof in aanmerking moet neem, sou hy egter beswaarlik enige verhouding tussen hom en die kind kan aantoon en is daar verder geen sprake van 'n ernstige graad van verbintenis jeens die kind nie. Hy het ook nie bygedra tot die uitgawes in verband met die geboorte en onderhoud van die kind nie. Artikel 23(2)(e) bepaal dat die hof wel enige ander feit kan oorweeg wat volgens die hof in aanmerking geneem behoort te word. Die hof behoort die feit te oorweeg dat daar 'n biologiese band (bloedband) tussen hom en die kind bestaan. In die omstandighede hierbo vermeld, behoort die hof ook kennis te neem van die feit dat die verhouding tussen hulle meer behels

as blote biologiese bande en dat die spermskenker 'n mate van belangstelling in die kind toon gesien in die lig van die bepalings van die ooreenkoms. Die vraag is of sy reg op identiteit, menswaardigheid en/of reg op vryheid van assosiasie (wat weliswaar in die breër Europese familiereg deur die EHRM onder die begrip "private life" hanteer word), nie ook alhier oorweging behoort te geniet nie. Selfs al voldoen die aansoeker beswaarlik aan enige van die faktore in artikel 23(2) vermeld , behoort kontak deur die hof oorweeg te word in die lig van die bekende spermskenker se vermelde persoonlikheids- en fundamentele regte.

Tot dusver het die bespreking gefokus op die posisie en regte van die bekende spermskenker. In die HR saak onder bespreking was kontak die bekende spermskenker nietemin steeds deur die hof 's Gravenhage ontsê op basis van die "zwaarwegende belangen van het kind" (a 1:377 a lid 3 d). Dit is 'n ietwat strenger maatstaf wat inhou dat kontak die biologiese vader slegs ontsê sal word indien aangetoon word dat dit ast ware "sleg" sal wees vir die kind, maar nie wanneer daar nie aangetoon kan word dat kontak "goed" sal wees vir die kind nie. Vlaardingerbroek *et al (Het hedendaagse personen- en familierecht* (2004) 348) verduidelik dit soos volg:

> "Bij de afweging van de belangen van alle betrokkenen bij omgang prevaleren uiteindelijk de belangen van het kind. Hierbij dient niet de vraag beantwoord te worden of omgang in het belang van het kind is (goed is voor het kind), maar dient de vraag central te staan of omgang moet worden afgewezen, vanwege het bestaan van één of meer ontzeggingsgronden (slecht is voor het kind)".

Natuurlik is die beste belang van die kind (art. 7 van die Kinderwet) nie alleen 'n faktor ingevolge artikel 23(2)(a) nie, maar van deurslaggewende belang in elke aangeleentheid rakende 'n kind (art. 9 van die Kinderwet en art. 28(2) van die Grondwet). In 'n vorige bydrae (2013 *LitNet* 10(2) 45 53) is 'n aantal faktore uitgelig wat vanuit die oogpunt van die kind in oorweging geneem behoort te word. Dit sluit in die kind se reg op afkomskennis; die kind se eie, afsonderlike reg op kontak met albei ouers, die stabiliteit van die gesinsomgewing en die afweging van verskeie mededingende grondwetlike belange (sien ook Neethling 2012 *LitNet* 9(2)). In beginsel behoort die bekende spermskenker se hierbovermelde persoonlikheids- en ander fundamentele regte egter erkenning te geniet in situasies waar sy verhouding met die kind meer behels as blote biologiese bande en hy byvoorbeeld aansoek doen om kontak met die kind. Dit sou strook met tendense in die breër Europese familiereg. Daar kan volstaan word met die volgende stelling deur Loucaides (1990 *BYIL* 175):

"[T]he achievement of effective protection of freedom of the person requires legal recognition and safeguarding of the individuality of man, i.e. of the qualities, abilities and characteristics that distinguish and individualize a particular person; all those attributes that give to every human being his special and original signification in society; in other words, *his personality*".

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Onlangse regspraak/Recent case law

Malatji v Gauteng Building Provident Fund, Alexander Forbes Financial Services (Pty) Ltd and LR Civil (Pty) Ltd (PFA/NP/9447/2011/LMP) (unreported)

Paying the price for being a careless employer or simply rewarding myopic employees

1 Introduction

The risk of becoming old and, as a result, not being able to participate or continue participating in the labour market and earn a living for oneself and dependants as well as the risk of dependants falling on hard times due to the passing on of the breadwinner are catered for in the South African social security system. One way in which these risks are covered in South Africa is by means of retirement funds (i.e. pensions fund and provident fund). It is estimated that there are about 3000 active retirement funds in South Africa (National Treasury *Charges in South African Retirement Funds* (National Treasury (2013)) 4). Being social insurance funds, the retirement funds are contributory-based. For a person and/or his or her dependants to enjoy the protection provided (such as death, disability and funeral benefits) he or she must be a member. A "member" is defined to mean:

> "in relation to (a) a fund referred to in paragraph (a) of the definition of 'pension fund organization', any member or former member of the association by which such fund has been established; (b) a fund referred to in paragraph (b) of that definition, a person who belongs or belonged to a class of persons for whose benefit that fund has been established, but does not include any such member or former member or person who has received all the benefits which may be due to him from the fund and whose membership has thereafter been terminated in accordance with the rules of the fund" (section 1 of the *Pension Funds Act* 24 of 1956).

In addition, he or she and his or her employer must pay the requisite contributions.

At the moment, there is no general statutory duty for all employees and their employers to belong to a retirement fund. However, this does not imply that the notion of compulsory membership to a retirement scheme is foreign to the South African social security system. As a matter of fact, there are instances where an employee can be compelled to belong to a retirement fund. For example, an employee can be obliged to belong to his or her employer's retirement fund by means of a *contract of employment* and/or *collective agreement*. In addition, there are cases

where employees and employers are compelled to participate in a retirement fund by a *sectoral determination*. The *Sectoral Determination 2: Civil Engineering Sector, South Africa* GN R204 in *GG* 22103 of 2 March 2001 (as amended by GN R201 in *GG* 26049 of 18 February 2004, GN R133 in *GG* 29635 of 16 February 2007 [with effect from 1 March 2007], GN R872 in *GG* 32525 of 25 August 2009 [with effect from 1 September 2009], GN NG R 757 in *GG* 33505 of 27 August 2010] (as corrected by GN R1115 in *GG* 33804 of 26 November 2010), and GN R699 in *GG* 35634 of 28 August 2012 [with effect from 1 September 2012] (as corrected by GN R725 in *GG* 35658 of 4 September 2012)) is the case in point.

The fact that the South African social security system does not have a general duty imposed on all employees and their employers to belong to a retirement fund means that employees without foresight to make provision for their old age are most likely to end up relying on the tax-financed old age grant during their twilight years (see, for example, Van Zyl "Old age pensions in South Africa" (2003) *International Social Security Review* 108). This undermines the underlying social assistance ideal that social assistance should be provided to those needy individuals who could not safeguard themselves and their families due to factors beyond their control such as unemployment and invalidity.

The limited circumstances under which an employer can be said to be duty-bound to register its employees with a retirement fund are not as straightforward as they seem. The point is that they raise a number of questions. For instance, is an employee of an employer (who is required to register its employees as members) at liberty to waive his or her right to take up membership of the employer's retirement fund? Second, should an employee choose not to exercise such a right, is his or her employer obliged to ensure that his or her employee is registered with the pensions fund? Third, assuming that the employer does not *nolens volens* register its employee, can such an employer be held liable for failing to do so? Put differently, can it be said that the employer acted unlawfully and unfairly by failing to register an employee as a member of a retirement fund when he was supposed to?

The aforementioned questions were grappled with by the Pensions Funds Adjudicator in the unreported determination of *Malatji v Gauteng Building Industry Provident Fund and others* (PFA/NP/9447/2011/PM) of 24 January 2013. This determination involved the failure of an employer to register an employee with a pension fund thereby resulting in meagre death benefits payable following the employee's death. The purpose of this case note is to review the Pension Funds Adjudicator's determination. The primary aim is to highlight the pitfalls and challenges facing employers when dealing with the decision whether to register an employee as member of a retirement fund or not.

2 Facts

The determination of *Malatji v Gauteng Building Industry Provident Fund and others* dealt with a situation where a deceased employee omitted to acquire membership of a retirement fund until a few months prior to his death. This resulted in the benefits payable in accordance with section 37C of the Pension Funds Act, which makes provision for the disposition of pension benefits upon the death of a member, being computed to a lump sum amount of R601.94. The complainant was aggrieved by the employer's failure to register the deceased as a member of the retirement fund from the date when he commenced his employment with the employer on 8 March 2004 and as a result causing a lower death benefit becoming payable upon his death. The complainant argued that the employer registered the deceased as a member of the retirement fund when it was clear that the member was ill. This was only in April 2011. Sadly, the member passed away three months later in June 2011. The complainant sought an order to the effect that the deceased's membership of the retirement be back-dated to 8 Mach 2004.

3 Central Question Before the Tribunal

The key issue to be determined by the Tribunal was essentially two-pronged. Firstly, the Tribunal had to establish whether or not a more beneficial death benefit would have been awarded had the deceased been registered as a member of the retirement fund at the commencement of his employment in March 2004. Secondly, the Tribunal had to decide whether the employer contravened the law by only registering the deceased as a member in April 2011 (par 5.1).

4 Complainant's Main Arguments

The reason for the complainant's prayer was two-fold. In the first instance, the complainant contended that the deceased's fellow workers were registered before him. She argued further that she was advised about the employer's duty to register its employees with the retirement fund arising from the Sectoral Determination 2: Civil Engineering Sector (the Sectoral Determination). It should be recalled that section 29 of the Sectoral Determination provides that:

> "(1) All the employers who do not have a retirement benefit fund in favour of their employees in place, shall by 1 March 2001, either join the Construction Industry Retirement Benefit Fund, or, whether independently or with other employers, do whatever may be necessary to have a retirement benefit fund registered in terms of the Pension Funds Act, 1956, in favour of their employees and shall confer the benefits or membership of such fund on their permanent employees. (2) The rules of the retirement benefit fund referred to above shall require that employers and employees contribute equally in respect of each employee's membership of the retirement benefit fund. (3) The rules of the retirement benefit fund shall provide for a risk benefit fund, which shall provide death, disability and funeral benefits".

Based on the aforementioned grounds, the complainant held the view that there was no justification for the deceased not to be registered as a member of the retirement fund (par 3.2).

5 Respondents' Main Contentions

5 1 The Retirement Fund and Retirement Fund's Administrator's Reply

Both the retirement fund and its administrator, in their reply, confirmed that that the deceased joined and remained a member of the retirement fund for a period of three months prior to his untimely death. Furthermore, they conceded that subsequent to the deceased's death, a death benefit to the tune of R601.94 became due. Moreover, they acknowledged that the retirement fund only received the deceased application for membership in April 2011. For this reason, it was argued that the retirement fund cannot accept the complainant's prayer that the deceased's membership be backdated to March 2004. To further support this view, it was contended that the retirement fund's rules and the Pension Funds Act do not provide for retrospective membership (par 4.2). Thus, the complaint against the retirement fund and its administrator deserved to be dismissed.

5 2 The Employer's Response

The employer, in its response to the complainant, agreed that it was required by section 29 of the Sectoral Determination to either join the Construction Industry Retirement Fund or register a fund to which its employees shall belong (par 4.3). Secondly, it submitted that the deceased was in its employ on permanent basis since 1 March 2004 and had accepted the terms and conditions of his employment. It pointed out that the deceased's contract of employment at the time of his employment spelled out the fact that the retirement fund was not applicable to him. However, in 2005 an opportunity was presented by the employer to the deceased and his colleagues to complete forms and express their desire to join the Gauteng Building Industry Provident Fund (i.e. the first respondent). Regardless of the employer's effort, the deceased chose not to join the retirement fund. In addition, neither the deceased nor his trade union seemed to have any issues with the fact that he was not registered with the retirement fund. The lack of interest in this matter changed only in April 2011 when the deceased approached the employer expressing his intention to belong to a retirement fund. Based on the employer's submission, it appears that the deceased's change of heart was inspired by his illness. Nonetheless, the employer duly processed the deceased's membership and commenced with the payment of contributions on the deceased's behalf. The employer protested that the allegations levelled against it were unfounded. The reasons for this stance were as follows:

"(a) First, the employer was of the view that the fact that the deceased could approach the employer and request to be registered with the retirement fund confirms that he was well aware of his option to join the retirement fund but elected not to file a grievance about his unfair treatment by the employer as intimated by the complainant (par 4.4).

