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## Editorial/Redaksioneel

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*“The measure of greatness in a scientific idea is the extent to which it stimulates thought and opens up new lines of research” (Paul Dirac)*

With the wise words of Paul Dirac in mind, the editorial board of *De Jure* has pleasure in presenting the first volume of 2015. As with every volume of *De Jure*, this volume contains valuable contributions by a variety of academics on a wide variety of topics. A particular feature of this volume relates to the cluster of contributions dealing with consumer law.

In recent years core pieces of legislation have brought about a significant change in the landscape of Consumer Law, not only in South Africa but also internationally. The National Credit Act 34/2005 and the Consumer Protection Act 68/2008 are central to Consumer Law Reform in South Africa. Due to the nature and wording of these pieces of legislation the relevant positions in Africa as well as abroad have become important.

In light of this, the Department of Mercantile Law at the University of Pretoria identified a need for an international platform to provide all role players (Government, academia and members of the legal profession) with the opportunity to exchange information specifically in the area of Consumer Law.

The University of Pretoria International Consumer Law Conference (UPICLC) took place at the University from 25 – 27 September 2014. The conference addressed important issues on International and National Consumer Credit Law and Consumer Protection Law (including key legislative amendments and the latest developments and case law). Many international and national key-note speakers addressed the conference. Specialised plenary sessions and papers during break-away sessions on all relevant topics also formed part of this very successful conference. Some of these presentations were reformed into contributions and now proudly form part of this issue of *De Jure*.

The volume, in addition, contains valuable discussions on topics such as evidence by means of closed circuit television, life insurance contracts and military intervention in Syria. The *De Jure* team wish to thank all contributors to this volume for their efforts and contributions to this volume. The editorial committee would like to thank all reviewers for their diligent assistance in reviewing all contributions.

The editorial committee would like to express our gratitude to our editorial assistant, Robert Steenkamp, for his diligent assistance during the production of this volume. We would also like to express our gratitude to the team of Pretoria University Law Press (PULP), and especially Lizette Hermann, for making this volume a reality.

**Dr GP Stevens**  
**Editor**



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# Evidence by means of closed circuit television or similar electronic media in South Africa: Does section 158 of the Criminal Procedure Act have extra-territorial application?

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## OPSOMMING

### Getuienis deur middel van Geslotekringtelevisie of Soortgelyke Media in Suid Afrika – Het Artikel 158 van die Strafproseswet Ekstra-territoriale Toepassing?

Artikel 158(2) van die Strafproseswet 51 van 1977 bepaal onder andere dat 'n Hof op eie inisiatief of op aansoek van die aanklaer, die beskuldigde of 'n getuie kan gelas dat die beskuldigde of getuie, indien die beskuldigde of getuie daartoe instem, deur middel van geslotekringtelevisie of soortgelyke elektroniese media getuig. Regspraak, insluitend appèlhof gesag, toon aan dat artikel 158 ook aangewend is in die verlede vir getuies wat buite Suid Afrika gesetel is ten einde getuienis af te lê deur middel van geslotekringtelevisie tydens 'n verhoor in Suid Afrika. In hierdie bydrae word daar aangetoon dat hierdie praktyk foutief is met spesifieke verysing na geskiedenis ten aansien van die opstel van artikel 158.

## 1 Introduction

Section 158 of the Criminal Procedure Act<sup>1</sup> provides that:

- (1) Except as otherwise expressly provided by this Act or any other law, all criminal proceedings in any court shall take place in the presence of the accused.
- (2)(a) A court may, subject to section 153, on its own initiative or on application by the public prosecutor, order that a witness or an accused, if the witness or accused consents thereto, may give evidence by means of closed circuit television or similar electronic media. (b) A court may make a similar order on the application of an accused or a witness.
- (3) A court may make an order contemplated in subsection (2) only if facilities therefor are readily available or obtainable and if it appears to the court that to do so would- (a) prevent unreasonable delay; (b) save costs; (c) be convenient; (d) be in the interest of the security of the State or of public safety or in the interests of justice or the public; or (e) prevent

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<sup>1</sup> Criminal Procedure Act 51 of 1977. For a discussion of evidence by means of electronic media in civil matters, see *Uramin Incorporated v Perie* (28154/2011) 2013 (GPJHC) 314 (2013-12-11).

the likelihood that prejudice or harm might result to any person if he or she testifies or is present at such proceedings.

- (4) The court may, in order to ensure a fair and just trial, make the giving of evidence in terms of subsection (2) subject to such conditions as it may deem necessary: Provided that the prosecutor and the accused have the right, by means of that procedure, to question a witness and to observe the reaction of that witness.

Section 158 was introduced into the Criminal Procedure Act in 1996 by the Criminal Procedure Amendment Act.<sup>2</sup> The Criminal Procedure Amendment Act was assented to by the South African President on 6 November 1996 and commenced on 26 November 1996 – the day on which it was published in the government gazette.<sup>3</sup> One of the purposes of the Criminal Procedure Amendment Act, as stated in the long title, is “to provide that evidence may be given by means of closed circuit television or similar electronic media”. This means that the accused or the witness does not have to be physically present in court if section 158 is invoked. Before section 158 was inserted into the Act, a witness had to be present physically or give evidence on commission<sup>4</sup> or by affidavit.<sup>5</sup> If a witness is physically present in court, the accused has a right to cross-examine him,<sup>6</sup> unless such a witness is subpoenaed by the court in which case the court’s consent is needed before the accused or the prosecutor may cross-examine such a witness.<sup>7</sup> If a witness gives evidence on commission, he may still be examined by the accused or the state.<sup>8</sup> Section 158 introduces a mechanism through which a witness or accused may give evidence by means of close circuit television or similar electronic media. It is important to note that underlying section 158(2) is the assumption that the witness or the accused is “present” in court, but through a monitor. This is supported by the fact that it is the presiding officer who administers the oath to the witness or the affirmation or to admonish the witness to speak the truth.<sup>9</sup> If a witness misconducts himself while giving evidence through closed circuit television or similar electronic media, he could be prosecuted for contempt of court. However, South African courts, including the Supreme Court of Appeal, have held that a witness who is based abroad may give evidence through

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2 Criminal Procedure Amendment Act No 86 of 1996.

3 *Government Gazette* No 1884 1996-11-20. However, section 158 came into operation on 1997-09-01. See Schwikkard & Van der Merwe *Principles of Evidence* (2008) 390.

4 See s 171 of the Criminal Procedure Act.

5 *Idem* s 212.

6 S 35(3)(i) of the Constitution provides that the accused has the right to adduce and challenge evidence. Courts have held that s 35(3)(i) embodies the accused’s right to cross-examine state witnesses. See *S v Msimango and another* 2010 (1) SACR 544 (GSJ) par 27; and *S v Ngudu* 2008 (1) SACR 71(N) par 24.

7 S 186 of the Criminal Procedure Act.

8 *Idem* s 172.

9 See for example, *S v Ncedani* 2008 JOL 22342 (Ck) where a child witness gave evidence through an intermediary and through closed circuit television.

closed circuit television or similar electronic media under section 158. In *Mclaggan v S*,<sup>10</sup> the Supreme Court of Appeal held that the High Court had correctly relied on section 158(2) to receive the evidence of witnesses who were based abroad.<sup>11</sup> The purpose of this article is to argue that section 158(2)-(4) was not designed to be invoked as a tool, through which a witness based abroad may give evidence before a South African court. It is argued that evidence obtained through section 158(2) from a witness based abroad, is improperly obtained and impacts on the fairness of the trial. Before I embark on the task of illustrating that section 158(2) – (4) should not be invoked to obtain evidence from a witness based abroad, it is imperative to highlight some of the issues that courts have dealt with in their application of section 158(2).

## 2 Section 158(2) in Practice

Section 158(2) has been applied to adult and child witnesses. Where it has been applied to child witnesses, intermediaries have also been appointed by the court. Section 170A of the Criminal Procedure Act empowers a court to appoint an intermediary in certain circumstances.<sup>12</sup> In *S v Motaung*, a child witness was sworn in and she “gave evidence in terms of sections 158(2)(a) and 170A(3)(c) of the Criminal Procedure Act in a room outside the court through the medium of closed circuit television”.<sup>13</sup> In *S v Sindane*,<sup>14</sup> the applicant was convicted of raping a 13-year old girl and sentenced to 18 years’ imprisonment. The complainant gave evidence by means of closed circuit television and the applicant applied for leave to appeal, against his conviction and sentence, on the ground that the requirements under section 158(2)-(4) were not complied with during the trial. He argued that the magistrate had ordered the complainant to give evidence through closed circuit television:

- [i] without enquiring from her whether she is prepared to consent thereto as required in section 158(2) of the Act and satisfying himself that the requirements of section 158(3) of the Act had been met by the prosecution;
- [ii] failing to appreciate that the requirements set out in section 158 (3)(a) of the Act ...

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10 *McLaggan v S* 2013 JOL 30559 (SCA); *S v Mclaggan* 2013 JDR 1359 (SCA).

11 *Idem* par 38.

12 S 170A(1) provides that: “Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the biological or mental age of eighteen years to undue mental stress or suffering if he or she testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary”.

13 *S v Motaung* (ECJ 079/2005) 2005 (EHC) 33 (2005-10-19) par 9.

14 *S v Sindane* (CC 166/04) 2008 (NWHC) 34 (2008-09-12).

- [iii] failing to appreciate that the words “if it appears to the court” in section 158 (3) of the Act connote a degree of proof not lower than that of proof on a balance of probabilities;
- [iv] failing to appreciate that the mere statement of the representative of the State ... could not be persuasive enough to enable him to make a finding on a balance of probabilities that the requirements of the Act had been met and more particular [sic] that the complainant would be exposed to harm or prejudice were she to testify in the normal course as contemplated in section 158(3)(e) of the Act;
- [v] not satisfying himself that the application was not being made on trivial grounds;
- [vi] not exercising the discretion giving to him in section 158 in a proper and judicial manner; and
- [vii] failing to ensure a fair and just trial by not imposing conditions as envisaged in section 158(4) of the Act.<sup>15</sup>

In dismissing the application, the High Court held that “[s]ection 158(3) gives the court a discretion and the court may make an order in terms of sub-section (2) ‘on its own initiative or on application by the public prosecutor ... in the interest of justice’”.<sup>16</sup> The Court added that the prosecutor’s application to the magistrate to invoke section 158(2)-(4) was clear that “the court environment [was] not a familiar place” for the witness and that she would be “free and comfortable to testify, to give evidence in a separate room from the court.”<sup>17</sup>

Another issue that emerged in applying section 158(2)-(4), is whether the requirements in section 158(3) should be read disjunctively. Cases dealing with this issue are discussed below. Central to this article is the question of whether or not section 158(2)-(4) may be invoked to enable a witness, who is based abroad, to give evidence in a South African court. South African courts have taken two opposed approaches on whether or not section 158(2)-(4) may be invoked for a witness based abroad to give evidence before a South African court. The author is aware of four court decisions on this issue. Three different court decisions, including a Supreme Court of Appeal decision, have held that section 158(2)-(4) may be invoked by a witness based abroad to give evidence before a South African court. One High Court decision is to the effect that section 158(2)-(4) may not be invoked for that purpose. In the light of the fact that the principle of precedent, or *stare decisis*, obliges the High Court to follow the decisions of the Supreme Court of Appeal,<sup>18</sup> the legal position in

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15 *Idem* par 3.

16 *Idem* par 4.

17 *Idem* par 5. In *S v Kimeze and Others* (SS33/2009) 2013 (WCHC) 48 (2013-02-25), the High Court dismissed the prosecution’s application for some of the state witnesses to give evidence by electronic media because “the state failed to indicate what form the electronic media would take and how long the trial would be delayed for that media to be set up” (par 8).

18 For a detailed discussion of this principle see du Bois (ed) *Wille’s Principles of South African Law* (2007) 76 – 99. See also *Media 24 Ltd and Others v SA Taxi Securitisation (Pty) Ltd* 2011 (5) SA 329 (SCA) parr 33-34.

South Africa is that section 158 (2)-(4) may be invoked to obtain evidence from a witness based abroad. The discussion below highlights the different court decisions mentioned above in the order in which they were handed down.

As far as I could ascertain, *S v F*<sup>19</sup> was the first case in which the question of whether section 158(2)-(4) is applicable to a witness who was based abroad was dealt with, albeit *obiter*. The state made an application for a seventeen year old complainant in a rape, assault and abduction trial, who was in the court's jurisdiction, to give evidence by means of closed circuit television. The central issue before the court was whether the grounds in section 153(3) had to be considered conjunctively. The Court observed that:

A good example of a situation that could very well find application under subsection 3(a), (b) and (c) would be of a witness who is bedridden in a London hospital. One could easily imagine that to await the recovery, if at all, of this witness might give rise to unreasonable delay in bringing the matter to a speedy conclusion. Even if arrangements could be made for her in her bedridden state to be brought to court in South Africa it might prove costly. To afford a witness in this position the facility of giving evidence by means of closed circuit television or similar electronic media, might very well under such circumstances prove to be convenient for all concerned. One would have thought that the presence of these three factors would have been sufficient for the obtaining of an order in terms of section 158. However, the legislature in its wisdom clearly stipulated that any of the further requirements set forth in paragraphs (d) or (e) of subsection (3), of which there is quite a number, must also be complied with. Thus, on the example postulated above, a case for an order in terms of section 158 might very well be made out if it is shown that in allowing the witness to give evidence by means of closed circuit television or similar electronic media, that not only will unreasonable delay be avoided, costs saved, it will be convenient to all concerned (as required in terms of subsection (3)(a), (b) and (c)) but, in addition thereto, it will – for example – be in the interests of justice (as required in terms of paragraph 3(d)).<sup>20</sup>

In *S v Staggie and another*,<sup>21</sup> the High Court disagreed with the reasoning in *S v F* to the effect that the grounds in section 158(3) had to be considered conjunctively. The Court held that the various paragraphs “must be read disjunctively”.<sup>22</sup> However, the Court did not dispute the observation in *S v F* that section 158(3) could be invoked in the case of a witness who is bedridden in a London hospital. In *S v Domingo*<sup>23</sup> the full bench agreed with the reasoning in *S v Staggie and another* that the grounds in section 158(3) must be read disjunctively. However, the Court went further and overruled the decision *S v F* “insofar as it relates to the meaning and interpretation of section 158” because it was “clearly wrong” and that “the provisions of [section 158(3)] must be read

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19 *S v F* 1999 (1) SACR 571(C).

20 *Idem* par 578.

21 *S v Staggie and another* 2003(1) SACR 232(C).

22 *Idem* par 248.

23 *S v Domingo* 2005 (1) SACR 193 (C).

disjunctively”.<sup>24</sup> Like in *S v Staggie and another*, the Court in *S v Domingo* did not take issue with the observation in *S v F* that section 158 may be invoked to obtain evidence from a witness who is bedridden in a London hospital. As stated above, this could be because of the fact that the witness in question was based in South Africa, and the issue of whether or not evidence could be obtained from a witness who is based abroad did not directly arise in the case. However, the courts’ silence on that issue cannot go unnoticed.

In the case of *Lawrence Goldberg and another v Magistrate R Boshoff NO and another*,<sup>25</sup> the issue of whether section 158 could be invoked to enable a witness based abroad to testify in criminal proceedings in a South African court arose. The applicants were on trial in a magistrate’s court for various offences, including fraud. The state made an application in terms of section 2(1) of the International Co-operation in Criminal Matters Act (ICCMA; this section will be discussed later in this article) for the witnesses based in the United Kingdom to give evidence on the basis of section 158(2)-(4) of the Criminal Procedure Act. The magistrate allowed the state’s application and ruled that the relevant authorities in the United Kingdom should be requested to:

[Secure] the attendance of the ... witnesses at a venue in the United Kingdom from where the court ... sitting in [South Africa], would receive their evidence by means of electronic media equipment. The witnesses [were] to be examined, cross-examined, and re-examined by electronic means from the court room in [South Africa].<sup>26</sup>

The applicant approached the High Court and argued that the magistrate had erred in making that order. The High Court unanimously agreed with the applicants and held that:

The learned regional magistrate has no authority, either in terms of the provisions of s[ection] 2(1) of the ICCMA or in terms of the provisions of s[ection] 158 of the CPA, to issue a letter of request in which the relevant authorities in the United Kingdom are requested to arrange and facilitate the attendance of witnesses at a venue in the United Kingdom from where they, by electronic means, would give their evidence at the proceedings in the court *a quo*. Such power and procedure cannot be read into the clear wording of these statutory provisions.<sup>27</sup>

The Court added that:

The relevant provisions of the ICCMA permit the examination at proceedings in the foreign state of a person who is in the foreign state, if the evidence of such person is ‘necessary in the interests of justice’ in the proceedings before a court of this country and ‘the attendance of such person cannot be obtained without undue delay, expense, or inconvenience’. Judicial authorisation to

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24 *Idem* par 199.

25 *Lawrence Goldberg and another v Magistrate R Boshoff NO and another* Case No 09/53076 (2010-07-30).

26 *Idem* par 2.

27 *Idem* par 13.

request this form of assistance from a foreign state is required and is given when a court issues a letter of request. The law and procedure of the foreign state apply to the proceedings at the examination of the witness abroad. Such proceedings at which the witness is examined are not proceedings of the court which issued the letter of request. The evidence obtained at such proceedings is admitted as evidence by the court which issued the letter of request '... in so far as it is not inadmissible at such proceedings'.

The provisions of [sections] 158(2) – (5) of the CPA concern the giving of evidence by an accused or by a witness through closed circuit television or similar electronic media at local proceedings in a criminal court and the circumstances under which the court may order that the evidence be given through such media. These provisions do not permit a procedure for the taking of evidence across borders by electronic means at a local criminal trial. Nothing in these subsections suggest an '... arrangement or practice for the provision or obtaining of international co-operation in criminal matters' as was submitted to us by the second respondent's counsel.<sup>28</sup>

In *Lawrence Goldberg and another v Magistrate R Boshoff NO and another*, the High Court makes it very clear that section 158 of the Criminal Procedure Act cannot be invoked in relation to a witness who is based abroad. This is the case even if the authorities in a foreign country are willing to ensure that those witnesses give that evidence on the basis of a letter of request issued by a South African court. In the cases discussed so far, witnesses based abroad did not testify on the basis of section 158 of the Criminal Procedure Act. In other words, section 158 was not put in practice.

However, the situation was to change in 2012. In *S v McLaggan*<sup>29</sup> the accused was convicted of raping an eighteen year old British woman who was visiting South Africa to participate in a youth programme in which the accused was also involved. The High Court allowed the state's applications for the evidence of experts, based in the United Kingdom, to be led through a video-link on the basis of section 158 of the Criminal Procedure Act. This is because the witnesses were too busy to travel to South Africa. The first witness was a medical specialist paediatrician and endocrinologist (Dr Spoudeas) who gave evidence at the trial. The second witness was a neuro-psychologist (Ms Smit) who gave evidence at sentencing. Both experts were familiar with the mental state of the complainant before and after the rape. On the issue of Dr Spoudeas' evidence, the prosecution submitted that:

[I]n the event that the application [to give evidence on the basis of section 158] was not granted it would inevitably result in a delay in the finalisation of the trial. The presentation of the evidence by way of a video conference link where there was a readily available facility to enable such link, would be both convenient and in the circumstances of the matter would result in a saving of costs. On this basis it was contended that it was in the interests of justice that the evidence be presented by way of a video conference link.<sup>30</sup>

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28 *Idem* par 15-16. Footnotes omitted.

29 *S v McLaggan* (CC70/2011) 2012 (ECGHC) 63 (2012-08-20).

30 *Idem* par 70.

The accused's lawyer opposed the application on the basis that:

[T]he fundamental requirement of fairness required that the accused be entitled to confront any witness who would testify and that the inroad into this right should be permitted only in exceptional circumstances. This required that the court should consider the nature of the evidence to be given. Where such evidence was irrelevant or where its probative value in relation to essential matters in dispute is limited, the deviation from the requirement that the proceedings be in the presence of the accused should not be permitted.<sup>31</sup>

The Court observed that:

The presentation of the evidence by way of a video link should not lightly be permitted. A court called upon to consider such an application must consider carefully the basis upon which the application is made and the requirements as set out in section 158 (3) and, in my view, must also give consideration to the nature of the evidence sought to be tendered.<sup>32</sup>

The Court agreed with the reasoning in *S v Domingo* that the requirements in section 158 of the Criminal Procedure Act should be considered disjunctively.<sup>33</sup> It observed that “[a] paramount consideration in determining an application made in terms of section 158(2) are the interests of justice”.<sup>34</sup> The Court added that it allowed Dr Spoudeas to present her evidence “by way of a video conference link” because she had “treated the complainant over a number of years and is highly familiar with both the nature of the complainant’s condition and the effect that such condition may have upon the complainant.”<sup>35</sup> The Court added that:

I was satisfied that in the event that the application was not granted that there will be an unnecessary and undue delay in the finalisation of the matter and that this could reasonably and properly be avoided by the presentation of the evidence via a video link. I was informed from the Bar that the nature of the electronic video link would be such that the accused and counsel and the court would be able to observe the witness and that there would be an immediate video and audio link allowing for questions to be addressed to the witness and the witness’ responses to be noted and observed. The witness too would be in a position to see via video link the court and all of the protagonists. The immediacy of the exchange would therefore allow for an appropriate level of interaction in order to ensure that the accused and his counsel are afforded an opportunity to confront the witness in cross-examination. In the light of this I was satisfied that the presentation of the evidence via video link would not unduly prejudice the accused in his defence. I was satisfied too that the nature of the evidence is such, given its expert nature, which is foreshadowed in written reports made available to the accused, that being presented via video conference link would not result in a breach of the accused’s right to a fair trial in his presence. I was accordingly

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31 *Idem* par 71.

32 *Idem* par 72.

33 *Idem* par 73.

34 *Idem* par 74.

35 *Idem* par 76.

satisfied that it would be in the interests of justice to have the evidence presented by way of a video conference link and I ruled accordingly ...<sup>36</sup>

Dr Spoudeas gave her evidence through a video link and she was cross-examined by the defence and the court admitted her evidence and explained in detail why it was relevant to the trial.<sup>37</sup> During sentencing, the Court also admitted the evidence of an expert, who was based in the United Kingdom, on the basis of section 158 of the Criminal Procedure Act. The prosecution's application "was motivated on the basis that Smit could give relevant evidence as to the psychological impact of the rape upon the complainant having assessed her and treated her as part of the team involved in her treatment as a young survivor of a brain tumour".<sup>38</sup> The defence's objection to the prosecution's application was based on "grounds similar to those raised in relation to an earlier similar application during the trial".<sup>39</sup> The Court held that:

In my view the nature of the evidence was clearly relevant and ought to be received. A sentencing court is concerned with formulating an appropriate and just sentence and is required to give consideration to a wide range of interests and factors. Evidence relating to the impact of the offence upon the victim is necessary. This matter involves a foreign national who is outside of the court's jurisdiction and it is therefore not easy to ensure the attendance of witnesses. Failure to receive the evidence by way of video link would not only result in an unnecessary and potentially lengthy delay to the prejudice of the accused but may also have had the effect that such evidence is ultimately not available to the court. In the light of these circumstances I considered that the use of the video link technology would not prejudice the accused having regard to the nature of the evidence.<sup>40</sup>

After that, the Court dealt with the evidence that Ms Smit adduced. It is important to note that the defence did not argue that section 158 was not applicable in this case. The reason for this is unclear. It should also be noted that in *S v Domingo*, to which the court in this case referred with approval, the court did not deal with the issue of invoking section 158 with regards to a witness who is based abroad. In the application for leave to appeal to the Supreme Court of Appeal, the defence did not argue that the High Court had erred in invoking section 158 to receive evidence from abroad. The only instance in the application for leave to appeal in which the defence referred to section 158, was when it submitted that the High Court did not consider the fact that the accused was "running on a very limited budget" when it called specialist witnesses hence, by implication, denying the accused the opportunity to call experts to challenge their evidence.<sup>41</sup> The High Court allowed the accused's application for leave to appeal to the Supreme Court of Appeal

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36 *Idem* par 77.

37 *Idem* parr 78-84.

38 *S v McLaggan* (CC70/2011) 2012 (ECGHC) 75 (2012-09-28) par 1.

39 *Idem* par 2.

40 *Idem* par 3.

41 *S v McLaggan* (CC70/2011) 2012 (ECGHC 78); 2013 (1) SACR 267 (ECG) (2012-10-04) par 9.

against conviction, and the state's application to appeal against the sentence was also allowed.<sup>42</sup> In *S v Mclaggan*<sup>43</sup> the Supreme Court of Appeal held, *inter alia*, that the appellant "wisely did not raise the objection [that the trial court should not have invoked section 158 for the witnesses to testify from the UK through video link] on appeal".<sup>44</sup> The Court added that the trial court "was correct in accepting the evidence of Dr Spoudeas"<sup>45</sup> and that of Ms Smit.<sup>46</sup> The above jurisprudence shows that some High Court judges and the Supreme Court of Appeal judges, are of the view that section 158 of the Criminal Procedure Act may be invoked to enable a witness who is in a foreign country to give evidence by means of closed circuit television in a South African trial. I take issue with that approach and argue that section 158 is only applicable to witnesses who are based in South Africa. Below are the reasons in support of this argument.

### 3 Reasons why Section 158 does not have Extra-Territorial Application

The first reason why section 158 does not apply to witnesses based abroad, is that its drafting history is clear that it was meant to be limited to witnesses based in South Africa. It has been mentioned above that section 158 was introduced in the Criminal Procedure Act in 1996 by the Criminal Procedure Amendment Act.<sup>47</sup> The Criminal Procedure Amendment Bill was one of the six Bills that the National Assembly debated (second reading) and passed on 31 October 1996.<sup>48</sup> The Hansard show that all political parties unanimously supported all the Bills that were tabled before the National Assembly on that day. Many members made submissions of the various Bills before the National Assembly. It should be recalled that the Criminal Procedure Amendment Bill contained thirteen clauses<sup>49</sup> and clause 7 was the one that amended

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42 *Idem* par 17.

43 *S v Mclaggan supra* n 10.

44 *Idem* par 35.

45 *Idem* par 36.

46 *Idem* par 38. See also parr 41-42 & 50.

47 Criminal Procedure Amendment Act *supra* n 2.

48 The other Bills were the International Co-operation in Criminal Matters Bill; the Proceeds of Crime Bill; Extradition Amendment Bill; Criminal Procedure Second Amendment Bill; and the Divorce Amendment Bill. See Debates of the National Assembly (Hansard), Third Session First Parliament, 15 January to 7 November 1996 4967.

49 The clauses dealt with the following issues: Clause one (admission of guilt and payment of fine after appearing in court); clause two (the rights of an accused); clause three (magistrate court referring the accused to a regional court for a summary trial); clause four (circumstances in which the prosecution may not be resumed or instituted); clause five (the court entering a plea of not guilty on behalf of the accused); clause six (empowering the regional court to ask the magistrates' court for a record of conviction if the former is of the opinion that the proceedings were not in accordance with justice); clause eight (courts regulating unreasonably

the Criminal Procedure Act by inserting section 158 into the Act. Different members made submissions on different clauses of the Criminal Procedure Amendment Bill, but only three members made submissions on clause 7. The first member to make submissions on clause 7 was Ms LB Ngwane who stated that:

Clause 7 of the Bill provides that criminal proceedings are to take place in the presence of the accused, but it also provides that a court may now order that evidence be given by means of closed-circuit television or similar electronic media if that will prevent delay, will save costs, is convenient, is in the public interest or the interests of the State or will prevent prejudice or harm to any person.<sup>50</sup>

She went on to explain why “most trials take long to finalise”.<sup>51</sup> The second member to make submissions on clause 7 was Dr CP Mulder. He stated that:

Clause 7 of the Bill maintains the correct principle that all criminal proceedings should take place in the presence of the accused. The clause, however, now provides for an exception without affecting the basic principle. Modern technological development makes it possible in certain cases to allow witnesses to give evidence or to prosecute an accused by way of closed-circuit television or other similar electronic devices, while they are not present, provided they agreed.<sup>52</sup>

The third and final member to make submissions on clause 7 was Dr FJ van Heerden. He stated that:

A new aspect which is to be welcomed is embodied in clause 7, which seeks to amend section 158 of the principle Act in such a way that it creates an effective balance between the right of the accused to a fair trial and the possible humiliation or traumatic experience of a witness in rape or child molestation cases, for example, by making use of, inter alia, closed circuit television and other electronic media.<sup>53</sup>

Neither the Criminal Procedure Amendment Bill nor any member of the National Assembly expressly or impliedly stated that clause 7 could be invoked to obtain evidence from a witness based abroad. It should be noted that another important Bill that was read the second time and debated and passed on the same day as the Criminal Procedure Amendment Bill, was the International Co-operation in Criminal Matters Bill which would later become the International Co-operation in Criminal Matters Act. This Bill contained clause 2, which empowered a judge to issue a letter of request to obtain evidence from abroad. All the submissions that were made on the issue of obtaining evidence from

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protracted cross-examination); clause nine (certificate or affidavit of an expert *prima facie* proof of the facts); clause ten (proof of undisputed facts); clause eleven (confessions); clause twelve (admissions); and clause thirteen (unreasonable delay in trials).

<sup>50</sup> Debates of the National Assembly *supra* n 48 at 4992.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Idem* 4995.

<sup>53</sup> *Idem* 5029.

witnesses based abroad related to the International Co-operation in Criminal Matters Bill.<sup>54</sup> For example, Mr WA Hofmeyer submitted that:

The first Bill [the International Co-operation in Criminal Matters Bill] is the one that deals with improving the co-operation between South Africa and other countries in obtaining evidence on criminal offences. The most important innovation in the law is to try to get around the rather cumbersome process of taking evidence on commission. The law now provides for judicial officers to issue a letter of request for evidence and for a speedy procedure to obtain that evidence from overseas.<sup>55</sup>

Another member, Mr MA Mzizi, submitted that:

The International Co-operation in Criminal Matters Bill is an attempt to enhance the effectiveness and co-operation between other prosecuting authorities and the South African prosecuting authority. We therefore welcome the introduction of a letter of request, a procedure whereby the Bill provides for obtaining evidence from foreign states. The current commission procedure in terms of the Criminal Procedure Act is cumbersome and not conducive to speedily and effectively obtaining overseas evidence.<sup>56</sup>

The above drafting history of section 158 makes it very clear that it was not meant to apply to witnesses based abroad. If a court wants to get evidence from a witness who is based abroad and the witness in question refuses, for whatever reason, to travel to South Africa and give evidence, that court has to invoke section 2 of the International Co-operation in Criminal Matters Act which provides that:

(1) If it appears to a court or to the officer presiding at proceedings that the examination at such proceedings of a person who is in a foreign State, is necessary in the interests of justice and that the attendance of such person cannot be obtained without undue delay, expense or inconvenience, the court or such presiding officer may issue a letter of request in which assistance from that foreign State is sought to obtain such evidence as is stated in the letter of request for use at such proceedings.

(2) A judge in chambers or a magistrate may on application made to him or her issue a letter of request in which assistance from a foreign State is sought to obtain such information as is stated in the letter of request for use in an investigation related to an alleged offence if he or she is satisfied— (a) that there are reasonable grounds for believing that an offence has been committed in the Republic or that it is necessary to determine whether an offence has been committed; (b) that an investigation in respect thereof is being conducted; and (c) that for purposes of the investigation it is necessary in the interests of justice that information be obtained from a person or authority in a foreign State.

(3) Subject to subsection (4), a letter of request shall be sent to the Director-General for transmission – (a) to the court or tribunal specified in the letter of request; or (b) to the appropriate government body in the requested State.

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54 See for example, submissions by the Minister of Justice, Mr Dullar Omar; Debates of the National Assembly *supra* n 48 at 4975.

55 *Idem* 4997-4998.

56 *Idem* 5021.

(4)(a) In a case of urgency a letter of request may be sent directly to the court or tribunal referred to in subsection (3)(a), exercising jurisdiction in the place where the evidence is to be obtained, or to the appropriate government body referred to in subsection (3)(b).

(b) The Director-General shall as soon as practicable be notified that a letter of request was sent in the manner referred to in paragraph (a) and he or she shall be furnished with a copy of such a letter of request.

The Constitutional Court explained the difference between the procedure in section 2(1) and that in section 2(2). In *Thint Holdings (Southern Africa) (Pty) Ltd and another v National Director of Public Prosecutions, Zuma v National Director of Public Prosecutions*<sup>57</sup> the Constitutional Court held that:

Under section 2(1), the letter of request is issued once it appears to the presiding officer during criminal proceedings that it is necessary in the interests of justice because a person who can give evidence cannot do so without undue expense, delay or inconvenience. The meaning of the section is clear: the letter of request is issued in court and not by a judge in chambers or a magistrate. The application is therefore made to the court by the investigator during, and not outside of, the criminal proceedings.

Section 2(2), however, requires a letter of request to be issued on application by an investigator outside of court proceedings. An application is made before a judge in chambers or a magistrate, thereby permitting a request to be made even before commencement of criminal proceedings and during investigations.<sup>58</sup>

The Court added that:

For a letter of request to be granted, it is required that the judge or magistrate be satisfied that each of the jurisdictional requirements under section 2(2) has been met. Save for the question as to whether or not the information sought is necessary in the interests of justice, which under subsection 2(2)(c) is determined in the discretion of the judicial officer of the court, all the jurisdictional requirements are facts which must be proved.<sup>59</sup>

Therefore, for a witness to give evidence at the trial or at sentencing proceedings, section 2(1) of the International Co-operation in Criminal Matters Act is the applicable law. Of course this evidence could also be obtained through other bilateral or multilateral arrangements or agreements between South Africa and other countries.<sup>60</sup>

Apart from the fact that the drafting history does not support the view that section 158 is applicable to witnesses based abroad, there are also other reasons as to why section 158 is only applicable to witnesses based in South Africa. Section 158 is silent on whether or not it is applicable to witnesses based outside South Africa. Had the legislature wanted section

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57 2008 (2) SACR 557 (CC); 2009 (1) SA 141 (CC); 2009 (3) BCLR 309 (CC).

58 *Idem* par 26-27.

59 *Idem* par 29.

60 See s 31 of the International Co-operation in Criminal Matters Act.

158 to apply to witnesses based abroad, it would have expressly stated so. This is because there are sections in the Criminal Procedure Act in which the legislature has expressly stated that they apply to witnesses based abroad<sup>61</sup> and section 158 is not one of them. Related to the above, is the settled principle of statutory interpretation in South African law that generally, “statutes are presumed not to operate extra-territorially”.<sup>62</sup> Where the legislature has intended that the legislation should operate extra-territorially, it has enacted specific provisions to that effect.<sup>63</sup>

The general rule, under section 158(1) of the Criminal Procedure Act read with section 35(3)(e) of the Constitution, is that the trial of the accused has to take place in his presence.<sup>64</sup> Section 159 of the Criminal Procedure Act embodies express exceptions to that general rule.<sup>65</sup> Jurisprudence emanating from South African courts<sup>66</sup> and the drafting history of the Criminal Procedure Amendment Act<sup>67</sup> suggest that section 158(2)-(4) creates an exception to the general rule under section 158(1) and section 35(3)(e) of the Constitution that the trial of the accused has to take place in his presence. The accused’s or witness’s consent is a prerequisite for section 158(2)-(4) to be applied. If section 158(2)-(4) is

61 See for example, s 212A on affidavits from abroad and s 272 on proving the accused’s foreign previous conviction.

62 *Minister of Law and Order, Kwandebele and others v Mathebe and another* 1990 4 All SA 98 (AD) par 13; and the earlier authorities referred to. See also *Casino Enterprises (Pty) Limited (Swaziland) v Gauteng Gambling Board and others* 2010 (6) SA 38 (GNP); 2011 1 All SA 305 (GNP) (South African gambling law does not regulate a gambling company registered in Swaziland although people based in South Africa could gamble online).

63 See for example, s 61 of the Criminal Law Sexual Offences and Related Matters Amendment Act 32 of 2007.

64 S 35(3)(e) of the Constitution provides that every accused has a right “to be present when being tried”.

65 In *S v Khumalo* 1991 (1) SACR 666 (NMS) the Court held that: “The section envisages three grounds which would entitle the court to order that criminal proceedings may take place in the absence of an accused, contrary to the fundamental rule that criminal proceedings may only take place in the presence of the accused ... The three exceptions to the general rule are: Where the court orders that an accused be removed if he conducts himself in a manner which makes the continuance of the proceedings in his presence impracticable (s 159(1)), or, secondly, where an accused makes application to be excused from the proceedings, and where such application is granted (s 159(2)(a)), read with s 159(2)(aa), and, thirdly, where the accused is absent from the proceedings without leave of the court (s 159(2)(b))”. See p 667.

66 In *S v Shinga (Society of Advocates Pietermaritzburg Bar as Amicus Curiae)* (AR969/2004) 2006 (KZHC) 12 (2006-08-03) par 11, where the court stated that “[t]he right to audience before a court, though sharing features in common with the right to a public trial, such as transparency of the proceedings and engendering confidence in the deliberations of the Court, also embodies some unique rights and privileges. Subject to the exceptional circumstances envisaged in ss 158(2)-(4) & s 159 of the CPA, s 158 provides for the presence of an accused person at his or her trial”.

67 See submission by Dr CP Mulder, Debates of the National Assembly *supra* n 48 at 4995.

applicable to a witness based abroad as it does to one based in South Africa, there is no compelling reason why it should not be applicable to an accused based abroad as it does to one based in South Africa. The effect would be that a person who is accused of an offence in South Africa, could give evidence at his trial by means of closed circuit television or similar electronic media while he is abroad. There would be no need to extradite him to South Africa to stand trial. If the court imposes a suspended sentence, it could even be enforced in his country on the basis of section 297B of the Criminal Procedure Act.<sup>68</sup> It is only when he is sentenced to imprisonment, that he would be required to serve his sentence in South Africa, in the light of the fact that South Africa is yet to sign a prisoner transfer agreement with any country or ratify any multilateral prisoner transfer treaty.<sup>69</sup> There is nothing in the Hansard to suggest that that is what the legislators had in mind when they debated and passed section 158.

It should also be recalled that unless otherwise provided for under legislation or common law, the powers of the National Director of Public Prosecutors and those of the prosecutors generally, “extend only to the borders of the country [South Africa]”.<sup>70</sup> Therefore, a South African prosecutor is generally not empowered to conduct prosecutorial activities outside South Africa. Applying section 158 of the Criminal Procedure Act to witnesses based abroad, would also be self-defeating as South African law does not govern witnesses in other countries. Another important issue is that before a witness gives evidence, he or she has to take an oath or affirm or be admonished to speak the truth. If he does not speak the truth, he could be prosecuted for the offence of perjury.<sup>71</sup> If such a witness is based abroad, the only way to have him prosecuted in South Africa for perjury is to have him extradited to South Africa in

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68 S 297B of the Criminal Procedure Act provides that “(1) The State President may, on such conditions as he may deem necessary, enter into an international agreement with any state, so as to provide, on a reciprocal basis, for the putting into operation of suspended sentences in respect of persons convicted, within the jurisdiction of the Republic or of such state, of an offence mentioned in the agreement. (2) The State President may, if the parties agree, amend such an agreement to the extent which he deems necessary. (3) If an application is made for a suspended sentence, imposed by a court of a state referred to in subsection (1), to be put into operation, the court at which the application is made shall, subject to the terms of the agreement, proceed with that application as if the suspended sentence was imposed by a court in the Republic. (4)(a) An agreement referred to in subsection (1), or any amendment thereof, shall only be in force after it has been published by the State President by proclamation in the Gazette. (b) The State President may at any time and in like manner withdraw any such agreement”.

69 Mujuzi ‘Towards the Establishment of a Prisoners Transfer Legal Regime in South Africa: Failed Attempts, Available Options and Critical Issues to Consider’ 2012 *AJICL* 281-300.

70 *Minister of Defence v Potsane and another, Legal Soldier (Pty) Ltd and others v Minister of Defence and others* 2002 (1) SA 1 (CC); 2001 (11) BCLR 1137 par 24.

71 For a detailed discussion of the elements of the offence of perjury in South African law, see Snyman *Criminal Law* (2008) 343-347.

terms of the Extradition Act.<sup>72</sup> It is very unlikely that such a person would be extradited to South Africa.<sup>73</sup>

## 4 Conclusion

Section 158(2)-(4) empowers a South African court to order that a witness or an accused give evidence by means of closed circuit television. In many cases it has been invoked for a South Africa based witness to give evidence. Although there are judges who hold the view that section 158 is applicable only to witnesses based in South Africa, there are judges, including those of the Supreme Court of Appeal, who hold the opposite view. Those in the latter category have even gone so far as to invoke section 158(2)-(4) to receive evidence from witnesses based abroad.

Relying on the drafting history of the Criminal Procedure Amendment Act, and on other rules of statutory interpretation, the author has demonstrated that section 158(2)-(4) was not designed to deal with witnesses who are based abroad. It has been argued that a court in a criminal trial, which needs to rely on the evidence of a witness who is based abroad and whose presence in South African cannot be secured, has to invoke section 2(1) of the International Co-operation in Criminal Matters Act. The question that one has to answer is: What is the legal status of evidence obtained from abroad on the basis of section 158(2)-(4)? It is submitted that such evidence is improperly or unlawfully obtained evidence. This is because it was obtained by invoking a wrong legal provision. The court will have to invoke its common law discretion to determine whether or not to admit such evidence. This would require it to determine whether the admission of such evidence would render the trial unfair or otherwise be detrimental to the administration of justice. If the answer to one of the legs in that test is in the affirmative, such evidence must be excluded.<sup>74</sup>

In deciding whether or not to admit evidence obtained from abroad, on the basis of section 158, courts should also consider the contribution of such evidence to the outcome of the trial. If it plays a vital role to the outcome of the trial, it should be excluded. However, there is a need for the courts, prosecutors and defence lawyers, where this has not happened, to appreciate that section 158 is not an avenue through which evidence may be obtained from abroad. Section 158 should not be used as a shortcut to avoid the process that has to be followed in terms of section 2(1) of the International Co-operation in Criminal Matters Act.

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<sup>72</sup> Act 67 of 1962.

<sup>73</sup> For a detailed discussion of the factors that have to be in place before a person is extradited to South Africa, see Dugard *International Law: A South African Perspective* (2005) 210-237.

<sup>74</sup> See Schwikkard & Van Der Merwe *supra* n 3 at 206-208; see also Zeffertt & Paizes *The South African Law of Evidence* (2009) 716-718.

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# Die aanvaardingsvereiste in lewensversekeringskontrakte

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## SUMMARY

### Acceptance Requirement in Life Insurance Contracts

In the South African *stipulatio alteri* it is a requirement that the beneficiary must accept the benefit in order for his right to vest. This is against the “privity of contract” doctrine where one may not put the beneficiary of a life insurance contract under any obligations. It seems, however, that the obligation of acceptance by the beneficiary has become set in the South African law through our old writers and legislation that failed to interpret the principle clearly and resulted in a unique application of the agreement on behalf of a third party in South Africa. A distinction must also be drawn between revocable and irrevocable life insurance contracts and the impact thereof on the acceptance by the beneficiary. The moment of acceptance by the beneficiary has important implications for the application of the rights for the beneficiary. Acceptance by the beneficiary before the death of the life insured, seems to have no effect, and no rights vest for the beneficiary. It is only after the death of the life insured that the nominated beneficiary can accept, and with this a right immediately vests in the beneficiary. The question of what the beneficiary must accept, may be seen as nugatory as this is confirmation that acceptance by the beneficiary should not be an obligation or a requirement before the right vests. Otherwise, the third party creates a right for himself by his actions, which is not the intention of a contract in favour of a third party. A look at English law might shed some light on the South African position because of the fact that they implemented a set of formal rules regarding a contract in favour of a third party. It is suggested that South Africa should also include a set of formal rules in legislation to govern the unique South African application of the *stipulatio alteri*.

## 1 Inleiding

Lewensversekering word algemeen in die praktyk gebruik. Daar is egter praktiese probleme waar 'n begunstigde in die polis benoem word om die opbrengs van die polis te ontvang in plaas daarvan dat die polishouer dit ontvang.<sup>1</sup> Die grootste kwessie vir bespreking is die Romeins-Hollandse beginsel wat met hierdie tipe polis verband hou. Waar 'n begunstigde in 'n lewensversekeringskontrak benoem word, word die kontrak in die Suid-Afrikaanse reg gesien as 'n ooreenkoms ten behoeve

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1 In die artikel word aanvaar dat die polishouer ook die lewensversekerde en premiebetaler is.

van 'n derde party, oftewel 'n *stipulatio alteri*. Hierdie beginsel, wat van die Romeins-Hollandse gemenerereg afkomstig is behels dat die *promittens* en die *stipulans* 'n ooreenkoms sluit ten einde die voordeel wat uit die kontrak voortspruit, aan 'n derde party, die begunstigde, voortspruit, en nie aan die *stipulans* self nie.<sup>2</sup>

Wat egter in Suid-Afrika as 'n *stipulatio alteri* aanvaar word, blyk te verskil van die oorspronklike toepassing van die *stipulatio alteri*. Volgens die *stipulatio alteri*-beginsel is die derde party nie veronderstel om 'n aktiewe party tot die ooreenkoms te wees nie, en hoef die derde party selfs nie bewus te wees van die benoeming nie.<sup>3</sup>

Die Suid-Afrikaanse toepassing van die beginsel behels egter dat wanneer hierdie voordeel uit die polis betaalbaar word, dit deur die *promittens* aan die derde party aangebied word en die derde party dan die geleentheid het om die voordeel te aanvaar of te verwerp. Die wese van die ooreenkoms ten behoeve van 'n derde party is dat die derde party nie deur sy eie aksie vir hom 'n reg tot die voordeel behoort te skep nie. Die verpligting wat op die begunstigde geplaas word om die voordeel te aanvaar of te verwerp, moet dus ondersoek word om vas te stel of hierdie verpligting geldig is.

Hierdie bydrae kyk gevolglik na beginsels wat sodanige verpligting verbied, en loods ook 'n dieper ondersoek na die betekenis van die *stipulatio alteri* in terme van die aanvaardingsvereiste. Daar word ook oorweeg of die Engelse reg 'n beter oplossing bied vir die probleem van 'n aktiewe derde party in die *stipulatio alteri*.

## 2 Aanvaarding deur die Begunstigde: Geëvalueer deur die “Privity of Contract”-Leerstuk

Die leerstuk van “privity of contract”, wat in die Engelse reg bestaan, behels dat slegs die direkte partye tot die kontrak (versekeraar en versekerde) regte en verpligtinge verkry.<sup>4</sup> Die leerstuk is ook in die Romeinse reg gevolg waar 'n reël ontwikkel is vir 'n totale verbod op ooreenkomste ten behoeve van 'n derde party, *alteri stipulari nemo potest*.<sup>5</sup> Daar heers die standpunt dat die leerstuk van “privity of contract” geskep is juis om die derde partye te beskerm teen die gevolge

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2 De Wet & Van Wyk *Suid-Afrikaanse Kontraktereg en Handelsreg* (1992) 105; Henckert 'Die begunstigdeklausule in die versekeringsreg: regsoorwegings en-gevolge' 1995 *THRHR* 178; Getz 'Contracts for the benefit of third parties' 1962 *Acta Juridica* 47.

3 Sutherland *Third-party Contract* (2006) 221.

4 Sutherland & Johnston *Contracts for the Benefit of Third Parties in Mixed Legal Systems in Comparative Perspectives: Property and Obligations in Scotland and South Africa* (2004) 209; Sutherland *supra* n 3 op 204; Scott 'Cession of whole life insurance rights' 2003 *Stellenbosch Law Review* 96.

5 Sutherland & Johnston 210; Hallebeek & Dondorp *Contracts for a Third-Party Beneficiary: A Historical and Comparative Account* (2008) 8.

van 'n kontrak wat deur ander partye geskep is.<sup>6</sup> Die derde party kan dus nie verpligtinge opgelê word uit hoofde van 'n kontrak waarby hy geen seggenskap het nie. Hierdie beginsel word egter verslap wanneer daar vir 'n derde party regte geskep word, aangesien daar niks afkeurenswaardig is om 'n voordeel aan 'n derde party te verleen nie.<sup>7</sup> Malan is verder van mening dat: “Geen beswaar kan egter gemaak word indien die verkryging van regte afhanklik gemaak word van die aanvaarding deur die derde nie”.<sup>8</sup>

Malan is derhalwe van mening dat 'n derde party regte mag verkry in teenstelling met die “privity of contract”-beginsel, maar trek dan onwetend 'n verpligting daarby in, naamlik aanvaarding. Die vraag wat gevolglik ontstaan is hoe aanvaarding anders is as 'n vereiste, en wat is die vereiste of voorwaarde<sup>9</sup> in die geval anders as 'n verpligting wat vir die derde party opgelê word? Die derde party word moontlik nie verplig om die voordeel te aanvaar nie, maar hy word verplig om kennis te gee van sy aanvaarding of verwerping van die voordeel. Sonder hierdie aksie is dit onmoontlik vir die derde party om 'n reg tot sy voordeel te kry. Malan huldig voorts as volg: “In die Suid-Afrikaanse reg word nie meer daarvoor getwis dat die derde eers met aanvaarding en mededeling daarvan 'n vorderingsreg teen die *promissor* uit die beding ten behoeve van 'n derde verkry nie”.<sup>10</sup>

Die derde party sal waarskynlik nie stry teen regte wat vir hom in 'n kontrak geskep word nie, maar regte kan ook negatiewe belastinggevolge skep wat die derde party nooit voorsien het nie.<sup>11</sup> Daarom behels die vereiste bloot kennis van sy aanvaarding. Indien hy nie die kennis openbaar wanneer die voordeel aan hom gebied word nie, kan dit stilswyend beteken dat hy die aanbod verwerp.

Dit is dan ook die geval vir 'n lewensversekeringskontrak waar 'n begunstigde as derde party benoem word. So 'n geval word gesien as 'n ooreenkoms ten behoeve van 'n derde party wat dan beskou word as 'n moontlike uitsondering op die “privity of contract”-leerstuk waar die begunstigde regte uit die kontrak verkry, maar wel 'n verpligting het om sy aanvaarding te kenne te gee. Hierdie aanvaarding is niks anders as 'n verpligting nie. Skrywers is geneig om die selfde mening to huldig en gevolglik word die interpretasie onomwonde erken as aanvaarbaar sonder dat dit getoets word vir geldigheid volgens die “privity of contract”-leerstuk.

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6 Sutherland *supra* n 3 op 205.

7 Hutchinson *Kontraktereg in Suid-Afrika* (2010) 231.

8 Malan 'Gedagtes oor die beding ten behoeve van 'n derde' 1976 *De Jure* 86; sien ook Sutherland & Johnston *supra* n 4 op 209 wat sê dat regte aan die derde party gegee kan word solank die derde party ontslae kan raak van die regte.

9 Sutherland & Johnston *supra* n 4 op 210.

10 Malan 86.

11 *Idem* 206. Of insolvensiegevolge volgens Sutherland & Johnston *supra* n 4 op 210.

Daar kan aangevoer word dat daar niks teen hierdie verpligting is nie, aangesien die verpligting ontstaan uit 'n reaksie tot die regte wat vir die begunstigde beding is. Die verpligting loop dus ten nouste saam met die regte wat die begunstigde verkry. Daar moet dus bepaal word of daar by die letter van die reël gehou moet word en of dit moontlik is dat verpligtinge in sommige gevalle toelaatbaar sal wees. Dit sou 'n ander geval gewees het indien die begunstigde van die polis verplig was om byvoorbeeld die premies te help betaal om sodoende aanspraak te kan maak op die opbrengs van die polis. Hierdie verpligting sou daartoe lei dat die derde party aktief betrokke sou wees by die kern van die kontrak en van die begin af aan die kontrak sou deelneem.

Vir die "privity of contract", moet daar versigtig omgegaan word met die regte en verpligtinge wat die derde party toekom. In die geval van lewensversekering voldoen die kontrak slegs as 'n uitsondering aan die vereistes van die leerstuk. Regte ten opsigte van die voordeel kan die begunstigde bevoordeel, maar hy het die verpligting om die aanvaarding of weiering daarvan te kenne te gee.

### **3 Aanvaarding deur die Begunstigde: Evaluasie aan die Hand van die *Stipulatio Alteri*-beginsel**

#### **3 1 Inleiding**

Uit die bespreking, is dit duidelik dat die enigste "plig" wat moontlik vir die begunstigde kan ontstaan, die aanvaarding van die voordeel is.<sup>12</sup> Hierdie aanvaarding van die stipulasie wat tot sy voordeel gemaak is, beteken dat die derde party die beloofde voordeel aanvaar, en hy bevestig daarmee sy wense om die prestasie te verkry wanneer dit tyd is daarvoor.<sup>13</sup> 'n Essensiële karaktereienskap van aanvaarding is dan die sameloop met die aanbod.<sup>14</sup>

Hierdie aanvaardingsvereiste spruit voort uit die interpretasie van die *stipulatio alteri*-beginsel. Daar sal vervolgens na die ontwikkeling van die aanvaardingsvereiste gekyk word waar ou skrywers en vroeë regspraak in Suid-Afrika hierdie vereiste in Suid-Afrika gevestig het. Ondersoek na die aard van aanvaarding of die oomblik van aanvaarding is veral belangrik vir die lewensversekeringskontrak met 'n benoemde begunstigde.

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12 Joubert *General Principles of the Law of Contract* (1987) 43; Van der Merwe & Reinecke 'Ekstensiebedinge en die Modus' 1997 *TSAR* 796.

13 Reinecke & Nienaber 'A suggested Template for Beneficiary Nominations' 2009 *SA Merc LJ* 22.

14 Joubert *supra* n 12 op 44.

### 3 2 Die ontwikkeling van die aanvaardingsvereiste by 'n *stipulatio alteri*

Sover terug as die dae van die *Corpus Iuris* het daar 'n reël ontstaan dat daar nie vir 'n derde party gestipuleer kan word nie.<sup>15</sup> Die reël is egter al meer verslap om sekere uitsonderings te aanvaar. Die *Corpus Iuris* het in die sewentiende en agtiende eeu die meeste van sy gesag verloor en daar is toegelaat dat 'n kontrak ten behoeve van 'n derde party aangegaan kon word.<sup>16</sup> Juriste het hulle eie leerstukke op grond van die natuurreg begin ontwikkel en die ou skrywers het 'n groot invloed gehad op die ontwikkeling van die *stipulatio alteri*-beginsel in Suid-Afrika.<sup>17</sup>

Daar was egter onsekerheid<sup>18</sup> oor die werking van hierdie stipulasie. De Groot<sup>19</sup> het seker een van die grootste bydraes gelewer tot die interpretasie van 'n belofte wat aan 'n derde party gemaak word. Volgens hom moet die *promisee* die belofte dat iets aan 'n afwesige begunstigde gegee gaan word, aanvaar.<sup>20</sup> Hy het verder verklaar dat die begunstigde hierdie 'reg' (of die *promisor* se aanbod)<sup>21</sup> moet aanvaar sodat die *promisor* nie die belofte kan herroep nie.<sup>22</sup> Hallebeek is van mening dat De Groot nie 'n verpligting wou skep met die aanvaarding nie, maar dat dit net bevestig dat die *promisor* sy woord hou tot voor die begunstigde aanvaar het. Dit is egter belangrik dat dit blyk dat De Groot wel van mening was dat die afwesige begunstigde die belofte kon aanvaar en daardeur vir homself 'n reg vestig.<sup>23</sup>

De Wet<sup>24</sup> argumenteer dat De Groot egter ratifikasie van 'n ongemagtigde handeling bedoel het en dat Voet,<sup>25</sup> aan die ander kant, nie aanvaarding vereis nie.<sup>26</sup> Hy meen dat Voet die man is aan wie ons die *stipulatio alteri* te danke het, en nie De Groot nie. Een van Voet se teorieë was dat die derde party sy reg kan vestig deur 'n ooreenkoms met die stipulans te sluit in teenstelling met De Groot se aanvaardingsvereiste.<sup>27</sup>

15 Hallebeek & Dondorp *supra* n 5 op 7.

16 *Idem* 47.

17 *Idem* 48.

18 Joubert 188.

19 De Groot *De Jure Belli et Pacis* Bk 2 c 11 par 18; De Groot *Inleidinge* 3 3 37 & 38.

20 Hallebeek & Dondorp 55.

21 *Idem* 57.

22 *Idem* 56.

23 *Idem* 62; Keeton 'Alteri Stipulari Nemo Potest in the Law of South Africa' 1929 *Journal of Comparative Legislation and International Law* 82.

24 De Wet *Die ontwikkeling van die ooreenkoms ten behoeve van 'n derde* (LLD-proefskrif 1940 Leiden) 117.

25 Voet *Commentary on the Pandects* (vertaal deur Gane) (1957) arts 36 1 9, 36 1 67 & 39 5 43.

26 Joubert *supra* n 12 op 188.

27 De Wet *supra* n 24 op 146.

De Wet en Van Wyk<sup>28</sup> kritiseer die ou skrywers wat nie 'n behoorlike onderskeid tref tussen 'n ooreenkoms ten behoeve van 'n derde party en verteenwoordiging onderskei nie. Hierdie skrywers meen ook dat Voet se uiteensetting van die sogenaamde *fideicommissum inter vivos* 'n groter invloed gehad het op die ontwikkeling van die ooreenkoms ten behoeve van 'n derde party. Volgens Voet kry die derde party 'n reg direk uit die ooreenkoms, maar voorwaardelik op grond daarvan dat die *stipulans* nie die *promittens* van sy verpligting verlos nie. Die derde party vestig hierdie reg deur die voordeel van die *stipulans* te aanvaar.<sup>29</sup> Kritiek word egter gelewer met betrekking tot die konstruksie waarvolgens die derde party eers 'n reg teen die *promittens* verkry indien hy iets van die *promittens* aanvaar het en noem dit 'n miskenning van die ooreenkoms ten behoeve van 'n derde party. Hierdie skrywers argumenteer dat die derde party 'n reg verkry, nie as gevolg van sy aanvaarding nie, maar bloot uit die konstruksie van die ooreenkoms ten behoeve van 'n derde party. Die aanvaarding deur die derde party vestig bloot die reg.<sup>30</sup>

De Wet en Van Wyk is dan ook van mening dat die regspraak wat in Suid-Afrika ontwikkel het rakende die ooreenkoms ten behoeve van 'n derde party, ook 'n miskenning van 'n ooreenkoms ten behoeve van 'n derde party is.<sup>31</sup> In die tweede saak<sup>32</sup> wat in verband met die ooreenkoms ten behoeve van 'n derde party in die Suid-Afrikaanse reg ontstaan het, was daar moontlik verwarring tussen 'n ooreenkoms ten behoeve van 'n derde party en verteenwoordiging.<sup>33</sup> De Villiers HR het in hierdie aangeleentheid<sup>34</sup> onder andere De Groot en Van der Keessel se beginsels van aanvaarding van verteenwoordiging geneem en dit toegepas op die saak waar daar ongetwyfeld 'n ooreenkoms ten behoeve van 'n derde party was.<sup>35</sup> Daar is ook na aanleiding hiervan die kritiek gelewer dat ratifikasie buitendien nie ter sprake is by die ooreenkoms ten behoeve van 'n derde party nie en dat aanvaarding alleen ter sprake kom in verband met die vraag of die *stipulans* die *promittens* kan ontslaan.<sup>36</sup>

Daar word vermoed dat die regter in *Mutual Life Insurance Co of New York v Hotz*,<sup>37</sup> wat op appèl geneem is het, onder die invloed was van die hoofregter se uitspraak in *Tradesmen's Benefit Society v Du Preez*.<sup>38</sup> Innes R stel dan ook die vereiste van aanvaarding voor die derde party 'n reg kan verkry as volg: "If the third party desires to enforce a stipulation

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28 De Wet & Van Wyk *supra* n 2 op 104-105.

29 *Idem* 104.

30 *Ibid.*

31 *Idem* 105.

32 *Tradesmen's Benefit Society v Du Preez* 1887 5 SC 269.

33 De Wet en Van Wyk *supra* n 2 op 106.

34 *Tradesmen's Benefit Society v Du Preez supra* n 32 op 269.

35 De Wet *supra* n 24 op 146.

36 *Idem* 148.

37 *Mutual Life Insurance Co of New York v Hotz* 1911 (AD) 567.

38 *Tradesmen's Benefit Society v Du Preez* 269.

made in his favour, he must accept this; for until he has notified his decision to the promisor, there is no *vinculum juris* between them".<sup>39</sup>

Hierdie uitspraak in die *Hotz*-saak<sup>40</sup> is dan ook vervleg met aspekte van aanvaarding wat uit die konstruksie van verteenwoordiging voortspruit en neem ook nie die bedoeling van die oorspronklike partye in ag nie.<sup>41</sup>

Dit blyk dat hierdie aanvaarding gevolglik vasgelê is in die Suid-Afrikaanse reg, en slaafs nagevolg is in daaropvolgende regspraak. In *Van der Plank v Otto*<sup>42</sup> wat ná die *Hotz*-saak aangehoor is, is daar soos volg deur De Villiers HR beslis:

Now our law recognises the right of a third party to sue upon a contract made for his benefit, provided only that he has accepted the stipulation made in his favour ... there can be no valid acceptance by the third party until he has notified his decision to the promisor.

Gevolglik, het die bogenoemde aanvaarding wortel geskiet en is daar gemeen dat dit die sleutel tot die hele konsep is, aangesien dit nie net die ooreenkoms vervolmaak sover dit die derde party aangaan nie, maar ook die juristiese aard en die grondslag van die reg bepaal:

It is this act of 'acceptance' which is the key to the entire concept, since not only does it perfect the arrangement so far as the third party is concerned, but it also determines the juristic nature and foundation of his right.<sup>43</sup>

In 'n ware ooreenkoms ten behoeve van 'n derde party, bevestig 'n derde party bloot die ooreenkoms. Aanvaarding is nie 'n vereiste vir die derde party om 'n reg te verkry nie, die derde party het as sodanig reeds 'n reg.<sup>44</sup> Binne die konteks van die Suid-Afrikaanse ooreenkoms ten behoeve van 'n derde party, vestig die aanvaarding die reg ten opsigte van die derde party.<sup>45</sup> Die vraag ontstaan gevolglik of dit enigsins 'n verskil sal maak indien daar aangevoer word dat aanvaarding nie 'n

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39 *Mutual Life Insurance Co of New York v Hotz* 567 *supra* n 37.

40 *Ibid.*

41 De Wet *supra* n 24 op 150.

42 *Van der Plank v Otto* 1912 (AD) 353 362.

43 Getz *supra* n 2 op 42.

44 Hoewel slegs voorwaardelik in die opsig dat die *stipulans* voor aanvaarding nog die *promittens* kan verlos van sy verpligting teenoor die derde party. Wanneer die *stipulans* dan nie die stipulasie herroep het nie, en die polis betaalbaar word, kan dit aan die derde party aangebied word vir aanvaarding. Die oomblik wanneer aanvaarding kan geskied om die ooreenkoms ten behoeve van 'n derde party te reël, is dus belangrik. Kyk par 3 3.

45 Hierdie "ware" ooreenkoms ten behoeve van 'n derde party is Sutherland (*supra* n 2 op 208) se siening oor die oorspronklike bedoeling van die *stipulatio alteri*. Hier onder word aangevoer dat die derde party nie 'n aktiewe party tot die ooreenkoms is nie. Hy het dus geen bevoegdheid om die kontrak te kanselleer nie, maar kry steeds regte direk vanuit hierdie ooreenkoms. Daar word ook nie regte aan die derde party opgedwing nie, maar die derde party kry die geleentheid om die reg te verwerp. Sien Sutherland *supra* n 3 op 221 hieroor.

vereiste is nie, maar dat die stipulasie vir die derde party se voordeel oop bly, tensy die benoemde derde party die voordeel repudieër. Dit kan egter steeds as 'n stilswyende aanvaarding beskou word. Hierdie aanvaarding moet egter beter gereguleer word sodat dit nie tot gevolg het dat die derde party só spoedig moet aanvaar ten einde sy reg, te vestig, en dit sodoende vir die *stipulans* onmoontlik word om die stipulasie te herroep nie.

### 3 3 Die Aard van Aanvaarding

Suid-Afrika volg die aanvaardingsleerstuk soos toegepas in Nederland.<sup>46</sup> Artikel 6:253(1) van die Burgerlijk Wetboek, 1992 bepaal dat die kontrak regte skep vir die derde party om te eis teen een van die kontrakterende partye wanneer die kontrak so 'n klousule bevat en die derde party die klousule aanvaar. Lande soos Duitsland, Frankryk en Engeland volg die "confirmation doctrine" waardeur die derde party se regte nie voorwaardelik is ten opsigte van sy aanvaarding nie.<sup>47</sup> Die reg bestaan reeds by die opstel van die kontrak vir die derde party. Hierdie leerstuk is onder gesag van Voet se analise van die *fideicommissum inter vivos*.<sup>48</sup> De Wet volg ook vir Voet se standpunt en is van mening dat De Groot se aanvaardingsvereiste na verteenwoordiging verwys. De Wet kon egter nie die howe en verklaar Sutherland and Johnston dat: "South African law is the poorer for recognizing third-party rights only following acceptance".<sup>49</sup>

In Suid-Afrika behels die aanvaardingsvereiste dat die derde party die aanbod wat deur die *promisor* gemaak is, aanvaar en eers dan vir homself 'n reg vestig.<sup>50</sup> Daar het egter binne hierdie aanvaardingsvereiste verdere benaderings ontstaan ten aansien van die impak van sodanige aanvaarding op die kontrak. Een van die benaderings stel dit dat die derde party deur sy aanvaarding nie net 'n reg verkry nie, maar ook die *stipulans* as kontraksparty vervang.<sup>51</sup> Daar is slegs die een oorspronklike kontrak. Na aanvaarding deur die derde party val die *stipulans* uit die prentjie en is daar slegs die kontrak tussen die *promittens* en die derde party.<sup>52</sup>

Volgens die tweede benadering skep die derde party na aanvaarding 'n nuwe kontrak, afsonderlik van die oorspronklike kontrak tussen die

46 Hallebeek & Dondorp *supra* n 5 op 148.

47 *Idem* 147.

48 Voet XXXVI, 1, 9 & 67 & XXXIX, 5, 43.

49 Sutherland & Johnston *supra* n 4 op 214.

50 Hallebeek & Dondorp 149.

51 De Wet & Van Wyk *supra* n 2 op 107 volgens *McCulloch v Fernwoord Estate Ltd* 1920 (AD) 204. Kyk ook Reinecke *et al General Principles of Insurance Law* (2002) 301, *Total SA (Pty) Ltd v Bekker NO* 1992 1 SA 617 (A) 625E.

52 Evans 'Should a repudiated inheritance or legacy be regarded as property in an insolvent estate' 2002 SA *Merc LJ* 695; Joubert *supra* n 12 op 189; Sonnekus 'Enkele opmerkings om die beding ten behoeve van 'n derde' 1999 TSAR 603.

*promittens* en *stipulans*. Hierdie tweede kontrak is nou tussen die derde party en die *promittens*.<sup>53</sup>

Volgens die derde benadering word die derde party, na sy aanvaarding, as kontraksparty deel van die oorspronklike kontrak. Na aanvaarding het die kontrak dan drie partye.<sup>54</sup>

Hierdie drie benaderings bevestig die onduidelikheid en onsekerheid ten aansien van die toepassing van die aanvaardingsvereiste in die ooreenkoms ten behoeve van 'n derde party vir die Suid-Afrikaanse kontrak.

Die aanvaarding kan skriftelik geskied, of dit kan deur optrede blyk. Die begunstigde moet die versekeraar egter inlig oor sy aanvaarding sodat die versekeraar seker kan wees aan wie die voordeel uitbetaal moet word.<sup>55</sup>

Die aanvaarding moet binne 'n redelike tyd geskied. Die tydperk begin loop vanaf die dag waarop die polis betaalbaar word.<sup>56</sup> Indien die begunstigde versuim om binne hierdie redelike tyd kennis te gee, sal die benoeming van die begunstigde verval,<sup>57</sup> maar hierdie redelike tyd neem egter wel die belang van die begunstigde en versekeraar in ag.<sup>58</sup> Dit is egter die versekeraar se plig om die benoemde begunstigde op te spoor, welke nie die begunstigde se tydperk van aanvaarding kan inperk nie.<sup>59</sup>

Daar word kortliks onderskei tussen die aanvaarding by 'n herroepbare benoeming, en die aanvaarding by 'n onherroepbare benoeming. By 'n onherroepbare benoeming kan die benoeming of voordeel enige tyd voor of na die dood van die versekerde aanvaar word. Daar bestaan selde nog onherroepbare benoemings by lewensversekeringskontrakte, en daar moet ook daarop gelet word dat

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53 *Crookes v Watson* 1956 1 SA 277 (A) 291E; *Davis Gordon & Getz: The South African Law of Insurance* (1993) 277; *Evans supra* n 52 op 695; *Getz supra* n 2 op 43; Van Zyl 'Die Regte van lewensversekeringsbegunstigdes' 2013 *TSAR* 636.

54 Sien meer hieroor in *NKP Kunsmisverspreiders (Edms) Bpk v Sentrale Kunsmis Korporasie (Edms) Bpk* 1969 3 SA 82 (T) 87B; Scott 'Vooroorlye van begunstigde in lewensversekeringskontrak – die Hoogste Hof van Appèl beslis' 2012 *TSAR* 803; *Henckert supra* n 2 op 180; *Reinecke & Nienaber supra* n 13 op 6.

55 *Reinecke et al supra* n 51 op 297; *Reinecke & Nienaber supra* n 13 op 22.

56 *Ibid.*

57 *Ibid.* Dit sal ook die geval wees by onvoldoende verwerping van die voordeel.

58 *Mutual Life Insurance Co of New York v Hotz supra* n 37 op 567.

59 Oor die algemeen in die praktyk is die opsporing van begunstigdes nie 'n probleem nie en word die inligting in die polis verval. Gevolglik kom verdragings selde voor.

dit nie 'n *pactum successorium*<sup>60</sup> uitmaak, waar die *stipulans* bedoel om die bate in sy boedel te beskik wat deur aanvaarding voor sy dood onherroeplik gemaak word nie.<sup>61</sup> Ten opsigte van herroepbare benoemings in lewensversekeringskontrakte word aangevoer dat die aanvaarding deur die begunstigde slegs op sekere tye geldig kan wees. Vir die lewensversekeringskontrak bestaan daar verskillende stadiums; naamlik die ontstaan van die kontrak waar die begunstigde benoem word, wat ook die stadium voor die dood van die lewensversekerde is; die stadium na die dood van die lewensversekerde maar voor aanvaarding deur die begunstigde; en die stadium na die aanvaarding deur die begunstigde.<sup>62</sup>

### 3 3 1 *Aanvaarding vóór die dood van die lewensversekerde by herroepbare benoemings*

Daar kan geen verbod of riglyn in regspraak of deur die ou skrywers gevind word oor die vraag wanneer die begunstigde sy aanvaarding mag gee nie. De Groot stel dit egter dat die *promittens* die derde persoon 'n reg gee, indien hy ook aanvaar, sodat die *stipulator* nie meer die belofte kan herroep nie.<sup>63</sup> Dit blyk die effek te hê dat aanvaarding eerstens 'n reg skep vir die derde party en tweedens dat die kontrak dan onherroepbaar word.

Die polishouer kan egter steeds op enige stadium voor sy dood die benoeming wysig. Ou skrywers is dit eens dat die *stipulans* die *promittens* te eniger tyd voor die derde party se aanvaarding kan verlos van sy prestasie teenoor die derde party.<sup>64</sup> Enige aanvaarding sou voortydig wees en sal geen effek hê op die wysiging van die benoeming nie.<sup>65</sup> Dit impliseer dat daar geen regte is waarop die begunstigde voor die dood van die versekerde kan steun nie.

Sommige skrywers is dus van mening dat daar voor die dood van die versekerde geen aanvaarding kan wees nie en dat die versekeraar en die versekerde kan besluit watter regte die benoemde begunstigde op watter tydstep moet besit.<sup>66</sup> Daarvolgens word lewensversekeringskontrakte opgestel met sogenaamde “geen-regte”-klousules wat die regte van die begunstigde voor die dood van die versekerde inperk. So 'n klousule sal byvoorbeeld lees:

60 Die *pactum successorium* het die uitwerking dat die persoon sy eie testeervryheid inperk en dat dit dus ongeldig is. Sien hieroor Henckert *supra* n 2 op 177-193; Keetse 'Is our law on beneficiary nominations and *pacta successoria* outdated?' 2004 *Insurance and Tax* 3-7; en Hutchinson 'Isolating the *pactum successorium*' 1983 *SALJ* 208 - 226.

61 Scott *supra* n 54 op 804.

62 Oor die regte vir die derde party in hierdie stadiums, kyk Van Zyl *supra* n 53 op 640-647.

63 De Groot II.11 art 18(1) (bl 337).

64 De Wet & Van Wyk *supra* n 2 op 108; De Wet *supra* n 24 op 144.

65 Reinecke & Nienaber *supra* n 13 op 22.

66 Henckert 'The life assurance policy, beneficiary clauses and marriage: A few aspects' 1994 *TSAR* 514 (hierna Henckert (2)).

Die begunstigde het geen reg in of tot hierdie polis voor die dood van die versekerde lewe, of na gelang van die geval, van die aansoeker nie, en totdat dit gebeur –

- (a) kan met hierdie polis in alle opsigte gehandel word asof geen begunstigde benoem is nie;
- (b) kan die aansoeker die benoeming sonder toestemming van die begunstigde terugtrek deur die hoofkantoor van [die versekeraar] skriftelik daarvan in kennis te stel.<sup>67</sup>

So 'n polis tussen die versekerde en versekeraar funksioneer as 'n aanbod tot die begunstigde met dien verstande dat die begunstigde geen regte daartoe besit nie.<sup>68</sup> Daar is aangevoer dat:

... where the insured has reserved the right to revoke or change the beneficiary, there can be no effective acceptance by the person nominated unless and until the insured dies without having changed that nomination. For if the nominated beneficiary accepts and the insured thereafter selects another beneficiary, the first nominee's acceptance is rendered nugatory.<sup>69</sup>

Dit word dus as bloot waardeloos of nutteloos gesien vir 'n begunstigde om iets te aanvaar wat moontlik nooit na hom oorgedra kan word nie. 'n Polis met 'n herroepbare klousule bly dan die eiendom van die versekerde.<sup>70</sup>

Dié siening is ook in regspraak aangeneem. In *Wilcocks NO v Visser and New York Life Insurance Co*<sup>71</sup> het Maasdorp HR dit gestel dat die versekerde die volle regte gehad het om met die dokument te handel soos hy wou. Maasdorp HR het verder die vraag gestel of daar dan vir die benoemde begunstigde enige regte in die polis oorbly, en hy het tot die gevolgtrekking gekom dat slegs indien die dokument (polis) onveranderd gelaat word, die opbrengs van die polis by die versekerde se dood aan die begunstigde betaal sal word – voor dit bly dit die eiendom van die versekerde se boedel.

In *Warricker NO v Liberty Life Association of Africa Ltd*<sup>72</sup> is daar opgemerk dat: “Upon the death of the insured, the beneficiary became entitled to accept or reject the benefit.” En ook: “While the insured is alive, the policy remains the property of the insured and he has, subject to the terms of the policy, the full right to deal with it as he likes.”

Daar word aangevoer dat selfs waar daar nie 'n “geen-regte”-klousule in die polis is nie, en die benoemde begunstigde aanvaar, dit nie beteken dat die versekerde die benoeming van die begunstigde kan herroep nie.<sup>73</sup>

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67 *Wolmarans en 'n ander v Du Plessis en andere* 1991 3 SA 703 (T).

68 Henckert (2) *supra* n 66 op 514.

69 Davis *supra* n 53 op 335.

70 *Ibid.*

71 1910 (OPD) 99.

72 2003 (6) SA 272 (W).

73 Reinecke & Nienaber *supra* n 13 op 23.

Indien daar so 'n voortydige aanvaarding is wat altyd deur 'n latere herroeping getroef word, is die regsgevolge minimaal. Die enigste waarde wat so 'n voortydige aanvaarding kan hê, is as die polishouer die voordeel nie voor sy dood herroep het nie en dit 'n feitelike vraag raak of daar aanvaarding was of nie, en ook in die geval waar 'n polishouer aan die versekeraar bevestig dat daar geen herroeping van die benoemde begunstigde se nominasie gaan wees nie.<sup>74</sup>

In *PPS Insurance Company v Mkhabela*<sup>75</sup> is die benoemde begunstigde oorlede voor die lewensversekerde, wat net daarna ook te sterwe gekom het. Die appêlhof, per meld Cachalia AR, het die volgende bevind:

The full court was correct in its view that Ms Sebata's nomination of her mother as the beneficiary under the policy was a contract for the benefit of her mother as a third party, which was capable of acceptance upon the death of the policy holder. But it then, with respect, erroneously found that Ms Mkhabela's acceptance of her nomination as a beneficiary had some legal significance.<sup>76</sup>

Die appêlhof erken dus hier die aanvaarding van die begunstigde, maar meld dat daar nie soveel klem gelê kan word op die aanvaarding om een of ander unieke werking te moet hê nie. Die hof bevind verder per Cachalia AR dat:

It is well established that a nominated beneficiary does not acquire any right to the proceeds of a policy during the lifetime of the policy owner. It is only on the policy owner's death that the nominated beneficiary is entitled to accept the benefit and the insurer is obligated to pay the proceeds of the policy to the beneficiary. Until the death of the policy owner, the nominated beneficiary only has a *spes* (an expectation) of claiming the benefit of the policy – the nominated beneficiary has no vested right to the benefit.

It follows that if the nominated beneficiary predeceases the policy owner, she would have had no right to any benefit of the policy at the time of her death.

Put simply, when the nominated beneficiary dies, the *spes* evaporates. It falls away. The fact that a nominated beneficiary accepts the nomination cannot change this.<sup>77</sup>

Die hof verduidelik gevolglik dat tot en met die dood van die versekerde, die benoemde begunstigde geen reg op die voordeel van die polis sal kry nie. Indien die benoemde begunstigde dus voor die versekerde se dood te sterwe sou kom, verdwyn enige hoop wat hy ten opsigte van die voordeel gehad het. Die eksekuteur kan gevolglik nie 'n voordeel namens die oorlede begunstigde aanvaar nie. Cachalia AR bevind gevolglik dat: "There was thus no enforceable right that was transmissible to the Mkhabela estate. The benefit remained with the

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74 *Ibid.*

75 2012 3 SA 292 (HHA).

76 *PPS Insurance Company v Mkhabela supra* n 75 op 6.

77 *Idem* 7 & 8.

insured, Ms Sebata, until her death approximately two months later, when it fell into her estate”.<sup>78</sup>

Dit is dus duidelik dat daar weereens deur ons regspraak aanvaar word dat 'n benoemde begunstigde 'n kontrak ten behoeve van 'n derde party is. Dit bevestig ook dat voor die dood van die lewensversekerde, die benoemde begunstigde geen reg verkry nie, slegs 'n *spes*, en dat aanvaarding van hierdie voordeel dus nutteloos sal wees. Dit is slegs op die oomblik van die dood van die lewensversekerde wat die benoeming oopgestel word vir aanvaarding. Indien die benoemde begunstigde dan nie bestaan nie, is daar niks wat hy kan aanvaar nie. Die begunstigde se verwagte *spes* verdwyn dan en die voordeel sal weer in die versekerde se boedel terugval indien hy/sy nie 'n ander begunstigde benoem nie.

### **3 3 2 Aanvaarding ná die Dood van die Lewensversekerde in die Geval van Herroepbare Benoemings**

Soos in paragraaf 3 3 1 aangedui, kan die begunstigde die benoeming voor die dood van die lewensversekerde aanvaar, maar dit vestig geen reg vir hom nie aangesien die lewensversekerde die benoeming te eniger tyd voor sy dood kan herroep. Dit is om hierdie rede dat aanvaarding ná die dood van die lewensversekerde geskied, en dan meer effektief is aangesien die derde party dan onmiddellik 'n reg uit hierdie aanvaarding verkry. Dit is die oordeel van een van die eerste sake oor die benoeming van 'n begunstigde waar daar gesê is: “If the third party desires to enforce a stipulation made in his favour, he must accept it; for until he has notified his decision to the promisor, there is no *vinculum juris* between them”.<sup>79</sup>

Dit is ook later bevestig in die saak van *Warricker NO v Liberty Life Association of Africa Ltd.*<sup>80</sup> “Upon the death of the insured, the beneficiary became entitled to accept or reject the benefit.”

Aanvaarding deur die begunstigde bewerkstellig dus 'n *vinculum juris* (regsband) tussen homself en die *promittens*.<sup>81</sup>

Hierdie aanvaarding het in Suid-Afrika die vereiste geword vir die benoemde begunstigde om voordeel te trek uit die kontrak.<sup>82</sup> Voor die aanvaarding gegee word, kan die *stipulans* die *promittens* onthef van sy verpligting om die voordeel aan die begunstigde te lewer. Daar moet egter ook genoem word dat dit die begunstigde vry staan om die begunstiging te verwerp.<sup>83</sup>

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78 *Idem* 9.

