De Jure Volume 1 2016

Pretoria University Law Press
PULP

ISSN: 1466 3597

PULP

De Jure

JAARGANG 49
VOLUME 1 2016

DE JURE

FAKULTEIT REGSGELEERDHEID/FACULTY OF LAW

PRODUKSIE/PRODUCTION
Pretoria University Law Press (PULP), Faculty of Law, University of Pretoria
Lizette Hermann (Manager, PULP)

REDAKSIONELE BELEID/EDITORIAL POLICY: sien agterblad/see back page

2016(1) *De Jure*

De Jure verskyn ten minste twee maal per jaar. Finansiële steun van die Universiteit van Pretoria en ander skenkers word erken. Korrespondense en navrae oor bydraes in *De Jure* moet gerig word aan die Redakteur, *De Jure*, Departement Publiekreg, Universiteit van Pretoria, 0002 (e-pos: philip.stevens @up.ac.za). *De Jure* is by wyse van ooptoegang beskikbaar op die internet by: http://www.dejure.up.ac.za

De Jure appears at least twice annually. Financial support from the University of Pretoria and other donors is acknowledged. Correspondence and queries regarding submissions should be addressed to The Editor, *De Jure*, Department of Public Law, University of Pretoria, 0002 (email: philip.stevens@ up.ac.za). *De Jure* is available as an open access journal on the internet at: http://www.dejure.up.ac.za

ISSN: 1466 3597
E-ISSN: 2225 7160

DE JURE

JAARGANG 49 2016 VOLUME 1

INHOUDSOPGAWE CONTENTS

Artikels/Articles

Aantekeninge/Notes

Onlangse regspraak/Recent case law

Editorial/Redaksioneel

"And as imagination bodies forth
The forms of things unknown, the poet's pen
Turns them to shapes and gives to airy nothing
A local habitation and a name"
(William Shakespeare from A Midsummer Night's Dream)

With the wise words of Shakespeare in mind, the editorial board of *De Jure* has pleasure in presenting the first volume of 2016. This volume paves the way for valuable discussions by a variety of academics on a wide variety of topics. Interesting discussions are provided for pertaining to the incidence of false child sexual abuse allegations and the inherent need to take these allegations more seriously; approaches to designing a more assessable curriculum for clinical legal education in order to prepare legal scholars for the demands of practice; the role of executive directors in a company; aspects relating to insurance fraud and discussions pertaining to the efficacy of debt review in terms of the national Credit Act 24 of 2005 to mention but a few. The *De Jure* team wish to thank all contributors as well as reviewers to this volume for their efforts and contributions to this volume.

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

Designing an appropriate and assessable curriculum for clinical legal education

M A (Riëtte) Du Plessis
LLM PhD
Associate Professor, School of Law, University of the Witwatersrand Johannesburg

OPSOMMING

Die ontwerp van 'n toepaslike en asseseerbare leerplan vir Kliniese Regsopleiding

Die Wetsgenootskap van Suid-Afrika en die professie het aangetoon dat graduandi van die vier-jaar LLB nie behoorlik toegerus word om die praktyk te betree nie. Studente se blootstelling aan en voorbereiding vir die praktyk geskied hoofsaaklik tydens hul kursus in Kliniese Regsopleiding. Dit is dus belangrik dat sodanige kursus oor 'n toepaslike en asseseerbare leerplan beskik. Met die opstel van die leerplan moet daar gelet word op die missie en die fokus van die regskliniek, die rol van die kliniese toesighouer, asook die doelstellings, vaardighede en waardes wat nagestreef behoort te word ten einde die beoogde uitkomste te bereik. Hierdie word bespreek deur na die huidige Suid-Afrikaanse literatuur asook die leerplanne van vier Suid-Afrikaanse universiteitsregsklinieke te kyk. Internasionale tendense word bespreek en met dié van Suid-Afrika vergelyk. Tekortkominge word uitgelig en aangespreek. Die gevolgtrekkings word dan gebruik om 'n voorgestelde leerplan vir Suid-Afrikaanse universiteitsregsklinieke te ontwerp.

1 Introduction

Introduced in 1997, the four-year undergraduate LLB degree led to complaints by law firms about the level of preparation of the LLB graduates they recruit.[1] The CEO of the Law Society of South Africa also indicated that most students did not have the requisite academic literacy or numeracy skills to complete the undergraduate LLB degree in four-years.[2]

On 16 April 2014, the University of the Witwatersrand (Wits)[3] announced, following extensive discussions with members of the profession,[4] that the Bar, academic colleagues, and after confirmation at the Society of Law Teachers of Southern Africa Conference,[5] the Wits

1 University World News 'Legal training uncertainty as university scraps degree' 2014 available from http://www.universityworldnews.com/article.php?story = 20140424114611428 (accessed 2015-04-22).
2 *Ibid*.
3 *Ibid*.
4 *Ibid*. Many of the discussions with law firms pointed to the lack of maturity or awareness of the graduates to be given stewardship of clients' affairs. Some firms of attorneys, who regularly recruit graduates, employ them on

How to cite: Du Plessis 'Designing an appropriate and assessable curriculum for clinical legal education' 2016 *De Jure* 1-22
http://dx.doi.org/10.17159/2225-7160/2016/v49n1a1

School of Law has decided to discontinue the undergraduate four-year LLB at the end of 2014.[6] From 2015, all students with an interest in law will have to enroll in the postgraduate LLB program which may take an additional two-years for those who have completed the BA Law or BCom Law.[7] The Head of the Wits School of Law indicated that:

> the rationale for this strategy is that a prior degree would already have prepared a prospective law student on the expectations of university education with some level of literacy, numeracy and exposure to the wider issues in South Africa and beyond that are material in their understanding of law.[8]

The decision was criticised by the South African Black Lawyers Association, commenting that Wits was 'pre-empting a multi-stakeholder review process' led by the Council on Higher Education.[9] However, academics indicated that these review discussions had not progressed in five years. The decision was welcomed by academics at four law schools across the country, one commenting anonymously that 'it was a move that other universities should follow as the current system produced "legal barbarians" who, while trained in law, were ill-equipped to translate that into understanding how lawyers functioned in relation to society and the "power dynamics" that existed'.[10]

To date, no other law school in South Africa discontinued the four-year undergraduate LLB. Clinical legal education (CLE) is a mode of instruction in various law school courses – particularly courses that are described as 'clinical', such as simulation-based courses (students assume professional roles in hypothetical situations), in-house clinics (students represent clients or perform other professional roles under supervision of a member of the faculty, who is an attorney), and externships (students represent clients or perform other professional roles under supervision of an attorney who is not a member of the faculty).[11] As in many global jurisdictions, CLE forms part of the LLB curriculum at most of the South African Universities.[12]

---

the proviso that they complete additional academic qualifications, such as a Bachelor of Laws or Masters degree. See http://www.wits.ac.za/law/programmes/15664/academic_programmes.html (accessed 2015-04-22); and http://www.wits.ac.za/newsroom/newsitems/201404/23367/news_item_23367.html (accessed 2015-04-22).

5 Held at the Wits School of Law in January 2014.

6 University World News 2014 *supra* n 1 (accessed 2015-04-22).

7 *Ibid*.

8 *Ibid*.

9 *Ibid*.

10 Business Day Live 'Wits scraps four-year law degree to give ethical grounding' 2014 available from http://www.bdlive.co.za/national/education/2014/04/17/wits-scraps-four-year-law-degree-to-give-ethical-grounding (accessed 2015-04-22).

11 Stuckey & Others *Best practices for legal education* (2007) 166.

12 South African University Law Clinics Association (SAULCA) is a voluntary association of all South African University Law Clinics, established to

Given the complaints by law firms about the level of preparation of the LLB graduates they recruit,[13] combined with the Law Society of South Africa's indication,[14] the importance of CLE becomes more accentuated. The CLE curriculum, therefore, is of cardinal importance. CLE can encompass a variety of courses and clinical methods. CLE serves a two-fold purpose, namely practical legal training of students and providing free legal services to the (indigent) community.[15] Due to the students' limited practical exposure during the four-year LLB studies, the CLE curriculum became pivotal and will be discussed with reference to foreign jurisdictions.

What follows will be a curriculum review of CLE – which will include determining the mission of the clinic, its focus and the role of the clinician. It will be indicated that the pedagogy of CLE should ideally consist of three basic components, namely the clinical experience, classroom teaching and tutorial components. Outcomes, skills and values are foundational to the design of a CLE curriculum and these will be probed. In an attempt to find a comprehensive and appropriate curriculum for CLE, suggestions from foreign jurisdictions will be explored. This will be followed by a review of the curricula of four South African university law clinics.

2 CLE Curriculum Review

A recent PhD study reviewed the CLE curricula of four South African universities, namely the Universities of the Witwatersrand, Pretoria, Johannesburg and the Free State.[16] These will be discussed, followed by a curriculum summary. Outcomes and skills stated for South Africa will be measured against those stated for multiple jurisdictions. The curriculum requirements identified across a number of foreign jurisdictions and the curricula of the four South African universities under review will be also compared.

In an attempt to formulate an ideal CLE curriculum, with a focus on applicability in South African university law clinics, the curriculum requirements that were identified across the foreign jurisdictions will be

promote and protect the interests, values and goals of its members. Part of SAULCA's mission is to promote high quality CLE programmes at universities in South Africa.

13 University World News 2014 *supra* n 1 (accessed 2015-04-22).

14 *Ibid*.

15 South African universities have identified their objectives as three-fold, namely teaching, community service and academic research. See Wimpey & Mahomed 'The practice of freedom – the South African experience' 2006 (unpublished copy on file with author) 17. Generally, university law clinics have to satisfy two main objectives, namely teaching students and service to the community. See Du Plessis 'Closing the gap between the needs of students and the community they serve' 2008 *Journal for Juridical Science (JJS)* 33.

16 Du Plessis 'Assessment methods in clinical legal education' (PhD thesis 2014 Wits).

compared to those used by the four South African universities that were under review.[17] Once the common, and ideal, components for the curriculum are identified, these will be measured against outcomes and skills determined for these components in the South African landscape. The required components for a curriculum in CLE will be identified – which clinicians may structure according to their needs, but it will be suggested that all components should form part of the teaching of CLE. As the components will be determined across a number of jurisdictions, the final suggestions may be applicable not only to South African university law clinics, but to many other jurisdictions as well.

2 1 Determining the Mission of the Clinic, its Focus, the CLE Programs and the Role of the Clinician

In order to design clinical programmes, it is imperative that the clinic has a clear mission. Once the clinic's mission is determined, it will be the foundation from which the subsequent student and institutional outcomes, curriculum, teaching methods and assessment will be reflected.[18]

The mission of the clinic will inform the focus of the clinic, its CLE programme and the roles of its clinicians.

The focus of a university law clinic is important in determining how the teaching methodology of CLE will be applied in the training of the students and the setting of the curriculum. This, in turn, will determine the roles of the clinicians.[19]

3 Pedagogy: The Clinical Experience and Inclusion of Classroom and Tutorial Components

The pedagogy of CLE should ideally consist of three basic components, namely clinical duty, classroom teaching and clinician/student tutorial sessions.[20]

17 All these universities follow the in-house live-client model and students are required to attend weekly clinic duties. The formulation of a curriculum will focus on the classroom components of the CLE courses.

18 Munro 'How do we know if we are achieving our goals?: Strategies for assessing the outcome of curricular innovation' 2002 *Journal of the Association of Legal Writing Directors* 231-232.

19 Research into determining the mission of the clinic, its focus, the CLE programmes and the role of the clinician outcomes, skills and values was undertaken across several jurisdictions and is fully described in Du Plessis (PhD thesis 2014) *supra* n 16 at 26-36; and Du Plessis 'Clinical legal education: determining the mission and focus of a university law clinic and required outcomes, skills & values' 2015 *De Jure* 312-327.

20 See Du Plessis (PhD thesis 2014) *supra* n 16 at 37-41. This study surveyed multiple international and national jurisdictions and it was indicated that these three components are the ideal basis for clinical pedagogy.

3 1 The Clinic Experience

The infrastructure for an in-house live-client model is well established in South Africa.[21] This model is used by the four South African universities reviewed. In-house live-client courses can be used to achieve clearly articulated educational goals. It is important to have a clear understanding about what students are required to learn, especially in light of the high cost of operating these clinics. Students, therefore, need to be taught about their relationships with the clinicians and the restrictions placed on their freedom to act as lawyers.[22]

Although acknowledging that a substantial part of traditional or doctrinal law teaching incorporates problem solving, practice-orientated clinical experiences teach students a different, but equally important, kind of reasoning. These are 'ends-means thinking', or problem-solving – described as 'the process by which one starts with a factual situation presenting a problem or an opportunity and figures out the ways in which the problem might be solved or the opportunity might be realised'.[23] Vawda describes problem-solving as a highly interactive methodology whereby students and clinicians work together in solving clients' problems.[24] He identifies a number of steps involved in the problem-solving approach, such as problem definition, option identification, decision making and implementation.[25] The process involving these steps is applied in the clinical setting initially, with continuous re-enforcement during tutorial sessions.[26] A live-client clinic enables students to scratch beneath the surface of the legal system and explore the hinterland of expectations, promises and goals engendered by the legal process.[27]

3 2 The Classroom Component

In a live-client clinic, a 'problem-first' approach is often used as pedagogy. This leads to clinicians labouring under an intrinsic belief that students will learn certain skills simply by seeing a real client with a legal problem. The assumption is then that they will develop further skills from having to find a solution to that problem 'on the run'. Evans and Hyams argue that, although there is evidence that many things are learnt in this manner, this 'osmotic' exposure model may not be the best way in which

21 For more on this model (also sometimes referred to as an 'in-house clinic') see Du Plessis 2008 *JJS supra* n 15 at 13.
22 Stuckey & Others *supra* n 11 at 189.
23 Findley 'Rediscovering the Lawyer School: Curriculum Reform in Wisconsin' 2006-2007 *Wisconsin International Law Journal* 311.
24 Vawda 'Learning from experience: the art and science of clinical law' 2004 *JJS* 121.
25 *Ibid.*
26 *Ibid.*
27 Hall & Kerrigan 'Clinic and the wider law curriculum' 2011 *International Journal of Clinical Legal Education (IJCLE)* 34.

to learn lawyering skills.[28] It is therefore advisable to run seminars and tutorial programmes alongside the live-client work. This will support and expand the legal skills learnt in the clinical environment. The classroom component is also essential because the clinician often has to 'teach things students should have learned before enrolling in client representation courses, such as the rules of evidence and professional conduct and basic lessons about lawyering skills'.[29] The classroom component, whether in smaller groups or by means of seminars, is also regarded as important in the South African teaching of CLE.[30] Classroom content can support a focus on professionalism and ethics,[31] and is also essential for the teaching of certain types of work done by practitioners that may be substantial and that students are unable to be taught in a clinical setting only.[32] This will require a concomitant reduction in casework load.[33] Vawda suggests a classroom component of two hours per week where clinicians meet with all the students and offer instruction in the theory of clinical law, skills, ethics and values,[34] as the focus of CLE is rather on training students than (uncontrolled) client services. Hyams holds that '[a]dequate time must be allowed in the formal clinical classroom curriculum and in the supervisor/student relationship to allow both formal (classroom) instruction and informal discussion to take place'.[35] At its most basic, the emphasis of the clinic may need to be restructured so that the number of clients that are seen in a given week are reduced, or the seminar/classroom component of the units may have to undergo a renewal and change of focus.[36] There is value in integrating practicing lawyers and judges into the classroom component as guest lecturers. They can give students a realistic view of the practice of law and bring diversity to clinical legal education.[37]

---

28 Evans & Hyams 'Independent valuations of clinical education programs' 2008 *Griffith Law Review* 63.

29 Stuckey & Others *supra* n 11 at 189.

30 Osman 'Meeting quality requirements: A qualitative review of the clinical law module at the Howard College Campus' 2006 *De Jure* 276; Haupt 'Some aspects regarding the origin, development and present position of the University of Pretoria Law Clinic' 2006 *De Jure* 234; McQuoid-Mason 'Methods of teaching civil procedure' 1982 *JJS* 165; Vawda '"But where is the halaal food?" An appraisal of diversity teaching in clinical law programmes in South African clinics' 2008 *JJS* 89.

31 For ethical skills exercises see Albert & Gundlach 'Bridging the gap: introducing ethical skills exercises to enrich learning in first year courses' (2011) Summer Conference of the Institute for Law Teaching and Learning (ILTL) 1-10.

32 Styles & Zariski 'Law clinics and the promotion of Public Interest Lawyering' 2001 *Law in Context* 65; Giddings 'Contemplating the future of clinical legal education' 2008 *Griffith Law Review* 12; Hyams 'On teaching students to "act like a lawyer": What sort of a lawyer?' 2008 *IJCLE* 32.

33 Hyams 2008 *IJCLE supra* n 32 at 32.

34 Vawda 2004 *JJS supra* n 24 at 119. The clinical programmes at the University of KwaZulu-Natal are described in McQuoid-Mason 'Street law as a clinical program. The South African experience with particular reference to the University of KwaZulu-Natal' 2008 *Griffith Law Review* 43.

35 Hyams 2008 *IJCLE supra* n 32 at 32.

36 *Ibid*.

37 Stuckey & Others *supra* n 11 at 158.

3 3 The Tutorial Component

Tutorial sessions are geared towards guiding students through the stages of learning.[38] The proper implementation of CLE requires close and direct supervision of students, which will satisfy the goal/outcome aimed at ensuring that the student is working effectively, efficiently and ethically for the client.[39] Clinicians should enforce regular tutorial meetings.[40] CLE, of which tutorials form a large component, 'is an active pedagogy in which students are required to perform certain tasks and draw lessons from those experiences'.[41] The learning process is enhanced through action, verbalisation of thoughts and an active engagement with ideas through consultation, discussion and feedback involving peers and clinicians.

The relationship between clinicians and their students is about managing the expectations of the students, clients and clinicians. Clinicians need to be consistent in dealing with these expectations, which become clear during tutorial sessions.

Tutorials are appropriate *fora* where student autonomy can be balanced with client protection.[42] Under the guidance of the clinician, the student must develop a reflective and critical approach to his or her own experience without risking harm to the client. The highest quality experience comes from a clinician who can strike the appropriate balance between allowing the student the freedom to explore, whilst protecting the client from harm.[43] Swanepoel *et al* describe the tutorial component in CLE as a forum where students are more relaxed and exert more effort into thinking than they would do when their immediate goal was just to memorise material to pass an imminent examination.[44] Tutorials were also identified as *fora* where the clinician's responsibility to provide a pedagogical basis for tackling ethical issues can manifest.[45]

---

38 Colon-Navarro 'Technology and assessment in the legal classroom: an empirical study' 2011 Summer Academy of the ILTL *supra* n 31 at 1-10.

39 Vawda 2004 *JJS supra* n 24 at 122; Cody & Schatz 'Community law clinics: teaching students, working with disadvantaged communities' in Bloch (ed) *The Global Clinical Movement: Educating Lawyers for Social Justice* (2010) 174.

40 Although the tutorial method of teaching, which can also be referred to as reflection sessions students have with their clinical supervisors, is used in clinics in the USA, the UK and South Africa, this method was only recommended as a method for imparting legal education in India in 1994; see Bloch & Prasad 'Institutionalizing a Social Justice Mission for Clinical Legal Education: Cross-National Currents from India and the United States' 2006 *Clinical Law Review (CLR)* 179; Lerner & Talati 'Teaching law and educating lawyers: closing the gap through multidisciplinary experiential learning' 2006 *IJCLE* 121.

41 Vawda 2004 *JJS supra* n 24 at 120.

42 Stuckey & Others *supra* n 11 at 195.

43 *Ibid*.

44 Swanepoel, Karels & Bezuidenhout 'Integrating theory and practice in the LLB curriculum: Some reflections' 2004 *JJS* 109.

45 Evans & Hyams 2008 *Griffith Law Review supra* n 28 at 64.

Neglecting tutorials, where students are trained in professional practice, effectively prolongs and reinforces the habits of thinking like a student rather than as a practitioner.[46]

4 Specialisation

Specialised units within the larger clinical setting are becoming the norm at more South African university law clinics.[47] Parameters for case specific and student learning criteria will ensure manageable caseloads.[48]

Similar to Stuckey, who voiced the perspective in the USA, Australians Evans, Hyams and Giddings believe that specialist clinical units may provide students with 'a richer skills set and a deeper and more comprehensive milieu in which to practice those skills' – which will benefit the law school and serves as a valuable resource for the community.[49] Such specialised clinical units must conform to the pedagogical aims of the CLE program.

5 Outcomes, Skills and Values

Outcomes,[50] skills and values are foundational to the design of a CLE curriculum which was identified as preconditions in designing a curriculum that can be assessed effectively.[51]

Outcomes were defined as 'the stated abilities, knowledge base, skills, personal attributes, and perspectives on the role of law and lawyers in society'.[52] The outcomes of a clinical programme are relevant to the needs of the society, students and the profession.[53] When planning a

46 Ortiz 'Going Back to Basics: Changing the Law School Curriculum by Implementing Experiential Methods in Teaching Students the Practice of Law' 2011 available from https://works.bepress.com/damian_ortiz/1/ (accessed 2016-07-17).

47 De Klerk 'Integrating clinical education into the law degree: Thoughts on an alternative model' 2006 *De Jure* 250; Du Plessis 'A consumer clinic as a specialised unit' 2006 *De Jure* 285; De Klerk & Mahomed 'Specialisation at a University Law Clinic: The Wits Experience' 2006 *De Jure* 306-318; McQuoid-Mason 2008 *Griffith Law Review supra* n 34 at 10; Haupt 2006 *De Jure supra* n 30 at 238-241.

48 Du Plessis 2008 *JJS supra* n 15 at 14.

49 Evans & Hyams 2008 *Griffith Law Review supra* n 28 at 67; Giddings 2008 *Griffith Law Review supra* n 32 at 4.

50 Research into outcomes, skills and values was undertaken across several jurisdictions and is fully described in Du Plessis (PhD thesis 2014) *supra* n 16 at 43-53; and Du Plessis 2015 *De Jure supra* n 19 at 312-327.

51 Smyth & Liddle 'Lulling ourselves into a false sense of competence: learning outcomes and clinical legal education in Canada, the United States and Australia' 2012 *Canadian Legal Education Annual Review* 21.

52 Munro 2002 *Journal of the Association of Legal Writing Directors supra* n 18 at 232.

53 Osman 2006 *De Jure supra* n 30 at 275.

curriculum, certain outcomes are expected. In South Africa, seven main goals (outcomes), each with their own sub-goals, of CLE have been identified.[54]

Skills can be categorised as attitudinal skills, cognitive skills, communication skills and relational skills.[55] In South Africa, skills are foundational to the setting of a curriculum and encompass a wide range.[56]

Chavkin identifies two values critical to the legal profession, namely the lawyer's relationship to opposing counsel, judges and court administration; and the lawyer's relationship to the profession.[57]

6 Curriculum

A curriculum which will serve the clinic's mission and the stated outcomes for the students must have certain characteristics which include focus, coherency and logical coordination, the provision for incremental and developmental formation of student abilities and that all the outcomes should be required for all students.[58] The latter characteristic should be heeded when a clinic operates in specialised units where students may be exposed to different styles of practice and different experiences. It is important that valid assessment and continual feedback are an integral part of the curriculum.

Suggestions from foreign jurisdictions were explored in an attempt to find a comprehensive and appropriate curriculum.[59] As part of the clinical curriculum, as it relates to student activity, it is recommended that students receive formative feedback on their clinical work; a

54 De Klerk *et al Clinical law in SA* (2006) 266-279.

55 Kift 'A tale of two sectors: dynamic curriculum change for a dynamically changing profession' 13th Commonwealth Law Conference (2003) *Developing the Law Curriculum to Meet the Needs of the 21st Century Legal Practitione*r (Melbourne, Australia: Conference paper unpublished) 1-13; abstract available from http://eprints.qut.edu.au/7468/.

56 De Klerk *supra* n 54 at 29-262. The authors describe the skills taught, together with instruction on the teaching of the different skills. These skills are mostly taught, and instructions are aimed at teaching these skills as part of CLE courses, which form part of the LLB curriculum.

57 Chavkin 'Experience is the only teacher: Meeting the challenge of the Carnegie Foundation Report' 2007 *Legal Education Digest* 5.

58 Munro 2002 *Journal of the Association of Legal Writing Directors supra* n 18 at 236.

59 Identified and proposed by: the Law Society of England and Wales; see Stuckey & Others *supra* n 11 at 44; the State Bar of Wisconsin's Commission on Legal Education; see Findley 2006-2007 *Wisconsin International Law Journal supra* n 23 at 324; for the USA and Canada see the MacCrate Report; the Bar Council of India see Bloch & Prasad 2006 *CLR supra* n 40 at 209-212; for Australia see Giddings 2008 *Griffith Law Review supra* n 32 at 12; for Germany see Brücker & Woodruff 'The Bologna Process and German Legal Education: Developing Professional Competence through Clinical Experiences' 2008 *German Law Journal* 579.

minimum of two students be responsible for each client/case;[60] students should be involved in group work; the knowledge, skills and expertise of students must be shared with their partner/group; the initial responsibility for the cases should be the students'; and weekly plenary lectures (either to the entire body of students in the clinical course, or to groups of students, in their specialised units).

In analysing the curriculum requirements set by the abovementioned jurisdictions, the following appeared to be common to all those jurisdictions in terms of course content. For CLE, each student should receive substantial instruction in: the substantive law necessary for effective and responsible participation in the legal profession; legal analysis and reasoning; legal research; problem-solving and oral communication; writing in a legal context; professional responsibility; social responsibility; practice management; observance of and reporting on trials (both civil and criminal); interviewing techniques; drafting of pleadings; drafting of letters and other formal documents; professional ethics; trial advocacy; negotiation techniques; and writing programmes.

7 Review of the CLE Curricula of the South African Universities of the Witwatersrand, Pretoria, Johannesburg and Free State

The aim of the review was to compare the clinical models used by the different clinics, whether the CLE course is compulsory or an elective and whether CLE is offered as a year or a semester course. The different clinical scenarios will be explained where after the contents of the different CLE curricula will be probed. The outcomes of the review may prove to be helpful to clinical directors at South African university law clinics.

All these university law clinics follow the in-house live-client model and students are required to attend weekly clinic duties, supervised by clinicians.

At the University of the Witwatersrand Law Clinic (WLC), students work in pairs and are allocated to a clinician who is responsible for managing their weekly clinic intake of cases. Students on duty, in

60 Chavkin 'Matchmaker, matchmaker: Student collaboration in clinical programs' 1995 *CLR* 213 indicates that, in pairs, students can filter client life experiences through multiple personal life experiences and thereby potentially develop richer and more accurate understandings of their clients. Du Plessis 'Assessment challenges in the clinical environment' 2009 *JJS* 97 is of the opinion that there are benefits for students working in pairs, such as having a partner to discuss the case with, to plan strategy and the execution thereof together, as well as in drafting the necessary documents and correspondence. Haupt 2006 *De Jure supra* n 30 at 235 is also in favor of students doing the clinical component 'initially in groups, later in pairs and eventually as individuals towards the end of the course'.

consultation with their clinician(s) who attend the clinics, consult with the clients and identify suitable cases.[61] No appointments are made for consultations, as the WLC operates on a 'walk-in' and 'first-come-first-served' basis. Each student pair has to attend weekly designated and compulsory clinic duty for two hours. Student pairs also have to attend compulsory 45-minute tutorials weekly with their supervising clinicians where the cases are discussed in depth, strategies are planned, instructions are given and student progress is monitored.

At the University of Pretoria Law Clinic (UPLC), students form small groups called firms consisting of five or six members called partners. They report to two clinicians who are not attending clinic, but are available. Student firms consult with clients, by appointment only, during their two-hour weekly clinic sessions.[62] No formal tutorials are scheduled, but clinicians monitor students' activities through messages placed in 'pigeon holes' in clinicians' offices. Students may also approach clinicians for consultations.

At the University of the Free State Law Clinic (UFSLC), students are only required to do one semester of clinical sessions, which are divided into the following specialised units from which students are allowed to choose: Labour, Evictions, Civil, Family and Appeals. Students, who each have a student partner, have to attend clinical sessions once a week, totaling approximately twenty hours of contact sessions per student per year. The student consultation sessions are pre-arranged with clients. In the Appeals unit, students do not consult with clients but are taught by way of simulation. Regular tutorials are arranged with the clinicians.

At the University of Johannesburg Law Clinic (UJLC), students are only required to do one semester of clinical sessions. Students do not work in pairs or firms, but consult on their own. Clients consult by appointment only. Student assistants and secretaries pre-screen clients telephonically. Students are allocated specific days for clinic duty, which last from 08h00 until 13h00. No formal tutorials are scheduled and students consult with clinicians as needed.

In comparing the above four models, the following is evident: at WLC, UJLC and UFSLC, CLE is a compulsory course, which is recommended, whereas CLE is an elective course at UPLC. At WLC and UPLC, CLE is taught as a year course, whilst CLE are semester courses at UFSLC and UJLC. The advantage of semester courses, and of making CLE an elective course, is the reduction in student numbers in the course. However, by limiting CLE to a semester course, it is doubtful that students will reap the full benefits of the potential that a CLE course can offer. It will also be more beneficial to clients when the same student counsellors are available for a longer duration to attend to their cases.

---

61 Haupt & Mahomed 'Some thoughts on assessment methods used in clinical legal education programmes at the University of Pretoria Law Clinic and the University of the Witwatersrand Law Clinic' 2008 *De Jure* 278.

62 *Ibid*.

Only WLC operates a 'walk-in' clinic. This is possible as WLC is better staffed than the other clinics. The remainder of this review will focus on the classroom components of the CLE courses.

7 1 University of the Witwatersrand

WLC teaches CLE in a full-year course to final year students. This experiential learning is taught in specialised units,[63] where the clinicians specialise in different fields of law.[64] The course consists of three components, namely plenary sessions, tutorials and clinic duty.[65] The plenary sessions comprise of group lectures for all the students and small group sessions where students are taught in their specialised units. These lectures continue throughout the academic year and are taught weekly during a double lecture (90 minutes). Students are presented with a prescribed reading list.[66]

The curriculum for the classroom component of the CLE course is as follows:[67] interviewing skills; file management; court report; basic drafting – letters and statements; professional negligence and insurance; legal research and problem solving; drafting court documents; attorneys' numeracy skills and costs; professional conduct and ethics; organisation of the legal profession; social justice; trial skills: analysis of pleadings and evidence, preparation for trial, a plenary session dealing with pre-trial procedures, analysis of pleadings and evidence; and trial skills: a plenary session dealing with court demeanor, opening statements and examination-in-chief, cross-examination and closing address, courtroom skills and a number of weeks conducting trial advocacy exercises. WLC operates in specialised units and each specialised unit will attend a workshop on courtroom skills through demonstrations, simulations and group exercises. In the specialised units,[68] students also attend unit-based sessions where the law and procedure applicable to the various units will be discussed.

63 'Experiential courses … rely on experiential education as a significant or primary method of instruction. [T]his involves using students' experiences in the roles of lawyers or their observations of practicing lawyers … to guide their learning'; see Stuckey & Others *supra* n 11 at 165.

64 These specialised units are: family law; refugee law; consumer law; labour law; land, housing and evictions; the law of delict; and a general unit to accommodate cases that cannot be allocated to any of the other units.

65 WLC CLE course outline (2016).

66 *Ibid*.

67 *Ibid*.

68 These specialised units are: family law; refugee law; consumer law; labour law; land, housing and evictions; the law of delict; and a general unit to accommodate cases that cannot be allocated to any of the other units.

7 2 University of Pretoria

UPLC teaches CLE in the course to final year students as an elective. They use a combination of the live-client teaching model, simulations and plenary lectures.[69]

The curriculum for the classroom component, presented over the course of a semester, comprise of an introduction to the course and the law clinic, which includes the 'shadowing' of a candidate attorney; consultation skills; filing, firm duty, clinic manual, rules of the clinic and means test; court procedures, which include an overview of pleadings, notices, process, issuing and service aspects of substantive and procedural law and divorce litigation; a workshop on diversity issues; a workshop on negotiations; and legal writing and numeracy skills.[70]

7 3 University of Johannesburg

UJLC teaches CLE as a compulsory year course to final year students.[71] They use a combination of the live-client teaching model, simulations and plenary lectures. The curriculum for the classroom component comprises of oral and written communication; divorces; Magistrate's Court procedure; legal ethics; numeracy skills; legal costs; the legal profession; practice management; and trial advocacy.[72]

7 4 University of the Free State

UFSLC teaches CLE as a compulsory course to final year students.[73] They use a combination of the live-client teaching model, simulations and plenary lectures.[74] The curriculum for the classroom component comprise the following:[75] consultation skills; file and case management; practice management; writing letters; drafting pleadings, notices and applications; and legal costs.[76]

In conclusion, Bloch and Noone identified three different models of practice used in CLE programmes, namely: (a) a relatively open-ended individual service model (as used by WLC);[77] (b) a specialisation model addressing a particular area of law with a specifically targeted group of clients (integrated by all the university law clinics under review);[78] and

69 UPLC CLE course outline (2016).
70 *Ibid*.
71 UJLC CLE course outline (2016).
72 *Ibid*.
73 UFSLC CLE course outline (2016).
74 *Ibid*.
75 *Ibid*.
76 The topic of legal costs is discussed in a study guide handed to the students.
77 Noone & Bloch 'Legal Aid Origins of Clinical Legal Education' in Bloch (ed) *supra* n 39 at 158-162.
78 *Ibid*.

(c) a community model concerned with a local community and utilising a range of approaches (as employed by UFSLC).[79]

8 Curriculum Summary

It was indicated above that the outcomes, skills and values are foundational to the design of a CLE curriculum. Surveys across a wide selection of jurisdictions, pertaining to the skills, values and expected outcomes of the course were reviewed, where common requirements for curricula were identified, all of which can be used in the design of an effective and assessable curriculum in CLE.[80]

8 1 Outcomes Summary

A summary of the abovementioned jurisdictions' identified outcomes indicate that when outcomes for CLE are determined, the following should be considered: collaboration with legal practice; the outcomes must be consistent with the mission of the school and the university to ensure consistency; outcomes must be assessable; an outcome must be stated; clinics should consider how many outcomes they can reasonably address and assess during the CLE programme; the demands of the outcomes on the clinic and the students should be reasonable.[81] The outcomes stated by the mentioned multiple jurisdictions, and that of the seven main goals (outcomes)[82] each with their own sub-goals, identified for South Africa were compared. The results are as follows:

79 *Ibid*.
80 See n 59 *supra* in this regard.
81 *Ibid*.
82 The seven goals were indicated in De Klerk *supra* n 54 at 266-279; Du Plessis *supra* n 19 at 312. Goal one relates to professional responsibility. The sub-goals (outcomes) are: a system of legal ethics and ethical philosophy; personal norms/morality; the professional role of legal practitioners; the analysis of legal institutions; social awareness; and affording students the opportunity to reform the system. Goal two is judgment and analytical abilities. The sub-goals (outcomes) are: recognition of relevant facts and applicable law; understanding strategy, tactics and decision making; understanding process and procedure; synthesis; and reflection. Goal three is the knowledge of substantive law. The sub-goals (outcomes) are: strengthening and deepening of existing knowledge; acquiring new knowledge; the impact of theory (strengthening and extending acquired theory); and the study of specific law areas. Goal four relates to applied practice skills. The sub-goals (outcomes) are: consultation skills; client counseling; negotiation; trial advocacy; appellate advocacy; drafting of legal documents; legal research; factual investigation; and office management. Goal five is rendering legal services to the community, which ties in with goal six where students are required to be able to learn and work in groups. Goal seven is the integration of all or some of these goals.