(b) Secondly, the employer maintained that the deceased was fully cognisant of the opportunity he was afforded to join the retirement fund and chose to turn it down.

(c) Lastly, the employer averred that it did not extend contributions and retirement fund membership on a discriminatory basis."

6 Determination and Order

The employers defence against the complaint fundamentally rests on the sentiment that it is nobody's fault but the deceased's that the benefits due to his survivors and beneficiaries are low. He had an opportunity to apply for membership. Nonetheless, he freely and voluntarily declined it. In dealing with this contention, the Tribunal referred to the Sectoral Determination and the Income Tax Act 58 of 1962. The Tribunal found that the Sectoral Determination does indeed place a duty on an employer to participate in a retirement fund. The effect of this duty is that permanent employees of such an employer become members of the retirement fund that the employer participates in. Put differently, the Sectoral Determination makes it obligatory for permanent employees in the civil engineering sector in South Africa to take up membership of a retirement fund. Even so, there is a choice to belong to the Gauteng Building Industry Provident Fund or a separate retirement fund in which their employer participates. Seeing that there was nothing to suggest that the employer participated in any other fund, the Tribunal found that it was obligatory and should have been a condition of employment of the employer's permanent employees to become members of the first respondent (par 5.8). The Tribunal proceeded by referring to section 1 of the Income Tax Act. This section defines a pension fund as "any pension, provident or dependants' fund or pension scheme established by law…that the rules of the fund provide…that membership of the fund throughout the period of employment shall be a condition of the employment by the employer of all persons of the class or classes specified therein who enter his employment on or after the date upon which the fund comes into operation; or the employer becomes a participant in that fund".

Based on the aforementioned definition, the Tribunal found that an employer is duty-bound to "make it a condition of employment that all its employees who are eligible to become members of the fund in which it participates, become members of such a fund and remain as such throughout their period of employment" (par 5.9). It found further that the employer's averments that the employee declined the offer to join the retirement fund showed that the employer did not make it compulsory for its permanent employees to become members. This was contrary to the provisions of the Sectoral Determination and the Income

Tax Act. In so doing, the employer acted unlawfully by failing to compel the deceased to become a member of Gauteng Building Industry Provident Fund. According to the Tribunal, the employer should have registered the deceased with the retirement fund irrespective of whether he was acquiescent to such a proposition or not. Therefore, it was the employer's failure to act as prescribed by law that the deceased's survivors' and beneficiaries suffered loss of benefits in the sense that they stood to be paid far less than what they would be entitled to had the employer registered the deceased as member with effect from March 2004. Thus, the Tribunal determined that the employer was liable to pay the death benefit as it would have become payable by the retirement fund at the time of the employee's death had the employer registered the deceased with effect from March 2004 (par 5.12).

In light of the preceding pronouncements, the Tribunal ordered the retirement fund to, among others, compute the total death benefit that would have become due to the deceased's survivors and beneficiaries in accordance with its rules had he been registered by the employer as a member from his commencement of employment and assuming that he remained a member until the date of his death (par 6.1.1). The amount so calculated was to take into account the fund credit. The retirement fund was directed to investigate and allocate and award the death benefit payable to the deceased's qualifying dependants and beneficiaries in accordance with section 37C of the Pension Funds Act (par 6.1.3). The employer was ordered to pay the death benefit as calculated by the retirement fund to the survivors and beneficiaries of the deceased within two weeks of receiving the relevant information and documentation from the retirement fund (par 6.1.4).

7 Analysis

The Tribunal's decision to hold the employer liable clearly penalises the employer for neglecting to ensure that its employees are registered with a retirement fund. This is, for a range of reasons, a correct approach. Firstly, as apparent from the determination and order of the Tribunal above, the need for the employer to register its employees with a retirement fund was not an act of benevolence on the part of the employer to the extent that it could adopt an "if you don't want to, you don't have to" attitude. Secondly, assuming that it was an act of the employer's kind-heartedness, this could still raise some fairness issues if some employees were afforded the opportunity and others were not. Furthermore, it should be appreciated that the Sectoral Determination requires employers and employees to contribute equally in respect of each employee's membership. This could entail serious cost to company savings in favour of the employer if it does not have any other ways and means through which it ensures that those employees who elect not to join a retirement fund still benefit from what could have been the employer portion of the contribution. In the absence of such ways and means, it could be worth the employer's while not to try hard enough to persuade an employee to take up membership of a retirement fund.

Moreover, it should be recalled that in the complaint in question, the employer had an *ex lege* duty arising from Sectoral Determination promulgated in terms of section 56(1) of the Basic Conditions of Employment Act 75 of 1997 to comply with. Failure to comply with the duties imposed by a Sectoral Determination, as rightly contended by Van Jaarsveld and Van Eck (Van Jaarsveld and Van Eck *Principles of Labour Law* (3rd Edition) (2005) 56), may amount to "an offence, an unfair labour practice or [may] simply be unfair". Thus, the employer has to deal with the consequences of violating the law.

The overall message that emerges from the preceding pronouncements is that an employer should and will not be rewarded for failing to comply with its legal obligation. If that is the position, should an employee or his or her dependants be compensated for the employee's short-sightedness and laxity? A positive answer to the preceding question may seem severe to the penalized employer. This is mainly because, broadly speaking, it could be said that both the employer and employee in this case had a hand in the eventual and disadvantageous position that the survivors found themselves in. It should be remembered that the employee resisted the initial efforts to register him and elected to belatedly join the pension's fund. Thus, it is tempting to assert that the blame should be apportioned accordingly between the employer and employee since there has been some contributory negligence on the part of the breadwinner. In addition, this had to be reflected in the benefits payable to the survivors. If one is to view things from this perspective, it should follow naturally that an answer to the question posed above would be in the negative. Nonetheless, if one is to take a social insurance slant, such an approach is untenable and should not be endorsed. The point is that retirement funds are put in place as part of the social security system with the aim of protecting individuals and their dependants against social risks such as old age and death. Another crucial fact to be considered is that the employer acted contrary to the law (i.e. the pertinent Sectoral Determination) by making it optional for the employee to belong to the pension's fund. Put differently, the employer acted unlawfully by offering the employee an opportunity to make a choice which he should have not been provided with in the first instance. Accordingly, the employee and/or his or her dependants should not be punished for the unlawful actions of the employer. The point is that in this case the fault rests with the employer and it is the employer alone that should carry the cost of not complying with the law.

A compulsory approach, adopted by the Sectoral Determination, supports social policy objectives such as the pooling of risks (see, for example, Walker *Social Security and Welfare: Concepts and Comparisons* (2005) 76-77) and other related objectives such as preventing individuals and their dependants from becoming destitute and (unnecessarily) weighing down the public coffers. These objectives have to be taken into account when determining matters similar to the one under review. Needless to say, employers cannot be allowed to frustrate the aforementioned social objectives by neglecting to comply with their

legally imposed social security obligations. Another point to be noted is that, compulsory social insurance is generally less punitive to (prospective) beneficiaries and their dependants if doing so would expose them (severely) to social risks or make them reliant on the social grant system. For example, a person who suffers injuries at work due to his or her wilful misconduct may, in accordance with the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA), be barred from claiming benefits from the Compensation Fund. This is in accordance with an approach where a person is prevented from being compensated for a risk he or she willingly assumed. However, COIDA does make provision for the payment of benefits in a situation where the accident arising from wilful misconduct results in serious disablement (s 22(3)(a)(i) of COIDA) or the employee dies as a result of the accident leaving a dependant wholly financially dependent upon him (s 22(3)(a)(ii)of COIDA). The thinking here, it seems, is that even if one voluntarily assumes risks there are instances where the risk assumed could inflict insurmountable harm to the risk taker, those close to him or her and the society at large. Thus, the most appropriate course of action to mitigate that risk is for a social insurance scheme to intervene by availing benefits – be they in cash or kind. Furthermore, social security is a human right (s 27(1)(c) of the Constitution of the Republic of South Africa, 1996 (Constitution)) and is crucial in aiding individuals and their families to enjoy other fundamental rights such as human dignity (s 10 of the Constitution) and life (s 11 of the Constitution). Therefore, it would seem socially and morally objectionable to punish employees and their survivors for the failure of employers to comply with legally imposed social security obligations. One could aver that the breadwinner was imprudent in making the choice he made. However, as true as this sentiment may be, this does and will not warrant a situation where survivors are penalised for the foolhardiness of their breadwinner. This is primarily due to the fact that the South African social insurance law, as it can be deduced from the preceding discussion, does not subscribe to a rigid adherence to the common law doctrine of *volenti non fit injuria*.

In the final analysis, the decision reached by the Pension Funds Adjudicator is a correct one and should not be faulted. Without retracting from the correctness of the determination and the need for as well as importance of employers and their employees to take their social insurance duties seriously, it is incumbent upon social insurance institutions, social insurance administrators as well as public and private social insurance funds to embark on and/or intensify efforts to educate the public on their services, risks they cover as well as benefits they offer. This proposition stems largely from the fact that human beings are, for a variety of reasons, more concerned about the so-called "here and now risks" (e.g., putting food on the table) and have the propensity of underestimating their own risks (International Labour Office *Into the Twenty-First Century: The Development of Social Security* (1986) 97). As pointed out by McGillivray (McGillivray "Contribution evasion:

Implications for social security pension schemes" (2001) *International Social Security Review* 3 at 6):

> "Current consumption needs can lead *workers* to seek to evade paying social security contributions, especially when the contribution rate is high. Poverty, temporary financial hardship and, particularly for young workers, expenses associated with family responsibilities are more immediate and pressing than paying contributions for a future retirement benefit. Myopic behaviour - placing too low a value on future retirement consumption needs - led to state intervention to set up retirement benefit schemes, to avoid both the consequences of inadequate provision for retirement by myopic individuals and the burden which they would create for prudent persons who in a modern State would be called upon to support them." (Italics in the original).

8 Conclusion

This determination sends out a clear message to employers that if there is a legal duty imposed on them to register their employees with a social insurance fund they will be wise to comply with it lest they face the consequences. It is simply not adequate to aver that an employee had an opportunity to request that he or she be registered and did not use it. Thus, employers need to act firmly against recalcitrant employees or face the wrath of the social security adjudication institutions. Their myopic refusal to act immediately will undoubtedly cause problems in the future for the affected individuals as well as their dependants, the society at large (due to the increased cost of bankrolling the tax-financed social grant system) and most importantly, themselves as they are most likely to be ordered to cover the costs of the benefits to be disbursed.

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Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd

2013 6 SA 520 (SCA)

Redefining the rules for the admissibility of evidence in the interpretation of contracts

1 Introduction

Any contractual dispute invariably requires an interpretation of the contract concerned to determine the obligations of the parties involved. The interpretation of any contract necessarily begins with a question regarding the sources which parties, their lawyers and presiding officers

in court or arbitration may consider to ascertain the nature, scope, extent, meaning and practical implications of that contract. This in turn raises the question of the admissibility of evidence in the interpretation of contracts.

The rules relating to the admissibility of evidence in the interpretation of contracts have for decades perplexed lawyers and clients who seek legal advice with regard to contractual disputes. For more than half a century, the courts have not assisted much in resolving some of this confusion, but sometimes even added to the confusion by misapplication of the rules or the introduction of terminology that was vague and confusing.

Fortunately, in the past five years, the Supreme Court of Appeal, beginning with the landmark ruling of Harms DP in *KPMG Chartered Accountants (SA) v Securefin Ltd* [2009] 2 All SA 523 (SCA) par 39), has begun to unravel the web of mystery surrounding the admissibility of evidence that may be used in the interpretation of contracts. The case of *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd* 2013 6 SA 520 (SCA) is the latest case in which the Supreme Court of Appeal has now given further clarity on the rules relating to the admissibility of evidence to assist with the interpretation of contracts. While it is a pity that the Supreme Court of Appeal has not seen the need in any of the cases dealing with contractual disputes, to provide a complete restatement of the rules relating to the admissibility of evidence in the interpretation of contracts, the rules that can now be extracted from recent case law turn out to be quite clear and simple once one sifts through all the chaff. The judgment in *Dexgroup* is another important step in this regard.