79 *Mutual Life Insurance Co of New York v Hotz supra* n 37 op 556-567.

80 2003 6 SA 272 (W).

81 *Getz supra* n 2 op 43.

82 Sien par 3 3 oor die ontwikkeling van aanvaarding in die Suid-Afrikaanse reg.

83 *Sutherland supra* n 3 op 210.

Daar kan ook geargumenteer word teen die stelling dat aanvaarding deur die derde party teenoor die *promittens* moet geskied. Dit is die *stipulans*, nie die *promittens* nie, wat die stipulasie maak en dit is 'n natuurlike uitvloeisel dat dit dan teenoor die *stipulans* is wat aanvaarding deur die derde party moet geskied en nie teenoor die *promittens* nie.<sup>84</sup> Wat dit egter moeilik maak, is die feit dat die *stipulans* gewoonlik ook die lewensversekerde is, en dus op die oomblik wat aanvaarding moontlik word, alreeds oorlede is. Gevolglik sal dit moontlik wees dat die benoemde begunstigde sy aanvaarding aan die afgestorwe versekerde se eksekuteur sal moet laat blyk. Dit is om hierdie rede dat daar eerder aan die *promittens* kennis gegee moet word van die derde party se aanvaarding, aangesien dit hierdie *promittens* is wat die prestasie na aanvaarding aan die derde party sal lewer.

Hierdie kwessie ten aansien van die oomblik van aanvaarding is 'n besonderse komponent van die Suid-Afrikaanse toepassing van die *stipulatio alteri*. Die kwessie is spesifiek belangrik vir die geval van lewensversekering. Sodra die begunstigde aanvaar, verkry hy 'n reg.<sup>85</sup> 'n Soortgelyke toepassing kan egter ook gevind word waar die *stipulatio alteri* op die diskresionêre *inter vivos* trust in Suid-Afrika van toepassing gemaak word. In hierdie geval is daar ook geen gevestigde regte vir die begunstigde van hierdie trust nie tot die trustees hulle diskresie uitoefen om aan die begunstigdes iets oor te dra en dit aan te bied aan die begunstigdes. Die begunstigdes is ook hier verantwoordelik om hulle aanvaarding te kenne te gee.<sup>86</sup> Dit is dan ook die oomblik wat die voorwaardelike reg verander na 'n gevestigde reg. Die trustbegunstigde kan ook nie sy aanvaarding gee voor die diskresie van die trustees uitgeoefen word nie, maar slegs op die oomblik wat dit vir hom aangebied word.

#### 4 Die Vraag oor Wát Aanvaar Moet Word

Die siening oor wát die derde party moet aanvaar, is al dikwels betwyfel.<sup>87</sup> Dondorp interpreteer Christian Wolff se siening hieroor as 'n "stipulasie" wat die begunstigde moet aanvaar of 'n "aanbod van die stipulator om sy eis aan die begunstigde te sedeer". De Groot is egter van mening dat dit die aanbod van die *promisor* is wat die begunstigde moet aanvaar.

Regspraak het ook al klei getrap oor die regte bewoording ten opsigte van wat die begunstigde moet aanvaar. In *Louisa and Protector of Slaves v Van den Berg*<sup>88</sup> blyk dit of die hof meen dat die derde party, saam met

84 Getz *supra* n 2 op 44; De Wet & Van Wyk *supra* n 2 op 109.

85 Die aard van die regte wat die begunstigde verkry, word nie hier bespreek nie. Daar word voorgestel dat die begunstigde 'n gevestigde reg verkry sodra hy aanvaar. In die tydperk tussen dood en aanvaarding word 'n voorwaardelike reg voorgestel.

86 *Crookes NO and another v Watson and others* 1956 1 SA 277 (AD).

87 Getz 42.

die *stipulans*, die “belofte” van die *promittens* moet aanvaar. In *Mutual Life Insurance Co of New York v Hotz*<sup>89</sup> meen die hof dat die derde party die “kontrak” moet aanvaar, wat ook deur *McCulloch v Fernwood Estate Ltd*<sup>90</sup> aanvaar is. In *Van der Planck NO v Otto*<sup>91</sup> sê die hof dat die “stipulasie” deur die derde party aanvaar moet word. Ander gesag praat weer gereeld van ’n “voordeel” of die “reg tot die voordeel” wat deur die begunstigde aanvaar moet word.<sup>92</sup>

In *Commissioner for Inland Revenue v Estate Crewe*<sup>93</sup> het die regter ’n middeweg probeer vind en dit verwoord as ’n kontrak vir die voordeel van ’n derde party, wat gesien kan word as ’n “aanbod van ’n voordeel” wat gemaak word en wat oop bly tensy dit gerepudieer word.

Hoewel aanvaarding in die kontraktereg voorkom waar ’n aanbod altyd gerig word aan een party welke die teen party moet aanvaar, is daar aangevoer dat die aanvaarding van ’n “aanbod” nie aanvaar kan word binne die konteks van die ooreenkoms ten behoeve van ’n derde party nie, aangesien die enigste aanbod wat gemaak word, aan die “*promisee*” is en nie aan die derde party nie.<sup>94</sup> Daar kan ook nie saamgestem word met die aanvaarding van die “kontrak” nie, aangesien die kontrak tussen die *promittens* en die *stipulans* is en die aanvaarding deur die derde party nie die geldigheid van die kontrak beïnvloed nie en die benoeming nog enige tyd voor aanvaarding herroep kan word. Die vraag wat gevolglik ontstaan is of dit nie moontlik is, in die geval van ’n benoemde begunstigde by lewensversekering, dat die “opbrengs van die polis” aanvaar moet word nie? Dit is immers wat vir die derde party beding word.

Daar word aangevoer dat die “voordeel”, “stipulasie”, “*promissio*”, “voorsiening” of “opbrengs” wat aanvaar word, slegs woorde met dieselfde betekenis is en dat dit nie nodig is om te onderskei watter woord die juiste is nie. Wat belangriker is, is wat die aanvaarding beteken.

Die stelling dat die derde party geen reg verkry voordat hy iets aanvaar nie, of dit dan nou ’n “belofte” of “stipulasie” is, is strydig met die wese van die ooreenkoms ten behoeve van ’n derde party in dié sin dat die derde party dan sy reg uit sy eie wilsverklaring verkry en nie uit die ooreenkoms nie.<sup>95</sup>

Om ’n ware ooreenkoms ten behoeve van die derde party daar te stel, moet die ooreenkoms tussen die *promittens* en die *stipulans* bestaan, wat hul verbind tot ’n prestasie aan ’n derde party. Dit wil dus weereens blyk

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88 1830 1 (Menz) 471.

89 *Supra* n 37.

90 *Supra* n 51.

91 *Supra* n 42.

92 Hutchinson *supra* n 7 op 237.

93 1943 (AD) 656.

94 Getz *supra* n 2 op 42.

95 De Wet & Van Wyk *supra* n 2 op 108.

dat dit nie 'n vereiste kan wees vir 'n begunstigde om die stipulasie te aanvaar ten einde 'n reg te verkry nie. Vir 'n ware derde-party-kontrak bevestig aanvaarding bloot die reg. "In South Africa, acceptance creates the third party right. In the true third-party contract, acceptance merely entrenches it."<sup>96</sup>

Die reg word dus bloot bevestig en bestendig deur aanvaarding: "Gevolglik beteken aanvaarding in hierdie verband nie die aanvaarding van 'n gewone aanbod nie, maar is dit 'n eensydige regshandeling wat dien om die reg van die derde te bevestig en bestendig".<sup>97</sup>

Hulle meen ook dat hierdie aanvaarding regverdiging is vir die verlening van 'n reg vir die derde party wat uit hoofde van die oorspronklike kontrak ontstaan.

Opsommenderwys kan daar met die volgende stelling saamgestem word: "Hierdie gespartel met die akseptasie en veral die "iets" wat die derde party dan moet aksepteer, is die gevolg van die miskenning van die gevolge van die ooreenkoms ten behoeve van 'n derde ...".<sup>98</sup>

## 5 Aanvaarding deur die Begunstigde: Uit die Oogpunt van die Engelse Reg

Hoewel die Engelse reg nie die *stipulatio alteri* van die Romeins-Hollandse reg aanvaar nie, bestaan daar ook "derde-party-kontrakte". Die "privity of contract"-leerstuk word deur Engeland gevolg en die ooreenkoms bestaan ten behoeve van 'n derde party as 'n uitsondering op die leerstuk.<sup>99</sup> Lewensversekering word spesifiek as 'n uitsluiting beskou in die lig van artikel 11 van die *Married Woman's Property Act* van 1882 waar 'n lewensverskeringspolis deur 'n persoon op sy eie lewe uitgeneem word en hy dan die voordeel van die polis aan sy gade of kinders bemaak.<sup>100</sup>

Die Engelse reg het ver gevorder om die ooreenkoms ten behoeve van 'n derde party statutêr te reël by wyse van die *Contracts (Right of Third Parties) Act 1999*. Ingevolge hierdie wet verkry die derde party 'n reg direk uit die kontrak:

Subsection to the provisions of this Act, a person who is not a party to a contract (a 'third party') may in his own right enforce a term of the contract if –

(a) the contract expressly provides that he may, or

<sup>96</sup> Sutherland *supra* n 3 op 216.

<sup>97</sup> Van der Merwe *et al Kontraktereg: Algemene Beginsels* (2007) 289.

<sup>98</sup> De Wet *supra* n 24 op 152.

<sup>99</sup> Min 'When do third party rights arise under the Contracts (Rights of Third Parties) Act 1999 (UK)' 2001 *Singapore Academy of Law Journal* 34.

<sup>100</sup> The Law Commission *Privity of Contract: Contract for the benefit of third parties* (1996) par 2.53.

(b) subject to subsection (2), the term purports to confer a benefit on him.<sup>101</sup>

Dit lyk egter of hierdie wet voorsiening maak vir onherroeplike kontrakte en dit blyk dat die reg nie van die begunstigde weggeneem kan word indien hy nie sy reg uit bogenoemde artikel verkry het nie.<sup>102</sup>

Daar is ook *The Principles of European Contract Law* wat deur die *Commission on European Contract Law* opgestel is. In artikel 6:110 handel hulle spesifiek met 'n *Stipulation in Favour of a Third Party*. In die artikel word gesê dat die derde party 'n reg uit die kontrak verkry slegs indien en wanneer die *promisee* die derde party in kennis stel van die voordeel.<sup>103</sup>

(1) A third party may require performance of a contractual obligation when its right to do so has been expressly agreed upon between the promisor and the promisee, or when such agreement is to be inferred from the purpose of the contract or the circumstances of the case. The third party need not be identified at the time the agreement is concluded.<sup>104</sup>

Die artikel verklaar verder:

- (2) If the third party renounces the right to performance the right is treated as never having accrued to it.
- (3) The promisee may by notice to the promisor deprive the third party of the right to performance unless:
  - (a) the third party has received notice from the promisee that the right has been made irrevocable, or
  - (b) the promisor or the promisee has received notice from the third party that the latter accepts this right.

Hierin word daar voorsiening gemaak vir herroeplike kontrakte, maar dit word ook gesien dat aanvaarding die reg vir die derde party bewerkstellig. Die aanvaardingsvereiste blyk nie om so 'n groot probleem te wees vir Engeland nie en daar word nie veel gereël in verband met die aanvaarding deur die derde party nie.

Ander lande het ook die kontrak vir die voordeel van 'n derde party statutêr gereël.<sup>105</sup> Die Regskommissie vir Engeland en Wallis was ook 'n groot hulp in die ontwikkeling van die *Contracts (Right of Third Parties) Act*. Alle aspekte van die kontrakte vir derde partye is in 'n gedetailleerde verslag uiteengesit en bespreek vir die toepassing in dié regsstelsel.

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101 *Contracts (Rights of Third Parties) Act 1999 art 1.*

102 *Idem art 2.*

103 Sutherland *supra* n 3 op 208.

104 Lando & Hugh (eds) *Principles of European Contract Law* (1999) art 6: 110.

105 Nieu-Seeland *Contract (Privity) Act 1982 art 4*; Queensland *Queensland Property Law Act 1974 art 55*; Wes-Australië *Western Australia Property Law Act 1969 art 11.*

Die Suid-Afrikaanse Regskommissie het in 1987<sup>106</sup> vergader oor die kwessie ten aansien van trustadministrasie waarna die Wet op die Beheer oor Trustgoed in 1988 gevolg het. Die kommissie het, onder andere, die kwessie rakende die *inter vivos*-trust, wat as 'n *stipulatio alteri* gesien word, bespreek en het ook die kritiek teen die aanvaardingsvereiste bespreek.<sup>107</sup> Die kommissie het egter nie besluit om dié saak in wetgewing te vervat nie.

Suid-Afrika sal baie baat vind indien die Kommissie die Suid-Afrikaanse toepassing van die ooreenkoms ten behoeve van 'n derde party kan bespreek en dit moontlik daarna vir wetgewing oorweeg kan word. In die Suid-Afrikaanse konteks kan die verskillende vorme van die ooreenkoms ten behoeve van 'n derde party ondersoek en geëvalueer word, onder meer verteenwoordiging, lewensversekering waar begunstigdes benoem word en die *inter vivos*-trust. Aspekte soos die regte en verpligtinge, asook die aanvaardingsvereiste, kan geëvalueer word vir die korrekte toepassing, met inagneming van die gemenerereg en die ontwikkeling wat in Suid-Afrika in die ooreenkoms ten behoeve van 'n derde party plaasgevind het. Dit sal lei tot 'n seker, eenvormige toepassing van die ooreenkoms ten behoeve van 'n derde party.

## 6 Gevolgtrekking

Hoewel die leerstuk van “privity of contract” enige verpligtinge vir derde-party-begunstigdes tot kontrakte belet, blyk dit dat die Suid-Afrikaanse reg wel 'n verpligting daargestel het vir derde-party-begunstigdes in 'n ooreenkoms ten behoeve van 'n derde party. Hierdie plig is om die begunstiging of stipulasie wat tot sy voordeel gemaak is, te aanvaar. Die aksie van aanvaarding word egter steeds nie beskou as 'n verpligting wat die begunstigde 'n aktiewe party tot die kontrak laat word nie, en is dus steeds aanvaarbaar vir die korrekte toepassing van die *stipulatio alteri*.

Dit mag blyk dat die probleem nie teen die aanvaardingsaksie as sodanig is nie, maar die effek wat die aanvaarding skep, naamlik regte. Dit blyk verder dat die aanvaarding 'n produk is van verwarring onder ou skrywers wat nie die ooreenkoms ten behoeve van 'n derde party en verteenwoordiging behoorlik onderskei het nie. Hierdie verwarring is egter nagepraat in die regspraak wat gevolg het en die Suid-Afrikaanse reg sit nou met 'n uitsonderlike toepassing. Die Suid-Afrikaanse ooreenkoms ten behoeve van 'n derde party is 'n unieke leerstuk.

In die tyd van die ou skrywers blyk dit dat aanvaarding slegs nodig was om herroeping onmoontlik te maak. In die konsep van hedendaagse lewensversekeringskontrakte is dit egter nou meer die norm om herroepbare kontrakte te sluit. Hierdie aanvaarding dan kan ook geen uitwerking hê op die herroepbaarheid van die kontrak nie. Daar is nou 'n

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106 Suid-Afrikaanse Regskommissie 'Verslag oor die hersiening van die trust-reg' June 1987 1-106.

107 *Idem* 90-91.

tydstip verbonde aan die kennisgewing van aanvaarding. Wat betref die aanvaarding vóór dood vir herroepbare benoemings, is dit nou duidelik dat dit nutteloos sal wees aangesien die versekerde die benoeming, waarop die verleë begunstigde geen aanspraak het nie, steeds te eniger tyd kan herroep of kanselleer.

Die aanvaarding deur die benoemde begunstigde wat ná die dood van die lewensversekerde geskied, is nou volgens regspraak die enigste en die effektiwste manier vir die derde party om 'n reg tot die voordeel te verkry.

Dit blyk dat daar opnuut gedink sal moet word oor die verpligting van aanvaarding deur die derde party en dat regspraak moontlik nodig is om 'n diep gewortelde toepassing in Suid-Afrika te herdefinieer. Dit sal die begrip en toepassing van die Suid-Afrikaanse beginsel van die begunstigde in 'n lewensversekeringskontrak bepaal, asook wat die omvang van die begunstigde se rol in die kontrak is.

Die tyd het aangebreek om weer die toepassing van die *stipulatio alteri* te beoordeel uit die oogpunt van die oorspronklike doel van hierdie ooreenkoms. Die Suid-Afrikaanse regskommissie moet sit rakende hierdie onsekerhede. Dit kan moontlik lig werp op die huidige verwarring oor wát presies aanvaar moet word. Dit blyk dat meer en meer skrywers mekaar napraat eerder as om na die oorspronklike bronne te gaan kyk om die toepassing te toets. Die daarstel van formele riglyne en vereistes vir aanvaarding is 'n moontlikheid. Sodoende kan daar gestipuleer word aan watter vereistes die partye tot die kontrak moet voldoen. Daar bestaan ook geen algemene reël vir die toepassing van alle vorme van die *stipulatio alteri* in Suid-Afrika nie, maar daar is afsonderlike reëls vir spesifieke gevalle, soos die lewensversekeringskontrak of die *inter vivos*-trust. Hierdie riglyne word nie konsekwent in die regspraak toegepas nie.

Sutherland merk tereg op: "Third-party contracts cannot be recognised without establishing an intricate set of rules for dealing with them".<sup>108</sup>

Die Engelse reg het so 'n stel reëls opgestel wat die situasie formeel reël waar derdes by 'n kontrak betrokke is. Al voldoen hierdie reëls dalk nie aan 'n ware derde-party-kontrak soos wat dit in die Suid-Afrikaanse reg bekend staan nie, kan dit wel sekerheid oor die stand van sake gee.

In Suid-Afrika het die tyd aangebreek om 'n stel formele reëls aan te neem ten einde die unieke ooreenkoms ten behoeve van 'n derde party in lewensversekeringskontrakte te reël. Sodoende kan verwarring uitgesakel word en alle gevalle kan konsekwent hanteer word.

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108 Sutherland *supra* n 3 op 207.

## Military intervention in Syria: The American, British and French alternatives and the Russian option

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### OPSOMMING

#### Militêre ingrype in Sirië: Die Amerikaanse, Britse en Franse Alternatiewe en die Russiese Opsie

Die gebruik van chemiese wapens deur die Siriese owerheid teen rebellegroepe in die land het dwarsoor die wêreld opslae gemaak. Die Amerikaanse, Britse en Franse owerhede het gedreig met gewapende ingrype teen ongedefinieëde teikens in Sirië, maar het regverdiging vir sodanige ingrype op verskillende gronde gebaseer. Die Britse Eerste Minister David Cameron het gewapende ingrype op grond van humanitêre intervensie probeer regverdig, President Barack Obama van die Verenigde State sou dit op grond van oorwegings van selfverdediging en die verdediging van Amerikaanse bondgenote in die Midde Ooste regverdig, terwyl die Franse Eerste Minister Jean-Marc Ayrault gewag gemaak het van die noodsaak om Sirië te straf vir sy vergrype teen die verbod van internasionale gewoontereg op die gebruik van chemiese wapens.

In hierdie artikel word aangevoer dat hoewel oorlogsmaatreëls in hedendaagse humanitêre reg nie tot die gronde beperk is wat in artikels 42 en 51 van die Handves van die Verenigde Nasies vermeld word nie, die gronde ter regverdiging van gewapende ingrype in Sirië wat deur die staatshoofde van die Verenigde State, Britanje en Frankryk aangevoer is, nie regtens geoorloof is nie. Humanitêre intervensie is tradisioneel gemik op die omverwerping van 'n regering wat sy eie burgers se regte ondermyn, maar al drie lande het dit duidelik gestel dat hulle nie daarop ingestel is om die Siriese regering tot 'n val te bring nie; voorkomende selfverdediging is alleen geregverdig as 'n militêre aanval onmiddellik dreigend is, en nóg die Verenigde State nóg enige van sy bondgenote is met 'n militêre inval bedreig; en strafmaatreëls teen 'n staatsowerheid is 'n uitsluitlike prerogatief van die Veiligheidsraad van die Verenigde Nasies.

Die Russiese Federasie het gevolglik die weg gebaan, naamlik om die aangeleentheid na die Veiligheidsraad te verwys. Dit het daarop uitgeloop dat Sirië verbied is om chemiese wapens te ontwikkel, te verkry of op te berg, en dat Sirië die 1993 Konvensie aangaande die Verbod op die Ontwikkeling, Vervaardiging en Opberging en Gebruik van Chemiese Wapens en die Vernietiging van Sodanige Wapens op 14 September 2013 geratifiseer het.

## 1 Introduction

Violence erupted in Syria following a popular demonstration of 15 March 2011, inspired by the Arab Spring, and demanding the resignation of President Bashar al-Assad and an end to the Ba'ath Party's rule. Following the deployment of the Syrian army in April 2011 to suppress the protesting masses, the uprising soon escalated into a full-scale civil war. Efforts by the United Nations,<sup>1</sup> and the Human Rights Council,<sup>2</sup> to broker a peace accord failed. By 20 July 2013, the death toll, according to United Nations (UN) estimates, exceeded 100 000.<sup>3</sup> According to some estimates, that number has since then grown to more than 120 000 casualties. In a report of the Secretary-General of the UN of 12 August 2012, the number of displaced persons by that time had grown to more than 1 million people.<sup>4</sup> More recent estimates set the number of displaced persons at close to 2 million, with perhaps double that number having been uprooted within the borders of Syria.

On 21 August 2013, a rocket attack was launched in Syria against rebel forces that have been engaged in attempts to overthrow the government of the country. The attack was aimed at a stronghold of the rebel forces within the eastern suburbs of Damascus and included the use of chemical weapons, which caused indiscriminate deaths, injuries and mutilations of at least 1429 people, including more than 400 children. There are strong indications that the rockets containing chemical weapons were launched by the military forces of the country.<sup>5</sup> Allegations that the use of chemical weapons was, or possibly was, orchestrated by the rebel forces in an attempt to discredit the Syrian regime were, to say the least,

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- 1 In Security Council (SC) Res 2042 of 2012-04-14, the SC called for the full implementation of a six-point plan proposed by former Secretary-General Kofi Annan, a Joint Special Envoy of the UN, and the League of Arab States to broker peace in Syria; in SC Res. 2043 of 2012-04-21, the SC established the UN Supervision Mission in the Syrian Arab Republic (UNSMIS) to monitor a cessation of armed violence in Syria.
  - 2 On 26 September 2013, the Human Rights Council adopted a proposal by the United States, condemning the ongoing violations of international humanitarian law in Syria, calling for the unfettered access throughout Syria of the UN mandated commission of inquiry and of humanitarian agencies, and expressing the need for accountability of those responsible for serious violations of international humanitarian law and human rights law. The Resolution was adopted by 40 votes to 1, with 6 abstentions. HRC Res 24/22 on *The Continuing Grave Deterioration of the Human Rights and Humanitarian Situation in the Syrian Arab Republic* UN Doc A/HRC/24/L.28 (2013-09-26).
  - 3 See statement by the President of the SC UN Doc S/PRST/2013/15 (2013-10-02).
  - 4 Report of the Secretary-General, *Implementation of General Assembly Resolution 66/253 B on the Situation in Syria* par 3 UN Doc A/66/889 (2012-08-21).
  - 5 See *Report of the UN Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic on the Alleged Use of Chemical Weapons in the Ghouta Area of Damascus on 21 August 2013* UN Doc A/67/997-S/2013/553 (2013-08-16).

highly speculative. Several Western countries, notably the United States, Great Britain and France threatened to respond to the use of chemical weapons by the Syrian military forces by launching an armed attack of some sorts against (unspecified) Syrian targets. Taking matters into their own hands was at least to some extent based on inaction by the Security Council of the UN due to public statements by representatives of Russia and China that any proposal to take action against Syria will be opposed by those countries, and if needs be through the use of their veto powers in the Security Council.

It should be noted at the outset that the bases of an armed response tendered by Great Britain, the United States and France were not the same. Describing the Syrian action as “morally indefensible”, and promising to “put an end to human rights atrocities in Syria”, British Prime Minister David Cameron seemed to justify an armed response on the basis of humanitarian intervention, while President Barack Obama was quite emphatic in seeking to legitimise a military intervention in Syria on grounds of self-defense. Military intervention, he said, was required (a) to protect American allies in the Middle East, such as Israel, Jordan and Turkey, against the possible use of chemical weapons against them; and (b) taking precautions against the possibility of such weapons falling into the hands of terrorist groups that might use them in attacks aimed at American targets. Statements made by the French Prime Minister Jean-Marc Ayrault suggested that an armed response would serve as a retributive deterrent: The act of Syria, said he, cannot go without response, and an armed response must serve to dissuade Syrian authorities from doing it again.

Be that as it may, the British Parliament on 29 August 2013, in what was described by some as a “stunning defeat” of Prime Minister David Cameron, by 285 votes to 272, rejected a government-sponsored motion to support in principle military action against Syria. On 10 September 2013, President Obama requested Congress to delay its finding on the matter pending a possible solution to the problem based on a Russian proposal for Security Council intervention,<sup>6</sup> and in the end the matter never came before Congress. There were strong indications that if the matter had gone before Congress, Congress would most likely have declined to give its blessing to an armed attack in Syria by American forces.

Public discourse in the United States was almost exclusively centred on the question whether Congressional approval of an armed response against Syria was required by the Constitution, which vested in Congress the power “To declare War.”<sup>7</sup> President Obama sided with those who believed that military intervention in Syria would not amount to a “declaration of war” and that the President, as “Commander in Chief of

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6 See President Obama’s Address to the Nation on Syria (2013-09-10).

7 Constitution of the United States art I s 8 cl 10.

the Army and Navy of the United States,”<sup>8</sup> was competent to order such intervention without Congressional approval. He stated, though, that he would seek Congressional approval so as to ensure that he has the support of the American people for the military action contemplated. The question whether or not an armed intervention would violate international humanitarian law was never part of the political debate in the United States.

## 2 International Humanitarian Law Pertaining to the Use, Development, Production and Stockpiling of Chemical Weapons

Every government has the right to resist efforts of factions within its population attempting to overthrow the regime by unconstitutional means. Such counter-revolutionary strategies may include the use of armed force. However, the means and methods of an armed response are subject to radical limitations, including the use of weaponry that have been outlawed by the rules and regulations of international humanitarian law. The use of chemical weapons in an armed conflict is outlawed by customary international law and constitutes a serious offence. The prohibition on the use of chemical weapons stems from the *Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous and Other Gasses and Bacteriological Methods of Warfare* of 1925.<sup>9</sup> It has come to be generally accepted that the use of bacteriological and chemical weapons is included in the proscriptive provisions of the 1925 Geneva Protocol.<sup>10</sup> In 1969, the General Assembly of the UN, in a Resolution on the *Question of Chemical and Bacteriological (Biological) Weapons*, proclaimed that the 1925 Geneva Protocol embodies generally recognised rules of international law prohibiting the use in international armed conflicts of all biological and chemical methods of warfare, and declared such use to be contrary to the generally recognised rules of international law as embodied in that Protocol. The proscription applies to:

[T]he use in international armed conflicts of:

- (a) Any chemical agents of warfare – chemical substances, whether gaseous, liquid or solid – which might be employed because of their direct toxic effects on man, animals or plants;

<sup>8</sup> *Idem* art II s 2 cl 1.

<sup>9</sup> *Protocol for the Prohibition of the Use in War of Poisonous and Other Gasses and Bacteriological Methods of Warfare* 1925, 26 UST 571; TIAS No 8061, 94 LNTS 65. The 1925 Protocol was preceded by the *Declaration to Prohibit the Use of Projectiles, the Only Object of Which is the Diffusion of Asphyxiating or Deleterious Gases*, 1899 (reprinted in 1 AJIL (Supp) 157 (1907)).

<sup>10</sup> 1925 Protocol *supra* n 9; and see Meron ‘Crimes Under the Jurisdiction of the International Criminal Court’ in Herman, von Hebel, Lammers & Schukking (eds) *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (1999) 53.

- (b) Any biological agents of warfare – living organisms, whatever their nature, or infective material derived from them – which are intended to cause disease or death in man, animals or plants, and which depend for their effects on their ability to multiply in the person, animal or plant attacked.<sup>11</sup>

It is submitted that the ban on the use of chemical weapons also applies to armed conflicts not of an international character; and the fact that new chemical, bacteriological and biological agents may have been developed subsequent to the date of the Protocol does not detract from its application to such new agents. The Protocol applies “regardless of any technical development”.<sup>12</sup>

In more recent times, the international community of states adopted the *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological and Toxin Weapons and on Their Destruction* of 1972,<sup>13</sup> and its counterpart, the *Convention on the Prohibition of the Development, Production and Stockpiling and Use of Chemical Weapons and on Their Destruction* of 1993.<sup>14</sup> The 1993 Convention added to the 1925 Protocol on *the use of asphyxiating, poisonous and other gasses and bacteriological methods of warfare*, the proscription of *the development, production and stockpiling* of chemical weapons and mandated the destruction of such weapons. At the time of the deployment of chemical weapons in Syria, the 1993 Convention had been ratified by 189 states, including the United States which acceded to the Convention on 25 April 1997. In 2012, the Organisation for the Prohibition of Chemical Weapons verified that the United States, in compliance with its treaty obligations, had destroyed 24 912 Mega Tons of chemical weapons which constituted

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11 General Assembly (GA) Res 2603 (XXIV) of 1969-12-16 in 24 UN GAOR Supp (No 30) 16 UN Doc A/7630 (1969); and see also *Report of the Secretary General on Respect for Human Rights in Armed Conflicts* par 192 UN Doc A/7720 (1969-11-20) urging member states of the UN “in the interests of enhancing the security of peoples around the world” to make a clear affirmation that the prohibitions contained in the 1925 Geneva Protocol applies to the use in war of all chemical, bacteriological and biological agents.

12 GA Res 2603 (XXIV) of 1969-12-16 *supra* n 11. The Report of the Secretary General refers to the application of the 1925 Protocol to chemical, bacteriological and biological agents “which now exist or which may be developed in future”. See also *Legality of the Threat or Use of Nuclear Weapons* 1996 ICJ 226 par 85 holding that the fact that nuclear weapons did not exist at the time when the rules of international humanitarian law were developed does not mean that their destructive use cannot be brought within the reach of those proscriptions.

13 *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological and Toxin Weapons and on Their Destruction* 1972 1015 UNTS 26 UST 583, TIAS, No 8062 11 ILM 309 (1972).

14 *Convention on the Prohibition of the Development, Production and Stockpiling and Use of Chemical Weapons and on Their Destruction* 1993 1974 UNTS 45 (1993).

89.71 % of its declared stockpile.<sup>15</sup> Two countries (Israel and Myanmar) have signed the Convention but have not yet ratified it, while five states (Angola, Egypt, North Korea, South Sudan, and Syria) have neither signed nor acceded to the Convention.<sup>16</sup> Syria announced on 10 September 2013 that it is now willing to sign the treaty, and the Secretary-General of the UN subsequently confirmed that Syria acceded to the 1993 Convention on 14 September 2013.<sup>17</sup>

Even though Syria had not ratified the 1993 Convention at the time of the attack of 21 August 2013, it is highly likely that, given the wide support given to it as evidenced by the large number of ratifications, its provisions will be held to constitute rules of customary international law that would as such be binding on all states, including Syria. For present purposes, though, that is neither here nor there, because Syria is accused of *the use* of chemical weapons, the prohibition of which dates back to 1925 and which is without any doubt prohibited by customary international law. The question now arises what can be done in response to Syria's unlawful conduct, and in particular whether or not an armed response would be permissible under the prevailing laws and customs of general international law.

### 3 The British Response

Promising to “put an end to human rights atrocities in Syria”, British Prime Minister David Cameron seemed to base the legality of an armed intervention in Syria on the principle of humanitarian intervention. Humanitarian intervention, which owes its origin to the writings of Grotius,<sup>18</sup> occurs when state A takes military action against state B in order to liberate the nationals of state B from ongoing and excessive repressive laws and practices of and in state B. The question is, though, whether or not humanitarian intervention is in this day and age still

15 *Report of the OPCW on the Implementation of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction* par 1.12 Doc C-17/4 (2012-11-27).

16 *Idem* annex 1 (45 & 46); and see also as to adherence to and compliance with the Chemical Weapons Convention in general by states parties, the report of the US Department of State on *Adherence to and Compliance with Arms Control, Nonproliferation and Disarmament Agreements and Commitments* 37-51 (2010-07-01).

17 *Supra* n 5; see also the note by the Secretary-General par 3 UN Doc A/67/997– S/2013/553 (2013-09-16).

18 In his seminal work on the law of war and peace, Grotius posed the question “whether there may be a just cause for undertaking war on behalf of the subjects of another ruler, in order to protect them from wrong at his hands” (Grotius *De Iure Bellie Ac Pacis Libri Tres* (eds) Molhuysen & van Vollenhoven (1919) 2.25.8(1)). He answered this question in the positive, provided the wrong inflicted by the ruler on his own subjects is obvious, explaining: “In conformity with this principle Constantine took up arms against Maxentius and Lucinius, and other Roman emperors either took up arms against the Persians, or threatened to do so, unless these should check their persecutions of the Christians on religious grounds”.

lawful within the confines of contemporary rules of international humanitarian law.

Armed intervention is authorised by the UN Charter in two instances only:

- (a) Collective armed intervention under auspices of the Security Council as a means of putting an end to a situation that constitutes a threat to the peace, a breach of the peace or an act of aggression;<sup>19</sup> and
- (b) Individual or collective self-defence in cases where an armed attack occurred against a member state of the UN.<sup>20</sup>

This raises the question whether or not the UN Charter deals comprehensively with the question of legally permissible armed interventions: Are there situations not mentioned in the UN Charter in which a resort to military action would be legal, or at least legitimate, under the rules of international law?

There are compelling reasons to believe that lawful armed interventions under contemporary international humanitarian law are not confined to those sanctioned by the UN Charter. The UN itself has gone beyond its own Charter provisions by affording legitimacy to instances of armed intervention not mentioned in the Charter. In 1950, when the Cold War was still in its infancy, the General Assembly of the UN adopted the *Uniting for Peace Resolution*, which provides:

... if the Security Council, because of lack of unanimity of the Permanent Members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or an act of aggression the use of armed force when necessary, to maintain or restore international peace and security.<sup>21</sup>

Article 1(4) of Additional Protocol I to the Geneva Conventions of 12 August 1949 afforded special sanction to “armed conflicts in which peoples are fighting against colonial domination and alien occupation

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19 See the UN Charter preamble & art 42.

20 *Idem* art 51. In cases of collective self-defence, the state for whose benefit this right is used must declare itself to be the victim of an armed attack. *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*: Merits par 196 1986 ICJ 13, at 114 (1986-06-27). The victim state must furthermore request the assistance of the other state or states participating in the collective defence of the victim state (*Nicaragua case supra* at par 199).

21 GA Res 377 (V) (A) of 1950-11-03 5 UN GAOR Supp No 20 at 10 UN Doc A/1775 (1950).

and against racist regimes in the exercise of their right to self-determination".<sup>22</sup> The legitimacy of wars of liberation against colonial rule, foreign domination and racist regimes has also been acknowledged repeatedly by the General Assembly of the UN.<sup>23</sup> The General Assembly was quite explicit in saying that the "legitimate struggle" includes the armed struggle of liberation movements.<sup>24</sup> If the UN, itself, endorsed the legitimacy of armed interventions not mentioned in its Charter, why then not also acknowledge the continued legality of humanitarian interventions?

There are indeed those who bluntly deny the legality of humanitarian intervention without Security Council endorsement.<sup>25</sup> However, arguments in support of the continued legality, or the moral legitimacy, of humanitarian intervention have been wide-ranging,<sup>26</sup> and can be reduced to three quite distinct points of departure.

- (a) The **literalist approach**, represented by Julius Stone (1907-1985), maintains that Article 2(4) of the UN Charter does not forbid the threat or use of force *simpliciter*, but only the threat or use of force for specific unlawful purposes, namely, "against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the UN"; and since humanitarian intervention does not seek to change territorial borders of the state under attack or to challenge the political independence of that state, it falls outside the scope of the UN

22 *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 1977, art 1(4) UN Doc A/32/144, 1125 UNTS 3, 16 ILM 1391 (1977).

23 See for example, GA Res 3163 (XXVIII) of 1973-12-14 par 5, 28 UN GAOR Supp (No 30) 5 UN Doc A/9030 (1973) proclaiming the legitimacy of the struggle of the people under colonial and alien domination to exercise their right to self-determination and independence by all necessary means; GA Res 3411 (XXX) of 1975-12-10 par G5, 30 UN GAOR Supp (No 34) at 36 UN Doc A/10034 (1975) proclaiming the legitimacy of the struggle against a racist regime by all means possible; GA Res 35/206A of 1980-12-16 par 1, 35 UN GAOR Supp (No 48) at 29 UN Doc A/35/48 (1980); GA Res 36/172A of 1981-12-17 par 13, 36 UN GAOR Supp (No 51) at 38 UN Doc A/36/51 (1981); and see also SC Res 437 of 1980-06-13, 35 UN SCOR (Res & Dec) at 18, par 4 UN Doc S/INF/36 (1980) proclaiming the legitimacy of the struggle of the South African people for the elimination of apartheid; and see Schwebel, 'Wars of Liberation as Fought in UN Organs' in Moore (ed) *Law and Civil War in the Modern World* 218.

24 See for example, GA Res 37/69A of 1982-12-09 par 16, 37 UN GAOR Supp (No 51) 28 UN Doc A/37/51 (1982); GA Res 38/39A of 1983-12-05 par 4, 38 UN GAOR Supp (No 47) 36 UN Doc A/38/47 (1983).

25 See for example, Shukri 'Will Aggressors Ever be Tried Before the ICC?' in Politi & Nesi *The International Criminal Court and the Crime of Aggression* (2004) 34-35; Bantekas 'Defences in International Criminal Law' in McGoldrick, Rowe & Donnelly (eds) *The Permanent International Criminal Court: Legal Policy Issues* (2004) 278-79 (maintaining that lawful armed intervention is confined to those sanctioned by art 42 & 51 of the UN Charter and that pre-emptive self-defence is not legitimate).

26 See Lillich 'A United States Policy of Humanitarian Intervention in Kommers & Loescher (eds) *Human Rights and American Foreign Policy* (1979) 288-89; and for a critical analysis of the following classification, see Kemp *Individual Criminal Liability for the International Crime of Aggression* (2010) 64-68.

Charter proscription.<sup>27</sup> Furthermore, one cannot, according to Stone, reconcile a blanket prohibition of the threat or use of force with the provisions of Article 2(3) of the UN Charter, which call upon member states of the UN to settle international disputes by peaceful means and in such a manner that international peace, “and justice”, are not endangered.<sup>28</sup>

- (b) The **flexible and teleological approach**,<sup>29</sup> represented by Michael Reisman, argues that the prohibition of the threat or use of force must be read in conjunction with the overarching human rights concerns of the UN as recorded in several provisions of the UN Charter<sup>30</sup> and of which humanitarian intervention is a logical extension.<sup>31</sup>
- (c) The **emergency mechanism argument**, represented by Richard Baxter<sup>32</sup> and Richard Lillich,<sup>33</sup> bases the justification for humanitarian intervention on a necessity deriving from the imperfections of the Security Council, due to the veto powers of the permanent members and the (then) prevailing Cold War, to execute its primary function of maintaining international peace and security: there is a need for humanitarian intervention exactly because the Security Council has been immobilised by the veto power of the permanent members. This presupposes that humanitarian intervention is to be “deactivated” should the Security Council ever begin to function smoothly.

Although humanitarian intervention remains “a murky area of law and morality”,<sup>34</sup> there does seem to be a need for “‘a form of collective intervention’ beyond the veto-bound Security Council”,<sup>35</sup> but then under strict conditions relating, first, to the circumstances that would justify military action in a given situation, and secondly, the manner in which it is to be executed. Humanitarian intervention will only be warranted in exceptional cases of extreme, and at the time ongoing, violations of human rights;<sup>36</sup> and as to execution of an armed intervention, collective rather than unilateral action must be the norm. Humanitarian

27 Stone *Aggression and World Order* (1958) 95; and see contra Schachter ‘The Right of States to Use Armed Force’ 1984 *Mich L Rev* 1620 1633.

28 Stone *supra* n 27 at 95 & 98-101.

29 See Brownlie ‘Humanitarian Intervention’ in Moore *supra* n 23 at 218.

30 UN Charter preamble & arts 1, 55 & 56.

31 Reisman ‘Humanitarian Intervention to Protect the Ibos’ in Lillich (ed) *Humanitarian Intervention and the United Nations* (1973) 177-178; and see also Roberts *supra* n 19 at 8.

32 Baxter (discussant in conference proceedings) in Lillich *supra* n 31 at 54 (“... it is almost as if we were thrown back on customary international law by a breakdown of the Charter system”).

33 Lillich *supra* n 26 at 289; and see also Lillich ‘Forcible Self-Help by States to Protect Human Rights’ 1967 *Iowa L Rev* 325 335 & 345-351; Lillich ‘Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives’ in Moore *supra* n 23 at 230.

34 Smith ‘Moral Hazard and Humanitarian Law: The International Criminal Court and the Limits of Legalism’ 2002 *Int. L & Politics* 175 189.

35 Henkin ‘Kosovo and the Law of Humanitarian Intervention’ 1999 *Am J Int L* 824 828.

36 Kritsiotis ‘Arguments of Mass Confusion’ 2004 *Eur J Int L* 233 273 (noting that states have reserved the right of humanitarian intervention for extreme situations of acute or aggravated humanitarian need).

intervention has thus been defined as “the use of military force – consensual or otherwise – by regional and international bodies to prevent or stop massive and systematic human rights violations”.<sup>37</sup> Human Rights Watch emphasised that “advocating non-consensual military intervention only when it is the last feasible option to avoid genocide or comparable mass slaughter”, adding that “given the risk to life inherent in any military action, only the most severe threats to life should warrant consideration of an international armed response”.<sup>38</sup>

There are a number of prominent international lawyers, on the other hand, who maintain that humanitarian intervention is decidedly illegal but might in special circumstances derive a certain morally-defined justification, basing their reluctance to subscribe to the legality of humanitarian intervention on its potential abuse.<sup>39</sup> Richard Falk, for example, argues that the legitimacy, if not the legality, of retaliation and the same, it is submitted, would apply to humanitarian intervention – derives from the “acceptability” of the use of force in the special circumstances that prompted its use.<sup>40</sup>

The assumption underlying such an approach is that the primary role of international law is to help governments plan *how* to act, rather than to permit some third-party judge to determine whether contested action is legal or not. In fact the function of the third-party judge can be performed properly only by attempting to assess *in what respects* and *to what extent* the governmental actor “violated” community norms of a presumptive nature.<sup>41</sup>

Jonathan Charney, commenting on the Kosovo bombings, likewise maintained that “keeping such intervention illegal and requiring states to break the law in extreme circumstances may be the best and most likely way to limit its abuse, despite not being a perfect solution”.<sup>42</sup> The moral appeal of the use of force “would tend to mitigate or even overcome any perceived ‘illegality’” of such action.<sup>43</sup>

Assuming, though, that humanitarian intervention would be the way to go in extreme cases of human rights abuses, the British proposal for taking such action in Syria is problematic in quite a different respect. The

37 Monshipouri & Welch ‘The Search for International Human Rights and Justice: Coming to Terms with New Global Realities’ *Hum Rts Q* 2001 370 378; and see also Smith *supra* n 34 at 178.

38 Human Rights Watch *World Report Events of 1999 2000* at xix.

39 Kritsiotis ‘Reappraising Policy Objections to Humanitarian Intervention’ 1998 *Mich J Int L* 1005 1020-21; see also Smith *supra* n 34 at 183.

40 Falk ‘The Beirut Raid and the International Law of Retaliation’ 1969 *Am J Int L* 415 425 (arguing that certain behaviour might be acceptable though not legal).

41 *Idem* 442.

42 Charney ‘Anticipatory Humanitarian Intervention in Kosovo’ 1999 *Am J Int L* 834 838; and see also Friedman ‘Comment’ in Moore *supra* n 23 at 578-579 (maintaining that concepts such as humanitarian intervention have at best attained the level of accepted international morality rather than law).

43 Falk *supra* n 40 at 439 (“also proclaiming that [a] rule of conduct isolated from context is often too abstract to guide choice of action”).

purpose of humanitarian intervention is invariably the toppling of a repressive regime and the reinstatement of the rule of law under a newly-elected government. However, Britain, France and the United States made it clear that the purpose of an armed intervention in Syria would not be geared toward the overthrow of the current regime. The problem that confronted the states concerned was that creating a situation in which the rebel forces might gain political control would most likely be bad news for the West because those rebel forces have close links with Al-Qaeda and seem to uphold quite radical political views.

#### 4 The American Alternative

President Barack Obama based the legitimacy of an armed attack against (undefined) targets in Syria on considerations of self-defence and the defence of allied countries in the region such as Israel, Jordan and Macedonia. The problem with this approach is that none of the countries mentioned have been attacked by Syria or are under threat of an armed attack.

Article 51 of the UN Charter authorises individual or collective self-defence in cases where an armed attack occurred against a member state of the UN.<sup>44</sup> The question whether or not this provision precludes anticipatory self-defence action is, in itself, problematic, since that article by its own wording only authorises individual or collective self-defence “if an armed attack occurs”.<sup>45</sup> Does this mean that one should wait until the enemy has slapped you in the face before you can punch him on the nose?

It stands to reason that a state need not wait for the other side to strike the first blow if it is abundantly clear and absolutely certain that an armed attack is imminent.<sup>46</sup> As noted by Sir Humphrey Waldock:

Where there is convincing evidence not merely of threats and potential danger but of an attack being actually mounted, then an armed attack may be said to have begun to occur, though it has not passed the frontier.<sup>47</sup>

Some analysts relied on reference in Article 51 to “the *inherent right* of individual or collective self-defence” [emphasis added] could arguably

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44 UN Charter art 51.

45 See Alexandrov *Self-Defence against the Use of Force in International Law* (1996) 165; O’Connell *The Myth of Preemptive Self-Defence* (2002) 5 available from <http://www.asil.org/taskforce/oconnell.pdf> (interpreting art 51 to mean that an attack must be underway or must have already occurred in order to trigger the right to unilateral self-defence).

46 See Reisman ‘International Legal Responses to Terrorism’ 1999 *Houston J Int L* 3 17; and see also Arend & Beck *International Law and the Use of Force: Beyond the UN Charter Paradigm* (1993) 186 (stating that “[w]ith the demise of Article 2(4), it is reasonable to assume that this preexisting right [to anticipatory self-defence] would be rehabilitated”).

47 Waldock ‘The Regulation of the Use of Force by Individual States in International Law’ in *Recueil des Cours* (1952) 498.

include pre-emptive action.<sup>48</sup> The inherent right to self-defence includes more than merely taking defensive action after an attack has occurred; reference to individual or collective self-defence “if an attack occurs” was intended “to list [merely] one situation in which a state could clearly exercise that right”.<sup>49</sup>

In its *National Security Strategy* of 2002, the United States endorsed the right to pre-emptive self-defence action:

The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.<sup>50</sup>

The General Assembly of the UN has also endorsed a right to pre-emptive self-defence action, proclaiming “... a threatened state, according to established international law, can take military action as long as the threatened attack is *imminent*, no other means would deflect it and the action is proportionate”.<sup>51</sup> It should be noted, though, that whereas the United States used the concepts of “pre-emptive” and “anticipatory” action interchangeably,<sup>52</sup> the General Assembly made a distinction between “pre-emptive” and “anticipatory” self-defence action, defining the former concept as action “against an imminent or proximate threat” and the latter as action “against a non-imminent and non-proximate one”.<sup>53</sup> Even though it could be argued “that the potential harm from some threats (eg, terrorist armed with a nuclear weapon) is so great that one simply cannot risk waiting until they become imminent, and that less harm may be done (eg, avoiding a nuclear exchange or radioactive fallout from a reactor destruction) by acting earlier”,<sup>54</sup> international law requires “that if there are good arguments for preventive military action, with good evidence to support them, they should be put to the Security Council, which can authorise such action if it chooses to”.<sup>55</sup> And what if the Security Council for whatever reason should not authorise anticipatory defensive action? Then, said the General Assembly, “there will be, by definition, time to pursue other

48 Arend & Beck *supra* n 46 at 72-73; and see O’Connell *supra* n 45 at 12; O’Connell ‘Review Essay: Re-leashing the Dogs of War’ 2003 *Am J Int L* 446 453.

49 Arend & Beck *supra* n 46 at 73.

50 *The National Security Strategy of the United States* 2002 15 (2002-09-17) available from [http://www.au.af.mil/au/awc/awcgate/nss/nss\\_sep2002.pdf](http://www.au.af.mil/au/awc/awcgate/nss/nss_sep2002.pdf).

51 *Report of the High-Level Panel on Threats, Challenges and Change* UN Doc A/59/565 at par 188 (2 Dec 2004).

52 *Ibid*; and note that this writer has also in the past used the two terms interchangeably; see van der Vyver ‘Ius Contra Bellum and American Foreign Policy’ 2003 *Sou Afr Y B Int’l L* 1 4-5.

53 *Supra* n 51; *supra* n 11 at par 189.

54 *Ibid*.

55 *Idem* 190.

strategies, including persuasion, negotiation, deterrence and containment – and to visit again the military option”.<sup>56</sup>

It is commonly accepted that pre-emptive self-defence must be confined to the circumstances specified by Secretary of State Webster in a diplomatic communique to his British counterpart in the case of *The Caroline*; that is to say, pre-emptive action must be confined to cases in which the “necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment of deliberation”.<sup>57</sup> Jordan Paust has pointed out that *The Caroline* incident was not actually a matter of pre-emptive self-defence since it occurred in the process of continued attacks on the government of Canada by insurgents.<sup>58</sup> That may be the case, but it is equally true that the citation from *The Caroline* has come to be regarded as the decisive norm governing pre-emptive military action.<sup>59</sup> It was, for example, quoted by the Nuremberg Military Tribunal in the context of preventive armed intervention.<sup>60</sup> Pre-emptive self-defence must therefore, remain confined to “situations in which the imminence of an attack is so clear and the danger so great that defensive action is essential for self-preservation”.<sup>61</sup> It must also comply with the test of proportionality.<sup>62</sup>

It should be evident to everyone that Syria had no intention whatsoever to launch an armed attack against the United States or against any of its allies in the region. That being the case, an armed attack by American forces against targets in Syria cannot even with any stretch of the imagination be justified on self-defence grounds – anticipatory, pre-emptive or otherwise!

## 5 The French Connection

French Prime Minister Jean-Marc Ayrault’s proposal that Syria should be rapped over the knuckles for its unlawful and highly unbecoming act was the least persuasive of all the reasons advanced by Western powers for an armed attack against selected Syrian targets. In his Address to the Nation on Syria of 10 September 2013, President Obama conceded that “we [the United States] should not be the world’s policeman”. That is a

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<sup>56</sup> *Ibid.*

<sup>57</sup> ‘The Caroline’ in Moore (ed) *Digest of International Law* (1906) 412; Lori, Henkin, Pugh, Schachter & Smit *International Law: Cases and Materials* (2001) 922-923.

<sup>58</sup> Paust ‘Use of Armed Force against Terrorists in Afghanistan, Iraq, and Beyond’ 2002 *Cornell Int’l LJ* 533 535.

<sup>59</sup> See Waldock *supra* n 47 at 498; Reisman, *supra* n 46 at 47 & 48-49.

<sup>60</sup> *United States & Others v Göring & Others*, Trials of the Major War Criminals Before the International Military Tribunal, Nuremberg 14 November 1945 - 1 October 1946, Judgment 171 at 207. Nuremberg: Int’l Mil. Tribunal (1946-49).

<sup>61</sup> Schachter ‘The Right of States to Use Armed Force’ 1984 *Mich L Rev* 1620 1634 (1984).

<sup>62</sup> Arend & Beck *supra* n 46 at 249.

fair assessment of the laws and customs of general international law. However, governments are fully entitled to take punitive action against foreign states for good reasons. Such action could include the severance of diplomatic relations, the interruption of trade relations, and the cessation of means of communication. Such unfriendly acts are part and parcel of state sovereignty. Engaging in an armed response to the unlawful conduct of the other state is not included in the retributory package authorised by contemporary international law as a matter of retorsion. It is trite law, today, that the Security Council of the UN is the only body in the world that can take punitive action against states whose conduct constitutes a threat to the peace, a breach of the peace or an act of aggression.

This raised the question in my mind whether or not French courts could perhaps prosecute the persons responsible for the deployment of chemical weapons in Syria under the rubric of universal jurisdiction. French courts can only exercise universal jurisdiction relating to customary law crimes in exceptional cases.<sup>63</sup> It is thus not within their general power to prosecute crimes against humanity or the crime of genocide committed by foreigners beyond the country's territorial borders. The French Code of Criminal Procedure does make provision for the exercise of universal jurisdiction in respect of specific crimes against humanity stipulated in crime creating conventions incorporated into French municipal law where the conventions authorise the exercise of jurisdiction by national courts,<sup>64</sup> such as the crime of torture,<sup>65</sup> acts of terrorism,<sup>66</sup> terrorist bombing,<sup>67</sup> and the financing of terrorism,<sup>68</sup> and the offence of enforced disappearance.<sup>69</sup> The events in Syria do not fall within any of these specific categories.

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63 See in general International Federation for Human Rights – Legal Action Group, France: Universal Jurisdiction, Status of the Implementation of the Principle of Universal Jurisdiction, no 431/2 (2005).

64 *Code de procédure pénale* art 689. See also International Federation for Human Rights – Legal Action Group, France Universal Jurisdiction: Status of the Implementation of the Principle of Universal Jurisdiction (2005) n 431/2.

65 *Idem* art 689-2 based on the *International Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment* of 10 Dec 1984.

66 *Idem* art 689-3 based on the *European Convention on the Suppression of Terrorism* of 27 Jan 1977; and the *Agreement concerning the Application of the European Convention on the Suppression of Terrorism among the Member States of the European Communities* of 4 Dec 1979.

67 *Idem* art 689-9 based on the *International Convention for the Suppression of Terrorist Bombing*, signed on 12 Jan 1998.

68 *Idem* art 689-10 based on the *International Convention for the Suppression of the Financing of Terrorism*, signed on 10 Jan 2000.

69 *Idem* art 689-13 based on the *International Convention for the Protection of All Persons from Enforced Disappearance*, adopted by the General Assembly of the UN on 20 Dec 2006, signed on 2007-02-06 and entered into force on 2010-12-23.

Other offences incorporated into French law and which have been subjected to universal jurisdiction include failure to protect nuclear facilities and material in peaceful domestic use or storage or being transported and to take rapid measures to locate and recover stolen or smuggled nuclear material, or to anticipate any radiological consequences of sabotage and to combat related offences;<sup>70</sup> unlawful acts against the safety of marine navigation,<sup>71</sup> and against the safety of fixed platforms located on the continental shelf;<sup>72</sup> the unlawful seizure of aircraft,<sup>73</sup> and against the safety of civil navigation;<sup>74</sup> unlawful acts of violence at airports serving international civil aviation;<sup>75</sup> acts in violation of financial interests of the European Community,<sup>76</sup> and corruption involving officials of member states of the European Union.<sup>77</sup> The French law of criminal procedure also established “quasi universal” jurisdiction for the prosecution of certain road offences within the European community.<sup>78</sup> Here, too, the deployment of chemical weapons in a foreign country does not fit the bill.

As far as crimes within the jurisdiction of the International Criminal Court (ICC) are concerned, the French Code of Criminal Procedure authorises the exercise of universal jurisdiction by French courts in cases where the ICC has declined to exercise jurisdiction and no other state has asserted jurisdiction or requested the extradition of the person suspected of having committed the crime.<sup>79</sup> For the exercise of universal jurisdiction in such cases, the Code of Criminal Procedure further requires that the suspect is currently residing in France, that the criminal act is punishable under the national law of the territorial state (the state where the crime was committed), and that the territorial state is a state party to the ICC Statute.<sup>80</sup> This again excludes Syrian nationals from prosecution in French courts. It does raise the question, though, whether those responsible for the deployment of chemical weapons in Syria can be brought to trial in the ICC.

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70 *Idem* art 689-4 based on the *Convention for the Physical Protection of Nuclear Material*, signed on 1990-05-03.

71 *Idem* art 689-5 based on the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* of 10 Mar 1988.

72 *Ibid* based on the *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf* of 10 Mar 1988.

73 *Idem* art 689-6 based on the *Convention for the Suppression of Unlawful Seizure of Aircraft*, signed on 1970-12-16.

74 *Ibid* based on the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, signed on 1997-09-23.

75 *Idem* art 689-7 based on the *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving Civil Aviation* of 24 Feb 1988.

76 *Idem* art 689-8 based on the *Protocol to the Convention on the Protection of the European Communities' Financial Interests* of 27 Sep 1996.

77 *Ibid* based on the *Convention on the Fight against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union* of 25 May 1997.

78 *Idem* art 689-12 based on *Regulation (EC) No 561/2006 of the European Parliament and of the Council* of 15 Mar 1996.

79 *Idem* art 689-11.

80 *Ibid*.

## 6 Prosecuting the Offenders in the ICC

Several well-intended analysts have proposed that the persons responsible for the rocket attacks in Syria be brought to trial to the ICC.<sup>81</sup> It must be noted that the ICC can only prosecute the individuals responsible for a crime within the subject-matter jurisdiction of the ICC and that since Syria has not ratified the ICC Statute, the matter can only be brought to trial if the situation in Syria is referred to the ICC by the Security Council of the UN pursuant to its Chapter VII powers. This means, among other things, that a Security Council resolution referring the situation in Syria to the ICC can be vetoed by any one of the permanent members of the Council.

The Security Council, in a Resolution of 27 September 2013, expressed “its strong conviction that those individuals responsible for the use of chemical weapons in the Syrian Arab Republic should be held accountable”.<sup>82</sup> This raised the question whether the Security Council envisaged reference of the situation in Syria for investigation by the ICC. It should be noted in this regard that:

- Since Syria has not ratified the ICC Statute and has not otherwise consented to the exercise of jurisdiction by the ICC, the matter can only be investigated by the Office of the Prosecutor following a Security Council referral;
- Since the Security Council Resolution of 27 September 2013 represented a compromise proposal orchestrated by the Russian Federation and the United States, one could expect that neither of those two states, nor any of the other permanent members of the Security Council, will veto a referral of the situation to the ICC;
- The responsible person or persons cannot be prosecuted in the ICC for the war crime of “[e]mploying asphyxiating, poisonous or other gasses, and all analogous liquids, materials or devices,” since the crime in question only comes within the subject-matter jurisdiction of the ICC if the employment of such weapons occurred in an international armed conflict;<sup>83</sup>
- The Review Conference that was held in Kampala, Uganda on 31 May to 11 June 2010, adopted, by general agreement, a proposal submitted by Belgium for the inclusion in the subject-matter jurisdiction of the ICC the employment of asphyxiating, poisonous or other gasses, and all

81 Those calling for a referral of the situation in Syria to the ICC include Nuremberg Prosecutor Benjamin Ferencz. National Public Radio, *Nuremberg Prosecutor Makes the Case for Trying Assad* (2013-09-08), available from <http://www.nrp.org/2013/09/08/220037023/nuremberg-prosecutor-makes-the-case-for-trying-assad.htm>.

82 SC Res 2118 (2013) par 15 UN Doc S/RES/2118 (2013-09-27).

83 Statute of the International Criminal Court (the ICC Statute) art 8(2)(b)(xviii) & (ii) UN Doc A/Conf.183/9 (1998-07-17).

analogous liquids, materials or devices in an armed conflict not of an international character;<sup>84</sup>

- Entry into force of the Kampala amendments to the ICC Statute requires 30 ratifications and it has not yet reached that goal;<sup>85</sup>
- Even though persons responsible for the employment of chemical weapons in Syria, therefore, cannot be prosecuted in the ICC for the war crime based on the same because the conflict in Syria is not an international armed conflict, they can be brought to trial in the ICC for the use of chemical weapons as a variety of crimes against humanity.<sup>86</sup>

However, in the end, reference of the situation in Syria to the ICC was not to be. A resolution drafted by France for referral of the situation in Syria to the ICC was vetoed by China and Russia on 22 May 2014.

## 7 Russia Having the Final Say

Ratification by Syria of the *Convention on the Prohibition of the Development, Production and Stockpiling and Use of Chemical Weapons and on Their Destruction* was clearly the outcome of an agreement reached between Russia and the United States on 14 September 2013, on a framework for the elimination of chemical weapons in the Syrian Arab Republic. Russia was from the outset strongly opposed to any punitive action against Syria, let alone an armed attack against Syrian targets. It also became quite evident that President Obama would most likely not get Congressional approval for such an attack. President Obama maintained that he could order such an attack without Congressional approval, but would nevertheless ask for such approval so as to ensure that he has the support of the American people. Embarking on discussion with Russian authorities was most likely sparked by the prospect of suffering the same kind of defeat which Prime Minister Cameron suffered in the British Parliament. Be that as it may, it was eventually decided that Syria will immediately set technologies in motion, under UN supervision, for the destruction of its chemical weapons. The Security Council on 27 September 2013, having noted that “the use of chemical weapons anywhere constitutes a threat to international peace and security”,<sup>87</sup> while condemning “in the strongest terms any use of chemical weapons in the Syrian Arab Republic”,<sup>88</sup> decided accordingly:

- (a) [T]hat the Syrian Arab Republic shall not use, develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer,

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84 *Idem* art 8(2)(e)(xiv), inserted pursuant to ICC-ASP/RC/Res 5 annex I (2010-06-11); and see also ICC-ASP/RC/Res 5 annex II (amending the Elements of Crimes accordingly).

85 Countries that have thus far ratified the Kampala amendments to the ICC Statute include Botswana, Estonia, Germany, Liechtenstein, Luxembourg, Samoa, Trinidad and Tobago and Uruguay.

86 See for example, Meron ‘Crimes Under the Jurisdiction of the International Criminal Court’ in von Hebel, Lammers & Schukking *supra* n 10 at 55.

87 SC Res 2118 (2013) *supra* n 82 at par 1.

88 *Idem* par 2.

directly or indirectly, chemical weapons to other states or non-state actors,<sup>89</sup> and

- (b) [T]hat the Syrian Arab Republic shall comply with all aspects of the decision of the OPCW Executive Council of 27 September 2013.<sup>90</sup>

The plan of action of the Organisation for the Prohibition of Chemical Weapons (OPCW) for the destruction of Syrian chemical weapons, which is attached to the Security Council Resolution,<sup>91</sup> was based on a Framework for Elimination of Syrian Chemical Weapons agreed upon by the United States and the Russian Federation on 14 September 2013.<sup>92</sup> Considering the responses of the Heads of State of France, Great Britain and the United States to the use of chemical weapons in Syria, it is fair to conclude that, in this matter, the Russian Federation has set the international community of states on the right course.

It must be emphasised in conclusion that an armed attack by the Western countries would have constituted a profound violation of international humanitarian law. The UN Charter demands that all member states “shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered”.<sup>93</sup> To France, one should say, that the maintenance of international peace and security is a primary function of the Security Council of the UN,<sup>94</sup> and that punitive action against states whose conduct constitutes a threat to the peace, a breach of the peace, or an act of aggression can only be imposed by the Security Council.<sup>95</sup> President Obama should be reminded that the United States and its allies in the Middle East were not under threat of an impending and immediate attack and that pre-emptive self-defence is only permissible in circumstances in which the “necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment of deliberation”.<sup>96</sup> Prime Minister Cameron of Great Britain was on the right track by seeking to justify an armed attack against Syria on the basis of humanitarian intervention, because the situation in Syria most certainly complied with the demands for militant humanitarian action. However, his Western allies made it quite clear that they will not seek to topple the Ba’ath Party rule and to replace President Bashar al-Assad as Head of State; and replacement of as repressive government is exactly what humanitarian intervention is designed to achieve. It was generally feared in the Western countries that toppling the current government of Syria and placing the country under the rule of the rebel forces might be bad

89 *Idem* par 4.

90 *Idem* par 6.

91 *Idem* annex I.

92 OPCW Executive Council *Joint National Paper by the Russian Federation and the United States of America: Framework for Elimination of Syrian Chemical Weapons* UN Doc EC-M-33/NAT.1 (2013-09-17).

93 UN Charter *supra* n 4 at art 2(3).

94 *Idem* art 24(1).

95 *Idem* arts 39-42.

96 ‘The Caroline’ *supra* n 57.

news for the West because there are clear indications that the rebel groups include quite radical Islamic forces with links to Al Qaeda.

In conclusion, it might be mentioned that it was at times suggested that the United States and its allies should perhaps provide weapons and afford logistical support to the rebel forces in Syria so as to enable them to topple the repressive government. The idea did not find favour with persons in authority, exactly because of the radical trends among the rebel forces. In addition, it should be borne in mind that the *Nicaragua Case* is authority for the proposition that if the government of state A is under threat of militant rebel forces, it could lawfully request state B to support it in its military efforts to suppress the uprising, but it would be unlawful under the current rules of international law for state B to afford military support to the rebels that are trying to overthrow the government of a member state of the UN.<sup>97</sup>

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<sup>97</sup> See *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* supra n 20 at par 196.

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# Angels and demons, innocents and penitents: An analysis of different “characters” within the penal discourse of apartheid South Africa 1980 to 1984 – Part One

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## OPSOMMING

### Engel en Duiwels, Onskuldiges en Boete-doeners: 'n Analise van Verskillende “Karakters” in die Gevangenis-diskoers van Apartheid Suid-Afrika (1980 tot 1984)

Wat ras, klas en geslag betref was daar vanaf koloniale tye af nog altyd 'n tweespalt in die Suid-Afrikaanse gemeenskap. In so 'n verskeurde samelewing is die openbare debat rondom 'n komplekse sosiale praktyk soos straf of gevangenisstraf noodwendig deurspek met nuanse. Hierdie artikel ondersoek wyses waarop temas in die openbare debat rondom gevangenisstraf in Suid-Afrika verskil van een kategorie van gevangenes tot die volgende. Die tydperk wat ondersoek word is die eerste helfte van die 1980s – 'n dekade waarin aansienlike krake in apartheid toegedien is; 'n tydperk waarin interne en eksterne opposisie teen die stelsel 'n hoogtepunt bereik het, en die owerhede met 'n “algehele strategie” opgetree het. Elke draad van die ondersoekte diskoers onthul 'n ander “karakter” in die oorkoepelende verhaal wat spruit uit die gevangenis-diskoers van die tyd. Die diskoers rondom die volgende vier kategorieë van gevangenes word ondersoek: wit manlike gevangenes, bende-lede in gevangenis, wit vroulike gevangenes, kinders. Die artikel bestaan uit twee dele – Deel Een fokus op die eerste twee kategorieë en Deel Twee op die laaste twee.

## 1 Introduction

In general terms, public discourse surrounding imprisonment as a form of punishment is multi-layered and nuanced. It is influenced by the social, political and economic history of the penal system under discussion, as well as by the particular historical conjuncture at which the discourse is examined. Furthermore, penal discourse will often vary widely from one category of prisoners to the next. The complex and multivalent nature of such discourse is particularly apparent in the case of the South African penal system, perhaps because of the deeply divided nature of South African society from colonial times to the present. The

purpose of this article is to examine the ways in which, at a particularly crucial time in the country's history, strands in the public discourse surrounding imprisonment in South Africa differed from one category of prisoners to the next. Each strand reveals a different "character" within the overall story which emerges from the penal discourse of the time.

The period examined is the first half of the 1980s, a decade which witnessed major cracks in apartheid, as internal and external opposition to the system reached a climax and the authorities responded with their so-called "total strategy". The total strategy of the apartheid government included the further militarisation of an already militarised white South African society, as well as the declaration of a state of emergency on 20 July 1985. The first half of the 1980s is particularly interesting from the point of view of penal discourse since the prisons were one of the points at which the stresses and strains within the apartheid system became visible, despite efforts on the part of the authorities to stifle reporting in the press.<sup>1</sup> The focus of this article is on a cross-section of reports drawn from national and regional newspapers published during this time, including both the English and Afrikaans "white mainstream press";<sup>2</sup> the more "politically conservative Afrikaner press";<sup>3</sup> and the "black mainstream press".<sup>4</sup> By comparing and contrasting many reports from these sources, it is possible to extract a fairly clear overall picture of the public discourse surrounding imprisonment at this time.

The discourse surrounding the following categories of prisoners is examined: white male prisoners; prison gang members; white female prisoners; and children. The first two categories will be dealt with in Part One of this article, and the last two categories in Part Two. The reasons for choosing to examine these particular categories of prisoners are: firstly, each of these categories is clearly distinguishable in the data as giving rise to a separate strand of discourse; secondly, the categories are sufficiently distinct from each other to provide clear points of contrast, sometimes appearing as polar opposites within the penal discourse as a whole; and thirdly, for each of the categories there are historical parallels

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1 See in general, Peté 'Holding up a mirror to apartheid South Africa – Public discourse on the issue of overcrowding in South African prisons 1980 to 1984 – Parts one and two' (forthcoming).

2 In this article the term "white mainstream press" is used as a rough rule of thumb and should not be read as a strict scientific definition. In this article, the English white mainstream press is taken to include newspapers such as the *Cape Times*, the *Rand Daily Mail*, the *Natal Mercury*, the *Natal Witness*, the *Daily News*, the *Cape Times*, *The Star*, the *Eastern Province Herald*, the *Sunday Tribune* and the *Daily Dispatch*. The Afrikaans white mainstream press is taken to include newspapers such as *Beeld* and *Rapport*.

3 In this article, the term "more politically conservative Afrikaner press" is used as a rough rule of thumb and should not be read as a strict scientific definition. In this article, the more politically conservative Afrikaner press is taken to include newspapers such as *Die Volksblad* and *Die Vaderland*.

4 In this article the term "mainstream black press" is used as a rough rule of thumb and should not be read as a strict scientific definition. In this article the mainstream black press is taken to include newspapers such as *City Press* and *Sowetan*.

to be drawn – historical resonances – with strands of discourse which emerged long before during colonial times. In relation to the historical parallels which may be drawn, it is clearly beyond the scope of this article to capture every nuance of South African penal discourse over several centuries, in order to identify each possible point of convergence within the discourse. Instead, this article will focus particularly on the penal discourse of colonial Natal for purposes of comparison. A defined focus of this kind allows a deeper and more nuanced analysis and comparison of penal discourse than would otherwise be possible.

Public discourse is important since it provides a clear indication of the ideological context within which the punishment of prisoners is taking place. A detailed understanding of this ideological context will, it is submitted, be helpful in getting to grips with the dilemmas faced by the South African penal system today. While problems such as overcrowding, “warehousing”, racial discrimination, the continued existence of prison gangs, the general failure to rehabilitate offenders, and so on, are often discussed in practical terms, the ideological dimension of the general failure of our penal system is not often addressed. Why is it that the same “problems” and the same “solutions” are endlessly, but fruitlessly, debated from year to year, decade to decade, and from one century to the next? In separating out the strands of public discourse in respect of different categories of prisoners in apartheid South Africa during the first half of the 1980s, and linking these strands to previous debates during colonial times, this article hopes to make progress towards answering this question and to contribute to a deeper understanding of the ideological context of imprisonment in South Africa.

## **2 Penitents – White Male Prisoners**

As a starting point to an examination of the discourse surrounding the punishment of white male prisoners in the first half of the 1980s, it is useful to make brief mention of what I have termed “historical resonances” within this particular strand of penal discourse. As mentioned in the introduction, the penal system of colonial Natal will be used as a point of comparison. An established theme in the discourse surrounding punishment in Natal during the colonial period was that the punishment of white offenders should be approached in a different manner to the punishment of black offenders.<sup>5</sup> Whereas the punishment of black offenders was often discussed in terms of retribution and the re-establishment of (white) authority and control, the discourse surrounding the punishment of white offenders was concerned mainly with rehabilitation and training. Corporal punishment with the dreaded cat-o-

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5 For a detailed account of the different strands of discourse surrounding the punishment of white and black prisoners in colonial Natal, see Peté ‘Punishment and Race: The Emergence of Racially Defined Punishment in Colonial Natal’ 1986 *Natal University Law and Society Review* 99-114.

nine-tails was considered a particularly suitable punishment for black “savages”, whereas skills-training in an environment segregated from the “brutalising” world inhabited by black prisoners, was considered appropriate for white offenders.<sup>6</sup> As stated in previous work by this author:

Although white prisoners formed only a small percentage of Natal’s total prison population they assumed a symbolic importance as representatives of the white master class. The white colonists of Natal formed a small tightly-knit community and they perceived of themselves as the guardians of ‘civilised’ norms and standards in a savage and heathen country ... The closed, homogenous nature of white society meant that those who deviated from the norms of that society would be met with social ostracism ... The white prisoner did not only suffer the degradation of being branded as a criminal, however, but to this was added the humiliation of being confined alongside black prisoners and being subjected to the authority of black prison guards. There was thus a double stigma attached to imprisonment for a white person in Natal, and on leaving the prison the white ex-prisoner encountered extreme difficulty in obtaining employment as a result of this stigma.<sup>7</sup>

In an important public debate which took place in the Colony of Natal at the beginning of the twentieth century, the issue of white prisoners and their treatment was discussed.<sup>8</sup> There was intense anxiety within white colonial society as to the perceived negative consequences of allowing “European” prisoners to be confined with prisoners of other races. For example, in January 1905 a correspondent to the *Natal Advertiser* expressed the following opinion:

Nothing is more keenly felt, nothing tends more to make a white man lose his self-respect in effecting reformation than to be paraded cheek by jowl several times a day with, and addressed in terms of familiarity by sombre tinted individuals, who in this part of the world only pass muster as ‘Europeans’ ...<sup>9</sup>

The anxiety of white prisoners to avoid “contamination” by contact with prisoners of mixed race was, at times, paranoid in nature. This is well illustrated in the following laughable account by a white journalist who was confined in the Durban Gaol at the turn of the century:

[A] European in [Natal] ... outside of a prison, means a white man with no coloured blood in him. Inside a prison it means anybody with a nominal education and dressed something like a European ... [T]he idea of whites and blacks huddled together is, when you see it as I saw it in gaol, revolting ... Three in a little cell – think of it – with the same bucket to use as a latrine, the

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6 See for example, Peté *supra* n 5 at 99-114; and Peté & Devenish ‘Flogging, Fear and Food: Punishment and Race in Colonial Natal’ 2005 *Journal of Southern African Studies* 3-21.

7 Peté *supra* n 5 at 106 & 107.

8 This debate took place during the deliberations of the Prison Reform Commission, between 1904 and 1906, when the final report of commission was delivered. See the *Natal Government Gazette* 1906-06-05 Government Notice 344: Report of the Prison Reform Commission.

9 *Natal Advertiser* (1905-01-05) ‘Prison Reform’.

same blankets continually interchanged, the same filth, and insect life creeping and crawling from white to black and from black to white!<sup>10</sup>

The white colonists were worried about more than the perceived dangers of "contamination" and its effect on the rehabilitation of "European" prisoners. Mixing "European" prisoners with "Coloured" prisoners was regarded as posing an ideological threat to white sovereignty as a whole. This is well illustrated in the following extract from the *Natal Advertiser*:

The gaols in Maritzburg and Durban see some thousands of natives passing through every year, and they observe that you treat white men (whom they naturally regard as your brothers) on an absolute equality with Hottentots, Griquas, and other coloured races, whom they themselves regard as their inferiors.<sup>11</sup>

The Natal Prison Reform Commission, which delivered its report in June 1906, concluded that the most fitting solution to the particular dilemmas faced by "European" prisoners – the double stigma and the near impossibility of finding unskilled employment upon release – was the construction of an entirely separate prison focused on industrial skills training for "Europeans".<sup>12</sup> Although this separate prison was never built, the ideology behind its proposed construction is clear. Within the proposed industrial prison for "Europeans", white prisoners would be reformed and taught industrial skills to enable them to fit in as members of the ruling white middle class upon their discharge.<sup>13</sup> Furthermore, with white prisoners sequestered from the public gaze in their exclusive industrial prison, unnecessary threats to white sovereignty would be avoided.

Moving forward in time from the 1900s to the 1980s, it is significant that the theme of racially differentiated punishment which, as pointed out above, emerged particularly strongly during the late colonial period, is still present within penal discourse. Although, by the 1980s, South Africa was clearly a country in transition, this theme – harsh treatment of black offenders versus rehabilitation and training for white offenders – continued to assert itself. An examination of newspaper reports dealing with white prisoners and their treatment in the first half of the 1980s, reveals a completely different ideological and conceptual world to that which is presupposed when the treatment of "non-white" prisoners is being reported on.<sup>14</sup> Although not all reports mention explicitly that it is "white" prisoners as opposed to "non-white" prisoners that are being discussed, by reading between the lines it soon becomes clear whether one is dealing with the smaller and more exclusive category of "white"

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10 Hardy *The Black Peril* (exact date of publication unknown) 274-275.

11 *Supra* n 10.

12 See the *Natal Government Gazette supra* n 8.

13 Peté *supra* n 5 at 110.

14 In this context, the category of "white prisoners" should not be taken to include white political prisoners, who form a completely separate ideological and conceptual category of their own.

prisoners, or with the much bigger category of “normal” – ie overwhelmingly “non-white” – prisoners. In the case of the latter group, imprisonment in apartheid South Africa during the early 1980s almost inevitably meant having to survive chronic overcrowding and brutal treatment. It also meant that many of those imprisoned were not criminals at all, but ordinary people caught in the net of legal social control measures designed to prop up the system of apartheid. Public discussion concerning such prisoners was characterised by wider political concerns; outrage at or support for the apartheid system and its methods of social control; concern over the levels of violence and brutality within the system; worries over the stability and ultimate sustainability of the system, and so on.<sup>15</sup> In the case of “white” prisoners, the concerns expressed were quite different. The language in newspaper reports describing the “white” prison experience is filled with references to introspection, self-discipline, honest hard work, skills-training and rehabilitation. A good example is a series of articles which appeared in September 1980 in *Die Volksblad*. The experiences of white male prisoners in Kroonstad prison were described, *inter alia*, as follows:

At Kroonstad, in the prison for white men, a new day has begun. It is 05h00 and it's another day, another un-ending round of self-examination and self-pity, discipline and silence, a re-examination of one's sense of value... At half past six, with the clang of tin plates and knives still in their ears and the sense of comfort afforded by full stomachs and the memory of warm bodies together around the dining tables, they stand in the first bleak rays of a winter morning with drawn faces, ready for the day's work which must help shape and prepare for a new life – one day ... Hands work with wood, weld, paint, bend and shape – for five hours. At half past eleven it is lunch time. At a central point hundreds of mouths swallow and chew eagerly at a meal of warm, nutritionally balanced food, smoke a precious cigarette, exchange desires and dreams... and then walk back to the work stations. Until half past four. Then it's the long, depressing road back to the prison ... Afterwards a chance for rest and relaxation. Competitive sport, measuring strength and skill, winning trophies and shields – or simply relaxing with a book, listening to music and trying to achieve inner peace within your restricted surroundings.<sup>16</sup>

The descriptions of daily life experienced by white male prisoners at Kroonstad, make it seem as if life for this category of prisoners was healthier inside the prison than out. A good example is a description of

15 See for example, Peté *supra* n 1.

16 The words used were: “Op Kroonstad, in die gevangenis vir blanke mans, het n nuwe dag begin. Dis 05h00 en dis nog 'n dag, nog n oneindiging van self ondersoek, selfbejammering, van discipline en stilstand, om weer jou sin vir waardes in oënskou to neem ... Halfsewe, met die geklingel van blikbord en mes nog in die ore en die behaaglikheid van 'n vol maag en warm lywe saam om n eettafel staan hulle met strak gesigte in die eerste bleek strale van n winteroggend, gereed vir die dagtaak wat moet help skaaf en voorberei vir die nuwe lewe – eendag ... [H]ande timmer, sweis, verf, buig en vorm – vyf ure lank. Halftwalf is dit etenstyd. Op 'n sentrale punt sluk en kou honderde monde gretig aan warm, gebalanseerde kos, rook n kosbare sigaret, wissel begeertes en verlangens ... en stap na

the wholesome prison diet, which was said to lower the usual health risks faced by the white population in general:

As a medical official recently explained: ‘Improved diets incorporating greater quantities of fibre and fewer refined foods mean that white prisoners in South African goals are less likely to suffer from coronary heart disease, obesity and appendicitis than the rest of the white population.’<sup>17</sup>

The list of indoor sports activities provided for white prisoners at Kroonstad reads more like the offerings made available at a sports oriented resort than a prison. The sports at Kroonstad included snooker, body building, darts, table tennis, squash, jukskei, boxing, card games and chess.<sup>18</sup> The overarching theme which informed the descriptions in *Die Volksblad* of the white male prison experience, was that all aspects of their lives were focused on rehabilitation. Over and over again the articles in *Die Volksblad* emphasised treatment, rehabilitation and training as the central goal of imprisonment for this category of offenders, with the aim of producing a better “product” for society in general:

Although, of necessity, the treatment programmes of short and long term prisoners differ, they essentially amount to discouraging negative patterns of behaviour and strengthening positive socially acceptable forms of behaviour. It boils down to the development of self-discipline, constructive labour as a counter to idleness and the cultivation of a sense of responsibility.<sup>19</sup>

A possible reason for this is that, for politically conservative newspapers such as *Die Volksblad*, white male prisoners were still regarded as being part of the “white lager”. Misguided they may be, but certainly not beyond salvation and eventual re-integration into white society. Of course, this somewhat romanticised view of white male prisoners as penitents engaged in a process of self-reflection and

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werkplekke. Tot halfvyf. Dan is dit die lang, trae pad terug na die gevangenis ... Dan is die geleentheid daar vir ontspanning en rus. Mededinging in sport, kragte en vernuf meet, trofee en skilde verower – of net met n boek le, na musiek luister en orde prober kry in jousef en jou beperkte ongewing”. See *Die Volksblad* (1980-09-23) ‘Hier gaan dae traag en grou verby ...’ 10.