To consider when determining outcomes:

Multiple jurisdictions[1]	**Outcomes stated for South Africa**[2]
Collaboration with legal practice	Professional responsibility, legal ethics (goal 1)
The professional role of legal practitioners	Analysis of legal institutions (goal 1)
Consistent with the mission of the school and the university	Mission statements of the four SA universities reviewed are consistent
Assessable	The outcomes stated by the four SA universities reviewed are assessable
Must be stated	The outcomes are stated by four SA universities reviewed
Substantive law	Substantive law (goal 3)
Procedural law	Judgment and analytical abilities, understanding process and procedure, synthesis (goal 2)
Professional conduct	Professional responsibility, legal ethics, professional role of legal practitioners, analysis of legal institutions (goal 1)
Client care	Social awareness, legal services to the community (goals 1 and 5)
Ethics	Legal ethics (goal 1)
Conduct an initial interview	Applied practice skills, consultation skills, judgment and analytical abilities, recognition of relevant facts and applicable law, understanding strategy, tactics, decision making (goals 2 and 4)
Preliminary written advice	Applied practice skills, judgment and analytical abilities, recognition of relevant facts and applicable law, understanding, strategy, tactics, decision making (goals 2 and 4)
Appropriate English and the ability to draft letters	Applied practice skills (goal 4)
Draft formal documents	Applied practice skills, draft legal documents (goal 4)

The ability to bring a case to an appropriate resolution	Applied practice skills, counseling, negotiation trial and appellate advocacy, legal research, factual investigation, judgment and analytical abilities, recognition of relevant facts and applicable law, understanding strategy, tactics, decision making (goals 2 and 4)
To work effectively in a group	Learning and working in groups (goal 6)
The capacity to reflect on his/her learning and performance	Reflection, office management (goals 2 and 4)

1 See n 59 *supra* in this regard.
2 See n 82 *supra* in this regard.

8 2 Skills Summary

The skills identified across a number of jurisdictions and those identified for South Africa were also compared. The results are as follows:

Essential skills identified across a number of jurisdictions[1]	**Skills taught in South Africa**
Ethics	Professional and ethical conduct[2] and professional responsibility[3]
Practice management	Practice management,[4] financial management,[5] office administration[6]
Case management	File and case management[7]
Interviewing skills	Consultation skills[8]
The capacity to deal sensitively and effectively with HIV/AIDS,[9] clients, colleagues and others from a range of social, economic and ethnic backgrounds and disabilities	Social justice,[10] welfare,[11]
Effective communication techniques	Consultation skills,[12] analysis of facts and law[13]
Recognise clients' financial, commercial and personal constraints and priorities	Social justice,[14] welfare,[15] HIV/AIDS[16] these are mainly taught during tutorials
Effective problem-solving	Consultation and analysis of facts and law,[17] legal research[18]
To be able to use current technologies	…
Legal research	Legal research[19]

Time management and billing	File and case management,[20] practice management[21] financial management,[22] office administration[23]
To manage risk	Practice management[24] file and case management[25] financial management[26] office administration[27]
To recognise personal strengths and weaknesses	These are mainly taught during tutorials
To develop strategies to enhance personal performance	These are mainly taught during tutorials
Manage personal workload and the number of client matters	These are mainly taught during tutorials
Work as part of a team	Pairing of students, working in firms and trial advocacy
Problem solving	Legal research,[28] alternative dispute resolution[29]
Legal analysis and reasoning	Consultation and analysis of facts and law,[30] legal research[31]
Factual investigation	These can be taught effectively in matters such as medical malpractice,[32] environmental law,[33] family law[34] and motor vehicle accidents[35]
Counseling	Consultation and analysis of facts and law[36] and in matters mentioned under 'factual investigation'
Negotiation	Alternative dispute resolution[37] an in most litigation matters
Alternative dispute resolution and trial advocacy	Alternative dispute resolution[38], trial advocacy,[39] preparation for trial.[40] In South Africa, the following additional skills are taught:[41] numeracy skills,[42] drafting letters,[43] drafting pleadings, notices and applications,[44] drafting wills,[45] drafting contracts.[46]

1 See n 59 *supra* in this regard.
2 De Klerk *et al supra* n 54 at 29-54; Swanepoel, Karels & Bezuidenhout 2008 *JJS supra* n 44 at 104.
3 During 2005, the Association of University Legal Aid Institutions (AULAI) compiled a manual with suggested topics relevant to the setting of a CLE curriculum; Vawda (ed) *AULAI Manual* (2005). For purposes of reference to this manual, the relevant pages of the manual will be indicated under 'Aulai'. See Du Plessis (PhD thesis 2014) *supra* n 16 at 56-59.
4 De Klerk *et al supra* n 54 at 103-128; Aulai (2005) 32-33.
5 *Idem* 34-35.
6 *Idem* 36-39.

7 De Klerk *et al supra* n 54 at 73-82; Aulai (2005) 32-33.
8 De Klerk *et al supra* n 54 at 55-72.
9 *Idem* 75-77.
10 Aulai (2005) 15-31.
11 *Idem* 81-82.
12 De Klerk *et al supra* n 54 at 55-72.
13 Aulai (2005) 40-45.
14 *Idem* 15-31.
15 *Idem* 81-82.
16 *Idem* 75-77.
17 *Idem* 40-45.
18 De Klerk *et al supra* n 54 at 129-154.
19 *Idem* 129-154.
20 Aulai (2005) 32-33.
21 De Klerk *et al supra* n 54 at 103-128.
22 Aulai (2005) 34-35.
23 *Idem* 36-39.
24 De Klerk *et al supra* n 54 at 103-128.
25 Aulai (2005) 32-33.
26 *Idem* 34-35.
27 *Idem* 36-39.
28 De Klerk *et al supra* n 54 at 129-154.
29 *Idem* 253-262; Aulai (2005) 83-86.
30 *Idem* 40-45.
31 De Klerk *et al supra* n 54 at 129-154.
32 Aulai (2005) 78-79.
33 *Idem* 80.
34 *Idem* 87-106.
35 *Idem* 73-74.
36 *Idem* 40-45.
37 De Klerk *et al supra* n 54 at 253-262; Aulai (2005) 83-86.
38 *Ibid*.
39 De Klerk *et al supra* n 54 at 233-252; Aulai (2005) 68-70.
40 Aulai (2005) 64-67.
41 De Klerk *et al supra* n 54 at 29-262.
42 *Idem* 83-102.
43 De Klerk *et al supra* n 54 at 155-172; Aulai (2005) 46-50.
44 De Klerk *et al supra* n 54 at 173-192; Aulai (2005) 51-55.
45 De Klerk *et al supra* n 54 at 193-218.
46 De Klerk *et al supra* n 54 at 219-232; Aulai (2005) 125-130.

8 3 Values Summary

The core values that were identified in foreign jurisdictions are equally important and embraced in the South African landscape and are specifically evident in the teaching and practice of ethics, professionalism and case and file management.

9 Curriculum Requirements Summary

The curriculum requirements identified across a number of jurisdiction and the curricula of the four South African universities reviewed in this study were also compared. The results are tabulated below:[83]

83 See n 59 *supra* in this regard.

Curriculum requirements identified across a number of jurisdictions	**WLC**	**UJLC**	**UPLC**	**UFSLC**
Substantive law	Yes	Yes	Yes	Yes
Legal analysis and reasoning	Yes	Yes	Yes	Yes
Legal research	Yes	Yes	Yes	Yes
Problem-solving and oral communication	Yes	Yes	Yes	Yes
Writing in a legal context	Yes	Yes	Yes	Yes
Professional responsibility	Yes	Yes	Yes	Yes
Social responsibility	Yes	Yes	Yes	Yes
Practice management	Yes	Yes	Yes	Yes
Interviewing techniques	Yes	Yes	Yes	Yes
Drafting of pleadings	Yes	Yes	Yes	Yes
Drafting of letters and other formal documents	Yes	Yes	Yes	Yes
Professional ethics[1]	Yes	Yes	Yes	Yes
Trial advocacy	Yes	Yes	No	Yes
Negotiation techniques	Yes	Yes	Yes	Yes
Writing programmes[2]	No	No	No	No

1 Professional ethics teaching also forms part of substantive courses earlier on in the LLB programme.
2 Writing programmes, as skills courses, form part of general training in some LLB programmes.

From the above, it is clear that the curriculum requirements identified across a number of jurisdictions and the curricula of the four South African universities reviewed compare favorably with global jurisdictions. What is apparent, however, is that the South African universities neglect the introduction of writing programmes in their CLE curricula. The importance of these programmes needs to be highlighted at Faculty and School levels to ensure urgent introduction.

10 Conclusion

Discussion on the surveys conducted by authors in the different jurisdictions indicated that CLE should be a core and mandatory course

in the law degree curriculum.[84] The focus of the clinic, therefore, should be on the students' academic needs and their practical training. Communities' needs for legal services are acknowledged, but such services should not be rendered at the expense of student training. Clinicians, although they generally are admitted attorneys, are academics for purposes of CLE and their main focus should be the training of the students.

In an in-house live-client clinic, students will learn certain skills through exposure but that is not enough to learn lawyering skills. It is therefore advisable to run a seminar and tutorial programme alongside the live-client work. This will support and expand the legal skills learnt in the clinical environment. Specialised units within the larger clinical setting may make more manageable caseloads possible, but students must be trained within set parameters to ensure that they are assessed in an even-handed manner across the different specialised units.

Finally, in an attempt to formulate an ideal curriculum for CLE, curriculum requirements identified across the aforementioned jurisdictions as well as those used by the four South African universities were compared.[85] Once the common (ideal) components for the curriculum were identified, they were measured against the outcomes and skills determined for these components.

Identified components	**Outcomes[1]**	**Skills[2]**
Substantive law	Substantive law (goal 3)	
Legal analysis and reasoning	Client counseling (goal 4) Decision making (goal 2)	Applied practice skills, consultation and analysis, legal research of facts, law and factual investigation, and legal research Judgment and analytical abilities, recognition of relevant facts and applicable law, understanding strategy, tactics
Legal research	Legal research (goal 4)	Legal research
Interviewing techniques	Applied practice skills (goal 4)	Consultation skills

84 See n 59 *supra* in this regard.

85 All these universities follow the in-house live-client model and students are required to attend weekly clinic duties, the formulation of a curriculum will focus on the classroom components of the CLE courses.

Problem-solving and oral communication	Judgment and analytical abilities (goal 2) Applied practice skills (goal 4)	Recognition of relevant facts, consultation skills and decision making, analysis of facts and law, legal research, factual investigation, negotiation, client counseling, alternative dispute resolution
Writing in a legal context	Draft legal documents (goal 4)	Drafting letters, pleadings, notices, applications, wills and contracts
Drafting of pleadings and other formal documents	Applied practice skills (goal 4)	Drafting legal documents, drafting letters
Drafting of letters	Applied practice skills (goal 4)	Drafting letters
Professional responsibility	Professional responsibility practice management (goal 1)	Financial management, office administration, file and case management
Practice management	Office management (goal 4)	Practice management, financial management and office administration
Observance of and reporting on trials, either civil or criminal	Understanding strategy, tactics, analysis of facts and law and decision making (goal 2) Trial advocacy (goal 4)	
Professional ethics	Legal ethics (goal 1)	Professional and ethical conduct and professional responsibility
Negotiation techniques	Negotiation (goal 4)	Alternative dispute resolution
Trial advocacy	Trial advocacy, appellate advocacy (goal 4) Learning & working in groups (goal 6)	Trial advocacy and preparation for trial
Social responsibility	Social awareness (goal 1) Legal services to the community (goal 5)	Social justice

1 The references to 'goals' in this column, refer to the goals/outcomes identified in De Klerk *et al supra* n 54 at 266-279; see n 82 *supra* in this regard.

2 The references to 'skills' in this column, refer to the skills identified in either the AULAI Manual (2005) (see Du Plessis (PhD thesis 2014) *supra* n 16 at 56-59) and/or in De Klerk *et al supra* n 54.

Additional components identified within the South African landscape:

Identified components	Outcomes	Skills
The capacity to reflect on learning and performance	Reflection (goal 2)	
To work effectively in a group	Learning and working in groups (goal 6)	Pairing of students, working in student firms and trial advocacy
Case management	Applied practice skills (goal 4)	File and case management, professional responsibility
Numeracy skills	Applied practice skills (goal 4)	Numeracy skills
Writing programmes	Reflection (goal 2) Applied practice skills (goal 4)	Reflection Draft legal documents, draft letters, applications, wills, drafting contracts, legal research, pleadings, and notices

The above identifies the required components for a curriculum in CLE. Although clinicians are free to structure the classroom component of the course according to their needs, it is suggested that the above components all form part of the teaching.

The effect of section 43 of the BCEA on employment contracts and legislative protection of minors

Malebakeng Agnes Forere
LLM (Essex) PhD (Bern)
Senior Lecturer, School of Law, University of the Witwatersrand

OPSOMMING

Die uitwerking van artikel 43 van die Wet of Basiese Diensvoorwaardes op dienskontrakte en die statutêre beskerming van minderjariges

Artikel 43 van die Wet op Basiese Diensvoorwaardes belet die indiensneming van kinders jonger as 15 jaar. Dit is 'n strafregtelike oortreding om te vereis of om toe te laat dat 'n kind werk verrig wat onvanpas is vir 'n persoon van sy of haar ouderdom, of wat die kind se welsyn bedreig. Artikel 43 swyg oor die geldigheid al dan nie van 'n werkskontrak wat met 'n minderjarige van jonger as 15 aangegaan is. Dit is van belang om te bepaal indien artikel 43 die gemeenregtelike posisie verander deur dit 'n kriminele oortreding te maak om die minderjarige in diens te neem. Die skrywer ontleed die teks van artikel 43 deur 'n 'purposive approach' tot wetsuitleg te volg en kom tot die slotsom dat artikel 43 nie die gemeenregtelike posisie verander nie, op voorwaarde dat die kontrak aan die vereistes van artikel 43(2) van die Wet voldoen.

1 Introduction

In South African law, a minor is any person below the age of eighteen years.[1] However, as far as the capacity to perform a juristic act is concerned, minority is divided into two groups, namely minors aged between zero and seven years (*infans*), and minors aged between seven and eighteen years (usually referred to as *pupilis*).[2] This paper focuses on minors aged between seven and eighteen years to the exclusion of the group aged between zero and seven years. Therefore, any reference to minors in this paper refers to minors aged between seven and eighteen years.

Child labour is a dynamic concept in that children are found in a variety of labour sectors, ranging from the worst forms of labour to soft employment. In South Africa in particular, children are mostly employed on farms while others do vacation work and there are those who do worst forms of labour, which rip them off their education and childhood, and endanger their lives. Additionally, diseases and illnesses such as HIV/AIDs have left many families as child-headed households with the result

1 S 7 of the Children's Act 38 of 2005.
2 Christie *The Law of Contract in South Africa* (2006) 232.

How to cite: Forere 'The effect of section 43 of the BCEA on employment contracts and legislative protection of minors' 2016 *De Jure* 23-40
http://dx.doi.org/10.17159/2225-7160/2016/v49n1a2

that children seek employment in order to pursue a living. Equally, in families where at least one parent is still alive, levels of poverty cause children to seek employment in an attempt to support the family. The survey conducted by the South African Department of Human Settlement for the province of KwaZulu-Natal indicated that 2 808 children, between the ages of ten and fourteen years, live in child-headed households.[3] Countrywide statistics reveal that 44 000 children, below the age of eleven years, live in child-headed households[4] and that there are an estimated 800 000 child labourers in South Africa.[5] This number is a cause for concern. Of course, it must be noted that social grants are available for these children and that if successful, each child is given R350 per month (approximately US $25).[6] However, given the high cost of living, the falling Rand against the American Dollar and increasing food prices, this amount needs to be supplemented. Consequently, the status of the employment contracts that children, below the age of eleven years, are concluding need to be assessed.

Against the above background, this contribution seeks to determine whether section 43 of the Basic Conditions of Employment Act 75 of 1997 (the BCEA), which makes it a criminal offence to employ minors aged below fifteen years, results in a contract of employment concluded between a child below the age of fifteen years illegal and, therefore, void. In essence, this question will address further practical questions on the minor's right of recourse to labour institutions and remedies in the following instances: (a) where a child is not paid wages and wants to enforce his/her rights in terms of the BCEA; (b) where a child is unfairly dismissed on grounds of incapacity or misconduct; (c) where a child is injured in the workplace and eligibility for compensation under the South African Compensation for Occupational Injuries and Diseases Act 130 of 1993 (the COIDA) is questioned. The scenarios mentioned above are embedded in the constitutional right to fair labour practice espoused in section 23 of the South African Constitution of 1996 (the Constitution) and more so in the Labour Relations Act (LRA),[7] which seeks to give effect to section 23 of the Constitution.[8] In all the above-mentioned situations, can it be argued that the employment contract was illegal and children are therefore not eligible for remedies under common law, the BCEA and/or any relevant labour statute? In answering these questions, the author will begin the analysis by discussing the status of employment

3 KwaZulu-Natal Department of Human Settlement 'Research on Child Headed Households' (June 2010) p 7 available from http://www.kzndhs.gov.za/Portals/0/docs/Research%20and%20Report/Research%20Report.CHH2010.pdf (accessed 2015-02-17).

4 *Idem* 8.

5 'Child labour in SA still too high' 2013-08-01 available from http://www.fin24.com/Economy/Child-labour-in-SA-still-too-high-20130801 (accessed 2015-02-18).

6 Parliament Budget Speech 6 presented to Parliament on 2015-02-24 p 22 available from http://www.parliament.gov.za/content/speech~11.pdf (accessed 2016-07-11).

7 Labour Relation Act 66 of 1995 (the LRA).

8 S 3 of the LRA; *Chirwa v Transnet* 2008 4 SA 367 (CC) par 110.

contracts concluded by minors. The discussion will then focus on the wording of section 43 of the BCEA with a view to determine if it makes the contract concluded by a minor, aged below 15 years, void and what the consequences thereof are (remedies).

2 Status of Minor's Contract at Common Law

2 1 Capacity

Given their inability to appreciate the consequences of their actions, minors do not have full capacity to perform juristic acts – that is, any action that the law attaches consequences to. This means that minors need assistance from guardians to perform juristic acts.[9] Consequently, any juristic act performed by a minor who is unassisted, is voidable at the instance of the guardian or at the instance of the minor when the minor reaches upon majority.[10] Whereas voidability relates to juristic acts concluded by the minor between the ages of seven and eighteen years, different statutes in South Africa regulate a minor's actions differently – leading to inconsistencies in the legal system. Thus, whereas the law generally does not give minors full capacity to give consent, the Children's Act accords minors, above twelve years, full capacity to give consent to medical treatment or operations performed on him/her and also on his/her child as provided for by section 129 of the Children's Act. Nevertheless, for contracts in general, minors aged between seven and eighteen years require assistance from guardians, otherwise the contract is voidable. While there are different contracts that a minor can conclude, this paper focuses on employment contracts.

As correctly indicated by Grogan, the capacity to enter into an employment contract is governed by general principles of the law of contract.[11] This means that an employment contract concluded by a minor between the ages of seven and eighteen years is voidable at the instance of the guardian or at the instance of the minor when the minor reaches majority.[12] If the guardian chooses to exercise his authority over such contract and withholds his consent, the contract becomes void *ab initio*. No rights and obligations arise from a void contract but a claim of unjustified enrichment can be made.[13] However, if the guardian decides to ratify the contract, it becomes enforceable against both parties (the minor and the other contracting party) and normal rights and obligations

9 The assistance can come in many forms, which include, *inter alia*, that a guardian can give his or her consent; a guardian can assist the minor in concluding the contract; a guardian can conclude the contract on behalf of the minor; or a guardian can ratify the contract *ex post facto;* see Christie *supra* n 2 at 233.

10 Christie *supra* n 2 at 233.

11 Grogan *Workplace Law* (2014) 38.

12 *Ibid*.

13 Christie & Bradfield *Christie's: The law of contract in South Africa* (2011) 244-245.

arising from the contract will be exercised by both parties. For employment contracts where the guardian withholds his consent, the minor will not be able to exercise certain rights accruing from an employment contract as will be discussed below.

2 2 Legality

As indicated above, section 43 of the BCEA not only deals with voidability of a minor's contract, but it also centres on the legality of the minor's employment – given that section 43 makes it a criminal offence to employ a minor who is aged below fifteen years. Therefore, it becomes important to discuss legality and the implications thereof.

One of the essential elements for concluding an employment contract is that the contract must be legal otherwise it becomes unenforceable.[14] Specifically, it must not be against public policy and it must not be prohibited by statute. Agreements that are against public policy or prohibited by statute are usually void and unenforceable while others may be valid but unenforceable.[15] It is crucial to note that for an agreement which is prohibited by the statute to be void, the statutory provision must specifically state that the prohibited agreement is void or invalid – otherwise, the agreement remains only illegal but not void.[16] If the statute merely prohibits the formation of a particular agreement without stating that the agreement is void, then the intention of the legislature to also void such agreement must be determined.[17] The criteria for determining the intention of the legislature is to consider the language, scope and object of the provision and the consequences in relation to justice and convenience of adopting one view rather than another.[18]

The legislature would generally be regarded as having intended to render the agreement void if upholding it would give rise to the mischief that the legislature intended to prevent.[19] It will be determined below whether the legislature intended to make the employment relationship that involves a minor, aged below fifteen years, illegal and void.

The usual consequences of an illegal contract would be an invocation of the *ex turpi causa non oritur* action rule, thereby declaring the contract unenforceable. Other than the *ex turpi causa* action rule, the *in pari delicto potior est condition defendetis* rule is also invoked. The effect of the latter rule is to weigh the guilt to determine who, between the plaintiff and the defendant, has participated more than the other in an illegal contract. However, given that employment rights are derived from the

14 *Idem* 406.
15 *Ibid*.
16 *Discovery Health Limited v CCMA* 2008 7 BLLR 633 (LC) 635; Sharrock *Business Transactions Law* (2007) 96.
17 *Ibid*.
18 *Metro Western Cape (Pty) Ltd v Ross* 1986 3 SA 181 (A) 188.
19 Sharrock *supra* n 16 at 96.

Constitution, these rules find limited application in an employment relationship as will be discussed below (see par 3 4).

3 Effect of Section 43 of the BCEA as Amended on a Minor's Employment Contract

3 1 General Approach to Statutory Interpretation

Although there are many cannons of statutory interpretation in the common law system, the practice of South African courts has been to give effect to the literal meaning of words and seek the intention of the legislature (literalist-cum-intentionalist approach).[20] This approach has been endorsed by the Constitutional Court.[21] Accordingly, the wording of section 43 will be determined using the literalist-cum-intentionalist approach to determine if it can be given an interpretation that is tantamount to invalidating an employment contract concluded by a minor. Section 43 of the BCEA provides as follows:

(1) No person may employ a child –

(a) who is under 15 years of age; or

(b) who is under the minimum school-leaving age in terms of any law, if this is 15 or older.

(2) No person may employ a child in employment

(a) that is inappropriate for a person of that age;

(b) that places at risk the child's well-being, education, physical or mental health, or spiritual, moral or social development.

(3) A person who employs a child in contravention of subsection (1) or (2) commits an offence.

In 2013, this section was amended as follows:

(1) Subject to section 50(2)(b), a person [may employ] must not require or permit a child to work, if the child –

(a) [who] is under 15 years of age; or

(b) [who] is under the minimum school-leaving age in terms of any law, [if this is 15 or older].

(2) [No] A person [may employ] must not require or permit a child [in employment] to perform any work or provide any services –

(a) that [is] are inappropriate for a person of that age;

(b) that [places] place at risk the child's well-being, education, physical or mental health, or spiritual, moral or social development.

20 Du Plessis *Re-interpretation of Statutes* (2004) 118.

21 *African Christian Democratic Party v Electoral Commission and Others* 2006 3 SA 305 (CC) parr 21, 25, 28 & 31; *Daniels v Campbell* 2004 5 SA 331 (CC) parr 22-23.

> (3) A person who [employs] requires or permits a child to work in contravention of subsection (1) or (2) commits an offence.

In their ordinary meaning, the words in section 43(1) do not allow employment of children aged below fifteen years or a child who is below the minimum school-leaving age in terms of any law. To this effect, the South African Schools Act[22] is the relevant law in point since it prescribes the minimum school-leaving age. That being said, section 43(2) creates flexibility to the general prohibition created in section 43(1). Thus, it allows employment of children aged below fifteen years provided that the work or service to be performed by the child does not place the child's well-being, education, physical or mental health, or spiritual, moral or social development at risk. This means that a child can be employed, in accordance with the ordinary requirements of the law of contract, provided that the work or service complies with section 43(2). Further, section 43 does not say anything about the validity of the employment contract concluded by a minor aged below fifteen years other than making it an offence for parents and employers to allow such children to work or provide services. Consequently, one needs to determine the intention of the legislature in this regard.

It is notable that the original section 43 uses a permissive word 'may' while the amendment uses the stronger word 'must'. It may therefore be argued that although section 43 is silent on the status of employment contracts concluded by a minor or with a minor, such contracts are illegal and void because section 43 uses the stronger word 'must'. This, coupled with the fact that it makes it an offence to employ a child aged below fifteen years, may be an indication of the legislature's intention to void or invalidate such contracts. To this end, a distinction is made between peremptory or directory provisions; if the use of the word 'must' is given a peremptory usage, then failure to comply with section 43 makes the contract of employment void but if it is merely directory, then such a contract will be voidable or valid where the guardian has given consent in accordance with the general principles of the law of contract – despite that it is concluded in contravention of section 43.[23] The test laid down in *Sutter v Scheepers*, a decision widely followed by South African courts,[24] to determine whether words should be given peremptory or directory effect is as follows:

> Generally the words "shall" or "must" are understood as being peremptory unless there are other circumstances that negate this construction:
>
> (a) if a provision is couched in the negative, it is regarded as peremptory instead of being merely directory ...

22 South African Schools Act 84 of 1996 (the SASA).
23 *Sutter v Scheepers* 1932 AD 165 par 173.
24 See *The Minister of Environmental Affairs & Tourism v Pepper Bay Fishing* 2003 6 SA 407 (SCA); *Kylie v CCMA* 2010 31 ILJ 1600 (LAC); and *Standard Bank of South Africa v Abduraouf Darwood* 2012 6 SA 151 (WCC).

(b) if a provision is couched in the positive and there is no sanction added in case the requisites are not carried out, then the presumption is in favour of an intention to make the provision only directory …

(c) if we consider the scope and objects of a provision, we find that its terms would, if strictly carried out, lead injustice or even fraud, and if there is no explicit statement that the act is to be void if the conditions are not complied with, or if no sanction is added, then the presumption is rther in favour of provision being directory.

(d) The history of the legislation will also afford a clue in some cases.[25]

Applying this test, one would like to construe section 43 as peremptory, thereby nullifying or voiding the contract of employment concluded by the minor aged below fifteen years, however, other circumstances (section 43(2)) may negate such a construction. As indicated above, section 43(2) permits employing children aged below fifteen years provided that the work is appropriate to a person of that age and provided that the work does not place in danger the child's wellbeing, education, physical or mental health, or spiritual, moral or social development. Given section 43(2) therefore, section 43 cannot be regarded as being peremptory despite that it is couched in the negative.

Assuming that section 43 were to be regarded as peremptory, thereby nullifying or voiding any contract of employment concluded by the minor, the effect of such construction on minors will lead to injustice or unfair labour practice as will be discussed below. Thus, one would recall that ordinarily the contract concluded by the minor is voidable but can be ratified by the guardian or the minor upon such minor attaining majority (eighteen years). That being said, if the guardian decides not to ratify the contract, it becomes void *ab initio* and unenforceable. For employment contracts, it follows that if ratified by the guardian; the minor can enforce the contract of employment against the employer and be entitled to remedies such as reinstatement or compensation in cases where the minor is unfairly dismissed. Further, the employer can be held vicariously liable for actions of the minor committed during the scope of the minor's employment and the employer can claim against the minor for losses incurred. In addition, a minor would be eligible to claim under COIDA if injured at the workplace or at least under common law for breach of employer's duty to provide safe working conditions.[26] However, if the employment contract is void, a minor injured at work cannot claim under COIDA as a claim from COIDA is embedded in a valid employment contract since the injury ought to have occurred during the scope of one's work. The same is true for the common law duty to provide safe working conditions – it presupposes a valid employment contract. Further, if void, it follows that the minor who is unfairly dismissed cannot be reinstated since one can only be reinstated if there existed a valid employment contract. Equally, such a minor cannot be awarded compensation for having performed under an illegal contract.

25 *Sutter v Scheepers supra* n 23 at par 173.
26 *Media 24 Ltd v Grobler* 2005 7 BLLR 649 (SCA).

Additionally, predatory employers may use minors and dismiss them when 'pay-day' approaches without any remedies available to such minors except holding the employer in question criminally liable. On the basis of the aforementioned, the injustices that are likely to occur if section 43 were to be declared peremptory are so grave that the provision should be regarded as directory. The issue of sanction alone does not always mean the provision is peremptory because, at times, the legislature simply uses sanction as a deterrent rather than as an indication to void an agreement.[27]

One should realise that the amendment replaces any reference to 'employment' with 'require or permit a child to work' which could be an indication that the legislature does not even regard rendering of services by a minor for reward as employment. However, it is not the form that courts are concerned with but the substance of the relationship.[28] Thus, it does not matter that the working relationship between a minor and an employer is given a different label – so long as the substance of the relationship is that of employment – the contract will be looked at as such.

As indicated above, section 43 makes reference to any law that prescribes the school-leaving age, and the provisions of SASA will be looked into as well to determine if they can be interpreted to invalidate the contract of employment concluded by the minor – specifically section 3 of SASA which deals with compulsory schooling. Section 3 of SASA compels parents to ensure that every learner under his or her responsibility attends school from the age of seven years until the attainment of either fifteen years or the ninth grade. Since admission to schools is not dependent on the parents, SASA also places an obligation on the Executive Council to ensure that there are enough opportunities for every child in the province to attend school.[29] Although the obligation to ensure that children below the age of fifteen years is placed on parents, anyone who employs a child below the age of fifteen years contravenes section 3 of SASA by analogy. The same question raised above is applicable here – is the employment contract concluded by the minor who is below the age of fifteen years void because the minor is supposed to be at school? The wording of section 3 does not indicate that every child below the age of fifteen years must be at school because resources (places at school) are put in place progressively as per section 3(4) of SASA. Also, concluding the employment contract does not mean that the minor has to leave school. Thus, a minor below the age of fifteen years can conclude an employment contract under which he works only on weekends for half a day and this, surely, does not infringe section 3 of SASA. Therefore, it is inconceivable that an employment contract

27 De Ville *Constitutional and Statutory Interpretation* (2000) 261; *Pottie v Kotze* 1954 3 SA 719 (A).

28 *State Information Technology Agency (Pty) Limited v CCMA* 2008 29 ILJ 2234 (LAC) par 10.

29 Ss 3(3) & (4) of the SASA.

concluded by the minor below the age of fifteen years can be rendered void on the grounds that it contravenes section 3 of SASA especially if such contract complies with section 43(2) of the BCEA.

Further, the difficulty posed by section 43(2) is that it is silent on who should determine the appropriateness or suitability of work to be done by a specific minor. It is therefore unclear whether it is the courts or the employer or the authorities in the Department of Labour who are tasked with such a determination.[30] Therefore, because of its vagueness, it cannot be interpreted to mean that it voids all employment contracts concluded by a minor especially because statute law must be interpreted in line with the common law unless it categorically changes the common law position. This golden principle of interpretation of statutes was echoed in *Johannesburg Municipality v Cohen's Trustees*[31] where the Court held that '[i]t is a sound rule to construe a statute in conformity with the common law rather than against it, except where and so for as the statute is plainly intended to alter the course of the common law'.[32] Consequently, since a long standing common law position on the status of minors' employment contracts is that such a contract is voidable at the instance of the minor upon attaining majority or at the instance of the guardian, a permissive provision such as section 43 cannot be found to be voiding employment contracts concluded by the minor aged below fifteen years.

As indicated earlier, section 43 makes it a criminal offence to employ a minor without stating whether the contract, concluded in contravention of section 43, is legal or not. To this end, South African courts have had an opportunity to deal with a provision similar to section 43 of the BCEA, with the purpose of the inquiry being to determine if the intention of the legislature was to render employment contracts, concluded by illegal immigrants, void.[33] It is important to look at this provision, which has been subject to courts' interpretation given its resemblance to section 43 of the BCEA, because both provisions criminalise the employment of illegal foreigners and minors respectively but are silent on the validity of the contracts concluded with illegal immigrants or children. The provision at issue is section 38, read with section 49, of the Immigration Act 13 of 2002. Section 38 provides as follows:

(1) No person shall employ –

(a) an illegal foreigner;

(b) a foreigner whose status does not authorise him or her to be employed by such person; or

30 Comparison can be drawn between section 43(2) and section 7(2) of Employment Equity Act 55 of 1998 which prohibits HIV testing of employees by an employer unless a court finds it justifiable. Meaning, the employer must apply to court to get permission to test employees for HIV.

31 1909 TS 811.

32 *Idem* par 823.

33 See *Discovery Health Limited v CCMA supra* n 16 at 635.

(c) a foreigner on terms, conditions or in a capacity different from those contemplated in such foreigner's status.

Section 49(3) of that Act states that anyone 'who knowingly employs an illegal foreigner or a foreigner in violation of this Act shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding one year'.

Section 38(1) of the Immigration Act is the reason behind the dismissal of a foreign national, Lanzetta, who was employed by Discovery Health.[34] In this case, Discovery Health had employed a foreigner who had claimed to be in possession of a work permit. Upon realising that the employee did not have a work permit, Discovery Health terminated the contract of employment. The employee took Discovery Health to the Commission for Conciliation, Mediation and Arbitration (CCMA). The first issue to be determined was whether the Commission had jurisdiction because, as Discovery Health contended, the applicant was not an employee since the employment contract was unlawful.[35] The Commission ruled that the applicant was an employee and further that the CCMA did have jurisdiction.[36] On appeal, the Labour Court had to decide whether the employment contract between Discovery Health and Lanzetta was valid and, if not, whether the invalidity meant that there was no employer-employee relationship between the parties. On the question of the validity of the contract, the Court held that the Immigration Act does not directly declare that a contract of employment concluded without the necessary permit is void but found, rather, that it merely prohibits an act of employing foreigners in violation of the Immigration Act and imposes penalties.[37] In the absence of direct pronouncement from the BCEA regarding the validity of a contract of employment concluded in contravention of Immigration Act, the Court sought to determine whether the legislature intended to rely on the deterrent effect of the sanction imposed on employers who breach the Immigration Act or whether the legislature intended to render the contract of employment void.[38] The Court found that there is no indication from section 38(1) that the legislature intended to limit the right to fair labour practice – except to penalise persons who employ others in contravention of section 38(1). The Court specifically ruled that:

> by criminalising only the conduct of an employer who employs a foreign national without a valid permit and by failing to proscribe explicitly a contract of employment concluded in these circumstances, the Legislature did not intend to render invalid the underlying contract.[39]

Given the similarities between section 38, read with section 49, of the Immigration Act and section 43 of the BCEA, the legal principles or

34 *Ibid*.
35 *Ibid*.
36 *Ibid*.
37 *Idem* par 640.
38 *Ibid*.
39 *Idem* par 642.

findings in *Discovery Health* are highly persuasive in deciding the effect of section 43 of the BCEA on a contract of employment concluded by a minor. To this effect, the author submits that since section 43 of the BCEA only criminalises employing minors aged below fifteen years and does not explicitly invalidate the contract of employment concluded by the minor who is below the age of fifteen years, any contract of employment concluded in contravention of section 43 of the BCEA remains only voidable, in accordance with the general principles of the law of contract, or valid if the guardian gives his/her consent and the contract complies with section 43(2).