2 Facts

In 2007 Trustco Group purchased all the issued shares in Trustco Financial Services, together with certain claims and loan accounts, from Dexgroup. The purchase price was the amount of R65 million. This was payable by means of an initial payment of R20 million, with the balance payable annually over four years by way of the issue of shares in Trustco Holdings. The number of shares that would make up each annual payment was calculated proportionately in accordance with the annual net profit after tax of Trustco Financial Services and certain subsidiaries. The total value of the shares issued in this regard would not exceed R45 million (521A-D).

The contract also provided that Trustco Group had to make a banking facility of up to R30 million available to Trustco Financial Services so that Trustco Financial Services and its subsidiaries could fund their day to day operations. Trustco Group made the facility available through Absa Bank. Dexgroup had to ensure that the banking facility was settled by 31 March 2011 or as soon as the profit targets for the issue of all the shares in Trustco Holdings were attained (521H-522C).

In April 2009 Brokernet, a subsidiary of Trustco Financial Services, paid an amount of R17 million into the Absa facility and thereby reduced the balance due on that facility to zero. However, Brokernet obtained the funds to make the payment from insurance premiums which it had collected on behalf of Clarendon Transport Underwriters and Brokernet remained liable to Clarendon to account for those premiums. In addition, Trustco Financial Services and its subsidiaries still required a bank facility to function and Trustco Group had to reinstate the facility (522C-F).

Dexgroup argued that that the banking facility had been repaid and that it was consequently entitled to receive the shares in Trustco Holdings to settle the outstanding balance of the purchase price (521E-F). Trustco Group argued that Dexgroup had not ensured repayment of the bank facility and disputed the duty to deliver the remaining shares (522F).

Dexgroup and Trustco Group then submitted the dispute to arbitration and the arbitrator ruled that the bank facility had not been properly repaid and that Dexgroup was consequently also not entitled to the remaining shares. The arbitrator dismissed Dexgroup's claim and upheld a counterclaim by Trustco Group (522G-H).

Dexgroup took the ruling of the arbitrator on review to the South Gauteng High Court in Johannesburg on the grounds that the arbitrator committed a gross irregularity or exceeded his powers as contemplated in section 33(1) of the Arbitration Act 42 of 1965. Dexgroup challenged the ruling of the arbitrator on three grounds. Firstly, Dexgroup argued that the pleadings at the arbitration did not allege that the repayment of the banking facility by Brokernet involved theft, misuse of trust money or a breach of fiduciary duty. Cross-examination that suggested this irretrievably tainted the proceedings before the arbitrator (524A-B). Secondly, Dexgroup argued that the central question for determination by the arbitrator was the proper interpretation of the sale agreement and in particular what the contract meant when it stipulated that Dexgroup had to ensure that the banking facility was repaid. In this regard Dexgroup further argued that the arbitrator did not construe the text of the contract, but sought to understand the contract within its proper commercial setting. (522I-524C.) Dexgroup also argued that the clause dealing with repayment of the bank facility was clear and therefore it was impermissible for the arbitrator to consider any extrinsic evidence to provide the context against which the contract was to be interpreted. The result was that the arbitrator relied on inadmissible evidence to interpret the relevant clause of the contract. (525FG.) Consequently the arbitrator's approach to the interpretation of the contract and the admissibility of evidence in that regard was flawed and resulted in an irregularity (524BC). Thirdly, Dexgroup argued that the approach followed by the arbitrator improperly extended the scope of the arbitration beyond its permissible limits (524C).

The South Gauteng High Court rejected the challenge to the arbitrator's ruling on all three grounds. Dexgroup then took the matter on appeal to the Supreme Court of Appeal (520I-521A).

3 Judgment

In a unanimous judgment, the Supreme Court of Appeal concluded that "the appeal was bound to fail on the facts" and dismissed the appeal on all three grounds raised by Dexgroup. As such, the judgment is of little significance in so far as it relates to review of arbitration proceedings and the rulings made by arbitrators.

However, the judgment on the second issue relating to the interpretation of the sale agreement and the admissibility of evidence to assist with the interpretation makes for some interesting reading. Wallis JA explained (525G-526C) that:

> "[I]t was submitted that the arbitrator was bound by 'the well-established rule that a contract must be interpreted by construing its plain words' and that it is only in cases of ambiguity or uncertainty that an arbitrator can take account of surrounding circumstances 'or its so-called factual matrix'. It is surprising to find such a submission being made in the light of the developments in the interpretation of written documents reflected in *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* and *Natal Joint Municipal Pension Fund v Endumeni Municipality*. These cases make it clear that in interpreting any document the starting point is inevitably the language of the document but it falls to be construed in the light of its context, the apparent purpose to which it is directed and the material known to those responsible for its production. Context, the purpose of the provision under consideration and the background to the preparation and production of the document in question are not secondary matters introduced to resolve linguistic uncertainty but are fundamental to the process of interpretation from the outset. The approach of the arbitrator cannot be faulted in this regard".

4 Discussion

A distinction is traditionally made between two apparently related rules that limit the admissibility of extrinsic evidence in the interpretation of contracts (Christie *The Law of Contract in South Africa* (2011) 200 *et seq*). Firstly, there is the so-called "parol evidence rule" or integration rule which provides that once a contract has been reduced to writing, the writing is in general viewed as the exclusive memorial of the transaction and no evidence is admissible to prove the terms of the contract (*Johnston v Leal* 1980 3 SA 927 (A); *Affirmative Portfolios CC v Transnet LTD t/a Metrorail* 2009 1 SA 196 (SCA)). The other rule, which is often referred to as the "golden rule of interpretation" (*Coopers & Lybrand v Bryant* 1995 3 SA 751 (A)), provides that the ordinary meaning of the words in a written contract must be followed and that no evidence is admissible to prove the meaning of the terms contained in a written contract (*Delmas Milling Co Ltd v Du Plessis* 1955 3 SA 447 (A)). This distinction seems vague and is often confusing.

However, a careful analysis of the process of interpretation can go a long way to explain the difference in scope between these two rules.

Interpretation of any legal instrument, whether it is legislation, a contract, a will, a receipt, a promissory note or even a judgment of a court or any other legal instrument, essentially entails four distinguishable, but interrelated elements (Burrows *Interpretation of Documents* (1946); see my discussion "A Proposed Systematic Approach to the Interpretation of Legal Instruments" 2001 *The Judicial Officer* 127; see also Du Plessis *Re-Interpretation of Statutes* (2002) ix):

(i) Classification: The legal nature of the instrument is determined. In other words, is there a valid contract and if so, is a specific nominate contract or is it just generically a contract? As far as this element is concerned, any relevant evidence is admissible to determine whether an instrument is indeed a contract, whether it is a valid contract and whether it is a specific nominate contract (*Absa Technology Finance Solutions (Pty) Ltd v Michael's Bid a House CC* 2013 3 SA 426 (SCA) 432F *et seq*).

(ii) Concretisation: The extent of the text which is contained in the written instrument and which sets out the written and unwritten terms of the contract, is determined. The question is therefore, which words, expressions, sentences and terms constitute the text of the contract and which words, expressions, sentences and terms are external to the contract and therefore not part of its text? Here the integration rule provides that if the writing is a complete integration of the agreement between the parties, extrinsic evidence is not admissible to add to, vary or detract from terms of the contract (*Johnston v Leal* 1980 3 SA 927 (A)). If the writing is an incomplete integration of the agreement between the parties, extrinsic evidence to supplement the terms of the contract is admissible (*Baker Tilly (a firm) v Makar* [2010] EWCA Civ 1411), but evidence to vary or detract from the written terms is still inadmissible. (See also Ågren *Demistifying the Parol Evidence Rule: An Analysis of the Parol Evidence Rule in American Contract Jurisprudence and the Lack thereof in the CISG* (LLM dissertation 2009 Lund) 19 *et seq*).

(iii) Interpretation: The meaning of the words, expressions, sentences and terms which constitute the text of the contract, is determined. Since all words or expressions have multiple meanings, and since meaning is always dependent on context, a court must establish the correct meaning which can be ascribed to each word or expression which is contained in a contract. Although our courts have long applied the golden rule of interpetation and held that, save in the case of ambiguity, evidence is inadmissible to guide the court in determining the meanings of the words or expressions contained in a contract (*Delmas Milling Co Ltd v Du Plessis* 1955 3 SA 447 (A)), this is an aspect of the law of contract which has undergone radical change over the past decade (*KPMG Chartered Accountants (SA) v Securefin Ltd* [2009] 2 All SA 523 (SCA)). It is this development of our law of contract which is again highlighted in *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd* 2013 6 SA 520 (SCA) and which will be discussed in more detail below.

(iv) Application: The meaning of the text is applied to the facts of the case at hand (or at least to hypothetical facts) to ascertain the practical effect of the instrument. When the meaning of the word or expressions is applied, it becomes necessary to determine the parties, goods, services

> and other factual matters to which the contract relate. Obviously, the starting point is the description given in the contract itself, but any relevant evidence can also be presented to assist in relating the description contained in the contract, with the factual state of affairs (*Richter v Bloemfontein Town Council* 1922 AD 57; *Headermans (Vryburg) (Pty) Limited v Ping Bai* [1997] 2 All SA 371 (A) 376e *et seq*; *Van Wyk v Rottcher's Saw Mills (Pty) Ltd* 1948 (1) SA 983 (A)).

(See also my discussion of *Zeeman v De Wet NO* 2012 6 SA 1 (HHA) in "Die toelaatbaarheid van ekstrinsieke getuienis by die uitleg van kontrakte" 2013 *TSAR* 805).

On the basis of the analysis above, the rules relating to the admissibility of extrinsic evidence in the interpretation of contracts can be discussed more fully.

Firstly, the integration rule restricts the evidence which is admissible to prove the terms or content of a contract. In *Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd* 1941 AD 43 Watermeyer JA explained (47):

> "[T]he rule that when a contract has been reduced to writing, the writing is, in general, regarded as the exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may the contents of such document be contradicted, altered, added to or varied by parol evidence".

(See also *Affirmative Portfolios CC v Transnet LTD t/a Metrorail* 2009 1 SA 196 (SCA).)

When a transaction is reduced to writing and integrated into a written instrument, evidence of any other statements, negotiations, mental reservations or other facts relating to that transaction, becomes inadmissible to determine the extent of the words, expressions, sentences and terms which constitute the text of the contract. In general, no words, expressions, sentences or terms may be added to the text, no words, expressions, sentences or terms may be replaced with other words, expressions, sentences or terms and no words, expressions, sentences or terms may be omitted from the contract.

The challenge to the arbitrator's ruling in *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd* 2013 6 SA 520 (SCA) did not address this rule. When the arbitrator considered the extrinsic evidence which gave rise to the second issue in dispute, the arbitrator did not rely on the evidence to add, vary or omit any words, expressions, sentences or terms in the contract. The arbitrator considered the evidence to provide clarity on the meaning of the terms. The second issue in dispute therefore relates to the so-called "golden rule of interpretation".

The golden rule of interpretation has, over the past six decades, undergone substantial development in South Africa. To fully understand this development, it is necessary to take a tour through the history and

consider the various landmark cases in which this rule was applied in South Africa since the 1950s.

In *Delmas Milling Co Ltd v Du Plessis* 1955 3 SA 447 (A) the court laid down three successive rules relating to the admissibility of extrinsic evidence to contradict the plain meaning of the words. The first so-called *Delmas* rule holds that the plain meaning of the words should be followed and uncertainties should as far as possible be eliminated by means of linguistic treatment. If it is not possible to clear an uncertainty by means of linguistic treatment, the second *Delmas* rule states that extrinsic evidence of the broad background against which the contract was concluded, is admissible to clear that uncertainty. Such extrinsic evidence, however, does not include direct evidence of the parties' intention. Only if the evidence under the second *Delmas* rule does not provide clarity and there is an ambiguity, does the third *Delmas* rule provide that direct evidence of the parties' intention, such as what was said during negotiations, is admissible (Kerr *The Principles of the Law of Contract* (2002) 352 *et seq*).