17 The words used were: “Soos ’n mediese beampte onlangs gese het: ‘Die beter dieet met meer veselstowwe en minder geraffineerde kos veroorsaak dat blanke gevangenes in Suid-Afrikaanse gevangnisse minder ly aan koronêre hartsiektes, oorgewig en blindedermonsteking as die res van die blanke bevolking”. See *Die Volksblad* (1980-09-23) “n Beter produk gevorm vir gemeenskap’ 13.

18 “Binnenshuise sport op Kroonstad bestaan uit onder meer snooker, liggaamsbou, veerpyltjies, tafeltennis, pluimbal, jukskei, boks, kaartspele en skaak”. See *Die Volksblad supra* n 17 at 13.

19 The words used were: “Hoewel die behandelingsprogramme vir kort en langtermyngevangenis noodwendig verskil, behels dit essensieel vir alle gevangenis n dekontisionering van negatiewe gedragspatrone en n versterking van positiewe, sosiaal aanvaarbare gedrag. Dit kom neer op die ontwikkeling van selfdissipline, konstruktiewe arbeid as teenvoeter vir ledigheid en die aankweek van n verantwoordelikeheidsin”. See *Die Volksblad supra* n 17 at 13.

rehabilitation may not have been shared by the broader “white” ruling class. Nevertheless, it is submitted that the views expressed in these articles provides an interesting insight into the attitudes of a least one faction of the white community at this time, ie those conservatively minded members of that community who tended to form the core of the apartheid government's political support base. The political and ideological assumptions embedded within the *Volksblad* articles provide important clues to the manner in which this important faction of the white ruling class conceptualised the fundamental nature and purpose of punishment. It may be argued that, consciously or unconsciously, they viewed the nature and purpose of punishment in a schizophrenic manner, shifting between diametrically opposed ways of looking at the issue, depending upon whether they had in mind the punishment of “white” offenders or “non-white” offenders. This bifurcation in attitude, dependent upon the race of the offender concerned, harks back to colonial times, when the colonial elite – particularly towards the end of the colonial period in Natal – conceived of the punishment of white and black offenders in completely separate terms.<sup>20</sup>

### 3 Demons and Gangsters – The Explosion of Interest in Prison Gangs

Although South African prison gangs have a long and rich history, it is interesting to note that public discourse on the activities of prison gangs is largely absent during colonial times, at least in so far as the point of historical comparison in this article – the discourse surrounding the penal system of colonial Natal – is concerned. Of course, penal discourse in colonial Natal had its share of designated “demons”, but these were defined in terms of racist colonial conceptions of the “brutal” and “savage” nature of the colony’s indigenous inhabitants in general, rather than in terms of the activities of prison gangs in particular. In the minds of Natal’s white colonists, black offenders in general were “childlike savages”, possessed of natures which were brutal as well as childishly immature. They needed to be punished with sufficient severity so as to deter the “brutal savage”, as well as in a manner which provided simple and direct guidance to the “childlike Native”. For this reason, corporal punishment with the dreaded “cat o’ nine tails” was regarded as a particularly suitable form of punishment for black offenders in colonial Natal, so much so that the practice became known as the “cult of the Cat”. Much has been written on the ideology behind corporal punishment during colonial times, and need not be repeated here.<sup>21</sup> For the purposes of this article it is sufficient to point out that, within the

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20 See for example, Peté *supra* n 5; Peté & Devenish *supra* n 6.

21 See in general, Peté *ibid*; Peté & Devenish *ibid*; Crocker & Peté ‘Letting Go of the Lash: The Extraordinary Tenacity and Prolonged Decline of Judicial Corporal Punishment in Britain and its Former Colonies in Africa (Part 1)’ 2007 *Obiter* 271-290; Crocker & Peté ‘Letting Go of the Lash: The Extraordinary Tenacity and Prolonged Decline of Judicial Corporal

penal discourse of the 1980s, the position of the “brutal savage” or “demon” – what Stanley Cohen would refer to as a “folk devil”<sup>22</sup> – has been assumed largely by the figure of the prison gangster, a member of one of South Africa’s notoriously violent “numbers gangs”.<sup>23</sup>

The 1980s were a particularly important decade from the perspective of public discourse on the issue of prison gangs. Public interest in the topic was ignited by the publication of a particularly fascinating study on South African prison gangs and their bizarre history. The study was conducted at the University of Cape Town’s Institute of Criminology by an anti-apartheid activist and former head of the National Union of South African Students, Nicholas ‘Fink’ Haysom. It was entitled “Towards an Understanding of Prison Gangs” and the shocking details it revealed about the origins and activities of South African prison gangs were seized upon by the public media.<sup>24</sup> Publicity around the details revealed in this study was to mark the beginning of period of intense public fascination with these gangs, which continued into the post-apartheid period.

A good example of the public furore, ignited by Haysom’s study, may be found in a number of newspaper articles published in June 1981, when the *Weekend Argus* carried no less than three reports focusing on various aspects of Haysom’s study. The following provocative headlines were used: “It’s ‘boere’ v ‘bandiete’ in SA jails”, “Biblical origin of 28 gang” and “When the ‘kring’ says kill”.<sup>25</sup> Details of the bizarre history and entrenched nature of the “numbers gangs”, which had been operating in South African prisons since the late nineteenth century, as well as the extent of their power and brutality of their practices, must have come as a shock to members of the South African public, particularly the sheltered (mainly white) middle class. For example the following are extracts from the initial reports on Haysom’s study carried by the *Weekend Argus*:

Prison gangs have created elaborate alternative societies. They have a structure, ranking and a discipline code maintained by an overall governing body – the ‘kring’. Each gang has its oral history and has its uniform, tattoos, flags, salutes and other military paraphernalia. In each gang, decisions must be made by the proper procedure. For example, a 28 Circle decision to kill a prisoner must be taken by a full ‘kring’ and the ‘judge’ must sign the death warrant ... Prison officials say it is nearly impossible to prevent a murder once the decision has been taken. Inmates who have reported to the authorities that the finger has been pointed at them may be killed before the authorities

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Punishment in Britain and its Former Colonies in Africa (Part 2)’ 2007 *Obiter* 465-501.

22 Cohen *Folk Devils and Moral Panics – The Creation of the Mods and the Rockers* (1973).

23 For a contemporary account of life in one of the prison “numbers gangs”, see Steinberg *The Number – One Man’s Search for Identity in the Cape Underworld and Prison Gangs* (2005).

24 Haysom ‘Towards an Understanding of Prison Gangs’ 1981 *UCT, Institute of Criminology*.

25 See *Weekend Argus* (1981-06-20) ‘When the “kring” says kill’ 15.

take steps to protect them. A prisoner may attempt suicide rather than be confined in a cell with hostile gangsters, aware that he might endure months of nerve-racking tension before he might be killed. Murders are extremely brutal. Usually, the victim is strangled with a belt, or has his throat cut, or is eviscerated and his intestines removed and played with. A victim may receive numerous stab wounds and be left to die.<sup>26</sup>

Around two weeks after the above report, Haysom's study was, once again, the subject of a detailed report in the national media. The newspaper concerned was the *Sunday Express*, which discussed the disturbing conclusions set out in Haysom's study. Among the details published were the following:

In the paper, Mr Haysom asks who really controls South Africa's prisons. 'If many witnesses are reluctant to appear in the Supreme Court and if some State witnesses are murdered after they have given evidence, the question arises as to who actually does wield power in the prisons. If gang members would rather face the gallows than refuse to participate in murders that can only be described as suicide missions, does it not seem that there are two authority systems operating in the prisons?' ... 'The most notable feature of South African prison gangs is that they are nationwide. While their potency and membership fluctuates from prison to prison, the gangs boast, and with justification, that they have brothers in every prison. It is this fact that gives the gangs tremendous power. In essence this means that no prisoner is beyond their reach. A State witness in a trial will, they claim, never escape their vengeance ...'<sup>27</sup>

After a further two weeks, the highlights of Haysom's study were, yet again and in similar terms, set out and commented upon in a detailed report in the South African media. The newspaper concerned was the *Daily Dispatch*, which ended its report by congratulating Haysom on his study and calling upon the government to act.<sup>28</sup> Just over a week later, the Afrikaans press in the form of *Die Burger* picked up on the story and set out Haysom's findings in a detailed report. It began its report by stating that the contents of Haysom's study bordered on the incredible, and pointed to Haysom's assertion that it was almost impossible for the prison authorities to prevent the murder of an inmate sentenced to death by a prison gang.<sup>29</sup>

The publicity around Haysom's study seems to have caused an upsurge of interest within the media on the issue of South African prison gangs and their gruesome activities. For example, on 25 June 1981, *Die Oosterlig* reported that, over the previous four years, the Supreme (now High) Court in Port Elizabeth had sentenced eighteen persons, who were all members of one or other prison gang, to death for their involvement in seven prison murders. A further five prisoners were on trial for a similar prison murder in the St Albans prison. After describing the

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26 *Ibid.*

27 *Sunday Express* (1981-07-05) 'Gangs rule with iron fists in SA's prisons' 11.

28 *Daily Dispatch* (1981-07-20) 'Murder gangs in SA's jails' 12.

29 *Die Burger* (1981-07-28) 'Wrede moorde in tronke' 6.

gruesome nature of these murders, which involved the use of razor blades and sharpened spoons, the newspaper claimed that the motives for the murders were, in most cases, related to conflict between various prison gangs.<sup>30</sup> The following month, it was reported that three of the five prisoners who had been standing trial for the St Albans prison murder had been found guilty. Under the headline "Prison horror", the *Eastern Province Herald* reported the facts of this shocking case *inter alia* as follows:

A man was held down by his feet and a belt was used to choke him. Then his throat was cut with a razor blade. The man, a convict, had been in the care of the State at the time. But the State was unable to protect him in the cell he shared with 25 other men in Port Elizabeth on the night of August 22 last year. The power of a prison gang was more effective ... The evidence in this case was as repulsive as it was bizarre. One of the convicted men said the gang held a 'court' and decided a man in the cell should be put to death. It was left to the designated killers to choose the victim. There was testimony about homosexual rape in terms suggesting habitual practice. Then there was a description of a deliberate killing. Nobody intervened.<sup>31</sup>

A further result of all the publicity on the issue of prison gangs, seems to have been that the authorities were spurred into action. In October 1982, it was announced that the Prisons Service had commissioned the Human Sciences Research Council to conduct extensive research into the activities of prison gangs in South Africa.<sup>32</sup>

Perhaps because of its bizarre and shocking content, Nicholas Haysom's 1981 study of South African prison gangs continued to enjoy an extraordinarily long "shelf-life" as far as the press was concerned. For example, on 16 October 1983 under the sensational headline "Inside the Circle of Death", the *Sunday Express* carried an in-depth report on South African prison gangs, based very largely on the details set out in Haysom's study. The report detailed, *inter alia*, the brutal murder in May 1978 of Mleleki Dhlamini, by members of the 26 and 28 gangs in the Leeuwkop prison. Dhlamini's death was described in the following lurid and shocking terms:

After Dhlamini had been sentenced in 'The Circle' or 'Kring', his executioners held him down, slit his stomach open with a razor blade, beginning a slow, merciless murder in a dark communal maximum security cell shared by 41 prisoners. He cried out for mercy - to be killed quickly. But his executioners took their time with tortures too gruesome to relate. Eventually, a belt was tied around his neck and he was hanged over the bars of the cell door.<sup>33</sup>

Yet further articles, summarising various sections of Nicholas Haysom's 1981 study, appeared in the press on 5 November 1983, 13

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30 *Die Oosterlig* (1981-06-25) 'Bendes pleeg moorde in nag - 18 in PE tronke kry doodstraf in 4 j' 11.

31 *Eastern Province Herald* (1981-07-14) 'Prison horror' 6.

32 *Beeld* (1982-10-29) 'Tronk-bendes ondersoek' 12; *Hoofstad* (1982-10-29) 'RGN kyk op versoek na tronk-bendes' 11.

33 *Sunday Express* (1983-10-16) 'Inside the circle of death' 19.

April 1984 and 14 April 1984 respectively. The first article appeared in the *Weekend Post* under the headline “SA’s notorious prison gangs date back to late 19th century”; the second, in *The Cape Times*, under the headline “A mechanism for control over lives”; and the third, in the *Rand Daily Mail*, under the headline “Rituals and edicts of prison gang societies”.<sup>34</sup>

In addition to the articles essentially re-cycling the results of Haysom’s seminal study, South African newspapers continued to report on the activities of prison gangs throughout the period under examination. For example, in June 1983 reports of gang warfare at Leeuwkop prison emerged in the media. The reports emerged as the result of evidence led at the trial of nineteen prisoners at the Johannesburg Magistrate’s Court. The prisoners on trial were members of the “Big Five” prison gang and were alleged to have assaulted a member of the rival “28” gang, a certain Jeremiah Maseko, who died in a coma two months later. A witness to the incident, Simon Makau, appeared to be terrified of testifying against the accused in the matter and, according to a report in *The Star*, he told the magistrate, Mr IJJ Luther, that: “If I point the men out, I will be selling my life because they will kill me when we return to Leeuwkop ... There is no safety for prisoners in that jail”.<sup>35</sup> The report went on to state that: “A trembling Makau later reluctantly identified the men and told Mr Luther: ‘I have signed my death warrant and have taken my soul out of my life’”.<sup>36</sup> These words portray in poignant fashion, the terrifying power exercised by prison gangs over the lives of inmates at this time.

In October 1983, the Afrikaans language newspaper *Rapport* published an article detailing prison life at the Brandvlei maximum security prison.<sup>37</sup> One of its reporters had been permitted to interview inmates at Brandvlei and had asked them about the extent of gang

34 *Weekend Post* (1983-11-05) ‘SA’s notorious prison gangs date back to late 19th century’ 15; *The Cape Times* (1984-04-13) ‘A mechanism for control over lives’ 15; *Rand Daily Mail* (1984-04-14) ‘Rituals and edicts of prison gang societies’ 6.

35 *The Star* (1983-06-18) ‘Tale of gang warfare inside prison walls’ 4.

36 *Ibid.*

37 This was one of a series of articles published by *Rapport* in October 1983. The newspaper claimed that the Commissioner of Prisons, Lieutenant-General JF Otto, had specifically lifted the veil of secrecy so that the newspaper could write a series of “no-holds-barred” articles on South African prisons (see *Rapport* (1983-10-16) ‘Unieke reeks oor SA gevangenis begin – Agter tronk deure – Ons kon oral instap ...’ 1). Under the headline ‘Behind Prison Doors - We had total access’, the newspaper made much of the fact that it had been afforded unhindered access to all South African prisons (see *Rapport* (1983-10-16) *supra*); it labeled this fact as “unique” in South African newspaper history (the words used were: “iets unieks in koerantgeskiedenis”; see *Rapport* (1983-10-16) *supra*) The newspaper gushed (ironically when viewed from the perspective of post-apartheid South Africa) that it had not even been expected to submit its reports to the prison authorities before publication and was able to make its own observations (the Afrikaans words used were: “Daar is nie eens van *Rapport* verwag om ons berigte voor publikasie voor te le nie. Ons kon ons eie waarnemings maak” (see *Rapport* (1983-10-16) *supra*). Although

activities in the prison. After speaking to several inmates, including a certain inmate named "Samma" who was said to carry the rank of a "fighting general [veggeneraal]" in one of the prison gangs, the reporter came to the conclusion that much of life in the prison revolved around sex. He explained as follows in his report:

One gets the impression that each man has his own 'moffie' or 'laaitie'. Sodomy is rife. Samma confirmed that most trouble revolves around 'moffies'. Although each man usually has his own 'moffie', the prison also has its quota of 'whores'. They are the people who do not belong to one 'man', but shop around. It is around them that all hell often breaks loose. It is the duty of each man to look after his 'laaitie' and to care for him. A bit of oil for his hair or an extra helping of food is important to maintain the relationship.<sup>38</sup>

In April 1984, a certain Mr James D Petersen, who was said to be a "General" in the 26 prison gang, revealed to the press the story of his involvement with the gang. Petersen had been released from Brandvlei in February 1984, and seems to have been motivated to tell his story due to the fact that he had undergone a religious conversion.<sup>39</sup> By revealing details of gang activities and practices to the press, Petersen was clearly taking a great risk. The *Rand Daily Mail* described Petersen's story as "an at times bizarre and brutal account of organised gangsterism behind bars".<sup>40</sup> According to the *Rand Daily Mail*, both Petersen's tattoos (six stars and a law book on each shoulder) and his knowledge of the structure and policies of South African prison gangs, marked him out as a "General" of the 26 prison gang. According to the report, Petersen had been known in prison by the nickname "Kettings [Chains]". Among his revelations to the *Rand Daily Mail*, Petersen stated that, in 1974, there

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*Rapport* may have been playing up the significance of its series of articles for dramatic effect, the tone of the comments which accompanied the newspaper's announcement of the series, indicates clearly that access to South African prisons by newspaper reporters was not a common occurrence at this time. The newspaper stated that the Prison Service had allowed its reporters to walk into any prison in South Africa unannounced and without prior warning. It warned its readers that they might be shocked at what went on in prisons, but pointed out that the series was a "warts and all" expose. The Afrikaans words used were: "Ons skryf in die reeks kaalkop daaroor"; see *Rapport* (1983-10-16) *supra*. Significantly, the newspaper claimed that this indicated that there was nothing that the Prison Service wished to hide.

38 "'n Mens kry die indruk dat elke man sy eie 'moffie' of 'laaitie' het. Sodomie vier hoogty. Samma het bevestig dat die meeste moeilikheid om moffies gaan. Hoewel elke man gewoonlik sy eie 'moffie' het, het die gevangenis ook sy kwota 'hoere'. Hulle is die mense wat nie een 'man' het nie, maar rondsmous. Rondom hulle bars alle hel dikwels los. Elke man maak dit sy taak om sy 'laaitie' op te pas en mooi na hom te kyk. 'n Olietjie vir die hare of 'n extra skoepie is belangrik in die verhouding." *Rapport* (1983-10-16) 'Bendes het eie straf' 9.

39 Petersen was quoted as stating that: "Gang fights have got to stop no one is benefitting from them. I would like to help achieve this now that I have given myself over to the Lord". See *Rand Daily Mail* (1984-04-14) 'A stark, sordid underworld behind bars' 6.

40 *Rand Daily Mail supra* n 39 at 6.

had been around 500 members of the 26 prison gang in the Brandvlei prison. He told the newspaper that he “didn't like the way the 28s continually practiced homosexuality or their favourite method of killing other prisoners – by using poison”.<sup>41</sup> Petersen maintained that it was established practice for members of the 28 prison gang to force young prisoners “to act as 'moffies'”. He stated further that: “These boys have got very little choice. Gang rapes still take place in every prison in South Africa – the authorities will never be able to stamp this out”.<sup>42</sup>

The South African Prisons Service decided to respond publicly to the shocking claims made by Petersen in his interview with the *Rand Daily Mail*. A spokesman for the Prisons Service, Brigadier HJ Botha, rejected Petersen's contention that members of the 28 prison gang used poison to kill their victims, stating that “no record could be found of cases where prisoners were killed by other prisoners by using poison”.<sup>43</sup> Botha also stated that: “In South African prisons ... gangs are not tolerated and steps are continually taken to combat their formation and functioning”.<sup>44</sup> He also spoke of the existence of a “prison milieu” which “promotes the cultivation of those characteristics that are necessary for a prisoner's successful reintegration into society as a law-abiding citizen”.<sup>45</sup> Whatever the accuracy of Petersen's statements to the *Rand Daily Mail*, in light of the significant degree of evidence that had been put forward over the years of a long-established and thriving gang culture within South African prisons, the general thrust of the statements by Brigadier Botha, on behalf of the South African Prisons Service, smacks of extreme naïveté or a wilful disregard of reality. One indication that South African prisons were clearly extraordinarily violent places during the period under examination, was the number of unnatural deaths which occurred within the penal system. For example, in March 1984 in answer to a question in Parliament, the Minister of Justice, Mr Kobie Coetzee, revealed that 260 deaths had been reported in South African prisons in 1983. Of these, 76 deaths had been classified as “unnatural”. The reason given for the vast majority of these unnatural deaths was “assault by fellow prisoners”. It was revealed that 57 “black prisoners” and 16 “coloured prisoners” had died in this way.<sup>46</sup> These shocking statistics reveal something of the extent of violent activity in South African prisons at this time.

In May 1984, widespread publicity was given to the report of the Van Dam Committee of Enquiry. This committee had been set up at the insistence of the Minister of Justice and Prisons, Kobie Coetsee, in order to investigate a series of violent incidents which had occurred within the

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41 *Ibid.*

42 *Ibid.*

43 *Daily Dispatch* (1984-04-13) ‘SA Prisons to combat gangs’ 17. See also *Rand Daily Mail* *ibid.*

44 *Daily Dispatch* *idem* 17. See also *Rand Daily Mail* *ibid.*

45 *The Cape Times* (1984-04-13) ‘Steps taken to stop gangs in jails’ 15. See also *Rand Daily Mail* *ibid.*

46 *The Citizen* (1984-03-06) ‘Prison deaths top 250’ 4.

Barberton prison complex between 29 December 1982 and 30 September 1983.<sup>47</sup> No fewer than twelve prisoners had died as a result of violence during this period.<sup>48</sup> One of the main findings of the committee was that the activities of prison gangs, which it described as "horrifying", had played a central role in the violence.<sup>49</sup> The extent of the publicity given to the activities of Barberton's prison gangs was such that it is impossible to summarise all the reports in a short article such as this.<sup>50</sup> The following two extracts from articles published in the mainstream media in May 1984, however, provide a flavour of the type of press coverage given to prison gangs at this time. Under the headline "Report details brutal prison gangs", the *Rand Daily Mail* stated as follows:

Alarming evidence of the existence of violent gangs in South African prisons has been uncovered by the Van Dam Inquiry into the Barberton prisons. It said the gangs, which were 'very strong', were mainly found in maximum security prisons. The committee found evidence of violence, assaults, murders, homosexuality and gangs specialising in escapes ... The committee described as 'frightening' the 'merciless cruelty' of the gangs and their members who could, in exceptional circumstances, take action against prison personnel. Often gangs sentenced members to death for the flimsiest of reasons and the death penalty was carried out with a variety of brutal methods.<sup>51</sup>

On the same day as the above report was published, another mainstream South African newspaper, *The Star*, provided its readers with the following shocking details about the activities of Barberton's prison gangs:

Cold-blooded murders were committed for rumours or transgressions of the gang codes. Innocent people were often assaulted simply as a show of force or to take revenge for a misdemeanour. Many weapons, including knives, were made in prison to use against prisoners. A favourite weapon was the heavy metal mugs in which prisoners received coffee or tea. Tied to a half-metre belt of towel, they formed a dangerous weapon. Six gangs were identified in the prison. In some of them, sodomy was prevalent and younger members were known as 'wyfies'. Members of such a gang did not hesitate to

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47 See Peté 'Apartheid's Alcatraz – The Barberton prison complex during the early 1980s' (forthcoming).

48 *Sunday Express* (1984-02-05) 'Minister still to see prison report' 11. See also *Die Burger* (1984-05-17) 'Tronkbendes was agter geweld' 7.

49 *The Argus* (1984-05-17) 'Gangs' role in prison riots "horrifying" 4.

50 The headlines of various articles published at this time reflect the extent of public concern about the activities of Barberton's prison gangs. For example: *Die Vaderland* (1984-05-17) 'Bendes in tronke moet vasgevat word [Prison gangs must be curbed]' 2; *Rand Daily Mail* (1984-05-17) 'Report details brutal prison gangs' 11; *Die Burger supra* n 48 at 7; *The Argus supra* n 49 at 4; *The Star* (1984-05-17) 'New strategy on prison gangs "vital"' 1; *The Star* (1984-05-17) 'Horror gangs a key factor in prison riots' 5; *The Star* (1984-05-19) 'Prison gangs: the grim truth' 11.

51 *Rand Daily Mail* (1984-05-17) *supra* n 50 at 11. See also *Die Vaderland supra* n 50 at 2.

murder if members of their own or of other gangs interfered with their 'wyfies' ...<sup>52</sup>

The following month, in June 1984, as part of a series of articles on "The Killer Gangs", the *Eastern Province Herald* published a report dealing with prison gangs in the Port Elizabeth area. According to the report, since 1978 no fewer than 22 prison gang members had been sentenced to death in Port Elizabeth for murders committed behind bars. Most prison gang activity was said to take place at the St Albans prison in Port Elizabeth. The report emphasised the brutality of the prison gangs, citing a former convict who had risen to the rank of captain – a senior position in the 28 prison gang at St Albans. In the words of the report:

Nobody gets to the top of a prison gang without spilling blood. 'If you want to become a leader you have to be willing to kill. You must be bad, worse than the next man'. Only ruthlessness can ensure total obedience by others in the gang. A soldier ordered to kill a cell-mate will do so without hesitation, knowing his own throat would be slit if he refused. Seldom will convicts before court implicate a gang leader in the killing. That also means certain death. 'It is a big thing to smuggle dagga into jail but it is not unusual. And we make knives from all kinds of things', said the former captain of the 28s. 'If we want to punish somebody without stabbing him, we would put a belt through the ear of a tin mug and beat him unconscious with it'.<sup>53</sup>

The *Eastern Province Herald* also described, in grisly detail, a number of murders which had been committed by prison gangs in the Port Elizabeth area. According to the newspaper, these accounts were "based on reports of murder trials held in Port Elizabeth".<sup>54</sup> A good example of the spine chilling detail to which the readers of the *Eastern Province Herald* were exposed, concerned the murder of a certain Simon Joseph on 22 August 1980 in the North End Prison, by members of the 28 gang. The murder was described as follows:

Two of the men were sitting alongside Joseph and a third was on his haunches near Joseph's feet. Suddenly this man jumped forward and threw a belt around Joseph's neck. One man fell across his legs, pinning Joseph to the floor. Two others held his arms. Then his throat was hacked open with a razor blade. Blood spurted everywhere, covering Joseph's assailants, the floor and walls. His throat gaped from ear to ear... From across the cell the 28's general watched. When the body lay still the general got up and crossed to a member of the 27 gang. 'We have taken a head,' he said.<sup>55</sup>

The South African Prisons Service responded to these reports in the *Eastern Province Herald* with a bland statement to the effect that gangs were not tolerated in South African prisons and that steps were continually taken to combat their function and ability to function. The Chief Liaison Officer of the South African Prison Services, Brigadier HJ Botha, stated that the prisons service was "deeply concerned about any

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52 *The Star* (1984-05-17) 'Horror gangs a key factor in prison riots' 5.

53 *Eastern Province Herald* (1984-06-21) 'It's murder behind bars' 10.

54 *Idem* 15.

55 *Ibid.*

incident of a violent nature” and that the service strove constantly “through research and practical experience, to eliminate the phenomenon of gangs in prison, or at least to contain it to the extent that it can be neutralised effectively”.<sup>56</sup> What is revealed by the examination of the public discourse on prison gangs set out above, however, is that this problem was both severe as well as deeply entrenched within South Africa's penal system. Due to the extensive publicity surrounding the activities of prison gangs during the period in question, it seems clear that no informed South African could honestly deny knowledge of either the severity or extent of the problem. This makes the “formulaic” responses of the South African Prison Services seem out of touch with the reality of the problem. The discourse consists of one shock revelation after the other, with the problem remaining firmly in place from one year to the next. In fact, the theme of extreme violence caused by entrenched prison gangs, was to extend way beyond the 1980s and well into the post-apartheid period.<sup>57</sup> The sadistic and violent prison gangster – the “demon” or “folk devil” who could not be safely contained – was to remain a prominent figure within South African penal discourse for many years to come.

To end this section, two brief notes on the brutality of the South African penal system in response to those perceived as “demons”. The first concerns the “caging” of dangerous prisoners. In October 1983, a reporter and photographer from the Afrikaans newspaper *Rapport* visited the maximum security prison situated at Brandvlei near Worcester in the Boland.<sup>58</sup> At the time, the prison contained 664 dangerous prisoners and was known as the Barberton of the Cape.<sup>59</sup> What the reporter and photographer saw on their visit is reminiscent of what one might have seen during a visit to a prison in colonial Natal during the nineteenth century.<sup>60</sup> According to an article which appeared in *Rapport* following the visit, a series of wire cages, approximately two metres square, had been erected in an enclosed courtyard at the prison. The courtyard was

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56 *Idem 2*.

57 See in general, Peté ‘The Politics of Imprisonment in the Aftermath of South Africa’s First Democratic Election’ 1998 *South African Journal of Criminal Justice* 51-83; Peté ‘The Good the Bad and the Warehoused – The Politics of Imprisonment During the Run-up to South Africa’s Second Democratic Election’ 2000 *South African Journal of Criminal Justice* 1-56; Peté ‘No Reason to Celebrate: Imprisonment in the Aftermath of South Africa’s Second Democratic Election’ (forthcoming).

58 This was for the purpose of obtaining material for a series of “first hand” articles on South African prisons. See n 37 for a full description of the manner in which this series of articles was conceived and brought to fruition.

59 The Barberton Maximum Security Prison was notorious for housing the most dangerous prisoners within the South African penal system at that time. See Peté ‘Hell on Earth – The Barberton Prison Complex in the Early 1980s’ (forthcoming).

60 See in general, Peté ‘Falling on Stony Ground: Importing the Penal Practices of Europe into the Prisons of Colonial Natal (Part 1)’ 2006 *Fundamina* 100-112; and Peté ‘Falling on Stony Ground: Importing the Penal Practices of Europe into the Prisons of Colonial Natal (Part 2)’ 2007 *Fundamina* 111-125.

open to the elements and each cage contained a convict busy breaking stones with a hammer. The reporter expressed his amazement at witnessing this scene by stating that, for the first time in his life, he realised that, just as the convicts of old had done, South African prisoners at Brandvlei still engaged in stone-breaking.<sup>61</sup> The convicts' food was passed to them in bowls which was pushed underneath the gates to the wire cages. The spoons with which they ate had no handles, in order to avoid the possibility that they could be turned into weapons.<sup>62</sup> The report pointed out that the stone breakers were all "brown or black" ie there were no white prisoners among them. According to the report, none of the prisoners complained about being locked in the cages to perform stone breaking, since it was preferable to being locked up in a single cell day and night. The prisoners also told the reporter that they felt safe in the cages, where they did not have to be on the lookout for other violent prisoners.<sup>63</sup> The prison authorities informed *Rapport* that this was a pilot project aimed only at the most dangerous prisoners within the penal system. At that stage, authorities believed that the project had been successful in all respects.<sup>64</sup> There were "single cages", which each measured approximately two square metres, as well as larger "group cages". Cages had been constructed at two prisons in the Cape – Brandvlei prison in the Boland and Victor Verster prison in Paarl. Brandvlei had 330 single cages as well as a number of group cages which could accommodate 70 prisoners, while Victor Verster had 96 single cages, with a further 96 being built. It was also revealed that there were group cages at the Leeuwkop prison near Johannesburg which could

61 "Vir die eerste keer besef jy dat mense vandag nog soos die bandiete van ouds in 'n gevangenis letterlik klippe kap." See *Rapport* (1983-10-16) 'Elke man in sy kampie – en hy kap klippe!' 9.

62 In relation to the issue of "homemade" weapons, another article in the same edition of *Rapport*, spoke of the ingenious ways in which prisoners manufactured weapons using items such as nails, spoons, tin plates and pieces of metal pipe. The article also described the ingenious methods employed by prisoners to conceal weapons. According to the article, on one occasion the internal search of a certain prisoner at Brandvlei, had discovered no fewer than three knives concealed in the man's rectum. The reporter summed up his astonishment as follows: "One must see it to believe what sorts of objects prisoners are capable of secreting in their bodies. Those 'suitcases [soetkyste]' as they are known in prison slang, are capable of concealing virtually anything" (the Afrikaans words used were: "'n Mens moet sien om te glo wat die gevangenis alles in hul lywe kan opdruk. Daardie 'soetkyste', soos dit in gevangenistaal genoem word, verberg feitlik enigiets"; See *Rapport* (1983-10-16) 'Alles word wapens' 10). In a comment with slightly racist overtones, the article mentioned that white prisoners were even more ingenious in manufacturing weapons. It cited the example of a weapon that had been manufactured at the Zonderwater prison near Cullinan, which looked like a normal pen, but could fire .22 rounds. See *Rapport* (1983-10-16) 'Alles word wapens' 10.

63 *Rapport supra* n 61 at 9.

64 In view of the fact that stone-breaking was a common form of hard labour for convicts in colonial times, one gets a strong sense that the apartheid prison authorities, who came up with this idea, were looking "back to the future". For example, see Peté 'Penal Labour in Colonial Natal – The Fine Line between Convicts and Labourers' 2008 *Fundamina* 66 77-82

accommodate 200 prisoners. In view of the type of work being performed by these "caged" prisoners – ie stone-breaking – an ironic twist to the article in *Rapport* was the assurance by the prison authorities that, as far as practically possible, attention was focused on opportunities for training, and that prison labour was designed to be productive in nature and as constructive as possible.<sup>65</sup> Significantly, although reporters may have expressed surprise at the sight of caged prisoners performing stone breaking, there was no real critique of the penal system in the articles examined above. It would seem that, during the period under examination, South Africans were inured to the brutality of the apartheid system in general and the penal system in particular.

A final note to end this section, concerns the cruel manner in which the death penalty was carried out at this time, further illustrating the brutality of the South African penal system at this time. In July 1981, a disturbing report appeared in *The Cape Times* concerning the manner in which four death row prisoners had been executed. The report started with the following firm denunciation of the death penalty: "Judicial murder, in the form of hanging, is still one of the more barbaric aspects of South African society, one that disposes of more than a hundred human beings a year without noticeable effect on the ever-increasing homicide rate".<sup>66</sup> It then went on to explain that four death row prisoners had been tear gassed when they refused to leave their cell and be led to the gallows. After the tear gassing, the men were dragged out of the cell and hanged. The Prison Service stated that it could not give an expert opinion on whether the men were still under the influence of tear gas when they were hanged. *The Cape Times* commented on the response of the Prison Service as follows:

The very fact that the prison authorities cannot be sure is a tacit admission that the men were not allowed to recover completely from the gassing before being plunged into eternity. The execution should have been delayed, and the men sedated. That at least would have restored to them some human dignity before being deprived of life.<sup>67</sup>

Another example of the brutality that is encompassed in the death penalty, is a poignant report which appeared in *Die Volksblad* in April 1983, concerning the manner in which prisoners on death row reacted to an approaching execution. The main focus of the report was on the well-known Afrikaans poet Breyten Breytenbach, who had served a period of seven years imprisonment. According to the report, one of Breytenbach's most prominent recollections of his time in prison was the way in which black prisoners used to sing before they were put to death. When a black inmate on death row was told of the date on which his sentence would be carried out, he would begin to sing. All his fellow black prisoners on death row would then sing along with him, almost constantly, for the week which preceded the execution. According to the

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65 *Rapport* (1983-10-16) 'Kampies hou hulle uit mekaar' 8.

66 See *The Cape Times* (1981-07-22) 'Gassed and hanged' 12.

67 *Ibid.*

report, the prisoners sang Christian songs, particularly psalms, but also blues, as well as the hit songs of Myriam Makeba.<sup>68</sup> The death penalty was widely used in South Africa at this time. In October 1984, a brief report in *The Cape Times* mentioned that, during 1983, about 100 people had been executed in South Africa for non-political offences and three for treason.<sup>69</sup>

#### 4 Conclusion

In Part One of the article, two “characters” who formed part of the story told by penal discourse in the first half of the 1980s have been examined – the white male prisoner (the “penitent”) and the prison gangster (the “demon”). It has been shown that these two characters occupied completely different conceptual spaces within the penal ideology of the time. White male prisoners, segregated in their own prison, were seen as “penitents” undergoing a period of enforced self-reflection and rehabilitation, which would enable them to be reabsorbed into white society. Prison gangsters were the “demons” of the story – cruel, sadistic, violent and savage – who generated intense anxiety on the part of the white middle class and were surrounded by a discourse of retributive punishment. In each case, it has been shown that there are “historical resonances” which serve to cast light on the penal discourse surrounding each of these categories of prisoner in the early 1980s. The fact that clear historical parallels can be drawn between penal debates which took place in colonial Natal, and those which took place during the height of apartheid in the early 1980s, is significant. It shows that ideological attitudes are deeply rooted and are able to endure over many decades. Prison reform is not simply a matter of bringing about physical changes within the penal system, but also about understanding and transforming these deeply rooted ideological attitudes. Part two of the article will deal with another two characters in penal drama of the early 1980s, namely, “Fallen Angels” (white female prisoners) and “innocents” (children).

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68 See *Die Volksblad* (1983-04-25) ‘Digter se onthulling oor werk in selle’ 13.

69 See *The Cape Times* (1984-10-24) ‘Amnesty puts SA in report’ 19.

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## The “reinstatement” of credit agreements: Remarks in response to the 2014 amendment of section 129(3)-(4) of the National Credit Act

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### OPSOMMING

#### Die “Herstel” van Kredietooreenkomste: Opmerkings in Reaksie op die 2014 Wysiging van Artikel 129(3)-(4) van die Nasionale Kredietwet

Voor die 2014 Wysigingswet het artikel 129(3) en (4) van die Nasionale Kredietwet voorsiening gemaak vir verbruikers om kredietooreenkomste te herstel deur alle agterstallige bedrae asook sekere kostes te betaal. Die idee was dat die skuldafdwingsproses onderbreek word wanneer die verbruiker aan die voorgeskrewe vereistes voldoen het. Die bestaan van hierdie maatreël is belangrik om verbruikers te beskerm teen die potensieël negatiewe gevolge van die streng afdwinding van vervoegingsbedinge in kredietooreenkomste. Ook vanuit 'n konstitusionele perspektief is hierdie meganisme 'n noodsaaklike element van ons kredietreg. Subartikel (3) het die basiese reg beskryf terwyl subartikel (4) die beperkings daarop omskryf het. Ten spyte van 'n paar onsekerhede aangaande die werking van hierdie meganisme, het regspraak en akademiese kommentaar 'n algemeen werkbare uitleg van hierdie bepalinge opgelewer. Die wetgewer het dit desnieteenstaande nodig geag om die subartikels te wysig. Die doel van hierdie bydrae is om sodanige wysigings te analiseer om uit te pluus wat die stand van sake is nou dat die wysigingswet in werking getree het. Dit is belangrik om te besef dat die spesifieke wysigings wat aangebring is waarskynlik nie daarop gemik is om die substansie van hierdie meganisme te verander nie. Inteendeel, die doel was waarskynlik slegs om sekere konseptuele teenstrydighede uit die weg te ruim. Die wysigings aangebring aan subartikel (3) is duidelik gemik

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op hierdie oogmerk en is daarom onproblematies. Subartikel (4) se wysigings verg egter meer kopkrapwerk, want die letterlike bewoording mag onlogies voorkom. Die gevolgtrekking is dat die doel van artikel 129(3) en (4) steeds is om enersyds te voorsien vir die verbruiker se reg om agterstallige bedrae op datum te bring en andersyds om die beperkinge van hierdie reg te omskryf, ten spyte van die verwarrende bewoording van veral subartikel (4).

## 1 Introduction

Ever since the National Credit Act 34 of 2005 (NCA) was enacted there has been a need to amend it to correct the many uncertainties and inconsistencies that plague the Act and that have resulted in a flood of case law and academic commentaries.<sup>1</sup> Finally in 2013 the Department of Trade and Industry published the results of a review process<sup>2</sup> as well as a draft amendment bill.<sup>3</sup> After comments were considered, a bill was introduced in the National Assembly.<sup>4</sup> A final version<sup>5</sup> was passed by parliament in 2014 and subsequently the president assented to the National Credit Amendment Act 19 of 2014.<sup>6</sup> The Amendment Act came into operation on 13 March 2015.<sup>7</sup>

As part of this bigger project to amend the NCA, a decision was also made to modify section 129(3) and (4) of the Act. These provisions introduced to South African consumer law a new concept of “reinstatement” or the “right to re-instate a credit agreement”.<sup>8</sup> Due to unclear drafting, the exact requirements and limitations of this mechanism were not obvious, but its general purpose was, and remains, fairly clear. It enables consumers to rectify their default by paying the amounts in arrears on their credit agreement, along with certain charges and costs. Subject to certain qualifications, the consequence of such payment is to effectively interrupt the formal debt enforcement process. Therefore, in effect the mechanism provides a way for a consumer to

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1 For general literature, see Otto & Otto *The National Credit Act Explained* (2013); Kelly-Louw *Consumer Credit Regulation in South Africa* (2012); Scholtz *et al* (eds) *Guide to the National Credit Act* (2008 loose-leaf).

2 Draft National Credit Act Policy Review Framework 2013; see General Notice 559 in *Government Gazette* 36504 of 2013-05-29.

3 Draft National Credit Amendment Bill 2013; see General Notice 560 in *Government Gazette* 36505 of 2013-05-29.

4 B 47 – 2013; see *Government Gazette* 36916 of 2013-10-09.

5 B 47B – 2013.

6 See General Notice 389 in *Government Gazette* 37665 of 2014-05-19.

7 See Proclamation R 10 in *Government Gazette* 38557 of 2015-03-13.

8 Both s 13 of the Hire-Purchase Act 36 of 1942 and s 12 of the Credit Agreements Act 75 of 1980 (the NCA's predecessors) referred to the idea of reinstatement, but in both instances this was meant as a mechanism available for a certain period after cancellation of the agreement, which is different than how the NCA uses the terminology. See Otto & Otto *supra* n 1 at 124. On reinstatement in the previous acts, see Otto ‘Right of credit receiver to reinstatement after return of goods to credit grantor’ 1981 *SALJ* 516.

overturn the credit provider's enforcement of his rights under the agreement's acceleration clause.

The purpose of this article is not to provide a detailed analysis of the reinstatement mechanism. Instead, the focus is on how the 2014 Amendment Act might influence the supposed right of reinstatement.<sup>9</sup> I set out the specifics of the amendments that have been made to these subsections and, in view of the apparent purposes of the amendments, I investigate the implications for the concept of reinstatement. The Amendment Act attempts to clarify certain conceptual inconsistencies in the original subsections, but it unfortunately also introduces new uncertainties that necessitate some degree of interpretational gymnastics to make sense of the provisions.

The first draft amendment bill<sup>10</sup> that was published in 2013, proposed the removal of section 129(3) without replacing it, while leaving section 129(4) as is. No explanation was given for this proposal, but in the end it was not seen through. Rather, the subsequently published Amendment Bill and the Amendment Act itself retain but amend both subsections. Unfortunately, neither the 2013 review framework<sup>11</sup> nor the summary attached to the draft bill<sup>12</sup> provides anything helpful regarding the legislature's intention with the amendment of these subsections. This factor complicates the task of interpreting the amendments, but one can probably assume that parliament intended to rectify some of the contradictions in the subsections. An alternative assumption is that the legislature intended to amend the substance of the right of reinstatement. However, because no explanation was given for the amendments to section 129(3) and (4), it is unlikely that the intention was to drastically amend the substance of these provisions.

After briefly considering the broader context of reinstatement, I discuss the amendments made to section 129(3) and (4). The amendment of subsection (3) is not that problematic because it is fairly clear what the legislature tried to achieve and because the substance of the consumer's right in this regard remains intact. Nothing much hangs on the fact that the terminology has changed. The only point that probably requires further clarification is the requirement that the consumer may only remedy his default before the agreement has been "cancelled", and therefore I briefly comment on this qualification. However, the most confusing aspect is the amendments to subsection (4), since it is difficult to see how a literal reading of the modified

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9 This article is a follow-up to a previous article that commented on these subsections prior to their amendment; see Brits 'Purging mortgage default: Comments on the right to reinstate credit agreements in terms of the National Credit Act' 2013 *Stell LR* 165.

10 Draft National Credit Amendment Bill 2013. See General Notice 560 in *Government Gazette* 36505 of 2013-05-29.

11 Draft National Credit Act Policy Review Framework 2013. See General Notice 559 in *Government Gazette* 36504 of 2013-05-29.

12 B 47 – 2013. See *Government Gazette* 36916 of 2013-10-09.

subsection could reflect what must have been the legislature's true intention. Consequently, an attempt is made at explaining how one should approach the interpretation of this subsection in view of the broader scheme of the reinstatement concept.

Taken as a coherent whole, the conclusion is that section 129(3) and (4) still involves a reinstatement mechanism (or a right to "remedy a default") for the consumer. Subsection (3) establishes the right and subsection (4) sets out the limitations of the right – even though, especially with regard to subsection (4), a degree of interpretational creativity is needed for this consumer protection mechanism to make sense.

## 2 General Context: Resolving Disputes to Avoid Debt Enforcement

Before considering how section 129(3) and (4) was amended, it is useful to place the reinstatement mechanism in context by taking a step back. In order to understand the idea behind reinstatement it is necessary to consider how it fits into the broader scheme of the Act and how it correlates to the Act's policy choice in favour of extra-judicial dispute resolution. Moreover, it is necessary to keep in mind the indispensable function that reinstatement fulfils in South African consumer law. A more normative question that must also be asked in this context is: What reinstatement-type mechanism does South African consumer law need for it to be fair, functional and – above all – in line with the country's constitutional norms?

It is apparent that the NCA encourages the resolution of disputes between credit providers and consumers so that, if possible, debt enforcement through litigation should be avoided and to ensure that the credit transaction can instead be seen through to its natural conclusion. In most instances this is better for all parties concerned. In a manifestation of this policy choice, the Act requires that the credit provider must first send a notice of default to the consumer, containing suggestions and giving him an opportunity to resolve the dispute.<sup>13</sup> A debtor who rectifies his breach of contract in response to this notification provides a prime example of a dispute being resolved.<sup>14</sup> This preference for solving the dispute is confirmed by the fact that, if there is no default, the credit provider has no *locus standi* to sue the consumer,<sup>15</sup> and the

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13 S 129(1)(a) of the NCA.

14 See the comments in *Kubyana v Standard Bank of South Africa Ltd* 2014 3 SA 56 (CC) par 22; *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) par 46-49; *Imperial Bank v Kubheka* (28713/08) 2010 (GPPHC) 3 (2010-02-04) par 55 & 58; *Firststrand Bank Ltd v Olivier* 2009 3 SA 353 (SE) par 18. For the purposes of the NCA, see s 3 of the Act.

15 S 130(1) states that "a credit provider may approach the court for an order to enforce a credit agreement only if, at that time, the consumer is in default ...".

court has no jurisdiction to hear the matter.<sup>16</sup> In general one can hardly quibble about the logic of this arrangement. The alternative could have inequitable results, which is also the reason why, even before the NCA, the strict enforcement of cancellation and acceleration clauses was limited under certain circumstances.<sup>17</sup>

However, what about instances where the consumer rectifies his default *after* the creditor had approached the court to commence enforcement proceedings? This is where the concept of reinstatement as contemplated in section 129(3) and (4) becomes relevant. Here we are dealing with the situation where, because the consumer was in default when the creditor approached the court, the creditor has *locus standi* to sue and the court has jurisdiction to hear the matter. However, if at some point during the enforcement process, the consumer complies with the requirements of section 129(3) and (4), the agreement will be “reinstated” and the enforcement process will be overturned. Generally speaking, the structure of the reinstatement mechanism involves two aspects: The first part is subsection (3), which establishes the consumer’s right to reinstate the agreement and stipulates for certain requirements, such as the relevant amounts payable. The second part is subsection (4), which delineates the limits of the right, namely the stages in the process after which reinstatement is no longer possible.

All-out debt enforcement can have some obvious detrimental impacts on consumers’ social and economic well-being, but in many cases these will be justifiable, for example to give effect to credit providers’ legitimate interests and to honour contracts. However, the effects of debt enforcement may sometimes go so far that it not only has disproportionate socio-economic effects on the consumer concerned but also compromises the integrity of the system as a whole. There is no doubt that the efficient enforcement of creditors’ rights is important for society and the economy overall. However, an over-emphasis on creditors’ interests might create benefits for society, or a small portion thereof, that are not justified in view of the broader prejudice caused at the same time. Indeed, the whole purpose of the NCA is to rectify and prevent imbalances in the credit market.<sup>18</sup> The Act clearly recognises the negative impact that over-indebtedness, reckless lending and unregulated debt enforcement, amongst others, can have on society. As explained earlier, if debt enforcement can at all be prevented or overturned so that the transaction can follow its normal course, this is the preferable choice instead of the financial and social costs that inevitably accompany debt enforcement. Reinstatement as a consumer protection mechanism can therefore play a contributing role in avoiding the

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16 S 130(3)(c)(ii)(dd) provides that, if the consumer has brought the payments contemplated in the notice of default up to date before the creditor approaches a court, the court may not even hear the matter.

17 See for example s 13 of the repealed Hire-Purchase Act 36 of 1942; s 12 of the repealed Credit Agreements Act 75 of 1980; and in general Otto *supra* n 8.

18 S 3 of the NCA.

unnecessary and costly socio-economic effects that the strict enforcement of acceleration clauses might otherwise have.

A good example of the importance of reinstatement, is where repayment of the debt is secured by a mortgage bond over residential property. The value of reinstatement was articulated in *Dwenga v First Rand Bank Ltd*, where the court explained that reinstatement is “the beacon ... that keeps the hope alive” for consumers who desire to “weather the hard times and keep their homes, and dignity”.<sup>19</sup> Therefore, the potential benefit for home-owning consumers is evident. If they can pay the amounts outstanding on their mortgage loan (along with the costs and charges), this should prevent mortgage foreclosure from going ahead. Ideally they should have the opportunity to make such payments and thereby reinstate the mortgage agreement until the moment that the judgment against them has been executed – thus until the property is sold at a public auction. Under the original section 129(3) and (4), this is how the right of reinstatement was generally interpreted,<sup>20</sup> and it is unlikely that the 2014 amendments were intended to substantively restrict the scope of application of these subsections.

The importance of reinstatement in the housing context is also illustrated by the impact of the Constitution on the law of civil procedure. Section 26(1) of the Constitution<sup>21</sup> provides that everyone has the right to have access to adequate housing. Without going into any details, the general understanding is that a forced sale of, or an eviction from, a home in principle involves a violation of the negative duty not to limit a person’s existing access to adequate housing.<sup>22</sup> A sale in execution of a primary residence is therefore not permitted to have an effect on the homeowner that is unjustifiable in terms of section 36(1) of the Constitution, which – again, without going into any details – entails a strict proportionality test.<sup>23</sup> If the effect of the sale in execution on the homeowner would be disproportionately harsh in comparison to the purpose of the sale, such sale would not be allowable. In other words, if the creditor’s rights under the acceleration and foreclosure clauses are

19 *Dwenga v First Rand Bank Ltd* (EL 298/11, ECD 298/11) 2011 (ECELLC) 13 (2011-11-29) par 35 n 36.

20 See particularly *Firstrand Bank Limited v Nkata* (213/2014) 2015 (SCA) 44 (2015-03-26) par 25, 27, 34, 38-39, 41 & 44; *Nkata v Firstrand Bank Limited* 2014 2 SA 412 (WCC) par 51-53; *Nedbank Ltd v Fraser* 2011 4 SA 363 (GSJ) par 40-41; and further Brits *supra* n 9 at 175-178; Coetzee ‘Voluntary surrender, repossession and reinstatement in terms of the National Credit Act 34 of 2005’ 2010 *THRHR* 569 581.

21 Constitution of the Republic of South Africa, 1996.

22 The most important cases on this point are *Jaftha v Schoeman and Others; Van Rooyen v Stoltz* 2005 2 SA 140 (CC); *Gundwana v Steko Development* 2011 3 SA 608 (CC).

23 For a more detailed analysis of how ss 26(1) & 36(1) operate in the mortgage context, see Brits & Van der Walt ‘Application of the housing clause during mortgage foreclosure: a subsidiarity approach to the role of the National Credit Act (part 1)’ 2013 *TSAR* 288 290-294 and the sources cited there.

strictly enforced despite the arrears being paid up, which is the traditional common law position,<sup>24</sup> the result might often be disproportionately harsh for the consumer. The consumer would lose his home despite the fact that other, less invasive, ways were available (and indeed pursued) to honour the creditor's interests. In all likelihood, this outcome would not satisfy the test in section 36(1) of the Constitution.

A comparable example is *ABSA Bank Ltd v Ntsane*,<sup>25</sup> where the court relied on the principles in section 26 of the Constitution and refused to allow the creditor to accelerate repayment of the full capital debt of R62 042.43, because the actual amount outstanding was only R18.46. If foreclosure and a sale in execution were held to be unacceptable under these circumstances, how much more unacceptable would it be to allow foreclosure if the arrears are completely purged? The NCA was not yet in force when *Ntsane* was decided but, as the court in *Nedbank Ltd v Fraser*<sup>26</sup> subsequently explained, reliance on the right of reinstatement would have been the perfect solution in a case like *Ntsane*.<sup>27</sup> The point is that there may be situations where the opportunity for a debtor to make use of the reinstatement mechanism is the ideal (and perhaps only) way in which an otherwise unjustifiable sale in execution can be avoided. Therefore, a generously-interpreted right of reinstatement is arguably a necessity in order for unconstitutional sales in execution to be avoided.

Reinstatement is also a reasonable compromise because it does not deny the creditors' rights, but merely limits them to achieve the important purpose of avoiding debt enforcement, and its social consequences, if the debtor's default is rectified in time. Granted, reinstatement may cause inconvenience to a credit provider who is in the process of enforcement proceedings when the consumer pays up and reinstates the agreement, but this is compensated for by the charges and costs that the consumer must pay. Also, the benefits of protecting a home far outweigh the administrative inconvenience experienced by the creditor. If the creditor receives the outstanding amounts plus charges and costs, there is no reason why it would want to continue enforcing the agreement or go ahead with a sale of the property.<sup>28</sup>

The purpose of the foregoing discussion is to emphasise the importance of having a clearly defined mechanism as far as the rectifying of default is concerned. It is therefore important for the NCA to include a

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24 See for example *Boland Bank Ltd v Pienaar* 1988 3 SA 618 (A) (mortgage creditor can refuse late payment); and also *Brits supra* n 9 at 167.

25 *ABSA Bank Ltd v Ntsane* 2007 3 SA 554 (T).

26 *Supra* n 20 par 39.

27 Regarding the *Ntsane* and *Fraser* cases, see further *Brits & Van der Walt supra* n 23 at 298-305.

28 For present purposes I assume that these costs and charges, as currently stipulated for in the Act (see s 129(3) read with s 1 sv "default administration charge", "collection costs", s 101(1)(f)-(g)), are sufficient to compensate the credit provider for expenses incurred prior to reinstatement. If this proves not to be the case, I am open for a reconsideration of how these amounts should be calculated.

mechanism that avoids instances where debt enforcement could have an unconstitutional result. Without expanding on this perspective any further, the point is simply that it is essential to understand that section 129(3) and (4) must be interpreted with not only the exact wording, but also the broader constitutional and socio-economic context in mind.

Reinstatement of credit agreements is an important part of the current consumer law regime, and therefore it is unfortunate that the legislature seems incapable of describing it in exact terms. However, I foresee that it is possible to interpret section 129(3) and (4) in a way that gives effect to constitutional norms. Below I explain that, even though the changes made to subsection (3) are not perfect, they are not fatally problematic, since the basic idea remains intact and because some conceptual contradictions are removed. However, the amendments to subsection (4) are confusing because they disturb the structural relationship between subsections (3) and (4). Nevertheless, with some effort one can probably arrive at a sensible interpretation of this subsection as well.

### **3 The Amendment of Section 129(3)**

As stated above, the general idea of section 129(3), is to establish a right for consumers to reinstate credit agreements by paying the stipulated amounts. The original subsection (3) provided as follows:

- (3) Subject to subsection (4), a consumer may –
  - (a) at any time before the credit provider has cancelled the agreement reinstate a credit agreement that is in default by paying to the credit provider all amounts that are overdue, together with the credit provider's permitted default charges and reasonable costs of enforcing the agreement up to the time of reinstatement; and
  - (b) after complying with paragraph (a), may resume possession of any property that had been repossessed by the credit provider pursuant to an attachment order.

The modified subsection (3) provides as follows:

- (3) Subject to subsection (4), a consumer may at any time before the credit provider has cancelled the agreement, remedy a default in such credit agreement by paying to the credit provider all amounts that are overdue, together with the credit provider's prescribed default administration charges and reasonable costs of enforcing the agreement up to the time the default was remedied.

What has changed textually? There are no longer two paragraphs (a) and (b), but only one subsection. The content of the original paragraph (a) is substantially repeated but with the crucial difference that the phrase "re-instate a credit agreement" is deleted and replaced with the

consumer's right to "remedy a default under such credit agreement".<sup>29</sup> The content of paragraph (b) is completely removed.

Section 129(3) no longer uses the terms "re-instate" and "reinstatement", but provides that the consumer may "remedy" his default at any time before the creditor cancels the agreement. It is debatable whether the term "reinstatement" can or should therefore still be used to describe this mechanism, since references to the term were removed from section 129(3). However, as explained below, the term still appears in section 129(4) and hence, for lack of a better word, it is generally still useful to employ the term to describe this feature of the NCA.

There are probably two theories for explaining the change in terminology. The first is that the idea of reinstatement, perhaps as previously understood, is not what the legislature has in mind for the future. Accordingly, the legislature possibly wanted to bring about changes to the substance of the consumer's rights in this regard. However, there is no express indication of what this substantive modification is supposed to be. Therefore, the more likely explanation for the change in terminology is that the legislature simply wanted to remove the conceptual contradictions in the original subsection (3)(a) as well as those between subsection 3(a) and (b).

The original section 129(3)(a) provided that, if the debtor pays all the amounts that are overdue<sup>30</sup> plus certain costs and charges, the credit agreement would be reinstated but only if this was done before the creditor had "cancelled" the agreement. Paragraph (b) stated that, after such amounts had been paid, the debtor was entitled to "resume possession of any property that had been repossessed by the credit provider pursuant to an attachment order". Otto criticised the conceptual contradictions in this subsection as follows:

It escapes my mind how, first, an agreement which has not been cancelled can be reinstated. Secondly, it is not clear how a person can resume possession of a thing which has been repossessed pursuant to an attachment order, if the agreement was *not* cancelled to justify such an attachment order in the first place.<sup>31</sup>

A partial solution to this inconsistency was presented recently in *Nkata v Firstrand Bank Limited*,<sup>32</sup> where the Western Cape High Court

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29 The reference to "reinstatement" at the end of the sentence is similarly replaced.

30 This amount does not refer to the full outstanding capital debt, but only to the amounts actually overdue: see *Firstrand Bank Limited v Nkata supra* n 20 at parr 12 & 24; *Nkata v Firstrand Bank Limited supra* n 20 at parr 36-38; *Nedbank Ltd v Fraser supra* n 20 at par 41; and also *Brits supra* n 9 at 179 & 181-182.

31 Otto *The National Credit Act Explained* (2006) 98, similarly repeated in Otto & Otto *The National Credit Act Explained* (2010) 117; Otto & Otto *supra* n 1 at 125.

32 *Nkata v Firstrand Bank Limited supra* n 20.

explained that there is a conceptual distinction between the cancellation of an agreement and specific performance of an acceleration clause:

Where an agreement is terminated by the credit provider because of the consumer's breach, the contract is terminated by the act of the credit provider (provided he has complied with the procedures laid down in the Act). The remedies then available to the credit provider are those provided by law where a contract has been terminated because of breach. Where the credit provider invokes an acceleration clause, the contract remains in force and the consumer is obliged to make specific performance of the accelerated indebtedness. If the consumer pays the accelerated indebtedness, the contract will be terminated not by the act of the credit provider but through performance by the consumer.<sup>33</sup>

Essentially therefore, the court held that "the enforcement of an acceleration clause does not in law constitute a cancellation of the agreement".<sup>34</sup> Generally speaking the distinction between cancellation and specific performance is doctrinally sound, and it is probably the most plausible way to make sense of the reinstatement mechanism as a whole. The benefit of this logic is that the before-cancelled qualification is not a major limitation of the consumer's rights. Consequently, it is reasonably clear that section 129(3) deals with the situation where the credit provider is in the process of enforcing the acceleration clause in the credit agreement. It does not deal with any situation after the agreement has been cancelled. However, at any time during the enforcement process, but before cancellation, it is still open to the consumer to pay the outstanding amounts and thereby overturn the creditor's decision to enforce the acceleration clause.

Despite the way in which the High Court in *Nkata* interpreted and applied section 129(3), it was still necessary to clean up the terminological confusion surrounding the idea of reinstating an agreement that has not yet been cancelled, as well as the implication that property might have been attached prior to cancellation. As Otto pointed out in the passage quoted above, it is nonsensical to refer to the reinstatement of an agreement that is still in force and which has not yet been cancelled. Presumably, this is why the legislature chose to remove references to the notion of reinstatement from subsection (3) and replaced it with the more neutral idea of "remedy a default". This amendment is helpful to maintain terminological logic but it is important to consider that this change in terminology probably does not impact the basic concept of what the consumer's rights in this regard entail.

Similarly, the striking out of paragraph (b) might have the advantage of removing the other contradiction pointed out by Otto, namely the idea that property could be repossessed before cancellation. Yet, this removal might have broader consequences than merely getting rid of a contradiction, since it may imply that, even if he remedies his default, the

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<sup>33</sup> *Idem* par 39.

<sup>34</sup> *Ibid.*

consumer is not entitled to be placed back in possession of property that has been repossessed. This might indicate the legislature's intention that the opportunity to remedy the default is no longer available at a stage after the property has been repossessed. The legislature, however, probably only intended to rid the subsection of the contradictions pointed out by Otto, and one should not assume any intention to substantively amend the consumer's rights as such. Hence, one should not read more into the removal of paragraph (b) than the mere purpose to rid the subsection of conceptual contradictions. In any event, the removal of paragraph (b) does not create a serious *lacuna*, because the operation of section 129(4) probably still covers instances where the consumer remedies the default after repossession or attachment of the property.

In summation, the amended section 129(3) still permits consumers who have fallen into arrears to remedy their default by paying the relevant outstanding amounts and prescribed charges and costs. However, this mechanism is only available before the credit provider has cancelled the agreement. This cancellation does not refer to the situation where the creditor is in the process of enforcing the acceleration clause. Therefore, enforcement of the acceleration clause does not prevent the consumer from remedying his default. If the consumer complies with section 129(3) and none of the restrictions in section 129(4) apply, the implied legal consequence is that the enforcement process is interrupted and nullified. Although paragraph (b) has been removed, it is still obvious that, subject to subsection (4), any attached or repossessed property must be returned to the consumer in instances where debt enforcement is not going ahead.

Before continuing to a discussion of the amendments to section 129(4), it is necessary to briefly consider the before-cancelled qualification in section 129(3), since it may not be that obvious when a credit agreement will be regarded as having been "cancelled" for purposes of the NCA. As stated above, the court in *Nkata* held that "cancelled" in this regard, does not refer to the specific enforcement of an acceleration clause.<sup>35</sup> Therefore, the before-cancelled qualification does not place a significant limitation on the consumer's right to remedy the default, since cancellation in this sense hardly ever plays a role in the credit context.

The general implication of the explanation given in *Nkata* is that the term "cancelled" probably refers to the normal concept in contract law in terms of which one party (the creditor) chooses to terminate the agreement as a result of the other party's (the debtor's) breach of contract.<sup>36</sup> However, in view of the structure and purposes of the NCA,

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<sup>35</sup> *Ibid.*

<sup>36</sup> See Van der Merwe, Van Huyssteen, Reinecke & Lubbe *Contract: General Principles* (2012) 343-344; Christie & Bradfield *Christie's The Law of Contract in South Africa* (2011) 561-565; and also Brits *supra* n 9 at 174.

it is important to consider that, even when the creditor cancels the agreement (instead of enforcing the acceleration clause), the requirements and procedures of sections 123, 129 and 130 must still be complied with to enforce the cancellation. As the court in *Nkata* acknowledged,<sup>37</sup> regardless of whether the creditor cancels a credit agreement or enforces the acceleration clause, in both instances he must follow the procedures set out in the Act. This approach must necessarily be correct, because it is inconceivable that the legislature would have intended a situation where a creditor can avoid following the procedures in the Act simply by cancelling instead of enforcing the agreement.<sup>38</sup>

Regardless of how the concepts of cancellation, termination and enforcement relate to and differ from each other – which is a broader controversy that goes beyond the scope of the present problem – it is safe to conclude that the only way to cancel, terminate or enforce the agreement is through debt enforcement proceedings in compliance with sections 123, 129 and 130 of the NCA. After this process has been concluded, the agreement will be regarded as fully cancelled, terminated or enforced.<sup>39</sup> Therefore, the consumer may remedy his default up until the moment that the creditor has cancelled the agreement by complying with the requirements, and following the procedures set out in the Act.

#### 4 The Amendment of Section 129(4)

In order to ensure certainty for all parties involved, it is important to provide for a point in the process until which the consumer can still remedy his default. The original section 129(4) fulfilled this function by delineating the limitations of the consumer's right of reinstatement, as is also indicated by the fact that subsection (3) is made subject to subsection (4). The original subsection provided as follows:

- (4) A consumer may not re-instate a credit agreement after -
  - (a) the sale of any property pursuant to –
    - (i) an attachment order; or
    - (ii) surrender of property in terms of section 127;
  - (b) the execution of any other court order enforcing that agreement; or
  - (c) the termination thereof in accordance with section 123.

Therefore, reinstatement is prohibited only after the attached or surrendered property has been sold; a court order that enforces the

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<sup>37</sup> *Nkata v Firstrand Bank Limited supra* n 20 at par 39.

<sup>38</sup> Despite the position taken by Eiselen 'National Credit Act 34 of 2005: The confusion continues' 2012 *THRHR* 389 394-398, and despite some indications in the cases that the author discusses, I am not convinced that extra-judicial cancellation of a credit agreement by a credit provider (that is, without following the prescribed procedure) is permitted by the NCA. However, for present purposes I do not investigate this point further.

<sup>39</sup> See further Brits *supra* n 9 at 172-175.

agreement has been executed; or the agreement has been terminated in terms of section 123.<sup>40</sup> The original subsection (4) was not that problematic, although there were some inconsistencies between the events listed in the subparagraphs.<sup>41</sup> Case law confirmed that reinstatement would at least have to be possible until the point that judgment has been granted,<sup>42</sup> and perhaps even until after the property has been sold,<sup>43</sup> but not after ownership has been transferred.<sup>44</sup> Although reinstatement after sale in execution seems unlikely and impractical,<sup>45</sup> the courts' interpretation of section 129(2) and (3) at least supports the argument that reinstatement is possible until the judicial enforcement process is complete.<sup>46</sup>

Why the legislature therefore deemed it necessary to amend the subsection in the way it did, is not clear. As indicated above, the initial plan was to leave subsection (4) unchanged, but within a relatively short period the decision was made to amend it instead and no explanation was given for this. This quick and drastic, yet unexplained, amendment leads me to speculate whether there was any rational purpose behind this move. The amendments to subsection (4) do not seem to be aimed at clarifying any particular uncertainties; in fact, the result is that it creates more confusion than before. The modified version of subsection (4) provides as follows:

- (4) A credit provider may not re-instate or revive a credit agreement after -
  - (a) the sale of any property pursuant to –
    - (i) an attachment order; or
    - (ii) surrender of property in terms of section 127;
  - (b) the execution of any other court order enforcing that agreement; or
  - (c) the termination thereof in accordance with section 123.

What has changed textually? The original subsection (4) delineated the limits of the consumer's right to reinstate the credit agreement. The new version of the subsection appears to turn this around by replacing the reference to "consumer" with "credit provider". The term "re-instate" is

40 S 129(4)(a)-(c) of the NCA. See *Firstrand Bank Limited v Nkata supra* n 20 at parr 23, 27, 34, 38-39, 41 & 44; *Nkata v Firstrand Bank Limited supra* n 20 at parr 51-53; *Nedbank Ltd v Fraser supra* n 20 at parr 40-41; and further *Brits supra* n 9 at 175-178; Coetzee 'Voluntary surrender, repossession and reinstatement in terms of the National Credit Act 34 of 2005 2010 *THRHR* 569 581.

41 See *Brits supra* n 9 at 175-178.

42 *Dwenga v First Rand Bank Ltd supra* n 19 at par 35 n 36.

43 *Nkata v Firstrand Bank Limited supra* n 20 at parr 51-53.

44 *Nedbank Ltd v Fraser supra* n 20 at parr 40-41. See also *ABSA Bank Ltd v Morrison* 2013 5 SA 199 (GSJ) parr 24 & 26.

45 *Brits supra* n 9 at 176-178; Botha 'A home owner's automatic mechanism for taking the sting out of default judgment' 2014 March *Property Law Digest* 2.

46 *Firstrand Bank Limited v Nkata supra* n 20 at parr 23, 27, 34, 38-39, 41 & 44; *Nkata v Firstrand Bank Limited supra* n 20 at par 55.

retained but “or revive” is added. This is now the only place in the Act that makes express reference to the notion of reinstating a credit agreement, as the term is removed from subsection (3). This is also the only mention of reviving a credit agreement. A surface reading of the subsection creates the impression that, unlike the previous right of reinstatement, the consumer’s right to “remedy a default” is not qualified by the events listed in section 129(4), since this subsection now expressly refers to the *credit provider’s* – not the *consumer’s* – rights.

What is one to make of the replacement of “consumer” with “credit provider”? If taken literally, the amendments to subsection (4) imply the introduction of a new concept, namely the credit provider’s, as opposed to the consumer’s, right to “re-instate or revive” a credit agreement, which is limited by the events listed in paragraphs (a) to (c). There is no other reference to something like this in the Act and there is, to my knowledge, no reason to think that such a right is necessary or had ever been advocated for. It is not clear why “or revive” had to be added to the subsection either. Is revival somehow different than reinstatement?

Consequently, subsection (4) ostensibly no longer has anything to do with whatever the consumer’s right under subsection (3) is intended to be, since these now clearly involve two different rights attributed to two different parties. The result may be that subsection (4) can no longer be used to interpret the confines of the right stipulated in subsection (3). However, this state of affairs would be strange because subsection (3) is still expressly made subject to subsection (4). How can the *consumer’s* right to “remedy a default” prior to cancellation be made subject to the limitations placed on the *credit provider’s* ostensible right to “re-instate or revive” a credit agreement?

A right for the *credit provider* to “re-instate or revive” a credit agreement hardly fits into the Act as a whole, but it is especially out of place in section 129. Firstly, why would the creditor ever want to reinstate a credit agreement? Secondly, forcing reinstatement on a consumer is at odds with the purposes of the Act and would be inequitable. One explanation might be that the legislature wants to afford the creditor the choice whether to accept the debtor’s payment of arrears, hence reinstatement, after debt enforcement proceedings have commenced. Therefore, whether the agreement is reinstated is in the creditor’s discretion. However, this does not make sense either. Firstly, if both parties want to reinstate, there is no dispute and hence no need for a specific statutory measure, since they could consensually arrange the matter. Secondly, if the legislature wanted to afford the creditor such a discretion, this could have been achieved in a much simpler and clearer manner.

It may consequently be that the amended section 129(4) gives the discretion to “re-instate or revive” the credit agreement after cancellation to the credit provider alone, but that he can elect to do so only until any of the events listed in paragraphs (a) to (c) takes place. Even if the

consumer pays all outstanding amounts, he is at the mercy of the credit provider who can elect whether or not to allow reinstatement. This would be a bizarre arrangement for which there is no principled reason. It also seems to contradict the overall purposes of the Act and it may even discourage the creditor's co-operation in extra-judicial dispute resolution.

Taken literally, therefore, the amended section 129(4) would have no practical meaning as far as the consumer's rights are concerned. This is a shame because the original version was a useful addition to the stipulation for the consumer's right of reinstatement, since it stipulated the confines of the right. The prospect that section 129(4) is no longer relevant will cause problems, because there is now nothing to indicate until which point in the process the remedy of default can take place. It is hard to believe that this repercussion was intended.

The fact that subsection (3) is still expressly made subject to subsection (4) might give an indication of how the two could fit together and what the function of subsection (4) is meant to be, notwithstanding its odd wording. In all likelihood the intention is still that subsection (4) should indicate the confines of the reinstatement mechanism. Logically, this makes sense but, if so, it is achieved through extremely poor drafting. To make practical sense of section 129(3) and (4) – as a coherent whole regarding the right of “reinstatement” – one is left with no other option than to stretch the wording of subsection (4).

Hence, there are two options when interpreting the amendment of section 129(4): The first option is that the legislature replaced “consumer” with “credit provider” so as to indicate that the reinstatement mechanism should be in the hands of the credit provider and not the consumer. This implies that subsection (4) no longer serves to indicate the limits of the consumer's right to remedy the default, but that it refers to some separate, albeit unexplainable, right of the credit provider. As I explain above, this approach is illogical and therefore it is difficult to accept that this was the legislature's intention.

The second option is to assume that the amendments made to section 129(4) should not be taken literally and, for all practical purposes, might have to be ignored. A strong indication of this possibility is the fact that the first draft amendment bill proposed no amendments to this subsection, and therefore the final version is probably the result of last-minute drafting confusion. Since the legislature also provided no explanation for the amendment, one must assume that it was never the intention to bring about the kind of substantive change that the literal wording of the modified subsection appears to indicate.

It is regrettable that the legislature leaves one with little choice but to disregard the actual wording of the NCA on this point, because the alternative would simply be too nonsensical. The bizarre reality is that one is compelled to interpret section 129(4) as if it has not been amended at all. Therefore, one must simply read section 129(4) as still providing for the limitations upon the *consumer's* right of “reinstatement” (or to

“remedy a default”), regardless of the fact that the subsection now literally refers to the limitations on the *credit provider*’s ostensible ability to reinstate or revive the agreement. What the legislature probably intended to do with the amendments to section 129(4) was to emphasise that the credit provider must *allow* reinstatement if the consumer remedies his default prior to any of the events listed in the subsection. After these events, the credit provider may (or must?) refuse to accept late payment. Not allowing reinstatement after property has been sold generally makes sense, because the alternative would create too much uncertainty for purchasers of property at sales in execution.

The aspect of section 129(4) that could have benefitted from the amendment process is clarification regarding the listed events after which reinstatement is no longer possible. This is the only issue in the subsection that has led to some uncertainty, since not all the cases were in agreement as to the latest point in the process until which the consumer can still rectify his default.<sup>47</sup> As I have pointed out, the general idea seems to be that reinstatement should be permissible until the moment that the agreement has been fully enforced or cancelled, which moment depends on the circumstances of the case. If property is involved, it would be when a sale in execution takes place; when no property is involved, it would be when judgment is granted. However, the wording of the subsection could have been clearer in this respect. Therefore, if anything, this is the issue that the legislature should have given attention to in subsection (4), instead of the unnecessary, and confusing, replacement of terminology that was opted for.

## 5 Conclusion

The regrettable reality is that the 2014 Amendment Act was a missed opportunity to simplify the right of reinstatement, its requirements and qualifications. By now we are accustomed to the unique way in which the NCA must be interpreted to make sense of matters. One is therefore compelled to squeeze the wording of the section 129(3) and especially subsection (4) into the general understanding of what a practicable and fair reinstatement mechanism should look like in view of the Act’s purposes as well as the constitutional context.

The point of departure when interpreting the subsections is the Act’s clear policy preference for dispute resolution and the avoidance of expensive litigation. The assumption is that, if at all possible, credit agreements should not be cancelled, terminated or enforced, but they should instead be seen through to their natural conclusion. Consequently, it is imperative to find creative ways to resolve disputes

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<sup>47</sup> See for example *Dwenga v First Rand Bank Ltd supra* n 19 at par 35 n 36 (until judgment is granted); *Nkata v Firstrand Bank Limited supra* n 20 at parr 51-53 (until the property is sold); *Nedbank Ltd v Fraser supra* n 20 at parr 40-41 (until the sold property has been transferred). See further Brits *supra* n 9 at 176-178.

by rectifying breaches of contract. The Act entails various such options, a notable example being the debt review process and its potential consequence of debt rearrangement. In the present context the possibility of reinstatement should be seen as being aimed at achieving the same purpose, and therefore the remedying of default should be encouraged<sup>48</sup> and available as an option for as late in the enforcement process as possible. This broad interpretation of the reinstatement mechanism is supported by the undeniable value it can have in avoiding unjustifiable limitations of constitutional rights, as is particularly evident if a debtor's home is at stake.

Taken on its own, the modified section 129(3) is not that problematic. The new version at least maintains a right for the consumer to remedy his default before the agreement is cancelled. The before-cancelled qualification is not a problem, since it does not preclude reinstatement during the process of specifically enforcing the acceleration clause. Therefore, as long as the creditor does not cancel the agreement (in the strict sense), the consumer is free to remedy his default by paying the prescribed amounts. As far as it goes, this arrangement makes sense.

The true confusion comes in when the amended section 129(4) is added to the picture. Previously it indicated the points in the debt enforcement process after which the *consumer* may not reinstate the agreement any longer. Now it refers to points in the process after which the *credit provider* may no longer reinstate the agreement. Listing these limitations from the credit provider's instead of the consumer's perspective is strange and a literal reading makes little sense. Notwithstanding, it is necessary that there should be some indication of the point until which the right established in section 129(3) is no longer exercisable, and one could assume that, despite poor drafting, this is still the purpose of section 129(4). The notion that the credit provider now has some sort of right of reinstatement is incomprehensible and hence one must assume that the legislature merely failed to express its true intention in coherent language.

In conclusion, it is a pity that one must go through such mental gymnastics and creative interpretation to come to a clear understanding of what the NCA's reinstatement mechanism is all about. The Amendment Act was meant to clarify matters, and it is disappointing that the result is continued confusion. Hopefully the amended section 129(3) and (4) will not cause problems in practice, although one can expect that it will not be long before a court will be faced with the task of explaining how these provisions should apply. Perhaps this contribution will provide the courts with some assistance.

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48 See for example *Nedbank Ltd v Fraser supra* n 20 at par 42, where the court advised that, when an execution order is granted against residential property, the debtor should be informed of his right to reinstate the agreement.

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## The 2014 credit-information amnesty regulations: What do they really entail?

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### OPSOMMING

#### Die 2014 Kredietinligting Amnestie Regulasies: Wat behels hulle regtig?

Op 1 April 2014 het regulasies ingetree wat behels dat sekere nadelige verbruikerskredietinligting en inligting aangaande volopbetaalde siviele vonnisse van alle kredietrekords van verbruikers wat gehou word deur alle geregistreerde kredietburos verwyder moet word. Die regulasies maak voorsiening vir 'n proses ten aansien van die eenmalige verwydering van sodanige inligting sowel as om inligting aangaande volopbetaalde vonnisse op 'n voortdurende basis te verwyder. Die Nasionale Krediet Wysingswet 19 van 2014 maak ook voorsiening vir die deurentydse verwydering van sodanige inligting. Alhoewel die regulasies redelik eenvoudig is, is daar tog 'n paar fasette wat onduidelikheid veroorsaak. Grotendeels het dit te make met die korrekte interpretasie van sekere woorde en uitdrukkings wat in party subregulasies gebruik word. Dit is byvoorbeeld onduidelik of die regulasies ook van toepassing kan wees op sekere regs persone. Daar is ook nie sekerheid oor welke inligting steeds in verbruikers se betalingsprofiel mag verskyn en hoe sodanige regulasies die betalingsprofiel beïnvloed nie. Die regulasies bepaal duidelik dat die inligting wat verwyder is van die kredietrekords van verbruikers ingevolge die regulasies nie deur kredietgewers gebruik mag word tydens die assessering of 'n verbruiker kwalifiseer vir enige krediet nie. Wat die regulasie egter nie bepaal nie is of sodanige kredietgewer sodanige inligting mag gebruik waar hy dit bekom het deur nie na 'n kredietburoverslag te kyk nie, maar deur sy eie interne rekords na te gaan, byvoorbeeld in die geval waar hy met 'n bestaande kliënt te doen het nie. Hierdie aspekte, sowel as 'n paar ander, word in diepte in hierdie artikel bestudeer. Die impak wat die regulasies op die verbruikerskrediet mark tot dusver gehad het, sowel as 'n paar voordele en nadele van die regulasies word ook kortweg bespreek.