3 2 Constitutional Approach

The advent of the new constitutional order in South Africa has had a great impact on the interpretation of statutes. Thus, while the general approach to interpretation as discussed above is still maintained, a purposive approach has also been applied extensively. The starting point is still the literal-cum-intentionalist approach, and if the words are still not clear, then the purposive approach is resorted to.[40] Of course, there is a thin line between the intention of the legislature and purpose of the legislation in question.[41] But, the purposive approach, as construed by the Constitutional Court, goes beyond the purpose of the act and requires that the act be interpreted in a manner that promotes the Bill of Rights.[42] Thus, in *Bertie Van Zyl (Pty) Ltd and Montina Boerdery (Pty) Ltd v Minister of Safety and Security,*[43] Mokgoro J stated that the Constitution requires a purposive approach to statutory interpretation,[44] which was also alluded to in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*[45] by Ngcobo J as:

> The technique of paying attention to context in statutory construction is now required by the Constitution, in particular, s 39(2). As pointed out above, that provision introduces a mandatory requirement to construe every piece of legislation in a manner that promotes the spirit, purport and objects of the Bill of Rights.[46]

On the basis of the above, section 43 must be interpreted in line with the Bill of Rights. Accordingly, section 28 of the Constitution deals with the rights of children and protects children from exploitative labour. Specifically, section 28(1)(e) and (f) which provides as follows:

> (1) Every child has a right –
>
> (e) to be protected from exploitative labour

40 Du Plessis *supra* n 20 at 118.
41 *Ibid*.
42 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) par 91.
43 2009 10 BCLR 978 (CC).
44 *Idem* par 21.
45 2004 4 SA 490 (CC).
46 *Idem* par 91.

(f) not to be required or permitted to perform work or provide services that –

(i) are inappropriate for a person of that child's age; or

(ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development.

To this effect, the above sections have been interpreted to mean that while paragraph (e) places a positive duty on the state to protect children from exploitative labour, paragraph (f) places negative obligations on employers and parents to refrain from engaging children in exploitative labour.[47] Overall, both paragraphs (e) and (f) recognise that children are engaged in gainful work and they both, therefore, do not ban child labour completely but rather ban exploitative labour.[48] Exploitative labour is one which is not appropriate for a person of that child's age and one which places the child's wellbeing, education, physical or mental health or social development at risk. Accordingly, section 43 of the BCEA has to be interpreted in line with section 28(1)(e) and (f) of the Constitution. As such, while section 43(1) prohibits child labour, section 43(2) recognises that children, aged below fifteen years, can be employed provided that the work or service does not place the child's wellbeing, education, physical or mental health or social development at risk. This conclusion reinforces the interpretation of section 43 adopted using the general approach to the interpretation of statutes above. Thus, section 43 does not completely prohibit employment of children aged below fifteen years; it allows employment to the extent that the work or services to be offered by the minor comply with the requirements of section 43(2). Nowhere in the section 43 does the legislature make a contract of employment concluded by the minor aged below fifteen years void.

3 3 The Effect of the International Labour Organisation on Statutory Interpretation

International law plays a major role in South Africa to the extent that it does not conflict with the Constitution. To this effect, South Africa is a party to many international labour organisation treaties and sections 39(1) and 233 of the Constitution require courts to take into account international law in interpreting statutes. At this point it is important to consider the International Labour Organisation (ILO) conventions on child labour with a view to determining whether section 43 of the BCEA invalidates employment contracts concluded by minors aged below fifteen years.

The ILO's Convention on Minimum Age (Minimum Age Convention), which South Africa is a party to, sets employment age as eighteen years

47 Robinson 'Children's Rights in the South African Constitution' 2003 *Potchefstroom Electronic Law Journal* 48.

48 *Ibid.*

and above.[49] That being said, it nonetheless allows children aged at least twelve years to do work provided that the tasks do not threaten their health and safety, or hinder their education or vocational orientation and training.[50] While it is acknowledged that the ILO aims to abolish child labour, this provision takes cognizance of the fact that children are engaged in gainful employment. However, it seeks to protect children involved in gainful employment from exploitation by requiring that the tasks should not threaten their health and safety or hinder their education or vocational orientation and training. Similar to section 43 of the BCEA and the Constitution, this provision does not seek to invalidate employment contracts concluded by minors aged below fifteen years provided that the tasks comply with Article 7.1 of the Minimum Age Convention. Additionally, the minimum standards provided for in the Minimum Age Convention apply to:

> mining and quarrying; manufacturing; construction; electricity, gas and water; sanitary services; transport, storage and communication; and plantations and other agricultural undertakings mainly producing for commercial purposes, but excluding family and small-scale holdings producing for local consumption and not regularly employing hired workers.[51]

This means that the ILO's minimum age for other forms of employment can be even lower. Therefore, given section 43(2) of the BCEA, the Constitution and the ILO's Minimum Age Convention, it becomes difficult to conclude that all contracts concluded by a minor aged below fifteen years are void. Of course, South Africa is free to raise the bar higher than the minimum protections afforded by international treaties but there is no pronouncement from section 43 as it currently stands that the legislature intended to raise the bar.

3 4 Remedies

Having concluded that section 43 of the BCEA does not render an employment contract concluded by a minor, aged below fifteen years, illegal and void, it becomes vital to look at the remedies available to the minor who gets unfairly dismissed or gets injured at the workplace. Can such a minor get the remedies under the LRA because his contract is valid although it contravenes the BCEA? Although not dealing with minors, courts have drawn a distinction between contracts that are illegal, because the subject matter of the contract is illegal, and contracts that are otherwise legal but contravene a statute when awarding remedies and these are contentious issues in South Africa following the decisions in *Discovery Health* and *Kylie v CCMA and Michelle van Zyl t/a Brigitte's*.[52]

---

49 International Labour Organisation Convention 138 on the Minimum Age (1973-06-26) 1015 UNTS 297 at art 3(1).

50 *Idem* art 7(1).

51 *Idem* art 5(2).

52 *Kylie and Van Zyl t/a Brigittes* (2007) 28 ILJ 470 (CCMA) which, on appeal, became *Kylie v CCMA and Michelle van Zyl t/a Brigitte's* 2010 31 ILJ 1600 (LAC).

With regard to contracts that are illegal because the subject matter of the contract is illegal, reference is made to the *Kylie* case. This case started at the CCMA as an application against unfair dismissal. The applicant was a sex worker, employed at a massage parlour to perform various sexual services. Without a hearing, the applicant was informed that her services had been terminated. The dispute was heard at the CCMA where the respondent objected to the CCMA's jurisdiction given that the applicant was employed to perform unlawful acts. The question was whether the applicant was an employee in accordance with section 213 of the LRA in the light of the fact that the Sexual Offences Act[53] criminalises sex work. The CCMA considered that the Sexual Offences Act prohibits prostitution both in the sense that it makes it a criminal offence to keep a brothel as well as to engage in carnal intercourse or perform indecent acts for reward.[54] The CCMA ruled that the nature of the work that the respondent employed the applicant to perform was illegal in terms of South African law – that is, the Sexual Offences Act.[55] It therefore follows that the purpose for which the employment contract between the applicant and respondent was concluded was illegal, and this resulted in the applicant not falling into section 213 of LRA – thereby excluding the jurisdiction of the CCMA. The matter was appealed to the Labour Court where it was held that the definition of an employee in section 213 is wide enough to embrace a person whose contract was otherwise unenforceable at common law. However, the Labour Court held that a sex worker would not be entitled to protection against unfair dismissal in accordance with section 185(a) of the LRA as that would be contrary to the common law principle – entrenched in the South African Constitution – which prevents courts from sanctioning or encouraging illegal activity. Further, relying on section 193(2) of LRA, which prescribes the remedies in cases of unfair dismissal, the Court concluded that:

> Nothing illustrates the conflict of the objective of the right to a fair dismissal and the objecting of the Sexual Offences Act more than an issue of reinstatement. An order of reinstatement is the primary remedy for an unfair dismissal. Reinstating a person in illegal employment would not only sanction illegal activity but may constitute an order on the employer to commit a crime.[56]

This ruling was appealed to the Labour Appeal Court which relied on section 23 of the Constitution and found that it is broad enough to encompass even employees such as the applicant who are performing illegal work. Unlike the Labour Court, which looked at the LRA (the statute which creates labour courts) to determine whether the applicant was an employee, the Labour Appeal Court relied on section 23 of the

53 Sexual Offences Act 23 of 1957.
54 *Kylie and Van Zyl t/a Brigittes supra* n 52 at 477.
55 *Idem* 479.
56 *Kylie v CCMA and Michelle van Zyl t/a Brigitte's* supra n 52 at par 11.

Constitution which attracted heavy criticism with which the present author agrees with.[57] Nevertheless, having found that the applicant was an employee and that she was unfairly dismissed, the Court then considered appropriate remedies and held that section 193 of LRA provides for considerable flexibility in awarding remedies such that although the primary remedy is reinstatement, the applicant or the court can refuse reinstatement where it is not reasonably practicable for the employer to reinstate or re-employ the employee, and held that it is manifestly not practicable to reinstate the applicant as that would be against public policy.[58] Similarly, the Court could not award compensation since compensation, awarded for substantive unfairness, is regarded as monetary equivalent for loss of employment and it would be inappropriate where the nature of services rendered are illegal.[59] However, the Court ruled that monetary compensation for procedural unfairness could be awarded as that is *solatium* for the loss by an employee of her right to fair procedure.[60]

For contracts where the subject matter is legal but the performance contravenes the statute, reference is made to *Discovery Health*, the facts which have been discussed above. Relying on the Constitutional Court decision in *South African National Defence Force Union v Minister of Defence*,[61] the Court in *Discovery Health* ruled that the protection against unfair labour practices enshrined in section 23 of the Constitution is not limited or dependent on the existence of an employment contract,[62] and held further that the definition of employee in the LRA is not confined to the existence of an employment contract.[63] Consequently, 'the fact that Lanzetta's contract was contractually invalid only because Discovery Health had employed him in breach of s 38(1) of the Immigration Act did not automatically disqualify him from that status'.[64] The Court concluded that the contract of employment between Lanzetta and Discovery Health was not invalid despite the fact that Lanzetta did not have a valid work permit to work for Discovery.[65] The case was then reverted to the CCMA to award appropriate remedies for unfair dismissal.

From *Kylie* and *Discovery Health*, it is important to discuss the remedies available to a minor if the contract were to be regarded as voidable or void. Starting with the issue of jurisdiction (access to courts), it can easily be concluded from the discussion above that irrespective of whether the contract is valid (where a guardian has given consent),

57 Selala 'The Enforceability of Illegal Employment Contracts according to the Labour Appeal Court Comments on *Kylie v CCMA* 2011 4 SA 383 (LAC)' 2011 *Potchefstroom Electronic Law Journal* 2.
58 *Kylie v CCMA and Michelle van Zyl t/a Brigitte's supra* n 52 at par 52.
59 *Idem* par 53.
60 *Ibid*.
61 1999 4 SA 469 (CC).
62 *Discovery Health Limited v CCMA supra* n 16 at par 40
63 *Idem* par 48.
64 *Idem* par 49.
65 *Idem* par 54.

voidable or void, a minor will have access to courts since the statutory (LRA) definition of an employee encompasses even contracts whose performance is illegal because they are performed by the minor contrary to section 43 of the BCEA. In addition, as courts have ruled, the right to fair labour practice enshrined in section 23 of the Constitution extends to everyone, including those who would otherwise not be regarded as employees by virtue of them being prohibited from working.

The most crucial aspect when discussing remedies relates to the kind of relief available to a minor who gets unfairly dismissed or who seeks to claim compensation under COIDA for injuries sustained at the workplace. From *Kylie*, if one were to adopt an interpretation that voids a contract of employment concluded by a minor in contravention of section 43 of the BCEA, reinstatement or compensation would not be available remedies as it would be contrary to public policy to reinstate an employee that was party to a void contract or to compensate one for performing under a void contract. Additionally, if the employer followed due process in dismissing the minor, the minor would not be eligible for any kind of compensation because *solatium* is only available for procedurally unfair dismissal. Consequently, the effect of declaring such contract void would be worse than the harm that the legislature seeks to prevent as the Court warned in *Sutter v Scheepers* and *Discovery Health*[66] because the consequences of declaring such a contract void would be unfair labour practice against the minor. Alternatively, were the contract to be declared voidable or valid where a guardian gave consent, perhaps reinstatement could be a viable remedy if the employer complied with section 43(2) – that is, provided the work is appropriate to the person of that age and provided the work does not endanger the child's wellbeing, education, physical or mental health, or spiritual, moral or social development. Assuming the work does not comply with section 43(2), courts can refuse reinstatement and award compensation as an alternative remedy because the underlying work done would not have been illegal – unlike with sex work. Similarly, if the minor were to be injured at the workplace under a voidable or valid contract of employment, the minor would be entitled to compensation under COIDA. It is important to note that, although very old data, the survey compiled by the Department of Labour in 2003 indicated that 61 percent of children who are engaged in economic activities have claimed to have been exposed to hazardous environments while four percent indicated that they have been injured at work.[67] Therefore, the issue of injuries sustained at the workplace is real and eligibility to claim compensation under COIDA becomes important. Going back to section 43 of the BCEA, if it were to be interpreted as voiding the contract of employment involving the minor, the minor would not be eligible to claim compensation under COIDA given the definition of 'employee' in COIDA. Whereas the definition of employee under the LRA is wide enough to include the minor whose contract contravenes the statute (the BCEA), the

66 Sutter v Scheepers *supra* n 23 at par 175; *Discovery Health Limited v CCMA supra* n 16 at par 642.

definition of employee under COIDA is restrictive and only limited to the existence of an employment contract. Thus, section 1(xix) of COIDA defines an employee as:

> A person who has entered into or works under a contract of service or of apprenticeship or learnership, with an employer, whether the contract is express or implied, oral or in writing, and whether the remuneration is calculated by time or by work done, or is in cash or in kind.

The words 'entered into or work under a contract of service' presuppose legality or validity of such a contract. Consequently, any person who has entered into an invalid contract of service cannot be regarded as an employee for the purposes of COIDA and, therefore, is not eligible to claim compensation under COIDA. Equally, a minor employee would not be eligible to lodge a claim of injuries under the common law duty of an employer to provide safe working conditions because for this action to arise, there has to be a valid common law employment contract. Therefore, if section 43 of the BCEA were to be interpreted as voiding a minor's employment contract, the minor would not be eligible to claim under COIDA or under common law.

Based on the above considerations regarding remedies and the finding in *Discovery Health* that the contract of employment between Lanzetta and Discovery Health was valid despite that it contravened the Immigration Act, it is concluded that the contract of employment concluded by a minor can only be voidable or valid where a guardian gives his/her consent in accordance with the ordinary principles of the law of contract.

4 Conclusion

From the discussion above, it is concluded that although section 43 of the BCEA criminalises the employment of children below the age of fifteen years, the underlying employment contract concluded by the minor cannot be rendered void but, rather, voidable in accordance with the general principles of the law of contract. This is because section 43 of the BCEA does not explicitly state that such a contract is void as required by the law stated in *Sutter v Scheepers*, *Johannesburg Municipality*, and *Discovery Health*. In addition, both the general and purposive approach to statutory interpretation do not support any view that section 43 seeks

67 Department of Labour 'Child Labour Action Programme for South Africa' (2003) 15 available from http://www.google.co.za/url?sa = t&rct = j&q = &esrc = s&source = web&cd = 2&ved = 0CCUQFjAB&url = http % 3A % 2F % 2Fwww.labour.gov.za % 2FDOL % 2Fdownloads % 2Fdocuments % 2Fuseful-documents % 2Fbasic-conditions-of-employment % 2FResearch % 2520report % 2520 % 2520National % 2520Child % 2520Labour % 2520Action % 2520Programme % 2520for % 2520South % 2520Africa.doc&ei = yDguVZSMFeLd7Qbml IHIAw&usg = AFQjCNFVtSEjY3ES8lvnDk0AEPY0btiXvg&bvm = bv.90790515,d.ZGU (accessed 2015-07-11).

to render employment contracts concluded by minors, aged below fifteen years, void.

The decisions in *Discovery Health* and *Kylie* shed light on the nature or status of employment contracts concluded in contravention of section 43 of the BCEA by clarifying that where the purpose of the contract is legal, the underlying contract cannot be rendered void despite the fact that it contravenes certain legislation. Consequently, the author comes to the conclusion that an employment contract concluded for a legal purpose by a minor cannot be rendered void despite that it may contravene section 43 of the BCEA.

It is important to mention that despite arriving at the conclusion that employment contracts concluded by minors in contravention of section 43 of the BCEA are voidable, the author does not lose sight of efforts of the international community, such as the ILO, to abolish child labour. To this end, South Africa is also party to the ILO Conventions and as such, the country has bound itself to abolish child labour. Additionally, given the large number of child-headed households, especially in the developing countries, states find it difficult to completely abolish child labour, at least at the present moment. As a result, the ILO sets minimum ages and conditions upon which children may be employed. For light work, developing countries are given twelve years as the minimum age for employment. Therefore, while the author takes cognizance of the efforts to progressively abolish child labour internationally and nationally, section 43 of the BCEA cannot presently be interpreted as rendering the contract of employment concluded by a minor void. Furthermore, the consequences of rendering an employment contract, concluded by a minor, void are greater than rendering it voidable because once such a contract is declared void, minors are taken out of the sphere of legal protection. This is so because while they are given access to courts, courts do not give effective labour remedies (reinstatement or compensation) to illegal contracts as it would be contrary to public policy. Consequently, it is a mockery for the law and for the courts to say that people who are engaged in illegal contracts, such as in *Kylie*, have a right to fair labour practice espoused in the Constitution and the LRA yet there are no remedies available to them. As Pistorius puts it, jurisdiction does not only refer to access to courts – the power courts have over a defendant – but also the court's ability to give effective remedy.[68] Consequently, it is as good as holding that courts do not have jurisdiction, as was done by the CCMA in *Kylie*, given that labour remedies (reinstatement and compensation) are not available to parties in illegal contracts.

68 Pistorius *Pollack on Jurisdiction* (1993) 4.

Does collaborative divorce have a place in South African divorce law?

Motseotsile Clement Marumoagae
LLM, LLM AIPSA Dip Insolvency
Senior Lecturer, School of Law, University of the Witwatersrand

OPSOMMING

Het gesamentlike wet 'n plek in die Suid-Afrikaanse egskeidingsreg?

Hierdie artikel bestudeer samewerkende beslegting as 'n alternatiewe geskils beslegtingsmetode in egskeidingsaangeleenthede. Dit bespreek verder die ontwikkeling, sowel as die kenmerke van kollektiewe reg. Verder sal melding gemaak word van hoe samewerkende bedinging van ander beslegtingsmetodes verksil. Hierdie artikel evalueer beide die voor- en nadele van samewerkende beslegting in egskeidingsake en hoe dit in die Verenigde State van Amerika ontwikkel het. In hierdie artikel word 'n saak gemaak vir die wyer aanwending van hierdie metode in egskeidingsake in Suid-Afrika deur family prokureurs.

1 Introduction

Academics, lawyers, courts and legislatures have shown support for alternatives to litigation based resolution of family disputes.[1] Alternative dispute resolution methods aim to create suitable atmosphere for parties to attempt to resolve their disputes by adopting processes that would allow them to engage meaningfully with each other. Recently, there have been unprecedented efforts to develop strategies aimed at more efficient, less costly and more satisfying resolution of family conflicts, including more extensive and appropriate use of various alternative dispute resolution approaches.[2]

A variety of innovative methods have been introduced to family law practice to minimise the harmful effects of an adversary system. Collaborative law is one of the alternative dispute resolution mechanisms which have been used by family law practitioners over the years to resolve family law disputes. Collaborative law has neither been practiced formally nor endorsed in South Africa despite clear evidence of its

1 Teitelbaum & Du Paix 'Alternative Dispute Resolution and Divorce: Natural Experimentation in Family Law' 1988 *Rutgers Law Review* 1132. See also the Children's Act 38 of 2005, *MB v NB* 2010 (3) SA 220 (GSJ) and Boniface 'A humanistic approach to divorce and family mediation in the South African context: A comparative study of Western-style mediation and African humanistic mediation' 2012 *African Journal on Conflict Resolution* 101-129.

2 Stipanowich 'ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution"' 2004 *Journal of Empirical Legal Studies* 843.

How to cite: Marumoagae 'Does collaborative divorce have a place in South African divorce law?' 2016 *De Jure* 41-57
http://dx.doi.org/10.17159/2225-7160/2016/v49n1a3

effectiveness in foreign jurisdictions like the United States of America.[3] In South Africa, mediation has been advocated as somewhat suitable alternative method of resolution of disputes in family law matters generally and divorce cases in particular.[4] The purpose of this paper is to provide a contextual understanding of what collaborative law in the context of divorces is, with a view to assess whether it can be successfully practiced in South Africa. This will be done, first, by tracing the history of collaborative law. The article will then critically discuss the advantages and disadvantages of collaborative law with a view to determine whether collaborative law has a role to play in South African family law.

2 Historical Perspective

An American family law attorney, Stu Webb, is credited for having started the collaborative law movement in the United States of America ('USA').[5] This practice was the result of Webb's unhappiness and bitterness towards the traditional adversarial nature of family law litigation.[6] Webb defines collaborative law as 'a method of practising law in which attorneys assist their clients in resolving conflict and making agreements using cooperative strategies rather than litigation'.[7] Webb rejected the confrontational and adversarial nature of his practice and approached fellow family law practitioners within the area his practice

3 See Voegele, Wray & Ousky 'Collaborative law: A useful tool for the family law practitioner to promote better outcomes' 2007 *William Mitchell Law Review* 971, where it is observed that 'a collaborative case may seem simple on its face. Yet, the art of the practice has a deep theoretical framework and dynamics. As a result, the dispute resolution model provides the potential for professional challenge and a higher degree of satisfaction for the attorney in helping the client through the challenges of a divorce'.

4 *MB v NB supra* n 1; see also *S v J* (695/10) [2010] ZASCA 139 (2010-11-19) par 54 where Lewis JA endorsed 'the views expressed by Brassey AJ in *MB v NB* that mediation in family matters is a useful way of avoiding protracted and expensive legal battles, and that litigation should not necessarily be a first resort'.

5 See Voegele, Wray & Ousky *supra* n 3 at 974; see also Webb 'An Idea whose Time has Come: Collaborative Law an alternative for attorneys suffering from "family burnout"' 2000 *Matrimonial Strategies* 7.

6 See Webb 'Collaborative Law: A practitioner's perspective on its history and current practice' 2008 *Journal of the American Academy of Matrimonial Lawyers* 156, where the author provides his account of how this movement started by stating that 'in the late 1980s, after practicing traditional civil law for eight years and family law for additional seventeen years, I was approaching burn-out. I had to come to hate the adversarial nature of my practice and hated to go to work. It was becoming harder and harder to tolerate my family practice. I was prepared to stop practising law. … So then I started thinking: Rather than stop practicing law, maybe I could continue my family law practice by developing a model that would allow me to do the parts of my practice which I enjoy and eliminate the parts I did not like. I felt like there had to be a better way to help people resolve their divorcing issues. I developed the insight that lawyers needed to be working with and representing clients for settlement'.

7 *Idem* 155.

was based, and sold them an idea of settling family law disputes through non-adversarial collaborative efforts.[8] Webb decided to stop litigating and going to court and resolved to represent his clients only in negotiations which were aimed exclusively at settlement.[9] However, where negotiations broke down and a settlement could not be reached, opening up the window for litigation, Webb withdrew and advised his client to obtain another legal representative who would litigate on their behalf.[10]

Webb believed that collaborative law was the way in which law should be practiced and thus, together with some of his colleagues, formed the Collaborative Law Institute of Minnesota – a non-profit organisation which has been used as a vehicle to spread the collaborative law doctrine.[11] Webb also provided training to law practitioners who were interested in practising collaborative law. Since 1993, collaborative law has spread throughout the USA and Canada and it has also been introduced in the United Kingdom of Great Britain ('United Kingdom').[12] Collaborative law has received wide spread support both in the USA and Canada, which has led to the training of many collaborative lawyers who later became instrumental in the resolution of family law cases, particularly divorces.[13] Currently, Collaborative law is practiced in virtually every state and province in the USA and Canada, as well in the United Kingdom and Australia.[14] The continued growth of Collaborative Law has also sparked the interest and curiosity of not only the academic community and law regulatory bodies but also courts and legislators in the USA. Some of the USA's states have enacted statutes of varying length and complexity that recognise collaborative law.[15]

---

8 Fairman 'A Proposed Model Rule for Collaborative Law' 2005 *Ohio State Journal on Dispute Resolution* 78.

9 Schwab 'Collaborative Lawyering: A Closer Look at an Emerging Practice' 2004 *Pepperdine Dispute Resolution Law Journal* 354.

10 *Idem* 355.

11 CLIM 'We are happy you are thinking about joining the Collaborative Law Institute!' available from http://www.collaborativelaw.org/ (accessed 2014-11-14).

12 Fairman *supra* n 8 at 83. See also Foran 'Adoption of the Uniform Collaborative Law Act in Oregon: The Right Time and the Right Reasons' 2009 *Lewis and Klerk Law Review* 789.

13 Fairman 'Growing Pains: Changes in Collaborative Law and the Challenge of Legal Ethics' 2008 *Campbell Law Review* 239.

14 Tesler 'Collaborative Family Law' 2004 *Pepperdine Dispute Resolution Law Journal* 318, wherein she observes that 'by the late 1990's, vigorous communities of collaborative practitioners had formed and begun representing family law clients in California, New Mexico, Arizona, Florida, Georgia, Pennsylvania, New York, Connecticut, Massachusetts, New Hampshire, Ohio, Illinois, Minnesota, Wisconsin, Colorado, Utah, British Columbia, Alberta, and Ontario. Today, the model has expanded to Ireland and the United Kingdom, Austria and Australia'.

15 See art 4 of the North Carolina General Statutes, Collaborative Family Law Act 2014 (New Jersey), California Family Code 2013 (2007) and Uniform Collaborative Law Act 2011 (Texas). See also Fairman *supra* n 13 at 340.

3 Collaborative Law in Family Matters

Collaborative law can be understood as a voluntary mechanism which divorcing parties, together with their respective legal representatives, decide to utilise in order to resolve disputes between them, thus creating an environment for the parties to find an amicable solution to their disputes. According to Peppet:

> In Collaborative Law, both divorcing parties agree to hire self-identified "collaborative lawyers" to handle their case. The lawyers and parties then agree that, so long as a so-called collaborative lawyer represents each side, the attorneys will serve their clients only during negotiations. In other words, if the attorneys fail to settle the case, they will withdraw. The parties and their lawyers sign "limited retention" agreements (LRAs) that limit the scope of the lawyer-client relationships and require the lawyers to withdraw if they cannot reach settlement. These agreements explain the lawyer's limited role and the mandatory mutual withdrawal provisions. In addition, the parties and their lawyers sign a "collaborative law participation" agreement (CLPA) at the start of their negotiations. This is a contract with the other side that signifies mutual interest in the Collaborative Law process.[16]

At the start of the collaborative law process, the parties, together with their legal representatives, bind themselves to engage in interest-based rather than positional bargaining, in order to jointly deal with issues which emanate from their disputes.[17] The deliberate avoidance of positional bargaining allows parties to be more open minded when negotiating, and thus allows them to consider each other's interests and those of their children (if they have any). Such an approach allows parties to adequately understand each other's needs and not to be unreasonable when negotiating for individual interests. Depending on the financial wellbeing of the parties, over and above their respective legal representatives, they can also hire one or more experts depending on their needs. For instance, they can hire a child development specialist, accountant, or a real estate appraiser to advise them fully with regard to their children, finances or properties. In order to ensure a certain level of fairness, experts who are brought in to assist parties to reach an amicable resolution – and thus be in a position to settle – need to be partial and neutral. However, should they fail to assist the parties as expected and the matter ends up in court, then they would be disqualified from testifying in court.[18]

16 Peppet 'Lawyers' bargaining ethics, contract, and collaboration: The end of the legal profession and the beginning of professional pluralism' 2005 *Iowa Law Review* 488.

17 Difonzo 'From Dispute Resolution to Peacemaking: A Review of Collaborative Divorce Handbook? Helping Families without Going to Court by Forrest S. Mosten' 2010 *Family Law Quarterly* 99.

18 Tesler *Collaborative Law: Achieving Effective Resolution in Divorce without Litigation* (2001) 106.

There have been a variety of definitions and models of collaborative law which have been put forward.[19] However, collaborative law 'is generally premised on what proponents argue is a fundamental paradigm shift in the lawyer's role: An overriding commitment to settlement of a dispute outside the traditional litigation model combined with individualised legal advocacy within a collaborative environment'.[20] It is meant to make legal representatives true counsellors to their clients by developing and utilising unique problem solving skills designed and aimed at reaching the best available outcome for both parties for the post-divorce restructured family, especially when children are involved. It also creates an environment wherein 'clients are supported by their legal representatives to aim for reasonable, mutually-respectful agreements as the normal, expected way to resolve divorce related disputes, and are taught to regard litigation as the "emergency room cum intensive care unit" of the legal system'.[21]

Collaborative law is founded on both parties and their respective legal representatives entering into a written agreement wherein all the parties to the process commit themselves to respectful and good faith negotiations. The hallmarks of the collaborative process are said to be: full, voluntary and early disclosures of relevant information; acceptance of the parties of the highest level of fiduciary duties towards each other; voluntary acceptance that the aim of the process is to settle the issues and commit to participate fully in the process; transparency of the process; joint retention of neutral expectations; commitment to meeting the legitimate goals of both parties if at all possible; avoidance of litigation or the threat of litigation; disqualification of all legal representatives and experts from participation in any future legal proceedings between the parties outside the collaborative process; and four-way settlement meetings as the principal means by which negotiations and communications can take place.[22] According to Tesler:

> What was unexpected was the degree of creativity that often arises during collaborative negotiations. When the sole agenda is settlement, and when the sole measure of lawyer success is achieving an agreement both clients can accept, and when the lawyers have been instructed by their clients not to include court-based resolution as a part of the range of possible solutions for a given problem, a quantum leap in problem solving frequently occurs: both lawyers and both clients marshal their creative intellects towards finding solutions for each problem that will work well for both parties. There is a concentration of intellectual energy brought to bear solely on solving the problem that is unmatched in any kind of negotiations.[23]

19 Lawrence 'Collaborative Lawyering: A New Development in Conflict Resolution' 2002 *Ohio State Journal on Dispute Resolution* 432.
20 Spain 'Collaborative Law: A critical reflection on whether a collaborative orientation can be ethically incorporated into the practice of law' 2004 *Baylow Law Review* 143.
21 Tesler *supra* n 18 at xx.
22 *Idem* 8.
23 *Idem* xx- xxi.

The training provided to collaborative lawyers allows them to understand the emotive nature of divorces and how one party may use his or her dominance over the other, be it financial or otherwise. As such, collaborative lawyers strive to balance power dynamics and thus create an environment wherein parties can be open to not only hear but, in good faith, attempt to understand the concerns and needs of the other, so as to reach an amicable agreement.[24] This method enables legal representatives to appreciate the socio-economic realities of their respective clients and to be forward-thinking by allowing parties to reflect on their lives post-divorce and how the decision they take now will affect their lives post-divorce. This allows legal practitioners to not only be concerned about the wellbeing of the clients that instructed them, but to also take the time to assess the needs of the other party to the divorce and create an environment where their clients, when taking particular positions, reflect on how the consequences of such decisions will affect other parties to the divorce. The primary responsibility of the collaborative lawyer is to his or her client and must represent the best interests of such a client. However, in order for the collaborative process to succeed, such practitioner should also caution his or her client to be reasonable on his or her demands and consider the interests of the other party.

While the collaborative process is settlement orientated, it does not disregard emotions generally associated with family law generally, but divorces in particular. The role of collaborative legal practitioners is to adequately advise their clients that emotions generally lead to irrational decisions and that they need to be open minded when negotiating and not necessarily view each other as opponents but partners within a joint solution seeking process. Parties should be encouraged to keep their cool and behave as adults and to not be manipulated by their emotions which might lead to the breakdown of negotiations. Collaborative system allows legal practitioners to move their clients from artificial bargaining positions, motivated by emotions, to the articulation of real needs and interests while assisting them to retain their human decency towards each other and self-respect as they move towards separate lives.[25] Collaborative lawyers claim that collaborative process allows for family law disputes to be resolved cheaper, faster and fairer than if the parties were to litigate their dispute.[26] These practitioners believe that collaborative process could result in those who wish to divorce being able to avoid the high costs that are often associated with litigation.[27] The mere fact that all parties are concerned with the attainment of a workable

24 Mosten *Collaborative Divorce Handbook: Helping Families Without Going to Court* (2009) 17.
25 Tesler *supra* n 18 at xxi.
26 Fairman *supra* n 8 at 73.
27 Chanen 'Collaborative Counsellors: Newest ADR Option Wins Converts, While Suffering Some Growing Pains' 2000 *ABA Journal* 52 available from http://www.jstor.org/stable/27845989 (accessed 2016-07-12).

settlement, that may lead to the negotiation proceedings being more dedicated and focused, enables the parties to reach an agreement faster.

3 2 Disqualification Agreement

A written participation agreement wherein parties bind themselves not to approach the courts during the collaborative process for the resolution of the dispute is the main distinguishing feature of collaborative law. This agreement is so central to the process that should any of the parties decide that the process is not working for him or her and resort to litigation, the legal representatives representing the parties in the process must withdraw, and thus not assist their clients to pursue litigation.[28] These agreements have also been referred to as limited retention agreements. Such agreements should be thoroughly reviewed and explained to clients, followed by the discussion which adequately explains the collaborative process as well as the scope of attorneys' limited representation in the whole process. Legal representatives, at all times, should receive permission from their respective clients to reveal any information, but should encourage their clients to reveal material information which will lead to the resolution of disputed issues. It has been argued that:

> The agreement to participate, or the "disqualification stipulation", gives collaborative law proceedings its spine. This is a document that (1) stipulates the constraints on the lawyer, and consulting professionals' participation. (2) spells out the ethical principles and procedural guidelines for the practice of collaborative law; (3) renders resorting to court a failure (requiring professionals to withdraw); and (4) once understood, voluntarily agreed to, and signed by the participants, gives the teams professional Super Glue to keep the clients from bailing out when the going gets tough. This is a document that defines the "container" for the process and, particularly because it defines the sole goal as collaborative settlement, causes a profound change in mindset and frees the problem solving creativity of the participants.[29]

In a collaborative process, the contractual forswearing of litigation changes everything and creates the correct atmosphere for respectful problem solving.[30] The fact that there is a formal agreement that collaborative lawyers must withdraw from the case and not participate in litigation, assures that everyone's interests are aligned towards resolution without acrimony.[31] This agreement can be signed in initial four way meetings between parties and their respective legal

28 Fairman *supra* n 13 at 239.
29 Schriner 'Agreements to Participate in the Collaborative Law Process' in Gutterman (ed) *Collaborative Law: A New Model for Dispute Resolution* (2004) 49.
30 *Ibid*.
31 *Ibid*.

representatives. This is a distinguishing feature of collaborative law from other alternative dispute resolution methods.[32] This agreement is referred to as a 'disqualification agreement'.[33] Should negotiations breakdown, the parties will be free to approach other legal practitioners who will assist them to litigate their matter. The confidentiality of the proposals, and discussions generated during the collaborative process, serve to prevent the disclosure and use of information disclosed during negotiations and later litigation.[34]

While collaborative law has grown significantly in various countries, it has nonetheless not escaped criticism. Some lawyers and judges have questioned the 'no court' agreement requiring legal representatives to withdraw should the negotiations fail. They are of the view that parties would incur further and unnecessary costs by bringing new legal representatives on board to assist them to start all over again with litigation and, further, that they would have to start and build a new relationship with such legal representatives during their time of emotional distress.[35] Doubts have been expressed as to whether the disqualification clauses comply with ethical rules. It has been argued that if ethical rules govern disqualification agreements, these agreements may be unethical because they might place excessive pressure on clients to settle.[36] It has been argued that collaborative law is unethical more particularly with regard to the 'disqualification agreement' clause because the conflict will materialise every time the collaborative law process is unsuccessful – because the lawyer's obligation to the 'opposing party' will then conflict with the lawyer's duty to 'recommend or carry out an appropriate course of action' (i.e., litigation) for the client.[37] It has further been observed that potential conflict 'inevitably interferes with the lawyer's independent professional judgment in considering the alternative of litigation' and forecloses 'a course of action

32 Lande 'The Promise and Perils of Collaborative Law' 2005 *Dispute Resolution Magazine* 29.

33 *Ibid*.