Since words do not exist in isolation, but are dependent on some context or another (Kerr 404 *et seq*) the distinction made between the first and second *Delmas* rules tended to be problematic. To make sense of the words, expressions, sentences and terms that constitute a contract, a court must understand the context of those words, expressions, sentences and terms. The first Delmas rule disregarded context.

As a result, the first *Delmas* rule was soon reconsidered by the Appellate Division. In *Haviland Estates v McMaster* 1969 2 SA 312 (A) the court effectively wiped out the distinction between the first and second *Delmas* rules and held that extrinsic evidence of the background circumstances was always admissible to place the court as near as possible in the position of the parties at the time of conclusion of the contract. However, extrinsic evidence was still inadmissible for any purpose other than explaining the broad context in which the contract was concluded. This seemed to settle the matter, so that evidence to explain the broad context in which the contract was concluded, was admissible to make sense of the words, expressions, sentences and terms that constitute a written contract. But any evidence which gave a clear indication of the parties' intention, was only admissible if there was an ambiguity in any of the words, expressions, sentences or terms that constitute the contract.

However, in *Coopers & Lybrand and others v Bryant* 1995 3 SA 751 (A), the Appellate Division found it necessary to revisit the admissibility of extrinsic evidence to ascertain the meaning of a contract. Joubert JA, in giving the judgment of the court, stated (768A-E) that:

> "The correct approach to the application of the 'golden rule' of interpretation after having ascertained the literal meaning of the word or phrase in question is, broadly speaking, to have regard:

(1) to the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract ...
(2) to the background circumstances which explain the genesis and purpose of the contract, i.e. to matters probably present to the minds of the parties when they contracted ...
(3) to apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their own intentions".

This signalled a further deviation from the strict linguistic approach laid down in *Delmas Milling Co Ltd v Du Plessis* 1955 3 SA 447 (A). It confirmed that there was no longer any distinction between the first and second *Delmas* rules. But the court to some extent also seemed to redefine the third *Delmas* rule by apparently suggesting that the introduction of a mere uncertainty concerning the meaning of any of the words, expressions, sentences or terms that constitute the contract, might suffice to find that the contract was ambiguous and therefore, to render extrinsic evidence relating to the intention of the parties, admissible (Otto "Die Aanwending van 'Background Circumstances' en 'Surrounding Circumstances' by die Uitleg van Kontrakte" 1997 *De Jure* 144).

However, by differentiating between "background circumstances" and "surrounding circumstances" and by failing to explain this distinction in any clear terms, this judgment provided anything but clarity on the admissibility of extrinsic evidence and introduced a substantial source for disputes to arise.

The Supreme Court of Appeal tried to make a bit more sense of the rules relating to the admissibility of extrinsic evidence to ascertain the meaning of a contract in *Van der Westhuizen v Arnold* [2002] 4 All SA 331 (SCA). Lewis AJA (as she then was) explained (538):

> "[T]hat the formalistic approach to the interpretation of contracts, one that precludes recourse to extrinsic evidence on what the parties intended in the absence of ambiguity or uncertainty, has been criticised by this Court, which has recently questioned whether the principle is justifiable ... On the other hand, it is trite that even where the wording of a provision is such that its meaning seems plain to a court, evidence of 'background circumstances' is admissible for the purpose of construing its meaning".

Eventually in *KPMG Chartered Accountants (SA) v Securefin Ltd* [2009] 2 All SA 523 (SCA) the Supreme Court of Appeal at last seemed to bring clarity on the admissibility of extrinsic evidence in the interpretation of contracts. Harms DP explained (par 39):

> "First, the integration (or parol evidence) rule remains part of our law… The time has arrived for us to accept that there is no merit in trying to distinguish between 'background circumstances' and 'surrounding circumstances'. The

> distinction is artificial and, in addition, both terms are vague and confusing. Consequently, everything tends to be admitted. The terms 'context' or 'factual matrix' ought to suffice".

While Harms DP expressly stated that he was not in any way detracting from the integration rule, his rejection of the distinction between "background circumstances" and "surrounding circumstances" also implied, as far as the admissibility of evidence is concerned, a rejection of the distinction between terms which are clear and unambiguous on the one hand, and terms which are ambiguous on the other hand, as made in *Coopers & Lybrand and others v Bryant* 1995 3 SA 751 (A) 768A-E. Consequently, it seemed that when it came to the admissibility of evidence to determine the meaning of terms in a contract, the existence of ambiguity no longer had any bearing on the admissibility of evidence to prove the meaning of the terms in a contract.

However, not everybody was convinced. Hutchinson and Pretorius (Law of Contract (2012) 260) dismissed the statement by Harms DP as a mere *obiter* remark and warned that it was by no means certain that the Supreme Court of Appeal was ready to deviate from the established rules relating to the admissibility of evidence. (For a contrary view, see my analysis of the judgment in "Background Circumstances, Surrounding Circumstances and the Interpretation of Contracts" 2009 *TSAR* 767. See also Wallis "What's in a word? Interpretation through the eyes of ordinary readers" 2010 *SALJ* 673 674).

Fortunately, the Supreme Court of Appeal wasted little time to provide clarity on this issue. In case after case on the law of contract, the Supreme Court of Appeal has relied on the judgment of Harms DP in *KPMG* to explain the admissibility of evidence to assist in ascertaining the meaning of the words, expressions, sentences or terms that constitute the contract under consideration. (See *Grobler v Oosthuizen* 2009 5 SA 500 (SCA); *Representatives of Lloyd's v Classic Sailing Adventures (Pty) Ltd* 2010 5 SA 90 (SCA); *Ekhuruleni Metropolitan Municipality v Germiston Municipal Retirement Fund* 2010 2 SA 498 (SCA); *Zeeman v De Wet* 2012 6 SA 1 (SCA); *Scholtz v Scholtz* 2012 5 SA 230 (SCA); *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 (SCA); *Gusha v Road Accident Fund* 2012 2 SA 371 (SCA); *Van Aardt v Galway* 2012 2 SA 312 (SCA); *Potgieter v Potgieter* 2012 1 SA 637 (SCA); *Picbel Groep Voorsorgfonds v Somerville* 2013 5 SA 496 (SCA); *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* 2013 5 SA 1 (SCA); *Absa Technology Finance Solutions (Pty) Ltd v Michael's Bid A House CC* 2013 3 SA 426 (SCA)). And in *KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal* 2013 4 SA 262 (CC), even the Constitutional Court weighed in and cited the judgment by Harms DP in *KPMG* with apparent approval.

The judgment in *Dexgroup* is yet another instance where the Supreme Court of Appeal has now given further clarity on the admissibility of extrinsic evidence in the interpretation of contracts. In view of the cases listed above in which the judgment in *KPMG* have been followed, one can

only, as Wallis JA apparently did in *Dexgroup*, shake your head in disbelief when counsel argue that extrinsic evidence to determine the meaning of words or expressions in a contract, is only admissible if there is an ambiguity (525G). Apart from putting the legal development introduced by Harms DP in *KPMG* beyond question, the judgment in *Dexgroup* also provides further clarity on the law relating to the admissibility of extrinsic evidence in the interpretation of contracts as it now stands.

When Wallis JA stresses that, whenever a contract must be interpreted, "the starting point is inevitably the language of the document" (526A), he is not merely indicating that one should read the document concerned – he is posting a reminder that the integration rule entrenches the language of the document and prohibits evidence to add to, vary or detract from that language. And then he gives further direction when he adds (526B) that any contract:

> "[F]alls to be construed in the light of its context, the apparent purpose to which it is directed and the material known to those responsible for its production. Context, the purpose of the provision under consideration and the background to the preparation and production of the document in question are not secondary matters introduced to resolve linguistic uncertainty but are fundamental to the process of interpretation from the outset".

This makes two issues clear. Firstly, the demise of the old golden rule of interpretation is now beyond doubt. Extrinsic evidence is now admissible from the outset to assist a court in determining the meaning of the words, expressions, sentences and terms that constitute the contract. Such evidence no longer constitutes a secondary source which can be considered to clear up uncertainties or ambiguities. It constitutes, together with the text of the instrument, a primary source which should be used from the outset to ascertain the meaning of the words, expressions, sentences and terms that constitute the contract. Secondly, the demise of the old golden rule of interpretation by no means signals a free-for-all in which all possible evidence can now be submitted in an attempt to sway a court towards a particular meaning. Wallis JA stressed that the evidence must relate to the "context, the apparent purpose to which it is directed and the material known to those responsible for its production".

This brings to mind the judgment of Traynor CJ in the Californian case of *Pacific Gas & Electrical Company v GW Thomas Drayage & Rigging Company Inc* 40 ALR 3d 1373, where he explained that the test to determine whether evidence is admissible to prove the meaning of a contract, is not whether the contract appears on the face of it, to be clear and unambiguous, but whether the evidence is relevant to prove a meaning which the words or expressions in the contract can reasonably have. (See *Telkom Directory Services (Pty) Ltd v Kern* [2011] 1 All SA 593 (SCA), where the contract stipulated that the law of California applied and the court therefore had to apply the ratio in *Pacific Gas*.)

In *Walker v Redhouse* [2007] 4 All SA 1217 (SCA), Lewis JA explained (par 15) that "Redhouse argues … that the word 'any' ... does not cover injuries sustained ..." She then held (par 19) that:

> "Redhouse nonetheless contends that the wording of the indemnity in issue in this case does not cover liability for injury caused in abnormal circumstances not contemplated by the parties: It is not injury 'from any cause whatsoever'. In my view, this interpretation strains the wording of the indemnity. It requires words to be read in which limit the causes of injury. There is nothing to suggest that this was the intention of either of the parties".

In other words, extrinsic evidence will in the first instance only be admissible if it is submitted to prove a meaning which can reasonably be ascribed to the text as it stands. In *Durban's Water Wonderland (Pty) Ltd v Botha* 1999 1 SA 982 (SCA) Scott JA held (989H-I) that "the alternative meaning upon which reliance is placed… must be one to which the language is fairly susceptible; it must not be fanciful or remote". (See also *Viv's Tippers (Edms) Bpk v Pha Phama Staff Services (Edms) Bpk* 2010 4 SA 455 (SCA) 463C *et seq*).

In addition, the law of evidence provides that evidence is only admissible if it is relevant (Zeffert & Paizes *Essential Evidence* (2010) 75 *et seq*). Because contracts are based on consensus and because the purpose of interpretation is to determine the (collective) intention of the parties (*Cinema City (Pty) Ltd v Morgenstern Family Estates (Pty) Ltd* 1980 1 SA 796 (A) 803G-H, 804C; *Picardi Hotels Ltd v Thekwini Properties (Pty) Ltd* 2009 1 SA 493 (SCA) 496F-G), evidence is generally only relevant if it tends to prove what the consensus and collective intention of the parties were at the time when the contract was concluded. Evidence to prove the individual intention of a party is therefore mostly irrelevant and therefore inadmissible. That is why Wallis JA emphasised that the evidence should relate to "the context, the purpose [of the term] … and the material known to those responsible for its production" (or the "background to the preparation and production of the document").

However, because it is often very difficult to prove actual consensus, contracts often come into being on the basis of quasi mutual assent (Christie (2011) 26 *et seq*). In such circumstances, evidence of the individual intention of a party can indeed be relevant to determine to what extent there is quasi mutual assent and how it affects the meaning of the words, expressions, sentences or terms in the contract (*Be Bop a Lula Manufacturing & Printing CC v Kingtex Marketing (Pty) Ltd* 2008 3 SA 327 (SCA) 332B *et seq*).

5 Conclusion

If there was any doubt after *KPMG* that the Supreme Court of Appeal intended to amend the existing law on the admissibility of extrinsic evidence in the interpretation of contracts, that doubt has now been completely dispelled. The judgment in *Dexgroup* makes it patently clear that extrinsic evidence to prove the meaning of the words, expressions,

sentences and terms that constitute the contract, is admissible from the outset irrespective of whether there is any uncertainty or ambiguity in the text – as long as the evidence concerned points to a meaning which the text can reasonably have and the evidence is relevant to prove the common intention of the parties. But the judgment also makes it clear that the starting point is the language of the document and the parol evidence rule still prevents evidence to add to, detract from or modify the words contained in the document.