## 1 Introduction

Comprehensive credit information, which provides details pertaining to credit ... already availed of by a borrower as well as his repayment track record, is critical for the smooth operations of the credit market. *Lack of credit history is an important factor affecting the credit flow to relatively less creditworthy borrowers. In the absence of credit history, pricing of credit can be arbitrary, the perceived credit risk can be higher, and there can be adverse*

*selection and moral hazard.*<sup>1</sup>

The credit information of a consumer held by a credit bureau is often used by a credit provider to determine the consumer's credit profile and to determine whether he has a good or bad debt repayment history before granting any credit to him. It is therefore critical that credit bureaux keep only accurate consumer credit information that truly reflects the credit profile and debt repayment history of the consumer. A credit bureau report plays a decisive role in assisting a credit provider to accurately assess the debt repayment history and creditworthiness of a prospective consumer. The moment the integrity of the credit information kept by a credit bureaux is questioned, credit providers will start relying on other factors (possibly to the detriment of consumers) to assess the creditworthiness of a prospective consumer. Without a proper credit profile and debt repayment history, a credit provider may decide to only grant credit to a prospective consumer, who it perceives as carrying a high-risk for defaulting, at a very high interest rate.

In terms of section 81(2) of the National Credit Act<sup>2</sup> (NCA or the Act), a credit provider may generally only conclude a credit agreement with a prospective consumer or increase an amount approved in terms of an existing credit agreement<sup>3</sup> after it has done a proper and reasonable assessment and concludes that the consumer will be able to satisfy all his obligations under all his credit agreements, including the prospective credit agreement.<sup>4</sup> The compulsory assessment requires that a credit provider not only does an "affordability" (financial) assessment of the consumer, but also assesses the consumer's debt repayment history and also tests the consumer's general understanding of the risks, cost and obligations of the credit agreement.<sup>5</sup> If a credit provider neglects to do an assessment or fails to conduct a proper assessment, such conduct may constitute reckless lending<sup>6</sup> which has many adverse consequences for

1 Devnomics (Developmentnomics (Pty) Ltd) *Literature review on the impact of the National Credit Act (NCA) has had on South Africa's credit market* (2012) (available from <http://www.ncr.org.za>, accessed 2014-09-01) 117.

2 34 of 2005 (the NCA or simply the Act). In this article words in the singular also mean words in the plural and vice versa, and words in the masculine also mean words in the feminine and neuter.

3 Other than an increase in terms of s 119(4).

4 Read with s 80(1).

5 Kelly-Louw 'A credit provider's complete defence against a consumer's allegation of reckless lending' 2014 *SA Merc LJ* 24 25 & 32. See also s 81(2).

6 See, in particular, ss 80 & 81. For a discussion of reckless lending in terms of the NCA, see Boraine & Van Heerden 'Some observations regarding reckless credit in terms of the National Credit Act 34 of 2005' 2010 *THRHR* 650; Van Heerden & Boraine 'The Money or the box: Perspectives on reckless credit in terms of the National Credit Act 34 of 2005' 2011 *De Jure* 392; Vessio 'Beware the provider of reckless credit' 2009 *TSAR* 274 281; Renke 'Measures in South African consumer credit legislation aimed at the prevention of reckless lending and over-indebtedness: An overview against the background of recent developments in the European Union' 2011 *THRHR* 208; Kelly-Louw *supra* n 5; Kelly-Louw (with contributions by Stoop)

the credit provider.<sup>7</sup>

Section 82(1) of the NCA originally<sup>8</sup> allowed a credit provider to determine for itself the evaluative mechanisms or models and procedures to be used in meeting its assessment obligation under section 81, provided that they resulted in a fair and objective assessment.<sup>9</sup> This section had to be read with section 61(5) of the NCA which provides that a credit provider may determine for itself any scoring or other evaluative mechanism or model to be used in managing, underwriting and pricing credit risk, provided that any such mechanism or model is not based or structured upon a statistical or other analysis in which the basis of risk categorisation, differentiation or assessment is a ground of unfair discrimination prohibited in section 9(3) of the Constitution of the Republic of South Africa of 1996. Section 82(1) was subject to section 82(2)(a) which stipulated that the National Credit Regulator (NCR)<sup>10</sup> could pre-approve the evaluative mechanisms, models and procedures to be used in terms of section 81 regarding proposed developmental credit agreements. Furthermore, section 82(2)(b) provided that the NCR could also publish guidelines proposing evaluative mechanisms, models and procedures, to be used in terms of section 81, applicable to other credit agreements. Therefore, credit providers have generally based their credit assessments of consumers on the information available from their own records and also from credit reports obtained by credit bureaux. In the

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*Consumer Credit Regulation in South Africa* (2012) (hereinafter Kelly-Louw *Consumer Credit Regulation*) par 12.2; Scholtz (ed) *et al Guide to the National Credit Act* (2008-; loose-leaf) par 11.4. For a discussion of the Affordability Assessment Regulations that came into force on 13 Ma 2015 (see Reg *Gazette* No 10382 in GG No 38557 of 2015-03-13) and how they influence the reckless lending provisions set out in the NCA; see Van Heerden 'Reckless credit: Developments regarding affordability assessment and the extended powers of the National Consumer Tribunal' (paper delivered at the 2015 Annual Banking Law Update held in Johannesburg on 28 May 2015) 219–255. For cases dealing with reckless lending, see, eg, *SA Taxi Securitisation (Pty) Ltd v Mbatha and Two Similar Cases* 2011 (1) SA 310 (GSJ); *Desert Star Trading 145 (Pty) Ltd v No 11 Flamboyant Edleen CC* 2011 (2) SA 266 (SCA); *Standard Bank of South Africa Ltd v Kelly and Another* (23427/2010) 2011 (WCHC) 1 (2011-01-25); *Standard Bank of South Africa Ltd v Newman* (27771/2010) 2011 (WCHC) 91 (2011-04-15); *Horwood v FirstRand Bank Ltd* (2010/36853) 2011 (GPJHC) 121 (2011-09-21); *ABSA Bank v Coe Family Trust* 2012 (3) SA 184 (WCC); and *Mercantile Bank Limited v Hajat* 2013 JOL 30499 (GSJ).

7 See ss 83 & 84. For a detailed discussion of what the consequences of reckless lending are and what the powers of a court are when it declares an agreement as constituting reckless credit, see Kelly-Louw *Consumer Credit Regulation supra* n 6 at par 12.2.3; and Scholtz *et al supra* n 6 at par 11.4.5. The National Credit Amendment Act 19 of 2014, which came into operation on 13 March 2015, amends s 83 of the NCA so that the power to declare a credit agreement reckless is also bestowed upon the National Consumer Tribunal. It also provides that the Tribunal has exactly the same authority as a court to make appropriate orders (ie, in terms of ss 83(2) & 83(3)).

8 See s 82(1) in its original form.

9 See also *Horwood v FirstRand Bank supra* n 6 at par 5.

10 Established in terms of s 12 (hereinafter the NCR).

past, the NCR, responsible for the regulation of the consumer-credit market and nearly all credit providers, could therefore publish non-binding guidelines proposing evaluative mechanisms, models and procedures to be used to determine whether credit was being granted recklessly in relation to credit agreements generally (other than for developmental agreements).<sup>11</sup> In September 2013, the NCR issued draft “Affordability Assessment Guidelines”.<sup>12</sup> The draft guidelines aimed to assist credit providers to conduct proper assessments of the consumers’ affordability in credit applications and to combat consumer over-indebtedness as well as reckless lending. However, the decision was later taken to rather amend the NCA, allowing for prescribed Affordability Regulations to be issued which would be applicable generally. The National Credit Amendment Act of 2014<sup>13</sup> (Amendment Act) which came into operation on 13 March 2014<sup>14</sup> amends section 82 of the NCA. The Amendment Act amends section 82 in that it now gives the Minister of Trade and Industry (Minister) the authority to issue “Affordability Assessment Regulations”. The amendment provides that such regulations must be made by the Minister if it is recommended by the NCR. The amendment to section 82 does not take away a credit provider’s right to determine for itself the evaluative mechanisms or models and procedures to be used in meeting its statutory assessment obligation as long as they are not “*inconsistent with the affordability assessment regulations*” issued and provided that they result in a fair and objective assessment.<sup>15</sup> On 1 August 2014, a comprehensive set of draft regulations on various matters including the draft Affordability Assessment Regulations were published for public comment and on 13 March 2015 the final regulations on various matters (the 2015 Regulations), including the final Affordability Assessment Regulations came into operation.<sup>16</sup> In terms of the Amendment Act and the Affordability Regulations credit providers now have to ensure that their evaluative/assessment mechanisms or models and procedures are compliant with the latest changes.

In order to improve and integrate the credit-information infrastructure, provisions dealing with consumer credit information and credit bureaux were included in the NCA.<sup>17</sup> For instance, it is compulsory for all credit bureaux to register<sup>18</sup> with the NCR and the NCA is prescriptive of the type of consumer credit information that credit

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11 See s 82(2)(b) read with s 82(3), prior their deletion by the National Credit Amendment Act 19 of 2014.

12 Available from <http://www.ncr.org.za> (accessed, 2014-08-01).

13 Act 19 of 2014 (hereinafter the Amendment Act).

14 Published in GG 37665 of 2014-05-19.

15 See s 82(2) of the NCA, as amended by the Amendment Act.

16 See GN R597 in Regulation Gazette 10242 in GG 37882 of 2014-08-01 and see National Credit Regulations including Affordability Assessment Regulations published in Regulation Gazette No 10382 in GG No 38557 of 2015-03-13.

17 See the Department of Trade and Industry *Consumer Credit Law Reform: Policy Framework for Consumer Credit* (2004) 31.

18 In terms of s 43.

bureaux may hold.<sup>19</sup> Particular duties are also placed on credit bureaux in respect of consumer credit information obtained and retained by them.<sup>20</sup> The Regulations to the NCA even specify the maximum retention periods that a consumer's credit information (such as a civil court judgment obtained against a consumer, the sequestration date of an insolvent consumer's estate, or number of enquiries made on a consumer's record) may be displayed by a credit bureau.<sup>21</sup> A credit bureau must also comply with certain prescribed standards when maintaining consumers' credit information.<sup>22</sup>

The whole idea behind the statutory regulation of credit bureaux and consumer credit information is to ensure that credit providers may rely on more accurate credit information when assessing the consumer's debt repayment history.<sup>23</sup> Unfortunately, this noble idea may be undermined by the Department of Trade and Industry's (DTI's) latest and second credit-information amnesty.

Before the NCA, the consumer credit information held by the credit bureaux was generally unreliable, incomplete and incorrect. In order to correct this unfortunate situation, regulations were issued in terms of the NCA to provide for the removal of consumer credit information that met certain criteria and assisted with the verification and review of certain adverse and negative consumer credit information that was kept by the different credit bureaux in the past (the 2006 Amnesty Regulations).<sup>24</sup> The 2006 Amnesty Regulations provided for a certain period, after the NCA came into operation, in which all credit bureaux had to verify, review and remove certain consumer credit information from their records. For example, a civil-court judgment for an amount of R50 000 or less which was listed on the consumer's credit record on or before 1 September 2006 and was satisfied (paid up) before 31 December 2007, had to be removed within three months of its payment date. Plus, any adverse information in respect of debt less than R500 reflected on a credit record as at 1 September 2006 had to be removed from the

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19 Ss 70–73. S 70(1) provides a description of what consumer credit information exactly entails (see also the discussion in par 3 *infra*).

20 For a full discussion, see Kelly-Louw *Consumer Credit Regulation supra* n 6 at par 6.4.

21 See eg, reg 17 published in GN R489 in GG 28864 of 2006-05-31, substituted by GN R1209 in GG 29442 of 2006-11-30 and amended by Regulation *Gazette* No 10382 in GG No 38557 of 2015-03-13. For a full discussion, see Kelly-Louw *Consumer Credit Regulation supra* n 6 at par 6.5; see also *Damon and Another v Nedcor Bank Ltd* 2006 JDR 0827 (C). Some of the amendment made in the 2015 Regulations includes an amendment to reg 17(1) providing for some of the maximum retention periods that consumer credit information may be displayed to be shortened and some adverse information to no longer be displayed.

22 See eg, ss 70–73.

23 See Kelly-Louw 'The prevention and alleviation of consumer over-indebtedness' 2008 *SA Merc LJ* 200 221–2; and Kelly-Louw LAWSA (eds Joubert & Faris) 5 (2010) par 131.

24 Published in GN R1209 in GG 29442 of 2006-11-30 (for a full discussion of these regulations, see Scholtz *et al supra* n 6 at par 15.6).

records kept by credit bureaux by 1 June 2007. Generally this amnesty was welcomed by the consumer-credit industry as it was a well-known fact that, in the past, the consumer-credit records kept by credit bureaux were in a dismal state, and many consumers were “blacklisted” without their knowledge and without an opportunity to challenge the correctness of the adverse information being reported to the credit bureaux. Consumers could also not easily access the credit information kept by credit bureaux and it was practically impossible for a consumer to have incorrect or adverse credit information corrected or removed. A consumer also did not have an automatic right to access or challenge his information and records kept by credit bureaux. In general, consumers only discovered that they had adverse credit records when they tried to apply for credit and their applications were declined because of it.<sup>25</sup>

What was initially thought to be a once-off provision of credit-information amnesty, resulted in a second and much more encompassing amnesty. The DTI felt that as a limited number of consumers benefited from the first amnesty, due to the monetary caps and lack of consumer education accompanying it, a further amnesty was needed. On 26 February 2014, the Minister published the Removal of Adverse Consumer Credit Information and Information relating to Paid Up Judgments Regulations (the 2014 Amnesty Regulations).<sup>26</sup> The 2014 Amnesty Regulations came into operation on 1 April 2014 and pertain to the once-off removal of certain adverse consumer credit information from the records of all consumers, irrespective of the type of credit agreement or amount of debt/credit involved, kept by all the credit bureaux as at 1 April 2014. The regulations also provide for the once-off and on-going removal of information relating to civil judgments of consumers where the consumers settled the capital amount. The Amendment Act also introduces a process whereby certain adverse consumer credit information and information regarding paid up judgments, may automatically be removed from the credit record of a consumer on an on-going basis.<sup>27</sup>

In this article, attention is given to the 2014 Amnesty Regulations and the recent amendments to the NCA providing for the on-going automatic removal of certain adverse consumer credit information and information regarding paid up judgments. Although the 2014 Amnesty Regulations and the amendments to the NCA are for most parts fairly straightforward, there are a few aspects which are confusing and that require a further discussion.

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25 Kelly-Louw *Consumer Credit Regulation supra* n 6 at 169.

26 Published in GN R144 in GG 37386 of 2014-02-26. For a brief discussion of how this project came about and what some of the initial amnesty proposals were, see Kelly-Louw *supra* n 5 at 39–40; Ackotia ‘A short-lived pardon under the credit amnesty’ *GhostDigest* (2014-09-12) (available from <http://www.ghostdigest.co.za>, accessed 2014-04-09).

27 See s 71A of the NCA inserted by the Amendment Act.

## 2 The 2014 Credit-Information Amnesty Regulations

### 2.1 Reasons for the Amnesty and Number of Consumers Benefitting

The removal of the adverse consumer credit information from the credit profile of a consumer in terms of the 2014 Amnesty Regulations, does not also entail the removal (write-off) of the consumer's duty to repay the debt which is affected by the regulations to the respective credit provider.<sup>28</sup> The 2014 Amnesty Regulations stress that a consumer remains liable for the repayment of any outstanding debt owned in terms of any credit agreement, irrespective of whether any adverse information concerning that specific debt was removed from a credit bureau<sup>29</sup> unless, of course, the debt prescribed or any other applicable law prohibits its repayment.

The NCR's motivation for removing the adverse credit information was that the removal would benefit the low – and middle – income group to access credit such as home loans, educational loans, increase employment opportunities and would be beneficial to those who could not afford fees for the rescission of judgment debts which had already been paid.<sup>30</sup> According to the DTI, the main purpose of the 2014 Amnesty Regulations is to enable blacklisted consumers whose financial circumstances have changed since they could not pay their debt in the past to be able to access credit again.<sup>31</sup> It is hoped that the removal of certain adverse credit information from the records of consumers will enable these consumers to obtain employment and rental housing opportunities that would not otherwise have been possible if they had remained blacklisted.<sup>32</sup>

On 27 February 2014, a day after the 2014 Amnesty Regulations were published, the Minister justified the reasons for granting this second amnesty as follow:<sup>33</sup>

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28 Ackotia *supra* n 26.

29 Reg 5 of the 2014 Amnesty Regulations.

30 Ackotia *supra* n 26.

31 See the Minister's media statement 'Removal of adverse consumer credit information and information relating to paid up judgments' 2014-02-27 (available from <http://www.thedti.gov.za>, accessed 2014-09-01) (hereinafter the Minister's Media Statement). The statements were also confirmed by attorney, Stephen Logan who was also one of the drafters of the 2014 Amnesty Regulations, during his presentation entitled 'Factors that informed the removal of adverse credit information' at the DTI's Seminar on the Impact of the National Credit Act & Affordability Assessment Regulations held in Pretoria on 2014-09-16 (hereinafter the DTI's September 2014 Seminar).

32 *Ibid.*

33 See the Minister's Media Statement *supra* n 31.

[T]he key pillars of the Act is the requirement for credit providers to conduct affordability tests before extending credit to consumers. The research we commissioned for the purposes of asses[s]ing the feasibility of removing adverse consumer credit information has revealed glaring gaps in how these tests are conducted by credit providers. In some instances these affordability tests are not conducted at all ...

Failure to conduct these affordability tests has results in reckless loans being extended to consumers that are already over-indebted, thus impacting on their ability to repay such loans ...Of primary concern also is the trend among credit providers to *lazily use blacklisting at the credit bureau as the substitute for affordability test*. It is not uncommon for a consumer to be declined credit purely on the credit bureau blacklisting without even conducting the affordability test (own emphasis).

Similar reasons were given to justify the creation of the Amendment Act, empowering the Minister to issue and prescribe Affordability Regulations which credit providers must comply with. It is the Minister's view that the self-regulatory method, allowing credit providers to determine for themselves their assessment modules and methods, did not yield positive results.<sup>34</sup>

According to the Minister, another major reason for the latest amnesty was that there were clear indications that the blacklisting of consumers at the credit bureaux had become a new impediment to employment opportunities. He added that:<sup>35</sup>

Having alluded to circumstances that led to consumers being blacklisted, it is a fact that adverse consumer credit information has been used incorrectly by some credit providers to deny consumers access to credit to secure homeloans, even where their financial position has changed. In terms of the regulations, a judgment would be reflected on the record of a consumer for five (5) years at the credit bureau, irrespective of the consumer having paid up. The process to remove such negative listing involves the court, which adds another cost to the consumer unnecessarily.

This Notice [that is, Regulations] provides a simple and quick process to remove such negative information without approaching the court once the consumer has paid up. It also provides relief to a consumer, whose financial position has changed to start on a clean slate and maintain a clean credit record going forward. While there is a chance that a few consumers that should not benefit from this Notice due to their repeat dishonest behaviour in regard to credit repayment, it would be easy to identify these consumers. Most consumers have however welcomed this second opportunity, and have committed to keep their credit record clean going forward. This Notice must benefit these most deserving consumers.

During a news conference in 2013, the DTI projected that only about 1,6 million consumers would benefit from the 2014 Amnesty Regulations. This figure was in contrast to the approximately 4 million consumers that the

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34 *Ibid.*

35 *Ibid.*

Credit Providers' Association and the Credit Bureau Association said would benefit from it.<sup>36</sup>

At this stage it is still too early to determine exactly how many consumers will benefit from the 2014 Amnesty Regulations. At the end of September 2013, credit bureaux held records for 20.29 million credit-active consumers, at the end of December 2013 the number increased to 20.64 million, and it increased further to 21.71 million at the end of March 2014.<sup>37</sup> Consumers classified in good standing, stood at 10.71 million at the end of December 2013 and just a few months later the number miraculously increased to 12.11 million, despite there only being 1.07 million new records being added to the credit bureau. According to the NCR's *Credit Bureau Monitor Quarterly Reports*, the number of consumers with impaired records stood at 9.34 million at the end of December 2012 and exactly a year later, it had increased to 9.93 million. However, at the end of March 2014 the numbers of consumers with impaired records decreased to 9.60 million.<sup>38</sup> These improved figures are the first to illustrate how many consumers were affected by the 2014 Amnesty Regulations. Unfortunately they only reflect the situation as at the end of March 2014. The executive manager, Ms Jeannine Naudé-Viljoen of the Credit Bureau Association, however, reported that during September 2014, around 5 million consumers had benefited. She added that credit bureaux removed credit information relating to 100 000 paid up judgments and 13 million adverse classifications from their credit records.<sup>39</sup> She did, however, point out that these numbers vary across credit bureaux depending on the market position of a specific bureau.

Over the years, there were a startling number of consumers that were struggling to remain up-to-date with their credit repayments pointing to the severity of over-indebtedness in South Africa. For instance, since the NCA's inception in June 2007, R14 billion was repaid to credit providers from consumers under debt review.<sup>40</sup> However, the effect of the latest amnesty is that a distorted rosy picture is created that does not truly reflect the number of consumers who have bad debt repayment records and are currently over-indebted.

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36 Brand-Jonker 'Vier miljoen mense se kredietrekords dalk gepoch' (available from <http://www.sake24.com>, accessed 2014-09-01).

37 See NCR's *Credit Bureau Monitor* (Fourth Quarter) (2013) 1 and NCR's *Credit Bureau Monitor* (First Quarter) (2014) 1 (both reports available from <http://www.ncr.org.za>, accessed 2014-09-01).

38 Ibid.

39 Statements made during her presentation entitled 'Perspectives on the removal of adverse credit information' at the DTI's September 2014 Seminar *supra* n 31.

40 See the presentation made by Mr Lesiba Mashapa, company secretary of the NCR, entitled 'Impact of the Credit Amendment Act, the removal of adverse credit information and affordability assessments' at the DTI's 2014 September Seminar *supra* n 31.

Credit providers, particularly banks, strongly opposed the introduction of the second amnesty. A primary concern was that the lack of access to adverse credit listings would lead to an increase in lending risks, as credit providers would be unable to distinguish between consumers who have received amnesty, although they are high-risk lenders, and consumers who are, factually, low-risk lenders who can manage their credit well.<sup>41</sup>

## 2.2 Overview and Application of the 2014 Amnesty Regulations

The 2014 Amnesty Regulations relate to the once-off removal of certain adverse consumer credit information from the credit records, including payment profiles, of all consumers, kept by all the registered credit bureaux<sup>42</sup> as at 1 April 2014. Regulation 1 provides that “adverse consumer credit information” for purposes of these regulations means:

- (a) *adverse classifications of consumer behaviour are subjective* classifications of consumer behaviour and include classifications such as ‘delinquent’, ‘default’, ‘slow paying’, ‘absconded’ or ‘not contactable’;
- (b) *adverse classifications of enforcement action*, which are classifications related to enforcement action taken by the credit provider, including classifications such as ‘handed over for collection or recovery’, ‘legal action’, or ‘write-off’;
- (c) *details and results of disputes lodged by consumers* irrespective of the outcome of such disputes;
- (d) *adverse consumer credit information contained in the payment profile* represented by means of any mark, symbol, sign or in any manner or form (own emphasis).

The 2014 Amnesty Regulations also provide for the once-off, as well as on-going, removal of information relating to “paid up judgments” of consumers. Regulation 1 defines “paid up judgments” as civil court judgment debts, including default judgments, where the consumer has settled the *capital amount* under the judgment. It is not clear what is meant by the term “capital amount” or exactly which amounts the term includes as neither the NCA nor any other regulation issued in terms of the Act, defines the term’s precise meaning. The NCA refers to and defines only the term “principal debt”.<sup>43</sup> The 2014 Amnesty Regulations are also completely silent about the payment (settlement) of the interest component and any other costs (for example, legal costs) in connection with the judgment debt. From a literal reading of the definition, it seems that a consumer would only have to pay the outstanding capital amount if he wishes to benefit from the amnesty. Even if that is the intended

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41 Ackotia *supra* n 26.

42 This refers to a credit bureau registered with the NCR in terms of s 43 of the NCA.

43 This means the amount calculated in accordance with s 101(1)(a) plus the value of any item listed in s 102 and is the amount deferred (as defined in reg 39(1) published in GN R489 in GG 28864 *supra* n 21 in terms of the agreement (see s 1 of the NCA).

meaning of the term, it should be remembered that the consumer is still liable for the payment of the interest, despite details regarding the “paid up judgment” being removed from his credit record. Also, a removal of the details of the judgment from the credit record does not automatically amount to a rescission of the judgment.<sup>44</sup>

The same problem did not arise under the 2006 Amnesty Regulations. In those regulations, regulation 3(3) provided that a consumer had to submit *prima facie* proof of the “full payment of the judgment debt” (own emphasis) if he wanted the qualifying paid up civil judgment (that is judgment for up to R50 000) to be removed from his credit record. But, in terms of the 2014 Amnesty Regulations, it is the credit provider that must submit the information regarding payment of the judgment debt. The 2014 Amnesty Regulations provide that the credit provider must submit the information relating to a paid up judgment to all registered credit bureaux within seven days of receipt of “such payment” (that is, the capital amount – set out in the definition of paid up judgment).<sup>45</sup> However, it is unlikely that a credit provider will inform a credit bureau to remove details regarding a “paid up” judgment unless all the outstanding amounts, including interest and legal costs, have been settled. The NCA clearly states that it aims to encourage the fulfilment of financial obligations by consumers.<sup>46</sup> The Act also clearly stresses that the mechanisms aimed at relieving the over-indebtedness of consumers are all based on the principle that consumers should satisfy “all responsible financial obligations”.<sup>47</sup> Seen in this light, it is improbable that it is the intention of the legislature to provide for the consumer to only settle his capital amount before benefitting from the amnesty.<sup>48</sup> It is probably just another case of ambiguous drafting for which the NCA has become notorious.

All registered credit bureaux had to remove the abovementioned adverse credit information and the “paid up judgment” data from their

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44 Currently a project is underway in which attention is given to possibly amending the legislation dealing with the rescission and abandonment of judgments. Specific attention is given to how the Magistrates’ Courts Act 32 of 1944 may be amended so that it allows for an easier, more efficient and cheaper method in which a judgment that has been settled by consumers may be rescinded or abandoned (see eg, the Working document Magistrates’ Courts Amendment Bill 2013-02-21 (available from <http://www.rebels.co.za>, accessed 2014-08-01) and Kelly-Louw *supra* n 5 at 39–40).

45 Reg 3(a) of the 2014 Amnesty Regulations.

46 See ss 3(c)(i), (g) & (i) of the NCA.

47 Ss 3(g) & (i) of the NCA.

48 One of the drafters of the 2014 Amnesty Regulations recently said that it was not the intention to exclude the interest component, but rather to prohibit credit providers from piling “all kinds of extra costs onto the judgment debt” so that it could not be settled by a consumer. Unfortunately, the drafter did not elaborate on the type of costs he was referring to (see Logan ‘Factors that informed the removal of adverse credit information’ a presentation made at the DTI’s September 2014 Seminar *supra* n 31).

records within two months (that was before 1 June 2014) from the effective date (that is 1 April 2014).<sup>49</sup> A credit bureau could have requested a seven day extension beyond this two month period. However, to have qualified for such an extension, the credit provider had to have applied for it at least seven days before the expiry of the two month period.<sup>50</sup> A credit bureau also had to notify all the other registered credit bureaux within three days of any of the adverse and paid up judgment information being removed from its records.<sup>51</sup> The credit bureau receiving such notifications, also had three days to remove similar information from its records.<sup>52</sup> A credit bureau is also not permitted to record or retain on its register, any of the information that was removed in terms of these regulations.<sup>53</sup>

As already mentioned, provision is made for credit bureaux to remove information regarding paid up judgments on an on-going basis after the final “clean-up” deadline.<sup>54</sup> A credit provider must submit all information relating to paid up judgments on a continuing basis to all registered credit bureaux within seven days of receipt of such payment from a consumer,<sup>55</sup> and the credit bureaux must remove such information within seven days after receiving proof of such payments<sup>56</sup> (note the concerns expressed above regarding the settlement of only the capital amount of judgments).

In general, credit providers had until the effective date of the regulations to submit the adverse and paid up judgment data to credit bureaux that had to be removed, but if they failed to do so by that date they could still have submitted the remaining data within seven days after the effective date. However, if they had failed to comply with this later deadline, they were no longer permitted to submit the adverse credit information to credit bureaux for listing.<sup>57</sup>

Regulation 3(d) provides that a credit provider is not permitted to use adverse consumer credit information and information relating to paid up judgments that have been removed in terms of the regulations for “any reason, including credit scoring and assessment” of consumers. A credit provider is also not permitted to re-submit, for purposes of listing,

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49 Regs 2(a)–(b) of the 2014 Amnesty Regulations. During this two month period a credit bureau had to ensure that the adverse credit and paid up judgment information that ought to have been removed in terms of this amnesty regulations was not displayed or provided to credit provider or any other person requesting such information (reg 2(h)).

50 Regs 2(c)–(d) of the 2014 Amnesty Regulations.

51 *Idem* 2(e).

52 *Idem* 2(f).

53 *Idem* 2(g).

54 *Idem* 2(a)(ii).

55 *Idem* 3(a).

56 *Idem* 2(i).

57 *Idem* 3(b)–(c).

adverse and paid up judgments information that was removed, in terms of these regulations, to any credit bureau.<sup>58</sup>

The 2014 Amnesty Regulations also imposed various reporting duties on credit bureaux and stipulated that an audited report containing certain information had to be submitted to the NCR one month after the deadline that was set for removing the adverse credit and paid up data (that was due at the beginning of July 2014).<sup>59</sup> Within three months after receiving the reports from the credit bureaux, the NCR has to submit a report to the Minister on the effectiveness and compliance with the regulation (due at the beginning of October 2014). So although the NCR's *Credit Bureau Monitor Quarterly Report* for March 2014 already contains some information reflecting what impact the removal of the data has had on the records of consumers,<sup>60</sup> the full scope and impact of this credit amnesty on the industry is still unknown. The 2014 Amnesty Regulations also imposes a duty on the NCR to regularly monitor the implementation of these regulations and ensure that information related to paid up judgments is removed continually.<sup>61</sup>

Any non-compliance with the 2014 Amnesty Regulations will be dealt with in terms of the remedies and procedures in the NCA.<sup>62</sup> Therefore, a credit bureau or a credit provider may even be deregistered by the NCR for failing to adhere to these regulations.

The 2014 Amnesty Regulations affect the credit bureau reports of a consumer, who is a natural person, stokvel or a specific type of trust<sup>63</sup> and who is a party to a credit agreement to which the NCA applies. There is nothing in these regulations to prevent the 2014 Amnesty Regulations from also applying to the credit bureau reports of a juristic person who qualifies as a consumer and who is also a party to a credit agreement in respect of which certain parts of the NCA applies.<sup>64</sup> There is also nothing in the NCA itself that states that the provisions in the Act<sup>65</sup> dealing with consumer credit information do not or could not also apply to juristic persons.<sup>66</sup> Although it can probably be argued that section 70(1) of the

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58 *Idem* 3(e).

59 *Idem* 4(a).

60 See the discussion in par 2.1 *supra*.

61 Reg 4(b) of the 2014 Amnesty Regulations.

62 *Idem* 7.

63 S 1 of the NCA provides that a juristic person includes a partnership, association or other body of persons (corporate or unincorporated), or a trust if there are three or more individual trustees; or the trust is itself a juristic person. The section excludes stokvels (as defined in s 1) from the definition of a juristic person, and therefore stokvels enjoy the full protection of the Act just as natural persons do when they borrow money from third parties, such as banks or micro-lenders. Certain trusts (for example, where there are fewer than three individual trustees) will also qualify as natural persons.

64 For a full discussion of the NCA's limited application to juristic persons, see Kelly-Louw *Consumer Credit Regulation supra* n 6 at par 2.3.1.

65 See ss 70 & 72–74.

66 See also s 4 read with s 6.

NCA, that defines “consumer credit information”, refers more to the information concerning natural persons than to juristic persons.<sup>67</sup> In principle, however, the 2014 Amnesty Regulations apply also to the credit records of certain juristic persons held by credit bureaux. Practically, this is neither here nor there as credit bureaux apparently either don’t keep credit reports of juristic persons or have very limited credit information on juristic persons.<sup>68</sup> Apparently this situation will only change if it becomes compulsory for credit bureaux to also keep the records of juristic persons.<sup>69</sup>

### 3 Credit Information Retained in the Credit Reports, Despite the Application of the 2014 Amnesty Regulations

The 2014 Amnesty Regulations do not entail (nor should they be so interpreted) that a consumer’s debt repayment history should be totally destroyed.<sup>70</sup> Credit bureaux are still required (and allowed) to maintain a record of a consumer’s monthly payments and his payment profile.<sup>71</sup> The 2014 Amnesty Regulations simply remove certain adverse credit information and information relating to paid up judgments from a consumer’s credit bureau report so that they are no longer reflected therein.

The NCA is prescriptive of the type of consumer credit information which may be held by a credit bureau. Section 70(1) provides that consumer credit information is information concerning a consumer’s (person’s):

- *credit history*, including his applications for credit, his concluded credit agreements (current and previous), pattern of payment or default under any credit agreements, debt re-arrangement/restructuring in terms of the NCA, incidence of enforcement actions with respect to any credit agreement, the circumstances of termination of any credit agreement, and related matters;
- *financial history* (such as his past and current income, assets and debts and other matters within the scope of the consumer’s financial means, prospects and obligations);<sup>72</sup>
- *education, employment, career, professional or business history*; or
- *identity*, including his name, date of birth, identity number, marital status, past and current addresses and contact details.

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67 See the discussion of s 70(1) in par 3 *infra*.

68 A statement made by Naudé-Viljoen during her presentation entitled ‘Perspectives on the removal of adverse credit information’ at the DTI’s September 2014 Seminar *supra* n 31.

69 *Ibid*.

70 See the Minister’s Media Statement *supra* n 31.

71 Ackotia *supra* n 26.

72 As defined in s 78(3).

Generally, a credit report compiled by a credit bureau includes the abovementioned information. It should be remembered that credit bureaux keep negative as well as positive information on a consumer. The report also contains a payment profile. The payment profile refers to the consumer's history relating to a particular transaction<sup>73</sup> (for example, the payment of instalments in terms of a mortgage agreement). The payment profile generally includes a record that indicates by way of numerals, the number of months that it has taken a consumer to pay off a specific debt. Sometimes a range of numbers, for example zero to five or more, is used to reflect this. The payment profile also indicates if a payment (instalment) for a particular month was missed. The payment profile normally also includes a categorisation, reflected by an abbreviation or code, and follows from the assessment of the payment profile and indicates whether the consumer is a punctual payer, slow payer or defaulter, and whether any debts of the consumer have been written off, any legal action (for example judgment) has been taken and if so, whether and when the judgment debts were settled.

The listing of the number of months it takes a consumer to repay his debt listed in his payment profile, is a factor that a credit bureau takes into consideration when it creates a credit score band (credit score) for a specific consumer. Credit reports normally set out the credit score bands that classify (rate) the likelihood of a particular consumer defaulting on his debt. A report indicates in which category a particular consumer falls, for example if he carries a minimum, low, average, high or very low risk for possible default. The credit score is based on the consumer's full credit profile and is usually the score that a credit provider uses when deciding whether to grant credit or extend credit to a consumer. Every credit bureau uses its own methods and numerals to determine the credit score band of a particular consumer. Therefore, the score band is not always the same for a consumer at the respective credit bureaux. Unfortunately there is no consistency in the methods used by the respective credit bureaux in South Africa to calculate the credit score band of consumers, and it is not always known how they derived at a particular score band for a specific consumer. It is, however, important to note that a credit bureau does not decide whether any credit should be granted, it generally just indicates what the possible risk factor for default by a consumer is, and such determination is not an exact science.

Upon a reading of the definition of "adverse consumer credit information" set out in the 2014 Amnesty Regulations, it becomes unclear how they precisely affect the payment profile of a consumer. For instance, may a credit report still contain a payment profile? If so, may the credit report still include the numeric content (for example, number of months it takes to repay a debt) as explained above or does regulation 1 prohibit this? Further, may the report reflect any missed payments (instalments) for a specific debt?

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73 As defined in reg 17(5) published in GN R489 in GG 28864 *supra* n 21.

From the definition of “adverse consumer credit information” set out in regulation 1 (quoted above),<sup>74</sup> it is clear that there are three major categories of information. That is, information concerning:

- Adverse classifications of consumer behaviour;<sup>75</sup>
- Adverse classifications of enforcement action;<sup>76</sup> and
- The details and results of disputes lodged by consumers.<sup>77</sup>

Regulation 1(a) deals with adverse classifications of consumer behaviour and defines them as *subjective* consumer behaviour and provides a few examples that would constitute that description. The regulation lists classifications such as “delinquent”, “default”, “slow paying”, “absconded” or “not contactable” as subjective examples. The list is not exhaustive and can, therefore, include any other classification which is also based on a person’s subjective opinion. The regulation is completely silent about the reporting of any *objective* classification in this regard. “Subjective” is defined as “one’s own feeling or capacities rather than being actually existent”.<sup>78</sup> “Something that is subjective is strongly influenced by personal opinions and feelings”.<sup>79</sup> In other words, if a person makes a subjective classification, he would be referring to his own view or feeling that is not impartial and not necessarily based on actual facts. In contrast, an “objective” opinion indicates “outward things, exhibiting actual facts uncoloured by exhibitor’s feelings or opinions”.<sup>80</sup> Therefore, if a person makes an objective classification, he would be fair and state his opinion based on a fact, rather than on personal feelings.<sup>81</sup> It should however, be pointed out that some of the examples given in regulation 1(a) as being subjective classifications, could easily also constitute examples of objective classifications. However, be that as it may, as these examples have specifically been listed as examples of subjective classifications, one will not easily succeed in arguing that they are actually objective classifications or at the very least can also be.

The scope of regulation 1(b) is more straightforward. This regulation concerns all classifications concerning the enforcement action taken against a consumer – right from the beginning that legal action is taken (for example, where the matter is handed over for collection), to the end of such legal action when the debt is written-off. This regulation does not distinguish between objective or subjective classification being made in this regard.

The ambit of regulation 1(c) is also clear and does not require any further interpretation or analyses.

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74 See par 2 2 *supra*.

75 Regulation 1(a) of the 2014 Amnesty Regulations.

76 *Idem* 1(b).

77 *Idem* 1(c).

78 See the *Concise Oxford Dictionary* (1976) 1148.

79 See Cobuild *Essential English Dictionary* (1988) 798.

80 See the *Concise Oxford Dictionary supra* n 78 at 752.

81 See Cobuild *supra* n 79 at 540.

Unfortunately, the same cannot be said of the interpretation of regulation 1(d). Regulation 1(d) is rather confusing. It does not seem to introduce a further category of consumer credit information. Regulation 1(d) does not give a description or provide any example of what adverse consumer credit information it specifically refers to. The sub-regulation, rather, seems to repeat the generalised phrase “adverse consumer credit information” which has been fully set out and explained in regulations 1(a)–(c). Therefore, sub-regulation (d) seems to simply refer to the three major categories of adverse consumer credit information set out in regulations 1(a)–(c). It appears that what regulation 1(d) attempts to say, is that any of the qualifying adverse information listed in regulations 1(a)–(c), which were represented or reflected in the payment profile by way of a mark, symbol, sign or in any manner or form, must be removed in terms of the 2014 Amnesty Regulations. Therefore, any of the adverse information set out in regulation 1(a)–(c) was relevant in credit bureaux determining whether they had to amend the payment profile of a specific consumer and whether any adverse information reflected by any mark, symbol, sign or any other method had to be removed from a specific payment profile. In other words, all the adverse information that fitted either of the three descriptions in regulations 1(a)–(c) and was reflected in the payment profile in the form of a mark, sign (for example, by an asterisk) or in any other way and that was on the profile as at the effective date, had to be removed in terms of the amnesty regulations.

It, therefore, follows that the 2014 Amnesty Regulations did not affect the objective classification of consumer behaviour in a consumer’s payment profile. An interpretation that these regulations aim to completely remove the payment profile of consumers would go against the very object of the NCA, and the statutory duty the Act imposes on credit providers to assess the debt repayment histories of consumers before granting or extending credit. The Affordability Regulations also stress the important role that credit bureau reports play in assisting a credit provider to properly conduct pre-agreement credit assessments of consumers. It is, therefore, highly unlikely that the 2014 Amnesty Regulations aim to remove the payment profiles of consumers.

The fact that regulation 1(d) makes reference to a payment profile also strengthens the reasoning that the regulations do not aim to remove payment profiles contained in credit bureau reports. All that the regulations do, is remove adverse credit information that meets certain criteria from the payment profile. If the regulations intended to remove payment profiles completely, they would clearly have stated so, and there would have been no need for regulation 1(d) to deal with the removal of certain adverse listings reflected in payment profiles. Regulation 1(d) undoubtedly provides for the continuation of payment profiles. This interpretation is also strengthened by the Minister’s statement that: “The payment profile of a consumer will remain available for credit providers to help assess the risk in extending credit to consumers. This obviously being one of the many factors considered by

the credit provider before extending credit”.<sup>82</sup>

A pertinent question that then arises, is whether the payment profile can still include the information regarding the number of months it has taken a consumer to repay a specific debt? The answer to this question depends on whether this kind of reporting is considered to be a subjective classification of consumer behaviour or rather an objective classification. Simply stating the number of months that a consumer has taken to repay a specific debt would in my view constitute an objective classification. Such a statement merely provides a historical history of payment (a fact, if you will). However, certain subjective views can be drawn by credit providers assessing such information, such as the fact that a consumer is a slow payer. The possibility that such deductions may be made from the information does not necessarily mean that the objective history of repayment is changed into a subjective classification. This type of information remains an objective classification of consumer behaviour. In terms of the 2014 Amnesty Regulations, it would therefore seem to be permissible if the payment profile contains information reflecting the number of months it took a consumer to repay a debt. The payment profile may, however, also not contain any of the adverse consumer information (including subjective classifications of consumer behaviour) reflected by an abbreviation, sign, mark, or code and indicating that the consumer is a slow payer or defaulter, that certain debts have been written-off or any legal action has been taken, and if so, whether and when the judgment debts were settled that had to be removed in terms of the credit amnesty regulations. Payment profiles issued post-amnesty may still include the coded categorisations which may include a subjective interpretation of the numeric profile of a consumer.<sup>83</sup>

It would, therefore, seem that a credit provider may still use a consumer’s payment profile reflecting objective information and his credit score band allocated by a credit bureau in conducting its statutory assessment of the affordability of the consumer. Even though certain listed adverse consumer credit information was removed from the existing records kept by the credit bureaux, the credit score bands and the payment profile reflected in the credit bureau report, will still reflect certain behavioural trends of the consumer that a credit provider will be able to use as a tool in assessing the probability of poor repayment by a specific consumer.

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<sup>82</sup> See the Minister’s Media Statement *supra* n 31.

<sup>83</sup> Similar views were expressed during a radio talk show hosted on the Unisa Radio ‘Credit Amnesty – What this really means for consumers’ on 2014-05-19 by Mr Lesiba Mashapa, company secretary of the NCR and Mr Nicky Lala-Mohan, company secretary of the Banking Association of South Africa.

## 4 The Automatic and On-going Removal of Adverse Information in terms of the National Credit Act

The Amendment Act inserted a process into the NCA whereby certain adverse consumer credit information may be removed automatically from the credit record of a consumer kept by all registered credit bureaux on an on-going basis.<sup>84</sup> The Amendment Act includes section 71A into the NCA and provides as follows:

- 71A. (1) The credit provider must submit to all registered credit bureaux within seven days *after settlement by a consumer of any obligation* under any credit agreement, information regarding such settlement where an obligation under such credit agreement was the subject of –
- (a) an adverse classification of consumer behaviour;
  - (b) an adverse classification enforcement action against a consumer;
  - (c) an adverse listing recorded in the payment profile of the consumer; or
  - (d) a judgement debt.
- (2) The credit bureau must remove any adverse listing contemplated in subsection (1) within seven days after receipt of such information from the credit provider.
- (3) If the credit provider fails to submit information regarding a settlement as contemplated in subsection (1), a consumer may lodge a complaint against such credit provider with the National Credit Regulator.
- (4) For the purpose of this section–
- (a) **‘adverse classification of consumer behaviour’** means classification relating to consumer behaviour and includes a classification such as ‘delinquent’, ‘default’, ‘slow paying’, ‘absconded’, or ‘not contactable’; and
  - (b) **‘adverse classification of enforcement action’** means classification relating to enforcement action taken by the credit provider, including a classification such as ‘handed over for collection or recovery’, ‘legal action’ or ‘write-off’ (own emphasis).

The section provides for the removal of certain adverse information “after settlement by a consumer of any obligation under any credit agreement”, but what exactly these words entail are uncertain. The meaning of the word “settlement” is also unclear. For instance, do these words refer to a consumer having to pay only the outstanding “capital amount” in terms of the amount in arrears, which form the subject-matter of the adverse information, or do they also refer to him paying all his arrears plus the relevant interest (including *mora* interest)? Or, do they simply refer to a consumer paying, for example, the missed instalments (and the interest included therein) in terms of an instalment agreement? No guidance is found in either the Amendment Act or the

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84 See s 71A inserted into the NCA by the Amendment Act.

2015 Regulations. Regulation 19(10) of the 2015 Regulations simply provide that “upon settlement of the amount in arrears, which form the subject matter of the adverse information, the source of the data [for example credit provider] must in its next data of submission to the credit bureaus, advise such credit bureaus that the arrear amounts have been settled”. Furthermore, regulation 19(11) of the 2015 Regulations also stipulates that the listing of a civil court judgment and administration order must be removed from the credit bureau records of a consumer where the source of the data (for example credit provider) advises a credit bureau that the *capital amount*, due in terms of either of them, have been settled (note earlier concerns expressed above<sup>85</sup> regarding the meaning of the term “capital amount”). It should be noted that it is common practice for credit agreements to contain clauses providing for the acceleration of payments (instalments) in the event of a consumer’s default, thereby making the full outstanding debt in terms of the credit agreement immediately payable. In such cases, it will be unclear what exactly the consumer must “settle” for the adverse information to be removed in terms of section 71A.

Section 71A does not distinguish between objective or subjective adverse classifications and listings. The 2014 Amnesty Regulations make specific reference to adverse classifications of consumer behaviour which are *subjective*, but in section 71A no such distinction is made. It is imperative that the objective listings remain in the payment profile, for example if a payment was missed for a month or the number of months it took a consumer to repay a debt, to enable a credit provider to conduct proper affordability assessment of consumers. However, from a literal interpretation of section 71A, it seems that the section aims to cater for the automatic removal of both types of information from the credit records as well as from the payment profile of a consumer, where the consumer settles his obligation which forms the subject-matter of the adverse information.

## 5 A Few Closing Comments

The NCA, in its current form, places a duty on a credit provider to take reasonable steps to assess the consumer’s debt repayment history, but fails to stipulate what these reasonable steps are or which documents and records a credit provider may use during its assessment. Section 82(1), as amended by the Amendment Act, still gives a credit provider some leeway to create its own evaluative mechanisms or models and procedures to be used in meeting its assessment obligation under section 81. Therefore, one way in which a credit provider may conduct this assessment is for it to consult its own internal records it keeps on a consumer. Another is to obtain a credit report on the consumer from a registered credit bureau. In the Affordability Regulations, great emphasis is placed on the important role that credit bureau reports of consumers

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<sup>85</sup> See par 2.2 *supra*.

play in credit providers conducting proper affordability assessments. For this to prove successful though, it is vital that the credit reports received from credit bureaux are reliable and complete.

Regulation 3(d) of the 2014 Amnesty Regulations provides that a credit provider is not permitted to use adverse consumer credit information and information relating to paid up judgments, that have been removed in terms of these regulations, for “*any reason, including credit scoring and assessment*” of consumers. It is, however, uncertain, if this removed adverse information may still be used by a credit provider to conduct the statutory assessment of a consumer where it obtained such information not from any credit bureau report, but from its own internal credit records for a specific consumer (for example where a consumer is an existing customer). It would not make sense to impose a statutory duty on the credit provider to assess the debt repayment history of a consumer, but to also simultaneously prohibit it from consulting its own internal records to do so. It will surely amount to gross reckless lending if a credit provider simply grants credit to one of its existing customers without first consulting its own records to determine the customer’s repayment history with the credit provider. The only interpretation of regulation 3(d) that would make sense is that it simply forbids a credit provider to use the information “that ha[s] been removed in terms of these regulations” and was obtained specifically from a credit bureau. The 2014 Amnesty Regulations do not provide for the removal of qualifying adverse credit information which the credit provider keeps in its own internal records and was collected over time by the credit provider itself. It would not make sense if the regulations required a credit provider to turn a blind eye to their own adverse credit information concerning one of its existing customers. The regulations censor only certain information which the credit provider receives from credit bureaux, and not the information that the credit provider obtains from its own internal records. The court in *Horwood v FirstRand Bank Ltd*<sup>86</sup> clearly alluded to the fact that a different level of assessment was required from a credit provider when it conducts an affordability assessment for an existing customer as compared to when doing so for a new customer. Although a credit provider is thus permitted to use the adverse credit information it has obtained from its own records, regulation 3(e) clearly prohibits a credit provider from resubmitting such old information (ie the adverse information and paid up information that was removed in terms of the 2014 Amnesty regulations) to a credit bureau. This prevents a recycling of old information.

It also needs to be established whether a credit provider is permitted to ask a consumer, as part of the credit provider’s affordability assessment of a consumer, any questions regarding the adverse credit information that was removed by the 2014 Amnesty Regulations or in terms of section 71A. For instance, is a credit provider allowed to ask a consumer if a judgment has ever been taken against him, although it was

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86 *Supra* n 6.

subsequently settled and removed from his credit bureau record? Neither the 2014 Amnesty Regulations nor section 71A deals with this aspect; in principle, there is legally nothing that would prohibit a credit provider from asking this and similar questions. That being said, it is unlikely that it was the objective of the 2014 Amnesty Regulations (and by implication also of section 71A) to allow for this type of conduct as it severely diminishes the effect of the regulations.

It is also unclear from the wording in regulation 3(d) whether a credit provider may use any of the removed credit information for another purpose not relating specifically to the assessment of a consumer for instance as part of a credit provider's prudential and statutory reporting, compliance or auditing duties to a regulatory authority. A bank for example, is obliged in terms of Basel II (or the Second Basel Accord) and III (or the Third Basel Accord) to report certain information regarding its consumer's debts so that the information may be used in assessing the bank's risk profile so that adequate provision may be made for the bank's capital requirements. It is unlikely that the 2014 Amnesty Regulations aim to prevent credit providers from complying with such duties. It is also unlikely that the Minister even has this authority (or the power to issue such regulations) to interfere with the prudential and statutory reporting, compliance or auditing duties that do not specifically involve the NCR or the NCA. Regulation 3(d) must also be read with the objectives and the exact scope of the NCA. The NCA and its regulations aim to regulate consumer credit aspects, they do not regulate other regulatory issues of credit providers falling beyond their scope. A regulation issued in terms of the NCA can, in any event, never override a statutory duty placed on a credit provider by another piece of legislation, such as by the Banks Act.<sup>87</sup> In the event of a conflict, the different purposes of each piece of legislation will have to be weighed against each other to find solution.

There are a few positive attributes of the 2014 Amnesty Regulations. In the first place, they definitely improve the prospects of benefiting consumers to obtain employment and successfully conclude rental agreements for properties. In general, landlords are hesitant (and often for good reason) to rent to blacklisted tenants. A consumer who was blacklisted due to circumstances beyond his control (for example because he lost his job or was experiencing temporary financial difficulty), should not be unduly punished for that. If such a consumer's financial position has subsequently improved, placing him in a position where he can afford the rental payments, a blacklisting should not prohibit him from being able to secure a rental property. Given the 2014 Amnesty Regulations, it would be wise for a landlord to also conduct a type of "affordability assessment" before concluding the lease agreement in order to protect its own interest. Secondly, the 2014 Amnesty Regulations compel credit providers to actually perform affordability assessments, preventing them from purely relying on credit bureau

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87 Act 94 of 1990.

reports, in making their decisions to grant credit. Lastly, it greatly minimises the costs for consumers to remove the information regarding paid up judgments from their credit records.

However, one enormous disadvantage of the credit amnesty is that a credit provider (and a potential landlord) no longer has the benefit of viewing adverse credit classifications and listings of a consumer made by other credit providers to determine the possible risk of default by the consumer. The credit provider is only able to rely on such adverse credit information if it obtained knowledge of the information by consulting its own internal records for the consumer. Going forward, the reports of credit bureaux will only list adverse credit information reported post-amnesty. Section 71A also has the effect that the reports will also only reflect information permitted by that section.

It is evident that many consumers benefited from the second amnesty and were removed from credit providers' blacklists. Immediately after the amnesty came into effect, banks were swamped with applications from consumers who benefited from the amnesty.<sup>88</sup> A serious downfall of the amnesty, however, is that it is now very difficult for a credit provider to correctly assess the debt repayment history and to distinguish between good and bad borrowers. If a credit provider, during an assessment period, receives a "good" credit report for a prospective consumer, who it suspects to have benefited from the latest amnesty, it is likely that the credit provider will grant the credit only at a very high interest rate to accommodate for the possibility of non-payment.<sup>89</sup> If there is any doubt as to a consumer's debt repayment history and classification, the credit provider will classify the consumer as "bad". Receiving less credit information on a consumer poses a higher risk for a lender and usually results in higher credit costs for the consumer.

At first glance, it seems that the 2014 Amnesty Regulations are undermining the aim of the NCA to encourage responsible lending and prevent reckless lending from taking place. The 2014 Amnesty Regulations make it more difficult for a credit provider to make a proper evaluation of a specific consumer's affordability as well as determining the consumer's risk for possible default. The NCR, however, argues that the latest amnesty does not amount to a blanket amnesty which will result in consumers obtaining more credit than they can afford to repay. The NCR states that the Affordability Regulations, together with the new adverse listing rules and regulations, will buffer the effect of consumers taking up more credit than they can afford and will assist in preventing reckless lending.<sup>90</sup> This, however, remains to be seen as the 2015 Regulations negatively affect the reliability of particular credit information kept by credit bureaux. For instance, the 2015 Regulations

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88 For authority see n 86 *supra*.

89 Ackotia *supra* n 26.

90 *Ibid*.

amends regulation 17(1)<sup>91</sup> by reducing the periods that certain adverse consumer credit information may be displayed on a consumer's credit bureau record.

The Minister clearly stated that the 2014 Amnesty Regulations do not aim to remove "the obligation on consumers to re-pay debt owed by them to credit providers. Instead, it seeks to create the incentive for consumers to re-pay their debt better and timely". However, I fail to see how it provides a consumer with an incentive to pay, it in fact creates the opposite and creates a further breathing ground for potential non-payment by consumers. Apparently, at least 74 percent of consumers who benefited from the first credit amnesty were in default again with their credit repayments.<sup>92</sup> If this figure is correct, then there is a good chance that it may be many of the same consumers that have now also benefited from the second amnesty.

An interesting question that has been posed, is whether a credit provider will be able to have legal recourse (for example a claim for damages) against the Minister for unpaid credit that it has granted post-amnesty, based on the ground that the Minister has removed a primary source of assessing credit risk from the credit profile of a consumer?<sup>93</sup> Only time will tell what the full impact of the second amnesty will be on the consumer-credit industry and whether it will exacerbate reckless borrowing amongst consumers. One also wonders whether we can expect more credit-information amnesties in future.

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91 See reg 17(1) as it was originally published in GN R489 in GG 28864 and subsequently amended by GN R 1209 in GG 29442 *supra* n 21.

92 *Ackotia supra* n 26. The Minister mentioned that about 48 percent of the 64 percent of consumers who were granted amnesty in 2007, were again blacklisted (see Minister's Media Statement *supra* n 31).

93 *Ackotia supra* n 26.

# Fairness a slippery concept: The common law of contract and the Consumer Protection Act 68 of 2008

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## OPSOMMING

### Billikheid is 'n Glibberige Konsep: Die Gemeenregtelike Kontraktereg en die Wet op Verbruikersbeskerming 68 van 2008

Die kontraktereg is in die verlede gekritiseer, onder andere vir die volgende redes: eerstens, vir die klassieke libertynse grondslag daarvan; tweedens, omdat dit nie grondwetlike waardes ten volle omsluit het nie; en, laastens, omdat dit daarvan weggeskram het om aan regverdigheid en billikheid uiting te gee in die aanwending van tersaaklike regsreëls. Die kwessie of howe na behore 'n balans tref tussen kontrakteervryheid en *pacta sunt servanda* enersyds, en billikheidsoorwegings andersyds bly een van die probleme wat die moderne kontraktereg in die gesig staar. Heelwat gewysdes dui daarop dat howe voorkeur verleen aan *pacta sunt servanda* bo billikheidsoorwegings aangesien die howe daarna streef om reg- en handelsekerheid te verseker deur die handhawing van kontrakte wat vrylik deur die partye daartoe gesluit is, al is dié kontrakte somtyds onbillik. Die Wet op Verbruikersbeskerming 68 van 2008 (WOV) het ten doel om, onder andere, die sosiale en ekonomiese belange van Suid-Afrikaanse verbruikers te bevorder, billike besigheidspraktyke aan te moedig, en verbruikers teen gewetenlose, onregverdige en onbehoorlike besigheidspraktyke te beskerm. Die doel van hierdie artikel is om te bepaal of die regs-paternalisme onderliggend tot die uitvaardiging van die WOV wel daarin slaag om van die kritiek aan te spreek wat in die verlede teen die gemeenregtelike kontraktereg geopper is, by uitstek ten opsigte van die billikheidskwessie.

## 1 Introduction

“This is a court of law, young man, not a court of justice”.<sup>1</sup>

The principles of freedom and sanctity of contract are rooted in the political and economic philosophies of *laissez-faire* liberalism and individualism.<sup>2</sup> This classical model of law is based on the assumption that parties generally have a real freedom of choice and that parties enjoy more or less equal bargaining power.<sup>3</sup> Parties are thus free to accept or

1 Oliver Wendell Holmes as quoted by Walters *Justice is God's idea: Man has corrupted and destroyed it!* (2012) 24.

2 Hutchison & Pretorius (eds) *The Law of Contract in South Africa* (2012) 23.

3 *Idem* 24.

reject any terms of a contract. The classical model of law is based on the assumption that there is near perfect competition in the market, and that parties actually negotiate the terms of their contract.<sup>4</sup> Although it is axiomatic that these assumptions are incorrect, contract law remains a domain where individual autonomy finds prominent expression.<sup>5</sup> Contractual autonomy, and the consent of the parties, is the basic legitimating factors behind the binding force of a contract. Finding the right balance between freedom and sanctity of contract, and considerations of fairness, remains one of the problems facing modern contract law.<sup>6</sup> Much of the jurisprudence shows that sanctity of contract prevails over fairness as courts seek to promote legal and commercial certainty by enforcing contracts that are freely and properly entered into by the parties, even if they are sometimes unfair.<sup>7</sup>

The first part analyses the question whether the common law of contract has fully embraced constitutional values to import fairness into contractual relations. This question remains unanswered not only in South Africa, but in other countries as well. This state of affairs has resulted in governments intervening in markets across the globe to alleviate poverty and some of the hardships caused by unbridled capitalism, particularly in consumer contracts.<sup>8</sup> The rationale behind contract regulation and legal paternalism through the enactment of the Consumer Protection Act<sup>9</sup> (CPA) is to control the exercise of power and ensure fairness in contractual relations. The main aim of this article is to assess whether legal paternalistic interventions by the State, through the enactment of the CPA, is a solution for the problem of infiltrating the application of rules in contract law with equity and fairness. It is argued that healthy legal paternalism is crucial in any given society as it can be a vehicle for addressing the problem of balancing sanctity of contract with fairness. However, the effectiveness of the CPA in doing so remains to be seen.

The second part examines the extent to which the law of contract has embraced constitutional values in view of the fact that the Constitution of the Republic of South Africa, 1996 (the Constitution) is the supreme law of the land. It also discusses the interaction between sanctity of contract and fairness, as well as equity in terms of the common law of contract. The discussion also deals with how fairness is generally imported into the common law of contract, and the extent to which courts are prepared to balance the competing goals. The third part assesses the role of the CPA as an instrument that has been designed to promote fair business practices and to protect consumers from

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4 *Ibid.*

5 Cserne *Freedom of Contract and Paternalism: Prospects and Limits of an Economic Approach* (2012) 81.

6 Hutchison & Pretorius 22.

7 *Barkhuizen v Napier* 2007 5 SA 323 (CC); *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA); *Brisley v Drotsky* 2002 4 SA 1 (SCA).

8 Hutchison & Pretorius 24.

9 68 of 2008.

unconscionable, unreasonable, unjust or improper trade practices.<sup>10</sup> The provisions of the CPA that have an impact on contract law are specifically analysed. The last part will include a conclusion.

## 2 Has the Common Law of Contract Fully Embraced Constitutional Values?

### 2.1 Introduction

Contract law basically deals with contractual private dealings and thus regulates socio-economic relationships in the private sphere.<sup>11</sup> The common law of contract refers to the law made by the courts as opposed to the law made by the legislature.<sup>12</sup> Judges make such law by interpreting already existing and established rules of law when resolving contractual disputes. Common law is thus an uncodified body of law that is developed through the doctrine of *stare decisis*.<sup>13</sup> By its nature, common law needs to be modified, extended or supplemented to ensure that it is in tune with societal social needs and values.<sup>14</sup> Mupangavanhu thus argues that it is within this context that courts are expected to develop the common law,<sup>15</sup> as required in terms of section 39(2) of the Constitution.<sup>16</sup> Courts should adapt the common law in accordance with the spirit, purport, and objects of the Bill of Rights.

The Constitution is founded on the values of human dignity, equality and freedom.<sup>17</sup> The question that arises is: To what extent has the common law of contract embraced constitutional values? Inequalities in bargaining power in South Africa are underscored by deeply entrenched social and economic inequalities, occasioned by apartheid and patriarchy.<sup>18</sup> Bhana argues that the value of equality requires evidence of unequal bargaining power to be taken into account, so as to ensure that there is autonomy in substance as opposed to mere form.<sup>19</sup> The move towards the concept of substantive consensus, that takes better

10 Part F ss 40-47 CPA.

11 Bhana 'The Role of Judicial Method in the Relinquishing of Constitutional Rights Through Contract' 2008 24 *SAJHR* 300 303.

12 Currie & De Waal *The Bill of Rights Handbook* (2005) 67. See also Du Bois (ed) *Wille's Principles of South African Law* (2007) 64.

13 Mupangavanhu 'Yet Another Missed Opportunity to Develop Common Law of Contract? An Analysis of *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* (2011) ZACC 30' 2013 *Speculum Juris* 148 150.

14 Brand 'The Role of Good Faith, Equity and Fairness in the South African Law of Contract: The Influence of the Common Law and the Constitution' 2009 *SALJ* 71 72.

15 Mupangavanhu 2013 *Speculum Juris* 148 150.

16 S39(2) provides: "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights".

17 S 1 of the Constitution.

18 Bhana & Pieterse 'Towards a reconciliation of contract and constitutional values: *Brisley and Afrox* Revisited' 2005 *SALJ* 865 887.

19 Bhana *supra* n 11 at 301.

cognisance of the inequalities prevalent in South Africa, is a dream which has to be realised in contract law.<sup>20</sup> There is need for an incremental development of contract doctrines to achieve a balance between the values of freedom and equality.<sup>21</sup> Bhana and Pieterse opine that courts should be willing to infuse contract doctrines with values underlying the Constitution.<sup>22</sup> Courts must not shy away from developing common law to ensure that the law responds to the general needs of the people.

*Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*<sup>23</sup> involved an application for leave to appeal which required the Court to consider the circumstances in which it should intervene to infuse the law of contract with constitutional values. The applicant argued directly for the development of the common law of contract in light of the spirit, purport and object of the Bill of Rights, but only in the Constitutional Court.<sup>24</sup> The majority of the judges held that: "It would not be in the interests of justice to remit this matter to the High Court on the narrow ground that it ought to have investigated the possible adaptation of the common law of its own volition".<sup>25</sup>

The application for leave to appeal thus failed.<sup>26</sup> It has been argued that the Constitutional Court missed the opportunity to develop the duty to negotiate in good faith beyond precedent in this case.<sup>27</sup> Although the case was not properly pleaded,<sup>28</sup> it cannot be gainsaid that the Court should have developed good faith to become enforceable as an independent rule so as to actively promote contractual fairness.<sup>29</sup> It remains to be seen whether the current role that good faith plays will be developed.

## **2.2 The Need for Certainty Versus the Need for Good Faith and Equity**

### ***2.2.1 Freedom and Sanctity of Contract***

It is becoming axiomatic that sanctity of contract and fairness are competing values that need to be balanced by courts. Freedom of contract means that parties are free to decide whether or not to contract; with whom and on what terms.<sup>30</sup> Ideally, the creation of a contract should be the result of a free choice, without external interference, and that in the process of contracting, the parties are sovereign. Once a court

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20 Bhana & Pieterse 2005 SALJ 865 887.

21 *Idem* 889.

22 *Ibid.*

23 *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC).

24 *Idem* par 1.

25 *Idem* par 77.

26 *Idem* par 80.

27 Mupangavanhu *supra* n 13 at 171.

28 *Supra* n 23 at par 71.

29 Mupangavanhu *supra* n 13 at 171.

30 Hutchison & Pretorius 23.

is satisfied that the contract was freely entered into with the intention to create binding obligations, it should uphold and enforce the contract based on the principle of *pacta sunt servanda*. Accordingly, there should be minimal state intervention in the area of contract law as a result of freedom of contract and party autonomy. Autonomy entails that the decision-maker must accept the responsibility of binding himself to a contract.<sup>31</sup>

Sanctity of contract guarantees certainty in contract law. Courts interfere with contractual provisions agreed upon between the parties only in exceptional cases.<sup>32</sup> A judge's role is, therefore, equivalent to that of an umpire in a cricket match who must ensure that the game is played according to the rules, in this case according to the terms of the contract.<sup>33</sup> Accordingly, judges have little judicial discretion as they should recognise and give effect to the agreement reached by the parties.<sup>34</sup> The discretion of judges in lower courts is also limited as they are not able to depart from the *stare decisis* rule.<sup>35</sup> A conservative legal culture, that respects the intricate nature of contract law rules, has developed over time.<sup>36</sup> Judges are cautious and will not interfere with contractual terms agreed upon by parties.<sup>37</sup> They also do not permit their personal ideologies, values and sensibilities to feature in the adjudication process.<sup>38</sup> This results in the occasional enforcement of contracts that are unfair and unjust, to the detriment of the weaker party.<sup>39</sup> The scale has been tilting in favour of certainty as opposed to fairness. The role of the court is to ensure procedural as opposed to substantive fairness.<sup>40</sup> It is argued that the modern law of contract should allow judges to be flexible by importing open-ended standards, such as, good faith and reasonableness, to ensure fairness and to protect the weaker party.

Time limitation clauses in insurance contracts and exemption clauses in relation to private health care, are sometimes at odds not only with the value of equality, but also with the values of dignity and freedom.<sup>41</sup> A

31 Van der Merwe, Van Huyssteen, Reinecke & Lubbe *Contract General Principles* (2012) 9.

32 *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) par 12; *Brisley v Drotzky supra* n 7 as per Cameron JA par 7; Christie & Bradfield *The Law of Contract in South Africa* (2011) 14-15.

33 Hutchison & Pretorius 23.

34 Van Huyssteen & Maxwell *Contract Law in South Africa* (2014) 84.

35 *Stare decisis* constraints legal reasoning and can lead to judicial conservatism (which can be seen in the Supreme Court of Appeal): Du Bois (ed) *Wille's Principles of South African Law* (2007) 80. See also Louw 'Yet another call for greater role for good faith in the South African Law of Contract: Can we banish the law of jungle, while avoiding the elephant in the room?' 2013 *PER/PEL* 44 47.

36 Bhana *supra* n 11 at 311.

37 *Barkhuizen v Napier supra* n 7 at par 70.

38 Bhana *supra* n 11 at 302.

39 *Afrox Healthcare Bpk v Strydom supra* n 7; *Brisley v Drotzky supra* n 7.

40 *Ibid.*

41 Hopkins 'Insurance Policies and the Bill of Rights: Rethinking the Sanctity of Contract Paradigm' 2002 *SALJ* 155 157.

party in a weak bargaining position has little option but to contract on harsh and oppressive terms, such as time limitation clauses which are normally contained in standard-form contracts.<sup>42</sup> Such contracts undermine freedom of contract between the contracting parties as they eliminate the opportunity for negotiating terms.<sup>43</sup> Consumers have no bargaining power to negotiate the terms of the contract and they are imposed on a take-it-or-leave-it basis.<sup>44</sup> As a result of the disparities in bargaining power, insurance companies are able to insist on the inclusion of time limitation clauses in their contracts. Limiting the time period within which an insured has to challenge repudiation of a policy, is a useful way for insurance companies to reduce the possibility of having to pay out on a claim.<sup>45</sup> It means that that particular claim is lost if it is not submitted on time since the insured is forever barred from lodging a claim.

Time limitation clauses are generally valid and enforceable based on the Constitutional Court decision in *Barkhuizen v Napier*. This case dealt with a contractual term that limited the right of access to the courts. Ngcobo J held that the correct approach to the constitutional challenges to contractual terms, is to determine whether the term is contrary to public policy as evidenced by the constitutional values that underlie our constitutional democracy, in particular, those found in the Bill of Rights.<sup>46</sup> The court developed a two stage enquiry in determining fairness: First, whether the clause itself is unreasonable; and secondly, if the clause is reasonable, whether it should be enforced, taking into account circumstances which prevented compliance with the term.<sup>47</sup> The argument that enforcement of the time-bar clause would be considered unjust, based on the requirement of good faith, was rejected. The Constitutional Court upheld the time limitation clause.<sup>48</sup> It was held that public policy would preclude the enforcement of a contractual term in circumstances where such enforcement would be unjust and unreasonable.<sup>49</sup> By implication, a clause which is so unreasonable that its unfairness is manifest would also not be enforced.

The decision in *Brisley v Drotzky* also shows that sanctity of contract prevails over the notion of good faith and fairness. This case involved a

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42 *Ibid.*

43 Naude 'The Consumer's "Right to Fair, Reasonable and Just Terms" Under the New Consumer Protection Act in Comparative Perspective' 2009 *SALJ* 505 529; Mupangavanhu 'Exemption Clauses and the Consumer Protection Act 68 of 2008: An Assessment of *Naidoo v Birchwood Hotel* 2012 6 SA 170 (GSJ)' 2014 *PELJ* 1168 1188; Hutchison & Pretorius 24-25.

44 The contract does not thus represent the agreement between the consumer and the supplier. See Naude 2009 *SALJ* 505 529; Mupangavanhu *idem* 1188.

45 Hopkins *supra* n 41 at 157.

46 *Barkhuizen v Napier supra* n 7 at par 30.

47 *Idem* parr 56-59.

48 The Court found that the enforcement of clause 5.2.5 would not be unjust to the applicant (par 86).

49 *Barkhuizen v Napier supra* n 7 at par 73. See also *Sasfin (Pty) Ltd v Beukes supra* n 32.

non-variation clause in a lease agreement. Although the parties orally agreed that the lessee could pay rent when it suited her,<sup>50</sup> the Supreme Court of Appeal (SCA) refused the lessee's reliance on good faith.<sup>51</sup> It was held that good faith is an abstract value and could thus not be employed by a judge to intervene in contractual relationships.<sup>52</sup> Just like reasonableness and fairness, good faith underpins and informs the substantive law of contract, shaping its rules and doctrines.<sup>53</sup> The majority of the judges held that to give judges a discretionary power to disregard contractual provisions on the basis of their personal idiosyncrasies regarding what is fair and reasonable, would give rise to legal and commercial uncertainty. The judges enforced the contract and upheld the *shifren* principle.<sup>54</sup> The enforcement was arguably substantively unfair and unjust since the application of the *shifren* principle allows a party to go back on his or her word, notwithstanding the other party's good reliance on it.<sup>55</sup>

Similarly in *Afrox Healthcare Bpk v Strydom*, *pacta sunt servanda* trumped fairness. The respondent went to a hospital and signed a standard-form contract incorporating a clause that excluded liability for any damages suffered as a result of the negligence of the nursing staff or employees of the appellant.<sup>56</sup> The respondent suffered damages as a result of the negligence of nursing staff. The Court held that it was in the public interest that a contract entered into freely and seriously, by parties having the necessary capacity, should be enforced.<sup>57</sup> The decision to indemnify the hospital from liability shows that the mere fact that a term is unfair or might operate harshly, does not, in itself, result in the contract being set aside. Even though the case involved a standard-form contract, it was held that there was nothing to prove that the patient had occupied a weaker bargaining position.<sup>58</sup> The court failed to recognise that the respondent was in a desperate situation of getting medical assistance and was accordingly, not in a conducive environment to contract compared to the appellant. The parties could thus not have been occupying an equal bargaining position since the need to go through with the operation as planned, decreased the patient's bargaining power.<sup>59</sup>

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50 *Brisley v Drotsky supra* n 7 at par 5.

51 *Idem* par 34.

52 *Idem* par 22. See also Kohn 'Escaping the "Shifren Shackle" Through the Application of Public Policy: An Analysis of Three Recent Cases Shows Shifren is Not Immutable After All' 2014 *Speculum Juris* 74 83.

53 Hutchison & Pretorius 32.

54 The principle was developed in *SA Sentrale Ko-operatiewe Graanmaatskappy Bpk v Shifren* 1964 4 SA 760 (A).

55 Kohn *supra* n 52 at 75.

56 *Afrox Healthcare Bpk v Strydom supra* n 7 at par 3.

57 *Idem* par 34.

58 *Idem* par 12.

59 Naude & Lubbe 'Exemption Clauses – A Rethink Occasioned by *Afrox Healthcare Bpk v Strydom*' 2005 *SALJ* 441 461; Bhana & Pieterse 2005 *SALJ* 886.

The decision in *Afrox* has been largely criticised because the patient was only confronted with an exemption clause at the very last minute and it is unrealistic to have expected him to seek a better contract elsewhere.<sup>60</sup> Non-acceptance of the terms would probably have led to refusal of the required health services.<sup>61</sup> The patient would likely have been presented with similar terms if he had decided to go to another private hospital. Naude rightly argues that the fact that the exemption clause was contrary to the essence of a contract to obtain medical care, and that it ultimately involves the patient's right to life and bodily integrity, means that the clause is generally substantively unfair.<sup>62</sup> The exemption offends against the underlying principle of good faith as well as the dignity of the patient.<sup>63</sup>

In *Bredenkamp and Others v Standard Bank of South Africa Ltd*,<sup>64</sup> the appellant sought an interdict to restrain the bank from exercising its contractual right to close a customer's bank accounts on reasonable notice. Jajbhay J held that the bank had to exercise this power fairly and for good cause, notwithstanding a provision in a contract allowing the bank to close the account "for no reason" as such a clause did not find support.<sup>65</sup> The SCA, however, rejected the idea of an overarching requirement of fairness in contract law.<sup>66</sup> In *Maphango v Aengus Lifestyle Properties (Pty) Ltd*,<sup>67</sup> the SCA reinforced the position that reasonableness and fairness are not free-standing requirements for the exercise of a contractual right.<sup>68</sup> A court can thus not refuse to give effect to the implementation of a contract simply because that implementation is regarded by the individual judge to be unreasonable and unfair.<sup>69</sup> It is argued that the view that fairness should not be an overarching requirement in contract law, in light of the Constitution and the CPA, is flawed. In a society where there are social and economic disparities, importing fairness as an overarching requirement will force judges to ensure that the enforcement of a contract is not unfair. There is therefore a need to develop fairness so that it becomes a broad requirement of our law in contractual relations. With the death of the *exceptio doli generalis* in *Bank of Lisbon*,<sup>70</sup> fairness could be achieved by developing the principle of good faith. The notion of good faith has an active role to play in ensuring that the law remains sensitive to and in tune with the needs of society. Contracting parties are subject to the values of society when

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60 *Ibid.*

61 Bhana & Pieterse *supra* n 18 at 886-887.

62 Naude 2009 *SALJ* 505 510.

63 Naude & Lubbe 2005 *SALJ* 441 457.

64 2010 4 SA 468 (SCA).

65 *Bredenkamp v Standard Bank of South Africa Ltd* 2009 5 SA 304 (GSJ).

66 *Bredenkamp v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA) par 30, 51 & 66.

67 2011 5 SA 19 (SCA).

68 *Idem* par 23.

69 *Idem* 25.

70 *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 3 SA 580 (A).

exercising their private autonomy.<sup>71</sup> Van de Merwe *et al* opine that:

The very principles of socio-economic expediency, which in many circumstances support a policy favouring the exact enforcement of contracts freely entered into by consenting parties, may in particular circumstances require that less weight be attached to the ideals of individual autonomy and freedom of action.<sup>72</sup>

The need to balance certainty, fairness and equity cannot be overstressed.

The Constitutional Court in *Everfresh Market Virginia v Shoprite Checkers*<sup>73</sup> emphasised the central importance of the principle of good faith and the desirability of infusing the law of contract with constitutional values, including the values of *ubuntu*. These statements are a source of hope regarding the notion of fairness and equity in contract law. It remains to be seen if the SCA will embrace the pronouncements in *Everfresh* by developing and expanding the role of good faith.

### **2 2 2 The Common Law of Contract and the Notion of Fairness**

Unfairness in contract law is dealt with in a number of ways, including the manner in which consensus is obtained; impossibility of performance;<sup>74</sup> relaxation of the *caveat subscriptor* rule; and through the *contra proferentem* rule,<sup>75</sup> which states that if there is ambiguity, the language must be construed against the *proferens*.<sup>76</sup> *Naturalia* also bring an element of fairness by ensuring that certain terms apply to a particular class of contract by operation of law.<sup>77</sup> It is based on notions of what is both economically and generally viable, fair and reasonable.<sup>78</sup> In addition to the above, public policy is generally used to balance sanctity of contract and fairness: For example, a restraint of trade which is unreasonable, is treated as being against public policy and will not be enforced by the courts.<sup>79</sup> The approach to disputes regarding restraint of trade agreements, requires judges to balance freedom of contract and freedom of trade as it is in the interest of society for its members to be productive. The burden of proof is, however, on the party wishing to escape liability to prove that the restraint of trade agreement is against public policy.<sup>80</sup> Both freedom and sanctity of contract are thus preferred

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71 Van de Merwe, Van Huyssteen, Reinecke & Lubbe *Contract General Principles* (2012) 9.

72 *Idem* 9-10.

73 *Supra* n 23.

74 Van de Merwe *et al* 189.

75 Christie & Bradfield 14.

76 Hutchison & Pretorius 268, Du Bois (2007) 804 & 805; Mupangavanhu *supra* n 43 at 1174.

77 Van de Merwe *et al* 246.

78 *Ibid.*

79 *Idem* 185; Hutchison & Pretorius 196.

80 *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 4 SA 874 (A) 898.

except where the agreement is unreasonable.<sup>81</sup>

Our common law does not recognise agreements that are contrary to public policy and will declare contracts invalid on that ground<sup>82</sup> Public policy is rooted in the Constitution and the values that underlie it.<sup>83</sup> It is informed by the values of *ubuntu*.<sup>84</sup> It imports notions of fairness, justice and equity, and reasonableness.<sup>85</sup> While public policy endorses freedom and sanctity of contract,<sup>86</sup> it precludes the enforcement of a contractual term in circumstances where such enforcement would be unjust and unreasonable.<sup>87</sup> The general approach to making fairness and reasonableness the focus of the public policy enquiry, has the potential to balance sanctity of contract with fairness in contract law. Public policy considerations are not static and may change as circumstances change.<sup>88</sup>

The question that arises is whether fairness and equity are fully accommodated under the rubric and scope of public policy. The answer must be in the negative. Public policy needs further development to fully accommodate fairness and equity.<sup>89</sup> Its current application is lacking in that it usually favours freedom of contract and is based on the understanding that commercial transactions should not be unduly trammelled by restrictions of that freedom.<sup>90</sup> Public policy has proven up until now not to be an alternative to fairness and will remain this way until its scope and content has accordingly been expanded. Again, its precise prescriptions and how exactly they ought to be weighed in the balance in a given case, are matters that have not proven easy to grapple with.<sup>91</sup> It is argued that public policy has not succeeded in balancing certainty with fairness and equity. Its scope needs to be expanded and developed to be able to fully accommodate fairness and equity. Despite this however, the judgments discussed below indicate that the tide is now turning towards fairness.

In *United Reformed Church, De Doorns v President of the Republic of South Africa and Others*,<sup>92</sup> the matter was primarily concerned with the validity of the provisions of clause 16 in the notarial lease agreements.

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81 Van de Merwe *et al* 185.

82 *Sasfin (Pty) Ltd v Beukes supra* n 32 at pars 8 and 9

83 *Barkhuizen v Napier supra* n 7 at par 28. Hopkins 2002 SALJ 155 172.

84 *Barkhuizen v Napier supra* n 7 at par 51; *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd supra* n 23 at par 51.

85 *Barkhuizen v Napier supra* n 7 at parr 51 & 73. See also *Bredenkamp v Standard Bank of South Africa Ltd supra* n 87 at par 38.