34 Voegele, Wray & Ousky *supra* n 3 at 1021.

35 Stoner *Divorce without Court: A guide to Mediation and Collaborative Divorce* (2006) 60.

36 See American Bar Association *Ethical Guidelines for Settlement Negotiations* (2002) s 3.2.4 available from http://www.abanet.org/litigation/ethics/settlementnegotiations.pdf (accessed 2014-12-03). In the USA, Rule 1.16(b) of the Model Rules of Professional Conduct permits lawyers to withdraw only under certain conditions, and because clients have unilateral authority to decide whether to accept settlement offers, the Rule does not authorise lawyers to withdraw when clients refuse to follow a lawyers' advice about settlement; the courts have strongly condemned lawyers' withdrawal in these circumstances. Under Rule 1.16(b)(4), a lawyer may withdraw if a 'client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement', but mere disagreement with a client's decision about settlement generally does not satisfy this condition. See also Lande 'Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering' 2003 *Ohio State Law Journal* 1345.

37 Colorado Bar Association (CBA) Ethics Committee released Opinion 1151.

that "reasonably should be pursued on behalf of the client", or at least considered.'[38] It has also been argued that the 'disqualification agreement' is unethical because it empowers the one party to terminate the mandate of the other party's legal representative ending the collaborative process.[39]

The fact that both parties would have to withdraw has the potential of allowing one party to impose great legal costs against the other. This might possibly be true when one party has agreed with his or her current legal representative on a certain fee which he or she can afford, and when the process fails, he or she is forced to lose the services of what, to him or her, might be financially reasonable legal representation. Further, that clauses requiring legal representatives to withdraw are not reasonable, more particularly when retaining new counsel imposes extremely asymmetrical costs on the two parties – one party can do it cheaply, the other only at a great expense – then these limited-retention agreements may work serious strategic disadvantage on the cost-sensitive party[40] For these reasons, it has been argued that collaborative law seems to be at odds with legal ethics.

It cannot be denied that should disqualification agreements be used to coerce parties to reach settlements, that would be unethical. Nonetheless, these agreements are not intended to force parties to settle. In actual fact, they are used to clarify the very purpose of entering into a collaborative process, which is to reach settlement. These agreements enable parties to be open minded and not to act in a manner that will jeopardise the process. Disqualification agreements enable legal representatives to be constantly focusing on the resolution of the disputes between the parties, which in turn allows the parties to engage meaningfully to resolve their disputes. Opponents of collaborative law have strongly defended the importance and relevancy of disqualification agreements. Lande is of the view that disqualification agreements differ from those traditional withdrawal agreements in that although the structure of the collaborative law process creates a constant risk that the lawyer will withdraw if the client cannot obtain a satisfactory settlement, it is still the client's decision.[41] Furthermore, if the legal representative is of the view that his or her client is not being truthful to him or her by not

38 Schneyer 'The organized bar and the collaborative law movement: A study in professional change' 2008 *Arizona Law Review* 296. This argument was made by the Colorado Bar Association. However, the American Bar Association concluded that collaborative practice is not unethical per se, and does not involve an 'unconsentable' conflict and, indeed, creates *no* lawyer-client conflict.

39 *Idem* 291.

40 *Peppet supra* n 16 at 488.

41 Lande *supra* n 32 at 1352. Further that lawyers in traditional cases are likely to invoke withdrawal agreements late in the litigation process, often shortly before trial, whereas collaborative processes often occur before litigation begins or early in litigation. Further that lawyers use the traditional withdrawal provision primarily to benefit themselves, whereas collaborative lawyers use the disqualification agreement primarily to benefit the clients

disclosing everything which needs to be disclosed to assist to reach a settlement and thus threatening the chances of settlement, then such a practitioner should be at liberty to withdraw and terminate the collaboration.[42]

While the American Bar Association conceded that the collaborative lawyer's disqualification agreement creates a contractual 'responsibility' to the other spouse, it nonetheless rejected the view that this 'impair[s] the lawyer's ability to represent his or her client'.[43] It argued, on the contrary, that the agreement is entirely 'consistent with the client's limited goals for the representation' and poses no risk.[44] It has been argued that on a practical level, disqualification is a no-brainer. No client heading to litigation after a collaborative case fails would choose their collaborative counsel to represent them in court. The collaborative attorney, who was reasonable and non-positional during the collaborative process, would be the last advocate a client wants in court.[45] The proponents of collaborative family law argue that the 'disqualification agreement' is intended among others: to enhance the ability of all participants to make the commitment necessary to achieve the best possible outcomes; to create a safe environment so that clients are more likely to identify the best outcomes for their situation; and allows parties to choose their own legal representatives.[46]

What makes collaborative law attractive in the view of the present author is the fact that it is driven by law practitioners who have actually been in practice and, thus, have seen the detrimental effects which litigation can have on the parties involved in family disputes, and more particularly divorces. Collaborative law is not an abstract academic exercise discussed by people who might not have practiced law or had the benefit of consulting with a client who is burning with emotions, due to the anticipated divorce, and who is putting all the blame on the other party for the current state of affairs leading to their divorce. Collaborative law, as an alternative dispute resolution mechanism, is a process advocated for people who have been in such situations and who, through

42 See Schneyer *supra* n 38 at 296.
43 *Idem* 314.
44 *Ibid*.
45 Gushurst 'Collaborative Practice: A Paradigm Shift' 2007 *The Colorado Lawyer* 89.
46 See generally Voegele, Wray & Ousky *supra* n 3 at 978-982. Further that collaborative law has generated a fair amount of attention regarding legal ethics in use of the model, its unique features, and practice norms. This attention has focused on the ethics of limited representation by attorneys, proper screening of cases appropriate for the model, as well as zealous advocacy within the model, the disqualification of attorney requirement, confidentiality, and use of neutral experts. Despite scrutiny from numerous jurisdictions, no part of the collaborative law model has been found to be unethical. Similarly, there have been no reported incidents of attorneys engaged in unethical practices while practicing collaborative law (Voegele, Wray & Ousky *supra* n 3 at 1011).

experience, have realised that divorces are capable of being resolved amicably.

4 Should Collaborative Law be practiced in South Africa?

4 1 Alternative Dispute Resolution

While an in-depth discussion of various Alternative Dispute Resolution (ADR) methods is beyond the scope of this paper, it suffices to mention that ADR in South Africa is understood to:

> include dispute resolution processes in which parties have opportunities to make decisions on their rights, interests and remedies and interveners are precluded from making binding determinations for the parties – known variously as facilitation, mediation, conciliation, case appraisal and neutral evaluation.[47]

In the context of family law generally and divorces in particular, the most common ADR method is mediation. In South Africa, mediation has received academic endorsement and there is general consensus that marital issues can be resolved through mediation.[48] The South African department of Justice and Constitutional Development has also introduced the court-annexed mediation rules which will be implemented in the District and Regional Courts, which rules are said to form part of the Government's concerted effort to transform the civil justice system and are geared at enhancing access to justice.[49] While an in-depth discussion of mediation is beyond the scope of this paper, and

47 Boulle 'Promoting Rights Through Court-Based ADR?' 2012 *SAJHR* 3.

48 See generally Boniface 'A humanistic approach to divorce and family mediation in the South African context: a comparative study of Western-style mediation and African humanistic mediation' 2012 *African Journal on Conflict Resolution* 101; Goldberg 'Family mediation is alive and well in the United States of America: a survey of recent trends and developments' 1996 *TSAR* 370' De Jong 'A pragmatic look at mediation as an alternative to divorce litigation' 2010 *TSAR* 515; De Jong 'Giving children a voice in family separation issues : a case for mediation: aantekeninge' 2008 *TSAR* 785; De Jong 'The need for new legislation and/or divorce mediation to counter some commonly experienced problems with the division of assets upon divorce' 2012 *Stell LR* 225; and De Jong 'Divorce mediation in Australia – valuable lessons for family law reform in South Africa' 2007 *Comparative and International Law Journal of Southern Africa* 280.

49 Court-annexed mediation available from http://www.conflictdynamics.co.za/SiteFiles/222/DOJ%20Mediation%20Rules%20Booklet.pdf (accessed 2012-12-04).

the fact that mediation has been addressed elsewhere, it is nonetheless fitting to properly compare mediation with collaborative law.[50]

4 2 Mediation v Collaborative Law

Both mediation and collaborative law endeavours to assist the parties to negotiate their differences in a more welcoming environment than what they may be exposed to if they were engaged in litigation. Both processes are intended at keeping parties away from court by creating a suitable environment wherein they can resolve their disputes. Parties' communication is vastly improved due to their active involvement in both processes and can, themselves, make important decisions regarding their divorce.

There are recognisable differences between mediation and collaborative law. In mediation, there is a neutral figure who oversees the process, whereas in collaborative law, each party brings his or her legal representative to assist him or her to negotiate. This means that mediation, in the context of divorce, can, and usually is, a three way process, whereas collaborative law is a four way process. This simply entails that in mediation there is a third party who is supposed to be impartial and neutral whose role is to facilitate the negotiations between the parties thereby assisting them to reach an amicable settlement that recognises the needs and rights of all family members.[51] Whilst in collaborative law, there is no neutral person in the strict sense of the word, and both parties bring their own legal representatives who should assist them to reach settlement.

Another distinguishing feature between the two processes is the fact that with regards to collaborative law, both legal representatives sign an agreement which binds them to withdraw and, thus, cease to represent their clients should the parties fail to reach settlement. In that case, such legal representatives cannot assist the parties to litigate against each other should they wish to do so. Alternatively, there is no such formal commitment to the resolution of the disputes between the parties from the mediator as far as mediation is concerned. In mediation, parties may candidly disclose any facts or information, even if it is of a highly personal nature, without being afraid that any statements or concessions made in the mediation process could later be used against them in litigation that might follow an unsuccessful mediation attempt.[52] Parties involved in collaborative law are actively encouraged to disclose all

50 See O'Leary *Mediation in Family & Divorce Disputes* (2014); Boniface 'African-style Mediation and Western-style Divorce and Family Mediation: Reflections for the South African context' 2012 *PER* 377; and see also De Jong 'An acceptable, applicable and accessible family-law system for South Africa - some suggestions concerning a family court and family mediation' 2005 *TSAR* 33.

51 De Jong 2010 *TSAR supra* n 48 at 515.

52 Dewdney 'The partial loss of voluntariness and confidentiality in mediation' 2009 *Australasian Dispute Resolution Journal* 18;

relevant information honestly and in good faith in order to assist the process.

However, it should be noted that the process of mediation allows parties ample scope to engage in a structured discussion to negotiate issues in dispute relating to their divorce, which might include, *inter alia*, the division of assets, care and contact with children, and maintenance.[53] Such a process is driven by a person who should be viewed as impartial and who does not have an interest in the matter, other than assisting the parties by creating an environment where the parties can endeavour to resolve their marital issues. Family law mediation as an alternative to litigation has also received judicial approval in South Africa.[54] Brassey AJ in *MB v NB*[55] held that:

> Mediation can produce remarkable results in the most unpropitious of circumstances, especially when conducted by one of the several hundred people in this country who have been trained in the process. The success of the process lies in its very nature. Unlike settlement negotiations between legal advisers, in themselves frequently fruitful, the process is conducted by an independent expert who can, under conditions of the strictest confidentiality, isolate underlying interests, use the information to identify common ground and, by drawing on his or her own legal and other knowledge, sensitively encourage an evaluation of the prospects of success in the litigation and an appreciation of the costs and practical consequences of continued litigation, particularly if the case is a loser.[56]

There are those who have argued that mediation, in general, is an inherently collaborative process.[57] Although mediation has sometimes been labelled as such, collaborative law is functionally different from

53 De Jong 2012 *Stell L R supra* n 48 at 235.

54 See among others *MB v NB supra* n 1, *S v J* (695/10) [2010] ZASCA 139 (19 November 2010), *Van den Berg v Le Roux* [2003] 3 All SA 599 (NC), *Townsend-Turner and another v Morrow* [2004] 1 All SA 235 (C), *G v G* 2003 (5) SA 396 (Z).

55 *MB v NB supra* n 1 par 23.

56 *Idem* par 50. Brassey AJ stated further that 'I am given to understand that in England the all but obligatory recourse to mediation has profoundly improved the process of dispute resolution. Parties resolve their problems so much more cheaply as a result and the burden on the court rolls has been considerably lightened. Informed estimates put the success rate of mediation at between eighty and ninety percent. For present purposes it is unnecessary, indeed undesirable, for me to say more about the general imperatives that favour mediation as a means of settling cases. I do not even feel the need to say much more about the need for mediation in family disputes. But I can say with confidence that the parties would have been well served if they had submitted this dispute to mediation and then fought out, if fight they must, the one or two issues of fundamental concern to them'.

57 Ackerman 'Disputing Together: Conflict Resolution and the Search for Community' 2002 *Oido State Journal on Dispute Resolution* 7l. Ackerman argues that 'the collaborative nature of mediation suggests a "friendlier" process, that the ideal circumstances, should promote an atmosphere more conducive to community building than the adversarial, "winner takes all" nature of adjudicative process'.

mediation in many ways.[58] It has been argued that the standard process of a collaborative divorce involves many steps, which include: making first contact with client and attorney; first communications with the other party or opposing counsel; pre-meetings, agenda-setting, and the first four-way meeting (of the parties and their attorneys); the debriefing (where the parties and their attorneys talk about the first four-way meeting); the mid-game (involving a number of four-way meetings); and the end-game (usually concluding the settlement).[59]

4 3 Collaborative Law in South Africa

The debate regarding the adoption of collaborative law in South Africa would be enriched by dealing with important questions regarding the value of this form of dispute resolution method. Given the fact that South Africa has adopted an extensive mediation driven approach towards family law dispute resolution, does collaborative law have a place in South Africa? Can collaborative law be an alternative not only to litigation but to mediation itself? Would South African family lawyers buy into a form of dispute resolution which totally discourages litigation? Would collaborative law lead to divorce potential litigants reaching settlement before litigation? What value would collaborative practice bring to the South African family law jurisprudence generally, and the divorce regime in particular? Perhaps all these questions could be effectively answered only if family law practitioners in South Africa consciously decide to start practising collaborative law. Nonetheless, the present author is of the view that collaborative law, just like any other method of ADR, does have a place to play in South Africa. As such, if potential litigants wish to utilise collaborative law, there must be practitioners who are willing to participate in it. Collaborative law enables legal representatives not to think about themselves by pushing for an outcome which will lead to their clients emerging as victorious and them being viewed as better legal representatives. This winning mentality is part of the South African divorce litigation system which becomes more evident when legal representatives attempt to reach a settlement in what is referred to as round table conferences in South Africa. These meetings are often attended by parties together with their legal representatives. It is at these meetings where the litigious mentality of South African divorce legal practitioners clearly comes out – where practitioners will be arguing firmly and, thus, advocating for the demands of their clients. Even though settlement agreements, at times, are reached by the parties, such agreements (due to the skill and experience of legal practitioners) often result in the prejudice of one of the parties who might have been made to compromise on issues that he or she should not have had to, only to realise, post-divorce, that he or she got a raw deal. Collaborative law can address this and ensure that practitioners are more open minded when

58 Beyer 'Pragmatic look at Mediation and Collaborative law as Alternatives to Family law Litigation' 2008 *St Mary's Law Journal* 320.

59 *Ibid;* Tesler *supra* n 18 at 102.

advising and representing their clients by pushing for a more equitable outcome for both parties.

South African family law practitioners, who see value in participating in this process, would be required to encourage their clients to engage meaningfully in a joint problem solving initiative as opposed to the traditional adversarial system. Legal practitioners who embrace the collaborative process would have to be genuine in their attempt to resolve conflicts between their respective clients and must act in good faith. Round table conferences are suitable platforms to practice collaborative law. Even though these round table conferences, at times, are convened to express the position of parties and, therefore, often lead to no settlement at all, the present author is of the view that these forums can be a good start to introducing collaborative law in South Africa.[60] Perhaps it is through these round tables where legal representatives could look beyond the emotions and tensions of their respective clients and create an environment wherein parties can be directly involved in the negotiations. This can be achieved if and when legal representatives do not necessarily see themselves as opponents but as role players in a collaborative effort which is intended to assist clients to settle their disputes. It cannot be disputed that an early settlement is particularly important in the context of divorce in order to prevent unnecessary costs which may occur if the parties are unable to agree on the most important aspects of their divorce – creating a litigious environment leaving the matter to be decided by the court and, thus, resulting in a winner and a loser between the parties. Divorce courts appreciate the parties' efforts to resolve issues between themselves and to come to court only to request the court to make their collective decision an order of court. In most instances, if the settlement is sound the court will rubber stamp it. However, the court retains its discretion to reject the settlement if it is grossly unfair to one of the parties. It has been held that:

> It has always been the trend in divorce proceedings, more so than in other civil actions, for parties to elect to resolve their disputes in a non-adjudicatory manner. Through the use of dispute resolution mechanisms designed to foster the amicable settlement of disputes, such as conciliation or mediation, parties arrive at a negotiated settlement of the issues raised in an action for the dissolution of their marriage relationship. The usual outcome of such a negotiated settlement is the conclusion of an agreement, for the terms of the settlement to be recorded in a written document, and for it to be made an order of the court. The record of this agreement or contract is commonly referred to as a settlement agreement, a deed of settlement or a consent paper. The agreement usually deals with matters such as the division of the assets of the parties, the payment of maintenance, custody of, and contact with the children, and the payment of the costs of the proceedings.[61]

60 As practicing attorney, I conduct at least four round tables in a month.

61 *Ex parte Le Grange and Another; Le Grange v Le Grange* 2013 (6) SA 28 (ECG) par 1. See also section 7(1) of the Divorce Act 70 of 1979, which provides that 'a court granting a decree of divorce may in accordance with a written

This author is of the view that family law practitioners should commit to transform roundtable conferences into collaborative law forums which will create an environment for parties to thoroughly and honestly discuss issues such as finances, properties, parental responsibilities and rights over children and the manner of their divorce. It cannot be disputed that the current South African adversarial court system has proved to be unsuitable for family law disputes. It fails to provide a contextual and close assessment of the parties' particular needs and does not cater to the post-divorce needs of litigants. Often, a magistrate or judge will make an order based on the facts presented by the legal representatives to him or her and, based on this, determine who the winner of the case is. This system does not go beyond understanding what life post-divorce is likely to be like for the parties before the court. As such, in order to understand the real issues affecting parties, there needs to be a forum where such issues can be canvassed in an open and honest manner. The present author believes that collaborative law is that alternative. This is because once the parties, together with their legal representatives, have addressed all the issues and reached settlement, the settlement can be taken to court to be made an order of court.

Collaborative law also makes provision for other people, with expertise in areas such as child related issues and finances, to be part of the process in order to assist parties to explore interests rather than positions and, therefore, make decisions which will benefit them post-divorce. The legal representatives will facilitate the process to ensure that parties negotiate in a manner that will bring about progress in the process. It is argued that progress will be brought about when practitioners sign a clear and well drafted 'participation agreement' wherein they would declare and commit themselves to withdrawing from the process should the negotiations breakdown and the parties fail to reach agreement – and therefore not participate in the litigation should either of the parties wish to litigate the matter.

5 Conclusion

Over the years, litigation has been used to resolve family disputes. However, in recent years there has been a deliberate effort to encourage people to resolve their family disputes using ADR mechanisms. While various ADR methods are available, this paper discussed collaborative law as an option which can be used to resolve divorce disputes. It has been argued that collaborative law should be formally introduced in South Africa because it is best suited to deal with issues surrounding divorces. In order for collaborative law to succeed in South Africa, on-going training should be provided to all those practitioners who are willing to practice it. The success of collaborative law practice in the USA

agreement between the parties make an order with regard to the division of the assets of the parties or the payment of maintenance by the one party to the other'.

and Canada came as a result of those who started this process and those who provided training and support to those who were willing to receive such training.[62] There mere fact that there are law firms in the USA and Canada which have established specialised units to deal specifically with collaborative law, means that South Africa can draw lessons from these countries on how to carry out collaborative law practice. Perhaps more research needs to be conducted on how South Africa can incorporate this practice of dispute resolution within its borders.

62 Fairman *supra* n 13 at 240. Fairman reiterates that 'Stu Webb, is credited as the first to articulate the concept and put it into practice around 1990. Since then, thousands of lawyers have been trained in the collaborative law model; tens of thousands of cases have been resolved with it in the United States and Canada. Collaborative law practice groups exist in virtually every state in the nation. Indeed, major law firms are even hiring partners to head up their collaborative law sections'.

Applying the CISG via the rules of private international law: Articles 1(1)(b) and 95 of the CISG – analysing CISG Advisory Council Opinion 15

Marlene Wethmar-Lemmer
BCom LLB LLM MA LLD
Associate Professor, College of Law, University of South Africa

OPSOMMING

Toepassing van die Weense Koopverdrag via die internasionale privaatreg: Artikels 1(1)(b) en 95 van die CISG – 'n analise van die *CISG Advisory Council* Opinie

Die Weense Koopverdrag (bekend onder die Engelse akroniem 'CISG') is 'n invloedryke internasionale verdrag wat tans vyf en tagtig lidstate verteenwoordigend van alle regstradisies het. Indien van toepassing, reguleer die verdrag die totstandkoming sowel as die regte en verpligtinge van die koper en verkoper tot 'n internasionale koopkontrak vir roerende goedere. Ingevolge artikel 1(1) van die CISG is die verdrag van toepassing indien (a) die partye tot die koopkontrak van verskillende lidstate afkomstig is of (b) indien die reëls van die internasionale privaatreg lei tot die toepassing van die reg van 'n lidstaat. Artikel 95 van die CISG magtig 'n lidstaat om 'n voorbehoud te maak dat die betrokke lidstaat nie aan artikel 1(1)(b) gebonde is nie. Die voorbehoud het 'n beduidende invloed op die toepassingsgebied van die verdrag en die korrekte interpretasie van die bepaling is dus van groot belang vir howe in lidlande en nie-lidlande. Die interpretasie van die artikel 95-voorbehoud het al tot baie kontroversie en akademiese kommentaar aanleiding gegee. Onlangs het die *CISG Advisory Council* 'n opinie oor die interpretasie van die bepaling gepubliseer en daar word voorsien dat hierdie interpretasie heel invloedryk sal wees. In hierdie bydrae word die *CISG Advisory Council* se interpretasie van die impak van 'n artikel 95 – voorbehoud op die CISG se toepassingsgebied ontleed.

1 Introduction

The United Nations Convention on Contracts for the International Sale of Goods (CISG or the Convention)[1] provides a set of uniform substantive law rules to govern the formation of international contracts for the sale of goods, as well as the rights and obligations of buyers and sellers.[2]

1 UN Doc A/CONF 97/18: 1489 UNTS. This Convention was adopted at a diplomatic conference of the United Nations held in Vienna during 1980 and entered into force on 1988-01-01; available from http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf (accessed 2015-07-15).

2 Art 4 of the CISG.

How to cite: Wethmar-Lemmer 'Applying the CISG via the rules of private international law: Articles 1(1)(b) and 95 of the CISG – analysing CISG Advisory Council Opinion 15' 2016 *De Jure* 58-73
http://dx.doi.org/10.17159/2225-7160/2016/v49n1a4

According to article 1(1) of the CISG, the CISG 'applies to contracts of sale of goods between parties whose places of business are in different states (a) when the states are contracting states or (b) when the rules of private international law lead to the application of the law of a CISG contracting state'.[3]

Given the large number of contracting states, representative of all legal traditions, as well as its important subject matter, the CISG is one of the most influential international conventions to date. The number of contracting states to the CISG has increased from 73 to 85 in the last five years.[4] Even though South Africa is not a contracting state as yet, most of its largest trading partners are CISG contracting states[5] and South Africa, therefore, should accede to the Convention as soon as possible.[6] It would also ensure regional harmonisation of international sales law if all Southern African Development Country (SADC) states were to accede to the CISG.[7] From a BRICS[8] perspective, China and Russia have been CISG contracting states from 1988 and 1991 respectively, and Brazil acceded in 2013.[9] It would therefore promote international trade between BRICS states if India and South Africa would follow Brazil's recent example and accede to the CISG.

Article 95 of the CISG impacts upon the convention's scope of application and this provision's interpretation, therefore, is of paramount importance for correct application of the Convention. In light of the

3 See art 1(1) of the CISG concerning its scope of application. For an analysis of the scope of application from a South African vantage point, see Hugo 'The United Nations Convention on the International Sale of Goods: Its scope of application from a South African perspective' 1999 *SA Merc LJ* 1; Wethmar-Lemmer 'When could a South African court be expected to apply the CISG?' 2008 *De Jure* 419; and Wethmar-Lemmer 'The important role of private international law in harmonising international sales law' 2014 *SA Merc LJ* 93.

4 See the status document detailing all contracting states as well as their date of signature, accession or ratification of the Convention, available from http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (accessed 2016-07-19).

5 South Africa's largest trading partners are currently China, the United States and Germany – see http://www.southafricaweb.co.za/page/trade-and-industry-south-africa (accessed 2015-07-15) in this regard. All three of South Africa's largest trading partners are CISG contracting states (as indicated on the status document).

6 Eiselen 'Adoption of the Vienna Convention for the International Sales of Goods (CISG) in South Africa' 1999 *SALJ* 323; Eiselen 'Adopting the Vienna Sales Convention: Reflections eight years down the line' 2007 *SA Merc LJ* 14.

7 Wethmar-Lemmer 2014 *SA Merc LJ supra* n 3 at 109.

8 BRICS is an acronym for five of the major emerging economies, namely Brazil, Russia, India, China and South Africa. For more information, access the BRICS Information Sharing and Exchanging Platform available from http://www.brics-info.org/ (accessed 2016-07-21).

9 UNCITRAL 'Status: United Nations Convention on Contracts for the International Sale of Goods' 2016 available from http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (accessed 2016-07-19).

almost worldwide accession to the CISG, courts in contracting and non-contracting states alike are regularly faced with questions concerning its application. South African courts and merchants should therefore pay heed to the correct interpretation of article 95 of the CISG.

Article 95 of the CISG provides that any 'state may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (1)(b) of article 1 of this Convention'.[10] As referred to above, article 1(1)(b) contains one of the two alternative applicability criteria of the CISG and provides that it applies when the rules of private international law refer to the law of a contracting state.

Even though the meaning of article 95 seems relatively clear at first glance, it has given rise to much controversy and its interpretation and application has generated considerable scholarly debate.[11] Recently, the CISG Advisory Council[12] published an opinion on its interpretation.[13]

This CISG AC Opinion will be analysed in this contribution. Since article 95 was analysed in detail by the present author in a previous edition of this journal,[14] its background and history will not be repeated. This article will engage with the Advisory Council's interpretation of this provision and focus on a remaining contentious matter, namely, the correct interpretation and application of the proper law of a contract.

2 Use of Terminology Explained

The terms 'reservation' and 'declaration' are used interchangeably in this contribution to denote a 'unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the

10 See the text of the Convention. To date, six states have availed themselves of the option of making an article 95 reservation. Of importance for South Africa, is the fact that these states include China, Russia and the United States. See the CISG status document in this regard.

11 Ferrari *Contracts for the International Sale of Goods. Applicability and Applications of the 1980 United Nations Sales Convention* (2012) 87 states that 'there is no agreement on the extent to which the article 95 reservation narrows down the CISG's applicability'.

12 See par 3 below.

13 CISG AC Opinion No 15 'Reservations under Articles 95 and 96 CISG' Rapporteur: Schroeter (University of Mannheim, Germany); adopted by the CISG AC following its 18th meeting in Beijing, China on 21 and 22 October 2013. The opinion is available from http://www.cisgac.com/cisgac-opinion-no15/ (accessed 2016-07-21).

14 Wethmar-Lemmer 'The impact of the article 95 reservation on the sphere of application of the United Nations Convention on Contracts for the International sale of Goods (CISG)' 2010 *De Jure supra* n 14 at 362.

legal effect of certain provisions of the treaty in their application to that State'.[15] For purposes of this article, 'reservation state' or 'reservation contracting state' refers to a CISG contracting state who availed itself of the option of making an article 95 reservation and 'non-reservation state' or 'non-reservation contracting state' refers to a CISG contracting state that has not made an article 95 reservation.

The CISG Advisory Council is known by its acronym 'CISG AC'. In this contribution, the relevant Advisory Council Opinion analysed will be referred to as 'the AC Opinion' or merely 'the Opinion'.

The concepts *lex causae* (governing law or applicable law) and 'proper law of the contract' are used interchangeably and indicate the legal system that governs an international contract in whole or in part.[16]

3 The CISG AC and its Work

The CISG Advisory Council (CISG AC or the Council) is an academic initiative by the Institute of International Commercial Law at Pace University, New York and the Centre for Commercial law Studies, Queen Mary University, London. Renowned academics in the field of international commercial law (and widely recognised as experts in the CISG) were invited to become members of the Council. The Council was established in 2001 and the late Peter Schlechtriem was elected as the first chairperson of the Council.[17] A list of the current Council Members can be obtained from the Council's website.[18]

The CISG AC's main goal is the promotion of uniform interpretation of the CISG and, to further this aim, the Council prepares and publishes interpretations of complex or controversial provisions of the CISG. Even though these interpretations do not count as 'official interpretations', they have been referred to by courts in contracting states and are held in high regard by other CISG commentators.[19]

---

15 This is the definition provided for the term 'reservation' in the Vienna Convention on the Law of Treaties (VCLT) 1969-05-23, Vienna 1155 UNTS 331; the CISG uses the term 'declaration' and the VCLT refers to the term 'reservation'. These terms are also employed interchangeably in the relevant CISG AC Opinion.

16 Forsyth *Private International Law. The modern Roman-Dutch Law including the Jurisdiction of the High Courts* (2012) 316-317.

17 Schlechtriem was the author and editor of several well-respected CISG commentaries in German and English, the most well-known English title is *Commentary on the UN Convention on the International Sale of Goods (CISG)*, first published in 1986, with a second edition in 1998. The latest edition (2010) is edited by Ingeborg Schwenzer, who is also the current chair of the CISG AC.

18 See CISG Advisory Council 'Council Members' 2016 available from http://www.cisgac.com/council-members/ (accessed 2016-07-21).

19 See CISG Advisory Council 'Bibliography' 2016 available from http://www.cisgac.com/bibliography-/ (accessed 2016-07-21) for a select bibliography in this regard.

The CISG AC has been granted observer status at the United Nations Commission on International Trade Law (UNCITRAL)[20] as well as at the Governing Council of the International Institute for the Unification of Private Law (UNIDROIT).[21]

4 CISG AC Opinion 15[22]

This AC Opinion is aimed at a better understanding of articles 95 and 96 of the CISG. Both these articles fall under Part IV of the Convention, termed 'final provisions'.[23]

In this contribution, the Opinion will only be analysed insofar as it addresses article 95. Article 96 of the Convention concerns a permissible reservation in respect of a completely unrelated matter and is not of relevance for the present discussion.

The AC Opinion consists of the official opinion or interpretation of articles 95 and 96 – also referred to as the black letter text – followed by comments that elucidate the Council's interpretation. The comments include an overview of the relevant article's drafting history, the scope of the reservation and the effects of the reservation.

The text of the Opinion concerning article 95 reads as follows:

1. A declaration under [a]rticle 95 excludes the declaring [c]ontracting [s]tate's obligation under public international law to apply the Convention in accordance with article 1(1)(b). However, it does not prevent the courts of such a [s]tate from applying the Convention when the rules of private international law lead to the application of the law of a [c]ontracting [s]tate.
2. A declaration under [a]rticle 95 is without any effect for the Convention's applicability in accordance with [a]rticle 1(1)(a). In applying [a]rticle 1(1)(a), it is irrelevant whether the forum [s]tate has made an [a]rticle 95 declaration or whether one (or both) parties to the sales contract have their place of business in a [s]tate which has made an [a]rticle 95 declaration.
3. When the forum is in a [c]ontracting [s]tate that has made no declaration under [a]rticle 95, the Convention applies in accordance with [a]rticle

20 UNCITRAL official website: www.uncitral.org (accessed 2015-07-20).
21 UNIDROIT official website: www.unidroit.org (accessed 2015-07-20).
22 The full text of this opinion may be accessed electronically on the CISG Advisory Council's website available from http://www.cisgac.com/cisgac-opinion-no15/ (accessed 2016-07-21).
23 The final provisions of the CISG span from arts 89-101. These articles include diplomatic clauses, reservation clauses, clauses addressing temporal aspects of the Convention and clauses that explain the relationship of the CISG to other international instruments. For an overview and discussion of these provisions, see Schlechtriem, Schwenzer & Hachem 'Final Provisions' in Schwenzer (ed) *Schlechtriem and Schwenzer. Commentary on the UN Convention on the International Sale of Goods (CISG)* (2010) 1170-1198.

> 1(1)(b) even when the rules of private international law lead to the application of the law of a [c]ontracting state that has made an [a]rticle 95 declaration.[24]

5 The Advisory Council's Interpretation of the Effect of the Reservation for Courts in Reservation Contracting States

Paragraph 1 of the AC's Opinion speaks to the effect of the reservation for courts in countries who have availed themselves of the option to exclude application of the CISG in terms of article 1(1)(b) when ratifying or acceding to the Convention.

The AC Opinion emphasises the fact that the reservation removes a reserving state's public international law obligation to apply the CISG under article 1(1)(b).[25] Additionally, the Opinion states that a court in a reservation state is still free to choose to apply the Convention under circumstances as provided for in terms of article 1(1)(b).[26] In other words, making an article 95 reservation relieves a reservation state from the obligation to apply the CISG if the requirements for its application under article 1(1)(b) are met, but does not prohibit a court in a contracting state from applying the CISG in terms of the last-mentioned provision if it so chooses. In this regard, the Opinion provides that a forum in a reservation state may elect to uphold a parties' direct choice of the CISG as governing law of their contract or the choice of a CISG contracting state.[27] The rules relating to the validity of a choice of law clause form part of private international law and the forum would uphold such a choice in line with its principles of private international law.[28] This view may possibly be disputed if the parties choose the law of a reservation contracting state as governing law of their contract. In such instances, it may be argued that the correct application of the proper law would require the domestic sales law of the chosen *lex causae* to be applied.[29]

---

24 See text of the Opinion *supra* n 13 at p 2.
25 AC Opinion par 3.7.
26 *Ibid.* See also Schroeter 'Backbone or Backyard of the Convention? The CISG's Final Provisions' in Andersen & Schroeter (eds) *Sharing International Commercial Law across National Boundaries. Festchrift for Albert H Kritzer on the Occasion of his Eightieth Birthday* (2008) 440 who states that a reserving state, although 'not obliged to do so under public international law, are still *entitled* to apply the Convention in cases in which the prerequisites of article 1(1)(a) CISG are not fulfilled'.
27 AC Opinion par 3.8.
28 Herre 'Final Provisions' in Kröll, Mistelis & Viscasillas (eds) *UN Convention on Contracts for the International Sale of Goods (CISG) Commentary* (2011) 1210; Schwenzer & Hachem 'Sphere of Application' in Schwenzer (ed) *supra* n 23 at 104.
29 See par 7 2 below.