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Loureiro and Others v iMvula Quality Protection (Pty) Ltd 2014 3 SA 394 (SCA)

Determination of constitutional nature of contractual and delictual claims – strict contractual liability of security company – vicarious liability of security company for wrongful and negligent conduct of employee

1 Introduction

The case under discussion is of general interest to those interested in the law of contract and delict, and of particular interest to practitioners in the private security industry field. It also provides a sterling example of the risks involved in modern litigation in South African courts: Here the plaintiffs who had succeeded fairly easily in the High Court and subsequently had to bear the disappointment of seeing their judgment overturned on appeal by a majority of the Supreme Court of Appeal, finally won the day when the Constitutional Court granted them leave to appeal and finally upheld their appeal against the judgment of the Supreme Court of Appeal, in effect reinstating the judgment of the High Court.

In this case note the focus will fall on certain aspects of the law pertaining to breach of contract as well as on the application of the principles of the law of delict dealing with wrongfulness and negligence in the context of causing pure economic loss. The set of facts that confronted the court would ordinarily be interpreted as an instance of pure economic loss, seeing that the actions of third parties (robbers) causing the damage *in casu* was made possible by the preceding conduct of one of the defendant's employees, which conduct was therefore indirectly causally linked to the plaintiffs' harm.

Van der Westhuizen J (with Moseneke ACJ, Skweyija ADCJ, Cameron J, Dambuza AJ, Froneman J, Jafta J, Madlanga J, Nkabinde J and Zondo J concurring) provided an interesting introduction to the judgment, highlighting the growing importance of the private security industry in contemporary South Africa. He referred to the high incidence of crime and provided startling recent statistics of serious offences such as murder and armed robbery and then remarked:

> "The South African Police Service is not always perceived to be capable of meeting its constitutional mandate. Hence, the private security industry is a large and powerful feature of South Africa's crime-control terrain. While it should and could not be a substitute for state services, it fulfils functions that once fell within the exclusive domain of the police" (398A).

The court attributed this tendency to historical factors, pointing out that it began developing since the late 1970s as one of the consequences of the apartheid regime's focus on state security and political control, which caused a strain on the availability of members of the police to perform their ordinary protective duties. The court continued to sketch a scene where security officers in the private security industry nowadays even outnumber the members of the South African Police Service (398B-C). It is suggested that this phenomenon in particular should kindle the interest in this judgment of anybody involved or associated within the mechanisms – public as well as private – by means of which public safety and security are maintained in our country.

2 Facts and Judgment

The respondent, iMvula (defendant in the South Gauteng High Court and appellant in the Supreme Court of Appeal), is a private security company who was contracted to provide an armed guarding service for the protection of the home of the appellants, Mr and Mrs Loureiro and their two minor sons (plaintiffs in the South Gauteng High Court and respondents in the Supreme Court of Appeal), on a 24-hour basis seven days a week. In addition, Mr Loureiro had an extensive security system installed at the property (electric fences, perimeter beams, multiple alarm systems, a guard house with bulletproof windows, an intercom system and closed-circuit television). Access to the property could be gained through two entrances, namely an armoured pedestrian gate and a driveway gate. Both gates could be observed from the guard house.

In terms of their agreement iMvula initially undertook, *inter alia*, to take all reasonable steps to prevent persons gaining unauthorised access and/or entry to the premises, to take all reasonable steps to protect the appellants and their property and to take all reasonable steps to ensure that no persons gained unlawful access to the premises. (These terms were not put in writing and their content was reflected in clauses 6.5.1 – 6.5.2 and 6.5 7 of Mr Loureiro's heads of argument presented to the High Court.) As a result of a lapse of security due to one of the guard's allowing someone to enter the premises through the main gate without obtaining Mr Loureiro's prior approval, the latter had the intercom system partially

disabled to prevent the guards from opening and closing the main gate. This arrangement unfortunately affected the movement of the armed guards during their shift changes. To alleviate this problem Mr Loureiro furnished the guards with a key to the smaller pedestrian gate. This course of action was accompanied by an express prohibition to the effect that the key should not be used for any purpose other than to enable the guards to change shifts. The guard supervisor was emphatically instructed that the key should not be used to open that gate to allow anybody to gain access without Mr or Mrs Loureiro's prior authorisation. This arrangement was accepted by iMvula and therefore constituted a further term of their oral agreement. (The full content of this further term to their oral agreement, reflected in clause 6.8 of Mr Loureiro's heads of argument, was as follows: "[iMvula] was not entitled to permit any person to gain access to the [Loureiro family's] residence other than [Mr and Mrs Loureiro] and their two minor sons, unless [iMvula] had obtained such prior authorisation from [Mr Loureiro] alternatively [Mrs Loureiro] to allow such person access" (399H-400A).) According to Mr Loureiro this term amended the initial terms alluded to earlier to the effect that it imposed strict liability on iMvula for harm pursuant to the latter's failure to observe it. However, iMvula denied that it had incurred such strict liability.

About one month after Mr Loureiro had issued this prohibition, a robbery took place at the premises. The circumstances were as follows: In the early evening an unmarked white BMW sedan with a flashing blue light mounted to its dashboard drove into the driveway. A man wearing dark blue clothing, a reflective vest marked "Police" and a cap with a logo resembling a police logo stepped from the car, proceeded in the direction of the guard house and flashed an identity card in the direction of Mr Mahlangu (henceforth M), the guard on duty. M was unable to examine the card and tried in vain to speak to the stranger through the intercom system. Relevant to these circumstances was the fact that M, a qualified Grade-A security guard, had never been informed of the prohibition against allowing unauthorised strangers onto the premises, nor had he been issued with a detailed job description pertaining to the specific services required by the Loureiros. In addition he had received no proper instructions on how to deal with police officers demanding entry (viz in conformity with section 25(3) of the Criminal Procedure Act 51 of 1977), nor how to identify police officers. Finally, the unarmed M's only means of contacting iMvula was his personal cellular phone which had no airtime at that crucial moment. Caught off guard by believing the man to be a police officer, M left the guard house, walked to the pedestrian gate and without attempting to speak to the visitor through the gate unlocked it without further ado. After unlocking and opening the gate, M was confronted by an armed robber pointing a firearm at him. Thereupon several accomplices joined the robber, entered the house and accosted the house staff and children. When Mr and Mrs Loureiro returned from a function about an hour later, they were also confronted and finally

coerced to provide the robbers with the keys to their safes. The robbers thereafter fled with booty worth R11 million.

Subsequently the Loureiros claimed damages from iMvula in the High Court (*Loureiro and Others v iMvula Quality Protection (Pty) Ltd* [2011] ZAGPJHC 140 (GSJ)) on two grounds: Mr Loureiro alleged that his damage had been caused by iMvula's breach of contract, whereas the claims of Mrs Loureiro and their two sons were brought in delict on the basis of iMvula's alleged wrongful and negligent conduct which had been a contributing cause of their damage. The parties agreed to separate the liability and quantum issues and the latter issue therefore did not feature in the litigation at all. The Loureiro family was successful due to the fact that Satchwell J, who approached both types of claim from the angle of negligence, found iMvula to have been negligent. She held iMvula to have failed to take reasonable steps to eliminate or reduce the foreseeable harm, from which she concluded that imVula was contractually liable to Mr Loureiro on the basis of a breach of contract and delictually liable to Mrs Loureiro and their two children on the basis of delict for failing to act in accordance with its so-called "duty of care" and in conformity with the required standard for security companies – therefore both wrongfulness and negligence had been established.

iMvula lodged an appeal in the Supreme Court of Appeal (*Imvula Quality Protection (Pty) Ltd v Loureiro and Others* 2013 3 SA 407 (SCA)). Mhlantla JA (with Mthiyane DP, Bosielo JA and Mbha AJA concurring) approached the issue on the basis of the reasonableness of M's conduct. She held that the contract did not impose strict liability on iMvula vis-à-vis Mr Loureiro and, in addition, that the contract had been subject to a tacit term excluding the police from the group of people who had no access to the property and that M had not acted unreasonably in his belief that the robber was a police officer. Mhlantla JA therefore concluded that iMvula had not breached its agreement with Mr Loureiro . In respect of the delictual claims, she concluded that no wrongfulness and negligence had been established on iMvula's part. iMvula's appeal was therefore upheld. In his minority judgment Cloete JA drew directly opposing conclusions, finding iMvula to be strictly liable in contract vis-à-vis Mr Loureiro, as well as delictually liable towards the other Loureiro family members on the basis of M's wrongful and negligent conduct that had contributed to their damage.

In the final appeal proceedings in the Constitutional Court the judgment of the Supreme Court of Appeal was reversed in respect of both the contractual and delictual claims. Van der Westhuizen J concluded that iMvula's liability in contract was strict and that M's conduct had constituted an act of breach of contract towards Mr Loureiro. The court also found that the appellants had established both wrongfulness and negligence on the part of M and that iMvula could thus not escape vicarious liability in delict vis-à-vis Mrs Loureiro and the two children. In upholding the appeal, the Constitutional Court thus gave effect to the judgment of the court of first instance.

3 Critical Evaluation

3 1 Introduction

The issues that the Constitutional court had to determine were three in number. In the first place the court had to determine whether it should at all grant the aggrieved parties leave to appeal; if this question were to be answered in the affirmative, the court then would have to ascertain whether iMvula was liable to Mr Loureiro for breach of contract; and, thirdly, whether iMvula had to answer in delict for the losses sustained by the rest of the family (398F-G).

3 2 The Appeal Issue

In urging the Constitutional Court to overturn the judgment of the Supreme Court of Appeal, the Loureiros raised two arguments to afford a basis for the court's jurisdiction in the matter at hand. The first argument was that a constitutional issue was involved, namely "the extent to which common-law actions in contract and delict give effect to the rights to security of the person, privacy and property" (404E), viz the fundamental rights enshrined in sections 12, 14 and 25 of the Constitution, 1996. This argument addresses the provision of section 167(3)(b) of the Constitution which provides that the Constitutional Court "may decide only constitutional matters, and issues connected with decisions on constitutional matters". In the alternative, the Loureiros argued that the court had jurisdiction in terms of a recent amendment to section 167 by the Constitution Seventeenth Amendment Act, 2012 (which came into force on 23 August 2013) that authorises the Constitutional Court to hear non-constitutional matters whenever "the matter raises an arguable point of law of general public importance which ought to be considered by it". The Loureiros' application for leave to appeal had been filed before the amendment came into force, but it was argued on their behalf that the general tenet of statute construction prohibiting the retrospective operation of legislation did not apply due to the recognised exception to this rule against retrospectivity pertaining to procedural matters which do not detrimentally affect a party's substantive rights (*Curtis v Johannesburg Municipality* 1906 TS 308 311, 313; *Veldman v Director of Public Prosecutions, Witwatersrand Local Division* 2007 3 SA 210 (CC) 224A-226G, 232C-233B).

Both arguments were opposed by iMvula and the court therefore commenced with an evaluation of the first of these. Van der Westhuizen J properly pointed out the well-established principle that both the law of contract and the law of delict give effect to and provide remedies for violations of constitutional rights (404H-405A, referring to *Barkhuizen v Napier* 2007 5 SA 323 (CC) parr 28-30, 35 and *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) par 58). He then proceeded to issue a warning that one should not oversimplify this issue: "[T]he mere fact that a matter is located in an area of the common law that can give effect to fundamental rights does not necessarily raise a constitutional issue"

(405A). He explained this by first making a positive statement and then following up with a negative statement: First, the matter must in addition raise questions about the *interpretation* and *development* of the common law that will force the Constitutional Court to consider constitutional rights or values, notwithstanding the fact that the arguments raising these issues ultimately fail, or the common-law rule in question ultimately did not need to be altered (referring to *Minister of Safety and Security v Luiters* 2007 2 SA 106 par 23 and *Barkhuizen* (supra)); and, secondly, the matter must not simply deal with the application of an uncontroversial legal test to the facts (referring to *Mbatha v University of Zululand* [2013] ZACC 43 par 194).