86 Hutchison & Pretorius 30; Christie & Bradfield 359; *Sasfin (Pty) Ltd v Beukes supra* n 32 at par 13.

87 *Barkhuizen v Napier supra* n 7 at parr 70 & 73; *Sasfin (Pty) Ltd v Beukes supra* n 32 at par 12; Du Bois 763.

88 *Bredenkamp v Standard Bank of South Africa Ltd supra* n 87 at par 38.

89 Brand 2009 SALJ 71 87.

90 *Sasfin (Pty) Ltd v Beukes supra* n 32 at par 13.

91 Kohn *supra* n 52 at 75.

92 *United Reformed Church, De Doorns v President of the Republic of South Africa and Others* 2013 5 BCLR 573 (WCC).

The clause obliged the applicant to transfer its three properties, free of charge, to the first respondent after the expiry of the lease. The question before the Court was whether the provisions of clause 16 offend public policy.<sup>93</sup> The applicant contended that at the time of the conclusion of the lease agreements, it was in a weaker position than the state, with the result that it was forced to conclude the agreements which contained terms that were largely biased in favour of the state. The second contention was that the provisions of clause 16 violate section 25 of the Constitution. Zondi J stated that:

... in determining the weight to be attached to the values of freedom and dignity and equality the extent to which the contract was freely and voluntarily concluded will be a vital factor<sup>94</sup> ... the role of the courts is not merely to enforce contracts but also to *ensure that a minimum degree of fairness which include consideration of the relative position of the contracting parties, is observed ...*<sup>95</sup>

Unequal bargaining power is a relevant consideration in determining whether a contractual term is contrary to public policy.<sup>96</sup> The High Court held that the applicant had succeeded in showing that it was in a weaker bargaining position than the Department of Local Government.<sup>97</sup> The terms had been dictated to them and the applicant had little option but to accept.<sup>98</sup> It was further held that clause 16 of the lease agreements was unfair and, therefore, contrary to public policy insofar as it sought to deprive the applicant of its properties without creating an obligation on the third respondent to pay compensation.<sup>99</sup> Clause 16 was found to be inimical to the values enshrined in the Constitution.<sup>100</sup> The provision was “unnecessary overbroad” and “a disguised form of expropriation” that could not be allowed to stand.<sup>101</sup> Accordingly, the provisions of clause 16 were declared void and unenforceable.<sup>102</sup> The Court held that the applicant was entitled to receive consideration to be agreed upon between the parties, alternatively fair compensation should the properties be transferred to the state.<sup>103</sup>

Similarly, the High Court in *Naidoo v Birchwood Hotel*<sup>104</sup> declined to enforce exemption clauses and the disclaimer notices on the basis that doing so would have been unjust and unfair.<sup>105</sup> The plaintiff instituted a delictual claim against the defendant for the serious injuries he sustained when a gate fell on top of him while trying to exit the hotel. The issue to

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93 *Idem* parr 24 & 31.

94 *Idem* par 33.

95 *Idem* par 34 (own emphasis).

96 *Ibid.*

97 *Idem* par 35.

98 *Ibid.*

99 *Idem* par 40.

100 *Ibid.*

101 *Idem* par 41.

102 *Idem* par 44.

103 *Ibid.*

104 *Naidoo v Birchwood Hotel* 2012 6 SA 170 (GSJ).

105 *Idem* par 53.

be determined by the Court was whether the defendant was liable for the bodily injuries sustained by the plaintiff.<sup>106</sup> The plaintiff's case was founded on the premise that the defendant had been negligent and that it could have prevented the harm from occurring. Nicholls J stated that exemption clauses that exclude liability for bodily harm in hotels and other public places have the effect, generally, of denying a claimant judicial redress.<sup>107</sup> The Court observed that:

Naidoo was a guest in a hotel. To enter and egress is an integral component of his stay. A guest in a hotel does not take his life in his hands when he exits through the hotel gates. To deny him judicial redress for injuries he suffered in doing so, which came about as a result of the negligent conduct of the hotel, offends against notions of justice and fairness ...<sup>108</sup>

The Court concluded that Naidoo had discharged his onus of proving a delictual claim against the hotel and that the disclaimer notices and the exemption clauses were not a good defence.<sup>109</sup>

The Constitutional Court in *Botha v Rich*<sup>110</sup> had to determine whether the respondents were obliged, in terms of section 27(1) of the Alienation of Land Act 68 of 1968, to register the transfer of the property in the name of the first applicant after more than half of the purchase price of the immovable property had been paid.<sup>111</sup> Alternatively, the matter concerned whether enforcement of the cancellation clause was unreasonable, unfair and unconstitutional and if so, whether the applicant was entitled to restitution of the amount paid. The question, therefore, was whether the purchaser's demand for the transfer of property, in terms of section 27(1),<sup>112</sup> could be refused by the seller.<sup>113</sup> The applicants contended that the enforcement of the cancellation clause in the circumstances would be contrary to public policy.<sup>114</sup> In granting leave to appeal, the Constitutional Court stated that it was of public importance to determine whether cancellation of a contract governed by the Act, and the resultant forfeiture of the payments of more than half

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106 *Idem* par 3.

107 *Idem* par 52.

108 *Idem* par 53.

109 *Idem* par 54.

110 *Botha v Rich* 2014 4 SA 124 (CC).

111 *Idem* par 2.

112 It reads: "Any purchaser who in terms of a deed of alienation has undertaken to pay the purchase price of land in specified instalments over a period in the future and who has paid to the seller in such instalments not less than 50 per cent of the purchase price, shall, if the land is registrable, be entitled to demand from the seller transfer of the land on condition that simultaneously with the registration of the transfer there shall be registered in favour of the seller a first mortgage bond over the land to secure the balance of the purchase price and interest in terms of the deed of alienation".

113 *Botha v Rich supra* n 110 at par 23.

114 *Idem* par 19.

the purchase price of the property, was fair and thus constitutionally compliant.<sup>115</sup>

The application for cancellation failed on the basis that forfeiture, in circumstances where three-quarters of the purchase price has already been paid, would have been a disproportionate penalty for breach.<sup>116</sup> The Court ordered the respondents to sign all necessary documents to effect the registration and to transfer the property concerned into the name of the first applicant.<sup>117</sup> It also ordered the first applicant to pay all arrears owing, outstanding levies and to secure the balance of the purchase price plus interest in terms of the sale agreement.<sup>118</sup>

The importation of section 27(1) into the instalment sale agreement afforded the applicant protection who otherwise could have been prejudiced by the cancellation of the contract and the forfeiture of the monies paid. The interpretation of section 27(1) by the Constitutional Court is laudable as it is consistent with the objective of the Constitution that contracting parties should be treated with equal worth and concern.<sup>119</sup> It validates fairness. To deprive the first applicant of the opportunity to have the property transferred to her and in the process cure her breach in regard to arrears, would have been a disproportionate sanction and consequently unfair.<sup>120</sup> It would also have been equally disproportionate to allow registration of transfer without making that registration conditional upon payment of the arrears and the amounts outstanding in municipal rates, taxes and service fees.<sup>121</sup>

The three judgements discussed above illustrate the developments that are taking place in balancing the principle of freedom of contract, and the counter-principle of social control over private volition in the interest of public policy. The judgements mark a significant stride towards fairness and equity in contractual relationships. The need to legislate against contractual unfairness, unreasonableness, unconscionability or oppressive contractual provisions,<sup>122</sup> however, remains crucial particularly in light of the inherent limits of judicial control.<sup>123</sup> Legislative intervention would protect consumers by ensuring that they are not exploited or abused in the marketplace. The relevant provisions of the CPA are examined below.

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115 *Idem* par 24.

116 *Idem* par 51.

117 *Idem* par 53.

118 *Ibid.*

119 *Idem* par 40.

120 *Idem* par 49.

121 *Ibid.*

122 *Barkhuizen v Napier supra* n 7 at par 170.

123 Naude 'Unfair Contractual Term Legislation: The Implications of Why We Need it for its Formulation and Application' 2006 *Stell LR* 361 384.

## 3 The Importance of the Consumer Protection Act

### 3.1 Introduction

The CPA attempts to achieve a balance between relevant principles and policies so as to satisfy prevailing perceptions of justice and fairness, as well as economic, commercial and social expediency.<sup>124</sup> The CPA gives precedence to the constitutional values of dignity and equality. A contract forms part of the fabric of society and as such, exists and functions within the realm of the values and interests of society.<sup>125</sup> Consumer protection is particularly important if there are inequalities in bargaining power between the supplier and the consumer.<sup>126</sup> The pursuit of social justice warrants intervention, especially in South Africa where poverty and inequalities are a reality.<sup>127</sup>

The Constitution recognises the imbalances of the past<sup>128</sup> and the CPA is in accordance with the objective of the Constitution to address the social and economic inequalities brought about by apartheid and the discriminatory laws.<sup>129</sup> The CPA was enacted to protect illiterate, poor, ignorant and vulnerable people from abuse and exploitation in the marketplace.<sup>130</sup> The purpose of the CPA is, *inter alia*, to advance the social and economic welfare of consumers in South Africa, by establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible and efficient. It also promotes fair business practices, and protects consumers from unconscionable, unreasonable, unjust or improper trade practices.

The formal rules embedded in contract law have not been flexible enough to cope with the complexities of modern society.<sup>131</sup> South African legal tradition respects and promotes party autonomy<sup>132</sup> and judges have thus failed to enjoy any discretion in the application and interpretation of legal norms. Courts have been both slow and hesitant in making the shift from the formal logic of the common law method to the purposive public interest orientated reasoning.<sup>133</sup> The legislature had to step in, by introducing the CPA, as the need for substantive justice was

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124 Van de Merwe *et al* 10.

125 *Idem* 12.

126 Hawthorne 'The "New Learning" and Transformation of Contract Law: Reconciling the Rule of Law with the Constitutional Imperative to Social Transformation' 2008 *SAPR/PL* 77 82.

127 Preamble CPA. See also Hawthorne 'Responsive Governance: Consumer Protection Legislation and its Effect on Mandatory and Default Rules in the Contract of Sale' 2011 *SAPL* 432 447; Hawthorne 2008 *SAPR/PL* 77 81.

128 Preamble Act 108 of 1996.

129 Preamble CPA.

130 *Ibid.*

131 Hawthorne *supra* n 126 at 86.

132 *Idem* 85.

133 *Idem* 86.

compelling.<sup>134</sup> Hawthorne argues that consumer law has caused disintegration of traditional orthodox contract law, as an autonomous system of law, since its implicit acknowledgement of the reality of inequality undermines one of the unwritten cornerstones of classical contract.<sup>135</sup> Contracting parties can no longer require their agreement to be allowed to function in a legal sphere of its own, outside the encompassing influence of the Constitution and other relevant statutes such as the CPA.<sup>136</sup>

### 3 2 The Consumer Protection Act: An Instrument for Fairness and Equity?

There are conditions that are prohibited outright with the result that they are void to the extent of their non-compliance with the CPA. Section 51 lists the forms of transactions, agreements, terms or conditions that are prohibited. These are, first, terms aimed at defeating the purposes and policy of the CPA. Secondly, terms misleading or deceiving the consumer; or subjecting the consumer to fraudulent conduct.<sup>137</sup> Thirdly, terms that directly or indirectly purport to waive or deprive a consumer of a right, and terms that set aside or override the effect of any CPA provision or rather authorise the supplier to do anything that is unlawful. Fourthly, a term that purports to limit or exclude the liability of a supplier for harm caused by gross negligence as well as a term that constitutes an assumption of risk by the consumer or imposes an obligation on a consumer to assume the risk of handling any goods.<sup>138</sup> Lastly, a term that falsely expresses an acknowledgement by the consumer that no warranties or misrepresentations were made in connection with the agreement is also proscribed in terms of the CPA.<sup>139</sup>

It is worth noting that the CPA makes explicit liability for gross negligence.<sup>140</sup> By implication, ordinary liability may still be excluded by means of an appropriately worded exemption clause, provided that the exemption has been signed or initialed by the consumer.<sup>141</sup> Such clauses may, however, be unfair “regardless of whether the consumer knew about them at the time of concluding the contract and signed next to them”.<sup>142</sup> They may involve the consumer’s fundamental rights to bodily integrity and life.<sup>143</sup> The consumer’s bargaining power is also fatally impaired if, for example, an exemption clause is drawn to his attention at a very last stage when he had made all the arrangements to be

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134 *Ibid.*

135 *Idem* 85.

136 Van de Merwe *et al* 12.

137 S 51 (1) (a).

138 S 51 (1) (c).

139 S 51 (1) (g).

140 S 51 (1) (c).

141 Hutchison & Pretorius 34; Mupangavanhu *supra* n 43 at 1185.

142 Naude 2009 *SALJ* 505 510.

143 *Ibid.*

admitted to a hospital<sup>144</sup> or to go on holiday.

Where contractual terms are not prohibited outright by the CPA, they are subjected to the requirement of fairness and reasonableness. Section 48 of the CPA deals with the consumer's right to fair, just and reasonable terms and conditions. It should be read in conjunction with the rest of part G as well as with regulation 44 that lists contract terms that are presumed to be unfair.<sup>145</sup> Regulation 44 only applies where the consumer is a natural person who bought goods for private purposes.<sup>146</sup> A supplier must not supply or offer to supply any goods or services at a price or subject to a term that is unfair, unreasonable or unjust.<sup>147</sup> Any marketing or negotiations, for the purpose of entering into transactions for the supply of goods or services, must also be done in a manner that is fair, reasonable and just. In addition to the above, a supplier must not require a consumer to waive any rights, assume any obligation, or waive any liability of the supplier on terms that are unfair, unreasonable or unjust.<sup>148</sup> Further, a supplier may not impose such terms as a condition of entering into a transaction.<sup>149</sup>

The CPA explains the meaning of a term that is unfair, unreasonable or unjust as a term that is: First, excessively one-sided in favour of the supplier; secondly, is so adverse to the consumer as to be inequitable; and thirdly, was induced by a supplier's false, misleading or deceptive misrepresentations.<sup>150</sup> It has, however, been argued that the test for unfairness set out in section 48(2) is not applicable to price.<sup>151</sup> Courts will thus have to create such a test themselves taking into account the factors listed in section 52(2) of the CPA which include, *inter alia*, the fair value of the goods or services in question; the conduct of the supplier and the consumer respectively; whether there was any negotiation between a supplier and the consumer, and if so, the extent of that negotiation as well as the extent to which any documents relating to the transaction satisfied the plain language requirement.

Although the legislature tried to give some indication as to their meaning of "unfair", "unreasonable" and "unjust", it failed not only to clearly and comprehensively define the words, but also to provide a guideline regarding the interpretation of these concepts.<sup>152</sup> An interpretation that gives effect to the CPA's purposes would be crucial so

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144 *Ibid.* See also *Afrox Healthcare supra* n 7.

145 Barnard *The Influence of the Consumer Protection Act 68 of 2008 on the Common Law of Sale* (LLD dissertation 2013 UP) 133.

146 *Ibid.* See also reg 44 (1) CPA.

147 S 48 (1) (a)

148 S 48 (1) (c).

149 S 48 (1) (c).

150 S 48 (2) (c) read with s 41.

151 Van Eeden *A Guide to the Consumer Protection Act* (2009) 84-185. See also Barnard *supra* n 167 at 134.

152 Christie & Bradfield 21; Hawthorne 2011 *SAPL* 432 439; Naude 2009 *SALJ* 505 516.

that consumers are afforded the intended protection. It is hoped that case law will provide direction in the near future.<sup>153</sup>

Section 49 of the CPA deals with notice required for certain terms and conditions. It requires that any notice or provision that purports first, to limit in any way the risk of the supplier; secondly, to constitute an assumption of risk by the consumer; thirdly, impose an obligation on the consumer to indemnify the supplier; or lastly to be an acknowledgement of any fact by the consumer,<sup>154</sup> to be drawn to the attention of the consumer in a conspicuous manner and form that is likely to attract the attention of an ordinary alert consumer, having regard to the circumstances.<sup>155</sup>

The fact, nature and effect of the provision must be drawn to the consumer's attention before she has entered into the transaction, begins to engage in the activity, gains access to the facility, or is required to offer consideration for the transaction.<sup>156</sup> The consumer's attention must also be drawn to any provision or notice which concerns any activity that is subject to any risk of an unusual character, the presence of which the consumer could not reasonably be expected to be aware of, or which an ordinary alert consumer could not reasonably be expected to notice or to contemplate in the circumstances, or that could result in serious injury or death.<sup>157</sup> The consumer must assent to that provision or notice by signing to show his acknowledgement and acceptance of the provision.<sup>158</sup> The consumer must also be given adequate opportunity in the circumstances to receive and comprehend the provision or notice.<sup>159</sup> The requirements of section 49 are meant to ensure that consumers are given the opportunity to make informed decisions.<sup>160</sup> A term is also construed as unfair, unreasonable or unjust where its existence, nature and effect were not adequately drawn to the attention of the consumer in a clear and conspicuous manner before the transaction was entered into.<sup>161</sup>

Part F of the CPA provides for the right to fair and honest dealing. It focusses on unconscionable conduct and false, misleading or deceptive representations.<sup>162</sup> The making of false, misleading or deceptive representations, concerning a material fact to a consumer, is prohibited.<sup>163</sup> In terms of the common law of contract, the grounds that render a contract voidable are duress, undue influence, misrepresentation and commercial bribery. An innocent party can thus

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153 Hawthorne 2011 *SAPL* 432 439; Naude 2009 *SALJ* 505 516.

154 S 49(1).

155 S 49(4)(a).

156 S 49(4)(b).

157 S 49(2).

158 *Ibid.*

159 S 49(5).

160 Mupangavanhu *supra* n 43 at 1180.

161 S 48(2)(d) read with s 49(4).

162 Ss 40 & 41.

163 S 41(a).

choose to rescind or affirm the contract and claim damages if he has suffered patrimonial loss. Although the CPA incorporates the same grounds provided in terms of the common law, it also includes physical force against a consumer, pressure or harassment, unfair tactics or any other similar conduct when marketing, supplying, negotiating, concluding or executing an agreement to supply any goods or services to a consumer.<sup>164</sup> In terms of the common law, the use of physical force, for example where X grabs B's hand and forces him to sign, does not give rise to a contract since B has not acted at all.<sup>165</sup> In terms of the common law, "pressure" forms part of duress and is not an independent ground for setting aside a contract. It remains to be seen whether a contract can be set aside solely on the basis of "pressure ... harassment or unfair tactics".<sup>166</sup>

In addition, the CPA clearly provides that:

... it is unconscionable for a supplier knowingly to take advantage of the fact that a consumer was substantially unable to protect the consumer's own interest because of physical or mental disability, illiteracy, ignorance, inability to understand the language of an agreement.<sup>167</sup>

The supplier may not, therefore, profit from the ignorance or weaknesses of the consumer as such conduct is "unconscionable".

### 3 3 Commentary

Although the common law of contract is trying to establish a balance between the sanctity of contract on the one hand, and the interests of the weak contracting party on the other hand, the balance has not yet been achieved. The CPA, together with the Constitution, is nonetheless exerting a strong impact upon contract law. The provisions of the CPA are likely to force courts to reshape the established principles and doctrines of contract law so that they can be in conformity herewith. Most problems in contract law exist due to its classical nature, socio-economic factors, patriarchy and historical factors. Inequalities in bargaining power appear to be inherent in contractual relationships because of social differences and the unequal distribution of wealth. The CPA creates mechanisms through which problems experienced in contract law could be ameliorated by introducing prerequisites for consumer contracts, such as plain language and the need for the attention of the consumer to be drawn to certain clauses.<sup>168</sup> The CPA also attempts to address terms that are unfair, unjust and unreasonable, but it does not cover every area; thus the criticisms levelled against contract law are only partially addressed.

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164 S 40(1).

165 Hutchison & Pretorius 136.

166 S 40.

167 S 40(2).

168 Ss 22 & 49(4).

Although the provisions of the CPA dealing with improperly obtained consensus overlap considerably with the common law, Hutchison and Pretorius rightly argue that the substantive provisions of the CPA go further than the existing common law.<sup>169</sup> The procedures laid down for their enforcement are also different. Christie and Bradfield argue that: “It may be that the real value in the legislation lies rather in the mechanisms that it has introduced for the relatively more accessible and informal resolution of consumer disputes”.<sup>170</sup>

A consumer may approach an ombud, the consumer courts, the National Consumer Commission and the National Consumer Tribunal to obtain relief.<sup>171</sup> The fact that consumers still enjoy their common law remedies together with the other forms of relief, which can be obtained in the various consumer protection institutions, is a remarkable development in the South African legal system. The importance of the enactment of the CPA thus cannot be underestimated.

Nonetheless, the enactment of the CPA does not mean that the law has achieved perfection.<sup>172</sup> The CPA has numerous shortcomings, *inter alia*, it fails to provide guidelines for the interpretation of key concepts, such as, “fairness”, “reasonableness” and “justice”. Naude rightly opines that the provisions dealing with unfair contractual terms are lacking in some respects, with the result that the problems faced by consumers have not been sufficiently addressed in accordance with international best practices.<sup>173</sup> Therefore, Naude recommends that the legislature and the Department of Trade and Industry make amendments to the CPA which would include an explicit provision that allows courts to raise the issue of unfairness on their own initiative.<sup>174</sup>

Hawthorne argues that the effectiveness of the CPA is undermined by its failure to introduce mandatory rules to avoid reliance on default rules.<sup>175</sup> He concludes that the introduction of a new definition for “defect” may not facilitate the seamless absorption of the CPA into the law of contract, and that it will have a limited impact on the law of sale.<sup>176</sup> It has also been argued that, viewed from the perspective of contractual mistake, the CPA does not provide consumers with much protection;<sup>177</sup> what it gives with the one hand it takes with the other, in relation to exemption clauses.<sup>178</sup> This is because the CPA requires that the fact, nature and effect of any notice, that purports to limit the liability of the supplier, be drawn to the attention of the consumer in a

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169 Hutchison & Pretorius 144.

170 Christie & Bradfield 22.

171 Ss 69, 70 & 71.

172 Christie & Bradfield 12.

173 Naude 2009 *SALJ* 505-506.

174 *Idem* 536.

175 Hawthorne 2011 *SAPL* 432 448.

176 *Ibid.*

177 Pretorius ‘Exemption Clauses and Mistake: *Mercurius Motors v Lopez* 2008 3 SA 572 (SCA)’ 2010 *THRHR* 491 500.

178 Mupangavanhu *supra* n 43 at 1182.

conspicuous manner and form that is likely to attract the attention of an ordinary alert consumer. The implication of this provision is that once the supplier has alerted the consumer, he cannot rely on *iustus error* as in the past.<sup>179</sup> It is noteworthy that there is scope to amend the CPA after the gaps herein, which can potentially prejudice consumers, have been identified.

Fairness is a slippery concept which is not easy to attain. On its own, the CPA will not suffice in achieving fairness. It must be seen as a step towards building a system that values fairness and equity. Courts, accordingly, should continue to gradually develop common law by infusing contract law doctrines with constitutional values. The problem of unfair contracts is not only limited to consumer agreements but permeates the whole of contract law. The problem of unfair contractual terms and the abuse of freedom of contract by a stronger party may persist in the rest of contract law, and needs to therefore be abated. It is argued that fairness should be an overriding requirement in all contracts to ensure that freedom and sanctity of contract do not always prevail over fairness and equity. South African society needs to promote fairness to the extent that the duty to act in good faith should be the expected standard; anything less ought to be contrary to community expectations. The values of *ubuntu*, which “inspire much of our constitutional compact”,<sup>180</sup> require fairness in contract law since “it carries in it the ideas of humaneness, social justice and fairness”.<sup>181</sup>

## 4 Conclusion

The enactment of the CPA, aimed at protecting public interests, reinforces the need to incorporate the societal values such as fairness, justice, and equality into contract law. The CPA is of particular significance insofar as the protection and regulation of consumer transactions are concerned. The fact that it has shortcomings, does not detract from its importance in ensuring that consumers' rights are recognised and respected by suppliers when entering into or executing a contract. The argument that provisions dealing with unfair contractual terms needs to be amended, is pertinent to the realisation of consumer rights in South Africa. The CPA, however, will not adequately address the problem of unfairness in contract law. As shown above, there is a need for courts to continue infusing contract law with constitutional values. By developing and expanding concepts such as, good faith and *ubuntu*, the problems of unfairness and inequality will be ameliorated. Alternatively, courts should expand and develop public policy to include good faith in order to import fairness into contract law.

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179 *Idem* 1181; Pretorius 2010 *THRHR* 491500.

180 *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd supra* n 23 at par 71.

181 *Ibid.*

## WTO Appellate Body Ruling in *United States – Certain country of origin labeling requirements*: Trading away consumer rights and protections, or striking a balance between competition-based approach in trade and consumer interests?

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### OPSOMMING

**WHO Appelliggaam Beslissing in *United States – Certain Country of Origin Labeling Requirements*: Erosie van Verbruikersbeskerming en Veiligheid, of is dit Noodsaaklik ten einde 'n Balans te Bewerkstellig Tussen Handelsregulering en Verbruikersbelang?**

Hierdie bydra oorweeg die bevinding van die Appelliggaam van die Wêreldhandelsorganisasie (World Trade Organization) in die geval van *United States – Certain Country of Origin Labeling (COOL) requirements* (US – COOL). Die kern oorweging is of die bevinding in die voormelde beslissing, neerkom op 'n erosie van verbruikersbeskerming en veiligheid, en of dit 'n noodsaaklike euwel is in 'n poging om 'n balans tussen handelsregulering en verbruikersbelange daar te stel. Die bevinding dien as bewys van die kompleksiteit van die interpretasie en toepassing van die Wêreldhandelsorganisasie se ooreenkomste. Sommige van die interpretasies het die potensiaal om 'n positiewe of 'n negatiewe impak op verbruikersregte te hê. Die betrokke bevinding van die Wêreldhandelsorganisasie sit gedeeltelik die beskouing voort dat hierdie organisasie nie verbruikersbelange vooropstel nie. In 'n poging om 'n balans tussen die kompeterende benadering in handel aan die een kant, en verbruikersbelange aan die ander kant te handhaaf, het die betrokke bevinding die onvermydelike impak dat dit die vermoë van die staat om verbruikers te beskerm, verswak het.

## 1 Introduction

In his book, *The Wealth of Nations*, Adam Smith, one of the great economists of his time, wrote that:

Consumption is the sole end and purpose of all production; and the *interest of the producer ought to be attended to, only so far as it may be necessary for promoting that of the consumer*. The maxim is so perfectly self-evident, that it would be absurd to attempt to prove it. But in the mercantile system, the interest of the consumer is almost constantly sacrificed to that of the producer; and *it seems to consider production, and not consumption, as the ultimate aim and object of all industry and commerce ... It cannot be very*

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difficult to determine who have been the contrivers of this whole mercantile system; not the consumers, we may believe, whose interest has been entirely neglected; but the producers, whose interest has been so carefully attended to; and among this latter class our merchants and manufacturers have been by far the principal architects.<sup>1</sup>

Those who studied Adam Smith's *The Wealth of Nations*, will recall that emphasis has often been on his proposition of comparative advantage principle at the centre of which is division of labour. However, Smith did not only provide an account of the dawn of the Industrial Revolution, he also spoke at length about consumerism and the interest of trade liberalism, producers and consumers.

In contrast, the philosophy of the World Trade Organisation (WTO) primarily seeks to establish a multilateral trading system focusing mainly on trade issues. Apart from scant reference to sustainable development which may be related to people or private party interest, the WTO's trade-oriented approach takes insignificant cognisance of consumer or peoples' interests and may have negative ramifications on other issues, including the protection of consumer rights. There is no doubt that any question of when, how and to what extent consumers must be protected within the context of the WTO framework of international trade and mercantilism remains controversial. Nevertheless, it is also a question that consumer rights scholars and those in the field of international economic law should be prepared to tackle, even if there can be no definitive answers.

This paper addresses the following questions relevant to consumer interest and protections: What role has country of origin labelling (COOL) to play besides being just a measure to provide point-of-purchase information, and relevance to product literacy? Has COOL any significant value and role to play in respect of consumer protection? These questions are addressed in the light of the 2012 WTO Appellate Body ruling in *United States – Certain Country of Origin Labeling (COOL) requirements*<sup>2</sup> (US – COOL). The *United States – COOL* was one of the three disputes<sup>3</sup>

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1 Smith *The Wealth of Nations* (1937) 625.

2 Appellate Body Report, *United States – Certain Country of Origin Labeling (COOL) Requirements* (hereinafter “US-COOL”), WT/DS384/AB/R, WT/DS386/AB/R (2012-06-29).

3 The other rulings are: Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes* (hereinafter “US – Clove Cigarettes”) WT/DS406/AB/R, adopted 2012-04-24; and Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (US – Tuna II (Mexico))*, WT/DS381/AB/R, adopted 2012-06-13. For more on US – Tuna disputes, see Silveira & Obersteiner ‘The Scope of the TBT Agreement in Light of Recent WTO-Case Law’ 2013 *Global Trade and Customs Journal* 112-120; Partiti ‘The Appellate Body Report in *US – Tuna II* and Its Impact on Eco-Labeling and Standardization’ 2013 *Legal Issues of Economic Integration* 73–94; McGivern ‘The TBT Agreement Meets the GATT: The Appellate Body Decision in *US – Tuna II*’ 2012 *Global Trade and Customs Journal* 350-354.

around the provisions of the Agreement on Technical Barriers of Trade<sup>4</sup> (TBT Agreement). The TBT Agreement, which entered into force in 1995, is the multilateral successor to the Standards Code, signed by General Agreement on Trades and Tariffs (GATT) contracting parties at the conclusion of the 1979 Tokyo Round of Trade Negotiations. TBT provides WTO member countries with the powers to impose measures against technical barriers of trade, over and above other exception-based protections in Article XX of the GATT<sup>5</sup> and other WTO agreements.<sup>6</sup>

Interesting to note, is that the WTO Appellate Body ruling in *United States – COOL* was against the country which demanded more protection for consumers, including having to embark on a complete overhaul of the consumer laws.<sup>7</sup> In addition to the contextualisation of the study in part 1 of this article, part 2 provides a summary of the factual scenario of the dispute and the key findings of the Appellate Body. Part 3 addresses ramifications of the Appellate Body ruling. Key consideration is whether the Appellate Body finding in *United States – COOL dispute* amounts to erosion of consumer protections and safety or if it was a necessary evil to strike a balance between trade regulation and consumer interest. The paper is concluded in part 4. In this paper, I argue that the *United States – COOL* ruling has the potential to continue the disjuncture between the legal protections given to consumers and trade liberalism. The ruling by the WTO Dispute Settlement Body (DSB) muddies attempts by the Appellate Body in *United States – Measures Concerning the Importation, Marketing and Sale of Tuna Products (US – Tuna II)* to clarify key conceptual issues of the TBT Agreement. The latter dispute involved environmental labelling requirements. The *United States – COOL* ruling, by the Appellate Body, in part perpetuates the perception that the WTO is anti-consumer

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4 The WTO Agreement on Technical Barriers to Trade 1995 (TBT Agreement).

5 For in-depth discussions on the GATT Article XX, see Bowen 'The World Trade Organization and its interpretation of the Article XX exception to the General Agreement on Tariffs and Trade, in the Light of Recent Developments 2001 *Georgia journal of international and Comparative Law* 181.

6 Other WTO agreements with exception-based protection include the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). Note that art 1.5 of the TBT Agreement explicitly states that its provisions do not apply to sanitary and phytosanitary measures as defined in annex A of the SPS Agreement. SPS Agreement deals with food safety, while the TBT Agreement address issues of consumer safety, health, environmental protection and measures such as labelling to an extent that they impact trade. Similarly, in terms of art 1.4 of the TBT Agreement its provisions are not applicable to purchasing specifications prepared by governmental bodies for production or consumption requirements of governmental bodies. The relevant Agreement to apply in such cases will be the *WTO Agreement on Government Procurement (AGP)*.

7 Cohen 'Warne Lecture 'Is It Time for Another Round of Consumer Protection? The Lessons of Twentieth-Century U.S. History' 2010 *Journal of Consumer Affairs* 234-246.

interests.<sup>8</sup> Butcher and Ip argue that some of the WTO decisions compromise consumer interest in favour of commercial interests.<sup>9</sup>

## 1.2 Definition of Concepts and Terms

### 1.2.1 Country of Origin, and Country of Origin Labelling

COOL is a measure intended at making consumers aware of the country of origin and the content of goods.<sup>10</sup> Thus, COOL may have several effects and uses including, but not limited to, serving consumer literacy<sup>11</sup> purposes, by readily providing the necessary information.<sup>12</sup>

Chattalas and Takada simply, and in more consumer accessible terms, refer to country of origin (COO) as a country which certain products or brands are associated.<sup>13</sup> Certainly, association with COO has a great influence on consumer perceptions about product quality<sup>14</sup> and choice.<sup>15</sup> In trade terms the determination of COO of the product is not a simple exercise, as it involves different tests and criteria. The WTO Agreement on Rules of Origin (WTO/GATT ROOs), for example, provides

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8 See *Consumer Interests and Sustainable Development in International Trade Law*. 2003 available from [http://www.ecologic.eu/download/projekte/1850-1899/1885/1885\\_vzbv\\_policy\\_brief.pdf](http://www.ecologic.eu/download/projekte/1850-1899/1885/1885_vzbv_policy_brief.pdf).

9 Butcher & Ip 'Are Chinese Consumers Winners or Losers under WTO Membership?' 2007 *Macquarie Journal of Business Law* 71.

10 For more on the understanding of the concepts of COOL see, Krissoff, Kuchler, Nelson, & Somwaru *Country-of-origin labeling: Theory and observation* 2004 USDA Economic Research Service Outlook Report WRS04-02 available from <http://www.ers.usda.gov/publications/WRS04/jan04/wrs0402/>.

11 On product literacy see for example, Pappalardo 'Product Literacy and the Economics of Consumer Protection Policy' 2012 *The Journal of Consumer Affairs* 319-332.

12 See Dransfield, Ngapo, Nielsen, Bredahl, Sjöden, Magnusson, Campo, & Nute. 'Consumer choice and suggested price for pork as influenced by its appearance, taste and information concerning country of origin and organic pig production' 2005 *Meat Science* 61-70.

13 Chattalas & Takada *Place Branding and Public Diplomacy* (2013).

14 COO impact may be cognitive, affective or normative. See generally Ehmke & Tyner 'Measuring the Relative Importance of Preferences for Country of Origin in China, France, Niger, and the United States' 2008 *Agricultural Economics* 277-285; Verlegh & van Ittersum 'The Origin of the Spices: The Impact of Geographic Product Origin on Consumer Decision Making' in Frewer, Risvik & Schifferstein (eds) *Food, People and Society* (2001) 267-279.

15 Sung-Tai & Wyer 'Effects of Country-of-Origin and Product-Attributes: Information on Product Evaluation: An Information Processing Perspective' 1989 *Journal of Consumer Research* 175-87; Wilkey & Nes 'Country-of-Origin Effects on Product Evaluation' 1982 *Journal of International Business Studies* 89-99. See also Al-Sulaiti, & Baker 'Country of origin effects: a literature review' 1998 *Marketing Intelligence & Planning* 150 - 199.

the approach to be used in determining the ROOs.<sup>16</sup> Possible approaches include preferential ROOs test- used to inquire into the nationality or the country of origin of the goods to determine whether such goods should enjoy the benefits of tariffs and quota elimination under a trading arrangement;<sup>17</sup> substantial transformation test – in terms of which a new product should be created that differs in name, character or use from the original article, as a result of the manufacturing process;<sup>18</sup> and the wholly-obtained or produced test according to which a good is regarded as having originated in the territory of a party where the good is wholly obtained or entirely produced.<sup>19</sup>

### 1 2 2 Product Identity and Product Literacy

Pappalardo succinctly explains the attainment of product literacy as follows:

I would say that a person attains product literacy when he or she possesses the tools necessary to determine if a particular product or service will meet his or her goals given his or her limited resources – including limited wealth, limited time, and limited household production capabilities.<sup>20</sup>

Thus, product identity is an aspect of consumer behavioural economics,<sup>21</sup> which in the case of Pappalardo's definition, involves

16 GATT Agreement on Rules of Origin (GATT ROO) of 1994 art 1(1). See also, SADC Protocol on Trade, *Annex 1 Concerning the Rules of Origin for Products to be traded between the Member States of the Southern Development Community* (agreed to on 1999-07-15 by the SADC Ministers of Trade). See LaNasa 'Rules of Origin in the Uruguay Round's Effectiveness in Harmonizing and Regulating Them' 1996 *American Journal of International Law* 625, for an extensive discussion of the WTO/GATT rules of origin.

17 *Idem* 626 & 626 n 6 & 7.

18 See Edwards 'National Juice Products Association v United States: A Substantial Transformation of the Country-of-Origin Substantial Transformation Test?' 1987/1988 *The University of Miami Inter-American Law Review* 493-507. The substantial transformation test has featured mainly in the USA's anti-dumping determinations since the early eighteenth century. See *Anheuser-Bush Brewing Association v United States*, 207 US 556, 562 (1908); *Rules of Origin*, ABA Standing Committee on Customs Law (ABA Rules of Origin) (1991) 11. See also, *GATT Agreement on Rules of Origin* on art 3(b) read with art 9(2)(c)(ii) & (iii). It is also a major test in the EU. See, EU Basic Law – Regulation No 802/68, OJ (1968) L 148/1.

19 GATT ROO Agreement art 3(b) read with art 9(2)(c)(i). In 2011 the WTO came up with an interesting concept of 'Made in the World' (MIW) which influences the way in which the traditional ROOs may be considered. For more on MIW see Yadav 'Are the WTO's Rules of Origin Turning Archaic as a Result of Trade in Value-Added?' 2014 *Estey Centre Journal of International Law and Trade Policy* 162-178.

20 Pappalardo *supra* n 11 at 321. See also Pappalardo 'Regulate, Inform, or Educate? Choosing Efficient Consumer Policy Strategies' 1997 *Advancing the Consumer Interest* 27-31.

21 See Salinger 'Behavioral Economics, Consumer Protection and Antitrust' 2010 *Competition Policy International* 65-86. There is a litany of studies on consumer purchasing behaviours studies, for example, Mafinini & Dhurup 'Assessing Consumer Purchasing Decision Styles: An Empirical Investigation From South Africa' 2014 *International Business & Economics*

information evaluation and the ability to appreciate and act in accordance with such an evaluation in order to make such an informed choice. Therefore, COOL is important to consumer product literacy and is a mandated disclosure in many jurisdictions.<sup>22</sup>

## 2 Summary of Decision

### 2.1 Facts: the Appellate Body, *US – COOL*

The *US – COOL* dispute, which began with the request of the establishment for panel intervention by Canada,<sup>23</sup> and by Mexico,<sup>24</sup> was based primarily on claims by Canada and Mexico that the United States country of origin labelling policy, as expressed in the 2002 Farm Bill,<sup>25</sup> is discriminatory in that it gives United States grown foods preferential treatment to the disadvantage of products from territories outside the United States. The COOL measure requires retailers selling specific products in the United States to label those products with their country of origin, irrespective of whether the products are imported or locally produced.<sup>26</sup> It also specified how each of the origins of meat must be labelled according to circumstances of each case.<sup>27</sup>

Mexico, Canada and the United States each appealed “certain issues of law and legal interpretations developed in the Panel Reports”<sup>28</sup> pursuant to Articles 16.4 and 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the DSU).<sup>29</sup> Canada appealed certain aspects of the Panel's analysis under Article 2.2, and requested the Appellate Body to complete the legal analysis in the event

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*Research Journal* 679 – 688; Radder & Pietersen ‘Decision-making styles of young Chinese, Motswana and Caucasian consumers in South Africa: an exploratory study’ 2006 *Journal of Family Ecology and Consumer Science* 20-31; Walsh, Mitchell & Hennig-Thurau ‘German consumer decision-making styles’ 2001 *The Journal of Consumer Affairs* 73-79; Shoham & Dakalas, ‘Family consumer decision making in Israel: The role of teens and parents’ 2003 *Journal of Consumer Marketing* 238-251; Hiu, Siu, Wang & Chang ‘An investigation of decision-making styles of consumers in China’ 2001 *Journal of Consumer Affairs* 26-345; Gonen & Ozmete ‘Decision-making styles of young Turkish consumers’ 2006 *Journal of the Home Economics* 26-33.

22 For more on mandated information disclosure, see Omri & Schneider ‘The Failure of Mandated Disclosure’ 2011 *University of Pennsylvania Law Review* 101–204.

23 See *Request for the Establishment of a Panel by Canada*, WT/DS384/8.

24 See *Request for the Establishment of a Panel by Mexico*, WT/DS386/7.

25 The 2002 Farm Bill amended the Agricultural Marketing Act of 1946 by adding requirements for COOL labelling at the final point of sale for various meats, fish, shellfish, peanuts, fruits, and vegetables.

26 See *US – COOL*, par 239 & 245.

27 *Idem* 3-5.

28 *Idem* 1.

29 Pursuant to the Rule 24(1) of the *Working Procedures*, Australia, Brazil, Colombia, the European Union, and Japan each filed a third participant's submission.

that it reversed the Panel's finding under Article 2.2.<sup>30</sup> Canada also raised conditional appeals with respect to the COOL measure under Articles III: 4 and XXIII: 1(b) of the GATT 1994.<sup>31</sup>

The TBT Agreement enjoins WTO members to ensure that technical regulations, standards, and conformity assessment procedures are not used for protectionist purposes.<sup>32</sup> Also, that they do not unjustifiably impede trade.<sup>33</sup> Annex I.1 of TBT Agreement defines “technical regulation” as a:

*Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory.* It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method (own emphasis).

In terms of the three part test set by the Appellate Body Report *European Communities – Trade Description of Sardines (EC – Sardines)*:<sup>34</sup> (a) the document applies to an identifiable product or group of products;<sup>35</sup> (b) the document must lay down one or more product characteristics;<sup>36</sup> and (c) compliance with these characteristics must be mandatory.<sup>37</sup>

In terms of Annexure I.2 of the TBT Agreement, a standard is:

*Document approved by a recognised body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory.* It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method (own emphasis).

For example, a government requiring that all watermelons weighing 70 grams or more should be labelled “Grade A” amounts to a standard. But, such a standard may not preclude watermelons weighing less from being sold.<sup>38</sup>

In terms of Annex 1:3 of the TBT Agreement, “conformity assessment procedures” refer to “[a]ny procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or

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30 *Supra* n 26 at par 434.

31 *Idem* 494.

32 See TBT Agreement art 2.1.

33 *Idem* 2.2.

34 Appellate Body Report *European Communities – Trade Description of Sardines (EC – Sardines) WT/DS231/AB/R*, adopted 2002-10-23.

35 See *EC – Sardines* par 176.

36 *Ibid.*

37 *Ibid.*

38 For more on the clarification of key conceptual issues by the Appellate Body see Partiti ‘The Appellate Body Report in *US – Tuna II* and Its Impact on Eco-Labeling and Standardization’ 2013 *Legal Issues of Economic Integration* 73.

standards are fulfilled” (own emphasis). Included as conformity assessment procedures are, for example, registration, procedures for sampling, testing and inspection; evaluation, verification and assurance of conformity; accreditation and approval, and their combinations.

The TBT Agreement allows members the necessary regulatory discretion to protect human, animal and plant life and health, national security, the environment, consumers, and other policy interests.<sup>39</sup> Thus, the TBT Agreement makes provision for members to exercise rights to enact product regulations for approved (legitimate) public policy purposes or objectives. Article 2.1 of the TBT Agreement provides for the national treatment and the most favoured nation (MFN) treatment disciplines as follows:

Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.

## 2.2 Key Findings of the Appellate Body

The Appellate Body report was circulated to members on 29 June 2012, following the Panel’s report, and its finding and conclusions recorded at paragraph 489. Upholding the Panel’s report, in part and for different reasons, the Appellate Body held that COOL measure in question violates Article 2.1 of the TBT Agreement in that it granted less favourable treatment to imported Canadian cattle and hogs than to like domestic cattle and hogs.<sup>40</sup> In its analysis under Article 2.1 of the TBT Agreement, the Appellate Body agreed with the Panel that the COOL measure has a detrimental impact on imported livestock because its recordkeeping and verification requirements create an incentive for processing exclusively domestic livestock, and a disincentive against using similar (like) imported livestock.<sup>41</sup> The Appellate Body found, however, that the Panel’s analysis was incomplete because the Panel did not go on to consider whether this *de facto* detrimental impact stems exclusively from a legitimate regulatory distinction<sup>42</sup>, in which case it would not violate Article 2.1.<sup>43</sup> The Appellate Body found that the COOL measure lacks even-handedness because its recordkeeping and verification requirements impose a disproportionate burden on upstream producers and processors of livestock as compared to the information conveyed to consumers through the mandatory labelling requirements for meat sold at the retail level.<sup>44</sup> That is, although a large amount of information must be tracked and transmitted by upstream producers for purposes of providing consumers with information on COO, not much information is

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39 See *chapeau* of the TBT Agreement.

40 *Supra* n 26 at par 496(a)(i) & (iv) & par 279.

41 *Idem* 292 & 496(a)(ii).

42 *Idem* 293.

43 *Idem* 271.

44 *Idem* 347.

actually communicated to consumers in an understandable or accurate manner.<sup>45</sup> Accordingly, the detrimental impact on imported livestock cannot be said to stem exclusively from a legitimate regulatory distinction, and instead “it is designed or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination in violation of Article 2.1”.<sup>46</sup> For these reasons, the Appellate Body upheld the Panel’s finding under Article 2.1.

The Appellate Body also reversed the Panel’s finding with regards to Article 2.2 of the TBT Agreement. The latter ruled that the COOL measure violates Article 2.2 of the TBT Agreement because it does not fulfill the legitimate objective of providing consumers with information on the origin of products.<sup>47</sup> While finding that the Panel did not err in finding that, pursuant to Article 2.2 of the TBT Agreement, the COOL measure served a legitimate objective,<sup>48</sup> the Appellate Body did find that the Panel erred in its interpretation and application of Article 2.2.<sup>49</sup> In particular, the Appellate Body found erroneous the proviso by the Panel that a measure could be consistent with Article 2.2 of the TBT Agreement only if it fulfilled its objective completely or exceeded some minimum level of fulfilment.

### **3 Did the Appellate Decision Trade Away Consumer Protections and Safety, or Strike a Balance Between Trade and Consumer Interests?**

#### **3.1 Competition-based Approach Versus Legitimate Objective Approach**

The decision of the Appellate Body in *US- COOL* is among the WTO rulings that outline and set guidelines on what WTO members can and cannot do when adopting technical regulations in order to be consistent with the TBT Agreement. From a competition perspective, the ruling supports the fact that technical regulations may not impact negatively or modify the conditions of trade, pursuant to Article 2.1 of the TBT Agreement. The fundamental question that remains, is whether the ruling has any significant ramifications on the discipline of the protection

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45 *Ibid.*

46 *Idem* 293. See also par 327.

47 *Idem* 496b(v) & (vi).

48 *Idem* 496(a)(iv). See also par 432 & 433.

49 But note that the Appellate Body made “no finding with respect to the United States’ claim that the Panel erred in finding that the COOL measure is ‘trade-restrictive’ within the meaning of Article 2.2, because that claim of error is dependent upon the Appellate Body’s reversal of the Panel’s finding under Article 2.1 of the TBT Agreement”. See TBT Agreement par 496(b)(1).

of consumers, and on socializing the WTO jurisprudence and practice in general?

Did the *United States country of origin labeling measures* serve “legitimate” objectives? In answering this question, it would be remiss not to mention the Panel ruling in *United States – Measures Affecting the Production and Sale of Clove Cigarettes*<sup>50</sup> (Panel Report, *US – Clove Cigarettes*), in which taking a regulatory approach to the issue under the discussion, the Panel stated that:

[W]e do not believe that the interpretation of Article 2.1 of the TBT Agreement, in the circumstances of this case where we are dealing with a technical regulation which has a legitimate public health objective, should be approached primarily from a competition perspective.<sup>51</sup>

Not relying heavily on the competition-based approach, the Panel took a different approach and felt it desirable to consider what it termed the “declared legitimate public health objective”<sup>52</sup> of the measure in question. However, the declared legitimate public health objective approach was later rendered inapplicable by the Appellate Body. Favouring the competition-approach, the Appellate body held that regulatory concerns identified by the Panel could be taken into account ‘to the extent that they are relevant [some examination] and are reflected in the products’ competitive relationship’.<sup>53</sup>

With the above stated Appellate Body position, the question is: Does consumer protection under COOL measure serve a “legitimate objective” for the purposes of the TBT Agreement? The TBT Agreement refer to consumer right and protection as understood under the traditional consumer protection law as legitimate purpose. In my view, however, since the protection of human life and health is deemed a legitimate interest in Article 2.2, the reach of the provisions of Article 2.2 are therefore wide enough to cover consumer protection within the general understanding of consumer protection law. Given the declared purpose and the main business of the WTO, this may, to some scholars, be a political and controversial issue as it suggests a convergence between international trade regime and national consumer protection regime. What is beyond any doubt however, is that consumer interests are directly and/or indirectly affected by the WTO discipline. As noted by Smith, the act of consumption is final to any economic activity, otherwise

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50 WTO Panel, *United States – Measures Affecting the Production and Sale of Clove Cigarettes* (Panel Report, *US – Clove Cigarettes*), WT/DS406/R (September 2, 2011).

51 *Idem* 7.119.

52 *Idem* 7.116.

53 Appellate Body Report, *US – Clove Cigarette* par 156.

no production and distribution would be worth pursuing.<sup>54</sup> It is consumers who keep the trade activities going through demand for goods and services. In their generation and supply of these goods and services, WTO members must also be mindful of consumer interests and to do whatever is possible to protect these interests. Therefore, the litigation of COOL cannot be done in clinical isolation of the interests of consumers.

### 3.2 What is in a “Label”?

Consumer preferences to product properties may be based on various reasons, such as the labelling, COO<sup>55</sup> or origin-indicators,<sup>56</sup> risk perceptions,<sup>57</sup> stereotypes,<sup>58</sup> ethnocentric,<sup>59</sup> hedonic, utilitarian, altruistic,<sup>60</sup> or other reasons.<sup>61</sup> Literature clearly shows that labelling is one of the most important and direct means of communicating product information between buyers and sellers. It is one of the primary means by which consumers differentiate between individual foods and brands to make informed purchasing choices. Inaccurate consumer information

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- 54 The view of consumers as having a say in the final economic activity finds support in the argument of consumer sovereignty. See Goodwin, Nelson, Ackerman & Weisskop. *Consumption and consumer sovereignty* (2008) available from [http://ase.tufts.edu/gdae/education\\_materials/modules/consumption\\_and\\_the\\_consumer\\_society.pdf](http://ase.tufts.edu/gdae/education_materials/modules/consumption_and_the_consumer_society.pdf).
- 55 See Schnettler, Vidal, Silva, Vallejos & Sepúlveda ‘Consumer Willingness to Pay for Beef Meat in a Developing Country: The Effect of Information Regarding Country of Origin, Price and Animal Handling Prior to Slaughter’ 2009 *Food Quality and Preference* 156-165.
- 56 See Pepler. ‘Where Is My Food From: Developments in the WTO Dispute over Country-of-Origin Labeling for Food in the United States’ 2013. *Drake Journal of Agricultural Law* 405.
- 57 See Angulo & Gil ‘Risk Perception and Consumer Willingness to Pay for Certified Beef in Spain’ 2007 *Food Quality and Preference* 1106-1117.
- 58 See Janda & Rao ‘The Effect of Country-of-Origin Related Stereotypes and Personal Beliefs on Product Evaluation’ 1997 *Psychology & Marketing* 689-702.
- 59 See Umberger, Feuz, Calkins & Killinger. ‘U.S. consumer preference and willingness-to-pay for domestic corn-fed beef versus international grass-fed beef measured through an experimental auction’ 2002 *Agribusiness: An International Journal* 491–504; Watson & Wright ‘Consumer Ethnocentrism and Attitudes toward Domestic and Foreign Products’ 2000 *European Journal of Marketing* 1149-1166; Cummings, Harrison & Rutström ‘Homegrown Values and Hypothetical Surveys: Is the Dichotomous Choice Approach Incentive-Compatible?’ 1995 *American Economic Review* 260-66; Yagci ‘Evaluating the Effects of Country-of-Origin and Consumer Ethnocentrism’ 2001 *Journal of International Consumer Marketing* 63-85.
- 60 See Umberger, McFadden & Smith ‘Does Altruism Play a Role in Determining U.S. Consumer Preferences and Willingness to Pay for Natural and Regionally Produced Beef?’ 2009 *Agribusiness: An International Journal* 268-285.
- 61 See generally Chattalas & Takada ‘Warm versus competent countries: National stereotyping effects on expectations of hedonic versus utilitarian product properties’ 2013 *Place Branding and Public Diplomacy* 88-97; Ravi & Wertenbroch ‘Consumer Choice Between Hedonic and Utilitarian Goods’ 2000 *Journal of Marketing Research* 60-71.

can be very costly in many respects.<sup>62</sup> Consumer commodity specific labelling and specifications is very important also as part of product literacy,<sup>63</sup> and the protection of consumers from manipulative advertising.<sup>64</sup> It may be important in helping consumers in their determination of which products are from the countries that have unconscionable or questionable methods of production, such as products made under unacceptable labour condition or standard.<sup>65</sup> Thus, COOL may be an important determinant of consumers' willingness to pay.<sup>66</sup> Relevant to the discussion of the case in question, it should be noted that the United States consumers' preference for COOL is one of the highest in the world,<sup>67</sup> particularly as far as beef products are concerned.<sup>68</sup>

#### 4 Conclusion

The findings in the *US - COOL* dispute is evidence of another complex interpretation and application of WTO agreements. Some of the interpretations of both the Panel and the Appellate Body have the potential of impacting positively or negatively on consumer rights and chipping away some of the basic consumer protections. Also, the findings are evidence of the preparedness, or the willingness, of the WTO to strike down country policies and standards that it considers high-level and restrictive.

Be that as it may, the international community must accept the fact that consumer is king<sup>69</sup> and ensure that in their stream of commerce, consumers' interests are protected through various measures, including COOL. The WTO trade rules may not be read in clinical isolation with

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62 Senauer, Kinsey & Roe 'The Cost of Inaccurate Consumer Information: The Case of the EPA Mileage Figures' 2005 *Journal of Consumer Affairs* 193 - 212.

63 On consumer literacy, see generally Pappalardo *supra* 11 at 319.

64 Thomas, Fowler & Grimm 'Conceptualization and Exploration of Attitude toward Advertising Disclosures and Its Impact on Perceptions of Manipulative Intent' 2013 *Journal of Consumer Affairs* 564-87.

65 Dickson 'Utility of No Sweat Labels for Apparel Consumers: Profiling Label Users and Predicting Their Purchases' 2005 *Journal of Consumer Affairs* 96-119.

66 See Gao & Schroeder 'Effects of Label Information on Consumer Willingness-to-Pay for Food Attributes' 2009 *American Journal of Agricultural Economics* 795-809; Loureiro & Umberger 'Assessing Consumer Preferences for Country-of-Origin Labeling' 2005 *Journal of Agricultural and Applied Economics* 49-63.

67 See generally Loureiro & Umberger *supra* n 66 for a study on how consumers perceive COOL. See also Lusk & Anderson 'Effects of country-of-origin labeling on meat producers and consumers' 2004 *Journal of Agricultural and Resource Economics* 185-205.

68 Umberger, Feuz, Calkins & 'Country-of-Origin Labeling of Beef Products: U.S. Consumers' Perceptions' 2003 *Journal of Food Distribution Research* 103-116.

69 Thornsbury & Fairchild 'King or Pawn? Consumer Preferences in International Trade' 2004 *Choices* 35-38 available from <http://www.farmdoc.illinois.edu/policy/choices/20041/2004-1-07.pdf>.

other interests such as local consumer protection laws.<sup>70</sup> In my view, COOL measures serve a very important legitimate objective of consumer protection. This objective must be encouraged and should not be nullified in favour of pure mercantilist desires. Food labels are an essential source of information for consumers, and should not merely be struck down because they do not allege or speak to the safety of the product. From a consumer protection perspective, COOL should be viewed as providing consumers the necessary effective control and choice over what they buy and eat, be it for hedonic, utilitarian, altruistic, ethical, religious, or other reasons. As pointed out by Kovalsky and Lusk, little validity can be obtained from the standard economic analysis of consumer behaviour which assumes consumers know their preferences with certainty and therefore, measures such as country of origin labels may not really be of utmost importance.<sup>71</sup> In sum, the interpretation of the TBT Agreement in *US-COOL* case in an effort to strike a balance between competition-based approach in trade and consumer interests inevitably made weaker States Parties to protect consumers.

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70 See Sibanda. A human rights approach to World Trade Organization trade policy: another medium for the promotion of human rights in Africa. 2005 *African Human Rights Journal* 38-405 discussing the human right-based approach paradigm shift in the WTO.

71 Kovalsky & Lusk 'Do Consumers Really Know How Much They Are Willing to Pay?' 2013 *Journal of Consumer Affairs* 98; an empirical study by Dan, Loewenstein, & Prelec 'Coherent Arbitrariness: Stable Demand Curves without Stable Preferences' 2003 *Quarterly Journal of Economics* 73.

## Bread as dignity: The Constitution and the Consumer Protection Act 68 of 2008

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### OPSOMMING

#### **Die Grondwet, verbruikersbeskerming en brood as menswaardigheid**

Die belang van die onderlinge verband tussen mense- en verbruikersregte, (her)verdelende billikheid, verbruikersbeskerming en die kontrakreg moet vooropgestel word. Die reg op gelykheid en menswaardigheid het die mees direkte invloed op die kontrakreg. Die kontrak kan potensieel as 'n instrument gebruik word waarmee armoede gedupliseer word. Die rol wat verbruikersbeskerming wetgewing speel in die proses om die verbruiker van die ekonomiese gevolge van onregverdige verbruikersoor-eenkomste te beskerm, moet geëvalueer word in oorleg met die grondwetlik-voorgeskrewe plig om op 'n volgehoue basis die regverdigheid en regmatigheid van die kontrakreg te verseker. Dit is uiters belangrik om die werklike bedingingstand van die partye te identifiseer, aangesien hierdie inligting noodsaaklik is om te bepaal of die ooreenkoms so aangegaan is om die voldoening van sosiale geregtigheid te bewerkstellig. Die Wet op Verbruikersbeskerming<sup>1</sup> stel regverdigde metodes daar waarmee kontrak-vryheid ingeperk word om sodoende die ekonomies grensgeval-verbruiker te beskerm. Die ideaal van die etiese kontrak kan verdere leiding in hierdie verband verskaf. Die hoofdoel van die Wet, om die mees kwesbare lede van die samelewing te beskerm wanneer hul verbruikersooreenkomste aangaan, moet by elke moontlike geleentheid nagestreef word. Die impak van die uiters ongelyke bedingingstand van lede van die Suid-Afrikaanse samelewing kan nie langer afgemaak word indien 'n billike en substantief-gelyke kontraktuele speelveld vereis word nie. Die vermoë om brood, een van die mees basiese verbruikersgoedere, te koop is een mate van waardigheid. Die rol van die reg in die Suid-Afrikaanse transformerende projek kan nie afgemaak word nie. Die strewe na 'n kontraktuele Utopia kan potensieel, al is dit in 'n mindere mate,

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1 'n Nie-amptelike vertaling van die Consumer Protection Act 68 of 2008 is beskikbaar by [http://www.vra.co.za/vorms/WET%20OP%20VERBRUIKERS%20BESKERMING%20\(No%2068%20van%202008\)%20Afr.pdf](http://www.vra.co.za/vorms/WET%20OP%20VERBRUIKERS%20BESKERMING%20(No%2068%20van%202008)%20Afr.pdf)

bydra tot die proses om armoede uit te roei en gelykheid in die samelewing daar te stel. Alle geleenthede moet benut word in die soeke na maniere om armoede aan te spreek. Die hoop is dat die Wet op Verbruikers-berskerming die era van die etiese kontrak sal inlei.

## 1 Introduction

Since South African law comprises a single legal system,<sup>2</sup> guided by the Constitution,<sup>3</sup> constitutional values and the rights enshrined in the Bill of Rights must inform the law of contract. The rights to equality and human dignity are those which have the most direct influence on contract law.<sup>4</sup> If critically analysed from a transformative constitutional perspective, the law of contract has not yet embraced the spirit and purport of the constitutional project.<sup>5</sup> It has also been argued that the courts have in fact been achieving the exact opposite.

Davis states that the highest courts of South Africa have not yet embraced the distributive potential of the law of contract and, at present, it benefits and protects some legal subjects while subordinating others.<sup>6</sup> He further welcomes the changes to the law of contract that the Consumer Protection Act 68 of 2008 (CPA or the Act) appears to implement, but warns that:

For the jurisprudence that emerges from the Consumer Protection Act to be coherent, the courts will no longer be able to eschew an interrogation of the ground rules upon which the contractual arrangement has been ultimately fashioned ... Inequality of bargaining power and the consequences thereof lie at the heart of the considerations of which the court is required to take into account in terms of [the Act].<sup>7</sup>

This clearly illustrates the relationship between rights, distributive justice, the law of contract, and more specifically, consumer agreements.<sup>8</sup> The desired and required societal change demanded by the fall of apartheid can only be achieved by altering the current outlook on wealth

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2 *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) par 44.

3 S 2 of the Constitution of the Republic of South Africa, 1996 (the Constitution).

4 Barnard AJ *A critical legal argument for contractual justice in the South African law of contract* (LLD dissertation 2006 UP) 229.

5 Davis 'Developing the common law of contract in the light of poverty and illiteracy: The challenge of the Constitution' 2011 *Stell LR* 845 847; Davis & Klare 'Transformative constitutionalism and the common and customary law' 2010 *SAJHR* 403 415. See also Bhana ('The horizontal application of the Bill of Rights: A reconciliation of sections 8 and 39 of the Constitution' 2013 *SAJHR* 351 375) and Moseneke ('Transformative constitutionalism: Its implications for the law of contract' 2009 *Stell LR* 3 13) who refer to the "constitutionalisation" of the South African private law and common law, respectively. For a more detailed discussion see par 2 2 *infra*.

6 Davis 2011 *Stell LR* 845 846.

7 *Idem* 861.

8 As defined in s 1 *sv* "consumer agreement".

distribution.<sup>9</sup> Only once this shift is achieved, can an attempt be made to rectify the socio-economic injustices caused by such a systemically and fundamentally unjust system, since “political change would scarcely enjoy legitimacy unless it could provide real, visible benefits for poor and marginalised members and sectors of society”.<sup>10</sup> The manner in which the common law of contract is currently interpreted and applied, does very little to better the position of the most impoverished in this country.

Traditional contract theory is built on the assumption that the parties to the contract negotiated the terms of the contract, reached consensus on each term and occupied equal bargaining positions during the negotiations.<sup>11</sup> This is unfortunately not observed in practice; traders and enterprises make use of standard form contracts that are slanted in their favour and not open to negotiation by the consumer.<sup>12</sup> Furthermore, many consumer contracts are concluded out of necessity, as life sustaining products are also purchased by means of consumer contracts. In light of this the common law remedies to address unfair contracts and contractual terms were considered insufficient.<sup>13</sup>

The CPA, as social justice legislation, has as aim the transformative constitutional aspiration to kindle and drive socio-economic change in the impoverished South African society. Law’s political element implies a process of implementing law to achieve political aims. Inducing drastic socio-economic transformation in the community as a whole is also one of the most important aims of the South African developmental state. Legislation could and should thus be employed in this regard.

The CPA highlights the position of the vulnerable party in a sales agreement, as well as how this vulnerability is directly related to the socio-economic position the vulnerable person fills in the community.<sup>14</sup> In line with its purpose, the Act implicitly addresses the notion of the poor as vulnerable, and the protection it aims to provide the vulnerable in an attempt to address poverty, is of importance and should be evaluated and approached from within the constitutional framework. In order to achieve its transformative goal the Act provides additional objectives: creating and supporting a fair, accessible, efficient and

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9 Van der Walt ‘Legal History, Legal Culture and Transformation in a Constitutional Democracy’ 2006 *Fundamina* 1 2.

10 *Ibid.*

11 Woker ‘Why the need for consumer legislation? A look at some of the reasons behind the promulgation of the National Credit Act and the Consumer Protection Act’ 2010 *Obiter* 217 231.

12 Sharrock ‘Judicial control of unfair contract terms: The implications of Consumer Protection Act’ 2010 *SA Merc LJ* 295 296.

13 *Ibid.*

14 S 3(1)(b) describes one chief aim of the Act as protecting vulnerable members of society: low-income persons and communities; individuals and communities who live in isolated or poorly populated areas; minors, seniors and similarly vulnerable individuals; or those who are hindered by poor literacy or language skills, or impaired vision, to read or understand advertisements, agreements or other visual representations.

sustainable consumer market;<sup>15</sup> promoting fair business practices;<sup>16</sup> and shielding consumers from suppliers' unfair trade practices and conduct.<sup>17</sup>

The CPA does not apply to all commercial transactions and the common law is consequently the reigning law in a great number of instances.<sup>18</sup> Therefore, this article will evaluate the protection granted to the consumer in terms of the CPA, as well as the common law.<sup>19</sup> However, the common law cannot be viewed as independent from the Constitution. The role of the Constitution in the South African developmental state and the role of contractual justice and paternalism will be scrutinised. Transformative constitutionalism and law itself will be assessed in terms of its potential to truly improve the socio-economic situation of the vulnerable and impoverished consumer. The ethical contract and the role of the CPA as a vehicle for contractual justice will be discussed. This article is written with the contract of purchase and sale and consumer agreements in terms of which goods are purchased, as its focus.<sup>20</sup>

## 2 The Common Law and the Constitution

The lack of constitutional development in the field of contract law must be regarded with concern, as it results from the courts' adherence to liberal interpretations and applications of the law which ultimately favour autonomy above paternalism. It has been said that the survival of the "splendid"<sup>21</sup> ancient Roman and the subsequent Roman-Dutch legal principles is miraculous<sup>22</sup> and can be attributed to the fact that South African courts have been able to efficiently and successfully adapt these ancient rules to the imperatives of modern life.<sup>23</sup> This view is however not held universally. It may be argued that painstakingly slow and incremental development of a truly unfair area of the common law has

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15 S 3(1)(a).

16 S 3(1)(c).

17 S 3(1)(d).

18 S 5(1)(a) of the CPA provides the scope of the application of the Act while s 5(2) lists the transactions exempt from the provisions of the Act.

19 S 2(10) of the CPA states that the consumer is protected by the consumer rights as contained in the Act, as well as the common law rights available to her in terms of the common law.

20 Although the National Credit Act 34 of 2005 (National Credit Act) has great potential to address poverty as a social ill by protecting poor individuals from credit agreements, which will detrimentally affect their financial position, an analysis of the effect of the National Credit Act on poverty in South Africa falls beyond the ambit of this article.

21 *Ex parte De Winnaar* 1959 (1) SA 837 (N) 839.

22 Van Niekerk 'The endurance of the Roman tradition in South African law' 2011 *Stud Iuris* 1 20.

23 Otto 'Verborge gebreke, voetstootverkope, die Consumer Protection Act en die National Credit Act: *Ius antiquum, ius vetus et ius futurum; aut ius civile, ius commune et ius futurum*' 2011 *THRHR* 525 527.

resulted in the legislature's much-needed intervention in the form of the National Credit Act and CPA.

Van der Walt proposes a methodology to be used when the common law, applicable to an area of private law, is developed in order to achieve transformative ideals.<sup>24</sup> He also criticises the idea that the existing "flexible" common law will evolve enough over time to bring about a sufficiently transformed legal system:

[T]he notion that development of the law has to be accomplished through incremental, interstitial developments of the common law doctrine ... is problematic in view of the necessity of meaningful and significant transformation ... [T]he incremental judicial process of interstitial development may well be too slow and protracted because it is driven by the logic of doctrinal development and not by *the need for change*.<sup>25</sup>

## 2 1 Poverty and the South African Developmental State

The notion of referring to the developmental state has become a fashionable manner to address the exploration of developmental challenges experienced by nation states.<sup>26</sup> The developmental state is identified as one where governing forces initiate a spirited drive towards economic growth and implements national resources towards a developmental goal.<sup>27</sup> In South Africa, this goal has been identified as broad-based economic development.<sup>28</sup>

The South African government has the duty to address the lived reality of the poor and vulnerable.<sup>29</sup> Socio-economic rights are constitutionally enshrined and the state must take "reasonable legislative and other measures, within its available resources, to achieve the progressive

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24 Van der Walt 'Development of the Common Law of Servitude' 2013 *SALJ* 722-756. Van der Walt's research relates to the development of the common law of property and servitudes in particular, but the methodology proposed is expounded in a manner which invites jurists to tackle all research regarding the development of the common law in the proposed fashion. He contends that any attempt to endorse developments of the common law, should start with a detailed account of the historical development of the common law in question, followed by a clear exposition as to *why* the existing common law is incongruent with the Constitution (738). Davis ('Where is the map to guide common-law development?' 2014 *Stell LR* 4 12) argues that the next step requires an investigation into the fundamental values of the Constitution, before an attempt can be made to align the common law in question with the Constitution.

25 Van der Walt 2006 *Fundamina* 1 9 (own emphasis).

26 Machete 'Developmental state: Implications for rural development in South Africa' in Turok (ed) *Wealth doesn't trickle down - The case for the developmental state in South Africa* (2008) 121.

27 Levin 'Public service capacity and organisation in the South African developmental state' in Turok *supra* n 26 at 50.

28 Turok 'What is distinctive about a South African developmental state?' in Turok (ed) *supra* n 26 at 160.

29 Levin in Turok (ed) *supra* n 26 at 50.

realisation of these rights”.<sup>30</sup> Such socio-economic development should involve participatory planning to realise practical redistribution in order to address poverty.<sup>31</sup> It can be argued that the promulgation of consumer legislation is an attempt to address poverty in South Africa, albeit in an indirect manner. By protecting poor and vulnerable members of society from “abuse or exploitation in the marketplace”,<sup>32</sup> the state is attempting to address poverty by means of legislative measures. Consumer legislation, as a weapon against poverty, does not put money or property in the hands of the poor, but aims to minimise the possibility of their manipulation by more powerful role players in the consumer market.

It is practically impossible to eradicate poverty in developing nations without implementing elements of the developmental state.<sup>33</sup> The gross inequalities so blatantly evident in our society cannot be remedied through the operation of the capitalist market.<sup>34</sup> “We cannot depend on ‘trickle down’ or ‘ladders up’ to create a more just and equal society”,<sup>35</sup> because “[w]ealth doesn’t trickle down”.<sup>36</sup> Jahed and Kimathi argue that development<sup>37</sup> cannot be achieved without intervention by the state and that legislation provides a “perfectly legitimate”<sup>38</sup> instrument with which to achieve such intervention.<sup>39</sup>

Decisions related to the management of the economy should be made with the collective society in mind, since the economy is in essence socially owned and new mechanisms for sustaining politico-economic democracy is thus necessitated.<sup>40</sup> Continuous intervention is required to bolster the development and transformation of our society, and accordingly the traditional, conservative interpretation and application of the law of contract should be ceased.<sup>41</sup> South Africa’s conservative legal culture, as perpetuated by the courts, is perpetuating poverty and a skewed vision of the distribution of wealth, power and resources in our society.

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30 S 27(2) of the Constitution.

31 Levin in Turok (ed) *supra* n 26 at 52.

32 Preamble of the CPA.

33 Levin in Turok (ed) *supra* n 26 at 51.

34 *Idem* 54.

35 Turok in Turok (ed) *supra* n 26 at 159.

36 *Ibid.*

37 Regarding the importance of development and the upliftment of communities, see Church ‘Sustainable Development and the Culture of uBuntu’ 2012 *De Jure* 511.

38 Graham ‘Socio-economic rights: cornerstone or capstone of democracy?’ in Jones & Stokke (eds) *Democratising Development – The politics of socio-economic rights in South Africa* (2005) 284.

39 Jahed & Kimathi ‘The economics of developmental states’ in Turok *supra* n 26 at 97; Graham in Jones & Stokke (eds) *supra* n 38 at 284.

40 Szentes *The Transformation of the World Economy* (1988) 91.

41 Hawthorne ‘Distribution of wealth, the dependency theory and the law of contract’ 2006 *THRHR* 48.

## 2 2 The Impetus for Transforming the Law of Contract in line with the Constitution

Directly opposed to the position defending the efficacy and superiority of the Roman-Dutch legal principles present in our common law, are the arguments put forward by transformative constitutionalists. These scholars believe that the common law, as rooted in Roman-Dutch and English legal principles, has, to date, not yet transformed enough to truly embrace the constitutional values of dignity, equality and freedom.<sup>42</sup>

The perception that the Constitution should serve as the inspiration for reconfiguring the common law rules which govern all economic activity, provides exciting possibilities and challenges. However, to date the courts have only referred to constitutional values in passing and then the focus of their judgments shifts to “the ‘real’ law of contract”.<sup>43</sup> The freedom of contract debacle proves this argument impeccably.

### 2 2 1 A Prime Example

The foundation of the South African common law of contract has been identified as freedom of contract, or “the idol that is *pacta servanda sunt*”.<sup>44</sup> Freedom of contract is based on the presumption that the parties to a contract occupy an equal bargaining position.<sup>45</sup> This presumption also serves as the justification for the enforcement of contracts. More often than not, the vastly disparate socio-economic realities of the parties in question have a direct influence on their bargaining power; freedom of contract and formal equality<sup>46</sup> perpetuate injustice and social inequalities which often results in the domination of one contracting party over the other.<sup>47</sup> Equal bargaining power will never be a reality if one party contracts out of necessity and in order to survive.<sup>48</sup> This is especially true in instances where basic consumer contracts and credit agreements are concluded. Consumer and sales agreements are often concluded without the vulnerable party really understanding what the

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42 Klare ‘Legal culture an transformative constitutionalism’ 1998 *SAJHR* 146; Davis 2011 *Stell RL* 845-864; Van der Walt 2006 *Fundamina* 1; Van Marle ‘Transformative constitutionalism as/and critique’ 2009 *Stell LR* 286. See also Hawthorne 2006 *THRHR* 48-49.

43 Davis 2011 *Stell LR* 845 847; Davis & Klare 2010 *SAJHR* 403 415.

44 *Ibid.* Barnard AJ 241; Hawthorne 2006 *THRHR* 48 53. For an exposition of freedom of contract see Hawthorne ‘The principle of equality in the law of contract’ 1995 *THRHR* 157 163, where she described the concept as having four distinct meanings.

45 Barnard AJ 213; Hawthorne 2006 *THRHR* 48 53.

46 Absolute equality before the law (Hawthorne 1995 *THRHR* 157 159).

47 *Idem* 163; Hawthorne 2006 *THRHR* 48 53; Barnard AJ 248; Lucy ‘Contract as a Mechanism of Distributive Justice’ 1989 *Oxford J. Legal Stud.* 132 146.

48 Hawthorne 1995 *THRHR* 157 163; Hawthorne 2006 *THRHR* 48 53-54 & 61. Also see Davis 2011 *Stell LR* 845 862 referring to Hale ‘Bargaining, Duress and Economic Liberty’ 1943 *Columbia LR* 603 625.

agreement entails, which reinforce the view that “[f]ormal equality before the law is an engine of oppression”.<sup>49</sup>

Pieterse argues that equality must be understood as being in touch with the societal context of parties: Attaining substantive (true) equality requires engagement with the disregard for the reality of the vulnerable.<sup>50</sup> This reality is that the most disadvantaged individuals in our society never attain the economic status which empowers them to take part in market transactions as true equals with equal bargaining power.<sup>51</sup> Because of this, freedom of contract provides no freedom at all.

The freedom to contract may be limited by public policy or the *boni mores*.<sup>52</sup> It has also been argued that public policy is closely related to good faith in the law of contract.<sup>53</sup> But interestingly an inferred contradiction exists between the sanctity of contract (autonomy) and good faith (constraint), to the point that these concepts seem irreconcilable.<sup>54</sup> The contemporary common law is haunted by the continuous struggle between autonomous and paternalistic approaches in an attempt to achieve a measure of justice for all legal subjects. Barnard argues that the law in its present form does more to hinder the accomplishment of a sense of balance between autonomy and paternalism, than to achieve it.<sup>55</sup>

The freedom of contract cases<sup>56</sup> epitomise the courts’ unrelenting adherence to the tradition and legal analysis associated with the common law and the resultant lack of transformation of contract law.<sup>57</sup> Davis and Klare argue that, although not blatantly obvious, these cases illustrate an adherence to apartheid-era morality, racial discrimination and conservative thinking about the law.<sup>58</sup> They are stunned by the courts’ blatant disregard for the social contexts relevant to the cases, and list this as one of the central difficulties with these judgments.<sup>59</sup> Directly related to this, is the disregard for the disparate bargaining power of parties to the contracts in question.<sup>60</sup>

49 Hawthorne 1995 *THRHR* 157 163. In this regard also see Davis 2011 *Stell LR* 845 854; Kok ‘Is law able to transform society?’ 2010 *SALJ* 59 68.

50 Pieterse ‘What do we mean when we talk about transformative constitutionalism?’ 2006 *SAPR/PL* 155 160.

51 Hawthorne 2006 *THRHR* 48 61-62.

52 Hutchison & Du Bois ‘Contracts in general’ in Du Bois (eds) *Wille’s Principles of South African Law* (2007) 737, as referred to by Davis 2011 *Stell LR* 845 847; *Barkhuizen v Napier* 2007 7 BCLR (CC) par 14. The Constitution has been described as a “repository of the *boni mores*” (Davis 2014 *Stell LR* 3 14).

53 Davis 2011 *Stell LR* 845 847 discussing Hutchison & Du Bois *ibid*.

54 Barnard AJ 229; Davis & Klare 2010 *SAJHR* 471.

55 Barnard AJ 220.

56 *Brisley v Drotzky* 2002 4 SA 1 (SCA); *Afrox Healthcare v Strydom* 2002 6 SA 21 (SCA) and *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

57 Davis & Klare 2010 *SAJHR* 403 468.

58 *Ibid*.

59 *Idem* 480.

60 *Ibid*.

Paternalism refers to a reigning measure of control which influences individuals' ability to act autonomously, thereby protecting them from acting or deciding in a manner which will attenuate their general well-being.<sup>61</sup> Autonomy, on the other hand is equated to the liberal ideal of "the 'good life'".<sup>62</sup> Autonomy allows freedom of contract to reign unchallenged. Paternalism sanctions the notion that the state's judgment (often superimposed through the work of the legislature) supersedes and replaces the individual's predilections.<sup>63</sup>

The National Credit Act and the CPA are examples of paternalistic legislation which limits freedom of contract with the intention of protecting the interests of the consumer. The CPA expressly dictates that the purpose of the Act is to protect the most vulnerable of consumers from the adverse consequences of unfair consumer agreements.<sup>64</sup> The socio-economic reality of these vulnerable consumers thus becomes important.

### **2 2 2 Redistribution**

In an attempt to attain the truly egalitarian society where substantive equality is the order of the day, legal rules should regulate the manner in which contractual power is exerted during the conclusion of (consumer) agreements, since one of the principal spinoffs of the contract is the division of wealth in a society.<sup>65</sup> The contract is thus one of the principal tools which may be employed for the distribution of wealth, power and resources in a society and therefore the right to equality<sup>66</sup> demands that distributive concerns be considered.<sup>67</sup> The reality of the inequality of resources demands that the actual resources of the parties involved be

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61 Hawthorne 1995 *THRHR* 157 168.

62 Davis 2011 *Stell LR* 845 848. See also Davis & Klare 2010 *SAJHR* 403 411.

63 Hawthorne 'Making public knowledge, making knowledge public: Information obligations effect truth-in-lending and responsible lending' 2007 *SAPR/PL* 477 479.

64 See s 3 for the purpose of the Act.

65 Hawthorne 2006 *THRHR* 48 49; Hawthorne 1995 *THRHR* 157 176.

66 As contained in s 9 of the Constitution. The consumer's right to equality in the consumer market is specifically created in terms of Part A of Chapter 2 of the CPA. Here the legislature has expanded on the consumer's right to equality as found in the Bill of Rights, by creating a consumer right with more direct application to marketplace related matters regarding quality. The constitutional right to equality and consumer right to equality in the marketplace both support the drive towards redistribution of wealth and resources.

67 Hawthorne 1995 *THRHR* 157 176. See also Hawthorne 'Constitution and contract: Human dignity, the theories of capabilities and *Existenzgrundlage* in South Africa' 2011 *Stud Iuris* 1. It is not contended that the contract is the only instrument with which to distribute wealth in a society. Lucy (*supra* n 47 at 147) argues against the contract in favour of taxation as a more efficient way to do so.

evaluated and considered,<sup>68</sup> since equality is central to the legal transformative endeavour.<sup>69</sup>

The imperative to redistribute wealth originates from the existence of two unequal groups making up South Africa's society: The opulent haves, and the gut-wrenchingly poor have-nots.<sup>70</sup> The unequal bargaining power between these unequal groups thus becomes of extreme importance. Cognisance should be taken of how the liberal conceptualisation of the freedom of contract (and the individualism and autonomy it reveres) is actively hindering the (re)distribution of wealth, resources and power in our unequal society.<sup>71</sup> Surely the contract (of sale) is not the most powerful measure with which to address this vast inequality, but the contract's ability to perpetuate the subordination of those most vulnerable can no longer be ignored.