It seems as though certain reservation states give a more extensive interpretation to the article 95 reservation than what was intended by the drafters of the CISG. The Opinion refers to the fact that Singapore – a reservation state – has included a section in its Sale of Goods (United Nations Convention) Act that categorically states that the CISG will only apply when both parties are from different CISG contracting states.[30] Furthermore, at least three United States (US) decisions have been handed down indicating that US courts will only apply the CISG if both parties are from CISG contracting states.[31]

However, the Opinion makes it clear that the AC do not regard an article 95 reservation as having the effect that courts in reservation states should only apply the CISG if the requirements of article 1(1)(a) are met.[32] As the AC points out, this interpretation of an article 95 reservation cannot be deduced from the text of the Convention.[33] This far-reaching interpretation of an article 95 reservation is also not supported by commentators.[34]

A matter not directly addressed by the AC Opinion, is the position where a forum in an article 95 reservation state is faced with an international sales contract dispute under circumstances where the requirements of article 1(1)(a) of the CISG are not met, the contract contains no choice of law clause, and the court assigns the law of a non-reservation contracting state as the proper law of the contract. Should the CISG be applied by the forum under these circumstances?[35]

Most authors advocate the application of the CISG in this scenario as part of the proper law of the contract.[36] It has also been stated, in this regard, that the court may be said to have a duty to apply the CISG under

30 S 3(2) of the Singapore Sale of Goods (United Nations Convention) Act 14 of 1995. See AC Opinion par 3.9.

31 *Impuls ID International SL, Impuls ID Systems Inc and PSIAR SA v Psion Teklogix Inc* (2002-11-22) available from http://cisgw3.law.pace.edu/cases/021122u1.html (accessed 2015-07-20); *Prime Start Ltd v Maher Forest Products Ltd* (2006-07-17) available from http://cisgw3.law.pace.edu/cases/060717u1.html (accessed 2016-07-21); *Princess d'Isenbourg et Cie Ltd v Kinder Caviar Inc* (2011-02-22) available from http://cisgw3.law.pace.edu/cases/110222u1.html (accessed 2015-07-20). See Wethmar-Lemmer *De Jure* 2010 *supra* n 14 at 371 for a short synopsis of the first two decisions.

32 Opinion par 3.9.

33 *Ibid*.

34 Ferrari *supra* n 11 at 87; Schroeter 'Backbone or Backyard of the Convention? The CISG's Final Provisions' in Andersen & Schroeter (eds) *supra* n 26 at 440.

35 See Wethmar-Lemmer *De Jure* 2010 *supra* n 14 at 374-376 for a discussion in this regard.

36 Herre 'Final Provisions' Kröll, Mistelis & Viscasillas (eds) *supra* n 28 at 1210; Ferrari *supra* n 11 at 88; Torsello 'Reservations to international uniform commercial law conventions' 2000 *Revue de Droit Uniforme / Uniform Law Review* 108; Kritzer, Vanto, Vanto & Eiselen *International Contract Manual* (2008) 95-39; Schwenzer, Fountolakis & Dimsey *International Sales Law. A Guide to the CISG* (2012) 10; Winship 'The Scope of the Vienna Convention

these circumstances – 'derived not from the CISG, but from the forum's own choice of law rules'.[37] In other words, correct application of the proper law of the contract, as determined by the private international law rules of the forum, requires that the CISG be applied.

However, it has been argued that:

> a court in [a reservation state] might adopt the line of reasoning that since its own legislature has deprived it of the possibility of applying the Convention pursuant to article 1(1)(b), then it should only apply it when the requirements of article 1(1)(a) are met.[38]

According to this interpretation, the forum in the reservation state might consider itself not bound to apply the CISG via article 1(1)(b) under any circumstances.[39]

The present author agrees with the scholars who support the application of the CISG in this scenario. Since the requirements for application of the convention under article 1(1)(a) are not met, the forum will turn to its rules of private international law to determine the law applicable to the contract. If its private international law finds the law of a CISG contracting state applicable, it should apply the CISG as part of that legal system. In other words, correct application of the foreign law requires the forum to apply the CISG. This does not amount to application in terms of article 1(1)(b).[40] According to this argument, the CISG is applied as part of the proper law, assuming that it has been ascertained by the forum that the CISG does indeed form part of the proper law.[41] It is trite law that 'if we look at treaties from the municipal point of view …

---

on International Sales Contracts' in Galston & Smit (eds) *International Sales: The United Nations Convention on Contracts for the International Sale of Goods* (1984) 1-31;

37 Spagnolo *CISG Exclusion and Legal Efficiency* (2014) 13.

38 Evans 'Final Provisions' in Bianca & Bonell *Commentary on the International Sales Law. The 1980 Vienna Sales Convention* (1987) 656. See also, Thieffry 'Sale of goods between French and US merchants: Choice of law considerations under the UN Convention on Contracts for the International Sale of Goods' 1988 *International Lawyer* 1018.

39 Bell 'Why Singapore should withdraw its reservation to the United Nations Convention on Contracts for the International sale of Goods (CISG)' 2005 *SYBIL* 65.

40 Fawcett, Harris & Bridge *International Sale of Goods in the Conflict of Laws* (2005) 916-917, 979; Schroeter 'Backbone or Backyard of the Convention? The CISG's Final Provisions' in Andersen & Schroeter (eds) *supra* n 26 at 441.

41 In this regard it would be relevant whether a monist or dualist approach is followed by the *lex causae* (for an *excursus* on monism and dualism, see Aust *Modern Treaty Law and Practice* (2007) 183-195). Should a dualist approach be followed, the CISG would only form part of the domestic law of the *lex causae* if the treaty has been transformed or adopted into domestic law by enacting the necessary legislation – see Dugard *International Law: A South African Perspective* (2005) 47. Parties to international treaties would be in breach of their treaty obligations if they did not give effect to the treaty by enacting, or, if necessary, amending their domestic legislation. However, it may not be always assumed that 'once a treaty has entered into

such rules constitute binding national law'.[42] Adopting this line of reasoning then, necessitates the conclusion that if the law of another reservation contracting state is found to be applicable, by virtue of the rules of private international law of the forum in a reservation state, then the proper law's domestic sales law and not the CISG should be applied by the forum.[43]

6 Impact of the Reservation on the Status of 'Contracting State'

The second paragraph of the AC Opinion emphasises the fact that an article 95 reservation has no impact upon the Convention's application in terms of article 1(1)(a).[44] Making an article 95 reservation does not impact upon a state's status as a 'CISG Contracting state'.[45] This interpretation is also undisputed by the commentators.[46]

7 The Advisory Council's Opinion in Respect of the Effect of the Reservation for Courts in Non-reservation Contracting States

7 1 Arguments in Favour of and Against Application of the CISG when a Forum in a Non-reservation Contracting State Finds the Law of a Reservation State Applicable

The AC Opinion advocates application of the CISG in this scenario.[47] According to this argument, the forum is bound to apply the CISG under article 1(1)(b) of the Convention if the requirements of its application under this provision are met. It is argued that a reservation state remains a CISG contracting state[48] and the forum has an international law

force for a state, it is in force in *that* state; in other words, that it has become part of its law' (Aust 178). For the most part, states would comply with their international treaty obligations, but it may be prudent for the forum seized of the dispute to investigate whether the CISG indeed forms part of the domestic law of the *lex causae* before applying it on that ground.

42 Hambro 'The Relations between International Law and Conflict Law' *Recueil des Cours. Collected Courses of the Hague Academy of International Law* (1962) 15.

43 Spagnolo *supra* n 37 at 14.

44 AC Opinion par 2.

45 AC Opinion par 3.11.

46 See, *inter alia*, Ferrari *supra* n 11 at 90; Herre 'Final Provisions' Kröll, Mistelis & Viscasillas (eds) *supra* n 28 at 1211; Schwenzer & Hachem 'Sphere of Application' in Schwenzer (ed) *supra* n 23 at 43.

47 AC Opinion par 3.14.

48 *Ibid*.

obligation to apply the CISG, since the forum is bound by article 1(1)(b).[49] According to this view, proof of the fact that a state, which made a reservation under article 95, remains a contracting state, is to be found in comparing the wording of article 95 with that of the other reservations under the CISG.[50] The reservations make provision for the fact that all states, making a reservation under articles 92, 93 and 94 of the CISG, are deprived of their status as a *contracting state* for purposes of article 1(1) of the CISG.[51] However, article 95 contains no comparable provision – depriving a reservation state of its status as a *contracting state* for the purposes of article 1(1)(b). Therefore, when the law of an article 95 reservation is found to be applicable in terms of the rules of private international law of the forum, the conditions for application of the CISG under article 1(1)(b) are met from the perspective of the forum, and it is bound to apply the CISG.[52] It has also been stated that an article 95 reservation made by one state cannot bind another state.[53]

The AC Opinion acknowledges that there are also a considerable amount of commentators who support the view that a forum in a non-reservation contracting state, whose rules of private international law point to the application of the law of a reservation state, should apply the domestic law of the proper law and not the CISG.[54] According to the AC Opinion, the reasoning behind this view is that the forum should apply the proper law in the same manner as a forum in the proper law a state would have.[55] A forum in the reservation state would not have applied the CISG under these circumstances and, therefore, the forum in the non-reservation state, whose rules of private international law direct it to the

49 Herre 'Final Provisions' Kröll, Mistelis & Viscasillas (eds) *supra* n 28 at 1211; Huber 'Article 1' in Huber & Mullis *The CISG. A New Textbook for Students and Practitioners* (2007) 41 54;

50 AC Opinion par 3.14; Fawcett, Harris & Bridge *supra* n 40 at 980.

51 See the text of these provisions as part of the CISG text.

52 AC Opinion par 3.14. This view is supported by Bell 2005 *SYBIL supra* n 39 at 63; Enderlein & Maskow *International Sales Law. United Nations Convention on Contracts for the International Sale of Goods. Convention on the Limitation Period in the International Sale of Goods* (1992) 381; Ferrari 'Specific topics of the CISG in the light of judicial application and scholarly writing' 1995 *Journal of Law and Commerce* 46; Ferrari *Contracts for the International sale of Goods* (2012) 90; Schlechtriem, Schwenzer & Hachem 'Final Provisions' in Schwenzer (ed) *supra* n 23 at 1191 (*contra* Schlechtriem's opinion in a previous edition of this work (reference in n 55 below); Torsello 2000 *Uniform Law Review supra* n 36 at 108.

53 Ferrari 1995 *Journal of Law and Commerce* 46.

54 AC Opinion par 3.16.

55 AC Opinion par 3.16. This argument is supported by Evans 'Final Provisions' in Bianca & Bonell (eds) *supra* n 38 at 657; Dore 'Choice of law under the International Sales Conventions: A US Perspective' 1983 *American Journal of International Law* 539; Schlechtriem 'Final Provisions' in Schlechtriem & Schwenzer (eds) *Commentary on the UN Convention on the International Sale of Goods (CISG)* (2005) 933; and Winship 'Private international law and the UN Sales Convention' 1988 *Cornell International Law Journal* 525.

application of the law of the reservation state, should also not apply the CISG.[56] The AC Opinion disagrees with this argument by stating that:

> The essential assumption underlying the opinion criticized here is that the forum's rules of private international law when applied under article 1(1)(b) CISG result in the application of the law of the state that the PIL rules refer to, of which the Convention forms a part. This assumption, it is submitted, is incorrect. The reason becomes evident when the wording of article 1(1)(b) CISG is read in its entirety, including its introductory phrase: '*This Convention*[57] applies to contracts of sale of goods between parties whose places of business are in different states … when the rules of private international law lead to the application of the law of a contracting state'. It is therefore 'this Convention' which the judge in a contracting state has to apply when its forum's rules of private international law lead to the application of the law of a contracting state, and *not* 'the law of a contracting state' (that may or may not have made a declaration under article 95). The contrary opinion instead reads the partial phrase 'lead to the application of the law of a contracting state' as calling for the application of that state's law, thereby confusing cause and effect under article 1(1)(b). It should therefore not be followed.[58]

The AC Opinion's view accords with that of commentators who contend that under these circumstances, the forum should apply the CISG under article 1(1)(b) as part of the law of the forum and not as part of the law of the reservation state.[59]

It deserves mention that two very well-respected CISG commentators advocated for the application of domestic sales law under these circumstances. Honnold argued for non-application of the CISG under these circumstances based on policy considerations.[60] He argued that the US made the reservation 'to protect its traders from being deprived of their familiar domestic law without the countervailing gain of supplanting the foreign law'[61] and the CISG, therefore, should not be applied in the situation above. Schlechtriem motivated non-application of the Convention by arguing that article 7(1) of the CISG requires the promotion of uniformity of application of the Convention and that

56 *Ibid*.
57 Emphasis added by the AC.
58 AC Opinion par 3.16 (14). See also Schroeter 'Backbone or Backyard of the Convention? The CISG's Final Provisions' in Andersen & Schroeter (eds) *supra* n 26 at 447 where this argument is echoed.
59 Fawcett, Harris & Bridge *supra* n 40 at 981; see also Zeller *CISG and Unification of International Trade Law* (2007) 40, who states that it is difficult to imagine that a forum situated in a non-reservation contracting state, whose conflict of laws rules point to the application of the law of a reservation state and who could apply the CISG as part of their own legal principles under article 1(1)(b), would elect to apply the domestic law of the reservation state instead.
60 Honnold *Uniform Law for International Sales under the 1980 United Nations Convention* (1991) 41.
61 *Ibid*; see Bell's (2005 *SYBIL supra* n 39 at 64) remark in this regard.

disregarding the article 95 reservation, when applying the law of a reservation state, would negate this directive.[62]

It is submitted that Bernasconi offers the most compelling argument against application of the CISG under these circumstances. He states that the *lex causae* (which is the law of the reservation state) 'has not enacted the CISG for cases similar to this one, thus the Convention's rules are inapplicable. By refusing to consider the reservation filed under article 95, the forum judge would fail to recogni[s]e the *lex causae* altogether'.[63]

7 2 Correct Application of a Foreign *Lex Causae* or Proper Law

There is much support for the view that application of the CISG, under article 1(1)(b), amounts to application of the Convention as part of the proper law of the contract – assuming of course that the *lex causae* is that of a CISG contracting state. It has also been established that a state that made an article 95 reservation, remains a contracting state under the CISG.[64]

It is widely accepted that the *lex causae* should be applied in the same manner as a forum, in its state of origin, would have applied it.[65]

A renowned conflicts scholar explained the correct application of a foreign *lex causae* as follows:

> In an autonomous conflict system the notion of "origin-conform application" of foreign law is not an expression of loyalty towards the State of origin of a foreign law. Instead it is primarily a consequence of taking seriously the command of the national rules on choice of law, and truly subjecting the dispute to the "really applicable" foreign law. The principle of origin-conform application of foreign law aims at safeguarding that foreign law in another State's court [and requires that it] is applied in the same manner as a court (or other competent authority) would do in the State of origin of that law. The perspective to be chosen is, in other words, that of the foreign court.[66]

As applied to the topic at hand, the CISG can only find application as part of the legal system indicated by the rules of private international law of the forum, if the applicable *lex causae* would designate the CISG as the relevant body of rules to be applied in the circumstances. The same holds true for application of the CISG as part of a proper law chosen by the parties.

---

62 Schlechtriem 'Article 1' in Schlechtriem & Schwenzer *supra* n 55 at 37.

63 Bernasconi 'The personal and territorial scope of the Vienna Convention on Contracts for the International Sale of Goods (article 1)' 1999 *NILR* 168.

64 See par 6 above.

65 Jänterä-Jareborg 'Foreign Law in National Courts: A Comparative Perspective' *Recueil des Cours. Collected Courses of the Hague Academy of International Law* (2003) 230.

66 *Idem* 230-231. See also Bogdan 'Private International Law as a Concept of the Law of the Forum' *Recueil des Cours. Collected Courses of the Hague Academy of International Law* (2010) 112.

7 3 International Law Obligation versus Correct Application of the *Lex Causae*

Although the present author supports a *pro convention* approach in general, it is difficult to ignore the arguments related to the correct application of the *lex causae*. Indeed, a forum in a non-reservation contracting state is bound by article 1(1)(b) and this provision is in force in the forum state.[67] However, article 1(1)(b) directs the CISG to be applied if the rules of private international law (of the forum) refer to the law of a contracting state *qua lex causae*.[68] In other words, in terms of the forum state's rules of private international law, the law of the reservation state has been designated as the applicable law to the dispute at hand. Going forward from this point on, the forum, therefore, is not applying its own law (that article 1(1)(b) forms part of) to the international sales contract, but the proper law of the contract.

Therefore, the most critical question is which rules of the *lex causae* are to be applied? The rules that the *lex causae* ordains for international sales contracts under these circumstances. Since the requirements for application of the CISG are not met from the perspective of the *lex causae*, correct application of the *lex causae* requires domestic sales law to be applied by the forum.

However, from the perspective of the forum, requirements for application of the CISG are met in terms of article 1(1)(b), since it is clear that a reservation state remains a CISG contracting state. The forum state therefore has an international law obligation to apply the CISG.

There seems to be an insoluble disconnect between the correct application of the *lex causae* from a private international law perspective on the one hand, and the forum state's international law obligation to apply the CISG on the other.

There may, however, be an alternative argument that could solve this conundrum – a recent argument supported by several contemporary CISG commentators and based on a 'literal reading' of article 1(1)(b).[69] According to this argument, article 1(1)(b) only requires reference to the rules of private international law of the forum to determine whether the CISG applies *per se*, but does not rely on the rules of private international law to determine the extent to which the CISG should be applied.[70] The rules of private international law, thus, only serve as a 'trigger' for the application of the CISG, but article 1(1)(b) 'remains the controlling provision' for the sphere of application for forums situated in non-

67 Hambro *supra* n 42 at 15, Thirlway 'Concepts, Principles, Rules and Analogies: International and Municipal Legal Reasoning' *Recueil des Cours. Collected Courses of the Hague Academy of International Law* (2002) 321.
68 It is the only acceptable reading of this provision; see Wethmar-Lemmer 2008 *De Jure supra* n 3 at 419.
69 Spagnolo *supra* n 37 at 16.
70 *Ibid.*

reservation contracting states.[71] One then regards article 1(1)(b) as requiring the CISG to be applied '*ipso iure*' by non-reservation contracting states.[72] This is also the view that the CISG AC promotes in their Opinion.[73] The most convincing argument in support of this interpretation of article 1(1)(b) is forwarded by Spagnolo, who states that the inclusion of article 1(1)(b) would otherwise have been redundant – the forum's choice of law rules would have applied in any event.[74]

Another explanation of this literal interpretation of article 1(1)(b) is to regard the application of the CISG under this scenario as being applied as part of the forum state's internal law.[75] According to this argument, the CISG is not being applied as part of the *lex causae,* and is therefore not foreign law that needs to be proved.[76]

8 The Advisory Council's View of the Effect of the Reservation for Courts in Non-contracting States Faced with the (Potential) Application of the CISG

The Opinion emphasises the fact that a forum in a non-contracting state is under no obligation to refer to the CISG directly.[77] A court, in a non-contracting state, will be faced with possibly applying the CISG when its rules of private international law point to the law of a contracting state as *lex causae*. If the *lex causae* is that of a CISG contracting state that made an article 95 reservation, and the requirements for application of the CISG under article 1(1)(a) are not met, the AC Opinion states that the court would most probably apply the domestic law of the *lex causae* – since a forum of the *lex causae* would have also applied its domestic law under these circumstances.[78]

Application or negation of the CISG rests on the question of whether the CISG could be seen as part of the applicable law in this scenario? Most authors support non-application of the CISG under these circumstances due to the fact that the requirements for application under article 1(1)(a)

71 Spagnolo *supra* n 37 at 17.
72 *Ibid*.
73 AC Opinion par 3.16.
74 Spagnolo *supra* n 37 at 18.
75 Bridge *The International Sale of Goods* (2013) 477. See also Fawcett, Harris & Bridge *supra* n 40 at 980 where they state that, under these circumstances, the forum applies the CISG under article 1(1)(b) as part of the law of the forum, and not as part of the law of the reservation state.
76 *Ibid*.
77 AC Opinion par 3.18.
78 *Ibid*.

are not met and application under article 1(1)(b) was excluded by the proper law state.[79]

That being said, there are authors who support the application of the CISG in this scenario. According to their argument, an article 95 reservation state still remains a CISG contracting state and the CISG should be applied by virtue of it being part of the law of a CISG contracting state.[80] The present author supported application of the CISG under these circumstances in an earlier contribution.[81] Subsequently, the present author has been convinced that the argument against application of the CISG is stronger here. There could be no other ground for applying the CISG under these circumstances than as part of the proper law of the contract. From the perspective of the *lex causae*, the CISG is not the relevant body of law to be applied. Article 1(1)(b) also does not form part of the law of the forum, since the forum is situated in a non-contracting state. Application of the CISG, therefore, would not constitute correct application of the proper law.[82]

Diagram

Summary of Permutations Under Article 95 Of The CISG

Note: Assume that the requirements for application of the CISG under article 1(1)(a) are not met.

Forum	**Applicable Legal System**	**CISG Applicable?**
In reservation contracting state	Law of reservation contracting state	NO
In reservation contracting state	Law of non-reservation contracting state	YES

79 Dore 1983 *American Journal of International Law supra* n 55 at 538, Schlechtriem 'Commentary on Oberlandesgericht Düsseldorf 2 July 1993' in *International Contract Manual*: *Guide to the UN Convention* (1994) available from http://cisgw3.law.pace.edu/cases/930702g1.html (accessed 2015-08-04), Spagnolo *supra* n 37 at 19, Winship 1988 *Cornell International Law Journal supra* n 55 at 525.

80 Ferrari 1995 *Journal of Law and Commerce supra* n 52 at 48; Torsello 2000 *Uniform Law Review supra* n 36 at 109, Wethmar-Lemmer 2010 *De Jure supra* n 14 at 378.

81 Wethmar-Lemmer 2010 *De Jure supra* n 14 at 378.

82 Wethmar-Lemmer *The Vienna Sales Convention and Private International Law* (2015) 216.

In non-reservation contracting state	Law of reservation contracting state	YES – forum state has international law obligation to apply the CISG, or NO – applying the CISG does not constitute correct application of the *lex causae*
In non-contracting state	Law of reservation contracting state	NO

9 Conclusion

Courts of certain article 95 reservation states seem to conclude that they should only apply the CISG if the requirements for application under article 1(1)(a) are met. The AC Opinion stresses the fact that the article 95 reservation relieves reservation states from the public international law obligation to apply the CISG under article 1(1)(b), but does not prohibit them from applying it should they wish to do so. The overwhelming majority of commentators also support the view that fora in reservation states should apply the CISG if the law of a non-reservation contracting state is found to be applicable as the proper law of the contract. Staying true to the principle of origin-conform application of the *lex causae* would indeed require the CISG to be applied as the relevant body of rules designated for international sales contracts under the *lex causae*. If this argument is followed through, then the CISG should not be applied if a forum in a non-reservation contracting state finds the law of a reservation state applicable in terms of its rules of private international law. However, the CISG AC supports application of the CISG in the last-mentioned scenario, based on the view that the Convention's applicability criteria are met from the forum's perspective. This argument is certainly commendable from a uniform law perspective and has won the support of several authors but does not, unfortunately, enjoy unanimous acceptance.

The purpose of the CISG is the adoption of uniform rules for international trade in order to contribute to the removal of trade barriers and to promote the development of international trade.[83] It seems as though the object and purpose of the CISG requires it to be applied as widely as possible. Therefore, the CISG AC's interpretation of the article 95 reservation, in a manner that ensures minimum impact on the Convention's scope of application, is certainly to be supported.

83 See the Preamble to the CISG.

Taking the incidence of false child sexual abuse allegations more seriously

Emma Charlene Lubaale
LLB LLM LLD
Post-doctoral researcher Institute of International and Comparative Law in Africa, South African Research Chairs Initiative (SARChI), Department of Public Law, University of Pretoria

OPSOMMING

Vals bewerings van seksuele mishandeling van kinders-die behoefte tot 'n meer indringende ondersoek

Kindermishandeling is 'n ernstige misdryf wat die daadwerklike vervolging van die oortreders noodsaak. In gevalle waar die oortreder 'n kennis is, word laasgenoemde noodsaaklikheid selfs sterker genoodsaak vanweë die feit dat daar 'n vertouensbreuk plaasvind. Sodanige vervolgings moet egter nie tot so vlak gedryf word dat dit onregmetige vervolgings tot gevolg het nie. Gevalle van onregmatige vervolgings, hoewel skaars, ondermyn die vertoue in behoorlike regspleging. Die onderhawige artikel onderskraag die behoefte om valse bewerings van kindermishandeling en gevalle van onregmatige vervolgings met meer erns te bejeën. Gevolglik word die noodsaaklikheid om meer gewig aan deskundige getuienis te heg onderskryf asook die behoefte aan betekenisvolle kruisondervraging. Die artikel lig verder toe dat indien gevalle van onregmatige vervolgings met meer erns bejeën word dit by implikasie sal vereis dat die deure van onskuld nie gesluit word sou addisionele getuienis voorsien word wat verdere bewerings van onskuld ondersteun nie.

1 Introduction

> When children's allegations of abuse were discounted out of hand, they were victimised not only by their abusers but by a society that neither believed nor protected them. Conversely, when allegations that have no basis in fact are believed, innocent adults can face a lifetime of imprisonment, shame, ostracism, and devastation.[1]

This quotation outlines the current dilemma with regard to the prosecution of child sexual abuse (CSA) cases. Prior to 1980, CSA was a secretive and private issue[2] and allegations of CSA were received with

1 Shanks 'Cross-Examination of a child witness' 2009-2010 *Legal Research Paper Series* 32.

2 Finkelhor 'Current information on the scope and nature of child sexual abuse' 1994 *The future of children* 31; Finkelhor 'The international epidemiology of child sexual abuse' 1994 *Child Abuse Research & Neglect* 409; Younts 'Evaluating and admitting expert opinion testimony in child sexual abuse prosecutions' 1995 *Duke Law Journal* 693-694.

How to cite: Lubaale 'Taking the incidence of false child sexual abuse allegations more seriously' 2016 *De Jure* 74-94
http://dx.doi.org/10.17159/2225-7160/2016/v49n1a5

disbelief.[3] Disbelief in CSA was compounded by myths: that children lie about being sexually abused; they fantasise about being sexually abused; all child sexual abuse cases have to be supported by medical evidence; children are abused by strangers; they report CSA immediately; and they scream during the abuse.[4] These myths have consistently been challenged as lacking empirical backing and, consequently, there is an ongoing shift in how society and the justice system view CSA allegations. Presently, CSA receives significantly heightened social and legal awareness. This awareness has brought with it a zealous attempt by criminal justice systems (CJSs) to hold offenders to account. This shift in attitude is a welcome development, but sometimes gives rise to a dogmatic belief in all CSA allegations – with limited effort on the part of concerned professionals to meaningfully substantiate these allegations. The increasing incidence of false CSA allegations and wrongful convictions arguably indicates that the pendulum has swung too far: such allegations of CSA are accepted as true without any real or meaningful investigation.

Presently, CSA presents the prosecution with innumerable challenges in proving that CSA occurred; equally the accused in CSA cases are confronted with the challenge to prove that the allegations against them are false. The myth that children lie about being sexually abused must be laid to rest. Equally, overzealous attempts to hold child sexual offenders to account must not cause CJSs to rule out the possibility of false CSA allegations. Otherwise a new myth would be created: that children never lie or are never mistaken about being sexually abused. Therefore, there is an urgent need to strike a proper balance between discarding the myths about CSA and ensuring that the swing of the pendulum does not lead to wrongful convictions. This article underscores the role of mental health professionals (MHPs) and meaningful cross-examination in striking this balance. Equally, it underscores the need for an appropriate forum in which new evidence is discovered with the effect of proving the innocence of wrongly convicted persons.

2 The Meaning and Extent of False Child Sexual Abuse Allegations

False allegations of CSA are different from 'unfounded' or 'unsubstantiated' CSA allegations. Many cases of alleged sexual abuse are labeled by investigators as 'unfounded' or 'unsubstantiated': Yuille *et al*[5] note up to half of reported cases. Yuille *et al*'s findings seem defensible as very young children may lack verbal or other communication skills

3 *Ibid.*
4 Muller & Holley *Introducing the child witness* (2009) 148-154.
5 Yuille *et al* 'The nature of allegations of child sexual abuse' in Ney (ed) *True and false allegations of child sexual abuse: assessment and case management* (1995) 22; see Green 'True and false allegations of sexual abuse in child custody disputes' 1986 *J. Am. Acad. Child Psychiatry* 449-456.

and may be unable to provide sufficient detail to determine whether abuse has occurred. Moreover, a child with communication difficulties by reason of an inability to see, speak or hear, may be unable to give an account of their abuse. Similarly, poor investigative techniques may prevent a child from telling what happened. Thus, many cases labeled unsubstantiated or unfounded may be genuine. On the other hand, Yuille *et al* describe a false allegation to constitute one or more of the following characteristics:[6]

- An allegation that is wholly untrue; that is, one in which none of the alleged events occurred,
- An allegation in which an innocent person has been accused but the allegation is otherwise valid. This is a case of 'perpetrator substitution' in which an abused child discloses his or her abuse but accuses someone other than the actual perpetrator,
- An allegation that contains a mixture of true and false features; that is, the child describes some events that actually occurred and adds others that did not occur.

Research documents that although CSA is on the rise, so also are false CSA allegations.[7] Increasingly, it is clear that although many victims are honest, some are mistaken. It does not necessarily follow that when a child victim appears honest and trustworthy, that their allegations are true. Brongersma explains that with the heightened awareness of CSA and the wide definition of sexual abuse, some children may interpret the accused's affection for sexual abuse.[8] Clarke-Stewart *et al*[9] add that repeated questioning and suggestive interviews by law enforcement authorities can cause children to interpret otherwise non-abusive

6 Yuille *et al supra* n 5 at 23-24.

7 For a demonstration of the reality of false allegations, see Schuman 'False accusations of physical and sexual abuse' 1986 *Bull. Am. Acad Psychiatry Law* 5-21; Coleman, & Clancy 'False allegations of child sexual abuse: Why is it happening? What can we do?' 1990 *Criminal Justice* 14-47; Benedeck & Schetky 'Allegations of sexual abuse in child custody and visitation disputes' in Benedek & Schetky (eds) *Emerging issues in child psychiatry and the law* (1985) 145-156; Blush & Ross 'Investigation and case management issues and strategies' 1990 *Issues in child abuse accusations* 152-160; Gordon 'False allegations of abuse in child custody disputes' 1985 *Minnesota Family Law Journal* 225-228; Kase-Boyd 'Fictitious allegations of sexual abuse in marital dissolutions' 1988 *Family Law News* 50-52; Sheridan 'The false child molestation outbreak of the 1980s: An explanation of the cases arising in the divorce context' 1990 *Issues in Child Abuse Accusations* 146-151; Yates & Musty 'Preschool children's erroneous allegations of sexual molestation' 1988 *American Journal of Psychiatry* 989-992; Faller 'Possible explanations for child sexual abuse allegations in divorce' 1991 *American Journal of Orthopsychiatry* 86-91.

8 Brongersma 'The meaning of "indecency" with respect to moral offences involving children' 1980 *British Journal of Criminology* 30.

9 Clarke-Stewart *et al* 'Manipulating children's interpretations through interrogation' 1989 Paper presented at SRCD; Wakefield & Underwager 'Manipulating the child abuse system' 1989 *Issues in Child Abuse Accusations* 58-67; White & Quinn 'Investigatory independence in child sexual abuse evaluation: Conceptual considerations' 1988 *The Bulletin of the American Academy of Psychiatry and the Law* 269-278.

conduct as sexual abuse. Some CSA allegations may be on account of a mistake but certain commentators[10] submit that some false CSA allegations are intentional. Research[11] documents that parental conflicts during custody, divorce and separation proceedings may also result in the use of CSA allegations. Genuine CSA allegations cannot be ruled out during custody and divorce proceedings in view of the fact that the family may no longer be trying to keep together and, to hide this particular secret. However, there are studies which demonstrate that, in some situations, the allegations are false. Klein[12] argues that although some CSA allegations during these proceedings are false, it is critical to guard against a tendency to view all CSA allegations during these proceedings as false.

There is a lack of authoritative empirical studies illustrative of the prevalence of false allegations. But to take an extreme view that false allegations never happen is incorrect. Available studies of false allegations of CSA show that although these allegations are rare, they still exist.[13] Thus, although CSA is a horrible crime that justifies CJSs' efforts to aggressively hold offenders accountable, it is equally critical to ensure that the innocent are not punished for crimes they did not commit.

Discussions on false CSA allegations are often advanced in the abstract: to inform the debate going forward, it is critical to engage with selected cases. The discussion in the next section engages this with reference to two cases.

---

10 Derdeyn 'Child psychiatry and the law: The family in divorce, issues of parental anger' 1983 *Journal of the American Academy of Child Psychiatry* 385-391. See also Green 1986 *J. Am. Acad. Child Psychiatry supra* n 5 at 449-456; Everson & Boat 'False allegations of sexual abuse by children and adolescents' 1989 *Journal of American Academy of Child & Adolescent Psychiatry* 230-235; Ekman 'Kids' testimony in court: The sexual abuse crisis' in Ekman (ed) *Why kids lie* (1989) 152-180; Emery 'Interparental conflict and the children of discord and divorce' 1982 *Psychological Bulletin* 310-330; La Rooy *et al* 'Repeated interviewing: A critical evaluation of the risks and potential benefits' in Kuhnle & Connell (eds) *The evaluation of child sexual abuse allegations: A comprehensive guide to assessment and testimony*) (2009) 327-335.

11 Fisk 'Abuse: The new weapon' 1989 *The National Law Journal* 20-25; Derdeyn 1983 *Journal of the American Academy of Child Psychiatry supra* n 10 at 385-391; Hall 'Child abuse as a tool' 1989 *Register Report* 12-13; Green 1986 *J. Am. Acad. Child Psychiatry supra* n 5 at 449-456.

12 Klein 'Forensic issues in sexual abuse allegations in custody/visitation litigation' 1994 *Law and Psychology Review* 347.

13 See e.g. studies by Klein *idem* 347*;* Jones & McGraw 'Reliable and fictitious accounts of sexual abuse to children' 1987 *Journal of Interpersonal Violence* 27.

3 The Reality of False CSA Allegations and Wrongful Convictions in Selected Cases

3 1 *State of North Carolina v Sylvester Smith*[14]

This 1984 case involves two girls, four and six years of age, who were sexually molested by their nine year old cousin at their family home in Bellville, North Carolina. When the molestation was discovered the girls' grandmother pressured them to accuse Sylvester Smith, the boyfriend of one of their mothers, of committing the sexual abuse instead of their cousin. The girls accused Smith and, based on their testimony, he was convicted of rape by the jury and sentenced to two consecutive life sentences. Twenty years later, in 2004, the victims came forward and recanted, confessing that Smith had never molested them and that they were pressured into lying by their grandmother, Mrs Fannie Mae Davis, who was trying to protect their cousin (her grandson). In November 2004, Smith's conviction was overturned.[15]

In 1984, at trial, the court held that the state had proved the case against Smith beyond reasonable doubt. The prosecution advanced evidence through a number of witnesses. The State's evidence tended to show that one night during the weekend of 2 March, 1984, the accused, Smith, entered the bedroom of the complainants, Gloria Ogundeji and Janell Smith, age four and five respectively, and engaged in sexual intercourse with both girls. At trial, Gloria testified that the accused came into the bedroom where she and Janell were sleeping, slipped off his pants and touched her in her 'project' with his 'worm'. Janell testified that the accused threatened to beat her 'half to death', pushed her down on the bed, and stuck his 'thing in [her] project'. She also testified that he '[stuck] his hand in [her] butt'. At trial the complainants were asked to show the jury where their 'project' was and both independently pointed to their vaginal areas. Gloria indicated the same area when asked to show where the 'worm' is and also identified both the 'project' and the 'worm' on anatomically correct dolls used as exhibits at trial. Janell pointed to her anal area when asked to show where her 'butt' was.