The court then went about applying these principles to the facts (405C-406C). Van der Westhuizen J immediately pointed out that if an appellant would base his application on the fact that the lower court has in its finding on wrongfulness failed to take account of the normative imperatives of the Bill of Rights, this would ordinarily be regarded as raising a constitutional issue. Strong authority for this is to be found in *Steenkamp NO v Provincial Tender Board, Eastern Cape* (2007 3 SA 121 (CC) par 19) in which it was held that the mere fact that an aggrieved party has lodged an appeal against a court's decision on wrongfulness in effect transforms it into a constitutional issue. Likewise, the judgment in *Phumelela Gaming and Leisure Ltd v Gründlingh and Others* (2007 6 SA 350 (CC) par 23) was referred to as authority for the contention that if a court, in applying the test for wrongfulness, ignores the sprit, purport and objects of the Bill of Rights, that would involve a constitutional matter affording the Constitutional Court the necessary jurisdiction to hear the matter. Obviously eager to establish the correct basis for making a finding on the constitutionality of the type of issue confronting the court, Van der Westhuizen J proceeded as follows (with reference to the leading cases of *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) par 21; *Minister van Polisie v Ewels* 1975 3 SA 590 (A) 597A-C); *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) par 56; *Van Duivenboden* par 17; and *Olitzki Property Holdings v State Tender Board and Another* 2001 3 SA 1247 (SCA) par 12):

> "This is because of the nature of the wrongfulness element in delict. An enquiry into wrongfulness is determined by weighing competing norms and competing interests. Since the landmark *Ewels* judgment, whether conduct is wrongful is tested against the legal convictions of the community. These now take on constitutional contours: the convictions of the community are by necessity underpinned and informed by the norms and values of our society, embodied in the Constitution. In this case the wrongfulness enquiry … invokes the convictions of a community plagued by crime on the crucial issue of respect for the police, its role and its interaction with the ever-growing private security industry"(405C-406A).

The court then proceeded to evaluate the decision of the Supreme Court of Appeal to the effect that M's conduct in allowing access to police officers or those claiming to be police officers had not been unlawful. The

court wasted no ink in concluding that that court failed to take constitutional considerations into account and in pointing out that if its decision were allowed to stand, "the harm-causing conduct of security companies and their employees who mistake robbers for police would not be wrongful and thus not attract delictual liability" (406B). It is suggested that at this point the court had already fully substantiated a stance that the issue at hand was of a constitutional nature which justified its hearing in that court. The next sentence should therefore be judged as an additional substantiation *ex abundanti cautela*, where Van der Westhuizen J expresses himself as follows: "Whether this Court should overturn the decision of the Supreme Court of Appeal poses questions about the interpretation and development of the common law" (406C). This is reminiscent of the wording of section 39(2) which enjoins every court, tribunal or forum to promote the spirit, purport and objects of the Bill of Rights. The court's final conclusion that "[a] constitutional matter is therefore raised" (406C) is in fact the only logical finding that it could make on the basis of quoted authority and should be welcomed.

It is noteworthy that the court's substantiation of its jurisdiction was up to this point based entirely on the nature of the wrongfulness issue in delict. It would appear that the court regarded its decision that the wrongfulness aspect of the set of facts served as a "connecting factor" to effect jurisdiction on the basis of the presence of a constitutional issue as sufficient to ensure its jurisdiction in respect of the contractual issue as well. This is clear from the following statement: "Mr Mahlangu's negligence and the interpretation of the contract are – in this case – issues connected to the required decision on a constitutional issue" (406C-D). Two comments on this will suffice: First, the adjudication of the negligence issue in delict is in its own right a process that brings constitutional values into play. It is well established that the *diligens paterfamilias* test for negligence entails, similar to the *boni mores* test for wrongfulness and the imputability test for legal causation, the application of open-ended or flexible delictual principles that can be described as the indirect application of the Bill of Rights. Such indirect application entails that all the rules and principles of private law should be given content in the light of the basic values contained in the Bill of Rights (see, in general, Neethling and Potgieter *Neethling-Potgieter-Visser The Law of Delict* (2010) 21; Visser "Enkele beginsels en gedagtes oor die horisontale werking van die nuwe Grondwet" 1997 *THRHR* 297 299, "Enkele gedagtes oor die moontlike invloed van fundamentele regte ten aansien van die fisies-psigiese integriteit op deliktuele remedies" 1997 *THRHR* 495; Van der Walt and Midgley *Principles of Delict* (2005) 18; Neethling, Potgieter and Visser *Neethling's Law of Personality* (2005) 75; Loubser and Midgley (eds) *The Law of Delict in South Africa* (2012) 34). It is therefore suggested that it was unnecessary to "link" negligence to wrongfulness to enable the court to adjudicate on the presence or absence or negligence. In the second place it is clear that the only way in which the court could justify its adjudication of the issue of breach of contract was to connect it "to the required decision on a constitutional

issue". The reason for this lies in the fact that fault in the form of negligence is not a requirement for breach of contract in terms of modern South African contract law, so that the issue of breach of contract is in fact to be regarded as an issue simply dealing with the application of an uncontroversial legal test to the facts, viz whether the actions of a party to a contract are factually in contravention of the terms and conditions of contract. No indirect application of the Bill of Rights was involved in this respect and on its own the issue of breach of contract would not have afforded the Constitutional Court a platform to adjudicate on the issue. As it would have been most unsatisfactory for the court to decide that it could resolve the delictual issue, but not the question pertaining to breach of contract, it is suggested that the stratagem of "connecting" or "linking" the breach of contract issue with the wrongfulness issue to enable adjudication on it, conforms to the spirit, purport and objects of the Bill of Rights and must therefore be welcomed. One could even describe the method applied in this judgment of applying the open-ended rules of delict pertaining to wrongfulness, which moves this branch of private law into the constitutional law sphere, as a "vehicle" for conveying the rules of (breach of) contract into the same constitutional law sphere. This is indeed a novel way of enhancing the influence of our Constitution.

Having decided that the issues involved were of a constitutional nature, the court did not need to consider the alternative argument based on the possible retrospective operation of the amended section 167 of the Constitution (406D). Should the issue have been pursued and the court have come to the conclusion that that section could be applied retrospectively, such decision could arguably have been applied alternatively to hold that the court had jurisdiction to decide the issue of breach of contract, as such issue would certainly fall under "any other matter… on the grounds that the matter raised an arguable point of law of public importance which ought to be considered by [the Constitutional] Court (s 167(3)(b)(ii) as amended).

Notwithstanding his positive finding on the constitutional nature of the issues involved – which, on its own, would logically suffice as reason for granting leave to appeal – Van der Westhuizen J, out of abundant caution, posed a further compelling reason for holding that it would be in the interests of justice to grant leave to appeal, namely the "substantial difference in the approaches of the majority and minority judgments in the Supreme Court of Appeal (as well as the High Court judgment)" which required the court to provide guidance on legal certainty (406E, quoting as authority *F v Minister of Safety and Security and Others* (2012 1 SA 536 (CC) par 38).

3 3 The Breach of Contract Issue

Mr Loureiro argued that the clause of his oral agreement with iMvula contained in clause 6.8 of the original heads of argument introduced strict contractual liability on iMvula's part and that the Supreme Court of

Appeal had erred in deciding that it was subject to a reasonableness qualification. On the other hand, iMvula contended that Mr Loureiro failed to prove that the contract was in fact amended as reflected in clause 6.8 of Mr Loureiro's heads of argument and further that, if the contract had in fact been amended, it did not impose strict liability, because that would be inconsistent with the other applicable terms which imposed a reasonableness standard (reflected in clauses 6.5.1-6.5.2 and 6.7 of Mr Loureiro's heads of argument). It was furthermore argued that iMvula's conduct had been reasonable and that it had therefore not breached that contractual term (407A-C).

The court identified three issues to be decided in determining iMvula's possible liability, viz: (a) whether the original contract had been amended by the term containing a prohibition against opening the smaller pedestrian gate without prior authorisation; (b) whether such prohibition had imposed strict liability on iMvula, or included a qualification as to reasonableness; and (c) whether the contract was breached (par 40). Although Van der Westhuizen J did not spell it out in such detail, the second issue was dependent upon a positive answer to the first question, whereas the third issue in turn depended on a positive answer to the second question. Be that as it may, the court's line of reasoning is abundantly clear.

The court did not experience the slightest difficulty in coming to the immediate conclusion on question (a) that the term including the prohibition had, on the evidence presented in the court of first instance, amended the agreement (407F). This was a simple finding of fact and involved no legal argument.

The court then proceeded to evaluate the second issue (question (b)) and commenced by pointing out that "[i]n the absence of a contrary stipulation, the law of contract does not require fault (even in the form of negligence) for breach [of contract]" (407G). In light of the approach followed in both the majority and minority judgments in the Supreme Court of Appeal, this correct statement of the law has to be welcomed. In that court Mhlantla JA, writing for the majority, stated that "this court is required to consider the *reasonableness* of the conduct of the security guard in both legs of the respondents' claims" (413H, own emphasis), viz in respect of the contractual and delictual claims. Perhaps this erroneous dictum was inspired by the equally incorrect statement of Satchwell J in the court of first instance, where she expressed herself as follows: "At the end of the day, the liability of defendant (whether on claim A in contract or claim B in delict) essentially boils down to the question of negligence" (par 43). This flies in the face of established case law to the contrary. In this respect Van der Westhuizen J referred to the judgments of *Thoroughbred Breeders' Association v Price Waterhouse* (2001 4 SA 551 (SCA) par 66) and the older judgment of *Administrator, Natal v Edouard* (1990 3 SA 581 (A) 597E-F) as authority for his commencing statement on this aspect (see also Van der Merwe, Van Huyssteen, Reynecke and Lubbe *Contract General Principles* (2007) 330-331). To this one can add

the recent judgment of the Supreme Court of Appeal itself in *Scoin Trading (Pty) Ltd v Bernstein* (2011 2 SA 118 (SCA) 122I) where Pillay AJA clearly pointed out that "contractual damage does not depend on fault". It is indeed strange that such a recent own judgment should have slipped the attention of the Supreme Court of Appeal.

Apart from this, the evidence established that the parties had expressly agreed that there would be an absolute, viz "strict-liability" prohibition which belied a stipulation to the contrary. The court furnished three reasons for this: (i) In light of the well-established rule that contractual obligations are determined by the intention of the contracting parties as well as the fact that Mr Loureiro's prohibition was unequivocal, and judged against the reason why the prohibition was imposed in the first place, one can only agree with the court's conclusion that "the prohibition does not, in fact, require fault for breach" (408B). In addition Van der Westhuizen J pointed out (408G-H: n 39) that the rule "*expressum facit cessare tacitum*" (that which is expressed excludes (or supersedes) what is implied) ruled out any conclusion that there had been a tacit imposition of a reasonableness standard (relying on *Penderis and Gutman NNO v Liquidators, Short-Term Business, AA Mutual Insurance Association Ltd* 1992 4 SA 836 (A) 842I; *Rashid v Durban City Council* 1975 3 SA 920 (D) 924-5; and *Glennie, Egan & Sikkel v Du Toit's Kloof Development Co (Pty) Ltd* 1953 2 SA 85 (C) 94). (ii) On the strength of the other terms of the agreement that required "all reasonable steps" to be taken by iMvula, the latter argued that the prohibition contained in clause 6.8 of its original heads of argument should be read in context and therefore be interpreted as containing a reasonableness standard. This was in fact also the conclusion of Mhlantla JA in the Supreme Court of Appeal (414C). Van der Westhuizen J approached this issue strictly on the basis of the evidence produced in the lower courts and reached the only logical conclusion in the following words:

> "While contractual terms must be understood in context, this is no reason to think that all the terms must impose the same fault standard. And in this case, other obligations explicitly imposed a reasonableness standard and the prohibition deliberately omitted that standard. Exactly because of this, the conclusion that strict liability was imposed is compelling" (408C).