The paramount importance of the transformative constitutional endeavour to the law of contract and consumer protection is found in the sentiment that our courts are ignoring opportunities to inject equity<sup>72</sup> into the common law of contract.<sup>73</sup> Fischer's conception of just law, which should be "morally defensible as tested against the common conviction of the community at large",<sup>74</sup> does not accommodate a system of contract law which does not insist that contracting parties act in good faith.

### **2 2 3 Bread as Dignity**

Moseneke argues that the fact that the Bill of Rights does not refer to "social justice" by name, does not mean that it is not a constitutionally mandated imperative.<sup>75</sup> Social justice has various guises and may impact lives and communities in numerous ways. Having one's human dignity respected certainly classifies as an aspect of social justice. Basic goods and conditions essential for survival are also inextricably linked to dignity. The ability to purchase bread has been linked to human dignity by both Mandela and Sachs:

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68 Hawthorne 1995 *THRHR* 157 176.

69 Moseneke 'The Fourth Bram Fischer Memorial Lecture – Transformative adjudication' 2002 *SAJHR* 309 316 & 318; Hawthorne *ibid*.

70 Sibanda 'Not purpose-made! Transformative constitutionalism, post-independence constitutionalism and the struggle to eradicate poverty' 2011 *Stell LR* 482 497.

71 Davis 2011 *Stell LR* 845 849-850. See also Hawthorne 2006 *THRHR* 48 57-58.

72 Hawthorne (2006 *THRHR* 48 58-62) observes that in *Haviland Estates (Pty) Ltd v McMaster* 1969 2 SA 312 (A) 336D-G; *Lanfeer v Du Toit* 1943 AD 59; *Van der Merwe v Viljoen* 1953 1 SA 60 (A); and *Oswanick v African Consolidated Theatres (Pty) Ltd* 1967 3 SA 310 (A) 317E, the courts liken equity to sympathy and therefore, spurn the possibility of applying it completely. In our opinion, *Wells v South African Alumenite Co* 1927 (AD) 69 could also be added to this list.

73 *Idem* 62.

74 Moseneke 2002 *SAJHR* 309 311.

75 *Idem* 314.

[D]emocracy itself, cannot survive unless the material needs of the people, the bread and butter issues, are addressed as part of the process of change and as a matter of urgency. It should never be that the anger of the poor should be the finger of accusation pointed at all of us because we failed to respond to the cries of the people for food, for shelter and for the dignity of the individual.<sup>76</sup>

The restoration of dignity for all South Africans accordingly requires the simultaneous creation of material conditions for a dignified life and development of increased respect for the personality and rights of each one of us. Both freedom and bread are necessary for the all-round human being. Instead of undermining each other, they are interrelated and interdependent.<sup>77</sup>

Sachs goes on to state that the fundamental right of having one's human dignity respected becomes the link between freedom and bread.<sup>78</sup> An essential consumer product therefore, becomes the symbol of dignity and freedom and the consumer and sales agreement thus becomes an instrument with which to further, or hinder, social justice. The circumstances surrounding the conclusion, interpretation and enforcement of these agreements can thus not be ignored.

#### **2 2 4 The Ethical Contract**

With the enactment of the Bill of Rights as contained in the Interim Constitution, freedom of contract was originally understood as being a fundamental human right.<sup>79</sup> This interpretation does however not hold constitutional muster today. Freedom of contract is associated with (and derived from) political freedom<sup>80</sup> whereas good faith has its foundation in human dignity.<sup>81</sup> Barnard argues that freedom, equality and human dignity should be understood and considered concurrently in the context of the constitutional notion of contract.<sup>82</sup> This conceptualises his idea of the ethical element of contract law.<sup>83</sup> He explains the link between human dignity as a form of empowerment<sup>84</sup> and human dignity embodied in the practice of constraint.<sup>85</sup> Human dignity relates directly to both the traditional notion of freedom of contract, as an expression of empowerment, as well as good faith in contractual dealings, which is

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76 Mandela on poverty, from an address to the joint session of the House of Congress, Washington DC, USA on 1990-06-26 in Hatang & Venter (eds) *Nelson Mandela By Himself* (2013) 165.

77 Sachs 'Judicial enforcement of socio-economic rights: the *Grootboom* case' in Jones & Stokke *supra* n 38 at 141.

78 *Idem* 142.

79 Hawthorne 1995 *THRHR* 157 166.

80 The traditional link between the right to liberty and freedom of contract stems from the French and American revolutions, as well as the British Industrial Revolution (Hawthorne 2006 *THRHR* 48 52-53).

81 Barnard *AJ* 229.

82 *Ibid.*

83 *Idem* 229-230.

84 *Idem* 231-232.

85 *Idem* 232-234.

achieved by a measure of constraint.<sup>86</sup> When looking through the lens of “the ethical element of contract in a constitutional South Africa”, Barnard comes to the powerful conclusion that in order to respect the right to human dignity when contracting, the common law right to freedom of contract must *be exercised in good faith*.<sup>87</sup> “[The] collective achievement of freedom cannot be attained where a claim to freedom violates another’s claim to dignity”.<sup>88</sup> He argues that freedom of contract has a duty or responsibility linked to it and is therefore an ethical freedom.<sup>89</sup>

In striving for the realisation of the consumer’s right to dignity, the ethical contract concluded in good faith, becomes an indispensable tool. Transforming South Africa’s society on an economic front therefore also requires the application of the Constitution.

### 3 The Role of Transformative Constitutionalism

The Constitution encapsulates the greater South African community’s yearning for transformation, while at the same time providing the impetus and means with which to achieve it.<sup>90</sup> In his “celebrated”<sup>91</sup> “seminal”<sup>92</sup> article, Klare explains that in a legal system where transformative constitutionalism<sup>93</sup> is the prerogative, a duty rests on legal scholars to evaluate the role of the Constitution and its inherent power to bring about transformation on a socio-economic front in an impoverished South African society.

The debate regarding the nature and scope of the (direct and/or indirect) horizontal application of the principles of the Bill of Rights has been raging since the promulgation of the Interim Constitution,<sup>94</sup> and is yet to be resolved.<sup>95</sup> Consensus has however been reached on the fact that the Constitution and the Bill of Rights apply horizontally between

86 *Idem* 231-232.

87 *Idem* 237.

88 *Idem* 237 & 249.

89 *Idem* 237.

90 Moseneke 2002 *SAJHR* 309 319.

91 Davis 2014 *Stell LR* 3 4.

92 Sibanda 2011 *Stell LR* 482 487.

93 Klare defines transformative constitutionalism as “a long-term process of constitutional enactment, interpretation, and enforcement committed ... to transforming a country’s political and social institutions and power relationships in a democratic, participatory and egalitarian direction. Transformative constitutionalism connotes an enterprise of *inducing large-scale social change* through nonviolent political *processes grounded in law*” (Klare 1998 *SAJHR* 146 150 (own emphasis)).

94 See Hawthorne 1995 *THRHR* 157 160-162.

95 A series of recently published articles illustrate this point: Bhana 2013 *SAJHR* 351-375; Roederer ‘Remnants of apartheid: The primacy of the spirit, purport and objects of the Bill of Rights for developing the common law and bringing horizontal rights to fruition’ 2013 *SAJHR* 219-250; Friedman ‘The South African common law and the Constitution: Revisiting horizontality’ 2014 *SAJHR* 63-88. See also Davis & Klare 2010 *SAJHR* 403 415-419.

private individuals and therefore, examining the law of contract in this light is of paramount importance. This horizontality becomes the reason why we are morally and legally obliged to contract in good faith.

Some however question whether change by means of legislation, and by extension the Constitution, is the appropriate approach to adopt, as well as whether law has the ability to effectively and significantly transform our society to a more equal community.

Sibanda argues that, in spite of all the good attempted in the name of transformative constitutionalism, the liberalistic character and interpretation of the Constitution (resulting from the conservative approach to law ingrained in South African jurists) cannot be avoided.<sup>96</sup> Transformative constitutionalism is accordingly “ill-suited for achieving the social, economic and political vision it proclaims”,<sup>97</sup> since “it promises more than it can actually deliver”.<sup>98</sup>

Michelman agrees with Sibanda that the South African Constitution is steeped in a classical-liberal legal culture from which it cannot escape.<sup>99</sup> He views the prevailing political and cultural reality, which adheres to an unwaveringly liberal reading of the law, as the reason that transformative constitutionalism can be seen as “a contradiction in terms”.<sup>100</sup> He thus believes that the Constitution is an inherently flawed transformative tool due to the fact that it was written, and is interpreted, in an inherently conservative manner.

Kok’s chief argument is compatible with that of Sibanda: Law has the ability to transform society, but this potential to transform is overestimated.<sup>101</sup> It is impossible to definitively prove the existence of a sufficiently causal link between changes to the law and the transformation of a society.<sup>102</sup> Since a legal change is implemented after the fact, as an attempt to address an already existing problem, it “plays no role in influencing human behaviour”.<sup>103</sup>

In *Fourie v Minister of Home Affairs*<sup>104</sup> Cameron JA, as he was then, explained a paradox he believes lies at the heart of South Africa’s national project of transformation: “[W]e came from oppression by law, but resolve to seek our future, free from oppression, in regulation by law”.<sup>105</sup> Governments view law as a speedy and cost-effective way to

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96 Sibanda 2011 *Stell LR* 482 485-486.

97 *Idem* 486.

98 *Idem* 490 & 495.

99 Michelman ‘Liberal constitutionalism, property rights, and the assault on poverty’ 2011 *Stell LR* 706 707 & 708.

100 *Idem* 707.

101 Kok 2010 *SALJ* 59 70 & 75.

102 *Ibid.*

103 *Idem* 75.

104 2005 (3) SA 429 (SCA).

105 Par 7, as quoted by Davis & Klare 2010 *SAJHR* 403 503. See also Klare 1998 *SAJHR* 146 169.

address problems that pop up in a society, in an attempt to change that society and eradicate the problem.<sup>106</sup> It must be accepted that law may not be the only instrument employed by a state to induce social change. Confirmation of this theory can be found in Lucy's argument that the contract, in essence a voluntary legal exchange, is not the ideal way to achieve distributive justice.<sup>107</sup> He believes that taxation is the more appropriate measure with which to attain such justice.<sup>108</sup>

The main critique against transformative constitutionalism is thus that law's power to bring about socio-economic transformation is greatly exaggerated. Along the same vein, Woker questions whether the "lofty aims" of the CPA can truly be realised.<sup>109</sup> The lived experience of the greater South African society is not one of transformation at the hands of the law. It would, however, be inappropriate to deny that judicial law-making can advance social development already in progress.<sup>110</sup> We, however, do not accept these pessimistic views of the role of the law and constitutional interpretation on face value. The mere fact that law has already assisted in bringing about some change in the South African society, no matter how insufficient such change may seem to some, means that the law can be used to transform the lives of those in our society who rightfully demand it.

Barnard argues for utopian thinking about the law, championing for the value it could potentially hold. In the context of contract law he maintains that "[u]topian thinking provides the space for contract's reconnection with the ethical in that it openly commits to the ideals of fairness, equity and justice".<sup>111</sup> He equates true contractual justice to a contractual Utopia.<sup>112</sup> A societal commitment to contracting in good faith will result in the introduction of the ethical element of contract and this could ultimately result in a measure of contractual justice.<sup>113</sup>

Barnard emphatically and convincingly argues that the fact that irresolvable fundamental contradictions<sup>114</sup> exist in the law of contract is the exact reason why the utopian ideal of contractual justice should never be abandoned.<sup>115</sup> Utopian thinking has the potential to lead to real

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106 Kok 2010 *SALJ* 59 83.

107 Lucy *supra* n 47 at 147.

108 *Ibid.*

109 Woker 2010 *Obiter* 231.

110 Sackville 'Courts and social change' 2005 *Fed LR* 373 390 (own emphasis).

111 Barnard 'Death, mourning and melancholia in post-modern contract – a call for (re)establishing contract's connection with the ethical' 2006 *Stell LR* 386 398.

112 Barnard *AJ* 241.

113 *Ibid.*

114 The relationship between freedom of contract and good faith.

115 Barnard *AJ* 242.

transformation,<sup>116</sup> but thinking alone is not enough – immediate action is required.<sup>117</sup>

It is not ‘the law’ which is responsible for this transformation – it is us who create the law with our human will in the face of our humanity who is inexcusably responsible for transforming it.<sup>118</sup>

Although the law is not the only available transformative apparatus, it can most certainly not be disregarded as such; “law and legal practices *can* be a foundation of democratic and responsive social transformation”<sup>119</sup> and law has the capacity to address injustice.<sup>120</sup>

When transformative constitutionalism and the law of contract are discussed in unison, two crucial truths should be acknowledged. Firstly, cognisance should be taken of the fact that the principles of *ubuntu* (should) impact the law of contract; and secondly, contract law and consumer protection (should) impact the fight against poverty.

The South African Constitution is informed by a sense of communality and *ubuntu*.<sup>121</sup> The minority judgment of the recent decision of the Constitutional Court in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*,<sup>122</sup> reiterates the importance of the relationship between *ubuntu*’s focus on the worth of the community and the principle of good faith in contractual dealings.

The crux of this judgment, as handed down by Yacoob J, centres around the fact that the time has arrived for the background (common law) rules of the law of contract to be infused with the principles of good faith and *ubuntu* in order to make way for a constitutionally conscious contracting epoch.<sup>123</sup> The Court stated that courts need to start considering good faith in contracts as constitutionally imperative due to its potentially immense impact on the public.<sup>124</sup> Many ordinary people conclude (consumer) contracts daily and each of these contracts could potentially be performed in a *mala fide* manner, detrimentally impacting the lives of vulnerable contracting parties.<sup>125</sup>

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116 *Idem* 245.

117 *Idem* 247; “While not sufficient, I do believe that a progressive legal culture is a necessary condition for a long-term success of transformative constitutionalism” (Klare 1998 *SAJHR* 146 170).

118 Barnard AJ 252.

119 Klare 1998 *SAJHR* 146 188 (own emphasis).

120 Pazzanese “‘My life was going to have to deal with issues of social injustice’ – Martha Minow’s sense of purpose’ in *Harvard Gazette*, 2014-04-22 (available from <http://news.harvard.edu/gazette/story/2014/04/my-life-was-going-to-have-to-deal-with-issues-of-social-injustice/> accessed 2014-08-25).

121 Davis & Klare 2010 *SAJHR* 403; Klare 1998 *SAJHR* 146 153; Moseneke 2002 *SAJHR* 309 313; the Preamble of the Constitution

122 2012 (1) SA 256 (CC) (*Everfresh* case).

123 *Idem* par 36.

124 *Idem* par 22.

125 *Idem* par 22.

The importance of the role of the contract in the daily lives of South Africans cannot be understated. Another essential point raised by the Court is that it would most likely benefit the community as a whole to incorporate the principle of good faith into the law of contract.<sup>126</sup> The Court makes the link between good faith, the spirit of the Constitution and the principles of *ubuntu*. It is later confirmed that the principles of *ubuntu* should inform any decision made on reinstating “the important moral denominator of good faith”.<sup>127</sup> The importance of the unequal bargaining power between poor individuals and financially strong companies is raised and the values *ubuntu* might bring to the table in this regard are highlighted.<sup>128</sup> The Court thus confirms Barnard’s theory that the introduction of the ethical element of contract is paramount.

What becomes clear is the urgent need to address the reality of poverty in our unequal society, as well as the role which the law of contract might play in this regard. The Constitution imposes a positive duty on the state to “combat poverty and promote social welfare”,<sup>129</sup> as well as providing subjects of the state the ability to live out their constitutional rights by means of self-realisation.<sup>130</sup> Here self-realisation reminds of the right to dignity and the accompanying ability to purchase bread. The state thus has to endeavour to achieve this goal in any and every manner possible, examples being the enforcement of the Bill of Rights in dealings between citizens themselves,<sup>131</sup> as well as the promulgation, interpretation and enforcement of legal rules done with this kept in mind. Section 8(2) of the Constitution specifically mandates such action by the state.

Judicial consideration of the plight of the poor who enter into consumer contracts is thus critical,<sup>132</sup> since the abolition of poverty is a “constitutional imperative”.<sup>133</sup> Barnard’s argument that the law of contract (and by extension the law of purchase and sale) has an important and significant role to play in the fight against poverty is supported. The transformation envisaged for the law of contract is, firstly, pleading for an interpretation and application of the law which allows for the stretching of the limits that legal scholars believe the existing law inherently has and secondly, but more importantly, the transformation of the legal thinking of those engaged with its interpretation and application, as called for by Klare. This transformative obligation can be directly transplanted to the interpretation and application of consumer law.

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126 *Idem* par 23.

127 *Idem* par 36 & 24.

128 *Idem* par 24.

129 Klare 1998 *SAJHR* 146 154.

130 *Idem* 153.

131 See Klare 1998 *SAJHR* 146 155 & 179-180.

132 *Everfresh* case par 25.

133 Klare ‘Concluding reflections: Legal activism after poverty has been declared unconstitutional’ in Liebenberg & Quinot (eds) *Law and Poverty: Perspectives from South Africa and Beyond* (2012) 423.

## 4 The Law of Contract, Poverty and Distribution

Davis argues that if the reconfiguration of the background rules of the common law contract is not achieved, the role contract law has to play in the eradication of poverty will never be realised,<sup>134</sup> since “the law reproduces patterns of power and distribution that reproduce poverty”.<sup>135</sup> He equates poverty to inequality and powerlessness<sup>136</sup> and directly links it to an infringement of the constitutional rights to dignity and freedom.<sup>137</sup>

If “the median person in the developing world, the *peripheral* contracting party, is rarely skilled, knowledgeable, well-educated or wealthy”,<sup>138</sup> this should be considered crucial when equity and contract are analysed. Along the same vein, Barnard contends that our legal system would have differed vastly had “its basic doctrines ... been written by poor people, women and black people”.<sup>139</sup> These basic doctrines refer to the same fundamental legal concepts as Davis’ background rules of the law. Barnard further explains these doctrines and rules as “seemingly ‘value-neutral’”,<sup>140</sup> which is a dangerous assumption in light of South Africa’s transformative project. Judicial decisions illustrate their inherent power to lobby for and achieve justice.<sup>141</sup> But social justice is incompatible with a strictly liberal manner of interpreting and enforcing contracts, as this approach rejects “the general fairness criterion” and the result is the denial of equity and human dignity as entrenched in the Bill of Rights.<sup>142</sup>

Barnard argues that the normative values of the Constitution and the interdependent nature of a community, creates the obligation to contract in an ethical manner.<sup>143</sup> For Barnard contractual justice entails each individual taking responsibility for the advancement of her own needs and welfare *as well as* those of the other members of the community, who are in turn potential contracting parties.<sup>144</sup> This therefore, strengthens the notion that contractual justice can be achieved by means of a lived experience of *ubuntu*.

Economic marginalisation is as serious and unjust as is discrimination based on race, gender or disability, and these forms of social injustice

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134 Davis 2011 *Stell LR* 845 857.

135 *Idem* 860 (own emphasis).

136 *Idem* 862.

137 *Idem* 863. In this regard also see Barnard AJ 231-232.

138 Hawthorne 2006 *THRHR* 48 61-62 (own emphasis). The CPA refers to these individuals as vulnerable consumers, those who deserve the most protection in terms of the application and interpretation of the Act (s 3(1)(b)).

139 Barnard AJ 212.

140 *Idem* 220.

141 Klare 1998 *SAJHR* 146 147.

142 Barnard AJ 221-222.

143 *Idem* 212.

144 *Idem* 243.

reinforce each other to create an unavoidable sequence of economic and cultural suppression.<sup>145</sup> This again highlights the importance of the right to human dignity, which has been linked to the manner in which individuals contract with one another.

Hawthorne supports this theory. Where commodities and property trade hands, these distributive agreements facilitate the distribution of wealth.<sup>146</sup> The fact that the contracts that distribute wealth are often concluded and enforced in an unconscionable fashion, creates severe injustices in our society and, in a socio-political climate where mass service delivery protests are the order of the day, it would be unwise to continue ignoring these injustices.

The traditional notion that neither judicial decision-making nor legislation should interfere with the almost religiously defended notion of the freedom of contract, results in the reproduction of social inequalities and the domination and exploitation of one contracting party over another. This view that contracts play no role in the socio-economic and political sphere of society leaves no room for the acknowledgement of the importance of the distribution of wealth. Such disregard would imply that protecting the most vulnerable members of society (who are automatically the weakest role-players in the economic market) from the effects of poverty is of no importance, and this view cannot be supported in light of South Africa's constitutional dispensation and disparate socio-economic situation. The consumer contract's potential impact on poverty in South Africa, illustrates the reason legislative intervention was required in this area of the law. As social justice legislation, the CPA shines the spotlight on the importance of addressing poverty in South Africa. The fundamental consumer rights protected by the Act<sup>147</sup> provide the roadmap for achieving ethical contracting in consumer agreements.

## 5 The Consumer Protection Act as Transformation

Consumer legislation has introduced various measures to infuse fairness and conscionability into the law of purchase and sale. But, as Davis argues, the fairness envisaged will only be achieved if the general law of contract is applied in an ethical manner. Striving towards such an ethical

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145 Fraser 'From redistribution to recognition? Dilemmas of justice in a "postsocialist age"' in Olson (ed) *Adding Insult to Injury: Nancy Fraser Debates her Critics* (2008) 16, as quoted by Liebenberg *Socio-economic Rights Adjudication under a Transformative Constitution* (2010) 481.

146 Hawthorne 2006 *THRHR* 48 56. In this regard also see Davis 2011 *Stell LR* 845 848-849 referring to Hale 'Coercion and Distribution in a Supposedly Non Coercive State' 1923 38 *Political Science Quarterly* 470 472-473, where the hypothetical position of the hungry (wo)man, forced to contract, is discussed: If she does not accept the contractual terms imposed by the other party she will starve.

147 See ch 2 parts A-H in this regard.

utopia also requires that the lived realities of the contracting parties be considered in order to bridge the chasm caused by unequal bargaining power.

Section 7 of the Constitution compels the state to actively protect and promote the rights enshrined in the Bill of Rights. By enacting the CPA, the state has provided legal practitioners, the judiciary and academics the tools with which to promote and advance constitutionally guided transformation of the South African common law of contract.

Legislation is often drafted to give light to public policy and the *boni mores*.<sup>148</sup> The CPA is an excellent example of such legislation.<sup>149</sup> The Act follows a rights-based approach, structuring the protection granted to consumers in terms of specific rights.<sup>150</sup> The Act provides a broad spectrum of justifications for its enactment.<sup>151</sup> These are found in the long title, preamble and Part B of Chapter 1 of the Act, which provides the purpose of the legislation. The golden thread running through these, is the aim of promoting and advancing “the social and economic welfare of consumers in South Africa”.<sup>152</sup> This broader aim of the CPA relates to the transformative goals of the Constitution and the desire to bring about social and economic transformation across the greater South African society. Section 4(2)(b)(i) of the CPA expressly states that the Act must be interpreted so as to protect the most vulnerable of consumers in our socio-economic community. These vulnerable persons include poor individuals, those who live in remote communities, minors, seniors, those with no or poor literacy and those with impaired visual functionality.<sup>153</sup>

The CPA’s development of the common law on the purchase of defective goods may be analysed as an anecdotal example of the transformation and development introduced by the Act.<sup>154</sup> Part H of Chapter 2 of the Act applies in instances where defective goods<sup>155</sup> have

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148 Du Plessis *The unilateral determination of price in contracts of sale governed by the Consumer Protection Act 68 of 2008* (LLM dissertation 2012 UP) 91.

149 Woker 2010 *Obiter* 217 230.

150 Meiring ‘Consequences of non-compliance with the Consumer Protection Act 68 of 2008’ 2010 *Without Prejudice* 28.

151 See ss 3 & 4 of the CPA in this regard.

152 S 3(1).

153 S 3(1)(b).

154 An in-depth evaluation of the law on defective goods falls beyond the scope of this article. The developed position discussed here merely provides a glimpse into the transformative power of in the CPA.

155 When reading s 55(5)(a) together with s 53, it becomes evident that the nature of the defect present in the goods is irrelevant; “any” defect is taken into consideration, be it latent or patent (ss 53(1)(a)(i)-(ii)). Barnard argues that s 53 of the Act confirms the common law definition of a latent defect (as provided in *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 3 SA 670 (A)), but that the Act also extends the scope thereof (Barnard J (*The influence of the Consumer Protection Act 68 of 2008 on the common law of sale* (LLD dissertation 2013 UP) 383 455)). This means that the consumer is awarded much greater protection under the CPA than under the undeveloped common law on latent defects.

been sold to the consumer. It is contended that protecting the consumer against the potentially unscrupulous action suppliers could take when selling (defective) goods, may be viewed as a prime example of the type of protection granted to the consumer under the CPA.<sup>156</sup> When determining whether a consumer's right to safe and good quality goods has been respected, a number of factors are taken into account.<sup>157</sup> Of great importance, is the fact that the court may consider the circumstances surrounding the supply of the goods.<sup>158</sup> The Act therefore sanctions going beyond the confines of the consumer agreement itself.

The Constitutional Court has started to take relevant social and historical contexts into account "as *sources* of legal knowledge".<sup>159</sup> The "abstract considerations subjacent to our law of contract" should be considered as crucial.<sup>160</sup> The courts therefore, have the responsibility to take cognisance of extra-legal information, but this has, however, not yet been the case in the adjudication of matters of a contractual nature. If section 55(4) of the CPA is scrutinised, it seems as if consumer law might be moving in this direction. Here the Act does not refer to the socio-economic situations of the parties,<sup>161</sup> but rather the circumstances surrounding the supply of the goods in question. This includes how and for which purported purpose the goods were marketed, packaged and displayed; whether any trademark, description, instructions or warnings related to the goods were provided; or the reasonable scope of use for which the goods might possibly be employed, at the time when the goods were produced and supplied.<sup>162</sup> This section clearly broadens the common law idea of the information which may be brought before the courts when deciding matters on defective goods and it therefore encompasses a transformed notion of equity.

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156 It should be mentioned that the CPA justifiably limits the liability of the supplier under ss 55(2)(a)-(b) where goods are received by the consumer in a specifically stated condition, and the consumer expressly states that she accepts the goods in the condition in which it has been supplied (s 55(6)(a)). S 55(6)(b), however, states that the liability of the supplier is also limited where the goods in question are supplied in a specifically stated condition, and the consumer "has knowingly acted in a manner consistent with accepting the goods in that condition." This subsection seems to favour the supplier, but since the burden of proof lies with the supplier, and it might be difficult to prove such actions, the supplier might still be held liable. We therefore argue that this subsection creates a justifiable limitation of the supplier's liability, as disputes will be assessed casuistically and where there is any doubt as to the intent of the parties, the consumer will benefit as a result thereof, since the Act will be interpreted in line with its purpose (ss 2-3).

157 See s 55(2) of the Act in this regard.

158 Ss 55(2)(c) & 55(4).

159 Davis & Klare 2010 *SAJHR* 403 495-496 (own emphasis).

160 Barnard 2006 *Stell LR* 386 394.

161 This is done in s 3 of the CPA which states its purpose.

162 Barnard J (*supra* n 155 at 383-384) provides a detailed discussion of the effect of regulations 44(3)(i)-(j) of the CPA and how these forbid a supplier from unilaterally altering the nature or characteristics of the goods agreed upon. See also s 4(4)(b).

The CPA also highlights the cardinal importance of addressing and transforming the areas of the common law that ought to provide a measure of fairness in order to protect the consumer.<sup>163</sup> The transformation implemented by the CPA may therefore, be viewed as an example of the transformation required in the related common law, which applies in instances where the CPA does not. In this regard, the validity of the *voetstoots* clause<sup>164</sup> may be mentioned as an example.

Though various conflicting opinions on the matter exist, we agree with Barnard that the *voetstoots* clause should not be permitted in consumer agreements and transactions as regulated by the CPA.<sup>165</sup> This interpretation provides the vulnerable consumer with the best protection in instances where defective goods are supplied. This would mean a development of the common law which brings it in line with the constitutionally transformative program. This argument could, however, be taken a step further. If the common law, which applies alongside the CPA in consumer agreements, is developed to deny the application of this waiver of consumer rights, surely this development should be transplanted to the common law which applies to commercial transactions where the CPA is not applicable? This would result in the protection granted to the consumer in terms of a consumer agreement, extending to sales agreements regulated by the common law, ultimately providing the common law purchaser with a more equitable remedy. This would satisfy the duty to transform the common law imposed by section 39(2) of the Constitution and section 4(2)(a) of the CPA.

Section 56(4) dictates that the legislative warranty of quality<sup>166</sup> applies “*in addition* to any other implied warranty or condition imposed by the common law, the Act itself, any public regulation or express contractual warranty or condition”. Section 2(10) of the Act holds that the consumer may not be denied the exercise of any right she has under the common law, and Barnard correctly argues that, by extension, this includes the common law remedies associated with those rights.<sup>167</sup> By allowing the common law and consumer legislation to apply at the same time, the legislature has granted the consumer the widest scope of protection available.

The role of consumer legislation, as it attempts to protect the consumer from the economic effects of unfair consumer agreements, should therefore, be considered in conjunction with the constitutionally

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<sup>163</sup> S 4(2)(a). This reminds of the similar responsibility imposed by s 39(2) of the Constitution.

<sup>164</sup> The *voetstoots* clause is an optional clause which may (at the parties' discretion) be inserted into a contract of sale and has the effect of excluding all liability on the part of the seller for latent defects in the property purchased (Otto 2011 *THRHR* 525 530).

<sup>165</sup> Barnard J (*supra* n 155) 395 & 470.

<sup>166</sup> This warranty is specifically created in the Act as a remedy related to the consumer's right to safe, good quality goods as encompassed in s 55 of the Act.

<sup>167</sup> Barnard J (*supra* n 155) 467.

imposed duty to continually evaluate the fairness and legitimacy of laws, and subsequently also the common law of contract.

## 6 Conclusion

All market transactions that contribute to the system of production create power relations. From the most basic consumer purchase and sale agreement opportunities for the exercise of power present themselves, for instance where a retailer has contracted out of repairing or replacing defective goods, leaving the consumer in a weaker position.<sup>168</sup>

In the not so distant past, judges stated that they were unsure as to whether the common law or the Constitution should guide their interpretation of legislation,<sup>169</sup> and one could predict that this confusion will most probably reign in future interpretations of consumer legislation in South Africa. However, in light of the importance and prominence of the Constitution's transformative project, the hope is that this uncertainty will soon be a thing of the past; the optimistic expectation being that the normative values of the Constitution will enjoy favour.

The complex issues related to law's true power to change society, provokes the question of whether developments of the consumer law, and related common law, will effectively impact poverty in South Africa. We do, however, conclude that the law's role in transforming South Africa's society cannot be denied. If transformation and development is not strived for, it will never be attained. For true transformation to take place in South Africa, it must be accepted as a national project as well as a challenge to be embraced by all in the community.<sup>170</sup> How else will we reach the point where we contract in good faith, taking the needs and human dignity of the other contracting party into consideration? Due to its importance and prevalence, the consumer agreement, in terms of which goods are purchased, might be a means to introduce members of the community to a more ethical manner to transact with each other in the marketplace. The *boni mores* demands that where a consumer (in terms of a consumer agreement) or a purchaser (in terms of a sales agreement which is not governed by the CPA) purchases a defective product from a supplier, the supplier *must* be held liable for such a defect.

It is blatantly clear that the background legal rules of the law of contract enforce and enshrine the unequal bargaining position,<sup>171</sup> which originally created the immeasurable inequality in South Africa's, now democratic, society. South African courts need to take responsibility for the fact that their lack of action in this regard is perpetuating the injustices running rampant in South Africa's society. The principles and

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168 Hawthorne 2006 *THRHR* 48 57.

169 Van der Walt 2006 *Fundamina* 1 11-12.

170 In this regard see Smith & Bauling 'Aiming for transformation: Exploring graduateness in South Africa' 2013 *Stell LR* 601 603-604.

171 Davis 2011 *Stell LR* 845 849.

aim of the CPA (as constitutionally mandated social justice legislation) could guide judges in their interpretation of the common law of sale. In a country as economically divided as South Africa, incremental changes to the common law of contract has not been sufficient to bring about adequate transformation; one-on-one contractual bouts between parties will not facilitate society-wide transformation:

A legal system based exclusively on individual common law action by “consumer” against “trader”, bears no relation to an efficient and fair market characterised by globalisation. Consequently, private contract law has been supplemented and supplanted by statutes, regulations and the introduction of consumer organisations.<sup>172</sup>

The importance of the enactment of the CPA cannot be denied. Hopefully its enactment heralds the era of the ethical contract. Freedom of contract, as imposed by the common law, is reined in by the CPA in a manner that is justified by the socio-economic reality of South Africa’s society. Possibly the most valuable contribution made by the CPA is the fact that it broadens the scope of information a court, tribunal or mediator may consider when deciding on a matter, and here the socio-economic realities of consumers and the level of their individual vulnerabilities are pushed to the fore. This acknowledges the poverty created and perpetuated by unequal bargaining positions and formal equality imposed by the common law of contract. The ideal is that this knowledge will lead to positive action which will contribute to the effort to eradicate poverty in South Africa.

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<sup>172</sup> Hawthorne 2007 *SAPR/PL* 477.

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## Aantekeninge/Notes

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### The timeous enforcement of trade mark rights

#### 1 Introduction

Ideally, a trade mark proprietor should take steps to enjoin infringing use as soon as possible after a third party commences use of a registered trade mark, such use amounting to infringement. The reality of commerce is, of course, that this does not always happen. Sometimes the proprietor might simply not be aware of the infringement. At other times the third party's use could be perceived not to be prejudicial at first, due to, *inter alia*, geographical considerations, the size of the operation, the nature of the goods produced or services rendered etc. The result could be that court proceedings are only instituted a number of years after use first began (but always on the assumption of course that the third party's use postdates the registration date of the proprietor's mark). By way of example, in *Turbek Trading CC v A & D Spitz Ltd* 2009 (SCA) 158, a claim was considered on the merits despite a delay of six years (par 15). One question that needs answering here is what the legal consequences are when there is a delay before a trade mark right is enforced. Another, in what circumstances the delay can constitute a defence, and the various defences that could feature (waiver and consent are not dealt with here – see Sonnekus *The Law of Estoppel in South Africa* (2012) 161). These issues are discussed below (see also Alberts 'Check who's using your trade mark: The need for the timely enforcement of trade-mark rights' 2007 *Juta's Business Law* 32).

#### 2 Relevant Situations

##### 2.1 Honest Concurrent Use (HCU)

Does a period of undisturbed use benefit the third party trade mark user mentioned above in a registration context? One scenario that can occur is that an application will be refused by the Registrar of Trade Marks, based on a conflict with a prior registered mark (s 10(14) of the Trade Marks Act 194 of 1993). Unless this citation is removed, the application will not proceed to registration. However, the Register may withdraw the citation in the event of HCU having taken place and "register" the mark (s 14(1)). The general factors which should be considered in HCU matters were set out in the British decision of *Pirie's Application* 1933 RPC 147. These include contingencies of confusion, whether the choice of the mark was honestly made, the nature of the trades of the respective parties, actual confusion, and, importantly, the duration of use (159 line

47-160 & line 12). A period of use of eight years was for instance accepted in *Ex parte Chemisch-Pharmazeutische Aktiengesellschaft* 1934 (TPD) 366. In so far as the British Registrar's previous practice is concerned, reference can be made to his *Working Manual* (Journal No 6171, ch 6, par 11.17.2; own emphasis):

As a starting point, the mark should have been in use for a reasonable period, usually about five years, prior to the application date. This means the other party, against which the applicant is claiming honest concurrent use, *has a reasonable time in which to become aware of the applicant, and to make any challenge*. It must be stressed however, that this period is only a guideline. Where circumstances dictate otherwise, this period can be *reduced* (or, indeed, increased). It may be possible to reduce this period if e.g. the applicant has spent a massive amount on advertising his product and/or has had a very good turnover, even though his use only predates his application by a couple of years. Conversely, the period of use may need to be substantially more than five years, if the turnover is so small that it diminishes the weight that can be given to the length of use" (information available from: [http://www.patent.gov.uk/tm/reference/workman/chapt6/sec11\(17\).pdf](http://www.patent.gov.uk/tm/reference/workman/chapt6/sec11(17).pdf)).

Currently, in the United Kingdom, the role of HCU in the examination stage of an application has been reduced, as an order was passed in 2007 which "means that honest concurrent use can no longer be filed in support of an application where there is a requirement to notify the owners of earlier marks thought to be confusable with the applicant's mark" (information available from: <http://www.ipo.gov.uk/tmmanual-chap3-exam.pdf>). The emphasis in the above quotation, is on the opportunity the proprietor must have had to take steps against the potential infringer. Whether knowledge on the part of the proprietor is required in our law is unclear, and the British position might be adopted, although the view in practice is that knowledge is not required. Perhaps one can then say that where the proprietor is unaware, the relevant ground in section 14(1) is not HCU, but "special circumstances" (see in general *Ex parte de Wet Bros (Pty) Ltd* 1940 (CPD) 136; *Origins Natural Resources Inc v Origin Clothing Limited* 1995 (FSR) 280).

Knowledge on the part of the *third party user* might be exclusionary (*Massachusetts Saw Works* 1918 (RPC) 137 148 line 13). It has however been held that knowledge of the registration of the opponent's mark may be an important factor where the honesty of the user of the mark sought to be registered is challenged, but when once the honesty of the user has been established the fact of knowledge loses much of its significance (*Pirie* case 159 lines 21-42). Lastly, it should be pointed out that if there is no confusion, the reason for the selection of a mark is no longer relevant. This approach is embodied in another decision, dealing with trade mark infringement, namely that in *Red Bull GmbH v Rizo Investments (Pty) Ltd* Case number 25741/2001, decision of the then Transvaal Provincial Division, delivered on 28 June 2002. There the court stated the following (p 10):

However if the charade is acted out successfully and the resemblance is not such as to be likely to deceive or cause confusion among potential purchasers of the products, then the reason why the offending mark was chosen is irrelevant.

## 2.2 The Absence of Confusion

The issue of confusion is central to most trade mark conflicts. This also applies to the common law remedy of passing off. In order to rely on the latter, it is a requirement that at least the likelihood of confusion must be established (Van Heerden & Neethling *Unlawful Competition* (2008) 181). Evidence of actual confusion is not required. The same applies to statutory trade mark infringement. Section 34(1)(b) of the Trade Marks Act deals with use in relation to similar goods, wherein “use there exists the likelihood of... confusion”. Likewise, section 10(12) and 10(14), dealing with oppositions on the basis of common law rights, and a registration, respectively, both require the likelihood of confusion. Proof of actual confusion is not required. However, in decisions such as that in *Arsenal Football Club PLC v Reed* (2001 (RPC) 922) it was said that “absence of evidence of confusion becomes more telling and more demanding of explanation by the claimant the longer, more open and more extensive the defendant’s activities are” (par 24).

In *Phones 4U Ltd v Phone 4u. co uk Internet Ltd* 2007 (RPC) 83 it was said that the absence of evidence of confusion “gives rise to a powerful inference that there is no ... confusion” (par 42). This principle was described in colourful language, in the latter decision, by a witness who said that the absence of evidence of confusion was a case where “the dog did not bark”. The court commented in this regard that the extent of use will determine whether the inference of an absence of confusion can be drawn, and stated that “[y]ou have to show [that] there is a dog who could have barked” (par 43). Other views also exist. In *Ratiopharm GmbH’s Trade Mark Application* 2007 (RPC) 630 reference was made to case law to the effect that the lack of evidence of actual confusion is “rarely significant”, as it may be due to differences extraneous to the registered mark (par 15). Also, the approach that absence of evidence of actual confusion shows that there is not a likelihood of confusion, is no more than a rule of thumb (par 15). Further, in the South African case of *Adidas AG v Pepkor Retail Limited* 2013 (SCA) 3 it was said that there is no significance that attaches to the absence of evidence of confusion (par 27). It would seem though, nevertheless, that the extent and duration of undisturbed side-by-use can be relevant (Webster & Page *South African Law of Trade Marks* (1997) 7-19). It is suggested that the approach of the *Arsenal* case is more in line with practical reasoning. To this extent a considerable period of use will be to the advantage of the user.

## 2 3 Acquiescence

In some jurisdictions the issue of acquiescence is regulated by statute. In the United Kingdom, for instance, section 48 of the Trade Marks Act of 1994 states the following:

- (1) Where the proprietor of an earlier trade mark or other earlier right has acquiesced for a continuous period of five years in the use of a registered trade mark in the United Kingdom, *being aware of that use*, there shall cease to be any entitlement on the basis of that earlier trade mark or other right –
  - (a) to apply for a declaration that the registration of the later trade mark is invalid, or
  - (b) to oppose the use of the later trade mark in relation to the goods or services in relation to which it has been so used,

unless the registration of the later trade mark was applied for in bad faith.

Importantly, infringement proceedings can thus not be instituted. Notable is the requirement that the proprietor must have been *aware* of the use concerned. The scope of use or any pending negotiations are also relevant factors in terms of case law. The issue of acquiescence (and estoppel), featured in those contexts in Britain in *Boxing Brands Ltd v Sports Direct International plc* (2013 (EWHC) 2200 (Ch)). Here the defendants argued that the claimant permitted them to build up a goodwill in the mark concerned. It was said that it would be unconscionable to prevent them from making use of that goodwill in future. The contention was rejected (par 123):

First I am far from satisfied that anything was done in the relevant period which built up any goodwill at all. The sales of gloves and other equipment was truly trivial. The usage of the QUEENSBERRY BOXING 1867 logo at fights might have built up some recognition but I am not satisfied about what that recognition would have related to. Second, the major steps relied on were undertaken at a time and in a context in which both sides were working toward coming to a mutual agreement. The fact the agreement was not reached does not make it unconscionable for either party to rely on their underlying legal rights. Third, the position was made clear by the claimant's letter of March 2012. The benefit of any permission or acquiescence by the claimant or its predecessors was terminated by that letter. I reject the defence based on acquiescence or estoppel.

A similar provision to said article 48(1) is found in article 9(1) of the European Council Directive No 89/104/EEC (repealed by EU Directive 2008/95/EC to approximate the laws of the Member States relating to trade marks). This provision featured in the decision of *Budějovický Budvar, národní podnik v Anheuser-Busch Inc*, Case C482/09, judgment of the Court of Justice of the European Union, dated 2011-09-22, where both parties obtained registration on the basis of HCU. An attack on the basis of prior use was however launched. The court remarked, amongst others, that the concept “acquiescence” differs from the word consent, which involves an intention to renounce a right which is unequivocally

demonstrated (par 43). “Acquiescence”, in contrast, means that someone remains inactive when faced with a situation in which he would be in a position to oppose (par 44).

With regard to English law, reference can be made to *Daimler Chrysler AG v Javid Alavi (t/a Merc)* 2001 RPC 813 where the defendant had used the trade mark Merc in relation to clothing for 30 years without instances of confusion. The court stated that mere delay does not form a ground of defence, unless it gives rise to a defence in terms of trade mark legislation, or amount to acquiescence. The view that mere delay, without more, can be no bar to the exercise by the owner of a registered trade mark of his statutory right, was accepted as correct (par 112). It was found that (par 113, own emphasis):

It is an essential component in a defence of acquiescence that the failure of the claimant to act should have induced the defendant to believe that the wrong was being assented to. But in this case there was no such reliance by Mr Alavi: indeed, he only remembered the visit to the stand on being asked by his solicitors, and had attached no importance to it at the time. In any event, DaimlerChrysler (or their predecessors) were not aware of his trading activities until 1997. These facts cannot support a plea of acquiescence. *But the period of trading is very long.* Had I found that Mr Alavi had infringed one or more of the Mercedes marks, but that there was no passing-off, and that there had been no damage, perhaps the question of delay should have to be considered in the context of relief. But the question does not arise. This defence fails.

In South Africa, in *Policansky Brothers v Hermann & Cannard* 1910 (TPD) 1265 it was remarked that it would be inequitable for a person to lay by for a “considerable” time (page 1281). In *William Grant & Sons Ltd v Cape Wine & Distillers Ltd* 1990 3 SA 897 (C) (the *Grant* case), the plaintiff was said to be barred from instituting proceedings in view of the delay that occurred after they became aware of the use of the defendant. The court attached weight to the fact that, initially, the defendant’s position in the market did not threaten the plaintiff. It was accepted that, hypothetically, action at a later stage, once the defendant became a leading brand, whilst originally being an insignificant part of the market for some years after its launching, was in order. The test was said to be (923H):

It was for defendants to show that their invasion of plaintiffs’ right had been, for a sufficiently appreciable number of years, substantial enough to justify (and indeed require) the institution of proceedings by plaintiffs, if an end was to be put to defendant’s unlawful competition.

It was also said that “the mere lapse of a number of years during which plaintiffs took no action does not in itself justify a finding of acquiescence on their part” (924A). It may be appropriate to state that the nature of the passing off concerned, namely a misrepresentation as to the origin of the goods, may have influenced the court. The approach where there is a (mere) *inter partes* dispute leading to confusion, but not deception, as in this case, could be different. It must be pointed out that it does not

appear equitable, with respect, to allow a plaintiff to adopt a “wait and see” attitude to determine if, in effect, the defendant’s business will prosper.

The appropriate status of the acquiescence defence was placed in perspective by Harms DP in *Turbek Trading CC v A & D Spitz Ltd* (*supra* par 15, own emphasis):

Turbek’s first line of defence was a reliance on what counsel referred to as an ‘equitable defence’ of delay: if a party delays in enforcing its rights the party may in the discretion of the court either forfeit the rights or be precluded from enforcing them. The factual basis of the defence was, briefly put, that Spitz had known since 1 October 2001 of Turbek’s trade mark applications and its use of the mark ‘KG’ on footwear but only took steps to enforce its alleged common-law rights when it instituted the present proceedings during July 2007. This delay, according to the submission, amounted to acquiescence which disentitled Spitz from attacking the registrations or obtaining an interdict. Counsel relied on a statement by Patel J that *our law recognises a defence of acquiescence distinct from estoppel* and that the doctrine can be applied to halt cases where necessary to attain just and equitable results (*Botha v White*). That Patel J had failed to take account of binding authority that contradicted his bald statement and that he had misread authority on which he sought to rely was pointed out by Thring J in *New Media Publishing (Pty) Ltd v Eating Out Web Services CC...* During argument it became clear that counsel was unable to contend more than that delay may in a suitable case be evidence of an intention to waive, evidence of a misrepresentation that might found estoppel, or evidence of consent for purposes of the *volenti non fit injuria* principle. In other words, counsel was *unable* to substantiate his submission that acquiescence is a substantive defence in our law. Delay, in the context of trade mark law, may provide evidence of a loss of goodwill or distinctiveness but that was not Turbek’s case on the papers.

In other words, acquiescence is not a defence separate from estoppel, practically a case for estoppel must, accordingly, be made out. Delay may be relevant though in other respects (to be dealt with in part 3 below).

## 2 4 Estoppel

Another ground that may feature is estoppel. Estoppel is defined as follows by Sonnekus (*supra* 2):

The doctrine of estoppel by representation as applied in the courts of South Africa may generally be said to consist of the following. Where a person (the representor) by his words or conduct makes a representation to another person (the representee) and the latter, believing in the truth of the representation, acts thereon and would suffer prejudice if the representor were permitted to deny the truth of the representation made by him, the representor may be estopped – that is precluded, – from denying the truth of his representation.

The person that has used a trade mark (B) and wishes to rely on estoppel to ward off an infringement action by the proprietor of a registered mark (A), will have to overcome certain obstacles. Amongst

others, there would have to be proof of a (mis)representation. Silence (or inaction by A) can indeed, in certain circumstances, amount to a representation (Sonnekus *supra* 165). Also required, is that A must have had a duty to speak. In other words, A should have foreseen that B would have made the wrong inference from A's "silence" and acted to his prejudice (Sonnekus *supra* 165). This introduces the issue of negligence. Negligence would require an answer to the question whether the reasonable person in the circumstances would have foreseen prejudice to a third party and would have taken steps to prevent detrimental consequences (Sonnekus *supra* 243). In the situation under discussion, this would inevitably involve questions as to the period of inaction. Periods of a few years usually feature. Significantly, in *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC* (2011 2 SA 508 (SCA)), it was held that inaction for a mere two months was sufficient to constitute negligence (par 21). Should A have been aware of B's use, before B can rely on estoppel? There is case law to the effect that a person can by his negligence be estopped from contending that he was not aware of the nature and contents of a document signed by him (Sonnekus *supra* 249 n 50). So A could not necessarily rely on the fact that he was not aware of B's use of the trade mark. On the other hand, in favour of A, is the approach, as per *Grobler NO v Boikhutsong Business Undertaking (Pty) Ltd* 1987 2 SA 547 (B) that there cannot be a misrepresentation if ownership (of immovable property) can be established from official records (562A). This view would, naturally, apply to intellectual property and the Register of Trade Marks, in the case of registered marks of course. However, mere knowledge by B of A's registered mark is not always the decisive factor. So, when A informs B that he has no objection to B's use, and A changes his position and object, for instance after obtaining legal advice, B could raise the estoppel defence (Webster & Page *supra* 12-84). In summary, what might be decisive in estoppel cases, is whether a representation was made. In this regard it is worth noting and adapting what was said in the *Grant* case, being that "[t]he mere lapse of a number of years during which plaintiffs took no action does not in itself justify a finding of acquiescence on their part" (924A). In other words, such circumstances do not necessarily constitute a representation in the context of estoppel.

### **3 Substantive Defence/Procedural Remedy**

#### **3 1 Staying of Infringement Proceedings**

In the above, consideration was given to the circumstances in which a third party user could have a defence based on the fact that an infringement action was not instituted timeously. One issue discussed was the position of the honest concurrent user (see Alberts 'Substantive and procedural facets of honest concurrent use in South African trade mark law' 2010 *SALJ* 339 341). What approach is followed in infringement proceedings, when the "defence" of concurrent right is raised? In the British case of *Second Sight Ltd v Novel UK Ltd* 1995 (RPC) 423, the court stated that it would be a requirement for a stay of

proceedings for the applicant for registration to have a seriously maintainable claim to registration and he must, furthermore, undertake to proceed with the application with all due diligence (434 line 44). In the South African case of *Robertsons (Pty) Limited v Pfizer SA (Pty) Limited* 1967 3 SA 12 (T), A brought an application for an interdict against B, based on the alleged infringement of A's registered trademarks. B asked the court to defer the matter until an application for concurrent use in terms of the relevant legislation has been disposed of. The court refused, indicating that B would not be prejudiced (15C–E).

Likewise, according to *Abdulhay M Mayet Group (Pty) Ltd v Renasa Insurance Company Ltd* 1999 4 SA 1039 (T), factors such as HCU or special circumstances do not constitute a statutory defence to infringement (1048G–H). It was stated, however, that the court does have a discretion to stay infringement proceedings, but that discretion is to be exercised sparingly and only in exceptional circumstances (1048 H–I). The rationale for this approach was described as follows (1048I–1049A). It was said that the law of infringement will fall into desuetude if every infringer would be allowed to raise the defence that “I know that I am acting unlawfully, but bear with me; there is a possibility that my actions may become lawful”. The proper route to follow would be to comply with the law and to desist from infringement until the application based on HCU is finalised. In *Sidewalk Cafes (Pty) Ltd t/a Diggers Grill v Diggers Steakhouse (Pty) Ltd* 1990 1 SA 192 (T), where the respondent had extensive use, it was held, in contrast, that the respondent did not have to await his application proceeding to registration on the basis of HCU, and was entitled to relief without delay (198J–199A). The province where the respondent conducted business in, was excised from the proprietor's registration. The factual bases in these matters might of course differ in relation to the scale of use.

### 3 2 Interdict

EU Directive 2008/95/EC in recital 12 states that:

It is important, for reasons of legal certainty and without *inequitably prejudicing the interests of a proprietor* of an earlier trade mark, to provide that the latter may no longer request a declaration of invalidity nor may he oppose the use of a trade mark subsequent to his own of which he has *knowingly* tolerated the use for a substantial length of time, unless the application for the subsequent trade mark was made in bad faith.

It was noted earlier that reliance on HCU in the United Kingdom required knowledge of the existence of the third party's activities by the proprietor. The position regarding acquiescence there, and in the European Union, is the same (the latter has no specific time period stipulated though), there must be awareness of the “infringer's” activities (s 48(1) of the British Trade Marks Act; *Budějovický* case (par 45)). Similarly in South Africa, in cases of estoppel, proof of knowledge on the part of the proprietor would assist the third party relying on estoppel. What is the situation though where there is no knowledge on the part of

the proprietor? The third party might, to force the point, have been using the mark for ten years, but cannot, for argument's sake, make out a case for estoppel. Can the proprietor prevent the third party's continued use after all those years? Van Heerden and Neethling (*supra* 180) say that there is protection against a passing off action in comparable situations, if the mark has become distinctive of the goods of the third party. In the *British Daimler* case it was stated that (par 67; own emphasis):

I should just add that there must come a time after which the court would not interfere with a continued course of trading which might have involved passing off at its inception but no longer did so: logically, this point would come six years after it could safely be said that there was no deception and *independent goodwill* had been established in the market by the protagonist.

Also of interest, is the view of Wadlow (*Law of Passing Off* (2011) 856) who states that “[t]he distinctiveness of marks is frequently destroyed by conduct which would have been actionable, even fraudulent, had the plaintiff acted in time. *A fortiori*, a concurrent right to use the mark, or more properly an immunity, can thus be obtained by use which was less than honest in its inception”.

What is the position though in a statutory milieu? In the *Jalavi* decision, it was remarked that the period of use was “very long”, and it was added that “[h]ad I found that Mr Alavi had infringed one or more of the Mercedes marks, but that there was no passing-off, and that there had been no damage, perhaps the question of delay should have to be considered in the context of relief” (par 113). Similarly, in the *Turbek* ruling, Harms DP stated, after the quotation set out above, that his earlier explanation “does not mean that delay may not have procedural consequences; for instance, it may be a factor to take into account in exercising a court's discretion to refuse to issue ... an interim interdict or, maybe, even a final interdict, leaving the claimant to pursue other remedies such as damages” (par 15). One may infer from this that whilst delay is not a substantive defence, the eventual refusal of an interdict may, through a procedural mechanism, ensure a fair outcome.

The view of Harms DP will then also be in line with the British position. It has been stated there that delay might cause a court to refuse injunctive relief even if the conduct does not amount to acquiescence (*Blackstone's Civil Practice* 2013: The Commentary 614). Much would depend on the facts. So a two year delay might be excused, whilst a 20 days delay might cause relief to be refused (*Blackstone's supra* 615). In *Blinkx UK Ltd v Blinkbox Entertainment Ltd* 2010 (EWHC) 1624 (Ch), a trade mark infringement and passing off matter, the plaintiff had operated a website providing an internet video service that gave access to film, television and video content. The respondent also had a website which offered its customers, amongst other things, the ability to choose, customise and share video and television clips. The court specifically rejected the argument that the plaintiff was entitled to wait for instances of confusion to occur in the marketplace (par 21). The court stated that “[h]ad the claimant acted promptly while the defendant's business was still in its

trial phase, the balance of convenience might have favoured an injunction. But two years later it seems to me that the position has reversed” (par 28). The delay was held to be “fatal” (par 28).

What is the position where the proprietor is not aware of the use? It is submitted that the focus should not be exclusively on “punishing” the proprietor for not taking timeous action, whilst being aware of the third party’s activities. In appropriate circumstances a court should thus refuse to grant an interdict if there has been an extensive period of open use.

#### 4 Conclusion

In conclusion, where appropriate, relief can be provided to a third party user if there was an undue delay, albeit not by way of a substantive law principle. Principles of equity should also apply to cases where the proprietor was not aware of the third party’s use.

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## Note on the use of the public nuisance doctrine in 21st century South African law

### 1 Introduction

Since the reception of the common law remedy of public nuisance into South African law during the late 19th century, it has been applied in what can be categorised as three series of cases: the first series dating from the late 19th century to 1943 (*Queenstown Municipality v Wiehan* 1943 (EDL) 134); the second series consisting of only one case in 1975 (*Von Moltke v Costa Aroesa (Pty) Ltd* 1975 (1) SA 255 (C) (the Von Moltke case)); and a third series between 1989 and 2001 (in *East London Western Districts Farmers’ Association v Minister of Education and Development Aid* 1989 (2) SA 63 (A) (*East London* case) the application for an interdict to abate a public nuisance as a result of an informal settlement was granted; *Diepsloot Residents and Landowners Association and Another v Administrator Transvaal* 1993 (1) SA 577 (T); *Diepsloot Residents and Landowners Association and Another v Administrator Transvaal* 1993 (3) SA 49 (T); *Diepsloot Residents and Landowners Association and Another v Administrator Transvaal* 1994 (3) SA 336 (A)). In the Diepsloot trilogy, an application for an interdict preventing the establishment of the formal settlement was denied after the court considered policy considerations; in *Rademeyer and Others v Western Districts Councils and Others* 1998 (3) SA 1011 (SE), the application for an interdict to prevent the establishment of an informal settlement was denied because the

occupiers of the informal settlement were protected as “occupiers” under the Extension of Security of Tenure Act 62 of 1997. In *Three Rivers Ratepayers Association and Others v Northern Metropolitan* 2000 (4) SA 377 (W) (*Three Rivers* case), an application for an interdict was granted after the local authority could not prove that it had taken reasonable steps to prevent a possible public nuisance caused by an informal settlement being established in the vicinity of the properties owned by the members of the Three Rivers Ratepayers Association. In *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another (Mukhwevho intervening)* 2001 (3) SA 1151 (CC), the court denied an application for an interdict to prevent a temporary transit camp from being established in the vicinity of farms and residential areas. Amongst the arguments presented by the applicants, was that of a public nuisance being constituted, but no evidence could be given to support that argument and it failed in the Constitutional Court.

In the first series of cases, public nuisance was applied in line with its original aims, namely to protect the health and safety of the public in general (according to Spencer (“Public nuisance – a critical examination” 1989 48 *Cambridge Law Review* 55-84 56), public nuisance can be defined as “an act or omission that endangers the life, health, property, morals, or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all Her Majesty’s subjects”). In an attempt to protect the wellbeing of the community at large, the remedy served as a means against infringements such as noise (in *Champion v Inspector of Police, Durban* 1926 47 NPD 133 the appellant was convicted when he lawfully used a building for public entertainment purposes when prohibited from doing so by section 76 of the General By-Laws. Section 76 stated that “[n]o person being in any private premises within the borough shall make any noise or disturbances so as to be a public nuisance in the neighbourhood of such private premises”), keeping a brothel (in *R v Paulse* (1892) 9 SC 423 the accused was convicted on the ground that his brothel was kept in such a manner that it constituted a public nuisance); and obstruction of a highway (in *Putt v Rex* 1908 EDC 25, the appellant erected gates across a main road. The court a quo found that the gates constituted a public nuisance). In essence, the important factors were that all these nuisances affected a public right relating to the protection of public health or safety and, importantly, that the nuisance originated on public rather than private land.

However, the second and third series of public nuisance cases were applied contrary to its original aims. Some of the courts in both the second and third series of public nuisance cases used the terms “private nuisance” and “public nuisance” interchangeably and failed to distinguish between the different requirements for the two distinct species of nuisance (for example in *Three Rivers* 380F Snyders J stated that the concept of public nuisance is similar to that of private nuisance, except for the public extent of the nuisance). Therefore, although the nuisance originated on private instead of public land, courts based their decisions on public instead of private nuisance. Furthermore, the public

nuisance doctrine was applied as a mechanism to evict occupiers of informal settlements and in so doing circumvented eviction legislation such as the Extension of Security of Tenure Act 62 of 1997 (ESTA) and the Prevention of Illegal Eviction from Unlawful Occupation of Land Act 19 of 1998 (PIE) (before the enactment of the anti-eviction measures of ESTA and PIE, applicants could rely directly on section 26(3) of the Constitution. However, there is no case law - in which the public nuisance doctrine was applied – wherein section 26(3) was directly applied) as well as sections 26 (1), (2) and (3) of the Constitution of 1996.

Statutory nuisance systematically replaced the common law notion of public nuisance in South African law, as it did in English law. Because of the implementation of statutory measures that regulate unreasonable interferences affecting the public at large, there was less need for the application of the common law. The implementation of statutory nuisance employed to curb and regulate public nuisance with great success ultimately resulted in a decline in the use of the common law notion of public nuisance in disputes.

For the reasons set out above there is a great deal of doubt regarding the legitimacy of applying public nuisance principles in South African law. However, from 2009 to 2011 three cases were decided with reference to public nuisance, namely *Intercape Ferreira Mainliner (Pty) Ltd and Others v Minister of Home Affairs and Others* 2010 5 SA 367 (WCC) (*Intercape* case); *410 Voortrekker Road Property Holdings CC v Minister of Home Affairs and Others* 2010 (8) BCLR 785 (*Voortrekker* case); and *Growthpoint Properties Ltd v SA Commercial Catering and Allied Workers Union* 2011 (1) BCLR 81 (KZD) (*Growthpoint Properties* case), which suggests the presence of genuine public nuisance disputes. By genuine public nuisance disputes, I refer to nuisance that affected the public at large and emanated on public land such as, for instance, a street. The aim of the case note is to analyse these three cases and determine whether the notion of public nuisance has a legitimate purpose in 21st century South African law (the *Intercape* and *Voortrekker* cases will hereafter be referred to as the fourth series of cases).

## **2 *Intercape, Voortrekker and Growthpoint Properties***

### **2.1 *Intercape***

To establish the existence of a public nuisance in the cases *Intercape*, *Voortrekker* and *Growthpoint Properties*, the logical point of departure would be to analyse the facts. Paramount to this investigation are two requirements inherently connected with the presence of a public nuisance. These characteristics normally associated with public nuisance are: a) the health or wellbeing of the general public would be affected; and, importantly, b) the nuisance must have originated on public as opposed to private land or space (see the definition of a public nuisance in Church J & Church J ‘Nuisance’ in Joubert WA, Faris JA & Harms LTC (eds) *LAWSA* 19 (2006) 115-145 par 163). The *Voortrekker* case is a direct

consequence of the judgment in *Intercape* and the facts of these two cases are therefore similar. However, *Growthpoint Properties* is a peculiar nuisance dispute. The facts of the case will be discussed below.

In the *Intercape* case, the first applicant (Intercape) owns or occupies various premises in the vicinity of Montreal Drive, Airport Industria, Western Cape. The first respondent is the Minister of Home Affairs. The Department of Home Affairs (DoHA) occupies a premise (Erf 115973) in Montreal Drive. Although the premises are used by the DoHA, the Department of Public Works leases the property from Cila, which is the third respondent. Therefore the Minister of Public Works was joined as a respondent to the proceedings. Intercape, together with the other applicants (who also either owned or rented premises in the same vicinity), sought an interdict prohibiting the DoHA from using their premises as a refugee office (*Intercape* case par 1). The applicants argued that the refugee office contravened the City's zoning scheme. Furthermore, the applicants argued that the refugee office constituted a common law nuisance, a point which is especially relevant for the purposes of this article (*Intercape* case par 2). The respondents and Cila opposed the application.

Before dealing with the two questions – namely, whether the refugee office contravened the City's zoning scheme and whether a common law nuisance was constituted – the appalling conditions complained of, which were a direct consequence of the refugee office, have to be analysed.

According to the first applicant, Mr Ferreira, the DoHA's activities seriously interfered with the applicant's business. On a working day, it was likely that four to five hundred asylum seekers would visit the refugee office. The DoHA's officials only allowed a certain number of visitors into the premises per day and, as a result, many asylum seekers congregated on the streets. Furthermore, some of them slept outside the refugee office to be in the front for the next day's queue. The applicants complained that asylum seekers on the street were responsible for litter, left-over food, make-shift materials (for instance; corrugated iron) and, in the absence of toilet facilities, human waste (par 35). The applicants also complained that the general litter and, especially, the absence of toilet facilities are a major health concern for all those in the vicinity.

Furthermore, the presence of the asylum seekers in turn attracted illegal street vendors, which added to the litter generated by the crowds. Criminal elements were also attracted and asylum seekers were robbed from time to time (par 36). Criminal elements precipitated violence between themselves and the crowd. Traffic flow within Montreal Drive increased, seeing that asylum seekers were transported to the refugee office by taxis and cars. As a result, vehicles parked as they pleased and thus violated traffic laws (par 38).

The large crowds, hooting of taxis and loud music from car stereos significantly increased the noise levels outside the refugee office. In the

case of violent outbursts, there is also an increased level of noise. Megaphones used by officials to organise crowds also contributed to the high noise levels (par 40).

Finally, the applicants argued that the safety and security of their employees was endangered. Some employees travelling to and from work on foot had been victims of robberies, muggings and intimidation, with some even resigning from their respective places of employment. Moreover, these conditions deterred clients from visiting the applicants' premises (par 45).

After having received substantial evidence and having conducted an analysis of the founding, answering and replying affidavits, the court finally adjudicated on the issue of whether the refugee office contravened the City's zoning scheme. On this issue, the court found that the refugee office did indeed contravene the City's scheme. In essence, the court concluded that Montreal Drive is subject to the Land Use and Planning Ordinance 15 of 1985 (LUPO) and that the scheme was zoned for "industrial general" purposes (par 91). The court found that it was common cause that the activities of the refugee office did not fall within the 'predominant uses for this site as required by LUPO (par 91).

The most interesting and relevant part of the judgment, for the purposes of this note, is the issue of whether a nuisance was constituted. While the court was ready to grant relief on the basis that the zoning scheme had been contravened, it still addressed the cause of action based on nuisance (par 141). Without identifying which of the two categories of nuisance would be applicable, the court accepted that the alleged nuisance was of a private nature when it stated:

In the context of the present case, the term nuisance connotes a species of delict arising from wrongful violation of the duty which our common law imposes on a person towards his neighbours, the said duty being the correlative of the right which his neighbours have to enjoy the use and occupation of their properties without unreasonable interference (par 142).

Subsequent to the statement above, the court formulated the question of whether the DoHA was using Erf 115973 in a way which resulted in an unreasonable interference in the right of neighbouring owners and occupants to use their premises (par 147).

The court accepted the material evidence provided by the applicants. The evidence was not convincingly disputed by the respondents and as a consequence, the court found in favour of the applicants. Illegal parking, blocking of roads, noise, violence, crowd numbers in the street, litter (including human waste) and endangering the safety and security of the general public were all given as material evidence. Video and sound recordings provided further compelling evidence such as the outburst of violence, noise, large crowds congesting the streets, illegal parking, appalling litter and the state of mobile toilets (par 151).

On the basis of this compelling evidence, the court further accepted that due to the presence of a large crowd on a daily basis, there was a continued nuisance in the form of noise, litter, etc. The respondents argued that they cannot be held liable for the large crowds, because the onus rests upon the law enforcement officials to deal with illegal activities in the street. However, the court concluded that the origin of the congested streets was the operation of the refugee office. The court further held that, even if it was the law enforcement officials' responsibility, it would be impossible for them to deal with circumstances in Montreal Drive on a daily basis (par 154). Even if the law enforcement officials had endless resources, their presence would by no means eliminate the unsatisfactory conditions under which the applicants are currently operating (par 154).

The court then shifted its focus to the facts of the *East London* case to compare it with those in the *Intercap* case. In the *East London* case, the facts clearly indicated that nuisance-causing actions originated on the respondent's property, which caused infringements on the applicant's private land; this cannot be said about the facts in the *Intercap* case. In the *Intercap* case, the nuisance was a result of the operation of a refugee office on private land, but caused a nuisance or infringement on public as opposed to private land. The judge recognised this distinction, but said, in his own words, "as a matter of principle I do not think this distinction matters" (par 156). This is a rather dubious statement, seeing that the court's misjudgement had some negative implications on the decision. There is a distinct difference between a private and a public nuisance. There are many similarities, but at the same time important differences. This issue will be dealt with in more detail in the concluding section of this note.

The court recognised that the central element, namely "reasonableness," is the same in both South African and English common law (par 157 and 163). The court concluded that an individual's actions may give rise to an actionable nuisance, even though the nuisance is caused by other persons who are attracted to the premises and congregate in the streets (par 167-168).

In conclusion, the court found that the actions emanating from the operation of the refugee office constituted a nuisance. The court granted an interdict as an order to cease the operation of the office. The court, however, suspended the interdict and allowed the DoHA to find alternative premises (par 171-186).

## **2 2 Voortrekker**

The second case, namely the *Voortrekker* case, is a direct consequence of the *Intercap* decision. After *Intercap*, the DoHA relocated to premises in Maitland. After moving from their premises in the Airport Industria, the DoHA occupied alternative refugee offices in Maitland. Once again the

applicants argued that the refugee office contravened the City of Cape Town's zoning regulations and created a nuisance.

Similar to *Intercape*, the court found that the operation of the refugee office contravened the zoning scheme and thus constituted a nuisance (par 78-81). Once again, the court failed to distinguish between a private and a public nuisance.

Again, the court granted an interdict to cease the operation of the refugee office, but this time the court gave the DoHA time to address illegalities and thereby regulate the operation of the office at its current location as opposed to finding alternative accommodation. The court was of the opinion that it would be impractical to close the refugee office immediately.

### **2 3 *Growthpoint***

In the latest case, namely the *Growthpoint Properties* case, it appears that the court might have missed yet another opportunity to clearly indicate the distinction between a private and a public nuisance. In this case, the applicant (Growthpoint) alleged that a group of Dis-Chem employees, participating in a strike organised by the South African Commercial Catering and Allied Workers Union (SACCAWU), constituted a public nuisance (par 1). According to Growthpoint, the strikers would sing, shout, ululate and make use of instruments which in effect constituted an intolerable noise. Growthpoint sought an interdict prohibiting the strikers from doing so (par 5).

The main issue in this judgment was to confirm a rule *nisi* granted on 3 June 2010. The court *a quo* granted an interim order prohibiting the strikers to sing, shout, ululate and use instruments to make a noise. For the purposes of this note, the focus is on the issue of whether a public nuisance was constituted. Growthpoint contended that by committing a nuisance the union SACCAWU and its members subjected themselves to criminal sanctions in terms of the by-laws of the city. Growthpoint further contended that they (and the other tenants of the shopping centre) had the right not be arbitrarily deprived of their use of the property. They based their premise on the right that landowners and land occupiers have the right to reasonable enjoyment of their land (the applicant relied on the *East London* case to substantiate the argument that a public nuisance was constituted (see *Growthpoint Properties* case (par 31))). Growthpoint alleged that an interference with such a right creates a public nuisance. On the issue of whether the municipal by-laws were contravened, the court found that the applicants could not provide compelling evidence to substantiate this argument. More importantly, on the issue of whether a public nuisance was constituted, the court did not make any findings.

However, to solve the question of whether a nuisance was constituted, the court decided to balance the constitutional rights of owners and occupiers to their property, the environment and trade, on the one hand, and the right of strikers to freedom of expression, to bargain collectively,

to picket, protest and demonstrate peacefully, on the other. This method of balancing the right of the owner and that of the strikers – as a means to establish whether a nuisance was present – circumvented the basic investigation into the nature of the nuisance: For instance, whether the nuisance took place on private or public land or space; were the individuals affected by nuisance of a private or public nature? These questions could only have been answered if the court distinguished between a private and a public nuisance, thereby establishing which form of nuisance was at hand. The distinction between private and public nuisance will be elaborated on in the conclusion.

Consequently, the court found that SACCAWU and its members had to exercise their rights reasonably without interfering with Growthpoint, its tenants and the public (par 60). Therefore, the effect of the remedy was to ensure that SACCAWU and its members lower their noise levels (par 61).

One could argue that a public nuisance was constituted, but due to a lack of evidence and arguments on the side of the applicants and the court's failure to investigate the nature of the nuisance, the matter was never addressed in detail.

### **3 Comments**

#### **3.1 Distinction between Private and Public Nuisance**

Although in both the *Intercape* and *Voortrekker* cases, the courts were correct to conclude that a nuisance was constituted, they erred when they automatically assumed, without relying on the facts to establish the character of the nuisance, that the unreasonable activities constituted a private nuisance. Similarly, in *Growthpoint Properties*, the applicant alleged the infringement of its reasonable use and enjoyment of land as a landowner. This allegation relates to a neighbour law dispute and therefore a private as opposed to a public nuisance. But Growthpoint alleged that an interference with such a right creates a public nuisance. The court never considered determining which of the two species of nuisance was constituted; instead it allowed the interchangeable use of private and public nuisance. Therefore, the courts failed to distinguish between a private and a public nuisance.

A more logical approach would be to establish the nature of the nuisance at hand. The courts would then distinguish between a private and public nuisance, and not simply use these two distinct species of nuisance interchangeably. A private nuisance affects the reasonable enjoyment of the land of an individual (typically a neighbour) who resides in the vicinity of the neighbour (Mostert, Pope, Badenhorst, Freedman Pienaar & Van Wyk *The principles of the law of property in South Africa* 132-134). A private nuisance “denotes an infringement of a neighbour’s entitlement of use and enjoyment so that it affects her quality of life, *i.e.* ordinary health, comfort and convenience, by an on-going wrong”

(Mostert, Pope, Badenhorst, Freedman Pienaar & Van Wyk *The principles of the law of property in South Africa* 134). In the case of private nuisance, the reasonableness test is applied, namely “whether a normal person, finding him or herself in the position of the plaintiff, would have tolerated the interference concerned” (Badenhorst, Pienaar, Mostert, Silberberg & Schoeman *The law of property* 112). A successful applicant is entitled to an interdict (according to Church & Church “Nuisance” in Joubert, Faris & Harms (eds) *LAWSA* 19 (2006) 115-145 par 198, an interdict “can serve to restrain an offender from establishing a threatened nuisance or from continuing an existing nuisance”) or an abatement order (An abatement order occurs when “a local authority or public officers are authorised under national or regional legislation to order owners or occupiers of land or premises to abate nuisances upon their property”). See Church & Church “Nuisance” (*supra* par 197), self-help (according to Church & Church “Nuisance” (*supra* par 196), self-help occurs only in exceptional circumstances, where an affected landowner is eligible to take the “law into his or her own hands; however, it is only available in the most urgent cases of necessity and in ordinary cases resort to self-help is not justifiable”. Examples of urgent cases include imminent risk to health or circumstances so pressing as to admit of no delay in abating the nuisance), or claim for damages (see Church & Church “Nuisance” (*supra* par 202). On the other hand, a public nuisance can be defined as “an act or omission or state of affairs that impedes, offends, endangers or inconveniences the public at large” (Church & Church “Nuisance” (*supra* par 163). The doctrine was originally used for the abatement of ordinary public nuisances (protecting the general public health and safety) such as smoke (*Redelinghuys and Others v Silberbauer* 1874 4 B 95); noise (*London & South African Exploration Co v Kimberly Divisional Council* (1887) 4 HCG 287); and smells (*R v Le Rot* (1889-1890) 7 SC 7). These kinds of nuisances can be private nuisance too, but are categorised as a public nuisance when they originate from a public space or on public land. No reasonableness test is applied to determine whether a public nuisance was constituted. The perpetrator’s action is unlawful if he or she is found guilty of causing injury, damage or inconvenience to the health and safety of the general public. Currently, the perpetrator’s action is unlawful if it is found to be in conflict with certain statutory regulations. An interdict or abatement order is used to suppress or stop a public nuisance.

Therefore, it was essential that the courts distinguish between these two species of nuisance to avoid the interchangeable use thereof and in so doing circumvent any confusion between the nature of a private and a public nuisance.

### 3 2 Existence of a Genuine Public Nuisance

It was clear from the evidence in *Intercape* and *Voortrekker* that it was not only the applicants but anyone – for example, clients, employees and visitors – who set foot in the vicinity of the refugee office would be negatively affected by having to endure noise, face the possibility of

being mugged and robbed, be exposed to a health risk and be prevented from using the road as a result of illegal parking or road blockage. Similarly in *Growthpoint Properties*, it can also be argued that alleged public nuisance existed. According to van der Walt (van der Walt *The Law of Neighbours* (2010) 51–52; see n 87 in van der Walt *JQR Constitutional Property Law* 2011 (1) at 2.4):

[T]he nuisance would probably have been the threat that the noise posed to the health and safety of the owners, occupiers and customers of the shopping mall. Although the shopping mall is of course private property it may well be assumed, partly on the basis of public accommodations doctrine, that the open spaces such as the entrances, parking areas and corridors of a shopping complex are sufficiently open to and used by the public that a threat or danger for public health and safety caused there could be adjudicated on the basis of public nuisance.

Abrams and Washington view a public right as (Abrams & Washington “The misunderstood law of public nuisance: A comparison with private nuisance twenty years after *Boomer*” (1990) 54 *Albany Law Review* 359–399 364):

[a] public nuisance does not necessarily involve an interference with the private enjoyment of property; rather the interference is with a public right, usually relating to public health and safety or substantial inconvenience or annoyance to the public.

Based on this view, one can ascertain that the nuisance affected a public right and not necessarily a private right. Furthermore, the nuisance occurred in a public space, namely the street. A street is a place where the community at large can be in contact with the alleged unreasonable interferences. In fact, the first series of South African public nuisance cases covered the majority of unreasonable interferences complained of in both the *Voortrekker* and *Intercap* cases, namely pollution (see *R v CP Reynolds* 1901 22 NLR), noise (*London & South African Exploration Co v Kimberly Divisional Council* 1887 4 (HCG) 287) and the obstruction of roads occurred in a public space or public land (see *Putt v R* 1908 (EDC) 23; *Coetzee v R* 1911 (EDL) 339). Similarly in *Growthpoint Properties*, parking areas, entrances and open spaces associated with the public accommodations doctrine affected a public as opposed to a private right. Therefore the nuisance complained of was a public nuisance and not a private nuisance.

These series of cases – in the period between the inception of the public nuisance doctrine into South African law and 1943 (categorised as the first series of cases) – rightfully categorised these interferences as a public nuisance after having analysed the facts in the particular context. One can therefore reach the conclusion that the court erred in assuming that a private instead of a public nuisance had been constituted. The nuisance originated in a public space, namely the street, or in the case of *Growthpoint Properties*, parking areas, entrances and open spaces.

As already indicated, the judgments can be criticised for failing to distinguish between the categories of nuisance but, more importantly, that they missed the opportunity to apply the public nuisance doctrine for its original purposes, especially after its indirect application in the third series of public nuisance case law, briefly referred to above. As indicated above, these original purposes were applied in the first series of South African public nuisance case law. On the other hand, these cases illustrate that public nuisance could still, depending on the situation, have a purpose to fulfil in South African law.

### **3 3 Nuisances Regulated by Statute**

In both the *Intercap* and *Voortrekker* cases, the unreasonable interferences complained contravened the provisions of LUPO. As a result, the courts granted an interdict that obliged the DoHA to cease the unlawful operation of the refugee office. However, in *Voortrekker* – in contradiction to the *Intercap* decision – the court gave the DoHA an option to address illegalities and thereby regulate the operation of the office at its current location, as opposed to finding alternative accommodation. The court was of the opinion that it would be impracticable to close the refugee office immediately. In essence, LUPO (in this specific scenario) replaced the use of the public nuisance doctrine.

Similarly, in the *Growthpoint Properties* case, if the court applied the Labour Relations Act 66 of 1995, the doctrine of public nuisance would not have been applied seeing that certain provisions in the Act would have prohibited the continuance of the alleged nuisance. This raises the question of whether the application of public nuisance was necessary or relevant at all. Therefore, it could be argued that although genuine public nuisance is constituted, the doctrine is only applicable in the absence of statutory or any other legislation such as LUPO, which covers existing or future public nuisance offences.

## **4 Conclusion**

In all three cases it appears that a genuine public nuisance was constituted. In essence, the courts were correct in finding the existence of a nuisance. However, the courts erred in automatically assuming that there is no need to distinguish between a private and public nuisance. Based on the facts of each case, this distinction is paramount in order to classify a nuisance as either private or public. In these cases it was clear that a public instead of a private nuisance had been constituted.

In these cases, the courts assumed a position without investigating the nature of the nuisance. It therefore failed to correctly classify the nuisance at hand. There was no need for a rigorous investigation; a mere enquiry into the two distinct classifications of nuisance, their definitions and an analysis of case law would have sufficed to determine the category of nuisance.

Based on the facts in the *Intercape* and *Voortrekker* cases, any individual (for example, client, employee, a motorist driving along Montreal Drive, pedestrian) who set foot in the vicinity of the refugee office was affected by the noise, violence, litter and street blockages. Thus the general public at large could be a victim of these unlawful actions such as violence, litter, health risks, noise and a blocked street in Montreal Drive, which could affect their health and safety. In the *Growthpoint Properties* case, although the shopping centre is privately owned, it is a public attraction. Therefore, not only those who own or rent a space in the centre are affected by noise, but anyone who comes into contact with this public space, namely the general public. Moreover, based on the public accommodations doctrine referred to by van der Walt, there is a much stronger argument that a public nuisance was constituted.