Mrs Fannie Mae Davis, the girls' grandmother, testified that she went to the mobile home where Smith, Ann, Gloria and Janell were living on 3 March 1984 and that Gloria had led her into the bedroom to tell her what Smith had done to her. She testified that Gloria told her that Smith had '[gone] in her'. She also testified that Gloria indicated to her that Smith had put his 'peeter' in her 'project' and in her 'butt' using his finger. She

14 *State of North Carolina v Sylvester Smith* 337 S.E 2d 833 (1985) 315 N.C.76.

15 For further discussion on the circumstances surrounding the false child sexual abuse allegations and ultimate exoneration of Sylvester Smith, see Barrett 'Falsely accused man freed' 2004 available from http://injusticebusters.org/04/Smith_Sylvester.shtml (accessed 2016-04-20).

also testified that Gloria indicated that Smith had told her to go in the bathroom and wash the blood off.

Both Gloria and Janell were examined at the hospital by a medical expert on 5 March, 1984. The medical expert testified that his examination of Gloria revealed 'a well-circumscribed area of bruising around the vaginal opening' on the interior of the labia. He stated that it was his opinion that a 'male penis' caused the trauma he observed. The expert also discovered the presence of protozoa trichomonas, an organism transmitted primarily through sexual contact. The expert testified that his examination of Janell revealed marked redness and irritation, with areas of contusions around the vaginal opening. He stated that a finger or penis could have caused Janell's injuries. His examinations revealed no presence of sperm, and he noted that Gloria's hymenal ring was intact.

The accused, Smith, took the stand and denied any knowledge of the incidents. Smith's denial was rejected and he was convicted and sentenced, hence the appeal to the Supreme Court of Carolina. Given that Smith's general denial of the alleged offence had no sound evidential backing, his grounds of appeal entirely revolved around the application of the rules of evidence. Amongst the grounds raised in the Memorandum of Appeal were that the trial court erred in allowing, as substantive evidence, the testimony of Mrs Davis as to what Gloria and Janell related to them following the assaults. Smith contended that this evidence was inadmissible hearsay. This ground was however rejected with the Supreme Court ruling that the hearsay evidence fell within one of the exceptions to the hearsay rule.[16] The Supreme Court's decision could hardly be faulted as the law on hearsay exceptions is clear. Ultimately, the Supreme Court concurred with the trial court, consequently dismissing the appeal.[17] Even without the objection to the hearsay evidence the evidence against Smith was deceptively overwhelming. The possibility of the allegations being false was hardly thought of.

3 2 *Sifiso Shezi* Case

In 2003, in the South African case of *Sifiso Shezi,*[18] Shezi was sentenced to two life sentences on allegations of rape of his daughter (Dube): a sentence that many saw as justly deserved. Shezi served ten years of his

16 *State of North Carolina v Sylvester Smith supra* n 14 at 839-841; for a commentary on the ruling of the Court in the case of *State of North Carolina v Sylvester Smith*, see Holm '*State v Smith*: Facilitating the admissibility of hearsay statements in child sexual abuse cases' 1985-1986 *North Carolina Law Review* 1352-1377.

17 *State of North Carolina v Sylvester Smith supra* n 14 at 850.

18 Judgement unreported. Similarly, findings of the court as it pertains to the newly-discovered evidence are unreported in view of section 327(3)(b) of the Criminal Procedure Act 105 of 1977 of South Africa, which prohibits a court entertaining the new evidence from announcing its findings. However, for details about alleged false accusations, see Ayanda & Mlambo

jail term, during which period he maintained his innocence. Dube, who was eight years old at the time of the allegations, retracted her accusation in 2008 after her mother died and confessed that her mother had coerced her into lying about the abuse. She confessed to falsely testifying at trial because she was scared of her mother who had a bad temper. Dube also confessed to being coached by her mother to testify that her father had raped her on four different occasions. Shezi was released in 2013, having served ten years of his sentence.

It is an axiomatic truth that '[p]unishment of the innocent may be the worst of all injustices'.[19] These two cases illustrate the fallout from false CSA allegations. They demonstrate, although false CSA are rare, that they are not merely rhetoric. The facts were so carefully fabricated and aligned with the circumstances: This, coupled with an attempt to protect 'innocent' child victims, led the appellate court, at the time of trial, to uphold the convictions. Smith and Sifiso maintained their innocence all along but were freed only after the victims confessed. In some cases, '[t]he pendulum has swung from a reluctance to believe any charge by a child against an adult to a non-reflective embrace of every accusation made, no matter how implausible or fanciful'.[20] Mantell makes the point that the potential consequences of false CSA allegations are massive, long lasting and devastating to the child, parents, family and society. Shanks similarly observes as follows:[21]

> To be wrongly convicted of child sexual abuse has immediate and long-lasting effects on the life of the accused, including lengthy prison terms, registration as a sex offender and the conditions and consequences that follow, which may include the loss of professional licenses, inability to live within certain areas, and a lifelong stigma. Given the nature of child sexual abuse, such convictions can destroy families. The individual accused is not the only victim of wrongful convictions. A spouse who refuses to believe an accusation may lose custody of the child involved or other children in the family. She herself may be [wrongly] charged criminally for refusing to 'protect' the child from abuse.[22]

Smith and Sifiso lost twenty and ten years, respectively, of their lives in prison. They are, in fact, free from 'behind bars' but may not exactly be free from stigma. Fortunately for Smith and Sifiso, the complainants confessed their earlier false accusations. Not many complainants are keen to set the record straight because of the legal consequences of false accusations. If CJSs are to accomplish much in affording protection to children, greater objectivity is called for. 'There can be no benefit to society or to children in imprisoning an innocent person merely because

---

'Dad cleared of rape happy to be free' 2013 available from http://www.iol.co.za/dailynews/news/dad-cleared-of-rape-happy-to-be-free-1.1534796 (accessed 2016-04-20).

19 *Jenner v Dooley*, 590 N.W.2d 463, 471 (SD. 1999).

20 Shanks 2009-2010 *Legal Research Paper Series supra* n 1 at 31.

21 Mantell 'Clarifying erroneous child sexual abuse allegations' 1988 *American Journal of Orthopsychiatry* 618-621.

22 Shanks 2009-2010 Legal Research Paper Series *supra* n 1 at 23.

the system is slanted against him'.[23] The consequences of false CSA allegations are disquieting as they often result in damage to the interests of the child and to the child's primary relationships. In order to resolve the dilemma and for CJSs to become more objective, increasingly, processes must be explored that ensure that the falsely accused are vindicated and at the same time, that offenders are fully held to account. Shanks rightly notes that it 'is imperative that improvements be made to ensure that individuals are not convicted of crimes they did not commit and that children are not the unwitting accomplices in such miscarriages of justice'.[24] Sutherland J, in the case of *Evans Michael v The State*, has equally demonstrated the need for courts to be cautious when confronted with CSA cases, stating that it is defensible for CJSs to be zealous about holding child sexual offenders to account:[25]

> [t]here is however a real danger that our indignation at the violation of the right to dignity of the vulnerable people can cripple our critical faculties. When that happens, there is a danger that one reaches for what is thought to be the right outcome without having properly conducted the fact finding exercise upon which to create a platform to stand and assert one's values.

The current state of affairs definitely warrants intervention. If accurate and correct decisions are to be arrived at during all stages of the process of criminal prosecution, then perhaps CJSs should consider increasingly engaging with MHPs and making the process of cross-examination more meaningful and inquisitorial. The next section engages with the latter two mechanisms and how they can be used to confront the rare, but pervasive, cases of false CSA allegations.

4 The Need for MHPs to Substantiate on CSA Reports and Assess the Competence of CSA Victims to Testify

Studies demonstrate that attempts to vindicate the falsely accused in CSA cases are fraught with difficulties.[26] CJSs are presented with a dilemma of balancing the obligation to protect CSA victims and at the same time guaranteeing the rights of those suspected of abuse. This dilemma is

23 Elder 'Investigation and prosecution of child sexual abuse cases' 1991 *Western State University Law Review* 285; see also Rogers 'Coping with alleged false sexual molestation: Examination and statement analysis procedures' 1990 *Issues in Child Abuse Accusation* 57-68.

24 Shanks 2009-2010 *Legal Research Paper Series supra* n 1 at 29.

25 *Evans Michael v The State* case no 2011/A46 unreported par 4.

26 Yuille *et al supra* n 5 at 24; Raskin & Yuille 'Problems in evaluating interviews of children in sexual abuse cases' in Cece *et al* (eds) *Children take the stand: Adult perceptions of children's testimony* (1989) 184-207; see also Ash & Guyer 'Child Psychiatry and the law: The functions of psychiatric evaluation in contested child custody and visitation cases' 1986 *Journal of American Academy of Child Psychiatry* 554-561; Benedeck & Schetky 'Allegations of sexual abuse in child custody and visitation disputes' in Benedeck & Schetky (eds) *supra* n 7 at 145-156; Corwin *et al* 'Child sexual

complicated by the fact that these cases hardly have conclusive medical evidence or eye witnesses to aid in substantiation. Many cases are not straight-forward, making it difficult to arrive at a clear-cut decision as to whether or not CSA occurred. Empirical research cites a host of symptoms as indicia of CSA in children; some symptoms may be evident in non-abused children, let alone symptoms caused by stressors other than sexual abuse. Equally important is Browne and Finkelhor's demonstration that not all sexually abused children necessarily show behavioural symptoms in reaction to CSA.[27] Therefore, there is no doubt that the task of deciding whether a child was abused in these circumstances is difficult. Yuille *et al* note, in circumstances such as these, that 'the job of assessment requires more than knowledge that such symptoms do or do not exist'.[28]

Myers *et al* caution judicial officers on the need to avoid underestimating the complexity and the degree of expertise required for evaluation of suspected CSA.[29] The authors explain that the evaluator must possess specialised knowledge of child development, individual and family dynamics, patterns of child sexual victimisation, signs and symptoms of abuse, and the uses and limits of various psychological tests. The competent evaluator must equally be familiar with the literature on child abuse and understand the linkage between behavioural reactions and CSA. Short of this knowledge, courts run the risk of arriving at uninformed decisions. Uninformed decisions either predispose the children to further CSA due to a failure to hold offenders to account, or account for the wrongful conviction of the falsely accused. The broad prerequisites described by Myers *et al* make the opinion of MHPs relevant in aiding CJSs in substantiating CSA allegations. Certainly, MHPs cannot distinguish between false and genuine CSA allegations, but they can provide the court with knowledge otherwise, not available to the court, which can improve a courts' assessment of CSA allegations. These experts do not have absolute criteria to discriminate false allegations from genuine allegations, nonetheless they have a better appreciation of the implication of behavioural and psychological reactions among children. Yuile *et al*[30] demonstrate that MHPs, properly qualified, can apply a number of techniques to improve assessment of CSA allegations. The authors mention three techniques that can be used by MHPs to substantiate CSA allegations: these are behavioural checklists, recantations and credibility assessments.[31]

---

abuse and custody disputes: No easy answers' 1987 *Journal of Interpersonal Violence* 91-105; de Young 'A conceptual model for judging the truthfulness of a young child's allegations of sexual abuse' 1986 *American Journal of Orthopsychiatry* 550-559.

27 Browne & Finkelhor 'Impact of child sexual abuse: A review of the research' 1986 *Psychological Bulletin* 66-77.

28 Yuille *et al supra* n 5 at 24.

29 Myers *et al* 'Expert testimony in child sexual abuse litigation' 1989 *Nebraska Law Review* 42.

30 Yuille *et al supra* n 5 at 24.

31 *Ibid*.

Further, the appointment of MHPs as experts is particularly appropriate in a case in which there is no physical evidence or any corroboration of the allegation, for instance, if the testimony of a young child is the only evidence of a serious criminal accusation, as is often the case in CSA cases. An expert witness can be appointed to aid the court in assessing the competency of children to testify if the court feels that the child's developmental maturity is in question. A child psychologist can evaluate the child using developmentally appropriate techniques to ascertain the child's level of developmental maturity and her ability to accurately relate a series of events. In this regard, the expert can aid the court in accurately appraising the child's ability to testify as opposed to allowing an incompetent child to take the stand or preventing a competent one from doing so.

Presently, the techniques of assessing the competence of children are out of touch: traditionally, according to Spencer, the nature of an oath for purposes of assessing the competence of a witness to testify meant 'saying that you believed you would burn in hell forever if you lied'.[32] Techniques applied to determine the competency of children to testify make 'little or no attempt to accurately ascertain the child's level of developmental maturity or ability to reliably relate a series of events'.[33] Indeed, the competency rules have been the subject of criticism and, consequently, have attracted reform in some justice systems with the competency requirement being abolished in some systems.[34] Increasingly it is acknowledged that all children who are capable of communicating intelligibly are competent to give evidence. Although this is a welcome innovation, in some cases there has been a shift from a reluctance to consider children competent to a non-reflective consideration of children as competent or incompetent.

Children who are capable of communicating intelligibly should be considered competent to give evidence, however, the process of assessing the competency of these children should advance more accurate findings on competency. CSA allegations are too serious for issues pertaining to the competency of children to testify, to be left to speculation and procedures whose accuracy is wanting. As Shanks notes: '[t]he lives of many individuals, including the child, will be changed forever as a result of the determination made at the competency

32 Spencer 'Introduction' in Spencer & Lamb (eds) *Children and cross examination: Time to change the rules?* (2012) 6.

33 Shanks 'Evaluating children's competency to testify: Developing a rational method to assess a young child's capacity to offer reliable testimony in cases alleging child sex abuse' 2010 *Cleveland State Law Review* 575. See also *S v N* 1996 (2) SACR 225 (C); *S v Seymour* 1998 (1) SACR 66 (NPD); and *S v Malinga* 2002 (1) SACR 615 (NPD), on the import and nature of an oath and its implications on evidence of children.

34 See e.g. s 52 of the Criminal Justice Act of England 1988, which abolished the competence requirement; see also South Africa's SCA's decision in *S v B* 2003 (1) SACR 52 (SCA), where Streicher JA observed that an understanding on the complainant's part of the nature and import of the oath did make the evidence she gave less reliable.

hearing'.[35] However, in carrying out this assessment, often the process 'is both startling and [it is] problematic that the typical competency hearing is comprised of … meaningless ceremony'.[36] For example, the process in the 2012 CSA decision of *S v Matshivha* (*Matshivha* case), in which the competence of the complainant was assessed, comprised of the following questions:

> Do you know your age - Yes?
>
> How many? - I am eight years old.
>
> Do you know the difference between the truth and a lie - Yes
>
> When a person lies is when a person is telling what? The truth or is when the person is not telling the truth. When it said that, that person is telling a lie – That is one person would be telling lies [sic].
>
> You speak lies? - No
>
> What do you speak? - The truth
>
> Thank you, you may proceed.[37]

Shanks persuasively observes that, ideally, the 'salient questions' in assessing the competence of children to testify should be 'whether the child can observe and register what happened, whether she has memory sufficient to retain an independent recollection of the events, whether she has the ability to translate into words the memory of those observations, and whether she has the ability to understand and respond to simple questions about the occurrence'.[38] 'Unfortunately, [in most cases] these critical skills are rarely explored during the competency hearings … Rarely are competency hearings used to assess the types of issues that are critical in criminal cases, such as the child's understanding of the concepts of time and ability to accurately perceive and relate a series of events'.[39] The questions in the *Matshivha case* above are the typical competence questions asked: often, questions pertain to a child witness' residence, name, age, ability to differentiate colours, among other general aspects. The answers and assessment with regard to this line of questioning are certainly within the common knowledge of judicial officers, hence, the justifiable option for judicial officers to dispense with MHPs in assessing the child witness' mental capacity and competency.

However, it is submitted that if false CSA allegations are to be increasingly confronted, an assessment of children's competence to testify will need to go further than generalised questioning. The aspects underscored by authors like Shanks above will need to be considered in informing the line of questioning and assessment. Judicial officers should

35 Shanks 2010 *Cleveland State Law Review supra* n 33 at 576.
36 *Idem* 578.
37 *S v Matshivha* (2014) 1 SACR 29 SCA par 7. As can be gleaned from the quote above, the questions are not only confusing and hard to follow, they also fail to address issues relevant to assessing children's competence.
38 Shanks 2010 *Cleveland State Law Review supra* n 33 at 585.
39 *Ibid*.

ensure, by the time the child complainant is deemed competent to testify, that the judicial officer has made an attempt to accurately ascertain the child's level of developmental maturity or his or her ability to reliably relate a series of events. This attempt will ensure that the accused are not convicted based on evidence of an ideally incompetent child complainant. Similarly, a broader view of assessment will ensure that child complainants, who are capable of testifying credibly, are not precluded from testifying based on generalised questions that fail to touch upon salient issues relevant in assessing competence. If such detailed assessment is to be explored, the expertise of MHPs will, seemingly, be indispensable as this wider scope touches upon the child's ability to differentiate between fantasy and reality in a particular case, the child's understanding of the concept of truth, his or her memory, children's enactive representation, imaginal representation, linguistic representation, categorical representation, capacity to observe, ability to communicate, among other more specialised aspects. Judicial officers can benefit from the expertise of MHPs: a more accurate assessment definitely, will be arrived at if judicial officers receive appreciable help from MHPs. In furtherance of greater objectivity in CSA prosecutions, courts should increasingly accommodate help from MHPs. The costs associated, admittedly, may be significant, but these costs pale in comparison to the injustice of punishment of the innocent on account of a failure to explore mechanisms that enhance accuracy.

5 The Need for Meaningful Cross-examination in Testing the Evidence of Alleged CSA Victims

An essential component of an adversarial trial is cross-examination. According to Davies, cross-examination is the strategy of words and actions which the advocate employs during presentation of evidence by the opposition that serves to cast doubt upon the opposing party.[40] Generally, the ideal purpose of cross-examination, as a technique in adversarial systems of justice, is to test the accuracy of evidence adduced by the opposing party. According to Zeffert and Paizes, 'the purposes of cross-examination are, first, to elicit evidence which supports the cross-examiner's case, and second, to cast doubt upon the evidence given for the opposing party'.[41] Ellison adds that '[i]nordinate faith is placed in the capacity of the skilful cross-examiner to expose the dishonest, mistaken or unreliable witness, and to uncover inconsistency and inaccuracy in oral testimony'.[42]

The two cases discussed in the preceding section demonstrate that the potential of an innocent person being convicted and sentenced to lengthy imprisonment is present. In these cases, wrongful identification

40 Davies *Anatomy of cross examination* (1993) 3.
41 Zeffertt & Paizes *The South African Law of Evidence* (2009) 909.
42 Ellison 'The protection of vulnerable witnesses in court: An Anglo-Dutch comparison' 1999 *International Journal of Evidence & Proof* 35.

arose where very young CSA victims failed to appropriately identify the actual offender or the children were coerced into making a false accusation. Substantiation of CSA allegations is extremely difficult. As Mlambo J put it in *S v Ndlovu*,[43] in these circumstances, '[c]ross-examination [becomes] an integral part of the armoury placed at the disposal of an accused person to test, challenge and discredit evidence tendered against him or her'. Khumalo AJ, in the 2012 judgement in *Muntuza v The State,* adds that '[t]he rule serves as a protective measure against the danger of an accused being found guilty on the strength of the evidence of a witness who is unreliable or lacks credibility'.[44]

Cross-examination, if appropriately conducted, can play a critical role in testing the evidence of child witnesses. However, legal practitioners often fail to make the best out of this process to advance this purpose. Presently, cross-examination of child witnesses is generally depicted in a bad light: it has been reduced to a technique of coercion, intimidation and the use of complex language to confuse child witnesses as opposed to being a procedure for testing evidence.[45] Cossins observes that 'rather than being a method for uncovering the untruthful child witness, empirical evidence shows that it is a process that manufactures inaccurate evidence'.[46] Often, the mode of questioning is characterised by closed-ended and leading questions which fail to further truth-finding.[47] Ellison observes that, in some cases, the process of cross-examination is gruelling, comprising of undue vigorous objections, warnings, reminders, repetition of questions and the insistence on proper answers.[48] These techniques fail to take into account the plight of vulnerable witnesses. For children, these techniques have been found to be abrupt, frustrating and degrading to the child witness and they dramatically reduce the scope for clarification, explanation and elucidation.[49] The process is compounded by undue focus on peripheral issues, often incidental to the ultimate issue for determination.[50] Research demonstrates that children, generally, may not be able to give an account of the details surrounding incidents, let alone those that are peripheral.[51] What Wigmore termed the 'greatest engine ever invented

43 *S v Ndlovu* 2002 (2) SACR 325 SCA.
44 *Muntuza v The State* case no A868/2011 (unreported) par 18.
45 Ellison 'The mosaic art?: Cross-examination and the vulnerable witness' 2001 *Legal Studies* 354-360.
46 Cossins 'Cross-examining the child complainant: Rights, innovations and unfounded fears in Australian context' in Spencer & Lamb (eds) *supra* n 32 at 111.
47 *Ibid*.
48 Ellison 2001 *Legal Studies supra* n 45 at 359.
49 *Ibid*.
50 *Ibid*.
51 Goodman & Helgeson 'Child sexual assault: Children's memory and the law' 1985 *University of Miami Law Review* 186; Christiansen 'The testimony of child witnesses: Fact, fantasy, and the influence of pretrial interviews' 1987 *Wash. L. Rev.* 705-721; Yuille 'The systematic assessment of children's testimony' 1988 *Canadian Psychology* 247-262; Muller *Prosecuting the child offender* (2011) 165. All these authors affirm that it is possible for detailed

for the discovery of truth' has, in some cases, turned out to be the greatest engine for distorting the accuracy by evidence of child witnesses.[52] Muller rightly observes that 'it would appear … that cross-examination has much to do with a battle between the two parties and very little to do with the need to establish the truth'.[53]

Since false CSA allegations are a reality, it is critical that cross-examination is not merely a tool for confusing child witnesses but for putting the evidence of children to the test in order to ensure that the falsely accused are not convicted. Some techniques used fail to advance the essence of cross-examination and, instead, traumatise child witnesses. Kassin *et al* have called these techniques 'dirty tricks' that mask the ideal essence of cross-examination making it hard for courts to make sound credibility judgements.[54] In *Carroll v Caroll*, Henochsberg AJ underscored the ideal essence of cross-examination by stating as follows:

> The objects sought to be achieved by cross-examination are to impeach the accuracy, credibility and general value of the evidence given in chief, to sift the facts already stated by the witness, to detect and expose discrepancies or to elicit suppressed facts which will support the case of the cross-examining party.[55]

Ideal techniques of cross-examination should test the evidence of child victims so that, at the end of the process, the reliability or non-reliability of their evidence is brought to the attention of the court. In the cases of child witnesses, it is particularly important that their evidence is not subjected to archaic cautionary rules, but that sympathy, on account of their tender age, does not obscure the need for common sense and objectivity in testing their evidence. This requirement is pivotal since it is possible for children to attract sympathy from the system: Spencer, for instance, paints a vivid picture of the dilemma of dealing with very young children as witnesses by observing as follows:

> Meaningful communication often proves impossible, particularly with little children. Sometimes they cannot be persuaded to say anything intelligible, even though they managed to communicate intelligibly during the video-interview that has now taken the place of their evidence in chief. Sometimes they are able to communicate intelligibly, but cannot be cross-examined to any useful purpose because by the time of trial they have forgotten all about the incident. And sometimes they cannot be cross-examined because they are scared out of their wits and unable to communicate at all: like a little girl

---

and accurate testimony to be elicited from a child victim. The authors, however, observe that generally, children often recall less than adults do. When appropriately questioned, the authors contend that children are more likely to answer correctly questions about central actions than questions about peripheral information.

52 Wigmore *A treatise on the Anglo-American system of evidence in trials at common law* (1940) 1367.

53 Muller *supra* n 51 at 146.

54 Kassin *et al* 'Dirty tricks of cross examination: The effect of conjectural evidence on juries' 1990 *Law & Human Behaviour* 374.

55 *Carroll v Caroll* 1947 (4) SA 37 (W) 40.

> in a case … who got up from her chair as soon as the cross-examination started and just ran away.[56]

Notwithstanding these vulnerabilities, it would be unrealistic to dispense with cross-examination techniques geared towards testing the credibility of the child victim. The '[f]ailure to allow cross-examination constitutes a gross irregularity'.[57] The court has no right to prevent cross-examination even if the purpose is to protect the witness. In *S v Manqaba*,[58] a magistrate prevented cross-examination of a child witness. The main reason for the refusal was the possible traumatisation of the child. Satchwell J found that this refusal was an irregularity which negated the right of the accused to a fair trial because the refusal to allow cross-examination 'was predicated upon an expresses intention by the magistrate to protect the complainant at the expense of the accused'.

In some CSA cases it is hard to substantiate the CSA allegations, thus it should be permissible for the credibility of the CSA victim to be attacked. What is critical during this process, is for the examiner to ensure, in testing the credibility of the child witness, that the process is not used as a platform to further myths about CSA. Equally, the cross-examiner should ensure, as much as is possible, that the examination technique is adapted to the developmental abilities and vulnerabilities of children 'to enable the child to give the best evidence of which [the child] is capable' while, at the same time, ensuring the accused person's right to a fair trial.[59] Zeffert and Paizes note 'a witness' credit [for purposes of cross-examination] means not only his honesty but also his powers of perception, memory and accuracy of narration'.[60] Therefore, it is unrealistic to assume that the evidence of child witnesses will be tested without any emphasis on their credibility whatsoever. It is to be noted, even with appropriate techniques, that examining the child witness to establish their honesty, power of perception, memory and accuracy may not necessarily be appealing to the child witness: realistically, some degree of discomfort on the part of the child is to be expected where their credibility is being tested.

Legal practitioners should increasingly test the credibility of CSA victims, in an inquisitorial manner, so as to expose the child's reliability or unreliability with a view to arriving at the truth. In essence, aspects of the CSA victim's evidence which reveal dishonesty, incompetency, poor powers of perception of the alleged CSA incident and inaccuracy in narration, should be brought to the attention of the court so that the innocent are not wrongly convicted. Cross-examination should enhance the credibility of CSA victims who are competent, accurate and honest and at the same time diminish the credibility of those who are

56 Spencer 'Introduction' in Spencer & Lamb (eds) *supra* n 32 at 11.
57 Schwikkard *Principles of evidence* (2010) 366.
58 *S v Manqaba* 2005 2 SACR 489 (W) parr 55 & 58.
59 Plotinkoff & Woolfson 'Kicking and screaming: The slow road to be evidence in Spencer & Lamb (eds) *supra* n 32 at 30.
60 Zeffertt & Paizes *supra* n 41 at 910.

incompetent, dishonest and inaccurate. Only appropriate techniques of cross-examination further this cause. Legal practitioners should be equipped with more appropriate techniques to reveal evidence that undermine the CSA victim's credibility. This notion was affirmed by the England and Wales Court of Appeal in the 2010 CSA judgement of *R v Barker*. The court ruled:

> [w]hen the issue is whether the child is lying or mistaken in claiming that the defendant behaved indecently towards him or her, it should not be over-problematic for the advocate to formulate short, simple questions which put the essential elements of the defendant's case to the witness, and fully to ventilate before the jury the areas of evidence which bear on the child's credibility. Aspects of evidence which undermine or are believed to undermine the child's credibility must, of course, be revealed.[61]

Taken together, cross-examination, as a technique of testing the evidence of children, is increasingly losing its efficacy because of the poor techniques applied by lawyers. Therefore, it is unsurprising that this procedural right is increasingly being questioned. However, if cases of false CSA allegations are to be appropriately dealt with, this procedure seems indispensable. Cross-examination is more likely to help in substantiating CSA allegations if legal practitioners adapt their examining techniques to the developmental abilities and vulnerabilities of children – such techniques will more readily expose the truth as opposed to confusing and misleading children. For example, the cross-examination of the CSA complainant in the case of *S v Nozazaku* comprised of the following questions:

> I'm going to put it to you that you are fabricating this now, Tuliswa. That the impression that you gave to this court the whole time was that that vehicle was locked and that you never unlocked or attempted to unlock that vehicle.
>
> Now, if your aunt said to the court yesterday that it is a busy shebeen and that while she was there she saw people coming in and leaving the shebeen and she described that she can't say how many but she gave the indication that they were a lot of people. What would you say to that?
>
> Now, I'm going to put it to you that if necessary there will be people that will say when you told the police inside the charge office at Motherwell, giving a description when or where and how you were raped, you told the police you were raped at the Smirnoff board at Zwide.
>
> Can you tell His Worship what the blanket is used for?
>
> I'm going to put it to you that you are fabricating now, Tuliswa.
>
> You see why I'm asking you the question, Tuliswa, is, my learned friend, when she led you in evidence in chief, she put two questions to you.[62]

It is unlikely techniques such as these meaningfully elicit truth from the child complainant. Therefore, it is submitted, for children, that cross-examination techniques should be more inquisitorial – questioning

61 *R v Barker* (2010) EWCA Crim 4 par 42.
62 *S v Nozakuzaku* 1995 case no RC 6/68/95(E) (unreported). Extracts obtained from Muller *supra* n 51 at 161-162.

techniques that inquire into unclear issues, seeking explanation for a lack of clarity, amount to a more meaningful method of cross-examination with a view to furthering the truth. Only if cross-examination is conducted meaningfully, will it serve the purpose of vindicating the innocent, namely, the innocent children who are used as conduits of false or mistaken CSA allegations, and the falsely accused. If done poorly, cross-examination can unduly erode or limit the testimony of CSA victims. However, if appropriately conducted, it can succeed in substantiating on unclear issues. As Shanks observes '[i]t is hard to overemphasise the importance of confrontation and effective cross-examination to the defense of an individual accused of a crime'.[63]

6 The Need for an Appropriate Forum to Entertain Newly-discovered Evidence

Not many complainants are keen to set the record straight in cases of false CSA allegations – very few cases of this nature come to the attention of the public and CJSs. However, in the exceptional circumstance of a case being brought to the attention of CJSs, there is often newly-discovered evidence which has the potential to establish the innocence of the convict who is serving a sentence. The newly-discovered evidence often fundamentally affects the earlier conviction and sentence. Currently, in most CJSs, the only legal procedure available to convicted persons who have exhausted legal procedures by way of appeal and review is a pardon or executive clemency. This is based on the popular assumption that the 'traditional fail safe remedy for claims of innocence based on new evidence discovered too late' is executive clemency.[64] Executive clemency is a concept of mercy and pardon that is constitutionally recognised in most countries.[65] It serves to show compassion by relieving an individual of the full weight of their sentence and to correct errors in the judicial process – the offender, therefore is unconditionally forgiven.[66]

In some cases executive clemency may involve courts – particularly if new evidence has been discovered which significantly impacts on the earlier conviction. For example, in South Africa's CJS, section 327 of the Criminal Procedure Act 105 of 1977 (CPA), provides for free pardon or substitution of a verdict by the president where new evidence has since been discovered after the trial. Executive clemency, with the involvement of the courts, arises if the convict has exhausted all the

63 Shanks 2010 *Cleveland State Law Review supra* n 33 at 594.
64 *Herrera v Collins* 506 US 390 (1993) 417.
65 See e.g. s 84(2) (j) of the Constitution of the Republic of South Africa of 1996; art 121 of the Constitution of the Republic of Uganda of 1995.
66 Smith 'The prerogative of mercy, the power of pardon and criminal justice' (1983) *Public Law Journal* 398.

recognised legal procedures in the form of appeal and review.[67] The convict or their legal representative addresses the minister of justice by way of petition indicating that further evidence has since been discovered which materially affects his or her conviction.[68] The minister may direct that the petition be referred to the court in which the conviction occurred.[69] The court may examine any witnesses in connection therewith.[70] The court assesses the value of the further evidence and advises the president on the extent to which the evidence affects the conviction in question.[71] The court, however, cannot announce its findings as to the further evidence or the effect thereof on the conviction in question.[72] The president, upon consideration of the advice of the court, may direct that the conviction in question be expunged or substitute the conviction in question with a conviction of lesser gravity.[73] The president, however, is not bound by the findings of the court on the newly-discovered evidence and its implication for the conviction in question.

In the cases discussed above, it is indisputable that the newly-discovered evidence significantly impacted on the earlier conviction.[74] Since, for many CJSs, executive clemency is the only post-conviction procedure available to convicts in cases of newly-discovered evidence, this seems to be the only procedure at the disposal of the falsely accused in CSA cases. It suffices to note, with regard to executive clemency, that in the eyes of the law, the petitioner does not come before the court as innocent but as a person in need of mercy, compassion and forgiveness.[75] With the procedure in section 327 of the CPA, the newly-discovered evidence, although highly probative in establishing the petitioner's innocence, merely serves as a pathway to executive clemency, without which the petitioner would not have had the opportunity to benefit from clemency. It suffices to note further that despite the high probative value of the newly-discovered evidence, in the form of a confession or recantation, the discretionary nature of executive clemency means that clemency cannot be guaranteed. The findings of the court with regard to the newly-discovered evidence and its implication for the conviction cannot guarantee clemency because these findings are not binding on the president.

67 S 327(1) of the Criminal Procedure Act 105 of 1977.
68 *Ibid*.
69 *Ibid*.
70 *Idem* s 327(2).
71 *Idem* s 327(4)(a).
72 *Ibid*.
73 *Idem* s 137(6).
74 In both cases, the complainants at the time of trial confessed to falsification of the CSA allegations.
75 See e.g. *Herrera v Collins supra* n 64 at 390, where the United States Supreme Court noted that '[i]n criminal cases, the trial is the paramount event for determining the defendant's guilt or innocence'. After trial, the presumption of innocence does not suffice but rather, compassion, mercy and forgiveness.

It is submitted that confessions on falsification of CSA allegations excluding the convict from the list of suspects, are forms of evidence that are too highly probative to be subjected to the discretionary nature of executive clemency. The high probative value of this evidence is apparent in the two discussed cases of *Smith* and *Sifiso*. Discretionary executive power does not seem to be the best forum to address such strong claims pointing to the petitioner's innocence. Petitioners must be given an opportunity to directly apply to the court that found them guilty to have newly-discovered evidence tested.[76] The state, equally, should be notified of the application and given an opportunity to respond. The court must admit the evidence and consider it in conjunction with the trial transcript and any other relevant evidence. Depending on the court's objective analysis, the court should be able to uphold the conviction or set it aside. Leaving referral of the petition to court to the discretion of the minister is problematic as the minister can chose not to have the petition referred to a court. Arming courts with the power to directly receive the petitions and to arrive at binding decisions with regard to the newly-discovered evidence affords broader protection to both the petitioner and the 'earlier complainant'. Subjecting the newly-discovered evidence to test by the courts, coupled with the power of courts to arrive at objective, binding decisions with respect to the new evidence guarantees that the objective findings of court trickle down to the final decision. Again, in arriving at this decision and testing the confession, the role of MHPs remains pivotal in availing courts of knowledge about the genuineness and the circumstances surrounding the recantation. Therefore, it is submitted that executive clemency, akin to that under section 327 of South Africa's CPA, does not seem to be an appropriate forum in cases involving evidence that is highly probative of the petitioner's innocence: because, even with the high probative nature of the newly-discovered evidence, there is no guarantee that the falsely-accused, in CSA cases, are protected. It suffices to note that with such strong claims, the petitioner is not necessarily seeking compassion or forgiveness but asserting that it was wrong for him or her to be convicted in the first place – in light of the newly-discovered evidence. Removing such strong claims from the arena of executive discretion, it is argued, is a furtherance of the greater goal of objectivity in dealing with CSA cases.