(iii) Finally, the court went out of its way to establish an additional explanation for holding that the term containing the prohibition was strict and not subject to a reasonableness proviso. The argument was raised that the terms containing a reasonableness proviso pertained to positive steps that iMvula had been obliged to take in terms of its agreement (viz "to prevent" (clause 6.5.1), "to protect" (clause 6.5.2) and "to ensure" (clause 6.7)), while the clause containing the prohibition imposed a negative obligation *not* to admit third parties without the applicable prior authorisation: "It makes sense that parties would contract to require a reasonableness standard for a positive obligation to do something, while not for a negative obligation not to do something – especially not to open the gate, which was at the very heart of iMvula's

contractual obligations" (408E-F). The logic of this statement escapes me. It would appear that this statement was inspired by the notion that the breach of a negative obligation is in law regarded as more serious that the failure to fulfil a positive obligation (on the authority mentioned at 408J: n 42, viz Honoré "Are Omissions Less Culpable" *Responsibility and Fault* (1999) 60, 65-66). Whether this supports the court's argument, based on pure logic, is to my mind doubtful. It is suggested that the first two grounds proffered by the court are more than sufficient for holding the term in question to impose strict adherence to the contract.

The answer to question (c) posed no problem at all. The court simply referred to the facts, pointing out that M disregarded the prohibition by allowing the robbers *unauthorised* entry: "This amounts to a breach of contract. Whether or not he was negligent is irrelevant. iMvula is liable"(409A).

Obviously eager to quell any dint of uncertainty that may have remained in this respect, the court addressed the further argument raised by iMvula that it had in terms of section 25(3) of the Criminal Procedure Act been compelled to allow the robber who had masqueraded as a police officer to enter the premises. This argument was in fact sustained in the majority judgment of the Supreme Court of Appeal (414E), but emphatically rejected in the minority judgment (422D). In effect Van der Westhuizen J adopted Cloete JA's minority judgment on this point and by implication rejected the patently wrong decision of Mhlantla JA by simply stating: "The demand was not lawfully made by a police officer" (409B).

The court's final word in respect of the breach of contract issue represents a contrary approach for mere argument's sake, viz that the clause containing the prohibition was in fact qualified by a reasonableness standard. To this the equally simple answer was that iMvula "would in any event be liable, since the standard was breached" (409B). This is obviously a mere *obiter dictum* in view of the conclusions reached on the basis of the strict nature of the clause in question and need not be pursued any further.

3 4 The Delictual Issue

3 4 1 Preliminary Issues

The delictual liability that iMvula could have incurred vis-à-vis Mrs Loureiro and their two children could be either vicarious – depending on the conduct of its employee, M – or direct, based on its own conduct (409C-D). Van der Westhuizen J commenced with the issue of vicarious liability by setting out the three well-established rules for holding an employer vicariously liable for the delict of his employee, namely that the employee should have committed a delict, that an employer-employee relationship should have existed and that the employee should have committed the delict while acting within the course and scope of employment (referring to the two most recent cases on vicarious liability

handed down by the Constitutional Court, viz *F v Minister of Safety and Security* par 40 n 33 and *K v Minister of Safety and Security* 2005 6 SA 419 (CC) par 21, as well as and Neethling and Potgieter 365-368 who concisely set out and explains these rules). This issue was uncontentious and the court therefore proceeded to apply the law of vicarious liability to the facts. The only aspect that merited attention was whether M, iMvula's employee, had in fact committed a delict which had caused the appellants' damage. The court thus tacitly accepted that the two remaining requirements for this type of liability had been complied with.

Van der Westhuizen J emphatically referred (409I-J: n 45) to one of iMvula's written arguments to the effect that M's conduct had not been the legal cause of the Loureiros' harm and that factors such as that the alarm system had partially been deactivated and the back door to the house had been left unlocked constituted "*nova acta interveniens*" (*sic*) (the present participle should read "*intervenientes*" to accord to the plural form "*nova acta*"). This argument involved the determination of legal causation but it had been abandoned, causing the court to conclude that it was "thus not in dispute that Mr Mahlangu's conduct caused damage to the Loureiros". In this way the delictual elements of conduct, causation and damage were accepted as proven. This explains why the rest of this judgment deals exclusively with the two remaining delictual elements of wrongfulness and negligence on the basis of the appellants' arguments that M had acted both wrongfully and negligently, which was denied by the respondent (409F-410B).

3 4 2 Wrongfulness

It is to be welcomed that the court commenced with an investigation of the wrongfulness issue, although this is (unfortunately) not to be accepted as an indicator that the court thereby unequivocally endorsed the approach that the determination of wrongfulness is logically anterior to ascertaining negligence. (It is not my intention to pursue this thorny issue on which much ink has been spent over the last few years. For an overview of recent literature on this point, see Neethling and Potgieter 123 n 6). The court's uncritical acceptance of the following *dicta* from *Trustees, Two Oceans Aquarium Trust v Kantley and Templer* (2006 3 SA 138 (SCA) 10) that "[n]egligent conduct giving rise to damages (*sic*) is not … actionable *per se*. It is only actionable if the law recognises it as unlawful" in fact creates the impression that the negligence issue could be determined before the wrongfulness issue. The same conclusion could be drawn from the court's assertion that "[i]t is recognised, however, that there are cases where conduct that would not be wrongful if negligent, may be wrongful if intentional, where the subjective state of mind may thus be relevant to the wrongfulness inquiry (with reference to the judgment in *Minister of Finance and Others v Gore NO* 2007 1 SA 111 (SCA) par 86 and academic sources such as Visser "Delict" in Du Bois (ed) *Wille's Principles of South African Law* (2007) 1187 and Boberg *The Law of Delict Volume I ~ Aquilian Liability* (1984) 33) as well as from the court's reference (410I-411G: n 50) to recent case law in which it was held that

deciding which test should be applied first, is a matter of convenience (with reference to cases such as *Haweka Youth Camp and Another v Byrne* 2010 6 SA 83 (SCA) par 24; *Gouda Boerdery BK v Transnet Ltd* 2005 5 SA 490 (SCA) par 12; and *Local Transitional Council of Delmas and Another v Boshoff* 2005 5 SA 514 (SCA) par 20; as well as recent academic sources, such as Brand "Reflections on wrongfulness in the law of delict" 2007*SALJ* 76 79; Nugent " Yes, it is always a bad thing for the law; a reply to Professor Neethling" 2006 *SALJ* 557 559-562 and Fagan " Rethinking wrongfulness in the law of delict" 2005 *SALJ* 90 109). Van der Westhuizen J probably did not specifically apply his mind to this aspect of the law, in view of the general tenor of his judgment and thus one should not endeavour to draw conclusions of a general nature in this respect.

Equally to be welcomed is the court's formulation of the nature of the wrongfulness test as opposed to that of negligence. After appropriately referring to Nugent JA's warning in the leading case of *Minister of Safety and Security v Van Duivenboden* (2002 6 SA 431 (SCA) par 12) not to conflate the enquiries into wrongfulness and negligence – a warning not heeded by the majority of the Supreme Court of Appeal – the court expressed itself as follows:

> "The wrongfulness enquiry focuses on the conduct and goes to whether the policy and legal convictions of the community, constitutionally understood, regard it as acceptable. It is based on the duty not to cause harm – indeed to respect rights – and questions the reasonableness of imposing liability. Mr Mahlangu's subjective state of mind is not the focus of the wrongfulness enquiry. Negligence, on the other hand, focuses on the state of mind of the defendant and tests his or her conduct against that of a reasonable person in the same situation in order to determine fault" (410B-D).

Although one could embark on a theoretical discussion on virtually each and every one of the above statements, only the following comments are relevant to this discussion: First, it should be welcomed by those such as Neethling and Potgieter (123), who doggedly maintain that the wrongfulness issue should be decided before the negligence issue, that the court places *conduct* as the focal point of wrongfulness, and not *negligent conduct*. Secondly, authors in the same camp as Neethling and Potgieter will not value the court's general approach that wrongfulness in general presents itself as a breach of a duty not to cause harm; the orthodox approach is that the duty approach should only be followed where the issue turns on the possible wrongfulness of an omission, or where wrongfulness has to be ascertained in the sphere of causing pure economic loss (see eg Neethling and Potgieter 54-56, 291 *sqq*). Finally, it is suggested that the court essentially contradicted itself where it was said in one and the same sentence that negligence deals with the defendant's state of mind (which implies an absolutely subjective test) and that one should test the defendant's conduct against the criterion of the *diligens paterfamilias* (which is essentially an objective *ex ante facto* test). It would have been better for the court to describe negligence as the defendant's *legal blameworthiness*, whereas there is no harm in describing intent

(*dolus malus*) as the defendant's blameworthy state of mind. (On this topic, see the thought-provoking discussion by Van der Merwe and Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (1989) 110 n 90.)

The way in which the court applied the reasonableness test for wrongfulness can be fully supported. In rejecting the finding of the Supreme Court of Appeal to the effect that M was obliged to allow the intruders masquerading as police officers access to the premises "because of his duty to cooperate with the police" (411B), the court simply declared: "The intruders were as a matter of fact robbers, not police officers" (*ibid*). This is a classic example of the *ex post facto* armchair (or diagnostic) approach to be taken in assessing wrongfulness, where one may be "wise after the event", as opposed to the *ex ante facto* (or prognostic) approach of the *diligens paterfamilias* test for negligence (411C; see, in general, Neethling and Potgieter 158). It is clear that this conclusion reached by the court fortunately eliminates any possible detrimental effect of Mhlantla JA's decision in the Supreme Court of Appeal on the future application of the reasonableness test for wrongfulness, where she flatly rejected application of the test of "an armchair critic with the benefit of hindsight" (417A). Although her assertion was, of course, quite correct in respect of the negligence element, she did not distinguish clearly between negligence and wrongfulness, which created the risk of uncertainty when applying the wrongfulness test in future. The Constitutional Court's judgment on this point must therefore be welcomed, as it "saved" the theory of the law of delict from being subjected to unnecessary uncertainty in future.

Although one would have thought that the court's conclusion up to this point on wrongfulness conclusively demonstrated that the wrongfulness of M's conduct had been established, the court chose to base its conclusion on the presence of wrongfulness on a further base, namely that of policy (411D-E). In this respect the following factors were isolated as pointing towards the wrongfulness of M's conduct: (a) The constitutional right to personal safety and protection from theft or damage to one's property; (b) the public interest in ensuring that private security companies who assume their roles for remuneration should succeed in preventing harm; and (c) the deterrent effect of imposing delictual liability. Perhaps one should draw the conclusion that the result of the application of the *ex post facto* reasonableness test which yielded a conclusion of wrongfulness was merely *prima facie* and that it could be rebutted if the court found that policy considerations militated against such finding. However, if policy considerations dictated otherwise, the *prima facie* finding would become conclusive, as in the instant case. This is clearly the only way in which one could explain the court's final verdict on this point, which reads as follows: "The convictions of the community as to policy and law clearly motivate *for liability to be imposed*" (411E; italics supplied).

It is noteworthy that the court only declared M's conduct to be wrongful in the next brief paragraph (411E), which amply demonstrates

that its finding at the end of the previous paragraph (see also 410C) that liability should be imposed is the true basis of its verdict on wrongfulness. This represents a clear choice for the "new" test for wrongfulness that originated in the judgment of Harms JA in *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* (2006 1 SA 461 (SCA) par 13), in deviation from the orthodox academic approach followed by authors such as Neethling and Potgieter (78-82). The Constitutional Court thus followed the line of its recent judgments in *Le Roux and Others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae* (2011 3 SA 274 (CC) par 122) and *Lee v Minister of Correctional Services* (2013 2 SA 144 (CC) par 53) in which the "new test" has met with its approval (see also the court's positive reference to the decision of the Supreme Court of Appeal in the *Two Oceans Aquarium Trust* case (par 11) in which Brand JA applied the new test). The scope of this discussion does not allow any discussion of the merits or demerits of the new approach to the wrongfulness test (see the interesting opposing views reflected in the following recent academic publications: Brand "The contribution of Louis Harms in the sphere of Aquilian liability for pure economic loss" 2013 *THRHR* 57; Neethling and Potgieter "Wrongfulness in delict: A response to Brand JA" 2014 *THRHR* 116). However, it should now be apparent that this test has won the day and that the appeal of Neethling and Potgieter (80-81) to the judgment of Moseneke ACJ in *Steenkamp NO v Provincial Tender Board, Eastern Cape* (2007 3 SA 121 (CC) 138) to the effect that "[f]ortunately, the Constitutional Court… and in contrast to Harms JA in the Supreme Court of Appeal, has not yet bestowed explicit recognition upon the new variation [of the wrongfulness test]". It is crystal clear that the reasonableness of imposing liability has now undoubtedly been accepted by our highest court as an acceptable test for wrongfulness.