More compelling evidence of the existence of a public nuisance, as opposed to a private nuisance, is that the first series of public nuisance case law compared with the last three cases (categorised as the fourth series of cases) is similar, because the infringements complained of – namely pollution, noise, blocked roads – are present in both series of cases. More importantly, all the nuisances in the first and fourth series of cases occurred in a public as opposed to a private land or space.

As stated above, this would have been an appropriate occasion to set the record straight pertaining to the application of nuisance, especially in the light of the indirect use of public nuisance in the second and third series of public nuisance cases.

In all three cases there were legislative measures to regulate interferences - which amounted to a public nuisance - at hand. This surely raises the question whether the application of public nuisance was necessary or relevant at all. It could be argued that although genuine public nuisance is constituted, the doctrine is only applicable in the absence of statutory or any other legislation such as LUPO, which covers existing or future public nuisance offences.

In essence, courts ought to distinguish between the two distinct species of private and public nuisance when determining the nature of the nuisance in a particular situation. The nature of the nuisance has to be determined in order to establish which nuisance is present and; finally, the doctrine can only be applied in the absence of any legislation regulating such interferences.

Furthermore, I am of the opinion that the notion of public nuisance can still serve a legitimate purpose in South African law. But it should be applied only in the absence of legislation covering nuisance offences.

**A SAMUELS**

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## Onderhoudstoekening vir gades of vennote *pendente lite* en by egskeiding: Het ons 'n nuwe benadering?

### 1 Inleiding

Hierdie aantekening beoog om vas te stel of die beleid met betrekking tot onderhoudstoekening vir vennote in 'n burgerlike vennootskap en gades in 'n huwelik by egskeiding verander het. Die aantekening gaan op twee gevalle konsentreer.

Die een geval wat ondersoek word, fokus op onderhoudstoekening ingevolge Reël 43(1) van die Eenvormige Hofreëls en die ander omstandigheid bespreek onderhoudsvoorsiening ingevolge artikel 7(2) van die Wet op Egskeiding 70 van 1979.

Alvorens daar met die bespreking verder gegaan word, gaan die algemene beginsels vir onderhoudstoekening kortliks bespreek word.

### 2 Algemene beginsels vir onderhoudstoekening

Gades (en telkens wanneer na gades verwys word, sluit dit ook vennote ingevolge 'n burgerlike vennootskap in terme van die *Civil Union Act 17* van 2006 in) is *ex lege* verplig om mekaar te onderhou. (Sien oa *Oshry v Feldman* 2010 6 SA 19 (HHA) 24E-F).

Onderhoud kan geëis word indien die eiser 'n behoefte daaraan het en die verweerder dit gedeeltelik of ten volle kan voorsien. (Sien oa *Botha v Botha* 2009 3 SA 89 (W) par 103; *EH v SH* 2012 4 SA 164 (HHA) parr 13-14.)

Wanneer die huwelik (en telkens wanneer na huwelik verwys word, sluit dit ook 'n huwelik en 'n burgerlike vennootskap ingevolge die *Civil Union Act 17* van 2006 in) beëindig word, kom die onderhoudsaanspraak gemeenregtelik tot 'n einde (sien oa *Thomson v Thomson* 2010 3 SA 211 (W) 215G; *Oshry* parr 24-25; *EH v SH* 167H).

Beide artikel 7 van die Wet op Egskeiding 70 van 1979 en die Wet op Onderhoud van Langslewende Gades 27 van 1990 maak voorsiening dat onderhoud ook na beëindiging van die huwelik toegeken mag word.

Die onderhoudsaanspraak kom ook gemeenregtelik tot 'n einde wanneer 'n gade, die gesamentlike huishouding deur sy/haar onregmatige gedrag beëindig (vgl oa *Stern v Stern* 1928 (WLD) 148 150; *Behr v Minister of Health* 1961 1 SA 629 (SR) 630F-G 633F; *Alarakha v Alarakha* 1975 3 SA 245 (RAA) 251E-F; *Chamani v Chamani* 1979 4 SA 804 (W) 806H-807A, 807B-C). Die onderhoudsaanspraak word volgens

die beskouings van beide hoofregter Murray en regter Young in die geval van onregmatige beëindiging van die gesamentlike huishouding eerder opgeskort as beëindig en herleef, indien die “skuldige” gade nie na die gesamentlike huishouding kan terugkeer nie as gevolg van die onregmatige gedrag van die “onskuldige” gade (*Behr v Minister of Health* 631D-E & 634A-E onderskeidelik). Hahlo (*The South African Law of Husband and Wife* (1985) 137) voer as rede vir die opskorting van die onderhoudsaanspraak aan dat kos en skuiling in die gesinswoning te vinde is.

Met bovermelde algemene beginsels vir onderhoudsvoorsiening as agtergrond, skuif die fokus na Reël 43(1) van die Eenvormige Hofreëls.

### 3 Reël 43(1) van die Eenvormige Hofreëls

#### 3 1 Onderhoud *pendente lite* Ingevolge Reël 43(1) van die Eenvormige Hofreëls

Reël 43(1) maak voorsiening dat ’n getroude persoon vir onder andere onderhoud *pendente lite* aansoek mag doen. (Getroude persoon sluit in ’n applikant wat beweer dat hy/sy ’n getroude persoon is, en hierdie bewering sonder stawende getuienis, deur respondent ontken word (sien oa *Zaphiriou v Zaphiriou* 1967 1 SA 342 (W) 345G; *AM v RM* 2010 2 SA 223 (OK) 227G-H). In *Hoosein v Dangor* (2010 2 All SA 55 (WKK) par 28), gaan die hof selfs verder en beslis dat “getroude persoon”, ’n gade insluit wat ingevolge die Muslim geloof getroud is. sien ook Carnelley ‘Enforcement of the maintenance rights of a spouse, married in terms of Islamic law, in the South African courts’ 2007 *Obiter* 340ev).

Om suksesvol met ’n aansoek vir onderhoud *pendente lite* te wees, word twee vereistes gestel naamlik een, dat die applikant ’n redelike kans op sukses in die hoofgeding het (sien oa *Davis v Davis* 1939 (WLD) 108 110, 112; *Von Broembsen v Von Broembsen* 1948 1 SA 1194 (O) 1196; *Hamman v Hamman* 1949 1 SA 1191 (W) 1193; *Zaduck v Zaduck* 1966 1 SA 78 (SR) 78H; *Zaphiriou v Zaphiriou* 346A; *SH v EH* 2011 5 SA 496 (OKP) par [15] & [20]; Nathan, Barnett & Brink *Eenvormige Hofreëls* (1984) 2271; Hahlo *supra* 432) en twee, dat die applikant tydens die aansoek *pendente lite* geregtig is op onderhoud (sien oa *Harrower v Harrower* 1909 TH 231 231; *Davis v Davis supra* 110-111, 112; *Von Broembsen v Von Broembsen* 1196; *Zaduck v Zaduck* 79A-C; *Zaphiriou v Zaphiriou* 346A; *Taute v Taute* 1974 2 SA 675 (OK) 676-677; *AM v RM supra* par 12; Hahlo *supra* 432). Dit bring mee dat aansoeke om onderhoud *pendente lite* gemeenregtelik afgewys is as die applikant nie geregtig is op onderhoud nie weens onder andere die rede dat applikant die gemeenskaplike huishouding onregmatig beëindig het (sien *Chamani v Chamani supra* 806H-807A & 807B-C). Die regsbeginseel wat hier toepassing vind, is die gemeenregtelike skuldbeginseel, wat sy ontstaan lank voor die nuwe egskeidingsbedeling in terme van die Wet op Egskeiding 70 van 1979, verkry het. Omdat die Wet op Egskeiding 70 van 1979 met ’n gemeenregtelike egskeidingsreg wat op skuld gebaseer

is, weggedoen het, laat dit die vraag ontstaan in welke mate dit regshulp vir onderhoud *pendente lite* gaan beïnvloed. Sinclair ('Notes and comments' 1981 *SALJ* 89 97-98) huldig die volgende mening en stel die volgende oplossing voor:

... it is suggested that the criteria for relief *pendente lite* must match those applicable to ancillary relief upon divorce and not those of the common law which determine the right to maintenance *stante matrimonio* ... To justify to an errant wife the fact that she is not entitled to maintenance pending divorce because determination of the duty of support during marriage hinges upon marital good behaviour, when only weeks later or months later judgment in the main action and an award of maintenance can be granted in her favour, will not be an easy task. ... The inescapable conclusion appears to be that legislative intervention to fill the hiatus just mentioned and to reconcile the opposing philosophies that underlie the common-law rules and the provisions of the new divorce legislation is called for.

Twee teenstrydige filosofieë blyk die onderliggende verskil in onderhoudstoekening te onderlê. Die skuldbeginsel blyk ingevolge die gemenerereg, die onderhoudsaanspraak te beëindig indien applikant, die gesamentlike huishouding onregmatig beëindig het, terwyl die skuldlose egskeidingsreg, wat die Wet op Egskeiding 70 van 1979 voorsien, die onderhoudsaanspraak lewend (kan) hou. Die wetgewer het nog nie die leemte aangevul nie.

Daar bestaan egter regspraak wat 'n antwoord mag bied en vervolgens bespreek word. In *Nilsson v Nilsson* (1984 2 SA 294 (K)) doen die applikante aansoek vir onderhoud *pendente lite* asook vir 'n bydrae tot koste vir die hangende huweliksgeding (295D). Die applikante en die respondent is beide bejaard. Sy is tydens die aansoek 78 en hy 85 jaar oud (295D). Hulle was vir ongeveer agtien maande getroud (295D), toe die applikante die gemeenskaplike huishouding en gesinswoning verlaat het (295D). Sy beweer dat die respondent die oorsaak is waarom sy die huishouding verlaat het aangesien hy haar beveel het om die huishouding te ontruim (295H). Die respondent is weer van mening dat die applikante die oorsaak vir die huweliksverbokking is (296C) en dat sy hom verlaat het (296H). Regter Van Den Heever is van mening dat dit onbillik sou wees om aan applikante regshulp *pendente lite* te verleen sonder om op die meriete van die huweliksgeskil te let (295D). Hoe moet 'n aansoek soos hierdie beslis word sonder om onbillik te wees? Die antwoord in die woorde van regter Van Den Heever is dat "... law and fairness should if possible run hand-in-hand" (295C-D). Dit word bereik deur artikel 7(2) van die Wet op Egskeiding 70 van 1979 ook op aansoeke vir onderhoud *pendente lite* van toepassing te maak (297B & 297E-F). Dit stem, sonder om te vermeld, ooreen met die siening van Sinclair, hierbo genoem. Artikel 7(2) bepaal dat die gedrag van die partye vir sover dit op die verbokking van die huwelik betrekking het as een van die genoemde faktore in ag geneem mag word. Die hof vermeld dat die skuldige gedrag van 'n party veral in ag geneem sal word, indien die huwelik van kort duur was en die beëindiging van die huwelik nie tot verlies lei nie, soos byvoorbeeld verlies aan vorige onderhoud, ander

huweliksverwagtinge of werk weens bedanking ensovoorts (297H-298A; sien *Grasso v Grasso* 1987 1 SA 48 (K) 53-54 waar die hof vermeld dat “[w]here, however, the misconduct of one of the parties is gross, fault not unnaturally assumes a greater relevance”). Die hof wys die aansoek vir onderhoud *pendente lite* van R600 per maand af op sterkte van die feit dat die huwelik van korte duur was en sy sedert sy die huishouding verlaat het haarself kon onderhou al was dit ook met die hulp van haar kinders (298A-C). Die hof is met ander woorde van oordeel dat sy in die hoofgeding nie suksesvol sal wees nie. Gedingkoste word wel toegeken aangesien respondent gewillig is om dit aan te bied (298D). Die belang van hierdie saak vir onderhoud *pendente lite* is dat die gemeenregtelike beëindiging van onderhoud deur skuldige gedrag nie absoluut toepassing vind nie, maar dat die faktore vir onderhoudtoekenning in ’n egskeidingsgeding wat hoofsaaklik met skuld weggedoen het, ook toepasbaar is by aansoeke vir onderhoud *pendente lite*.

Regter Mullins in *Carstens v Carstens* (1985 2 SA 351 (SOK)) is ook van oordeel dat die faktore vermeld in artikel 7(2) van die Wet op Egskeiding 70 van 1979 toepassing moet vind by onderhoud *pendente lite* (354C-D). Applikante en respondent het struwelinge met verloop van tyd gedurende hul huwelik gehad. Die laaste was toe applikante, die huishouding verlaat het en by haar minnaar ingetrek het. Hulle het ook sedertdien ’n kind wat dit vir applikante moeilik maak om met haar werk voort te gaan. Nou eis sy onder andere onderhoud *pendente lite*. Die onderhoud *pendente lite* word nie toegeken nie, en die hof bied twee motiverings hiervoor aan. Een, die hof is van oordeel dat dit teen die openbare beleid is dat ’n vrou, ’n aanspraak op onderhoud *pendente lite* teen haar man het, terwyl sy skandalig en voorbedagt as man en vrou met ’n ander man saamleef (353E-F; sien vir dieselfde standpunt *Dodo v Dodo* 1990 1 SA 77 (W) 89F-G). Twee, die hof verwys (353H-I) ook na die mening van Hahlo (*The South African Law of Husband and Wife* (1975) 454) waar hy van oordeel is “... it is contrary to justice and equity that she should be able to collect support for the same period from her ex-husband as well as from her ‘putative’ second ‘husband’”. Die hof beslis dan (353I): “I see no reason why a claim for maintenance *pendente lite* should not depend on similar principles of justice and equity”. Daar is myns insiens geen substantiewe verskil tussen hierdie twee motiverings nie. Dit is dieselfde motivering of rede met verskillende woordgebruik. Die hof is van oordeel dat hierdie bevinding nie op ’n toepassing van die skuldkonsep neerkom nie (353I) en verwys dan na *Singh v Singh* (1983 1 SA 781 (K) 787). In laasgenoemde saak bevind die hof dat skuld slegs ’n rol speel indien dit as grof beskryf kan word (sien vir dieselfde standpunt *Kroon v Kroon* 1986 4 SA 616 (OK) 617H-I; *Beaumont v Beaumont* 1987 1 SA 967 (A) 994D-H; *Kritzinger v Kritzinger* 1989 1 SA 67 (A) 80C-E; *Dodo v Dodo* 89D-F, 92D-E; sien Barnard ‘Enkele opmerkings oor die voorgestelde nuwe Suid-Afrikaanse egskeidingsreg’ 1978 *THRHR* 263 277; Barnard ‘Nog ’n stap nader aan ’n nuwe egskeidingsreg’ 1979 *De Rebus* 11 14; Nathan ‘Divorce Act 1979: “Fault” as a ground and “fault” as a factor, distinguished: Kenneth Daniels in 1979 *DR* 513’

1979 *De Rebus* 675; Joubert 'Onderhoud na egskeiding' 1980 *De Jure* 80 91; Sonnekus 'Onderhoud na egskeiding' 1988 *TSAR* 440 442-443 is van mening dat die strafgrondslag vir onderhoudsonthouding uitgedien is). Die onderhoud word in *Carstens* geweier omdat die beginsels van geregtigheid en billikheid by die toekenning, 'n afkeur het waar 'n vrou deur twee mans op dieselfde tyd onderhou word.

Die hof in *Dodo v Dodo* word gevra om 'n bestaande onderhoudsbevel *pendente lite* te verhoog en om 'n bedrag vir gedingkoste bykomstig tot 'n vroeëre bedrag te beveel. Sedert applikante, die huishouding verlaat het, het sy ook haar werk verloor en kan geen ander vind nie en vra sy 'n verhoging vir onderhoud *pendente lite* (80D-E). Respondent staan egter 'n bevel ter verhoging van die onderhoud *pendente lite* teen onder andere op grond dat applikante haar aanspraak op onderhoud verbeur het weens haar gedrag met ander mans (80G, 87F). As gesag vir die verbeuring van die eis vir onderhoud word daar op onder andere *Chamani* en *Carstens* gesteun (88C). Die hof in *Dodo* onderskei die *Chamani*-beslissing. As rede word onder andere aangegee dat in *Chamani* die gemenerereg met betrekking tot die voorsiening van onderhoud toegepas is (88G). Dit het beteken dat die skuldige sy aanspraak op onderhoud verbeur het (sien *Chamani* par 3 2 hieronder). Hier word die gemenereregbeginself met betrekking tot die verlies aan onderhoud nie toegepas nie, maar artikel 7(2) van die Wet op Egskeiding 70 van 1979 (88G-H) en dit bemagtig die hof om ook ander faktore as die gedrag van die partye in ag te neem (88H). Die hof wys daarop dat *Carstens* die onderhoud *pendente lite* afwys omdat dit teen die openbare beleid sou wees om dit toe te staan (88H-I) en dan sê die hof:

It would appear from the *Carstens*' case *supra* that, in refusing an order for maintenance *pendente lite*, the learned Judge considered that the living together as man and wife, coupled with that man furnishing her with some support, is conclusive or so overriding as to render irrelevant the other factors mentioned in s 7(2).

Hierdie woorde gee, ten spyte van die hof in *Carstens* se uitdruklike woorde dat die afwys van die bevel nie betrekking het op die gedrag of skuld van die applikante nie (353I), te kenne dat die buite-egtelike gedrag as oorheersende negatiewe faktor, die aansoek gekelder het. Alvorens die hof in *Dodo* sy bevinding maak, wys die hof (89B-F) op Hahlo (*supra* (1985) 371); *Swart v Swart* (1980 4 SA 364 (O) 368C-D); en *Singh*, wat almal met betrekking tot onderhoud ingevolge artikel 7(2) van die Wet op Egskeiding 70 van 1979 aantoon dat "... misconduct may be merely one of many features in which both parties contributed to the breakdown of the marriage, in which event a fair sum may be allowed as maintenance" (*Dodo supra* 89F) Die hof staan die aansoek vir die wysiging van die onderhoudsbevel toe (101G-I), omdat daar gronde vir wysiging aanwesig is en geen stawende bewys vir die onregmatige gedrag voorgelê is nie (90F-G, 91A-B, 91G). Die hof gaan egter verder en sê dat artikel 7(2) aan die hof 'n wye diskresie gee wat inhou dat, desnieteenstaande applikante die huishouding verlaat en met 'n derde

saamwoon, ander faktore wat die erns van die huwelikswangedrag van applikante mag neutraliseer ook in ag geneem mag word (92D-E).

Applikante in *SP v HP* (2009 5 SA 223 (O)) het die huishouding verlaat en doen aansoek om onderhoud *pendente lite*. Sy baseer haar aansoek op die feit dat sy werkloos is en dat vriende by wie sy woon haar onderhou, waarop sy nie meer kan of wil aandring nie (par 3). Respondent staan die aansoek teen (224H-J). Hy voer aan dat applikant die huishouding verlaat het en by haar minnaar ingetrek het en sodoende haar onderhoudsaanspraak verbeur het (parr 5 & 6). Hierdie bewering word bevestig deur 'n verslag van 'n maatskaplike werker vir die kinderhof wat beveel het dat die twee minderjarige kinders van die partye in die sorg van respondent se broer geplaas word (parr 6 & 7). Regter-president Musi wys die aansoek om onderhoud *pendente lite* van die hand. As motivering vir hierdie beslissing word *Carstens* as gesag gebruik. Regter-president Musi vermeld dat die aansoek in *Carstens* afgewys is, omdat die hof van oordeel is dat dit teen die beginsels van geregtigheid en billikheid is dat 'n vrou, gelyktydig deur twee mans onderhou word (226C; sien hierbo). Hierdie beswaar teen die toekenning van onderhoud is volgens regter-president Musi "... not so much about the moral turpitude attaching to the illicit cohabitation, but more about the notion of a woman being supported by two men at the same time" (226C-D; sien ook hierbo waar regter Mullins in *Carstens supra* 3531 sê: "It is not a question of applying the 'guilt' concept to such an application"). Die toekenning word afgewys omdat dit, anders gestel, teen die openbare beleid of beginsels van geregtigheid en billikheid is dat 'n vrou deur twee mans onderhou word.

Die hof in *SH v EH* (2011 5 SA 496 (OKP)) word genader om 'n onderhoudsbevel ingevolge artikel 7(2) van die Wet op Egskeiding 70 van 1979. Die beslissing is egter vir onderhoud *pendente lite* ook van belang. Daar is eenstemmigheid dat die huwelik tussen die eiseres en verweerder onherstelbaar verbrokkel het (par 2). Die feite van die saak word ook kortliks weergegee. Die partye is buite gemeenskap van goed getroud. Verweerder verlaat eiseres en die gemeenskaplike huishouding en trek by 'n vriendin in. Ses maande daarna trek die verweerder by 'n ander man in. Hierdie verhouding is tans tien jaar aan die gang (par 6). Eiseres knoop nadat verweerder die huishouding verlaat het 'n verhouding met 'n gesinsvriend aan by wie sy ook tans bly en 'n intieme verhouding mee het (par 7). Die partye bereik 'n skikkingsooreenkoms in Julie 2003 waarin die verweerder onderneem om aan eiseres R3 000.00 onderhoud per maand te betaal. 'n Dag voordat die egskeiding gefinaliseer sou word, word die boedel van verweerder gesekwestreer en al eiseres se bates word ook op beslag gelê (par 9). Haar bates word eers in 2008 aan haar oorgedra (par 9). Intussen het sy niks om van te leef nie en word sy en haar minderjarige seun deur haar vriend en minnaar onderhou (par 11). In 2006 het verweerder ook die eiseresse aanspraak op sy mediese skema laat stop en in 2009 is die eiseres met kanker van haar onderkaak gediagnoseer en behandel wat haar ongeveer R150 000.00 gekos het (parr 12 & 14). In April 2010 bring eiseres 'n aansoek vir onderhoud *pendente lite* wat geweier is "... on the basis, *inter alia*, that it is unlikely

that the plaintiff will succeed with a claim for maintenance in the court hearing the action” (498H). Met betrekking tot die eis vir onderhoud ingevolge artikel 7(2) van die Wet op Egskeiding 70 van 1979 voer verweerder twee verweersgronde aan waarvan die belangrike vir die saak onder bespreking is dat dit teen die openbare beleid is om onderhoud toe te ken aan ’n vrou wat deur twee mans onderhou word (vgl par 4). In antwoord hierop sê regter Schoeman (500B-C): “Through a long line of cases dealing exclusively with maintenance *pendente lite*, it has become customary not to award maintenance to a spouse who is living in a permanent relationship with another”.

As gesag vir hierdie stelling verwys die hof na drie sake naamlik *Carstens* (500G); *SP v HP* (501A); en *Qonqo v Qonqo* (2010 (FSHC) 107; op 501B van *SH v EH*). *Carstens* en *SP v HP* is direk toepasbaar (sien ook die bespreking hierbo). In *Qonqo*, word die aansoek nie afgewys nie en die rede, volgens *SH v EH* (501C), is omdat daar geen bewys is dat applikante deur haar minnaar onderhou is nie. Aanvullend tot bogenoemde gesag met betrekking tot die toekenning van onderhoud *pendente lite* vermeld die hof in *SH v EH* (par 32):

Marriage entails that the parties establish and ‘maintain an intimate relationship for the rest of their lives which they acknowledge obliges them to support one another, to live together and to be faithful to one another’. [*Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC) par 30].

Hierdie woorde regverdig die gevolgtrekking dat onderhoud *pendente lite* onder omstandighede soos in *SH v EH* nie toegeken sou word nie, indien dit vir beslissing gedien het (vir die bespreking van die onderhoudseis ig a 7(2) van die Wet op Egskeiding 70 van 1979, sien par 4 hieronder). Dit is jammer dat *SH v EH* nie *Dodo* as gesag aanhaal dat artikel 7(2) van die Wet op Egskeiding 70 van 1979 ’n wye diskresie ook by die vraag na onderhoud *pendente lite* verleen nie (sien die bespreking van *Dodo* hierbo). Daar is by my geen twyfel dat onderhoud *pendente lite* aan die applikante (eiseres) toegestaan sou gewees het, indien *Dodo* toegepas is.

Op appèl in *EH v SH* lewer appèlregter Leach die volgende kommentaar (167E-H):

Relying on judgments such as *Dodo v Dodo* ...; *Carstens v Carstens* ...; and *SP v HP* ..., it was argued, both in the high court and in appellant’s heads of argument, that it would be against public policy for a woman to be supported by two men at the same time. While there are no doubt members of society who would endorse that view, it rather speaks of values from times past and I do not think in the modern, more liberal (...) age in which we live, public policy demands that a person who cohabits with another should for that reason alone be barred from claiming maintenance from his or her spouse. Each case must be determined by its own facts, and counsel for the appellant (...) did not seek to persuade us to accept that the mere fact that the respondent was living with Mr Smith operated as an automatic bar to her recovering maintenance from the appellant. Instead he argued that the

respondent had failed to prove that she was entitled to a maintenance order in her favour.

Hierdie *dictum* van die Hoogste Hof van Appèl stel dit, nieteenstaande dit 'n *obiter dictum* met betrekking tot onderhoud *pendente lite* is, sonder twyfel duidelik dat dit nie noodwendig teen die openbare beleid is nie om onderhoud *pendente lite* toe te ken aan 'n gade wat die huishouding verlaat het en in 'n buite-egtelike verhouding met 'n minnaar betrokke is. Die standpunt van Sinclair word, myns insiens, hier sonder uitdruklike vermelding deur die Hoogste Hof van Appèl aanvaar en ondersteun.

Ek sluit hierdie paragraaf af en doen dit by wyse van 'n opsomming. Gemeenregtelik is onderhoud *pendente lite* verbeur indien die applikant, die skuldige party was en die gesamentlike huishouding beëindig het. (*Chamani v Chamani supra*). In *Carstens* word die onderhoud ook geweier uit hoofde van die feit dat dit teen die beginsels van geregtigheid en billikheid is dat 'n vrou deur twee mans op dieselfde tyd onderhou word (sien ook *SP v HP*; *SH v EH* hierbo bespreek). Sinclair (*supra* 97-98) kritiseer die gemeenregtelike skuldbeginsel en stel voor dat die wetgewer ingryp en onderhoud *pendente lite* op dieselfde basis as onderhoud ingevolge artikel 7(2) toeken. Laasgenoemde standpunt word vir die eerste keer sonder vermelding in *Nilsson* toegepas (sien ook *Dodo*; *EH v SH* hierbo bespreek). Die mees resente gesag ondersteun die gedagtegang dat die faktore in artikel 7(2) van die Wet op Egskeiding, 70 van 1979, die toekenning *pendente lite* ook moet beheer en onderlê.

### **3 2 Bydrae tot die Koste van 'n Hangende Huweliksgeding Ingevolge Reël 43(1) van die Eenvormige Hofreëls**

'n Bydrae tot die koste van 'n hangende huweliksgeding word ingevolge Reël 43(1) van die Eenvormige Hofreëls gemagtig (Spero 'Contributions towards costs in matrimonial causes' 1948 *SALJ* 421 is van mening dat omdat bydraes ook geëis kan word voordat die huweliksgeding ingestel is, 'n beter benaming bydrae *stante matrimonio* is).

Indien die partye binne gemeenskap van goed getroud is, het beide gades gelyke bevoegdhede met betrekking tot onder andere die beskikking oor die bates van die gemeenskaplike boedel en die bestuur van die gemeenskaplike boedel (A 14 van die Wet op Huweliksgoedere, 88 van 1984). Desnieteenstaande die feit dat artikel 17(1) van die Wet op Huweliksgoedere 88 van 1984, bepaal dat litigasie deur 'n gade teenoor derdes nie sonder die skriftelike toestemming van die ander gade mag geskied nie, is daar geen verbod in die Wet wat huwelikslitigasie tussen gades verbied nie. Hahlo vermeld in hierdie verband die volgende (*supra* (1985) 428):

Seeing that both spouses have equal powers of disposition, it is, at first blush, difficult to perceive why either of them should ever require a contribution towards costs from the other. However, in fact or in law, one spouse may hold the purse strings. ... In this case, she will be entitled to a contribution towards

her costs, provided, of course, she can satisfy the court that she has a reasonable prospect of success.

In *Carstens* word die aansoek vir onderhoud *pendente lite* afgekeur (sien hierbo par 3 1), maar die aansoek vir tussentydse gedingkoste word egter toegestaan (354F). Die hof is van mening dat “[h]er application for a contribution is in a somewhat different position” (354D). Waarom is die hof van hierdie mening? Die hof verwoord dié mening só (354E-F):

However, I am prepared to accept in applicant’s favour that she may have some patrimonial claim in respect of the assets of the joint estate. The parties were married *in community of property* and there is a house in the joint estate with a net value of about R60 000. I do not feel I should deprive applicant of the opportunity to seek to establish some claim to a share thereof (eie beklemtoning).

Hierdie motivering stem in wese ooreen met die mening van Hahlo hierbo. Die gade getroud binne gemeenskap van goed is geregtig op koste hangende die huweliksgeding omdat die applikant(e) ’n aandeel in die gemeenskaplike boedel het en redelike kans op sukses in die vermoënsregtelike eis in die egskeidingsgeding het. Hy wil haar nie haar eis met betrekking tot ’n aandeel in die gemeenskaplike boedel ontnem nie, desnieteenstaande haar aansoek vir onderhoud *pendente lite* onsuksesvol is.

’n Kostebydrae word as deel van die onderhoudsplig beskou waar die partye buite gemeenskap van goed getroud is (sien oa *Lyons v Lyons* 1923 (TPD) 345 346; *Boezaart & Potgieter v Wenke* 1931 (TPD) 70 83; *Butterworth v Butterworth* 1943 (WLD) 127 129; *Reid v Reid* 770; *Zaduck v Zaduck supra* 80C-D; *Chamani supra* 806D; *Dodo v Dodo supra* 96F; *AM v RM supra* 227H; *Spiro supra* 420; *Hahlo supra* (1985) 428; sien egter *Davis v Davis supra* 114, waar die hof aantoon dat daar ’n belangrike verskil tussen onderhoud en tussentydse koste bestaan en dit skep *prima facie* die indruk dat tussentydse gedingkoste nie deel van die onderhoudsplig is nie. Die eerste indruk word egter later duidelik gestel dat hoewel die logiese basis vir onderhoud en gedingkoste dieselfde is, die toekenning van die een van die ander mag verskil; sien ook *Reid v Reid supra* 770). Die aanspraak op gedingkoste word ook verbeur, indien ’n gade getroud buite gemeenskap van goed sy/haar reg op onderhoud verbeur (sien *Chamani supra* 806H-807A, 808G; *Dodo supra* 97A). Die geldigheid van hierdie standpunt word vervolgens ondersoek.

Die hof in *Carstens* verwys (354F) na *Chamani* waar aanvaar is dat die partye buite gemeenskap van goed getroud was (*Chamani supra* 805D) en die aansoek om tussentydse gedingkoste afgekeur is omdat applikante haar aanspraak op onderhoud verbeur het (*Carstens supra* 354F-G). Hierop antwoord *Carstens* (354G): “This case was decided before the Divorce Act 70 of 197 came into operation. In view of the provision of that Act relating to property rights on divorce, it does not seem to me that the views expressed in *Chamani*’s case necessarily still apply”.

Hierdie stelling regverdig die gevolgtrekking dat 'n aansoek vir tussentydse gedingkoste nie outomaties verbeur word nie, as onderhoud *pendente lite* verbeur word nie. Onderhoud *pendente lite* mag verbeur word, omdat daar geen redelike vooruitsig op sukses daarvoor in die hoofgeding bestaan nie, desnieteenstaande die onderhoud nie outomaties verbeur word weens die onregmatige verlating van die gemeenskaplike huishouding nie (dit is presies wat in *Chamani* en *Carstens* gebeur het, sien hierbo par 3 1). Wanneer dit kom by tussentydse gedingkoste verander die prentjie, indien die hoofgeding in plaas van of addisioneel tot onderhoud na egskeiding, ook 'n vermoënsregtelike eis bevat. Die fokus is nie alleen op onderhoud nie, maar bevat ook 'n aanspraak op bates. Die bepaling waarna in die Wet op Egskeiding 70 van 1979 in die aanhaling verwys word, is waarskynlik artikel 9 wat verbeuring van vermoënsregtelike voordele beheer. Die hof sou myns insiens ook 'n bevel vir tussentydse gedingkoste toegestaan het waar die eis in die hoofgeding, 'n eis met betrekking tot ouerlike verantwoordelikhede is (sien ook Heaton *South African Family Law* (2010) 189), desnieteenstaande applikante die huishouding onregmatig verlaat het en die alleenoorsaak vir die huweliksverbodding was. Dieselfde beslissing sou ook gehandhaaf word waar die applikante, 'n aansoek om tussentydse gedingkoste bring vir 'n hoofs eis by egskeiding ingevolge die aanwasbedelling of herverdeling van bates ingevolge artikel 7(3) van die Wet op Egskeiding 70 van 1979, en die eis vir onderhoud *pendente lite* nie suksesvol is nie.

Hierdie siening word myns insiens in *SP v HP* ondersteun wanneer regter-president Musi daarop wys (par 11) dat desnieteenstaande applikante se aansoek in *Carstens* vir onderhoud *pendente lite* afgewys is, sy wel met tussentydse gedingkoste geslaag het. Die rede hiervoor verwoord hy só (226D-F):

The rationale for this was that the parties were married **in community of property** and as such the applicant had a share in the assets of the joint estate. It was held that she was entitled to claim such share through the divorce action and for that reason she was entitled to a contribution towards the costs to enable her to pursue her claim. *In casu* the parties are married **out of community of property** and there is no indication on the papers that she is making any claim against the estate of the respondent (eie beklemtoning).

Die aansoek vir tussentydse gedingkoste word gevolglik in *SP v HP* van die hand gewys (par 12) omdat applikante geen hoofs eis met betrekking tot vermoënsregte maak nie.

Die gesag hierbo vermeld, toon myns insiens aan dat dit irrelevant is of die partye binne of buite gemeenskap van goed getroud is. Die sukses van die aansoek vir tussentydse gedingkoste berus op die redelike vooruitsig van sukses op die regshulp in die egskeidingsgeding. Dit regverdig verder dat die grondslag van die aansoek vir tussentydse gedingkoste, wat as deel van die onderhoudsaanspraak gesien is waar die partye buite gemeenskap van goed getroud is (par 3 2 hierbo en gesag

daar vermeld), verander is en dat dit op die beskerming van die regshulp in die egskeidingsgeding berus.

#### **4 Onderhoud Ingevolge Artikel 7(2) van die Wet op Egskeiding 70 van 1979**

Die hof in *SH v EH* staan vir die eerste keer in ons regspraak, onderhoud aan die eiseres toe, desnieteenstaande die feit dat die eiseres in 'n buite-egtelike verhouding met haar minnaar saamleef (parr 49 & 51; vir 'n opsomming van die feite sien par 3 1 hierbo). Die hof kom tot hierdie beslissing deur op drie aspekte te wys.

Eerstens, verwys die hof na die doelstelling van artikel 7(2) en vermeld dat artikel 7(2) se bewoording nie voorsiening maak dat onderhoud verval wanneer die ontvanger in 'n verhouding verwant aan 'n huwelik met iemand saamleef nie. Dit sal plaasvind wanneer die onderhoudsooreenkoms ingevolge artikel 7(1) daarvoor voorsiening maak (par 31).

Tweedens, skep saambly geen onderhoudsplig *ex lege* nie en die hof verwys (par [33]) dan na *Volks v Robinson* (2005 5 BCLR 446 (KH) parr 55 & 56). Dit bring mee (par 34):

From this decision it is clear that the plaintiff has no right to maintenance from S now or in the future unless they get married. ... The plaintiff is adamant that she cannot marry S due to her age and health. It is also clear from her evidence that she cannot earn an income for the same reasons. ... The reasons for plaintiff's decision not to marry S are reasonable under the circumstances of the case.

Derdens, verwys die hof na die faktore vermeld in artikel 7(2) en sê dat die faktore nie eksklusief of uitputtend is nie en dat die hof enige ander faktor wat na oordeel van die hof in aanmerking geneem behoort te word, in ag mag neem (par 36). Die hof opper dan die vraag (5031): "Can it be said that the fact the the plaintiff is living with S is determinate of the issue?" Die hof beantwoord die vraag in die volgende woorde (5031-504D):

When the plaintiff and her son were in dire straits due to the sequestration of the defendant's estate and the subsequent attachment of the plaintiff's property, it was S who supported plaintiff and M when the defendant failed to do so. It is immaterial whether the defendant was unable to support the plaintiff and their son, or whether he was merely unwilling to do so.

[41] Other legislation also makes it clear that the legislature envisaged that a man can be supported by two women. In terms of the provisions of s 8(4) of the Recognition of Customary Marriages Act 120 of 1998, a court dissolving a customary marriage has the powers contemplated in ss 7, 8, 9 and 10 of the Act. This has the effect that with polygamous customary marriages a husband will have the right to be supported by more than one wife, post-divorce, if circumstances demand it. Although it might have been a concept that was unacceptable in a previous dispensation, the concept is not unacceptable today.

[42] I am of the opinion that in the circumstances of this case it cannot be said that it is against public policy that the defendant should be liable to pay maintenance to the plaintiff; there is no legislative prohibition and I find that there is no general public policy to that effect or moral prohibition.

Die hof maak gevolglik 'n onderhoudsbevel van R2000.00 per maand ten gunste van eiseres (par 48). Eiseres het R5000.00 per maand geëis en selfs dit merk die hof op, sou nie ten volle in haar onderhoudsbehoefte voorsien nie (504H-I). Omdat die verweerder se boedel onder sekwestrasie is, is hy ook nie in 'n posisie om, volgens die hof, haar meer as die toegekende bedrag te betaal nie (parr 44 & 48). Hoe die tekort aan haar lewensonderhoud aangevul word, word nie vermeld nie, maar dit is nie vergesog om te dink en te meld dat dit deur S aangevul sal word nie, alhoewel hy nie daartoe verplig is nie. Die gevolgtrekking kan gehandhaaf word dat dit nie teen die openbare beleid is nie dat 'n geskeide gade beveel mag word om onderhoud te betaal indien omstandighede dit regverdig, desnieteenstaande die feit dat die ander gade in 'n buite-egtelike verhouding betrokke is en ook deur die minnaar onderhou word.

Die verweerder appelleer egter teen die beslissing en die hof in *EH v SH* staan die appèl toe (parr 15 & 17). Die rede waarom die appèl suksesvol is, word gemaak op 'n basiese beginsel wat op onderhoudstoekenning van toepassing is, naamlik die eiseres (of dan die respondent in die appèl) het nie 'n behoefte aan onderhoud bewys nie (parr 13 & 14). Die Hoogste Hof van Appèl het egter nie bevind dat die beginsel soos verwoord in die hof *a quo*, sonder regsbegroning is nie. Inteendeel, daar is stilswyende goedkeuring dat onderhoud ingevolge artikel 7(2) van die Wet op Egskeiding 70 van 1979 toelaatbaar is, wanneer die eiser in 'n buite-egtelike verhouding met 'n minnaar saamleef en omstandighede die onderhoudstoekenning regverdig (sien die bespreking hierbo par 3 1).

## 5 Slot

(a) Die beleid met betrekking tot onderhoudstoekenning *pendente lite* het verander. Die gemeenregtelike skuldbeginsel dat die applikant(e) onderhoud *pendente lite* weens onregmatige gedrag verbeur, word deur die meerderheid van resente gesag verwerp. Die sukses van die aansoek berus op die redelike vooruitsig van sukses in die hoofgeding (sien par 3 1 hierbo).

(b) Die standpunt dat die onderhoudsaanspraak, die grondslag vir 'n aansoek vir tussentydse gedingkoste is waar die partye buite gemeenskap van goed getroud is (par 3 2 hierbo en gesag daar vermeld), word ook verander. Die sukses van 'n aansoek vir tussentydse gedingkoste berus op die redelike vooruitsig op sukses van die hoofgeding.

(c) Paragraawe (a) en (b) plaas dus die sukses van beide aansoeke op dieselfde beleid en grondslag.

(d) *SH v EH* bevind vir die eerste keer in ons regspraak dat onderhoud ingevolge artikel 7(2) van die Wet op Egskeiding 70 van 1979 toelaatbaar is, ook as 'n gade in 'n buite-egtelike verhouding met 'n minnaar saamleef. Die hof kom tot hierdie beslissing op grond van onder andere artikel 7(2) wat die hof magtig om enige faktor te gebruik wat na oordeel van die hof in aanmerking geneem mag word (sien par 4 hierbo).

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## Onlangse regspraak/Recent case law

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### *Body Corporate Palm Lane v Masinge* 2013 JDR 2332 (GNP)

*Discretion and powers of the court in applications for sequestration*

#### 1 Introduction

In *Body Corporate Palm Lane v Masinge* (2013 JDR 2332 (GNP)) the court exercised its discretion in terms of section 12(1) of the Insolvency Act 24 of 1936 against the granting of a final order for sequestration even though all the requirements for the granting of such order in terms of section 12(1) were satisfied. The court thus came to the assistance of the respondent-debtor by allowing him the opportunity to pay off his debt rather than have his estate sequestrated and being obliged to surrender his assets and thus also being subjected to the stigma and restrictions of insolvency. In this respect, it is to be noted that it is currently a world-wide trend to accommodate insolvent or over-indebted debtors and to retreat from the principle of maximising returns for creditors as the only objective of consumer insolvency regimes. The following observation in a recent report of the World Bank is pertinent in this regard (see Working Group on the Treatment of the Insolvency of Natural Persons *Report on the treatment of the insolvency of natural persons* Insolvency and Creditor/Debtor Regimes Task Force, World Bank 2012 par 393 – available at <http://bit.ly/Oft3hp> – hereafter the World Bank Report):

[A] regime for treating the insolvency of natural persons not only pursues the objectives of increasing payment to individual creditors and enhancing a fair distribution of payment among the collective of creditors, but, just as importantly, such a regime pursues the objectives of providing relief to debtors and their families and addressing wider social issues. In achieving those objectives, a regime for the insolvency of natural persons should strive for a balance among competing interests.

The court in *Masinge* did not elaborate much on its decision. References to relevant case law and provisions of the Insolvency Act are few and far between and the court's viewpoints and reasons for its decision have to be deduced from what is read between the lines. The aim of this case discussion is thus, first of all, to discuss and analyse the court's decision with specific reference to the applicable provisions of the Act and relevant case law that relate to the question as to what the discretion of the court pertaining to the granting or refusing of sequestration applications entails. *Masinge* concerned a compulsory sequestration application, but it should be noted that the Act also affords

discretion to the court to grant or refuse a voluntary sequestration application even though the requirements in terms of the Act have been complied with. The provisions of the Act and relevant case law in this regard are therefore also investigated as it may shed some light on the issues under consideration. After discussing the issues relating to the court's discretion, the implications of the ruling in *Masinge* and the powers of the court when refusing a sequestration order are discussed. In light of this discussion, proposals are made for the amendment of the relevant provisions of the Act in order to allow the court to make certain orders when exercising its discretion to dismiss an application for sequestration. Paragraph 4 contains our proposals for amendment of the Act and concluding remarks.

## 2 Facts and Decision

*Masinge* concerned an application for the compulsory sequestration of the respondent's estate. A provisional order had already been obtained by the applicant and the matter was before Kubishi J for a final sequestration order (par 1). The court referred to the requirements for the granting of a final sequestration order in terms of section 12 of the Insolvency Act (par 3; see the discussion in par 3.1 below).

It was not in dispute that the respondent was indebted to the applicant in the amount of R32 003,16 for levies and costs payable to the applicant in terms of the Sectional Titles Act 95 of 1986. The levies and costs were payable in respect of immovable property situated in Pretoria and owned by the respondent. It was also common cause that the respondent had committed an act of insolvency in that he failed to satisfy a warrant of execution issued against him in respect of the debt. The act of insolvency (see s 8(b) of the Insolvency Act) entailed that the respondent was unable to point out any disposable goods, movable or immovable, to the sheriff and that the latter could not locate any goods for attachment (par 3).

The respondent opposed the application on the basis that the sequestration would not be to the benefit of the creditors (par 4). However, no details are provided in the judgment as to the grounds for such allegation.

Contrary to our courts' unsympathetic attitude generally as regards debtors' interests in sequestration applications (see Boraine & Roestoff 'Revisiting the state of consumer insolvency in South Africa after twenty years: The courts' approach, international guidelines and an appeal for urgent law reform' 2014 *THRHR* 351 361 *et seq*), Kubishi J was of the view that he should exercise his discretion against the applicant's request for a final sequestration order. Referring to *Epstein v Epstein* (1987 4 SA 606 (C) 612G–J) the court pointed out that even if a court is satisfied that the creditor has established his or her claim, that the debtor has committed an act of insolvency or is in fact insolvent, and there is reason to believe that it would be to the advantage of creditors that the debtor's estate be sequestrated, the court nevertheless has a discretion, which

must be exercised judicially, to grant or refuse a final sequestration order (par 5).

The court stated that it was inclined to give the respondent the benefit of the doubt. The respondent's evidence was that he initially was not aware that he had to pay levies to the applicant. By the time he realised that he had to pay he was in arrears to such an extent that he was not able to pay the amount due in one lump sum. The fact that his wife lost her employment further contributed to his inability to repay the levies in one lump sum. The respondent then approached his attorney to negotiate a settlement to repay the debt in instalments, but the settlement proposals were not acceptable to the applicant who insisted upon payment in one lump sum (par 6).

Kubishi J stated that the applicant's reasons for requiring the debt to be paid at once were understandable, but indicated that he was of the view that the respondent should be afforded the opportunity to repay the debt in instalments whilst continuing to pay the monthly levy. The court pointed out that the applicant's evidence was that the respondent did not have any other asset apart from the house. Accordingly the application for sequestration was refused. No order was made as to costs and each party had to pay its own costs of suit (parr 6–8).

### **3 Analysis of Decision**

#### **3.1 Requirements for Sequestration Applications**

It is trite law that a High Court hearing an application for the sequestration of a debtor's estate must firstly decide whether the applicant has met the prescribed requirements for either sequestration by means of voluntary surrender or compulsory sequestration (see ss 6, 10 & 12 of the Insolvency Act discussed below). Proof of the advantage to creditors requirement is of paramount importance and a sequestration order cannot be granted unless the advantage to creditors requirement has been satisfied. Moreover, when the court has to exercise its discretion as to whether to grant or refuse the order after all requirements have been met, our courts, in line with the present pro-creditor approach in South African consumer insolvency law, will generally be guided by considerations which are more favourable to the interests of the creditors than those of the debtor (see *Boraine & Roestoff supra* 361 *et seq.*, and the discussion of relevant case law below).

It is interesting to note that proof of the advantage to creditors requirement was not required in applications for voluntary surrender in terms of the previous Insolvency Act 32 of 1916 (see *Ex parte Terblanche* 1923 (TPD) 168 170) and orders for voluntary surrender were generally only refused when the granting thereof would be to the detriment of creditors (*Ex parte Theron* 1923 (OPD) 46; *Wille & Millin Mercantile Law of South Africa* (1925) 348) or if there was a clear indication of fraud or a lack of *bona fides* on the part of the debtor (*In re Spiers Brothers* 1932

(NLR) 618 624). Contrary to the approach of our courts today, the courts then took into consideration the interests of both debtors and creditors when exercising their discretion in voluntary surrender applications. In *Ex parte Packer* 1933 GWL 34 37 the court explained as follows:

[I]t would seem that the Court in exercising its discretion should bear in mind the interest of both the debtor and those of the general body of creditors. On the one hand it would not come to the assistance of a debtor whose conduct is shown to have been dishonest or reprehensible; on the other hand it would not accept a surrender if that course would be unjustly detrimental to creditors, for instance, when it is shown that although the debtor at the time is insolvent through misfortune he has prospects which may later enable him to pay his creditors. It seems to me that in a case of a debtor whose financial position has become intolerable and hopeless as a result of misfortune the Court could in the exercise of its discretion come to the conclusion that his interests should outweigh those of his creditors who would not receive any dividend and could not benefit by an order resulting in their debtor being freed from his liabilities.

The other requirements (ito ss 6, 10 & 12) must of course also be met before a sequestration order can be granted, and of paramount importance is that the advantage principle should logically only become relevant once it is accepted that the debtor is indeed factually insolvent, or in the case of compulsory sequestration, where the applicant may also rely on an act of insolvency, once such an act is established on the facts. The fact of the matter is that once the advantage principle is considered by the court it should be accepted that the court is in fact dealing with an insolvent debtor.

Where application is made for compulsory sequestration in terms of the current Insolvency Act, the court will initially place the estate under provisional sequestration. The insolvent or any creditor is then entitled to oppose the granting of a final order by addressing the court on the return date of the rule *nisi* as to the reasons why the application for the final order should be refused (s 11(1); Bertelsmann, Evans, Harris, Kelly-Louw, Loubser, Roestoff, Smith, Stander & Steyn *Mars The law of insolvency in South Africa* (2008) 130).

As regards the requirements for the granting of the provisional order and the applicant's burden of proof in this regard, section 10 provides as follows:

If the court to which the petition for the sequestration of the estate of a debtor has been presented is of the opinion that *prima facie* –

- (a) the petitioning creditor has established against the debtor a claim such as is mentioned in subsection (1) of section *nine*; and
- (b) the debtor has committed an act of insolvency or is insolvent; and
- (c) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated,

it may make an order sequestrating the estate of the debtor provisionally.

Section 10 states that the court “*may* make an order sequestrating the estate of the debtor” and it would therefore appear that the court has a discretion in this regard (see eg *Epstein v Epstein supra* 612; *Nedbank Ltd v Potgieter* unreported case no 2012/5210 (GSJ) par 15; *Julie Whyte Dresses (Pty) Ltd v Whitehead* 1970 3 SA 218 (D) 219).

As regards the requirements for the granting of a final sequestration order, section 12(1) provides as follows:

If at the hearing pursuant to the aforesaid rule nisi the court is satisfied that –

- (a) the petitioning creditor has established against the debtor a claim such as is mentioned in subsection (1) of subsection nine; and
- (b) the debtor has committed an act of insolvency or is insolvent; and
- (c) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated,

it may sequester the estate of the debtor.

In terms of section 12(2) the court, if it is not satisfied as regards the requirements set out in section 12(1),

[S]hall dismiss the petition for the sequestration of the estate of the debtor and set aside the order of provisional sequestration or require proof of the matters set forth in the petition and postpone the hearing for any reasonable period but not *sine die*.

It is thus clear from the word “shall” in section 12(2) that the court is obliged to dismiss an application for sequestration and set aside the order for provisional sequestration where the requirements are not satisfied (*Amod v Khan* 1947 2 SA 432 (N) 435; *Braithwaite v Gilbert (Volkskas Bpk intervening)* 1984 4 SA 717 (W) 723G; Meskin, Galgut, Magid, Kunst, Boraine and Burdette *Insolvency law and its operation in winding-up* (1990) par 2 1 13; Bertelsmann *et al* 134–135).

In terms of section 12(1) it would appear from the use of the words “*may* sequester” that the court is not bound to grant a sequestration order where the requirements are indeed satisfied as the court is once again afforded a discretion (see eg *Amod v Khan supra* par 435).

The requirements for the acceptance by the court of the surrender of the debtor’s estate are found in section 6(1) which reads as follows:

If the court is satisfied that the provisions of section four have been complied with, that the estate of the debtor in question is insolvent, that he owns realizable property of a sufficient value to defray all costs of the sequestration which will in terms of this Act be payable out of the free residue of his estate and that it will be to the advantage of creditors of the debtor if his estate is sequestrated, it may accept the surrender of the debtor’s estate and make an order sequestrating the estate.

It should be clear from the use of the words “*may* accept the surrender” that the court still has a discretion to reject the surrender of the estate even when it is satisfied as regards all the requirements in

section 6(1) (see eg *Ex parte Hayes* 1970 4 SA 94 (NC) 96; *Ex parte Bouwer and similar applications* 2009 6 SA 382 (GNP) 385). This is particularly the case where creditors appear to oppose the application (*Bertelsmann et al* 72).

It should be noted that the degree of proof with regard to the advantage to creditors requirement is more stringent in the case of voluntary surrender than in the case of compulsory sequestration (compare the wording of ss 6(1), 10(c) & 12(1)(c)). The reason for this difference is that a debtor knows about his own affairs and can adduce facts to show an advantage to creditors. A creditor, on the other hand, is seldom (except in the case of so-called “friendly sequestrations”) in possession of sufficient facts relating to the debtor’s assets to be able to provide details to the court. Consequently our courts have generally been inclined to accept, as proof, very little evidence that sequestration would be to the advantage of the creditors in compulsory sequestration applications (*Amod v Khan supra* par 438; *Hillhouse v Stott* 1990 4 SA 580 (W) 584; *Nedbank Ltd v Thorpe* 2009 JOL 24292 (KZP) par 51).

From the above discussion it should be evident that a court has to exercise its discretion at different stages of the sequestration proceedings. First of all it should exercise a discretion, after all relevant facts and circumstances have been taken into consideration, as to the question whether it is *prima facie* of the opinion (s 10) or satisfied (ss 6 & 12) that the relevant requirements have been met. Should the court be of such opinion, or if it is so satisfied, it must secondly decide, after consideration of all relevant facts and circumstances, whether it will in fact grant or refuse the order.

### 3 2 Discretion of Court

#### 3 2 1 Advantage and Discretion

##### 3 2 1 1 Case Law

Advantage to creditors upon sequestration is not the necessary concomitant with the commission of an act of insolvency (*London Estates (Pty) Ltd v Nair* 1957 3 SA 591 (N) 592) and advantage still needs to be proved even where the applicant is armed with a *nulla bona* return (see *Mamacos v Davids* 1976 1 SA 19 (C) 22 & *cf* the facts of *Masinge* as regards the commission of an act of insolvency in terms of s 8(b)).

With regard to the meaning of advantage to creditors our courts have repeatedly cited the *dictum* in *Meskin & Co v Friedman* (1948 2 SA 555 (W) 559) that there must be “a reasonable prospect – not necessarily a likelihood, but a prospect which is not too remote – that some pecuniary benefit will result to creditors”. The court in *Meskin* referred to the so-called “indirect” advantages (see also *Stainer v Estate Bukes* 1933 (OPD) 86 90) which are not in themselves of a pecuniary character, such as the advantage of investigation of the insolvent’s affairs under the powers of enquiry given by the Act. In this regard the court stated that the right of

investigation is not an advantage in itself (see also *London Estates (Pty) Ltd v Nair supra* par 559; *Mamacos v Davids supra* parr 21F–22C). The right of investigation is given as a possible means of securing ultimate material benefit for the creditors, for example in the form of the recovery of property disposed of by the insolvent or the disallowance of doubtful or collusive claims. According to the court in *Meskin* it is thus not necessary to prove that the insolvent has any assets. Even if there are none at all, it would be sufficient if it could be shown that there is a reasonable prospect that investigation in terms of the Insolvency Act may result in the discovery of assets to the benefit of the creditors (*Meskin supra* par 559; see also *Nedbank Ltd v Thorpe* parr 52 & 53; Smith ‘The recurrent motif of the Insolvency Act – advantage of creditors’ 1985 *Modern Business Law* 27 32).

It has been held that an advantage to creditors is proved generally in applications for compulsory sequestration when the petitioning creditor establishes that the debtor has a substantial estate to sequester and that the creditors cannot obtain payment except through sequestration (*Hill & Co v Ganie* 1925 (CPD) 242 245; *Trust Wholesalers & Woolens (Pty) Ltd v Mackan* 1954 2 SA 109 (N) 111; *Realizations Ltd v Ager* 1961 4 SA 10 (N) 11; *Mamacos v Davids supra* par 20C). However, in *Realizations (supra* parr 11–12), Williamson JP stated that a court, when considering the advantage to creditors requirement, should not consider the question whether alternative methods of obtaining payment might bring better results than sequestration. This is an issue to be considered at the stage of the proceedings when the court has to decide whether it should refuse an order despite the fact that all requirements entitling the applicant to an order have been established (see also *Trust Wholesalers supra* parr 112–113). However, in other cases our courts when considering the advantage to creditors requirement have indeed considered alternative procedures and debt repayment options in order to come to a decision as to whether sequestration is the best option to deal with the debt situation of the debtor (see eg *Ex parte Van den Berg* 1949 (WLD) 816 817; *Gardee v Dhanmanta Holdings* 1978 1 SA 1066 (N) 1070; *Madari v Cassim* 1950 2 SA 35 (N) 39; *Levine v Viljoen* 1952 1 SA 456 (W) 461H; *Behrman v Sideris* 1950 2 SA 366 (T) 370–372; *Sacks Morris (Pty) Ltd v Smith* 1951 3 SA 167 (O) 173).

Case law indicates that the machinery of sequestration should only be implemented in cases where it would be cost-effective to do so, namely, when the proceeds of the assets would be sufficient to cover at least the cost of sequestration. In *Van den Berg (supra* par 817), Ramsbottom J observed that to use the machinery of sequestration to distribute amongst the creditors the small amount which may be available from the realisation of the assets after paying the costs of administration is really “to use a sledge hammer to break a nut”. The court was of the view that the administration procedure rather than the “expensive machinery” of sequestration was the best procedure to deal with the estate in this instance. In *Gardee (supra* par 1070), Didcott J held that where there is a single creditor who has a judgment against the debtor upon which he can

execute, compulsory sequestration is a more expensive course which is not to the advantage of creditors. This situation should, however, be distinguished from cases where there is no judgment against the debtor. In these cases it would probably not be more advantageous to the creditor to issue summons and to proceed to judgment and execution, especially where the creditor knows that the debtor is hopelessly insolvent and will not be able to meet the judgment. In such a case the machinery of sequestration would probably be more advantageous than trial procedure (*Absa Bank Ltd v De Klerk* 1999 SA 835 (E) 839; *Maxwell v Holderness* 2009 JOL 23740 (KZP) par 9).

In several other cases the court preferred the machinery of sequestration as a measure to deal with the debtor's financial situation. In *Julie Whyte Dresses (supra 220)*, for example, the respondent-debtor requested the court to implement garnishee proceedings and to refuse the granting of a provisional sequestration order. However, Muller J refused to exercise its discretion in favour of the respondent-debtor as he found that there was nothing to show that garnishee proceedings would be less expensive or more advantageous to the general body of creditors than the administrative procedure provided for by section 23(5) and (11) of the Insolvency Act.

In *Levine v Viljoen (supra 459–460)*, Roper J stated that the machinery of administration provides an inexpensive and convenient means of dealing with the estates of small debtors of the salaried or wage-earning class or those whose business affairs have been simple. However, the court was of the view that it is unsuitable for use in the case of more elaborate estates where transactions have been more complex, especially because of the limited facilities for investigation available to the trustee of the sequestered estate.

As regards applications for voluntary surrender, our courts have also considered alternative measures such as debt review in terms of the National Credit Act 34 of 2005 (NCA) (*Ex parte Ford and two similar cases* 2009 3 SA 376 (WCC) 384; *Ex parte Arntzen (Nedbank Ltd as intervening creditor)* 2013 1 SA 49 (KZP) 56–57; *Ex parte Shmukler-Tshiko* 2013 JOL 29999 (GSJ) par 33). In *Ford (supra par 18)*, the court refused to exercise its discretion in favour of the applicants for an order for the voluntary surrender of their respective estates, as it found that the machinery of the NCA was the more appropriate mechanism to be used and thus more advantageous than sequestration (Boraine & Van Heerden 'To sequestrate or not to sequestrate in view of the National Credit Act 34 of 2005: A tale of two judgments' 2010 *PER* 84 113). The court ultimately refused to grant the sequestration order, despite the fact that creditors did not intervene to oppose the matter and despite the fact that the applicants testified that debt review in terms of the NCA would not be a workable solution to their debt problems (see Roestoff & Coetzee 2012 'Consumer debt relief in South Africa; Lessons from America and England; and suggestions for the way forward' *SA Merc LJ* 53 62; *Ford supra par 15*).

A factor which according to the court in *Arntzen* (*supra* 57) plays an important role with regard to the advantage to creditors requirement in voluntary surrender applications is whether, despite the applicant-debtor being insolvent, his or her income exceeds his or her expenses as this would enable the applicant to liquidate his indebtedness over time (see also *Ex parte Bouwer supra* 385C–D). It should be noted that such a situation may convince the court to refuse a sequestration order as sequestration would see the debtor obtain a discharge of all his pre-sequestration debts. However, in order to ascertain whether the acceptance of the surrender of an estate would be to the advantage of creditors it is not only the income of the applicant that needs to be disclosed, but also all other relevant information regarding the applicant's estate as the surrender of an estate involves, amongst others, a financial enquiry (*Ex parte Bouwer supra* par 7).

### 3 2 1 2 Analysis

The advantage to creditors requirement clearly plays a central role in the exercise of the court's discretion and our courts' emphasis on the creditors' position when considering this requirement should obviously be attributed to the fact that the Act currently sets such a requirement for sequestration applications. It is thus noticeable that the court in *Masinge*, contrary to the current pro-creditor approach of our courts, has in fact taken the debtor's best interest and convenience into consideration when exercising its discretion.

From the case law discussed above and the facts and decision in *Masinge* in this regard, it would appear that our courts are generally willing to refuse a compulsory sequestration order when they are of the opinion that the repayment of a debt in instalments might be a better or more cost-effective option to deal with the debt situation of the debtor and thus be more advantageous to creditors. However, it should be noted that the court in *Masinge* apparently did not decline the order because it was of the view that the repayment option would be a better or less expensive solution and that the advantage requirement was thus not complied with. The court noted that the application was opposed by the respondent on the basis that sequestration was not to the benefit of the creditors, but it did not pronounce upon this issue. It merely stated that its view was that it should exercise its discretion against the granting of a final order despite the fact that the requirements of section 12 were complied with. The court held that the respondent should be afforded an opportunity to pay off his debt in instalments, and in this instance it appears that the court took into consideration the debtor's position and convenience when exercising its discretion rather than the interests of the creditor. The court mentioned that the applicant's evidence was that the respondent's house was his only asset and the fact that the debtor could lose his home when his estate was to be sequestrated was probably a factor which convinced the court to exercise his discretion in favour of the respondent-debtor, by allowing him the opportunity to repay his debt in instalments. The fact that the applicant's house was his only asset may

also have had a bearing on the advantage to creditors requirement as such a situation may imply that there is insufficient assets in the estate to establish an advantage to creditors. However, as indicated, the court apparently did not refuse the application on the basis that there was no advantage proven.

### **3 2 2 Discretion when all Requirements are Met**

#### 3 2 2 1 Case Law

Apart from exercising its discretion in relation to the various requirements of a sequestration application, be it voluntary or compulsory, the court still has a discretion to grant or deny the order (see eg *Firstrand Bank Ltd v Evans* 2011 4 SA 597 (KZD) par 27; *Nedbank Ltd v Potgieter supra* par 15; *Ex parte Ford supra* par 19; *Ex parte Bouwer supra* 385).

As regards the question as to how the court should exercise this discretion, it has been held that the court has an overriding discretion which must be exercised judicially and upon consideration of all the facts and circumstances (see eg *Julie Whyte Dresses (Pty) Ltd v Whitehead supra* 219; *Nedbank Ltd v Potgieter supra* par 15). The court has a wide discretion and may refuse to sequester an estate even where there has been an act of insolvency. However, it is a discretion to be exercised not capriciously, but in accordance with the correct principles (*Pelunsky & Co v Beiles* 1908 (TS) 370 372). No exhaustive or general rule can be laid down and each case thus depends on its own facts (*Consolidated Estates and Collection Agency v Choonara* 1929 (WLD) 92 93; see also *Bertelsmann et al* 141). So, for example, the court refused a final sequestration order where it was of the opinion that an administration order in terms of the Magistrates' Courts Act 32 of 1944 (MCA) was in existence and working satisfactorily (*Barlow's (Eastern Province) Ltd v Bouwer* 1950 4 SA 385 (E) 397; *Madari v Cassim supra* 39). In *Chenille Industries v Vorster* (1953 2 SA 691 (O) 701) the court refused to grant the order despite the fact that an act of insolvency was committed and proved where there was a substantial surplus of assets over liabilities and the court was of the view that the likelihood of injury or hardship to creditors was more remote than in the case where the excess was small or problematical. In *Amod v Khan (supra* 439), Hathhorn JP exercised his discretion in favour of the respondent-debtor where it appeared that the object of the applicant-creditor was not to obtain payment of his debt, but to prevent the debtor from obtaining payment against the creditor's son. Hathhorn JP made the following observation regarding the nature of the court's discretion:

[T]he section enacts that if the Court is satisfied 'it may sequester the estate of the debtor', and in my judgment 'may' in that phrase does not mean 'must'. The word 'may' is frequently used by the legislature when it gives the power of decision to the Court, and it is natural that ordinarily the legislature should not intend to bind the Court to a particular course when it decides a

case. If it does so intend, it uses appropriate words as it has done in sub-sec. (2) in the phrase 'it shall dismiss.

However, the general approach of our courts appears to be that the court is indeed bound to grant a sequestration order when all requirements are met and the court may not exercise its discretion in favour of the debtor-respondent unless special circumstances are present (*Millward v Glaser* 1950 3 SA 547 (W) 554; *Port Shepstone Fresh Meat and Fish Co (Pty) Ltd v Schultz* 1940 (NPD) 163 165; *Chenille Industries v Vorster supra* par 700; *Firstrand Bank v Evans supra* par 27). Furthermore, the exercising of the discretion should in all instances bear a close relation to considerations relating to the rights and best interests of the creditors (*Cyril Smiedt (Pty) Ltd v Lourens* 1966 1 SA 150 (O) 155). In *Firstrand Bank v Evans (supra* par 27) Wallis J explained as follows:

There is little authority on how this discretion should be exercised, which perhaps indicates that it is unusual for a court to exercise it in favour of the debtor. Broadly speaking, it seems to me that the discretion falls within the class of cases generally described as involving a power combined with a duty. In other words, where the conditions prescribed for the grant of a provisional order of sequestration are satisfied, then, in the absence of some special circumstances, the court should ordinarily grant the order. It is for the respondent to establish the special or unusual circumstances that warrant the exercise of the court's discretion in his or her favour.

The view of Wallis J in *Evans* that the discretion provided for in sections 10 and 12 involves a "power combined with a duty", supports the view that the court is generally bound to grant an order for compulsory sequestration and will normally not have a residual power to dismiss an application for compulsory sequestration when it is satisfied as to the relevant requirements. Wallis J referred to *Schwartz v Schwartz* (1984 4 SA 467 (A) 473–474) where Corbett JA, referring to section 4(1) of the Divorce Act 70 of 1979, explained as follows:

A statutory enactment conferring a power in permissive language may nevertheless have to be construed as making it the duty of the person or authority in whom the power is reposed to exercise that power when the conditions prescribed as justifying its exercise have been satisfied. Whether an enactment should be so construed depends on, *inter alia*, the language in which it is couched, the context in which it appears, the general scope and object of the legislation, the nature of the thing empowered to be done and the person or persons for whose benefit the power is to be exercised ... this does not involve reading the word 'may' as meaning 'must'. As long as the English language retains its meaning 'may' can never be equivalent to 'must'. It is a question whether the grant of the permissive power also imports an obligation in certain circumstances to use the power.

Section 4(1) empowers the Court to grant a decree of divorce on the ground of the irretrievable breakdown of the marriage 'if it is satisfied that'; and then follows a specified state of affairs which is in effect the statutory definition of irretrievable breakdown. Clearly satisfaction that the estate of affairs exists is a necessary prerequisite to the exercise by the court of its power to grant a decree of divorce on this ground. But once the Court is so satisfied, can it, in its discretion, withhold or grant a decree of divorce? It is difficult to visualize

on what grounds a Court, so satisfied, could withhold a decree of divorce. Moreover, had it been intended by the Legislature that the Court, in such circumstances, would have a residual power to withhold a decree of divorce, one would have expected to find in the enactment some more specific indication of this intent and of the grounds upon which this Court might exercise its powers adversely to the plaintiff.

Applying the above explanation as regards the nature of the court's discretion to grant a decree of divorce to the discretion of the court in sequestration applications, it could be argued that the courts are generally bound to grant compulsory sequestration orders when all requirements are met. It could further be argued that, in light of the context in which the discretion is afforded to the court, namely, that the main purpose of the Insolvency Act is to ensure an orderly and fair distribution of the debtor's assets for the benefit of the creditors as a group (see Bertelsmann *et al* 2–3), as well as the fact that the interests of debtors are not specifically indicated as a possible ground for exercising its discretion against the applicant-creditor, a court is bound to grant an order unless other special circumstances exist which do not relate to the position and convenience of the debtor.

As regards the issue of the court being empowered to exercise its discretion in favour of the debtor when special circumstances are present, it should further be noted that the debt review provisions of the NCA do not preclude a credit provider from bringing an application for the sequestration of the debtor's estate (*Investec Bank Ltd v Mutemeri* 2010 1 SA 265 (GSJ) par 35; confirmed on appeal in *Naidoo v Absa Bank Ltd* 2010 4 SA 587 (SCA) par 4). In this regard it has been held that sequestration proceedings do not amount to proceedings to enforce a credit provider's rights in terms of a credit agreement (see s 88(3) which precludes a credit provider from enforcing a credit agreement debt once a debtor is under debt review). The purpose of sequestration proceedings is to set the machinery of the law in motion to have the debtor declared insolvent (*Mutemeri supra* par 27–35; *Naidoo supra* par 4; *Firstrand Bank v Evans supra* par 25). Consequently, a creditor may proceed with sequestration proceedings and the mere fact that the debtor preferred debt review as the solution to his or her financial problems appears to be irrelevant when the court has to decide whether a sequestration order should be granted or not (see Roestoff & Coetzee *supra* 63). In *Firstrand Bank v Evans* (par 35) Wallis J held that the fact that a debt rearrangement order has been granted in terms of section 87 of the NCA will not affect the situation and will therefore also not preclude sequestration proceedings. However, according to Wallis J the existence of a debt rearrangement order that provides for the payment of the debtor's debt within a realistic and reasonable time and in an orderly fashion, in conjunction with proof that the debtor is complying with the order, could constitute the special circumstances mentioned above and could thus be a powerful incentive for the court to exercise its discretion in favour of the debtor. However, the court emphasised that it is not necessarily

decisive, especially where, as was the position in this instance, the existence and validity of the order were debatable (par 36).

The burden of proving the special or unusual circumstances on a balance of probabilities rests upon the respondent and entails proof of facts showing that the dismissal of the provisional order will be more or at least as advantageous to the applicant and the other creditors as regards obtaining payment, than the administration of the estate in insolvency (*Meskin et al* par 2 1 13 and see *Cyril Smiedt (Pty) Ltd v Lourens supra* 155–156; *Realizations Ltd v Ager supra* 13; *Benade v Boedel Alexander* 1967 1 SA 648 (O) 655–656; *Firststrand Bank v Evans* par 27). In *Realizations* Williamson JP observed as follows (12):

[B]efore I in effect grant a moratorium by refusing a sequestration order, I would have to be satisfied quite clearly that the creditors do, in fact, stand to lose nothing, that they will be paid fully or certainly paid not less than they would have if they obtained a sequestration order at this stage, and that any such payment would be made substantially at the time when a dividend would have been expected in insolvency.

Where a debtor cannot pay immediately, but is not insolvent and if given time would be able to repay his debt, it has been held that the court will be justified in exercising its discretion against sequestration (*Millward v Glaser supra* 553; *Barlow's (Eastern Province) Ltd v Bouwer supra* 396–397). In *De Waard v Andrew and Thienhaus, Ltd* 1907 (TS) 727 736 Solomon J observed as follows:

[W]here it is clearly proved that a man has committed an act of insolvency it is a matter of discretion for the judge to decide whether or not he shall sequester the estate, and he is not debarred from doing so merely because the debtor produces evidence to show that his assets are in excess of his liabilities. In such cases he may either sequester the estate, or he may in the exercise of his discretion give the insolvent time to pay. If the insolvent comes to court and says, 'It is true I have committed an act of insolvency, but I am in a position to pay the debt, and if reasonable time is given me I undertake to pay my creditor,' then I for one should be disposed to give him that reasonable time within which to liquidate his debts.

However, the considerations that the respondent-debtor is solvent, despite the fact that an act of insolvency has been committed and that he or she will be able to pay all his debt in full, are not decisive in his favour (*Meskin et al* par 2 1 13; see also *Metje & Ziegler Ltd v Carstens* 1959 4 SA 434 (SWA) 435; *Realizations Ltd v Ager supra* 12–13; *Benade v Boedel Alexander supra* 655; *Brakpan Municipality v Chalmers* 1922 (WLD) 98 101). In the recent judgment of *Nedbank Ltd v Potgieter (supra* par 19), Mudau AJ held that a debtor who wishes to persuade a court to exercise its discretion in his or her favour should place evidence before the court that clearly establishes that the debts will be paid if a sequestration order is not granted. Should such contention furthermore be based on a claim that the debtor is in fact solvent then that should, according to the court, be shown by acceptable evidence (see also *Matthiesen v Glas* 1940 (TPD) 147 150; *Firststrand Bank v Evans supra* par 33). The creditor-orientated

approach and the emphasis on the best interests of the creditors is evident from Mudau AJ's reference to Holmes J's observation in *R v Meer* 1957 3 SA 641 (N) 619A "that the Insolvency Act was passed for the benefit of creditors and not for the relief of harassed debtors". According to Mudau AJ this statement remains as apposite today as it was then (par 20).

The fact that an act of insolvency has been proved thus clearly plays an important role in the exercise of the court's discretion against the respondent-debtor (*Millward v Glaser supra* 553–554; *Metje & Ziegler Ltd v Carstens supra* 435; *Pelunsky & Co v Beiles supra* 374; *Julie Whyte Dresses supra* 219; *Port Shepstone Fresh Meat and Fish supra* 164; *Firstrand Bank v Evans supra* par 33) In *De Waard (supra 733)*, Innes CJ explained as follows:

Now, when a man commits an act of insolvency he must expect his estate to be sequestrated. The matter is not sprung upon him; first a judgment is obtained against him, then a writ is taken out and he must expect, if he does not satisfy the claim, that his estate will be sequestrated. Of course, the Court has a large discretion in regard to making the rule absolute; and in exercising that discretion the condition of a man's assets and his general financial position will be important elements to be considered. Speaking for myself, I always look with great suspicion upon, and examine very narrowly, the position of a debtor who says, 'I am sorry that I cannot pay my creditor, but my assets far exceed my liabilities.' To my mind the best proof of solvency is that a man should pay his debts; and therefore I always examine in a critical spirit the case of a man who does not pay what he owes.

In *Realizations Ltd (supra 12)*, Williamson JP stated that the court, when exercising its discretion whether to grant an order after all requirements have been met, may consider whether there are alternative methods of meeting creditor's claims. The main difficulty raised at this stage of the enquiry is often whether in fact the respondent is insolvent or whether it is merely a case of a temporary embarrassment which will be overcome in the near future if an order is not granted. However, the court indicated that it is not entitled to grant a debtor a moratorium, or a "breathing space to recover" by refusing a sequestration order if the result would be to deprive the creditors of the possibility of an early dividend. The court concluded as follows (par 15):

A creditor in the applicant's position is entitled to enforce payment in the way he seeks to do – he has established a legal position to entitle him to it – and cannot be deprived of that right merely because one may have sympathy for a person who is perhaps – but not for certain – only financially embarrassed.

As regards the discretion of the court which is to be exercised in voluntary surrender applications, it also appears that the mere proof of the requirements will not necessarily lead to the granting of the order. In *Ex parte Ford supra* the major portion of each of the applicants' debts arose from credit agreements in terms of the NCA. In each case there were strong grounds for suspecting some degree of reckless credit

extension. Binns-Ward AJ observed (parr 19–20) as regards an argument advanced on the applicants' behalf that:

it is for them to choose the form of relief that suits their convenience simply by mechanically and superficially satisfying the relevant statutory requirements under the Insolvency Act, is a misdirected approach, especially where the grant of the selected remedy is discretionary ... To the contrary, it is the duty of the court, in the exercise of its discretion in cases like the current, to have proper regard to giving due effect to the public policy reflected in the NCA. That public policy gives preference to rights of responsible credit grantors over reckless credit grantors and enjoins full satisfaction, as far as it might be possible, by the consumer of all 'responsible financial obligations'.

The court in *Arntzen* (*supra* 60 n 22) stated that it could not find any authority as regards the nature of the discretion in voluntary surrender applications. With reference to *Ex parte Ford* (*supra* parr 18–21) and *Ex parte Van den Berg* (*supra* 817–818), Gorven J pointed out that the courts have applied a more general approach without any discussion of the nature of the discretion. With reference to the statement of Wallis J in *Firststrand Bank v Evans* (*supra* par 27), that proof of the relevant requirements will ordinarily lead to the granting of a provisional order, Gorven J stated (60 n 22):

It seems to me that, in voluntary surrender applications, a different approach may need to be considered, not least because the debtor is the applicant rather than the party opposing the application. In addition, a creditor brings sequestration applications and this indicates the attitude of at least that creditor.

The disregard for the debtors' interests when exercising its discretion appears from the court's response in *Ford* (*supra* par 21) to the further argument on behalf of the applicants that they had a "constitutional right" to the acceptance by the court of the surrender of their estate and that "the primary object of the machinery of voluntary surrender is not the relief of harassed debtors" (Binns-Ward AJ here referred to the observation by Holmes J in *Ex parte Pillay* 1955 2 SA 309 (N) 311E).

With reference to the above-mentioned observation of Holmes J, Marais AJ in *Ex parte Dube* (2009 JOL 24731 (KZD) parr 6–7) stated that where an application for surrender is motivated largely by the debtors' concerns with their own difficulties and less concerned with the interests of the creditors, this will indicate an ulterior motive which, in itself, will constitute a circumstance weighing against the exercise of the court's discretion in favour of the applicants (see also *Ex parte Gumede* 2010 JOL 24744 (KZD) parr 4–5). In *Ex parte Gumede* (*supra* par 4) Marais AJ further stated that the court must in actual fact be satisfied that an application was indeed brought for the benefit of creditors and not to assist the applicants as harassed debtors.

### 3 2 2 2 Analysis

From the above discussion it should be clear that the interests of creditors have been a consideration of utmost importance when our

courts exercised their discretion in sequestration applications. In summary, decisions in compulsory sequestration applications, where the courts were willing to refuse an order and thus be more lenient towards the debtor, appear to be based on the fact that the debtor, despite the fact that an act of insolvency was proved, could prove his or her solvency and that sequestration would not be to the detriment of the creditors in that they would not be paid less than they would have been paid if a sequestration order was granted. Furthermore the courts were in general also willing to refuse a sequestration order where they were of the opinion that there was an alternative procedure or repayment option that would provide a better solution to the debtor's financial problems and would thus be more advantageous to creditors. However, the court in *Masinge* did not indicate explicitly whether its decision to refuse the sequestration order was indeed based on the solvency of the respondent-debtor and his ability to repay his debt in instalments. Details regarding the respondent's financial situation were also not provided in the judgment. It also does not appear that Kubishi J was of the opinion that the repayment of the respondent's debt in instalments would bring better results than sequestration.

The judgment merely conveys the respondent's evidence that he was not able to pay the amount due in one lump sum and that his settlement proposals were not acceptable to the applicant. The court stated that in its view the respondent should be afforded the opportunity to pay off the debt in instalments while also mentioning the fact that the respondent does not have any other asset except the house. The court finally held that the application for sequestration must be refused and it is suggested that the court's decision in this regard may have been based on its viewpoint that the facts and circumstances of the case required the court to come to the respondent's assistance. As mentioned above, the fact that the respondent's house was his only asset may have convinced the court to refuse the application as sequestration would have caused the debtor to lose his house.

It is submitted that our courts' present creditor-orientated approach to sequestration applications is to be understood in light of the advantage to creditors requirement and the often-stated objective of the Insolvency Act, namely, to be for the benefit of creditors and not to bring relief to harassed debtors. However, in light of the world-wide trend that consumer insolvency regimes should strive to accommodate insolvent and over-indebted debtors as an additional objective of consumer insolvency law, the decision in *Masinge* is to be commended insofar as the court has apparently realised the importance of following a more balanced approach by also taking into consideration the interests of the respondent-debtor as to what would be the best solution to his debt problems.

At this point it would be apt to also refer to the World Bank's reservations as regards creditor-initiated proceedings. According to the World Bank Report (parr 186–187) the standards for access to consumer

insolvency systems should *inter alia* ensure against improper use by creditors. The Report points out that both creditors and debtors can initiate individual insolvency proceedings in several countries. However, almost all the countries that have introduced distinct consumer insolvency systems in recent decades only accept debtor petitions. Moreover, creditor petitions are uncommon even in most of the countries where such petitions are allowed. The World Bank's stance is that if creditor petitions are permitted controls should be implemented to prevent its abuse as a collection tool. This may be accomplished through a requirement that more than one creditor should initiate a petition, or by establishing a high financial threshold for an individual debt as a prerequisite for a petition.

#### **4 Implications of Court's Ruling and Powers of Court**

In *Masinge* the court dismissed the creditor's application and the question thus arises as to what the implications of the dismissal would be as regards to the creditor's and debtor's respective rights and obligations after refusal of the order. At this juncture of the sequestration proceedings the dire financial position of the respondent-debtor would have been further inflated by the costs involved. The further question arises as to what extent the court hearing the matter can actually provide a practical and cost effective solution to the debt situation, rather than just refusing the sequestration order and sending the debtor, and for that matter the creditor, back into the realm of individual debt collection procedures – given the history of the matter up to that point (namely, that the debtor failed to satisfy a warrant of execution and that his settlement proposals were not acceptable to the creditor) and the time and cost involved.