Certainly, with this proposal the principle of finality is defied.[77] However, to the extent that life and liberty are at stake, a different

76 This is the position in cases of newly-discovered deoxyribonucleic acid testing (DNA) evidence in Criminal justice systems such as America's. Because of the high probative value of the evidence, such as DNA, the current trend in the courts in America is that the petitioner should be given an opportunity to show their innocence. Confessions of falsification may not necessarily constitute scientific evidence: they also constitute strong claims of innocence to warrant removal from the arena of executive discretion.

77 The principle of finality is based on the reasoning that both the accused and society have an interest in ensuring that there, at some point, will be the certainty that comes with an end to litigation, and that attention will

procedure should govern evidence of a high probative nature in CSA cases than in cases in which evidence is not so probative. It is submitted that cases such as *Smith* and *Sifiso* present powerful claims of innocence and is coupled with evidence which is highly probative in establishing the petitioner's innocence. Petitioners, in cases such as these, must be given an opportunity to prove their innocence. It is argued that taking false CSA allegations seriously requires courts to be open to powerful claims of innocence without regard to whether procedural guidelines, challenging a conviction, have been exhausted or have expired – it should never be too late for innocence to be established. Sufficient showing of probable innocence should trigger a due process right to a judicial hearing on newly-discovered evidence. The standard applicable in this regard should be 'whether after viewing the evidence in the light most favourable to the prosecution, any rational [judge] could have found the essential elements of the [child sexual offence] beyond a reasonable doubt'.[78] Admittedly, reforms such as these might be the subject of considerable opposition, however, it is hoped, over a period of time, this trend could be reversed.

7 Conclusion and Recommendations

Even the most vehement critics of the CJS concede that the conviction of those who are innocent is rare.[79] Wrongful conviction in CSA cases, although extremely minimal and occasional, can undermine public respect for and confidence in the legal system and law enforcement. These risks suggest a greater call for objectivity and a need to take claims of wrongful conviction more seriously. Human error is inevitable and no CJS can purport to be perfect. However, it is critical, as much as possible, that CJSs make the best of available mechanisms to improve their accuracy. In CSA cases in which there is often hardly any medical evidence, the role of MHPs is critical in evaluating CSA allegations and assessing the competence of children to testify. Furthermore, over the years, the ideal essence of cross-examination has been undermined. Often defence attorneys fail to make the process meaningful in furtherance of the truth. Therefore, it is critical for legal practitioners to get back to the 'real' essence of cross-examination. A more inquisitorial approach in furthering this process seems inevitable. Equally, if new evidence with the effect of proving innocence has been discovered long after conviction and sentence, it is particularly important that the doors to proving innocence are not closed. Where new evidence has since been discovered, that backs stronger claims of innocence, it is recommended that those falsely-accused of CSA be afforded a judicial platform to prove their innocence.

---

ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community.

78 *Jackson v Virginia* 443 U.S. 307, 319 (1979).

79 See e.g. Green 'Lethal fiction: the meaning of "counsel" in the Sixth Amendment' 1993 *Iowa Law Review* 504.

If they are to take the incidence of false CSA allegations and wrongful conviction more seriously, legal professionals are faced with obligations. Defence attorneys need to reconsider their technique of cross-examination in testing the evidence of children – the process should, preferably, be inquisitorial with the aim of unravelling the truth as opposed to it being used as a weapon to confuse and traumatise children. Judges are vested with the power to arrive at decisions about the competence of children to testify, and it is therefore critical for competence assessments not to be reduced to mechanical processes. Judicial officers should see to it that the competence assessment is meaningful to ensure that convictions are not based on the evidence of incompetent child witnesses. Defence attorneys should play a more active role in the competence assessment process and, where need be, make use of MHPs to challenge the competence of child witnesses to testify, particularly if their competence is in question. Prosecutors bear the obligation to call witnesses. In this regard MHPs should be increasingly incorporated in their witness lists in CSA cases. The task of prosecutors should not merely be to secure convictions – as officers of the court and administrators of justice, prosecutors should ensure that 'justice' is done.

Executive directors in business rescue: employees or something else?

EP Joubert
LLB LLM
Lecturer in Mercantile Law, University of Pretoria

A Loubser
LLB LLM LLD
Professor of Mercantile Law, University of South Africa

OPSOMMING

Uitvoerende direkteure in ondernemingsredding: werknemers of iets anders?

Die Maatskappywet 71 van 2008 verleen uitgebreide magte en regte aan die werknemers van 'n maatskappy wat in ondernemingsredding verkeer. Afgesien van die regte wat aan die werknemers verleen word in hul hoedanigheid as geaffekteerde persone en as moontlike skuldeisers vir onbetaalde vergoeding, verkry hulle ook spesiale regte bloot weens die feit dat hulle werknemers is. Daar bestaan voldoende gesag vir die standpunt dat die uitvoerende direkteure van 'n maatskappy ook werknemers van die maatskappy is. Die vraag wat in hierdie artikel aangespreek word is of uitvoerende direkteurs dus ook outomaties al die regte en magte verkry wat aan werknemers verleen word wanneer hul werknemer-maatskappy in ondernemingsredding geplaas word. Daar word gekyk na sommige van hierdie regte en magte en die effek wat dit op die ondernemingsredding kan hê.

1 Introduction

Although the *Memorandum on the Objects of the Companies Bill, 2008* states that Chapter 6 of the proposed Act regulating business rescue proceedings would recognise the interests of shareholders, creditors and employees, emphasis was placed on the protection of the 'interests of workers' not only by recognising them as creditors if the company owed them money before commencement of the business rescue proceedings, but also by affording them specific rights to participate in the procedure simply by virtue of being employees.[1]

It was thus to be expected that the rights of employees in this process would be extensive and entrenched throughout the whole of the business rescue proceedings. These rights stem from three sources in the Companies Act of 2008:[2] the inclusion of employees in the definition of 'affected persons' who enjoy a wide array of powers and rights; their

1 Item 10 of the *Memorandum on the Objects of the Companies Bill, 2008* attached to the Companies Bill, B61D – 2008.
2 Act 71 of 2008 (hereafter the 'Companies Act').

How to cite: Joubert & Loubser 'Executive directors in business rescue: employees or something else?' 2016 *De Jure* 95-104
http://dx.doi.org/10.17159/2225-7160/2016/v49n1a6

recognition as creditors where the company owes them any remuneration that was due before commencement of business rescue; and simply based on the fact that they are employees of the company.[3]

Section 128(1)(a) of the Companies Act defines an 'affected person' for purposes of business rescue proceedings as a shareholder or creditor of the company, as well as any registered trade union representing employees of the company, and any individual employee who is not represented by a trade union. Directors, in their capacity as such, are not included in this definition. However, executive directors are normally in the full-time employment of the company and are thus employees, albeit a special type of employee. Because they have not been specifically excluded from the definition of 'affected persons', or from enjoying any of the special rights and powers given to employees by Chapter 6 of the Companies Act, there is a strong argument that they also may benefit from the special position that employees enjoy during business rescue proceedings. Their inclusion may lead to a situation in which directors are able to exert much more influence on the process than would be desirable or was perhaps foreseen by the legislature.

The issue that will be addressed in this article is whether executive directors will, or should, be regarded as employees for purposes of business rescue proceedings and what the possible consequences could be if they enjoy all the special rights and privileges.

2 The Distinction Between Executive and Non-executive Directors

The *King Report on Corporate Governance* (King I)[4] distinguished clearly between executive and non-executive directors[5] while the *King Report on Corporate Governance for South Africa 2002* (King II) further developed this distinction by listing the criteria according to which a director can be classified as an executive or a non-executive director.[6] According to these criteria, an executive director is a person who is involved in the day-to-day management of the company and/or in the full-time salaried employment of the company or any of the subsidiaries of the company. A non-executive director is characterised by not being involved in the day-to-day management of the company. He or she is also not in the full-time salaried employment of the company.

3 For a detailed discussion of the rights and powers afforded to employees in these three capacities, see Loubser & Joubert 'The role of trade unions and employees in South Africa's business rescue proceedings' 2015 *ILJ* 25.

4 Published in 1994 by the Institute of Directors.

5 *King I Report* 32-33 par 4.

6 In Principle 2.4.3., the *King Report on Governance (King III Report)* published in 2009 did not repeat these criteria but clearly incorporated them: see Loubser 'The King Reports on corporate governance' in Esser & Havenga (eds) *Corporate Governance Annual Review 2012* (2012) 35.

In contrast to the King Reports, the Companies Act does not use the words 'executive' or 'non-executive' either in its definition of a director in section 1 or in sections 75 to 78 dealing with the duties and liabilities of directors.[7] However, the Companies Act describes some directors in such a way that a distinct description of a particular director similar to that found in the King Reports can be implied. For example, section 94 of the Companies Act, that regulates the composition of audit committees, explicitly states that a director who is elected to serve on the audit committee must not be involved in the day-to-day-management of the company or be in the full-time employment of the company.[8] Clearly, this section requires that only non-executive directors may be members of the audit committee.

Another example is found in Regulation 43(4) of the Companies Regulations[9] where the composition of the Social and Ethics Committee is prescribed. This Regulation requires that at least one of the directors serving on this committee must be a director 'who is not involved in the day-to-day management of the company's business'. Again, the reference is to a non-executive director. It is clear, despite the fact that there is no express distinction between the various types of directors in the Companies Act, that the Act acknowledges that there is a difference.[10]

3 Executive Directors as Employees

Section 213 of the Labour Relations Act[11] provides a wide definition of an employee and provides that 'employee' can be defined as:

(a) any person, excluding an independent contractor who works for another person or for the state and who receives, or is entitled to receive, any remuneration; and

(b) any other person who in any manner assists in carrying on or conducting the business of an employer.[12]

In *PG Group (Pty) Ltd v Mbambo NO and Others*, Revelas J remarked that 'this definition would surely apply to most, if not all, directors'.[13]

The question whether executive directors qualify as employees of a company has been considered by the courts on many occasions when dealing with a director's dismissal from the company.

---

7 'Director' is defined in s 1 as follows: '… a member of the board of a company, as contemplated in section 66, or an alternate director of a company and includes any person occupying the position of a director or alternate director, by whatever name designated'.
8 S 94(4)(b) of the Companies Act.
9 Companies Regulations, 2011.
10 Loubser & Joubert *supra* n 3 at 25.
11 Act 66 of 1995 (hereafter the 'Labour Relations Act').
12 S 213 of the Labour Relations Act.
13 *PG Group (Pty) Ltd v Mbambo NO & Others* [2004] ZALC 78 par 24.

In *Chillibush Communications (Pty) Ltd v Johnston & Others*[14] the Labour Court held that there was convincing authority confirming that a director could, and very often would, be an employee of the company and would be governed by the Labour Relations Act in this capacity as opposed to the Companies Act that regulated the director in his or her capacity as a director. The court found strong support for this view in the *PG Group* case.

The dual capacity of a person as director and employee was clearly illustrated in *Amazwi Power Products (Pty) Ltd v Turnbull*[15] where it was held that a person could resign as director but continue to be an employee.

In *Protect A Partner (Pty) Ltd v Machaba-Abiodun*[16] the Labour Court once again had to decide on this matter. The court considered the definition of 'employee' in the Labour Relations Act and adopted the reality test that consists of the following aspects:

- The right of supervision and control of the employer over the employee;
- Whether or not the employee forms an integral part of the organisation; and
- The extent of financial dependence of the employee on the employer.[17]

The court emphasised the fact that not one single factor can be decisive, but that the control element weighed slightly more in determining an employment relationship. The court explained, in determining whether or not the employee formed part of the organisation, that one should consider whether the employee assists the employer in conducting its business. Due to the fact that a company is a juristic person, the only way the company can conduct business is through its organs, of which the board of directors is one. The court therefore found that Machaba- Abiodun, who was an executive director of the company, was an employee of the company.

One can thus say that when an executive director is dismissed it must be in terms of the provisions of the Labour Relations Act.[18] This view is confirmed by section 71 of the Companies Act that provides for the removal from office of a director either by the passing of an ordinary resolution by the shareholders of the company or, in some instances, by a decision of the board.[19]

14 *Chillibush Communications (Pty) Ltd v Johnston & Others* [2010] ZALC 3 par 24.
15 *Amazwi Power Products (Pty) Ltd v Turnbull* [2008] ZALAC 8 par 20.
16 2013 34 ILJ 392 (LC).
17 Lumb & Maharaj 'Directors – when are they considered to be employees' 2012 *Lexology* www.lexology.com/library/ (accessed 2014-09-22).
18 In this regard, see Van Eck & Lombard 'Dismissal of executive directors: comparing principles of company law and labour law' 2004 *TSAR* 20.
19 S 71(1) of the Companies Act.

Section 71(9) states that nothing in the section will deprive a person, that was removed from office as a director in terms of section 71, of any right that that person may have in terms of common law or otherwise to apply to court for damages or compensation. The damages or compensation envisaged in this section can be claimed for either the loss of office as a director,[20] or *loss of any other office as a consequence of being removed as director*.[21] It is thus clear, in the event where the director is dismissed and his employment is also terminated as a result thereof, that he still has his common law remedies for damages and compensation. The Companies Act therefore, by implication, treats executive directors as employees of the company.

It must be noted that section 5 of the Companies Act, dealing with the general interpretation of the Act, states that should there be any conflict between the provisions of the Companies Act and the Labour Relations Act, the provisions of the Labour Relations Act shall prevail.

4 Directors as Affected Persons

If it is accepted that executive directors are employees of the company and therefore affected persons as defined in section 128 of the Companies Act, an individual director will have the right to apply for an order commencing business rescue proceedings in terms of section 131 of the Companies Act without being a shareholder or creditor of the company. This means, although directors have been excluded from the list of affected persons in their capacity as such and possibly were not intended to have the power to apply for a business rescue order, that they will have this power as employees.

Although both the definition of affected persons and, more explicitly, section 144(1) of the Companies Act make it clear that employees who are members of a registered trade union must collectively exercise their rights in terms of Chapter 6 through their trade union, it would be highly unusual for an executive director to be a member of any trade union. Executive directors, therefore, would be able to exercise their rights directly as individuals as they see fit and in their own best interests.

In *The Employees of Solar Spectrum Trading 83 (Pty) Ltd v Afgri Operations Limited*,[22] the applicants were treated rather sympathetically by the court because, as the court pointed out, as employees they did not readily have access to all the information needed to prove the requirements for a business rescue order. An executive director will obviously not get the same treatment because of his or her access to all the relevant information and must expect to be held to high standards by the court if applying for a business rescue order in the capacity of an

20 *Idem* s 71(9)(a).
21 *Idem* s 71(9)(b); own emphasis.
22 *The Employees of Solar Spectrum Trading 83 (Pty) Ltd v Afgri Operations Limited* [2012] ZAGPPHC 359.

employee. However, the order can still provide relief to a director who is outvoted by the other members of the board, who are not in favour of placing the company under supervision in terms of a board resolution,[23] and who is concerned about the fate of the company or the potential personal liability for reckless trading if the company continues doing business while commercially or factually insolvent.

Section 131(6) contains another important provision for affected persons. Although the board is precluded from taking a resolution commencing business rescue proceedings once liquidation proceedings have been initiated by or against the company, an affected person can apply to a court for business rescue proceedings to commence even if liquidation proceedings have already been commenced. The effect of such an application is that the liquidation proceedings are automatically suspended until the application is heard.[24] A director in these circumstances, therefore, could maliciously or fraudulently cause the suspension of liquidation proceedings for a substantial period, irrespective of the merits of the business rescue application.

As the applicant for a business rescue order, a director would also be the one nominating a person for appointment as the business rescue practitioner, although the nomination is subject to ratification by the independent creditors.[25] This could result in the director having an undue influence on the business rescue proceedings or the actions of the rescue practitioner. This possibility position is strengthened by the power of an affected person to apply to a court for the removal of the practitioner in terms of section 130 where the practitioner was appointed by the board, and in terms of section 139 of the Companies Act in all instances.

As affected persons, directors will also have the right to participate in the hearing of an application for commencement of business rescue proceedings brought by a creditor or shareholder, and this would include the right to oppose such an application. Directors have inside knowledge of the company's financial situation and business prospects and would be in a strong position to refute allegations of financial distress or prospects of rescue on which the application is based, or at least sow doubt as to whether these requirements have been met.[26]

An affected person may also apply to a court for an order in terms of section 130(1) of the Companies Act setting aside the board resolution commencing business rescue proceedings, or to set aside the

23 In terms of s 129 of the Companies Act.
24 *Idem* s 131(6).
25 *Idem* s 131(5). The nomination of such a business rescue practitioner must be ratified by holders of a majority of the independent creditors' voting interests.
26 In terms of s 131(4) of the Companies Act the court must be satisfied that the company is financially distressed and that there is a reasonable prospect for rescuing the company.

appointment of the practitioner appointed by the board. An application may be made until a rescue plan has been adopted. In this section there is some hint that the legislature acknowledged the possibility of a director being an affected person, although most probably in the capacity as a shareholder or creditor: section 130(2) of the Companies Act provides that a person who, as a director, voted in favour of the resolution may not apply for the resolution or the appointment of the business rescue practitioner to be set aside unless such a person satisfies the court that the resolution was supported in good faith and based on information that subsequently turned out to be false or misleading.

In general, affected persons have the right to be notified of, and to participate in, the hearing of an application to a court to set aside a rescue resolution or replace the business rescue practitioner[27] or to commence business rescue.[28] These are just some of the rights of affected persons that a director, as employee, will automatically have.

5 Special Rights of Employees

However, it is specifically as employees that executive directors would have special and strong rights in terms of section 144 of the Companies Act that they would not otherwise enjoy.

5 1 Committee of Employee's Representatives

One of these special rights is to form a committee of employee representatives.[29] As already mentioned, employees who are represented by a registered trade union may not exercise this right themselves but must do so through their trade union. Since directors would not be represented by a trade union, each individual executive director would have this right, and would quite possibly be able to exercise a substantial degree of influence on the committee as a result of their direct involvement in the company and better knowledge of its affairs.

5 2 Employment Contracts and Remuneration

Two sections are contained in Chapter 6 of the Companies Act that emphasise the extensive rights afforded to employees. These are section 136 that deals with the effect of business rescue proceedings on employees and employment contracts and section 135 that deals with post-commencement finance.

Section 136(1) provides that employees who were employed before the commencement of business rescue proceedings must continue to be employed on the same terms and conditions unless changes occur in the

27 *Idem* s 130(3) - (4).
28 *Idem* s 131(2) - (3).
29 *Idem* s 144(3)(c).

ordinary course of attrition or the employees and company agree to different terms and conditions in accordance with applicable labour laws.[30] Employment contracts are also specifically excluded from the power of a business rescue practitioner to entirely, partially or conditionally suspend or apply to a court for cancellation of any contractual obligations of the company arising during business rescue proceedings out of contracts entered into before the business rescue started.[31]

Interestingly enough, section 137(5) provides that a practitioner may apply to a court for an order removing a director from office on one of the specific grounds listed in the subsection. These grounds are limited to failure by the director to comply with a requirement contained in Chapter 6, or an act or omission by the director obstructing the practitioner in the performance of his or her duties during business rescue. This provision means that an executive director could be removed as director by a court order, but would still be an employee with all the rights of an employee in business rescue proceedings. The practitioner would also not be able to amend the terms and conditions of employment of such a director without his consent even if he is removed from office by the court[32] and would have to follow the prescribed procedures of the Labour Relations Act in order to dismiss or retrench the director.[33]

In terms of section 135, any remuneration, reimbursement or other money relating to employment that becomes due and payable by a company to an employee during business rescue proceedings and is not paid to the employee must be treated as post-commencement finance.[34] The section further states, even if the company obtains post-commencement finance from any lender, that these employee claims will be paid directly after the payment of the business rescue practitioner's remuneration and expenses.[35] The employee entitlements will therefore be treated as super preferent claims and will rank above the claims of post-commencement lenders – even those whose claims may be secured. Unlike the Insolvency Act,[36] section 135 does not limit the period or amount of such employee claims. If directors of the company are to be treated as employees during business rescue proceedings, their unpaid salaries, bonuses and other benefits, whether reasonable or unreasonably high, would also attract super preference in terms of this section.

30 *Idem* s 136(1).
31 *Idem* s 136(2)(a).
32 *Idem* s 136(1)(a).
33 *Idem* s 136(1)(b).
34 *Idem* s 135(1).
35 *Idem* s 135(2) and 135(3).
36 Act 24 of 1936.

5 3 Submission to Creditors Before Voting on a Plan

Another important right that directors would have in their capacity as employees, is the right to be present and to make a submission to the meeting of creditors before the creditors vote on the acceptance or rejection of a business rescue plan.[37] They would not have this right as directors, and even creditors have not specifically been granted this right. The right to address the meeting will put the directors in a position in which they are able to directly influence creditors to vote for or against the plan and neither the practitioner nor the creditors will be able to prevent them from exercising this right.

5 4 Proposal of an Alternative Plan and Acquiring Votes

If a business rescue plan is rejected, employees may propose the development of an alternative plan,[38] or may offer to acquire the interests of any affected persons who voted against the plan to acquire or increase their own voting rights.[39] Creditors, as affected persons, may only acquire the voting interests of other creditors[40] and not those voting rights of shareholders, but employees, like shareholders, may acquire both.[41] However, shareholders do not have the right to propose an alternative plan unless they have the right to vote on the plan because their rights would be altered, which is not usually the case.

Section 153(1)(a)(ii) provides that if a business rescue plan is rejected, the practitioner may apply to a court to have the result of the vote set aside on the grounds that it was inappropriate. If the practitioner fails to take any action after rejection of the plan, any affected person present at the meeting may make this application to a court.[42] Since the executive directors, as employees, have the right to address the creditors' meeting before voting takes place, the question arises whether they will be 'present at the meeting' as required by the subsection and thus authorised to bring such an application. Shareholders will not be present at the creditors' meeting and will presumably not have this right if the rescue plan is rejected by the creditors. This right would give executive directors very strong rights and, considering the rather surprising willingness the courts have displayed in some cases to grant such an application in spite of strong objections by major creditors, this could allow the directors to have a plan approved that favours them or buy them more time before the inevitable liquidation of the company.[43]

37 S 152(1)(c) read with s 144(3)(e) of the Companies Act.
38 *Idem* s 144(3)(g)(i).
39 *Idem* s 144(3)(g)(ii) read with s 153(1)(b)(ii).
40 *Idem* s 145(2)(b)(ii).
41 *Idem* s 144(3)(g)(ii).
42 *Idem* s 153(1)(b)(i)(bb).
43 See for example *Copper Sunset Trading 220 (Pty) Ltd v SPAR Group Ltd and Normandien Farms (Pty) Ltd* 2014 6 SA 214 (LP); *KJ Foods CC v First National Bank* [2015] ZAGPPHC 221.

Although directors have fiduciary duties and duties of care, skill and diligence to the company in their capacity as directors, they are released from most of these duties during business rescue proceedings if they act in accordance with the instructions of the business rescue practitioner.[44] Combined with the fact that they would be acting in their capacity as employees when exercising the abovementioned rights, it would seem as if they need not take the best interests of the company into consideration when proposing an amended plan or acquiring the votes of creditors and shareholders and using those votes to approve a rescue plan.

The matter of directors who also act in the capacity of employees has been under the spotlight before. In *Chillibush Communications (Pty) Ltd v Johnston & Others*, the Labour Court referred to the *Amazwi Power Products* case where it was stated that the individual must be seen from the perspective of the capacity in which he is acting at a specific moment. The approach proposed by the *Chillibush* case includes the following outlook: when the individual is engaged in activities related to his duties as a director, the company's constitution and shareholders' resolutions should prescribe the way in which he acts but when the same individual is busy with obligations resulting from his employment relationship, applicable labour laws should govern his conduct.[45]

In the *PG Group* case, Revelas J stated that the office and duties of a director are separate from his status as an employee, and must be distinguished.[46] Therefore, it is clear that a director occupies a dual position, as a 'holder of office on the one hand and [as] an employee on the other'.[47]

6 Conclusion

It is impossible to say with any certainty whether the legislature considered the fact that directors could also be employees of the company and thus be entitled to the special rights, powers and super preferences that are given to employees in business rescue proceedings. However, in the absence of any provision clearly, or by implication, excluding executive directors from being regarded as employees, it must be assumed that they have all the rights, powers and benefits that any other employees have during business rescue proceedings, even if that position may lead to abuse of the process or have other undesirable (although possibly completely unintended and unforeseen) consequences.

44 S 137(2)(d) of the Companies Act.
45 *Chillibush Communications (Pty) Ltd v Johnston & Others supra* n 14 at par 29.
46 *PG Group (Pty)) Ltd v Mbambo NO & Others supra* n 13 at par 26.
47 *Ibid*; *Stevenson v Sterns Jewellers (Pty) Ltd* 1986 7 *ILJ* 318 (LC).

Aantekeninge/Notes

Fair deuce: an uneasy fair dealing-fair use duality

1 Introduction

At the consultations between the Department of Trade and Industry and major stakeholders on 11 and 27 August 2015, brought on by the publication of the Copyright Amendment Bill (GN 642 (2015-07-27); GG 39028), the importance of users' entitlements was emphasised in excellent presentations and insightful commentary elaborating on this theme. The intention of this note is to continue this dialogue and the numerous published comments by deconstructing the fair use amendment proposed by section 14 of the Amendment Bill, to be known as section 12A of the Copyright Act 98 of 1978.

The bill engenders a disharmonious marriage of two distinct but integrally related empowering provisions, which was made clear during the August consultations. Section 12A of the bill instils confusion by creating a largely pointless, notionally discordant and thoroughly bizarre duality which provides so much matter for objection that this analysis is devoted entirely to it and cannot address the proposed additions to the current section 12. This note gives in-depth commentary on the course set by the bill, specifically its attempts at crafting a fair dealing/fair use model. The approach is decidedly critical, punctuated by carefully considered proposals to optimise the balance between users' entitlements and owners' interests.

The developments envisioned by the bill certainly present some worthy trajectories which could set a visionary course for subsequent shaping of South African copyright law through the contextual and purposive interpretation of unique clauses. Notwithstanding this noble pursuit, the execution places overly-restrictive conditions on fair use, and the senseless differentiation between digital and analogue formats, purposes of use, and forms of expression must be questioned. The flaws in the proposed model are revealed to point out the fault lines in every user's legal position that it will expose if enacted, before proposing an alternative fair use/fair dealing hybrid.

2 The Bill

2 1 The Conceptual Differences

It is necessary to distinguish the doctrines of fair dealing and fair use. Fair dealing has its origin in the Imperial Copyright Act of 1911, which made provision for newspaper summaries (s 2(1)(i)), and expanded into section

How to cite: Shay 'Fair deuce: an uneasy fair dealing-fair use duality' 2016 *De Jure* 105-117
http://dx.doi.org/10.17159/2225-7160/2016/v49n1a7

12 of the current South African Copyright Act. Section 12 was initially based on section 6 of the English Copyright Act of 1956 then amended to its current form by the Copyright Amendment Act 125 of 1992. It is thus a creature of statute, with (comparatively) clearly defined purposes and boundaries and a wealth of case law from many jurisdictions to clarify it. Fair dealing operates by exempting the use of copyright works for certain statutorily-defined purposes and only relates to particular types of works. The relative advantage of the fair dealing approach is that it provides more extra-judicial clarity to users who take the trouble to familiarise themselves with the statute, but this naturally comes at the cost of flexibility.

Fair use, by contrast, is a creation of the American bench first applied in *Folsom v Marsh* (9 F case 342 1841) and subsequently taken up in statute, currently embodied in section 107 of the Copyright Law of the United States (17 USC 1978). It provides inherent flexibility by not restricting its application to a *numerus clausus* of permitted purposes of use, and is best understood as a mechanism to determine whether a user's conduct is fair rather than a set of requirements to be met (Hughes 'Fair use and its politics – at home and abroad' in Okediji (ed) *Copyright Law in an Age of Exceptions and Limitations* (2016) (forthcoming)). This presents a marked advantage to users and better embodies the broad array of public interest reasons that exist to legitimately use copyright works without prior authorisation or paying compensation. It enables transformative use of digital content for a perpetually expanding range of applications. The cornerstone attribute for the use to be allowed is fairness, which is also the substantive requirement of fair dealing (flanked by formal and threshold requirements).

These are the key differences between the two parallel doctrines. Already it should be clear that the two cannot operate in unison, as they serve the same function in different ways and fair dealing will be largely subsumed by fair use. There is no sense in retaining an expanded fair dealing exception (as proposed by s 13 of the Bill) *and* adopting a new, catch-all defence. Not only does this complicate matters unnecessarily, it compounds the risk of inherent linguistic and substantive contradiction as well as having an enormous area of convergence – effectively doing the same work, both being rendered cross-redundant. A blended model that replaces the existing fair dealing provisions and takes the non-exhaustive fair use approach – that enumerates the character of use that could fall under its protection – should instead be considered. This exception could also be invoked under circumstances that are in the public interest and meet the requisite fairness standard but which were not foreseen by the legislature. A critical analysis of the proposed amendments follows below.

2 2 Section 12A(1)

One laudable development is the generality of scope – the provision is not constrained to certain categories of works, as the current fair dealing

exceptions are (parts of which do not apply equally across all categories of works). This represents a shift towards an open and inclusive approach that can adapt as and when creative culture requires it to. Unfortunately, this positive development is rivalled by numerous insertions that should not survive the redrafting of section 12A of the South African Copyright Act.

The very first subsection unnecessarily complicates matters by stating that 'fair use of work eligible for copyright includes the use by reproduction in copies, translation or by any other means'. It is difficult to extract cogent meaning from either part of this statement, but the latter part is the most contentious. It appears to derive from the relatively out-dated American provision which was drafted in a time when 'use by reproduction in copies or phonorecords or by any other means' (presumably an attempt at keeping its application technology-neutral) represented the most prudence that could be achieved in the context of the existing state of technology. However, because this provision was crafted by and for a foreign jurisdiction, it does not cater for South African law as it was not designed for it. For example, what about adaptations that are neither copies nor translations, like most parodies and countless other forms of use? The fair use provision was not created with adaptations in mind because American copyright law does not grant a separate right of adaptation and cases are decided on the question of whether there has been a *reproduction* of the original work. However, there is no reason that a direct infringement of the right to make an adaptation cannot be accommodated as fair use if the standard fairness assessment so concludes. Notwithstanding this formulation, the proposed fair use amendment injects confusion from the opening bid by adopting provisions piecemeal from a foreign template.

The standard fair dealing construction ('[c]opyright shall not be infringed by any fair dealing', as contained in the current s 12(1)(a) of the South African Copyright Act) is preferable as it attains a more inclusive neutrality regarding technology, and indicates that all of the exclusive rights that comprise an owner's copyright are implicated. The phrase stems from fair dealing provisions but can confidently be used to accustom fair use to South African law, if that is the intention.

2 3 Section 12A(2)

The second subsection is a reiteration (arguably in a looser form) of some of the existing fair dealing purposes, but crucially employs the phrase 'for purposes such as' instead of the current 'for purposes of', which closes the list of the permitted types of conduct. This phrase performs the pivotal function of fair use and makes the list inclusive rather than exhaustive. Although its inclusion is to be commended, it should go further in crafting a uniquely South African contextualisation of the defence. It is submitted that the existing list of purposes, currently concentrated in section 12(1) but scattered throughout the subsequent

subsections, be incorporated and consolidated here, as well as the additional provision for parody (see par 2 5 below).

Unfortunately, section 12(2) is too heavily based on the phrasing of the 1978 American exception (s 107 USC 17 *supra*), which can and should be improved in view of subsequent developments relating to the interpretation of the fair use defence and the expansion of subject-matter suitable for copyright protection – as well as the evolution of social and cultural context and needs in the intervening forty years since its statutory formulation. Such improvements are suggested below (see par 3 below).

2 4 Section 12A(3)

The (presumably unintended) effect of subsection (3) is worrying. The amendment reads:

> Notwithstanding any provision of this Act, the use of digitised copyright material published in the internet [sic] and other electronic media shall be restricted for educational purposes, unless covered by an explicit notice for [sic] request for licence to use the digitised material.

Given that this provision immediately follows the central fair use exception itself, it must be read to refer to this use of 'digitised' content. The suggestion that fair use of any variety, other than for educational purposes, can only be undertaken in relation to analogue content is absurd. This provision goes against the very grain of the integral Technological Neutrality principle recognised worldwide (Craig 'Technological Neutrality: (Pre)Serving the Purposes of Copyright Law' in Geist (ed) *The Copyright Pentalogy* (2013) 271-305), and seems to imagine that the prevalent methods of use have remained unchanged over the past few decades.

The limitation that this wording places on the fair use provision could relegate its utility to the margins. The practical effect of restricting fair use for criticism, comment, scholarship and even judicial proceedings to antiquated forms of media could render some industries (such as journalism) impossible to legitimately pursue, unless only print media is resorted to, and others (such as film review) virtually meaningless (if only films in analogue form can be used, as this will likely require obtaining such a format from the copyright owner, given the increasing scarcity of analogue material). There is no clear justification for this difference and it remains indefensible until it is made apparent that the effects have been properly considered and that it serves valuable objectives.

It would be nonsensical to read the fair dealing provisions (if still extant) to include digital content if its sister provision, which covers much (if not all) of the same ground, restricts such use to analogue material. Therefore, the fair dealing provisions would either validate conduct that the fair use provisions specifically exclude, or they would be

reined in to comply with this new restraint. Both possibilities are to be avoided at all costs.

The problems with this provision do not end here. If a user wishes to invoke their fair use entitlement for any reason other than an educational one, they must first issue 'an explicit notice for [sic] request for licence to use the digitised material' (s 12A(3)).

On its kindest reading, this wording requires users to make a bona fide attempt to licence the use before proceeding with a fair use. Naturally, this places an immense burden on users to locate the owner of any material they wish to use and negotiate such use (which may, quite legitimately, not always be flattering to the owner's work). This undermines the rationale and purpose of fair use and repositions it as a mechanism exclusively for relieving market failure. This proviso must be rejected forthwith, as it would result in the end of fair use.

2 5 Section 12A(4)

The next provision is equally riddled with conceptual misunderstanding and misguided execution. It starts encouragingly enough by allowing for 'some limited and reasonable use of copyrighted work for purposes of cartoon, parody or pastiche work … [sic]'. Evidently the bill seeks to exempt parody and similar uses of copyright works. It should be noted that currently the Copyright Act does not allow this type of use of copyright works, but section 16(1) of the Constitution of the Republic of South Africa, 1996, undoubtedly exempts this form of expression. The aim of the bill is plainly to carve out an exception in line with section 16 of the Constitution, thus lending valuable clarity to potential users and it should be retained in the bill after revision. However, this specification of purpose arguably contributes nothing to the exemption granted by section 12A(2) of the Copyright Act, as it is clear that the non-exhaustive nature of the exception will include free speech in the form of parody in line with section 16(1) of the Constitution. That said, specific recognition of this valuable form of expression is noble and potentially permits users greater confidence that their conduct is protected as fair use by codifying an existing constitutional right in a specific instance.

Ultimately, if it is to be included for purposes of extra-judicial certainty (which is recommended), this should be done in the general fair use clause along with the other typical purposes that direct its application. Listing a short variety of virtually synonymous terms is a characteristic of the fair dealing approach (s 30A of the United Kingdom's Copyright Designs and Patents Act of 1988 (pending promulgation); s 41A of the Australian Copyright Act 63 of 1968; s 29 of the Canadian Copyright Act (C-42) of 1985) and is peculiar to the fair use context, although unobjectionable in principle. That said, it is puzzling that 'cartoon' was chosen for inclusion above any other term, as a cartoon is a *medium* of expression rather than a form. A cartoon could constitute parody, but it could also be used as a vehicle for any other form of speech (such as

political, commercial or even hate speech) or as an adaptation of virtually any literary work (where it would adapt the written narrative to a visual artistic narrative). It is preferable for a legislative provision to remain medium neutral and content specific, with substantive aims that reflect constitutionally-entrenched rights and freedoms.