If the set of facts of the case under discussion represents an instance of the causing of pure economic loss by iMvula to the Loureiros, the court's conclusion does not need to raise the eyebrows, for it has already generally been accepted by its proponents (and adversaries) that the new version of the wrongfulness test operates exclusively in the spheres of omissions and pure economic loss. However, it is suggested that an alternative interpretation of this set of facts is possible: When M took the fatal decision and unlocked the gate to allow the robbers entry to the premises, that conduct can certainly be regarded as a *positive act* which contributed to the ultimate damage. The mere fact that M failed to observe the terms of the contract and in general failed to act reasonably does not transform the positive act into an omission (Van der Walt and Midgley 66). The normal rule in respect of positive acts (*commissiones*) is that the causing of physical damage to a plaintiff's person or property is regarded as *prima facie* wrongful and that in such a case the onus is on the defendant to rebut the inference of wrongfulness arising from such harm (*Gouda Boerdery BK v Transnet* par 12; *Telematrix* par 13; *Roux v Hattingh* 2012 6 SA 428 (SCA) par 32; *Mabaso v Felix* 1981 3 SA 865 (A) 871F-874F; *Santam Insurance Co Ltd v Vorster* 1973 4 SA 764 (A) 780G-

781G). One could speculate on the outcome of this judgment had this line of reasoning been followed. Then the defendant (respondent) would have been saddled with the onus of proving that its employee had not acted unreasonably and therefore not wrongfully. Possibly the defendant would then simply have concentrated on the fault (negligence) element, which would in all probability have yielded the same practical outcome. However, this interpretation of the set of facts as an instance of liability for positive conduct should not mean that the "new test" for wrongfulness has now been extended to cover instances of positive conduct. It is quite clear that the court approached the case from a pure economic loss perspective.

3 4 3 Negligence

The court proceeded (411F-412A) from the authoritative negligence test formulated by Holmes JA in *Kruger v Coetzee* (1966 2 SA 428 (A) 430E-F) which has been constantly applied in our courts for almost 50 years. The test entails three questions. A positive answer to all three of these will yield a conclusion of negligence on the part of the party being tested. In respect of the facts at hand the court had to determine whether a reasonable person in the shoes of M at the time of his actions (a) would have reasonably foreseen the damage; (b) if so, would have taken reasonable precautions to avoid the harm; and (c) if so, whether M failed to take such steps (411F-412A). The court then proceeded to apply the foreseeability and preventability stages of this test to the facts. iMvula's endeavour to portray the negligence test as purely factual (therefore not involving a constitutional issue) in order to avoid it being considered at all by the Constitutional Court was summarily disposed of in the following terms: "It is generally understood in our law that the enquiry into negligence is at least partly normative" (412B). A moment's reflection points to the correctness of this conclusion, for what else is the *diligens paterfamilias* than an objective criterion, a *standard* of reasonableness? Two lines later the court emphasised the objective nature of this test by correctly denying that the enquiry of negligence focuses on the defendant's belief (in the process contradicting its earlier statement that the negligence test focuses on the defendant's state of mind (see 410D and my comments under § 3.4.2 above)).

Van der Wetshuizen J commenced his treatment of the foreseeability tier of the negligence test by concluding that a reasonable person in M's shoes would have foreseen that the person who had approached him had been an impostor and then furnished the following reasons for his conclusion: (a) The robbers' car was unmarked; (b) the flashing blue light had been affixed to the car's dashboard (and not to its roof, as is conventional); (c) the clothing worn by the person demanding access was not typical of that worn by on-duty police officers; (d) the impostor had not properly presented his "identity card", but merely "flashed" it at M without giving M the opportunity to inspect it properly; and (e) it was foreseeable to a reasonable person "in his position as security guard" – which is an alternative way of referring to a reasonable security guard –

that criminals may try to gain entry to the premises by masquerading as police officers (412C-G). This practical approach to the determination of foreseeability is to be welcomed.

In light of the positive answer to the foreseeability question, the court embarked on an application of the preventability tier of the *diligens paterfamilias* test, entailing asking what reasonable steps could have been taken by M to avoid the Loureiros' harm. Here the court relied on the well-established criteria that have developed over a long period, namely (i) the degree or extent of the risk created by M's conduct; (ii) the gravity of the consequences if the harm would occur; and (iii) the burden of eliminating the risk of harm (referring to the leading judgment of *Ngubane v South African Transport Services* 1991 1 SA 756 (A) 776H-I; see also Van der Walt and Midgley 179; Neethling and Potgieter 145-148; Loubser and Midgley 124-129; Boberg 274 *sqq*). The fourth consideration regularly applied in determining whether the harm was reasonably preventable is the utility of the actor's conduct, but this did not play a role in this set of facts. Van der Westhuizen thereupon applied these criteria to the facts and found that preventability had been established on all of the three grounds mentioned: In respect of (i) he found that the risk created by not verifying the identity of the person demanding entry had been great, the gravity of the consequences of possible harm (factor (ii)) had been equally great and the burden of taking adequate preventative steps (factor (iii)) had been slight (412H-413A).

Having answered the second question in the affirmative as well, the court finally had no difficulty in concluding as follows:

> "Mr Mahlangu failed to take any of these fairly easy precautions. When one is tasked with protecting a property against intruders, it is simply not reasonable to open a door for a stranger without adequately verifying who that person is or what he or she wants. Mr Mahlangu's conduct fell short of that of a reasonable person" (413C).

As an afterthought the court referred, although not in so many words, to the application of the *imperitia culpae adnumeratur* rule which entails raising the standard of care expected of a defendant when he or she possesses certain expertise in the relevant field (on the more stringent test of the reasonable expert, see Neethling and Potgieter 139-141; Van der Walt and Midgley 192-194; Scott "Die reël *imperitia culpae adnumeratur* as grondslag vir die nalatigheidstoets vir deskundiges in die deliktereg" *Petere Fontes: LC Steyn Gedenkbundel* 124). The fact that M was an experienced security guard in possession of a "Grade-A qualification" prompted the court to declare that it would be appropriate to raise the standard of conduct expected of him "to be commensurate with this expertise" (413D). This is in stark contrast with the decision of the majority judgment of the Supreme Court of Appeal (see 416E-418A of that judgment), but in conformity with the minority judgment of Cloete JA (423H-424B) on this aspect.

The court concluded its findings on negligence by rejecting iMvula's argument – obviously presented as a desperate last stand – that the court was unable to decide the negligence issue in the absence of expert evidence pertaining to security-industry standards. Referring to the judgment in *Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another* (2001 3 SA 1188 (SCA) parr 34-40) Van der Wetshuizen J pointed out that the negligence issue must be resolved by the court itself and that if the court is able, on the facts, to draw a conclusion on the level of the appropriate reasonableness standard, then it is unnecessary to hear evidence on the matter (413F).

Finally, having in effect found iMvula vicariously liable for M's conduct, the court declined to consider iMvula's possible direct delictual liability (414B). It is suggested that such an enquiry would probably have presented the Loureiros' with a more difficult case, judged from a theoretical perspective (see, eg, the minority judgment of Froneman J in the case of *F v Minister of Safety and Security* 564A-575A).

4 Conclusion

The judgment of the Constitutional Court is to be heartily welcomed. The majority judgment of the Supreme Court of appeal, overturned on both the issues of breach of contract and delict, was in fact potentially calamitous in its effect on both branches of private law: it disregarded the well-established principle that fault is no requirement for breach of contract and it confused the delictual elements of wrongfulness and negligence. If that judgment had not been overturned, the doctrine of *stare decisis* would have presented legal practitioners, academics and students, obliged to follow the judgments of a higher-ranking court, with unnecessary uncertainties in respect of clear rules which have come about after a long process of development. The judgment of Satchwell J in the court of first instance surpassed that of the Supreme Court of Appeal majority in quality, whereas the minority judgment of the latter court provides a good example of judicial clarity in which the glaring flaws in the majority decision are pointed out. The fact that both last-mentioned judgments were in effect reinstated/upheld, justifiably allows the legal fraternity to heave a sigh of relief.

Finally, the court's willingness to hear this appeal on the basis that constitutional principles were involved, is noteworthy. It demonstrates that the open-ended principles of both our laws of contract and delict make these branches of law particularly susceptible to judicial interpretation on a constitutional basis. This is particularly true in respect of the law of delict, on which a judge of the Supreme Court of Appeal commented as follows in a recent article (Brand "Influence of the Constitution on the law of delict" *Advocate* (April 2014) 42 45):

> "[A]lthough the overt purpose of the law of delict is to compensate, it also plays a covert role [in] which it prescribes a set of ethical rules for social interaction. As a natural consequence, the law of delict is underpinned by a sense of morality and fairness. In this light it seems logical that constitutional

values would have a dramatic impact on delict, but that the impact would be through the application rather than the amendment of established principles".

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Boekaankondigings/Book Announcements

Public Procurement Regulation in Africa

edited by

GEO QUINOT & SURE ARROWSMITH

Cambridge University Press 2013 xvii plus 429 pages

Price: $124.00 USD

1 Introduction

Geo Quinot and Sue Arrowsmith are the editors of the book Public Procurement Regulation in Africa. Geo Quinot is Professor of Law in the Department of Public Law at Stellenbosch University, where he is also Director of African Public Procurement Regulation Research Unit and Co-Director of Socio-Economic Rights and Administrative Justice Research Project.

Sue Arrowsmith is Achilles Professor of Public Procurement Law and Policy at the University of Nottingham, where she is also Director of the Public Procurement research Group and of the postgraduate Executive Programme in the Procurement Law and Policy.

The book deals with Public Procurement as a field of law. Public Procurement deals with the whole process through which governments deal with the acquiring of goods and services from the time of identifying a need for goods and services to the conclusion of a contract with a supplier.

The purpose of the book is to provide foundations for future research on African procurement regulation, to form the basis for specific research and teaching programmes and finally to provide a platform for African scholars to develop research partnerships and gain access to broader international scholarships.

The countries that were selected for discussion in this book are, Botswana, Ethiopia, Ghana, Kenya, Namibia, Nigeria, Rwanda, South Africa and Zimbabwe. The other authors of the book are all experts in the field of Public Procurement from the respective countries.

2 Strengths

The book has a very practical and well thought-out systematic approach to explaining the dynamics of procurement in Africa. It is divided into two parts. Part one deals with the regulatory frameworks on public procurement from each country that was selected. The regulatory frameworks of all the countries are discussed under the following

headings: Introduction to the public procurement system; coverage of the public procurement rules; public procurement procedures; and concluding remarks. This structured comparison of public procurement in the different countries is particularly effective when analysing the differences and similarities in procurement systems.

Part two deals with specific themes relating to procurement regulation in Africa i.e. the donor's influence on developing countries' procurement systems, rules and markets; procurement methods in the public procurement systems of Africa; a comparative perspective on supplier remedies in African public procurement systems; a perspective on corruption and public procurement; and the promotion of social policy through public procurement. Most objectives of public procurement are shared by most countries and the aspects discussed in the second part of the book gives a comparison on most of these objectives.

3 Weaknesses

The weakness relates more to this field of law than a weakness identified regarding the book and that is the fact that public procurement regulation in Africa is not widely researched and there are limited resources available in the field of procurement regulation. This fact makes a comparison with other literature difficult.

4 Conclusion

The book is informative and provides the reader with enough information to understand the objectives of public procurement. From other research done on this topic, it is clear that the editors and the other authors are very knowledgeable in their field of study and although it is too soon to say whether they will reach their objective to lay a foundation for future research on the topic of public procurement, it is safe to say that this is an excellent start.

This book is highly recommended to scholars in the field of procurement law.

U Botha
Member of the Institute of Directors
Advocate of the High Court

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