Outside the realm of the sequestration process, a debtor and his creditor or creditors may negotiate new terms that may give rise to a rearrangement of the debt, which may entail a repayment in instalments over a longer time period and/or a full or partial discharge of the debts or any part thereof. Since such an arrangement is contractual in nature, consensus is required and this may prove difficult to achieve in many instances – a situation that will be aggravated when the debtor has a number of different creditors to deal with. Of course, and in so far as some or all of the debts are credit agreements regulated by the NCA, the debtor may consider to apply for debt review in terms of section 86 of the NCA. The problem with debt review is of course that in many instances it may not provide a lasting solution, especially where only some of the debts are subject to the process (the NCA only applies to "credit agreements" as defined in s 8). As indicated, the court may also, in the exercise of its discretion, find that administration is the better procedure to be utilised. On the one hand this scenario should be rare in practice due to the monetary limitation of R50 000 (see s 74(1)(b) of the MCA and GN R3441 in GG 14498 of 1992-12-31) but at the same time the implication is further that the court will send the debtor off to initiate another procedure in a different court. The fact of the matter is that

neither the court hearing the sequestration proceedings, nor the debtor can force the creditor or creditors to accept the negotiation option, and the two statutory procedures mentioned are subject to further legal procedures that will entail further time and cost for an already insolvent debtor.

If a sequestration order is refused and the debtor is unwilling to negotiate an arrangement or to follow one of the statutory procedures, the creditor will have to consider debt enforcement by individual debt enforcement means. Usually, and following a court order in favour of the creditor, execution will follow if the debtor fails to meet the court order. This may entail executing against the property of the debtor with some additional procedural hurdles if the property consists of the family home of the debtor, or forced repayment procedures such as emoluments attachment orders. It is to be noted that the creditor may also call for a so-called section 65 procedure in terms of the MCA. However, it should be borne in mind that this process is only available in the Magistrates' Courts.

Although the court may consider alternative procedures or debt repayment options when considering the advantage to creditors requirement or when exercising its discretion either to grant or refuse a sequestration order (see the discussion of case law in par 3 2 1 1 & 3 2 2 1 above), it should be clear that the High Court does not have the power at present to make any orders as regards the implementation of alternative procedures or alternative debt repayment options other than granting or denying a sequestration order. The only exception appears to be the discretionary power granted in terms of section 85 of the NCA to a court when considering a credit agreement to refer a matter to a debt counsellor for debt review or to declare that the consumer is over-indebted and simultaneously to grant an order for debt rearrangement in terms of section 87 (see *Ex parte Ford supra* par 12, where the court held that it may exercise the discretion provided for in s 85 when hearing an application for voluntary surrender; see also Borraine & Van Heerden *supra* 118 who submit that the provision may also be applied by a court hearing a matter for compulsory sequestration). Section 85 provides as follows:

Despite any provision of law or agreement to the contrary, in any court proceedings in which a credit agreement is being considered, if it is alleged that the consumer under a credit agreement is over-indebted, the court may—

- (a) refer the matter directly to a debt counsellor with a request that the debt counsellor evaluate the consumer's circumstances and make a recommendation to the court in terms of section 86(7); or
- (b) declare that the consumer is over-indebted, as determined in accordance with this Part, and make any order contemplated in section 87 to relieve the consumer's over-indebtedness.

It is submitted that the lack of a procedure to deal with the alternatives to sequestration at this point in time is cost and time consuming and that

the Act should be amended to specifically grant the court the power to make certain orders when refusing a sequestration order. In this context it should be noted that section 65 of the MCA, for instance, allows for various ways to recover a debt after judgment has been granted against a debtor (see in general Van Loggerenberg *Jones and Buckle Civil practice of the magistrates' courts in South Africa* (2015) 406 ff). A court has various powers and options to deal with the execution or repayment of the debt. This type of debt-collection procedure is available only in the Magistrates' Courts, but in terms of a section 65M procedure, a High Court judgment for any amount of money may also be enforced by a judgment creditor in the Magistrates' Courts.

In addition to the section 65 debt-collection procedure, emoluments attachment orders (see s 65J) and administration orders, the MCA also makes provision for the recovery of debts in terms of section 57 when the defendant admits liability for a debt and offers to pay in instalments, or in terms of section 58 when the defendant unconditionally consents to judgment and offers to pay in instalments.

The sections 65 and 65M procedures apply where an original judgment has been granted for payment of an amount of money or where the court has ordered payment in specified instalments of such amount and the judgment or order has not been complied with within ten days of the date on which the judgment was granted, became payable, or, where the court has suspended payment for a certain period in terms of section 48(e), and ten days have elapsed after expiry of such a suspension period (s 65A(1)(a)). Section 65C also allows for the joinder of more than one notice against the same debtor in order to be heard concurrently.

Where the debtor fails to meet the judgment debt, he or she may be called for a so-called section 65 hearing in terms of the MCA. On the day stated in the section 65A(1) notice, the judgment debtor appears *in camera* before the court. The judgment debtor takes the oath and presents oral evidence relevant to his or her financial situation (s 65D(1)). The judgment creditor's attorney is afforded the opportunity to cross-examine the judgment debtor on all issues regarding the judgment debtor's financial situation, the judgment debtor's ability to pay the judgment debt and costs, and the reasons for his or her failure to do so. In terms of section 65D(4)(a)–(b) the factors to be considered in judging an ability to pay a debt are:

- (a) the nature of debtor's income;
- (b) the amounts needed for necessary expenses; and
- (c) the amounts needed to make periodical payments in terms of other court orders or other commitments.

The court may also call witnesses and receive further evidence in this regard by means of affidavit or in any other manner deemed appropriate

by the court. In reaching its decision the court may at its discretion (see ss 65D(5); 65E(1)(a)(i); 65E(1)(a)(ii); 65E(1)(b); and 65E(1)(c)):

- (a) refuse to take into account periodical payments made by a judgment debtor in terms of a hire purchase agreement;
- (b) authorise the issuing of a warrant of execution against movable or immovable property and issue a warrant together with an order for the payment of a judgment debt in periodical instalments in terms of section 73;
- (c) authorise the attachment of a debt due to the judgment debtor in terms of section 72; and
- (d) where the judgment debtor has made a written offer to pay in instalments and the debtor is able to pay, the court may order the debtor to pay in specific instalments and even order the issuing of an emoluments attachment order.

The court may in terms of sections 65D(2), 65K(1) and 65E(5) also:

- (a) postpone the hearing at any time and to any future date;
- (b) order the judgment debtor to pay the costs of the hearing except where the judgment creditor has refused a reasonable offer of settlement made by the judgment debtor; or
- (c) suspend, amend or rescind its order.

## **5 Proposals for Amendment of the Act and Concluding Remarks**

As mentioned, our courts' present creditor-orientated approach when hearing sequestration applications should be understood in light of the context in which the discretion to either grant or refuse a sequestration order is afforded to them. As indicated, it is generally accepted that the current South African consumer insolvency system has been designed for the benefit of creditors and not to provide debt relief to debtors. Moreover, advantage to creditors is a requirement which must be met in both compulsory and voluntary sequestration applications. It is submitted that the advantage to creditors requirement serves an additional goal insofar as it ensures that sequestration will only be resorted to if it would be cost effective to do so, that is, if the proceeds of the residue would be sufficient to cover the costs of sequestration and to provide a pecuniary benefit to creditors. We therefore believe that the requirement should be retained for that purpose (see also Roestoff & Coetzee *supra* 59).

Nonetheless, it is of concern that the South African system does not follow a balanced approach and that it has remained creditor orientated despite international developments to the contrary (see Boraine & Roestoff in Cisse *et al The World Bank Legal Review* (2013) 91). Insolvency law reform to address the Insolvency Act's failure to pursue the additional objective of providing relief to debtors as well as its failure to strive for a balance amongst the competing interests of creditors and

debtors is thus of paramount importance. In *Masinge*, the court apparently refused the sequestration order as it was of the opinion that the facts and circumstances of the case required the court to come to the assistance of the debtor. However, as is apparent from the case law discussed above, our courts have rarely been willing to be led by the best interests of the debtor when exercising their discretion. As indicated, case law confirming the nature of the discretion to be a “power combined with a duty” may furthermore be interpreted to actually oblige the court to grant a sequestration order when all requirements of the Act are met unless special circumstances exist, which circumstances may not relate to the position and convenience of the debtor. In order to ensure that our courts follow a balanced approach when exercising their discretion to grant or refuse a sequestration order, it is thus suggested that insolvency legislation be amended to explicitly require an advantage for the *debtor* as a prerequisite for compulsory sequestration applications. In voluntary surrender applications the legislator should expressly provide that the court, when exercising its discretion, should take into consideration the debtor’s interests regarding what the best solution to his or her financial problems should be (see also Roestoff & Coetzee *supra* 63). In light of the World Bank’s reservations regarding creditor-initiated insolvency petitions it is furthermore suggested that law makers should take notice of the controls suggested in the Report in order to prevent the abuse of compulsory sequestration as a collection tool (see the discussion in par 3 2 2 2 above).

As indicated, the lack of a procedure to allow the court to deal with the alternatives to sequestration after a sequestration order has been refused, is cost and time consuming. As regards the current consumer insolvency legislative framework it is thus submitted that a court hearing an application for sequestration should, in addition to the powers afforded to it in terms of section 85 of the NCA, be explicitly empowered to impose a suitable alternative measure or procedure in order to conclude the matter. Thus, instead of only being able to dismiss the matter and suggest a suitable alternative procedure, the court should for instance also be empowered to refer the matter to a Magistrate’s Court to deal with it in terms of a section 65 type of procedure.

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## ***Farm Frites v International Trade Administration Commission Case 33264/14 GN***

*Urgency and prejudice in anti-dumping investigations – nullification of Anti-Dumping Regulations – removing only interim legal remedy available to interested parties*

On 20 May 2014, in the High Court, Bam J passed judgement that may have far-reaching implications for the administration of the law of unfair international trade, specifically anti-dumping law, in South Africa. It is submitted that the decision could lead to abuse of administrative powers by the International Trade Administration Commission (ITAC), the authority responsible for conducting anti-dumping investigations. This is the second judgement that severely curtails the rights of interested parties, following on *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* Case CCT 59/09 2010 (CC) 6.

Before considering the merits of the case or the verdict, it is important to provide a brief background to the applicable law. The Anti-Dumping (AD) Regulations specifically provide for the judicial review of any interim decisions or procedures in an anti-dumping investigation. Regulation 64.1 provides as follows (own emphasis):

Without limiting a court of law's jurisdiction to review final decisions of the Commission, *interested parties may challenge preliminary decisions or the Commission's procedures prior to the finalisation of an investigation* in cases where it can be demonstrated that –

- (a) [T]he Commission has acted contrary to the provisions of the *Main Act* or these regulations;
- (b) [T]he Commission's action or omission has resulted in serious prejudice to the complaining party; and
- (c) [S]uch prejudice cannot be made undone by the Commission's future final decision.

South Africa has also incurred international obligations in terms of the World Trade Organisation (WTO) Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, 1994 (the AD Agreement) (see *Progress Office Machines v SARS* 2008 (2) SA 13 (SCA) par 6). The Constitutional Court has also held in the *ITAC v SCAW* Case (*supra* par 25) that (own emphasis):

[T]he Anti-Dumping Agreement is *binding on the Republic in international law*, even though it has not been specifically enacted into municipal law. In order to give effect to the Anti-Dumping Agreement, Parliament has enacted legislation and, in turn, the Minister has prescribed Anti-Dumping Regulations.

Article 17.4 of the AD Agreement provides that:

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[w]hen a provisional measure has a significant impact and the Member that requested consultations considers that the measure was taken contrary to the provisions of paragraph 1 of Article 7, that Member may also refer such matter to the [Dispute Settlement Body].

This confirms that preliminary anti-dumping determinations should be subject to review. However, a clear differentiation needs to be drawn between the wording of Article 17.4 of the AD Agreement and AD Regulation 64.1. Article 17.4 provides for the review of “a provisional measure”. This review considers not only a review of the procedures applied in an investigation, but also the substance thereof (see Art 17.6(i) of the Anti-Dumping Agreement, which provides that “in its assessment of the facts of the matter, the panel shall determine whether the authorities’ establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective”, and Art 11 of the WTO Understanding on Dispute Settlement, which provides that “a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements”).

AD Regulation 64.1, on the other hand, refers to “preliminary decisions or the Commission’s procedures prior to the finalisation of an investigation”. Thus, whereas Article 17.4 of the AD Agreement only refers to “a” provisional measure that can be reviewed (as happened recently when Brazil challenged a preliminary measure imposed by ITAC – see *WTO South Africa – Anti-dumping duties on frozen meat of fowls from Brazil* WT/DS439/1), the AD Regulation makes reference to “preliminary decisions” and to “procedures” in the plural. It is, therefore, clear that this does not only relate to the preliminary determination that may result in the imposition of provisional measures, but to any interim decision. This could thus relate, for instance, to the decision to initiate an investigation, to accept or reject a party’s claim for confidentiality, to accept or reject a party’s information, or any other relevant decision or procedure. The qualification is that the decision or procedure must have “resulted in serious prejudice”, that is, the prejudice must not be something in the future, and that such prejudice cannot be undone by ITAC’s future decision. It is not clear how any interim decision cannot be undone by a future final determination, which means that care should be taken in applying this provision so as not to nullify it. However, Bam J in *Farm Frites v ITAC* disregarded this, as will be clear from the analysis below.

In the present case, the applicant, Farm Frites, was accused of dumping frozen potato chips on the South Africa market. The applicant had operations in both Belgium and the Netherlands, but functioned as a single economic entity with a single set of financial accounts. It, therefore, made a single submission to ITAC, which rejected this and required that it make separate submissions for each plant. ITAC also required the applicant to submit individual cost build-ups for each of the more than 350 types of chips that it produced and not only for the nine types that it sold to South Africa, as well as its worldwide sales, on a

transaction-by-transaction basis, for each of the more than 350 types. The applicant could not complete all this information in time and its information was disregarded for purposes of ITAC's preliminary determination (AD Regulation 31.3). The applicant submitted a complete update of its information before the deadline for comments on the preliminary determination, which is also the deadline for addressing any deficiencies to its submissions (AD Regulation 35.5). However, in the process of splitting the costs and sales between the plants in Belgium and the Netherlands and preparing an additional more than 340 cost build-ups, the applicant neglected updating two columns in the overall cost build-up for the Netherlands, being those relating to "other products", that is, products not subject to the investigation, and "total company", being the total information for the specific plant. On 17 January 2014, ITAC indicated that it would verify the applicant's information, but five days later, without any further information submitted in the investigation by any party, it rejected the applicant's information *in toto*. The applicant liaised with ITAC in an attempt to convince it to take its information into consideration and was granted an oral hearing in March 2014. At the oral hearing, a commissioner asked why the outstanding information could not simply be submitted, which was then done on the same day.

On 14 April 2014, ITAC issued an essential facts letter. The purpose of this letter is to inform interested parties of all the essential facts that ITAC will take into consideration during its final deliberations (see WTO *EC – Salmon (Norway)* par 7.807 where the panel held that essential facts are the "body of facts essential to the determinations that must be made by the IA before it can decide whether to apply definitive measures. That is, they are the facts necessary to the process of analysis and decision-making by the IA, not only those that support the decision ultimately reached"). Whereas for all other exporters, this letter indicated their individual domestic sales volumes and values, their export sales volumes and values and margins of dumping, for the applicant, it was merely indicated that it was regarded as a non-cooperating party and that its information was rejected for a number of reasons, as indicated in the letter.

On 2 May 2014, the applicant lodged an urgent review application against ITAC in which it requested that ITAC be interdicted from taking a final determination pending a full review of ITAC's decision. The application was brought on an urgent basis as ITAC's final determination was to be made on 13 May 2014.

ITAC argued that there was no administrative procedure that could be reviewed as only the final determination would be reviewable, that there was no urgency, and that the applicant had experienced no detriment. However, both the High Court and the Supreme Court of Appeal have previously held that a procedure or determination, such as ITAC's essential facts letter, is a decision or step that affects the rights of others and that it must be regarded as an administrative action (see *Oosthuizen's Transport v MEC, Road Traffic Matters Mpumalanga* 2008 (2) SA570 (T);

*Grey's Marine Hout Bay v Minister of Public Works* 2005 (6) SA 313 (SCA)) and that a fatal flaw in this process affects the whole process (see *Minister of Finance v Paper Manufacturers of South Africa* Case 567/07 (SCA), not reported; *Chairman, Board on Tariffs and Trade v Brenco Inc* 2001 (4) SA 511 (SCA)). This issue was therefore moot.

As regards the other two issues, Bam J contradicted himself. First, he held that "I find it difficult to understand why the applicant brought the application *only at this stage*" (par 8, own emphasis). However, he then indicates that the application was "premature" and that ITAC would only have considered the relevant issues the day after the application was heard in court, that ITAC's recommendation could still have been favourable to the applicant and that the Minister "was enjoined to, independently, consider the recommendations of ITAC" (par 11). It is not clear how the application could have been brought too late, yet was still premature. Bam J did not deal with the issue of prejudice.

This notwithstanding, it is submitted that this is an incorrect interpretation of Regulation 64, which does not require a party to await the final decision by the Minister. On the contrary, it provides specifically that any preliminary determinations or procedures may be reviewed before a final determination is made, subject to certain criteria. These criteria include that ITAC has acted contrary to the provisions of the International Trade Administration Act or the AD Regulations, which Bam J essentially found to have been the case (see parr 10 & 12), that the action has resulted in serious prejudice and that such prejudice cannot be made undone by a final determination. The most important question that needs to be answered is what possible prejudice can be experienced as a result of preliminary determinations that cannot be made undone by a future final determination. If, as Bam J indicated, the application was premature as ITAC's final determination "could have been favourable to the applicant" despite all indications to the contrary, and that the Minister could still have reached a favourable determination, this would mean that a final determination could *always* overturn a negative preliminary determination. This would render the provision null and void. Accordingly, a different meaning has to be considered.

A decision to initiate an investigation without proper basis has an immediate and direct effect on importers and exporters. Even if it is subsequently found that no injurious dumping took place and no definitive anti-dumping duties are imposed, the interested party's trade is significantly affected by the uncertainty caused by the investigation and it may have to pay substantial fees to defend its interests in the matter. This prejudice cannot be made undone by future action. Likewise, a decision to impose a provisional duty against an exporter has an immediate and chilling effect on that exporter's exports to South Africa. Importers are seldom willing to pay provisional duties in the hope that the final decision will allow the exporter back into the market. This means that the exporter is often effectively prevented from competing in the South African market for the duration of the provisional duties, even

if no definitive duties are imposed. Again, this cannot be made undone by the future decision. Likewise, the decision to reject a party's information from being taken into consideration in the final determination has direct prejudicial effect as ITAC may consider *only* the essential facts made known to interested parties in its final determination. Thus, where the essential facts indicate that the party's information has been rejected, there are no other facts pertaining to that party before ITAC. ITAC cannot therefore make any determination other than treating that party as not cooperative and assigning it the highest possible margin of dumping, resulting in anti-dumping duties significantly higher than that for any cooperating party. It appears that the Court did not fully understand the significance of the essential facts letter (see Brink 'Anti-dumping and judicial review in South Africa: An urgent need for reform' 2012 *Global Trade and Customs Journal* 274-281 & Brink 'South Africa: A complicated, unpredictable, long and costly judicial review system' in Yilmaz *Domestic Judicial Review of Trade Remedies* 2013 247-268 regarding the problems with judicial review of anti-dumping measures in South African courts).

If the verdict in *Farm Frites v ITAC* is to remain unchallenged, this would effectively nullify the provisions of the AD Regulations. It is clear, however, that the Regulations were specifically drafted to counter such a situation. Accordingly, it is submitted that the decision is wrong and based on an error of law. It follows that that the relief requested should have been granted and that ITAC should have been instructed either to take the exporter's information into consideration or should have been interdicted from proceeding in the matter until a full review had been concluded, especially in light of the fact that Bam J twice indicated that there were proper grounds for review.

**GF BRINK**

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## ***The President of RSA v Reinecke* 2014 3 SA 205 (SCA)**

*Constructive dismissal, common law remedies and the changing identity of the employer: A Critique of some of the findings made by the Supreme Court of Appeal*<sup>1</sup>

### **1 Introduction**

The recent appeal case of *The President of RSA v Reinecke* (the *Reinecke* judgment) dealt with many issues about the employment of magistrates under the Magistrates Court Act (90 of 1993) but the most important issue for purposes of this note is how the judgment grappled with, on the one hand, the relationship between the common law rights and those rights conferred by statute in the labour sphere and; on the other hand, the notion of constructive dismissal in a complex working environment. The case calls for comment purely on the possible precedent it sets for the relationship between the common law and statutory rights in matters concerning employment as well as the impact it makes into the doctrine of constructive dismissal. The findings made by the court could potentially escalate and begin to constitute new defences to common law remedies where these intersect with other statutes that regulate employment and to claims of constructive dismissals.

It should however be said at the outset that *Reinecke*'s case, properly considered was for contractual damages arising from a repudiation of his contract of employment which repudiation he had accepted by resigning. But, because the remedy he invoked is so closely related to constructive dismissal under the Labour Relations Act (66 of 1995) (the LRA) the court discussed his remedy in relation to constructive dismissal as generally understood under the LRA. This is evidenced by the fact that the court actually did make reference to constructive dismissal and the LRA. It therefore follows that the pronouncements the court made are equally applicable to constructive dismissals and it is in that light that this note approaches the discussion. As would be seen elsewhere in this note *Reinecke* would in any event have been entitled to invoke the remedies afforded by constructive dismissal under the LRA had he not been excluded from the ambit of the LRA by virtue of his judicial office as a magistrate.

Constructive dismissal as a form of dismissal serves a very important purpose in our labour relations. It allows an employee who has been a victim of intolerable conduct in the workplace to resign and still have recourse against an employer. Absent the remedy afforded by constructive dismissal this employee will have no recourse against the

1 I wish to thank my colleague Prof Peter Jordi, for the useful exchange of views we had during the writing of this note

employer as the employment relationship would have been terminated at his instance and not at the instance of the employer. Constructive dismissal affords this employee a remedy he otherwise would not have. It does this by recognizing that although the employee resigned the cause of the resignation is the employer's intolerable conduct. In this way it can be said that constructive dismissal serves a purpose of protecting employees against an employer who makes their working conditions so intolerable that they resign and in the process forfeit their rights of recourse against such an employer (Dekker 'Did He Jump or was he Pushed? Revisiting Constructive Dismissal' 2012 *SA Merc LJ* 346). It was for this reason that in *Murray v Minister of Defence* (2009 3 SA 130 (SCA) par 8), it was said that constructive dismissal "represents a victory for substance over form."

In the *Reinecke* judgment, the Supreme Court of Appeal seems to have made a few worrying findings. One, the court seems to have declared that if the process of dismissal is statutory in nature and in origin, then constructive dismissal or any reliance on common law contractual remedies is not available. In those circumstances the court suggested that a victim of intolerable conduct should instead approach the High Court to remedy the intolerable situation through an interdict. On this point Wallis JA, after finding that the process for the discharge of a magistrate from service was statutory and after going through the applicable provisions of the statute, held (par 21):

It follows that the process for dismissing a magistrate was at the time (and remains) a statutory process. Non-compliance with any part of that process would have been remediable (and still would be remediable) at the instance of the magistrate by resort to the high court. It would, for example, have been open to Mr Reinecke to apply for an interdict...

Two, the court appeared to be saying that before claiming constructive dismissal or contractual damages based on repudiation of the contract of employment, the employee has to be certain that the intolerable conduct complained against was committed by someone who had the power to dismiss in the first place. In this regard the court held (par 22):

In practical terms Mr Booi had no power to dismiss Mr Reinecke. How then can his conduct be invoked as constituting a repudiation of the latter's contract of employment as a magistrate? It would be entirely anomalous to hold that the conduct by someone, who had no power to appoint or to discharge the magistrate, could nonetheless provide contractual grounds upon which a magistrate subjected to such conduct could terminate their appointment as a magistrate and claim damages.

Three, the court seemed to suggest that for constructive dismissal or contractual damages arising from a repudiation of an employment contract to succeed the claimant should not have had another remedy available to him but to resign. In particular the court held (par 23):

I do not think that Mr Reinecke can contend that there was no remedy other than resignation available to him in response to Mr Booi's conduct.

He had available, and used in relation to his financial claims, the grievance procedures laid down in the regulations to address this type of situation.

It is not suggested that Mr. Reinecke's case was without difficulties. For starters, there were difficulties relating to whether Mr. Reinecke had cited the correct parties. But the judgment falls to be criticized for the narrow stance it took on the application of the common law rights to contractual damages in the employment sphere as well as its application of the constructive dismissal doctrine which now forms part of "the constitutionally developed common law" (*Murray v Minister of Defence supra* par 9).

In criticizing the judgment, this note will argue that the judgment gives an incorrect impression that a statute like the Magistrates Court Act extinguishes existing common law rights of an employee to claim contractual damages resulting from a repudiation of the contract of employment; or somehow prevents an employee from claiming constructive dismissal. It should be noted that although constructive dismissal is a statutory invention under the LRA, its function closely resembles the contractual action for damages an employee would have against an employer who through unacceptable conduct repudiates a contract of employment. This, Corbett JA explained in *Nash v Golden Dumps (Pty) Ltd* 1985 3 SA 1 (A), occurs:

Where one party to a contract, without lawful grounds, indicates to the other party in words or by conduct a deliberate and unequivocal intention no longer to be bound by the contract, he is said to 'repudiate' the contract ... Where that happens, the other party to the contract may elect to accept the repudiation and rescind the contract [to claim damages] (22D-F).

In those circumstances once an employee accepts the employer's repudiation as was done by Reinecke who accepted the repudiation by resigning, that employee becomes entitled to claim contractual damages. The note will submit that it cannot be said that just because a litigant potentially has another cause of action emanating from a particular statute or another source therefore he is barred from instituting a constructive dismissal claim under the LRA or an action for contractual damages at common law.

The note will further submit that a conclusion that says a litigant is barred from instituting a claim of constructive dismissal merely because he has another cause of action arising from a particular statute goes against the dictum of *Fedlife Assurance Ltd v Wolfaardt* (2002 2 All SA 295 (A)). In this case a differently constituted Supreme Court of Appeal considered the impact of the LRA on the common law contract of employment and held that the effect of the unfair dismissal regime introduced by the LRA has not been to extinguish existing common law rights but, so reasoned the court, the LRA operates to supplement the common law rights of an employee whose employment could at common law be lawfully terminated at the will of the employer (par 13).

This finding in *Fedlife Assurance Ltd v Wolfaardt supra* was fitting because it accords with the wholesome rule of our law that for a statute to alter the common law, that statute must either expressly say so or the inference must be such that no any other conclusion could be reached (*Casserly v Stubbs* 1916 (TPD) 310 312). In the absence of express provisions to that effect there is no presumption that a statute extinguishes existing common law rights. To the extent that a suggestion was made in the *Reinecke* judgment that the Magistrates Court Act somehow extinguishes existing common law rights of magistrates, the court was clearly wrong as the Magistrates Court Act has no express provision stating that it in any way interferes with existing common law rights of magistrates and the court did not say it was reading such an interference with the common law rights into the Act by necessary implication.

Moreover, this note will further argue that the judgment, in requiring that the conduct causing resignation must emanate from someone who has the power to dismiss, is out of touch with reality and must be rejected on that basis. Although it is clear that constructive dismissal is said to arise where an “employer” has made continued employment intolerable, the construction of the term “employer” need not be too narrow or restrictive as the nature of employment itself has meant that the term “employer” is a broad construction.

Furthermore, in light of the Constitutional Court’s judgment in *Strategic Liquor Services v Mvumbi* (2010 2 SA (CC) par 4) where it was held that the test for constructive dismissal is not whether the employee has no choice but to resign, but only that the employer made continued employment intolerable, this note will submit that Wallis JA’s judgment cannot stand in so far as it purports to hold that an employee can only claim constructive dismissal where there are no other remedies. If the correct test for constructive dismissal is not whether an employee resigned as a last resort, then by parity of reasoning it should not matter if that employee had other remedies available to him.

## **2 The Facts**

The case concerned Reinecke, a magistrate who was appointed for the district of Germiston but performed the duties of a relief magistrate throughout South Africa. As a relief magistrate, Reinecke relieved magistrates who were indisposed, or absent and at times assisted with the clearing of backlog of cases. He lived in Pretoria whilst his wife and children lived outside Rustenburg. He intended joining them but initially could not do so as he spent most of his time in Gauteng and on the East Rand performing his duties as a relief magistrate (par 1).

In October 2000, the Magistrates’ Commission advertised a number of posts for magistrates throughout the country, including at Randburg which was for a relief magistrate. Reinecke applied for this post as the Randburg Court provided relief magistrates for the North West province

and he expected to perform relief duties in Rustenburg, nearer to his family. He made it clear in his interview for the position that he did not want the post if it meant he would continue performing relief duties primarily in Gauteng and not in the North West province. In 2001, Reinecke got the post in the Randburg Court but it did not work out the way he had envisioned (par 2).

Months into the job he clashed with Booï, the chief magistrate at the Randburg Court. The clash began immediately after Reinecke's appointment at the Randburg Court when he lodged a claim for payment of a relocation allowance due to him in terms of the applicable regulations. Booï objected to Reinecke's claim, taking a view that since his family was already in Rustenburg before he came to the Randburg Court, Reinecke's claim for a relocation allowance could not stand (par 18). This caused Reinecke to make a few complaints about Booï's conduct, in response to the complaints Booï unilaterally and without consultation decided that Reinecke would no longer perform relief duties and that from that point onwards Reinecke would only perform the duties of a magistrate in the Randburg Court. Booï also advised the regional office of the department to terminate Reinecke's standing advances and to recover past payments from his salary (par 19).

Booï also ensured that at the Randburg Court, Reinecke was not allocated any judicial work except for a few postponements and that he was allocated work of an administrative nature (par 19). Such conduct, the court accepted would amount to a repudiation of the contract of employment in a conventional employment relationship (par 20). As a result of all the frustrations emanating from Booï's conduct and the complaints against him that went unanswered; Reinecke resigned and claimed constructive dismissal, unfair labour practice as well as damages for loss of earnings against the defendants, namely the President of South Africa, the Minister of Justice as well as the Magistrates' Commission. There was also a claim for *injuria* which was dismissed by the court *a quo*.

### 3 Judgment

Wallis JA began his judgment by embarking on a lengthy enquiry into whether or not magistrates were employees of the state and part of the public service, a question that was later abandoned without making any final decision on the basis that the decision "would not on its own serve to resolve the dispute in favour of Mr Reinecke" (par 16). The Supreme Court of Appeal noted that Reinecke's claim had both contractual and statutory elements to it and that he incorrectly, so the judge reasoned, sought to rely solely upon the contractual elements thereby divorcing the relationship from its statutory background. The court then upheld the appeal and in the process made a few findings this note will take issue with.

## 4 Analysis and Discussion of Judgment

### 4.1 Courts to Decide Cases on Pleaded Causes of Action

In *Khanyile v Commission for Conciliation, Mediation & Arbitration* (2004 25 ILJ 2348 (LC)) Murphy AJ considered the question of magistrates in the employment sphere and concluded that magistrates were not employees under the LRA. He held that: “In the premises I am persuaded that a magistrate is not an employee as defined within the Labour Relations Act, by virtue of the special constitutional position a magistrate holds as a judicial officer appointed in terms of Chapter 8 of the Constitution” (par 30).

A finding that magistrates are not employees within the definition of an employee under the LRA means that they are excluded from the ambit of the protection afforded by the LRA. This point is particularly important for it means that Reinecke would not have been entitled to the relief afforded by constructive dismissal under the LRA, but argues this note, Reinecke would have been entitled to claim contractual damages arising from the repudiation of his contract of employment because that is his existing common law right which has not been extinguished by either the Magistrates Court Act or the LRA.

Going further, excluding magistrates from the ambit of the protection afforded by the LRA did not leave them without rights or remedies in that together with “everyone” magistrates have a right to fair labour practices as guaranteed by section 23(1) of the Bill of Rights. When that right to fair labour practices is in anyway infringed, magistrates are entitled to choose a cause of action which they believe sufficiently advances their individual cases and vindicates their infringed rights. That cause of action could either be found at common law or on any statute including the Magistrates Court Act. Courts are only entitled to decide a case on a pleaded cause of action not on some other cause of action which may be applicable and was not utilized. The only time courts can decide on an issue that is not specifically pleaded it is when that issue was fully canvassed at trial (see *South British Insurance Co Ltd v Unicorn Shipping Lines (Pty) Ltd* 1976 (1) SA 708 (A) 714G).

It is not unusual for one act of dismissal to give rise to various causes of action especially in instances where the employer, like in Reinecke is an organ of state, or where the exercise of public power was involved (*Majake v Commission for Gender Equality* (2010 1 SA 87 (GSJ) par 3). In *Gcaba v Minister of Safety and Security* (2010 1 SA 238 (CC) par 53) a case that concerned the intersectionality of rights and remedies available to police officers in the public service the Constitutional Court correctly fortified this argument as follows: “[f]irst, it is undoubtedly correct that the same conduct may threaten or violate different constitutional rights and give rise to different causes of action in law, often even to be pursued in different courts or fora”.

There is another reason offered by Nugent JA in *Makhanya v University of Zululand* (2010 1 SA 62 (SCA)) as to why a single wrongful act may give rise to multiple remedies and causes of action. This is primarily so held Nugent JA (par 8) because:

The law does not exist in discrete boxes, separate from one another. While its rules as they apply in various fields are often collected together under various headings, that is, for convenience of academic study and treatment that should not be allowed to disguise the fact that the law is a seamless web of rights and obligations that impact upon one another across those fields.

It is also not unusual for a litigant that potentially has various causes of action to choose that cause of action which in the mind of that litigant properly and sufficiently vindicates her infringed rights. When a litigant has chosen a particular cause of action amongst the many, it is then not open for courts to second guess the litigant's chosen cause of action. It was not open for Wallis JA to tell Reinecke that he should have applied for an interdict in the high court instead of resigning and claiming contractual damages emanating from the repudiation of his employment contract. The court should have decided the pleaded case and provided sound reasons as to why the pleaded case was bad in law. This would have been in line with Langa CJ's dictum in *Chirwa v Transnet Ltd and Others* (2008 4 SA 367 (CC) par 168) where the then chief justice correctly stated that a claim "must be approached as it is pleaded".

#### **4 2 Contract Remains the Basis of Employment Relationship**

The judgment can also be criticized for suggesting that those whose employment is regulated by statute should look at the statute for remedies and not rely on the contract. Implicit in this suggestion is that the statute somehow alters the nature of the employment relationship and that the contract, which is the basis of the relationship, yields or defers to the statute. This seems to go against what the Constitutional Court held in *Chirwa v Transnet supra* where after a careful examination of whether dismissals of public sector employees constitute administrative action for purposes of PAJA, Ngcobo J held (par 142):

The subject-matter of the power involved here is the termination of employment for poor work performance. The source of the power is the employment contract ... The nature of the power involved is therefore contractual. The fact that Transnet is a creature of statute does not detract from the fact that in terminating the applicant's contract of employment, it was exercising contractual power.

What the Constitutional Court did in this decision, was to put it beyond doubt that the existence of a statute does not change the nature and character of the employment relationship. This is the position even if the statute in question is the Magistrates Court Act. The basis of the employment relationship even if regulated by statute remains contractual and can attract both contractual and statutory remedies. To

this end, Basson J in *MEC for the Department of Health, Eastern Cape v Odendaal & Others* (2009 30 ILJ 2093 (LC) par 52) authoritatively held that “[t]he contract of employment (although influenced by labour legislation, collective bargaining and the constitutional imperative of fair labour practices) remains the basis of the employment relationship”.

It is trite that both statute and contract constitute separate and independent sources of obligations in our law. However, it is doubtful if one can maintain a stringent separation between statute and contract in employment matters. This is so because the employment relationship itself has become highly legislated. So legislated is the employment relationship, that Cheadle in his chapter ‘Employment (including Master and Servant)’ (in Coaker & Zeffert (eds) *Wille and Millin’s Mercantile Law of South Africa* (1984) 340)) correctly argued that:

The employment relationship is so shot through by statute and collective bargaining agreement that it has become an inextricable complex of rights and obligations with its sources in contract, common law, trade custom and practice, legislation and collective bargaining.

It is generally accepted that legislating in employment matters is primarily aimed at correcting the power imbalance that exist between the employer and employee at common law, but by the same token it has not be said that the common law contract of employment has been completely eroded by legislation. If anything, the true import of legislating in the employment relationship has been that the contract of employment which remains the basis of the relationship is now reinforced and suffused by legislation. Of this Basson J in *MEC for the Department of Health, Eastern Cape* (*supra* par 50) correctly remarks:

Labour legislation has therefore supplemented the common law principles regulating the *termination* of a contract of employment with the import of the requirement of *fairness* ... From the foregoing it therefore does not appear that the LRA has overtaken the common law in respect of the termination of the contract of employment although, as already indicated, it is accepted that the fairness principles embodied in the LRA have soften the harsh effects a mere lawful termination of the contract may have.

Due to the fact that the contract remains the basis of the employment relationship, it follows that, in appropriate circumstances, litigants will rely on the contract to find causes of action even in circumstances where the employment relationship has statutory elements governing it. In the *Reinecke* judgment Reinecke did exactly that and was well within his rights to do so. In those circumstances, courts should not deny causes of action founded on contract, but should say why that cause of action is bad in a particular case.

### 4 3 Changed Nature and Identity of Employer

Going further, Wallis JA’s judgment in so far as it suggests that Booï’s could not have constructively dismissed Reinecke because he (Booi) in practical terms did not have the power to dismiss, is stuck in time from

an era where the employment relationship was simple and straight forward. The judgment is steeped in tradition where the employer-employee relationship consisted of an easily identifiable employer who at common law had, amongst others, a duty to receive his employee into service, supervise the work done, remunerate the employee and provide a safe working environment (*SAR & H v Cruywagen* 1938 (CPD) 219 229). This was a simple relationship, the regulation of which was in many ways straight forward and did not present many difficulties. An employee knew who the person of his employer was and was constantly under that person's supervision. But the economies of the world have changed and the employer-employee relationship has followed suit thereby necessitating a change in the laws that regulate and govern the employer-employee relationship. The reality of the situation is that Booi's conduct constituted the repudiation of Reinecke's employment contract necessary to entitle Reinecke to contractual damages similar to what he would have been entitled to under the LRA had he been an employee under that Act claiming constructive dismissal.

Wallis JA may find support for his view in section 186(1)(e) of the LRA, which defines constructive dismissal as a dismissal where "an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee". The provisions of section 186(1)(e) are clear in providing that it must be an "employer" that made continued employment intolerable. It is axiomatic that in an employment relationship, it is the employer that has the power to dismiss. Perhaps Wallis JA had this in mind. If indeed Wallis JA had the provisions of section 186(1)(e) in mind, then it is submitted that he narrowly and too literally construed the word "employer" and this is out of touch with the way in which modern enterprises, the state included, are run and managed. Modern undertakings are run and managed in such a way that various people through their titles and positions within those undertakings qualify as "employer" and that is the reality courts need to be aware of.

Courts should be mindful of the fact that the nature and the identity of the employer in modern times have changed and continue to change. The end result has been that an employer is no longer an individual or a natural person. It is now often a juristic person or a corporate of one form or another. This juristic person or corporate is managed by a collective calling itself "the management" of the enterprise. In this context, the employment relationship exists not between any identifiable person or member of the corporate, but between the employee and the enterprise. This is so because there is a separate liability between members of the enterprise and the enterprise. The management of the enterprise possesses some managerial prerogative which enables it, amongst other things, to control and discipline the employees of the enterprise (see Strydom 'The Origin, Nature and Ambit of Employer Prerogative (Part 1)' 1999 *SA Merc LJ* 42). This in essence is a chain of command within the working environment which must be observed by all employees. These are the realities in management which all employees are subjected to.

The state in its capacity as employer is not immune to these realities in management. It too has a complex chain of command under which it subjects its employees. The employees of the state like their counterparts in the private sector are expected to observe and respect the chain of command. At the Randburg magistrate's court, Booie was part of that chain of command through his office and title, the office of the Chief Magistrate. That, it is submitted, brought Booie within the ambit and purview of "employer" and also by necessary implication clothed him with an implied power to dismiss. Booie was well apprised of the power his title and position gave him and he used that power to make Reinecke's working conditions intolerable. How the court missed this is inconceivable especially if one takes into account the common occurrence of delegation of powers and responsibilities in the public administration. It may well be the case that the Magistrates Court Act places the appointment of magistrates and issues incidental thereto on the ministry of justice, but the ministry may delegate some of its duties to people like Booie. When Booie acts under delegated authority as he did in Reinecke's case it is illogical to say that he did not have powers to dismiss. The reality is that in a complex working environment, there is no day to day interface between employer and employee but there is a chain of command that manages the undertaking. Any member in that chain of command has implied if not express powers of dismissal. This is the reality Wallis JA's judgment misses.

#### **4 4 Availability of Other Remedies does not Affect Constructive Dismissal Claim**

For a while there was a sense in our law that to succeed in a constructive dismissal claim a litigant had to prove that it had no other option but to resign or that resignation was a measure of last resort (*Old Mutual Group Schemes v Dreyer and Another* 2009 20 ILJ 2030 (LAC) par 18). The argument was that an employee ought to show that he exhausted all internal processes aimed at correcting the intolerable conditions to no avail. In *Albany Bakeries v Van Wyk and Others* (2005 26 ILJ 2142 (LAC) par 28), the court held that it would be opportunistic for an employee to resign and claim that the resignation was as a result of intolerable conditions when there was an avenue open to solve his problem which he did not utilize.

The only time an employee was permitted to resign without having gone through the internal processes, appear to have been in instances where the employee showed that following such internal procedures would have been futile or the outcome was pre-determined (*LM Wulfsohn Motors (Pty) Ltd t/a Lionel Motors v Dispute Resolution Centre and Others* 2008 29 ILJ 356 (LC)). The requirement that an employee shows that he resigned as a last resort, or that he shows that he did not have a choice other than to resign and claim constructive dismissal, was expressly rejected by the Constitutional Court in *Strategic Liquor Services* (*supra* par 4). In this case, the Constitutional Court held that the test for constructive dismissal "does not require that the employee have no choice but to

resign, but only that the employer should have made continued employment intolerable” (par 4).

It follows therefore, that even if Reinecke had other options short of a resignation, his claim; be it for contractual damages or constructive dismissal cannot be dismissed only because he could have utilized those options and he did not. Simply put, to succeed in a constructive dismissal claim, it is no longer necessary that a litigant prove that the resignation was a last resort or that he had no choice; a requirement that he proves he did not have other options, seeks to reintroduce to the test a requirement which the Constitutional Court expressly rejected.

## 5 Conclusion

For constructive dismissal to remain relevant and effective, courts should not place unnecessary restrictions on the remedy, and associated concepts such as “employer” must be given their proper meaning within the context in which they operate and not be interpreted too restrictively as was done in this case. If anything, the concept of “employer” must be given a generous interpretation so as to afford protection to a greater number of employees who would otherwise be excluded. This will not be anything new seeing that section 200A of the LRA already casts a rebuttable presumption as to the existence of an employer-employee relationship in certain instances spelled out in the section. A literal interpretation of employer, that does not take into account the complex nature of employment, is tantamount to giving effect to form as opposed to substance. In modern economies employment comes about in many shapes and forms and labour laws must consistently keep up with the changes of modern economies so to be relevant. Any strict adherence to the person of the employer can potentially throw constructive dismissal as a form of dismissal into disuse as many employees will not be able to prove that the intolerable conduct causing their resignation was perpetuated by someone who had the power to dismiss in the first place.

Moreover, for reasons advanced in this note, it is apparent that magistrates, and all those whose employment contracts impact both statute and contract, lay a valid claim to the remedy of constructive dismissal where they are found to be employees under the LRA or contractual damages at common law if excluded from the ambit of the protection afforded by the LRA. For this not to be applicable, the statute impacting on their employment must expressly, or by necessary implication, exclude the application of and any reliance on the common law contractual rights (*Stadsraad van Pretoria v Van Wyk* 1973 2 SA 779 (A) 784D-H). Holding that a contractual claim for damages is not available, in the absence of any express exclusion by the relevant statute, is unjustifiable.

Furthermore, it is trite that courts do not make cases for litigants but that litigants must make their cases in the pleadings supported by evidence. Likewise, courts should only decide the pleaded case and not

any other case that potentially could have been brought but was not. There may very well be plausible reasons as to why a litigant brings the case that he does, and not any other case that potentially arises from the same facts. Having said all this, it can only be hoped that the findings made by the Supreme Court of Appeal do not escalate and become defences to constructive dismissal claims as well as claims for contractual damages where these intersect with other statutes that also regulate the employment relationship.

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## ***Minister of Safety and Security v Sekhoto* 2011 1 SACR 315 (SCA)**

*A critique of reasonableness as the fifth jurisdictional fact for a lawful arrest*

### **1 Introduction**

The right to liberty of the person has always been accorded protection by our courts even before the advent of the Constitution. This right has been constitutionalised in the post-apartheid Constitutions. Section 12 of the Constitution of 1996 guarantees everyone's right to freedom and security of the person, which includes the right "not to be deprived of freedom arbitrarily or without just cause". Like all rights in the Bill of Rights, the right to freedom is not absolute and can, where it is reasonable and justifiable, be limited. Section 36 of the Constitution provides for the general limitation of the rights in the Bill of Rights. Arrest by police officials is one of the most common means of limiting an individual's right to freedom. Arrest may take one of two forms: arrest without a warrant and arrest with a warrant (in terms of ss 40 & 43 of the Criminal Procedure Act 51 of 1977 (CPA) respectively). This article will not concern itself with the latter form, ie arrest with a warrant. Suffice it to say unlike a warrantless arrest, arrest on a warrant is subject to judicial oversight. For an arrest without a warrant to be lawful, it has to satisfy the four jurisdictional facts set out in *Duncan v Minister of Law and Order* (1986 2 SA 805 (A) 818G-H). Where these factors are complied with, the arrest is deemed lawful regardless of its reasonableness. These factors are:

- (a) the arrestor must be a peace officer;
- (b) she must entertain a suspicion;
- (c) the suspicion must be that the suspect has committed an offence listed in schedule 1 of the CPA;

(d) such suspicion must be based on reasonable grounds.

The position postulated above accurately reflects the pre-constitutional era. Since the advent of the Constitution, several High Courts have held that this position falls short of affording the right to freedom the pride of place it deserves in our constitutional state. For instance, in *Louw v Minister of Safety and Security* (2006 2 SACR 178 (T) 185a-187g), Bertelsman J purported to widen the set of jurisdictional facts which a lawful arrest has to satisfy. According to the court, in addition to satisfying the traditional jurisdictional facts for a lawful arrest, time was ripe to evaluate the lawfulness of an arrest through the prism of the Bill of Rights. There is no need in a society founded on the values of equality, dignity and freedom to deprive individuals of their freedom where less invasive means could be used to achieve the objects of arrest – to bring a person suspected of having committed a crime to court. In essence, Bertelsman J demanded that the police action of arrest, in addition to satisfying the traditional jurisdictional facts, has to be objectively reasonable, taking into account whether milder methods of bringing a suspect before court could not be as effective as an arrest. This means that where methods short of arrest could ensure that the suspect appears in court to answer the charges against her, such milder methods should be preferred over arrest (see amongst others *Minister of Safety and Security v Sekhoto* 2010 1 SACR 388 (FB) par 24 (*Sekhoto a quo* case); *Mvu v Minister of Safety and Security* 2009 2 SACR 291 (GSJ); *Gellman v Minister of Safety and Security* 2008 1 SACR 446 (W)). However, this view has not been unanimously shared by the High Courts (see *Charles v Minister of Safety and Security* 2007 3 SACR 137 (W)). The Supreme Court of Appeal (SCA) had an opportunity to reconcile these contradictory views. In *Minister of Safety and Security v Sekhoto* (2011 1 SACR 315 (SCA) (*Sekhoto case*)) the SCA favoured the conservative view espoused in the *Charles* case in this regard.

## 2 Facts of the Case

The brief facts in this case were as follows: The first and second plaintiffs were arrested on allegations of being in possession of suspected stolen stock and stock theft respectively. After receiving a report of stolen stock from an informer, police paid a visit to the first plaintiff's home where they found bags containing seven sheepskins in an outbuilding. The first plaintiff's father informed the police that those skins belonged to the first plaintiff who was not around at the time. The first plaintiff arrived whilst the police were still there. The police asked him for an explanation about the sheep skins. The first plaintiff's explanation was to the effect that he had bought them but could not remember where. Mention should be made that those skins carried the same mark. The police found the first plaintiff's explanation implausible. The first plaintiff was arrested. The second plaintiff was arrested on the basis that the first plaintiff had later told the police that he had received the sheepskins from the second plaintiff. They were then prosecuted and discharged at the end of the state's case (*Sekhoto a quo* case par 29).

### 3 Judgment and Analysis

The court *a quo* found that the traditional jurisdictional facts for a lawful arrest were satisfied. However, the court found for the plaintiffs' on the basis that the respondent had failed to satisfy the fifth jurisdictional fact. (*Sekhoto a quo* par 28; see *Sekhoto case* par 10). The respondent appealed to the SCA. The SCA found the judgments of the High Courts' in this regard troubling. The SCA held that the present and other High Courts' formulation of the fifth jurisdictional fact is not borne out by the principles of interpretation. As the starting point, the SCA pointed out that it was not clear that when formulating the fifth jurisdictional fact the High Courts did so by directly applying the Bill of Rights, by developing the common law, in line with section 39 of the Constitution, or by way of interpreting section 40(1) of the CPA (*Sekhoto case* par 14).

The SCA found the High Courts' interpretation of section 40(1)(b) of the CPA problematic in that these courts had failed to deal with the constitutionality or otherwise of this provision. Secondly, relying on *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* (2001 1 SA 545 (CC) (*Hyundai case*)), the SCA held that with the interpretational aids at its disposal, it was unable to conclude that the fifth jurisdictional fact could be inferred from the proper reading of section 40(1) of the CPA without straining the language of the provision. Lastly, the SCA found that it was not clear whether the development of the fifth jurisdictional fact was through the development of common law (see parr 24 & 14).

The first and third concerns were disposed of easily. With regard the first ground, the SCA found that absent the finding of unconstitutionality of this provision, these courts were not entitled to read anything into a clear text. As to the third ground, the SCA held that the fifth jurisdictional fact could not be developed through the common law as the common law regarding this aspect has been superseded by legislation (parr 22-24). In relation to the second ground, the SCA held that although courts are under an obligation to read legislation through the prism of the values of the Bill of Rights in terms of section 39(2) of the Constitution, this was not possible in each and every case. This was one of those cases. According to the SCA, the text of section 40(1)(b) was not amenable to the interpretation ascribed to it by the High Courts. In this regard, the SCA drew a distinction between interpreting legislation in terms of section 39(2) of the Constitution (reading down) and the process of reading words into or severing them from a statutory provision that has been declared unconstitutional (par 15). With regard to the former, the court need not declare an otherwise unconstitutional provision invalid but read it in conformity with the values of the Bill of Rights to save it from invalidity. With regard to the latter, the court must declare a provision unconstitutional before saving it from invalidity by either reading-in or severing words from the provision (Currie & De Waal *The Bill of Rights Handbook* (2013) 67). When a court reads a provision in line with the values of the Bill of Rights that is usually the end of the matter.

For instance, if such a finding is made by a high court the matter would not be referred to the Constitutional Court for confirmation. In other words such a provision is not declared invalid. However, where a reading-in or severance is used the matter must be referred to the Constitutional Court to confirm the unconstitutionality of the provision (see s 172 of the Constitution).

In the current case, the High Courts purported to rely on the interpretational clause to reach their conclusions. The SCA held that the reliance on section 39(2) was flawed. In this regard the SCA held that the reason the High Courts' found a fifth jurisdictional requirement hidden somewhere in section 40(1)(b) was that the High Courts failed to draw a distinction between the objects of arrest and the motive for the arrest. It is the object, and not the motive, that is relevant in the determination of whether an arrest is lawful or not (par 31). According to the SCA, once the jurisdictional facts are satisfied and the object of the arrest is to bring the accused to justice, then the discretion whether to arrest or not arises. The arrestor is not obliged to affect an arrest (par 28). If the arrestor exercises her discretion within the bounds of rationality, such an arrest cannot be said to be unlawful. This is more so because section 40(1)(b) is silent on how the discretion must be exercised. In this regard, the SCA found that the manner in which the discretion to arrest is to be exercised must be discovered by inference in accordance with the ordinary rules of construction. In the present case, once the object of arrest (ie to bring the arrestee to justice) is the underlying reason for an arrest and the arrestor has rationally exercised her discretion, such an arrest could not be said to be unlawful. It is common cause that there are a number of avenues available to the arrestor to bring the arrestee to justice, however, that does not mean that the arrestor must be faulted for having chosen arrest over other methods. In other words, the question to be asked should not be whether the arrestee was brought to justice in the best possible manner, but whether the arrestor had the intention to bring the arrestee to justice and that she exercised her discretion properly. The arrestor exercises her discretion unlawfully when she invokes the power to arrest for a purpose not contemplated by the legislator (parr 30-31). It is common cause that the release of the arrestee after she has been arrested requires a judicial evaluation to determine whether it is in the interests of justice to do so. In other words, the arrestor's role in this regard is circumscribed by law. If a peace officer were to be required to arrest only in circumstances where she is satisfied that the suspect would not attend trial, the statutory structure relating to bail will be undermined (parr 30-44). The SCA has summarised this position (par 44):

[I]t seems to me to follow that the enquiry to be made by the peace officer is not how best to bring the suspect to trial: the enquiry is only whether the case is one in which that decision ought properly to be made by a court (or a senior officer). Whether his decision on that question is rational naturally depends upon the particular facts but it is clear that in cases of serious crime – and those listed in Schedule 1 are serious, not only because the legislature thought so – a peace officer could seldom be criticised for arresting a suspect

for that purpose. On the other hand there will be cases, particularly where the suspected offence is relatively trivial, where the circumstances are such that it would clearly be irrational to arrest.

It is worth mentioning that the arrestor is not required to conduct a hearing before affecting an arrest. That question arises later, when the arrestee is at the police station (depending on what offence the arrestee had committed) or when he appears in court. Once the jurisdictional facts are satisfied then a discretion, which must be exercised rationally, arises (*National Commissioner of Police v Coetzee* 2013 1 SACR 358 (SCA) par 14). It is for this reason that the SCA found that if the fifth jurisdictional fact can indeed be read into section 40(1)(b) of the CPA, by parity of reasoning, it must also be read into section 43 of the CPA. Section 43 of the CPA provides for the arrest of a suspect on the strength of a warrant of arrest. The text of section 43 of the CPA is not susceptible to such a reading (par 23). However, it is noteworthy that even when a suspect is arrested on the strength of a warrant, the arrestor must still exercise the discretion whether to arrest or not (par 28).

#### **4 Is the Formulation of The Fifth Jurisdictional Fact Justifiable?**

It is difficult to comprehend why the SCA had difficulty establishing the route used by the High Courts to formulate the fifth jurisdictional fact. Firstly, the constitutionality or otherwise of section 40(1) of the CPA was not at issue in the High Courts that developed the fifth jurisdictional fact. With regard to the second concern that the High Courts failed to explain the basis for widening the traditional jurisdictional facts, the High Courts relied on section 39(2) of the Constitution. Despite the SCA claims that the interpretational aids at its disposal do not justify the development of the fifth jurisdictional fact (the second SCA concern), the High Courts' read section 40(1)(b) in a manner that embraced the values underlying our constitutional project as per section 39(2) of the Constitution injunction. It is not clear where the confusion of the SCA in this regard stems from. In the *Sekhoto a quo* case, the court specifically refers to the Constitution's dictate to interpret legislation in the manner that must promote "the spirit, purport and objects of the Bill of Rights" (*Sekhoto a quo* par 27). In this context, this principle means that legislation is to be presumed constitutional. In other words, wherever possible legislation must be read consistently with the Constitution. Devenish eloquently sums up this approach as follows (Devenish *A Commentary on the South African Bill of Rights* (1999) 600):

[S]hould a statute be capable of being interpreted in more than one way, one resulting in validity and the other in invalidity, the court should presume that the legislature intended to act in a way that is compatible with the constitution.

Section 39(2) of the Constitution gives effect to this principle (Devenish *supra* 601). This provision provides that "when interpreting any legislation, and when developing the common law or customary law,

every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights". It provides a leeway to courts to interpret a provision of a statute that otherwise would be unconstitutional liberally to save it from invalidity. The caveat is that the values and principles underlying the Constitution be upheld without straining the language of the provision. In the words of Devenish (*supra* 600-601):

This [the interpretation of legislation in light of section 39(2)] does not necessitate that the constitution be interpreted restrictively in order to accommodate the impugned statute. The constitution should, as indicated above, be interpreted liberally, after which the statute should be analysed to determine whether it can be construed in a manner that is in accordance with the provisions, values and principles of the constitution.

De Ville takes this point further by stating that (De Ville *Constitutional and Statutory Interpretation* (2000) 266):

A new consideration the courts would have to take account of in this regard is the principle that where two interpretations of a statutory provision are possible – the one leading to the validity thereof and the other to its invalidity (due to its conflict with the provisions of the Constitution) – the first-mentioned interpretation is to be followed. It may namely in certain instances occur that construing a provision as directory instead of peremptory leads to the invalidity of that provision or vice versa. One must follow the construction which leads to the validity of the provision.

Are the SCA's concerns regarding the formulation of the fifth jurisdictional fact justified? As already stated, the High Courts relied on section 39(2) of the Constitution to formulate the fifth jurisdictional fact. This method of interpretation (s 39(2)) was applied in *Govender v Minister of Safety and Security* (2001 4 SA 273 (SCA)) in relation to section 49(1) of the CPA. In that case, the SCA found that the threshold requirement for the exercise of power conferred by that provision was very low, as the arresting officer had only to be satisfied that the legislative requirements for the use of force (even fatal force) are present without having to adhere to the standard of reasonableness (par 21 *et seq*). The formulation of the fifth jurisdictional fact in the manner the High Courts did is therefore, nothing alien to our constitutional jurisprudence. The Constitutional Court has since confirmed the soundness of the interpretation adopted in the *Govender* case (see *Ex parte Minister of Safety and Security: In re S v Walters* 2002 4 SA 613 (CC) par 39 (*Walters* case)).

In the context of this discussion, given a number of choices open to the arrestor with regard to methods of bringing the suspect before court, it is therefore, implicit that the arrestor will have to apply her mind as to the appropriate method to use (see *Hyundai supra* par 37). Section 38 of the CPA specifically lists four "methods of securing the attendance of an accused in court for her trial", *ie* arrest; summons; written notice and indictment. Surely the CPA does not prescribe that a person, who is reasonably suspected of committing a schedule 1 offence, *must* be arrested. This is made clear by the usage of the modal verb "*may*" in section 40 of the CPA which denotes that the arrestor has a discretion.

Joubert intimates that wherever a police official exercises a discretion in terms of the law, she has to be familiar with the possible alternatives open to her and must endeavour to avoid choosing the one infringing the rights of the individual (Joubert *Applied Law for Police Officials* (2001) 17). This, of necessity, requires that an arrestor weigh the appropriate method from the ones available to him, given the circumstances of each case. To argue otherwise would be to undermine the structure and objectives of the CPA pertaining to bringing suspects before court. That the arrestor has to choose an appropriate method of bringing the accused before court is obvious from the CPA and in particular section 38.

In addition to failing to apply the interpretational principles, the SCA found that the reasons offered by the High Courts for the formulation of the fifth jurisdictional fact cannot withstand scrutiny. The SCA held that if an arrest accords with the traditional jurisdictional facts, it could not be unlawful. Once the jurisdictional facts are present, the arresting officer is entitled to exercise her discretion as she sees fit (*Sekhoto* case par 28-29). The SCA seems to have narrowed down the grounds for unlawful arrest to situations where the arresting officer “knowingly invokes the power to arrest for a purpose not contemplated by the legislator” (par 30). The SCA asserts that where the intention of the arrestor is to bring the arrestee to justice, no claim for unlawful arrest could lie despite the circumstances at the time of the arrest (par 30). Where an arrest is perpetrated for reasons other than bringing the arrestee to justice, such an arrest is in *fraudem legis* and amounts to the misuse of the power granted by the legislation and is therefore, unlawful. According to the SCA, the High Courts failed to draw a distinction between situations where the exercise of arrest power amounted to abuse and where the intention has always been to bring the arrestee before court; the High Courts conflated the motive and objects of arrest. In short, where the arrest was motivated by malice, a claim lies not because the arrestor failed to exercise her discretion reasonably, but in the fact that the arrest was not for the purpose for which it was meant (par 31).

The standard of rationality is not breached because the arrestor has opted for the less perfect (or even imperfect) method at the time: “The standard is not perfection, or even optimum, judged from the vantage of hindsight so long as the discretion is exercised in accordance with the jurisdictional facts the standard is not breached” (par 39). The standard is not breached for as long as it remains “within the bounds of rationality” (par 39). Once the legislative requirements for the exercise of discretion to arrest are satisfied, such an arrest cannot be said to be unlawful. In the context of section 40(1)(b) of the CPA, the legislature has failed to provide a matrix within which the arrestor has to exercise her discretion and therefore, such limits are to be discovered by inference (parr 40-41). The SCA intimates that if the arrestor has exercised her discretion rationally, that should be the end of the matter. The rationality to which the SCA seems to refer to is choosing one of the available options of bringing the suspect to justice without really applying one’s mind to the effects that the chosen method would have on the subject.

Failure to use milder methods, without any justifiable reason, where the CPA grants the arrestor that discretion, should surely amount to a failure to exercise one's discretion reasonably, if not failure to act in accordance with the objects of the empowering legislation. This position is confirmed in the *Govender* case (see par 21). In that case, the plaintiff's seventeen year old son was involved in a motor car theft. After being cornered by the police, the plaintiff's son attempted to run away despite verbal warnings and a warning shot being fired. The police officer then shot the plaintiff's son in the back, fracturing his spine. The police official purportedly acted in terms of section 49(1) of the CPA (before its amendment) (*Govender supra* par 5). This provision authorised police officers to use force (even deadly force) when attempting to effect an arrest and the arrestee flees or attempts to flee and the use of force is reasonably necessary to overcome the arrestee from fleeing. The High Court found the shooting lawful in the following terms (*Govender supra* par 7):

[I]n my view the force used was reasonable and necessary and proportionate to the offence of motor vehicle theft. The public interest involved in the use of deadly force as a last resort to arrest a fleeing car thief relates primarily to the serious nature of this crime, its increasing prevalence throughout this country, and the public's interest in the apprehension, prosecution and punishment of car thieves. In the result in my view the shooting was justified by section 49(1).

Mention should be made that in the *Govender* case, the constitutionality of section 49(1) was not at issue (par 9). Instead, the plaintiff urged the SCA that, in addition to taking into account the "proportionality between the degree of force used and the seriousness of the crime for which the victim is suspected" (*Govender supra* par 16), the reasonableness and justifiability of the police conduct must be taken into consideration (par 17). The court agreed with the plaintiff. The SCA found the approach of the High Court inappropriate. The SCA reaffirmed the standard of reasonableness as a yardstick for measuring the conduct expected of an arresting officer in terms of this provision as follows (par 21):

[I]n licensing only such force, necessary to overcome resistance or prevent flight, as is 'reasonable', section 49(1) implies that in certain circumstances the use of force necessary for the objects stated will nevertheless be unreasonable. It is the requirement of reasonableness that now requires interpretation in the light of constitutional values. Conduct unreasonable in the light of the Constitution can never be 'reasonably necessary' to achieve the statutory purpose.

To underscore this sentiment, the SCA held that in relying on section 49(1) of the CPA, the arrestor must also take into consideration the rights of the fugitive (par 19). The court expanded factors that the arrestor has to take into consideration when relying on section 49(1) of the CPA to include whether, at the time and under the circumstances, the suspect posed immediate danger to the arrestor or to members of the society or that the suspect was involved in the commission of a crime involving the

infliction of serious bodily harm or attempt thereof (par 24). The SCA concluded that section 49(1) of the CPA could be reasonably developed to encompass the extended requirements for the lawful reliance on the provision.

The development of the fifth jurisdictional fact is sound for another reason. It is a fundamental principle in our law that “the interpretation of legislation involves more than analysing the particular provision in question” but the holistic reading of the statute (Botha *Statutory Interpretation: An Introduction for Students* (2012) 128) and other legislation that directly impacts on the provision at hand (see *DPP, Western Cape v Prins* 2012 2 SACR 183 (SCA)). Thus, it could not be said that the SCA in Sekhoto embarked on the holistic reading of the CPA for reasons advanced above. If the holistic reading of this legislation was undertaken, then this was done in isolation of other instruments that have the direct bearing on the issue at hand. Having regard to the fact that the legislature is presumed to be aware of its creations, it could not be said that the CPA is the only relevant instrument in the interpretation of section 40(1)(b). For instance, section 13(3)(a) of the South African Police Service Act 68 of 1995, provides that whenever a police official exercises powers granted to her, she must do so in a manner that is reasonable. It is therefore, beyond doubt that police actions in general and of arrest in particular, must comply with the standard of reasonableness. Furthermore, the Standing Order (G)341 issued by the National Commissioner of Police emphasises that arrest must be effected as a matter of last resort.

The afore discussion makes it clear that the legislature must be taken to have contemplated that the discretion afforded to the arrestor would be exercised reasonably, having regard to all relevant surrounding circumstances, including the use of the least severe method of bringing the suspect to court (see *Hyundai supra* par 43). The SCA’s restrictive reading of section 40(1)(b) cannot be accepted in light of the fact that the Constitution, and not the legislature, is supreme. Therefore, the satisfaction of the traditional jurisdictional facts as intended by the legislature for a lawful arrest is not determinative of the matter. These factors have to be measured against the constitutional imperative of the protection of the right to freedom of the person. The legislature’s intention cannot be the yardstick with which to measure whether a constitutional right has been breached or not. Botha (*supra* 145) counsels that:

[I]f these values are not taken seriously and borne in mind constantly during (amongst others things) interpretation of legislation; and if we are not prepared to succumb to constitutionalism, we might as well get rid of the supreme Constitution, the justiciable Bill of Rights and rights rhetoric, and return to the former old bad days of sovereignty of Parliament and executive-minded interpretation of legislation. Otherwise we need to become serious about the rights and values in the Constitution – including a new ‘constitutional’ approach to statutory interpretation ...

The SCA misdirected itself by relying on the rationality test in that it failed to recognise that rationality is a lower standard than reasonableness. In *Ronald Bobroff & Partners Inc v La Guerre* (2014 3 SA 134 (CC)), the Constitutional Court held that rationality is not an appropriate test to use in cases in which the infringement of fundamental rights is at stake: “It is a less stringent test than reasonableness, a standard that comes into play when the fundamental rights under the Bill of Rights are limited by legislation” (par 7). The same holds true even where the fundamental rights are limited by the exercise of discretion by a functionary. This goes against what the SCA held in the *Sekhoto* case.

Interestingly, the *Govender* case is not referred to in the *Sekhoto* case. Despite this, striking features between the two cases can be observed: Both cases relied on the *Hyundai* case and are agreed on the interpretational principles laid down in that case. However, these cases part ways as to how these principles have to be applied in difficult cases. The provisions that the two courts grappled with, in *Sekhoto* and *Govender*, differed in some regards. For instance, section 49(1) of the CPA specifically provided for the use of “reasonable force” where the suspect flees or attempts to flee. The provision, however, did not specifically enlist the offences for which deadly force could be used. The court had to chart and define circumstances under which deadly force could be used. With regard to section 40(1)(b) of the CPA, the arrestor is granted the discretion to arrest upon a reasonable suspicion that the suspect has committed an offence listed in schedule 1. Given the usage of the modal verb “may” and a number of choices available to the arrestor to bring the suspect before court, it defies logic to argue that once the arrestor has decided to arrest no questions could be raised as to why she did not use milder methods, even *ex post facto*. Even in the case of unlawful arrest, the court can, as the High Courts did, chart and define circumstances under which a lawful arrest could take place. Therefore, it cannot be argued that these cases are distinguishable to the extent that the application of section 39(2) of the Constitution is acceptable in one and not the other.

As the *Sekhoto* case did not displace the *Govender* case, the latter was binding on the former. This clearly, shows that the High Courts were justified in their formulation of the fifth jurisdictional fact and the *Sekhoto* case failed to follow precedent. In addition to the above, it is common cause that, in a constitutional state, courts should be wary of limiting the rights of individuals unless it is shown that such limitation is reasonable and justifiable. The police arrest powers must be measured against the standard of reasonableness. Absent reasonableness, police would arrest suspects who should not be subjected to arrest. In *Khambule v Minister of Police* (2014 JOL 31721 (GSJ) parr 28-30) the court commented in this regard as follows:

[T]he available methods of securing that attendance in court are arrest, summons, written notice and indictment in accordance with the relevant provisions of the Criminal Procedure Act. Read with section 40(1)(a) this

implies that where a warrantless arrest is permissible, the *arresting peace officer* must consider all factors relevant to the appropriate method of bringing the alleged offender before a court and balance them, the one against the other, for what might be justifiable in one case could constitute gross abuse of power in another ... It is clear that ... [the arrestor] simply proceeded with an arrest on the basis of an erroneous assumption (or pursuant to an errant official directive) that it was not his job, but that of some other official tasked with making a decision on an early release at some stage after the arrest ... Even if the [arrestor] was unsure as to whether, for example, a written notice to appear would be an appropriate alternative to an arrest because of considerations such as the identity of the plaintiff, a fixed residential address, etc., he had available to him another option. That option was an arrest for the purpose of the verification of such matter and as a precursor to a written notice to appear in court (own emphasis).

Why impinge on the rights of the subjects when less intrusive, yet equally potent means could be used? That would not be in keeping with the requirement of the rule of law. "Arrest is not an objective in itself ..."  
(*Walters supra* par 49).

## **5 The Requirements for a Successful Claim based on the Fifth Jurisdictional Fact**

Although it does not explicitly say so, the SCA seems to realise that the only way to give effect to the right to freedom, where arrest without a warrant is concerned, is by recognising the fifth jurisdictional fact (*Sekhoto supra* par 45ff). This could be deduced from this passage (par 57):

The case can be disposed of on a simple basis, namely, that the proper exercise of [arrestor's] discretion was never an issue between the parties. The plaintiffs, who had to raise it either in their summons or in replication, failed to do so. The issue was also not ventilated during hearing. This means that since the magistrate had found that the four jurisdictional facts required for a defence under s 40(1)(b) were established by the appellant (a finding upheld by the court below) their claims had to be dismissed.

In this regard, the court held that if the plaintiff alleges failure to exercise discretion properly, the plaintiff must bear the onus of proof (par 49). The SCA concludes that for a claim of unlawful arrest, based on the fifth jurisdictional fact, to succeed, the plaintiff has to allege and prove it. Rules of evidence require that the plaintiff must make up its case with all jurisdictional facts, the fifth jurisdictional fact in particular (par 50). As previously stated, the SCA concluded by holding that the issue of the fifth jurisdictional fact was raised neither during the pleadings nor during the hearing.

It is clear that the conclusion of the SCA (which seems at odds with the reasons it advanced) is that the fifth jurisdictional fact is part of our law. The plaintiff would just need to allege and prove it.

## 6 Conclusion

The formulation of the fifth jurisdictional fact sparked disagreements and dissents among different divisions of the High Court. The SCA was seized with the opportunity to reconcile the differing views among the High Courts. It is clear that the SCA leaned towards the rejection of the fifth jurisdictional fact. It has to be said, nonetheless, that the *Sekhoto* case was not ideal for the SCA to settle this question. This is due to the fact that the plaintiff's in this case failed to make their case with regard to the fifth jurisdictional fact. In other words, the plaintiffs' case was not based on the fifth jurisdictional fact on summons and same was not expressed during the trial. Therefore, some High Courts may find that the *Sekhoto* case is not binding on them. For instance, a High Court in which the issue of the fifth jurisdictional fact is pertinently raised in pleadings and in argument, may hold that it (a High Court) is justified in not following the *Sekhoto* case with regards to the question of the fifth jurisdictional fact, as this matter was not specifically raised in pleadings nor was it dealt with during trial. In other words, a High Court, in which the plaintiff has pleaded the fifth jurisdictional fact, may find that the *Sekhoto* case is distinguishable and therefore, not binding. At this moment, the last word on the question of the lawfulness of the fifth jurisdictional fact has not yet been spoken.

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## Boekaankondigings/Book Announcements

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**Complementarity in the Line of Fire: The Catalysing Effect of the  
International Criminal Court in Uganda and Sudan**

by

**Sarah M Nouwen**

Cambridge University Press 2013 xi plus 525 pages

Price: \$110.00 USD

... if anything, the story of complementarity's catalysing effect has shown that this is not a world of endless 'complementaries' in which efforts for criminal, restorative, political and legal justice seamlessly 'complement' each other. This is a world of horrific constraint, in which the promotion of one value often compromises another. More precisely, the absolute war on impunity succeeds in achieving some justice, but also produces, shapes and legitimates injustices. This is not a moment for concluding. It is the moment for more questioning.<sup>1</sup>

*Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* by Sarah Nouwen is an excellent exploration of the concept of complementarity under the Rome Statute of the International Criminal Court (the Rome Statute). In this book, Nouwen does not attempt a pure legal treatise. While she provides an excellent account of the legal dimensions of complementarity, she goes deeper, exploring sociological and political dimensions of complementarity and how it is used by various actors in the international criminal justice arena. Her findings, many of which are intuitive, are based on real empirical study and not just analysis of text. *Complementarity in the Line of Fire* is well written, well-researched and adopts an objectivity that is often lacking in the literature on international criminal law, and the International Criminal Court (the ICC) in particular. It should be said that Nouwen is no stranger to authorship which dissects the line between law and politics in the ICC discourse.<sup>2</sup>

The book tackles perhaps one of the key principles of international criminal justice, ie complementarity. But it is certainly not the first to do so.<sup>3</sup> Nouwen, however, attempts to go beyond the rhetoric, in the

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1 This is the "concluding" paragraph from Sarah M Nouwen *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (2013) 414.

2 See, eg, Nouwen & Werner 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan' 2010 *European Journal of International Law* 941.

process uncovering the myths around the concept, and laying bare not only what complementarity is meant to be under the Rome Statute, but also what it has become in practice. Complementarity is the idea or principle that the primary function for ensuring accountability for Rome Statute crimes, is not the ICC but rather domestic courts. The ICC only steps in when domestic courts are unable or unwilling to “genuinely” investigate and/or prosecute.

One of the critical contributions that *Complementarity in the Line Fire* makes is to distinguish between the legal nature of complementarity as provided for in the Rome Statute and what Sarah Nouwen refers to as “complementarity as big idea”, ie the rhetoric or sound bites associated with complementarity. As provided for in the Rome Statute, complementarity is a procedural bar to the jurisdiction of the ICC. But, contrary to popular belief, complementarity does not provide a legal basis for domestic courts to exercise jurisdiction over Rome Statute crimes.<sup>4</sup> As Nouwen correctly asserts, however, “complementarity as big idea” includes the idea that there is a responsibility or even sometimes a legal obligation to prosecute. It is, to borrow from Nouwen, an idea that “lives in the assembly halls of international organisations, conference rooms, auditoria, and other places where diplomats and politicians ...” and others make rhetorical statements. In truth, however, this invented tradition of complementarity as establishing a legal obligation has, in fact, managed to find itself into judicial decisions, including in South Africa.<sup>5</sup> While the Rome Statute may assume, rightly or wrongly, the pre-existence of such a duty under customary international law, it does not create it.

*Complementarity in the Line of Fire* also identifies other effects of the complementarity craze such as an expanded meaning of complementarity beyond what was envisaged in the Rome Statute. To the extent that this particular process is giving content to a rule already established in the Rome Statute, then it may be unremarkable, amounting to nothing more than a process which could lead to an interpretation of the complementarity as legal bar to jurisdiction through practice – assuming

3 See, eg, Bergsmo (ed) *Active Complementarity: Legal Information Transfer* (2011). See also Tladi ‘A Horizontal Treaty on Cooperation in International Criminal Matters: The Next Step for the Evolution of a Comprehensive International Criminal Justice System’ 2014 *SA Public Law* 368 describing key gaps in the application of complementarity as a central element of the Rome Statute system. Stone & du Plessis ‘The Implementation of the Rome Statute of the International Criminal Court (ICC) in African Countries’ available at <http://www.issafrica.org> (accessed: 2014:07-21).

4 See Tladi *supra* n 3.

5 *South African Litigation Centre and Another v National Director of Public Prosecutions and Others*, 2012 (10) BCLR 109 (GNP) par 15 and *National Commissioner of the South African Police and Another v Southern African Human Rights Litigation Centre and Another* 2014 (2) SA 42 (SCA). *National Commissioner of the South African Police and Another v Southern African Human Rights Litigation Centre and Another* 2014 (12) BCLR 1428 (CC).

the requirements for subsequent practice under the Vienna Conventions on the Law of Treaties are met.<sup>6</sup>

Other findings in Nouwen's book, however, are not as unremarkable and are more controversial. For example, Nouwen suggests that the ICC, in particular, the Office of the Prosecutor, has created a new meaning for complementarity – one derived from the literal meaning of the word complementarity, but far removed from its legal connotation in the Rome Statute. She asserts that the Court has used complementarity to suggest a division of labour where it, the ICC, goes after the big fish (or Nile Perch) while domestic courts go after the small fry (Tilapia). This understanding is captured in the Prosecutorial Strategy adopted by the Office of the Prosecutor. However, as Nouwen points out, it does not find support in the Rome Statute. While complementarity is intended to encourage domestic prosecution, she argues that it has the effect of discouraging certain prosecutions, in particular those relating to the big fish.

The idea of the Court, on the one hand stressing the importance of complementarity and the responsibility of states to prosecute,<sup>7</sup> while on the other pushing the idea that it has the responsibility for certain prosecutions, could suggest at best schizophrenia or at worst, a hypocrisy – assuming of course that the factual assertion that the Court both pushes a line of primacy of domestic jurisdictions while also, itself, asserting primacy of certain prosecutions. This conclusion appears buttressed by another one of Nouwen's conclusions, namely that the Office of the Prosecutor has a "policy" of inviting states to refer situations – it is doubtful whether this can be regarded as a policy, although, at least the first Prosecutor had earlier in his tenure mentioned an intention to invite states to refer. The "policy", of course, is critical to another ranging debate concerning the so-called Africa bias since the ICC's response to the charge of bias is, in part, to refer to the fact that most situations on its docket are the result of self-referrals by states. But from the perspective of complementarity, it raises issues concerning the validity of the assertion that justice must be done domestically first and at the ICC only as a last resort.

Nouwen explores these issues through an empirical study of ICC engagement in Uganda and Sudan. And it is at this point that certain cautionary notes should be made. First, Sudan and Uganda are two of the earlier situations and, particularly, with respect to the role of the ICC itself in bringing the matters within its jurisdiction, it should not be too hastily assumed that whatever conclusions can be drawn from the Court's involvement in those two situations are generally accurate. Second, it is also important in approaching this book – which by both intent and result is not purely a legal text, but includes sociological, anthropological

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6 See generally Nolte (ed) *Treaties and Subsequent Practice* (2013).

7 For references to various statements in which the Court has stressed the primacy of national jurisdiction, see Tladi *supra* n 3.

perspectives – to take into account personalities involved. The Office of the Prosecutor, responsible for much of the posture of the Court in respect of prosecutorial policy, is essentially under new leadership coming after much of the empirical research conducted. From a legal perspective this is irrelevant: there is only one Office of the Prosecutor.

There will be many who will (and judging from the blurbs on the back cover, many already have) sing the praises of this book and yet others will not agree with the conclusions. But what cannot be disputed is that *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* is a well written, well researched book that will hopefully lead to a dynamic debate on the role and future (and future role) of the ICC vis-à-vis domestic jurisdiction. The value of the book lies in the ability of the author to put on the blinders and tell the story as she sees it (paradox intended). The story is complex and readers should not be quick to judge the ICC harshly because of the book. Rather, they should search for the nuance that I (think) Nouwen is trying to bring out. Nouwen avoids the lazy tendency that I have identified in another publication:

The [ICC debate] has been characterised by an ideological chasm that has pitted villains against protagonists – with both sides casting the other as villains intent on wanton destruction and themselves as protagonists fighting the good fight.<sup>8</sup>

**D TLADI**

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<sup>8</sup> Tladi 'When Elephants Collide it is the Grass that Suffers: Cooperation and the Security Council in the Context of the AU/ICC Dynamic' 2014 *African Journal of Legal Studies* 378 378.

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3. Contributions in both English and Afrikaans are published and may consist of articles, notes, discussions of recent cases and book reviews. A translated title and a brief summary of approximately 300 words in Afrikaans must accompany an article written in English. In the case of Afrikaans articles a similar requirement applies regarding an English title and summary.
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