This befuddlement aside, the remainder of the sentence warps its admirable inclinations. The provision continues:

> for purposes of cartoon, parody or pastiche work [sic] in songs, films, photographs, video clips, literature, electronic research reports or visual art for non-commercial use, without having to request a permission [sic] specified in the Schedule hereto.

Dictating the form that a parody may take is unreasonably restrictive, especially when the forms are oddly specific without legislated definition: songs (presumably including the literary and musical works and potentially sound recordings); visual art (presumably covering most but not all of the forms listed in the definition of 'artistic work'); and both video clips and films (the latter presumably including video clips if the statutory definition of 'cinematograph film' is followed). Despite genuine interest, the author was unable to locate a parodying electronic research report and is confused – if intrigued – by what this wording could possibly refer to, or seeks to achieve. This may be a case of a confused preposition, but prepositions provide substantive meaning in legislation. If the preposition 'in' was perhaps mistakenly inserted instead of 'of', the sentence would change meaning completely. It would then allow parodies *of* songs, films, photographs, and video clips, which is a slightly better *modus operandi*, although misplaced in the fair use doctrine, belonging, again, to the fair dealing canon. However, there is no apparent reason – nor is it the norm internationally – to limit the parody exception to enumerated subject matter, perhaps other than those being the only conceivable types of copyright works that can meaningfully be parodied. This is evidently not the case here; the satirical performance of dramatic works being analogue works and website parodies being digital works that are excluded *ex facie*.

It is further questionable whether there is any basis to limit the availability of this exception to non-commercial uses, especially considering that this qualification creates confusion when read with subsection 5(d) (see par 2 6 below). The fallacy of equating commercial use with unfairness has been exposed and warned against by many foreign courts and governmental reviews that it is trite. At its softest construction, the non-commercial requirement will create a presumption of unfairness, and at its strictest, will completely invalidate the use of this exception in commercial instances. It is submitted that guidance should be sought from the numerous investigations undertaken by foreign governments into the use and value of allowing commercial parodies of similarly commercial works (Gowers *Gowers Review of Intellectual Property* (2006) recommendation 12; Hargreaves *Digital Opportunity* (2012) recommendation 5; McKeough *Copyright and the Digital Economy*

(2014) recommendations 5-3; see also Shuttleworth Foundation *South African Open Copyright Review* (2008) recommendation 2 available from http://ip-unit.org/wp-content/uploads/2010/07/opencopyrightreport1.pdf (accessed 2015-04-22)).

Critically, the non-commercial rider should be removed from the proposed exception (currently inserted in the parody defence in s 12A(4)) in order to maximise the free speech benefit that it carries. There can, in principle, be no conceivable objection to commercial parodies, especially considering the established legal fact that speech (as protected by section 16 of the Constitution, and specifically parody as speech) can be commercial, as was the case in *Laugh it Off CC v South African Breweries International (Finance) BV t/a Sabmark* (2005 (8) BCLR 743 (CC)) where it was condoned in relation to a trade mark. This accords with foreign case law from jurisdictions that have seen some use of their parody exceptions, where the commercial nature of the use invariably plays a role in determining fairness but does not disbar it from the outset (*Campbell aka Luke Skywalker et al v Acuff-Rose Music Inc* 510 US 569 (1994); *Mattel v Walking Mountain Productions* 353 F 3d 792 (9 Cir 2003)).

It must also be assumed that if the request for permission to use the work as the subject of a parody is turned down (which is not unlikely, given the nature of the request), the user may then rely on her fair use entitlement purportedly granted by this very section. This would presumably also be the case if the granting of permission is made contingent on financial consideration, given the purpose of fair use (which is to enable unauthorised and uncompensated use). Of course this raises the question of why the permission must be sought in the first place.

The referral to an appending schedule also seems to be a misfire, because this schedule does not refer to parody of works once, as it only relates to educational uses of translations – a decidedly different endeavour.

Subsection (4) then proceeds to state that the fair use for purposes of cartoon, parody or pastiche, as outlined above, includes:

(a) quoting the works of the copyright owner in a manner that is reasonable and fair;

(b) making copies of eBooks or compact discs purchased by the user; or

(c) transferring of purchased compact discs onto the user's MP3 format player.

The first of these enumerations demonstrates a misunderstanding of the parody mechanism and the latter two have nothing to do with it. Depending on the form of the original work and the consequent form of the parody (although inter-form parody is of course possible), quoting from a work is not a typical tactic of the parodist. Parodies usually constitute an adaptation of a work more than a reproduction, although

the key elements (likely comprising a substantial part) of the original work must be present for the parody to assume that status (Visser 'The Location of the Parody Defence in Copyright Law' 2005 *CILSA* 342). If the original work is not recognisable in the derivative work, the parody has failed in its core aim and function (and, ironically, will neither qualify for nor need the present exception). Even if the subject were a literary work and thus susceptible to being quoted, quotation is resorted to more often by literary critics than by social commentators who choose parody as their form of commentary. A more common style of critiquing literary works is satire, which uses a recognisable element of the protected literary work such as its peculiar style, plot or themes and provides a satirical take on this element of the work or even society more broadly (*Dr Seuss Enterprises v Penguin Books* 109 F 3d 1394 (9th Cir 1997)).

Once relieved of the parody context in which they are currently anchored, the latter two provisions are valuable additions to South African copyright law, but should be formulated more broadly and crafted in a separate provision as it has nothing to do with fair use. The format shifting provisions (as they are known) allow users to convert media that they are in lawful possession of into another format and transfer these files onto a personal media device (e.g. 'WAV' files from a compact disc to 'MP3' on an electronic music playing device). This is another meaningful development but must be divorced from the fair use provision. However, it is imperative for the exception to go beyond its envisioned scope of music and eBooks, as well as to go beyond the restrictive formulation that only applies to music purchased in the form of compact discs – which is becoming increasingly rare – and enable the similar use of digitally purchased music and other media. It could also be worth investigating the inclusion of a tax imposed on electronic media devices to compensate copyright owners for their consequent loss of revenue.

2 6 Section 12A(5)

The standard factors for establishing the fairness of the use have been adopted, albeit amid some alteration. These factors have been taken largely from section 107 of the United States Copyright Law, replete with American terminology, and infused with existing provisions of the South African Copyright Act. The first three factors in section 12A(5) are identical to the American counterpart, directing that the purpose and character of the use, the nature of the work, and the amount and substantiality of the portion used in relation to the work as a whole must be considered. This much can be accepted as an established part of the fair use doctrine, but the amendment then veers off course by imposing rigid quantitative thresholds on the last of the three factors mentioned. In addition to considering 'the amount and substantiality of the portion used in relation to the copyright work as a whole', section 12A(5) also requires that it must be considered:

> whether the use of the copyrighted work is fair and proportionate, by considering further that (i) the use of copyrighted work is of few lines [sic] of a song, literature [sic] or few parts [sic] of a film or art work [sic] for cartoon, parody or pastiche; (ii) the use of the *whole* copyrighted work for cartoon, parody or pastiche for commercial use shall require the issuance of licence [sic]; and (iii) the use of copyrighted work is compatible with fair practice in that the source and the name of the author are mentioned in the publication, broadcast, recording or the platform where the copyrighted work is displayed (italics in original).

This provision is quite inexplicable. It seems to relate only to determining whether a parody constitutes fair use, which triggers an internal interpretive implosion that would result in the entire allowance made for parody being rendered useless, and may have a similar impact on other types of use. If it is correct that sub-factors (i)-(iii) apply only to parodies, the reasons for which remain evasive, this would betray the complete misunderstanding of the practicalities of parodying expression, evidenced most starkly by the last of the three requirements which are discussed in due course.

The provision goes awry in the first clause, which neglects to state what the use should be proportionate to. The safest guess is probably that the use must be fair in proportion to the work as a whole, but this reading perfectly positions this new factor to subsume the relevance and function of the immediately preceding factor – that of 'the amount and substantiality of the portion used in relation to the copyright work as a whole'. So far it seems as if this fourth factor can be interpreted quantitatively and qualitatively, much like the third factor, but this purposeless – if benign – perspective is dismantled by what follows.

Setting quantitative limits on what constitutes fair use (as does section 12A(5)(i)) defies the very purpose of the chief doctrine of user empowerment. Fair use is necessarily context-sensitive and will be rendered virtually impotent in many important current forms of application if quantitative restrictions, however vague (e.g. 'few parts of a film or artwork'), are imposed without distinction. Although this quantitative qualification is structured as an elaboration of the novel fourth factor for determining fairness, it reads as barring a finding of fairness on this factor if more than the permitted few lines/parts of a work is used, regardless of the qualitative importance of said lines/parts. The *ex ante* deeming of unfairness goes against the overriding qualitative nature of the fairness inquiry (although, interestingly and seemingly inconsistently, deeming provisions can be of tremendous value to users if inverted to deem conduct fair, thus discouraging litigation). The tried-and-tested evaluation techniques associated with fair use should not be warped without reason.

The second factor enumerated by section 12A(5) does no better than its anterior counterpart, stating that a commercial parody that uses the whole copyright work shall require a licence and thus cannot be fair use. First, an absolute prohibition on commercial parodies – which is what

the requirement of obtaining a licence does, thereby invalidating fair use by requiring consent – is senseless and without international precedent. As mentioned, fair use cases often involve a commercial use and nowhere has it been suggested that the presence of this attribute should prohibit a finding of fair use per se. While the commerciality of a parody should undoubtedly be considered in determining fairness, elevating this consideration to the status of the pivotal deciding – formalistically barring, even – element retraces the misguided steps in American jurisprudence following on the decision in *Sony Corporation of America v Universal Studios Inc* (464 US 417 (1984)) that took decades to correct. In fact, this provision would go further even than the judicial misstep by creating a formalistic requirement, not a mere rebuttable presumption as did the *Sony* case.

Second, and crucially, the quantitative barrier imposed on users ignores the fact that often the essence of the whole work must be reproduced in order for the parody to hit its mark. Consider an artistic work such as a painting or photograph: if the artistic work achieves suitable fame or notoriety for it to be susceptible to popular parody, reproducing a small part of the painting or photograph will almost inevitably not sufficiently signify the original work. However, parody will never reproduce a work without modification, as this will simply and self-evidently not be parody. The focus of the parody justification should be on how transformative the use is, not how much of the original work is reproduced. Parody, much like the currently permitted purposes of use stipulated in section 12(1) of the Copyright Act, cannot be donned after the fact to validate brazen reproduction of a work without any parodying intention or modification.

The third subsection does not explicitly restrict itself to the parodying uses of copyright works, but, read with the antecedent subsections, it is not an unreasonable reading that this is the legislature's intention. If this is the case, it effectively prohibits any cartoon, parody or pastiche, in its currently prevalent form, where no attribution is given to the work that is being parodied (on the futility of this requirement in relation to parody, see Visser 2005 *CILSA supra* at 336-337). However, even on the preferable reading that this does not necessarily relate to parody only, the requirement is out-dated and the wording drastically restricts its utility in orchestrating fair use. The stipulation that the use must comply with 'fair practice' could be helpful if it is read as connoting fair practice of the particular industry to which the user belongs (if applicable). In other words, where the user reproduces a copyright work for a particular purpose – such as reporting on current events or reviewing the work – such use should accord with standard practice in the particular industry, which could naturally vary from one profession to the next and will change as the industry does. However, to then constrict the manner of accreditation (which could potentially comply with standard practice for the industry, such as providing a hyperlink back to the original work if applicable, but does not adhere to the letter of the law) would effectively retrograde the proper context and application of this aspect of fair use to

the analogue age, imposing an anachronous *modus operandi* on users in the digital space, even after the sensible finding in *Moneyweb (Pty) Ltd v Media 24 Ltd* (2016 3 All SA 193 (GJ)) that providing a hyperlink back to the source can fulfil the requirement of sufficient acknowledgement.

It is submitted that if this requirement is found absolutely necessary (it is not a standard feature of fair use) the requirement of 'sufficient acknowledgement' (such as that found in s 30(2) of the English Copyright, Designs and Patents Act of 1988) should replace the dated and formalistic requirement that the source and name of the author be mentioned. Situating the admittedly broad 'sufficient acknowledgement' in a more concrete, but steadfastly *ad hoc* and interpretive context, can be achieved by retaining the reference to 'fair practice', if such phrase is taken to refer to the particular user's industry as suggested above.

The adoption of the final of the fifth factors from the American statute is unproblematic and is a valuable aid in determining whether the use would have a harmful impact on the incentive to create copyright works if it is sustained.

2 7 Section 12A(6)

Section 12A(6) continues in puzzling fashion by confining the first two subsections (the latter of which comprises the general fair use exception) to non-commercial uses. This seems to be an unwelcome bit of borrowing from the fair dealing model, which specifies that the use of a copyright work for some purposes should be non-commercial, such as 'private study' and 'personal or private use' (s 12(1)(a) of the Copyright Act). The problem in making this a blanket requirement is that some legitimate uses which are currently allowed (and should legitimately be allowed in future), are almost invariably for commercial gain. This includes news reporting and criticism or review of a work, both of which are contained in the inclusive list of characteristic purposes espoused by the amendments to section 12A(2) as well as the existing section 12(1)(b)-(c). It also causes an *ex facie* inconsistency by insisting that all use undertaken in terms of subsection (2) be non-commercial, despite subsection (2) including 'professional advice' as an explicitly permitted purpose. Further, imposing the proposed ban on all commercial use would not only go against established doctrine and betray one function of the exception (which is to obviate market failure), it would render meaningless the context-sensitive application of numerous fairness factors (notably the considerations of 'the purpose and character of the use including, whether such use is of a commercial nature or is for non-profit educational purposes' and 'the effect of the fair use upon the potential market for or value of the work'). This single-sentence subsection threatens to confuse and contort users' entitlements in unprecedented and unwelcome ways and should be done away with.

2 8 Section 12A(7) & 12A(8)

The last two subsections of a very long section should not be present as they purportedly relate to parallel importation of trademarked goods and encryption of computer-generated data, which do not deal with fair use. It is possible that the last subsection is meant to protect users' entitlements under this section in relation to the legitimate circumvention of Technological Protection Measures (TPMs) to exercise fair use entitlements. However, there is nothing to suggest that this is the case as TPMs are regulated separately in the bill and there is a reinforcing provision aimed at protecting such entitlements in section 28P of the Copyright Amendment Bill (which tragically forgets to specify s 12A along with the other 'general public interest exceptions', such as the current s 12).

Space does not allow for expanding this critique to the related subsequent provisions relating to exceptions for educational purposes, persons with disabilities, and libraries, but the prognosis for these provisions is no better than for section 12A.

3 Further Proposals

A deeming provision such as that found in section 40(5) of the Australian Copyright Act, which relates only to use for purposes of research and study, should be considered as scholars and librarians would benefit enormously from clear but malleable quantitative guidelines, and any use that exceeds the relevant threshold must be justified as usual.

One particularly significant function that this exception could play in South African law is enabling the use of copyright works for the transformative creation of derivative content by Internet users. This flourishing environment of creativity should be accommodated and nourished by copyright law, as copyright owners could potentially assert their rights simply to silence user-cum-creators of their works (users that engage in transformative use of copyright works to create new, derivative works). Fair use is more permissive towards such unauthorised use, which makes it more valuable than fair dealing on this point.

The fair use provision should enumerate a non-exhaustive list of conceivable purposes that may be judged to be fair in order to characterise the type of use that the legislature intends to cater for. This has been achieved for the most part, but it is submitted that the characteristic purposes should be amended to better suit the core purpose of the provision. If a proper preamble is supplied, purposive interpretation becomes significantly more focused on producing the desired outcome. Currently, the proposed provision lacks context, vision and imagination, all of which are necessary to craft a new benchmark fair use exception. Many of the bill's intended objectives can be salvaged, but

only if these objectives are clearly stated in the preamble or in policy which, unfortunately, has also not been adequately achieved.

RM SHAY
University of South Africa

To what extent should the Convention of Cabinet Secrecy still be recognised in South African constitutional law?

1 Introduction

This note deals with the question whether, under the present-day South African constitutional law, members of the public are entitled to any information held by cabinet (the national executive). This question is considered with specific reference to the law of comparative jurisdictions. Two competing principles must be considered: on the one hand, the constitutional right of access to information held by the state (cabinet information in the present case) and, on the other hand, the convention of cabinet secrecy. The latter originated in English constitutional law, which might be argued to have been inherited by South Africa.

The note will first deal with the relevant provisions in the Constitution of the Republic of South Africa of 1996 (hereafter the Constitution), the Promotion of Access to Information Act 2 of 2000, and applicable dicta from South African case law. The law of selected comparable jurisdictions which are sufficiently similar to that of South Africa will then be discussed. Such foreign law would be the most instructive for the local legal position and thus capable of reaching a motivated conclusion on the matter under discussion. The jurisdictions selected for comparative analysis are those of England (and Whales), Canada, Australia, India and Kenya.

2 The Position in South Africa

Section 32 of the Constitution provides, with regard to the constitutional right of access to information, that:

(1) Everyone has the right of access to –

(a) any information held by the state; and

(b) any information that is held by another person and that is required for the exercise or

protection of any rights.

How to cite: Malan 'To what extent should the Convention of Cabinet Secrecy still be recognised in South African constitutional law?' 2016 *De Jure* 117-133
http://dx.doi.org/10.17159/2225-7160/2016/v49n1a8

(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

The founding values of the South African Constitution, outlined in section 1, are arguably also pertinent in dealing with the issue of access to information. Section 1 provides as follows (own emphasis):

> The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
>
> (b) Non-racialism and non-sexism.
>
> (c) Supremacy of the constitution and the rule of law.
>
> (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of
>
> democratic government, *to ensure accountability, responsiveness and openness.*

It should be clear from the emphasised part of section 1 that the *raison d'être* of the values is to *ensure* accountability, responsiveness and openness. Hence, the values set out in section 1(a), like the values mentioned in the other subsections, are intended to achieve an objective, namely, to ensure accountability, responsiveness and openness (transparency).

In spite of the fact that the section 1 values are not justiciable (*Minister of Home Affairs v NICRO* 2004 (5) BCLR 445 (CC) 455D-E par 21), they fulfil a significant function in litigation, namely, as an important aid to interpretation and a basic legal source of last resort. Therefore, whenever a provision is open to more than one interpretation, the interpretation that best advances the achievement of accountability, responsiveness and openness should be preferred. This is particularly pertinent for the present issue dealing with access to information held by the state (cabinet in the present discussion): a context in which the achievement of accountability, responsiveness and openness is patently relevant.

Thus, in *Minister of Home Affairs v NICRO* (*supra* at 455 D-E par 21) the Constitutional Court stated as follows:

> The values enunciated in s 1 of the Constitution are of fundamental importance. They inform and give substance to all the provisions of the Constitution. They do not, however, give rise to discrete and enforceable rights in themselves. This is clear not only from the language of s 1 itself, but also from the way the Constitution is structured and in particular the provisions of Chapter 2 which contains the Bill of Rights.

The same sentiment was voiced in *Chirwa v Transnet Ltd* (2008 (4) SA 367 (CC) par 74).

The legislation that was passed in order to give effect to section 32(2) of the Constitution is the Promotion of Access to Information Act 2 of

2000 (hereafter PAIA). PAIA provides for a sweeping right of access to information held by public bodies (s 11). This Act, however, does not apply to a record of the proceedings of cabinet or its committees (s 12(a) of PAIA).

This lacuna has two implications. First, section 32 of the Constitution, and not PAIA, is the law which is applicable to the present issue. Second, whenever a public body, including cabinet, denies access to information it would constitute a *prima facie* infringement of the constitutional right of access to information. Such infringement would be justified only in terms of a law of general application (in accordance with s 36 of the Constitution) but with the exclusion of any of the exceptions provided for in PAIA, more particularly in Chapter 5 (ss 33-46). If the respondent (cabinet) would deny access, therefore *prima facie* infringing the right of access to information, it bears the onus of showing that the requirements for the justification of such denial, as set out in section 36(1) of the Constitution, have been met (*Ferreira v Levin* NO 1996 (1) SA 984 (CC) par 44).

Such refusal to disclose cabinet information may be justified in terms of the convention of cabinet secrecy (privilege/confidentiality), which is arguably a law of general application as envisaged in section 36(1) of the Constitution (in this regard, see the argumentation of Mokgoro J in *President of the Republic of South Africa v Hugo* 1997 (6) BCLR 708 (CC) par 99). The convention originated in the Westminster constitutional order as practised in the United Kingdom (UK) and has been transplanted into other common law jurisdictions that follow the Westminster model.

The basis of the convention of cabinet secrecy is the principle of the collective accountability of the national executive (cabinet) to the national legislature (and to the public). In terms of this principle, all members of cabinet assume collective responsibility for the policies adopted by cabinet, thus preventing an individual member from distancing himself/herself from a decision on the grounds that he/she is not in agreement with it and has expressed such disagreement during cabinet deliberations. In this way:

- cabinet solidarity is maintained and promoted; and
- cabinet maintains a united front to the national legislature (and the public).

By the same token, coherent and stable government is maintained.

This coherence has the effect of barring public access to the content of cabinet deliberations, which is the primary subject matter of the convention of cabinet secrecy. At the same time, it also precludes any individual member from escaping collective accountability by relying on the content of such deliberations to show that he/she has expressed disagreement with the cabinet decision in question (in this regard, see Carpenter *Introduction to South African constitutional law* (1987) 183;

Murray & Stacey 'The President and the national executive' in Woolman *et al* (eds) *Constitutional Law of South Africa* (2014) 32-35).

Under the influence of the Westminster-based constitutional order, and premised on the principle of collective cabinet accountability, cabinet secrecy was practised in South Africa under all constitutions before the constitutional transition in 1994 (Carpenter *Introduction to South African constitutional law* (1987) 183). Although South Africa, since 1994, has expressly departed from the Westminster system, section 92(2) of the Constitution specifically retained the principle of collective cabinet accountability and provides that '[m]embers of the Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions'.

Collective accountability implies cabinet confidentiality (secrecy). As long as the cloak of secrecy over the internal workings of cabinet remains intact, cabinet as a whole can be held accountable. An individual member cannot escape accountability by referring to internal discussion and debates of cabinet in which he/she distanced himself/herself from a cabinet decision. Therefore, cabinet secrecy secures, once a decision has been taken, that it is the decision of cabinet as a whole, thus rendering it collectively accountable.

The need for cabinet secrecy, by implication, was also recognised by the Constitutional Court in *President of the RSA v SARFU* (1999 (10) BCLR 1059 (CC) par 243 (1159C-D)) where the court acknowledged the need for what it described as the protection of robust and uninhibited debate of sensitive and important policy matters in cabinet.

3 Comparative Jurisdictions

Since collective cabinet accountability (and the accompanying convention of cabinet secrecy) originated in England, from where it was adopted by other Westminster-based jurisdictions, it is instructive to consider the English position as well as the practice followed in other common law jurisdictions in regard to the convention of cabinet secrecy. The crisp questions in this regard are the following:

- What does the legal position regarding cabinet secrecy in these jurisdictions entail?
- To what extent are the principles of South African law in this regard similar to or different from those in the other jurisdictions?
- Should there be room for the convention of cabinet secrecy in South African constitutional law, and if so, to what extent?

In step with the long-standing practice of South African courts, section 39(1)(c) of the Constitution provides, when interpreting the Bill of Rights, that a court, tribunal or forum may consider foreign law. It stands to reason that such foreign law needs to be comparable to South African law. It is submitted, for present purposes, that the court may take judicial notice that the comparable law in this scenario would be the law of any

constitutional jurisdiction in which there is a cabinet system similar to the South African system:

- Cabinet takes collective responsibility;
- Ministers are members of the national legislature; and
- The head of the national government is elected from the ranks of the members of Parliament.

The most comparable examples, therefore, are those found in the jurisdictions of the UK, Canada, Australia, India and Kenya which are concisely discussed below.

The sources governing the question of cabinet secrecy and access to cabinet information in these various jurisdictions might be one or more of the following:

(a) common law;

(b) constitutional provisions, more in particular –

(i) provisions that relate to the principle of collective cabinet accountability (or cabinet responsibility or solidarity as it is also called); and cabinet secrecy and/or accessibility to cabinet information; and

(ii) provisions that relate to the constitutional right to information;

(c) specific legislation, more specifically legislation relating to the right of access to information held by any public body.

3 1 England

England is the cradle of the doctrine of cabinet secrecy. In terms of the convention of cabinet secrecy, cabinet is entitled to withhold all cabinet *deliberations* and, arguably, also (in some cases) cabinet *decisions* from the public. The convention of cabinet secrecy is premised on the principle of collective cabinet accountability/responsibility, that is, on cabinet solidarity which requires collective ministerial responsibility to the legislature (and the public) and, thus, enables cabinet to maintain a united front and the stability of government and allows ministers to speak frankly and openly in cabinet knowing that their views would not be made public and thus cause embarrassment to government.

The most recent expression of the convention in England is encapsulated in paragraph 2.1 of the Ministerial Code published in May 2010 (available from https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/61402/ministerial-code-may-2010.pdf (accessed 2015-01-20)) which reads as follows:

> The principle of collective responsibility, save where it is explicitly set aside, requires that Ministers should be able to express their views frankly in the expectation that they can argue freely in private while maintaining a united front when decisions have been reached. This in turn requires that the privacy of opinions expressed in Cabinet and Ministerial Committees, including in correspondence, should be maintained.

Also relevant is the first part of paragraph 2.3 which states that the 'internal process through which a decision has been made, or the level of Committee by which it was taken should not be disclosed'.

It is clear from these provisions that the convention is applicable to the expression of opinions that eventually give rise to decisions, that is, to cabinet proceedings prior to actual decisions and not to actual decisions, that is, decisions that have already been taken. The correct view, so it seems, should therefore be, even though cabinet decisions may be withheld from the public, that such a refusal must be justified on the basis of considerations other than cabinet secrecy and not on cabinet secrecy per se.

Moreover, following the leading judgment of *Attorney-General v Jonathan Cape Ltd* ([1976] QB 752; [1976] 3 All ER 484; as reflected, amongst others, in Turpin *British government and the constitution – Texts, cases and materials* (2005) 105-110) it should be clear that the convention of cabinet secrecy does not allow complete confidentiality of all cabinet information. Firstly, the views of individual ministers expressed prior to a decision are covered but not necessarily permanently. Such views, depending on the circumstances, may be disclosed after a period of time, more specifically when such disclosure would no longer prejudice the maintenance of joint cabinet responsibility. Secondly, the question whether or not cabinet information may be disclosed is subject to judicial review. Thirdly, even information that needs to be kept secret need not be kept secret permanently. Secrecy is subject to different time limits, depending on the nature of the information and the possible impact that disclosure might have (Turpin *British government and the constitution – Texts, cases and materials* (2005) 105-110). Some information is required to be kept secret only for a very short period. In the final analysis there cannot be a single rule. Public interest will require that some information be kept secret for varying periods; in other cases public interest will dictate that cabinet information be made public.

The most significant aspect of the current position on cabinet secrecy in England is that blanket secrecy is not countenanced. Cabinet cannot refuse disclosure solely on account of the fact that it is cabinet information. It must justify the refusal on account of considerations pertinent to the information in question and show that the public interest dictates its non-disclosure. If it fails to do so, the information is not covered by the convention of cabinet secrecy and qualifies for public disclosure.

It is instructive that cabinet secrecy has been diluted in England despite the absence of a broad right of access to information similar to that of section 32(1)(a) of the South African Constitution. The English Human Rights Act of 1998, which incorporates the rights outlined in the European Convention on Human Rights and Individual Freedoms (1950) into English law, does not provide for a right of access to information. Taking into account that the South African Constitution does

acknowledge this right, it may convincingly be argued that the public in South Africa has a stronger entitlement to cabinet information than the public in England.

3 2 Canada

The convention of cabinet secrecy in terms of the principle of collective cabinet accountability was inherited from the English constitutional tradition and is part of the common law of Canada. However, the Canadian Charter of Rights (ch 1 of the Constitution of Canada, 1982) does not include a right of access to information held by the state.

The Canadian Privacy Act, which came into force in 1983, affirms the principle of cabinet secrecy. The Act, which provides in section 12 for a general right of access to information, is, under section 70(1), not applicable to:

(1) confidences of the Queen's Privy Council for Canada (Cabinet), including, without restricting the generality of the foregoing, any information contained in

(a) memoranda the purpose of which is to present proposals or recommendations to Council;

(b) discussion papers the purpose of which is to present background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions;

(c) agenda of Council or records recording deliberations or decisions of Council;

(d) records used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;

(e) records the purpose of which is to brief ministers of the Crown in relation to matters that are before, or are proposed to be brought before Council or that are the subject of communications or discussions referred to in paragraph (d); and

(f) draft legislation.

(2) For the purposes of subsection (1), "Council" means the Queen's Privy Council for Canada, committees of the Queen's Privy Council for Canada, Cabinet and committees of Cabinet.

(3) Subsection (1) does not apply to-

(a) confidences of the Queen's Privy Council for Canada that have been in existence for more than twenty years; or

(b) discussion papers described in paragraph (1)(b)

(i) if the decisions to which the discussion papers relate have been made public, or

(ii) where the decisions have not been made public, if four years have passed since the decisions were made.

It is instructive that all the exclusions listed in this provision relate to matters still under consideration and not to cabinet decisions already

taken. It, therefore, reinforces the notion that to the extent that there is room for cabinet secrecy, such secrecy pertains primarily to deliberations and not to decisions already taken.

3 3 Australia

Australia has inherited the principle of cabinet secrecy and it is part of the constitutional law of that country. The seventh edition of the Australian cabinet handbook published by the department of the prime minister and cabinet (available from https://www.dpmc.gov.au/sites/default/files/publications/Cabinet_Handbook.pdf (accessed 2015-01-20)) endorsed the principle of collective cabinet accountability (Cabinet solidarity), thus providing in paragraph 16 that:

> Cabinet collective responsibility is most obviously expressed in the principle of Cabinet solidarity. In governments using the Westminster system, members of the Cabinet must publicly support all government decisions made in Cabinet, even if they do not agree with them. Cabinet ministers cannot dissociate themselves from, or repudiate the decisions of their Cabinet colleagues unless they resign from the Cabinet. It is the Prime Minister's role as Chair of the Cabinet, where necessary, to enforce Cabinet solidarity.

Thereafter, under the heading *Operational Principles,* it endorses and explains the convention of cabinet secrecy, stating as follows in paragraph 20 to 23:

> Confidentiality
>
> 20. The principle of collective responsibility requires that ministers should be able to express their views frankly in Cabinet meetings in the expectation that they can argue freely in private while maintaining a united front in public when decisions have been reached. This, in turn, requires that opinions expressed in the Cabinet and Cabinet committees, including in documents and any correspondence, are treated as confidential.
>
> 21. All attendees are responsible for ensuring that discussions at Cabinet and Cabinet committee meetings remain confidential. Ministers and officials should not disclose proposals likely to be considered at forthcoming meetings outside Cabinet-approved consultation procedures. Nor should they disclose the nature or content of the discussions or the views of individual ministers or officials expressed at the meeting itself. The detail of discussion at Cabinet and Cabinet committee meetings is not recorded in the Cabinet minutes.
>
> 22. The vital importance of confidentiality in relation to the deliberations of Cabinet is recognised in legislation and under the common law. The *Freedom of Information Act 1982*, for example, recognises the special nature of Cabinet deliberations in the exemption it provides for certain Cabinet documents from disclosure … Cabinet confidentiality is also a well-established ground for not producing documents or information on a public interest immunity basis to courts, royal commissions or legislature.
>
> 23. Where a document is being prepared for Cabinet's consideration, care should be taken to expressly state in the body of the document that it is intended that it be considered by Cabinet. This will remove any possible doubt as to the purpose of the document. It is not sufficient to simply

mark the document as 'Cabinet-in-Confidence', although this practice should be followed for all Cabinet and Cabinet-related documents.

Australia does not have a Bill of Rights and therefore no constitutional right to information.

The doctrine of cabinet secrecy is, in part, affirmed and demarcated by a number of legislative provisions. Section 34 of Australia's Freedom of Information Act 3 of 1982 as amended specifically applies to cabinet documents. It provides that a document is an 'exempt document' (and therefore not accessible to the public) if:

(a) both of the following are satisfied:

(i) it has been submitted to the Cabinet for its consideration, or is or was proposed by a Minister to be so submitted;

(ii) it was brought into existence for the dominant purpose of submission for consideration by the Cabinet; or

(b) it is an official record of the Cabinet; or

(c) it was brought into existence for the dominant purpose of briefing a Minister on a document to which paragraph (a) applies; or

(d) it is a draft of a document to which paragraph (a), (b) or (c) applies.

(2) A document is an exempt document to the extent that it is a copy or part of, or contains an extract from, a document to which subsection (1) applies.

(3) A document is an exempt document to the extent that it contains information the disclosure of which would reveal a Cabinet deliberation or decision, unless the existence of the deliberation or decision has been officially disclosed.

Exceptions

(5) A document by which a decision of the Cabinet is officially published is not an exempt document.

(6) Information in a document to which subsection (1), (2) or (3) applies is not exempt matter because of this section if the information consists of purely factual material, unless:

(a) the disclosure of the information would reveal a Cabinet deliberation or decision; and

(b) the existence of the deliberation or decision has not been officially disclosed.

In terms of section 36 of the Australian Administrative Appeals Tribunal Act 91 of 1975 as amended, the Attorney-General may issue a so-called public interest certificate in terms of which information may be withheld in the public interest. The provision reads:

(1) If the Attorney-General certifies, by writing signed by him or her, that the disclosure of information concerning a specified matter, or the disclosure of any matter contained in a document, would be contrary to the public interest:

(a) by reason that it would prejudice the security, defence or international relations of Australia;

(b) by reason that it would involve the disclosure of deliberations or decisions of the Cabinet or of a Committee of the Cabinet; or

(c) for any other reason specified in the certificate that could form the basis for a claim by the Crown in right of the Commonwealth in a judicial proceeding that the information or the matter contained in the document should not be disclosed; the following provisions of this section have effect.

Section 14(1)(b) of the Australian Administrative Decisions (Judicial Review) Act 59 of 1977 as amended, provides for a similar certificate procedure. It provides:

14 Certification by Attorney-General concerning the disclosure of information

(1) If the Attorney-General certifies, by writing signed by him or her, that the disclosure of information concerning a specified matter would be contrary to the public interest:

(b) by reason that it would involve the disclosure of deliberations or decisions of the Cabinet or of a Committee of the Cabinet.

It is clear that Australian law does not acknowledge blanket cabinet secrecy; that the refusal to withhold information is subject to judicial review; and that cabinet secrecy pertains essentially to deliberations prior to the actual taking of decisions.

It is important to underscore that Australia, like England, does not acknowledge a broad right of access to information similar to that of section 32(1)(a) of the South African Constitution. Taking into account that the South African Constitution does acknowledge this right, there is a compelling argument that South African courts should allow for broader public access to cabinet information than is the case in Australia.

3 4 Kenya

As a recently adopted African constitution with a Westminster-based constitutional order with a cabinet system similar to that of South Africa, and a detailed Bill of Rights, the legal position in Kenya is particularly relevant and instructive from a comparative point of view. The Constitution of Kenya of 2010 provides for a general right to information in section 35, subject to a limitation clause in section 24. The relevant provisions of section 35(1) and (3) read as follows:

(1) Every citizen has the right of access to –

(a) information held by the State; and

(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.

(3) The State shall publish and publicise any important information affecting the nation.

As to the national executive, section 129(2) of the Constitution provides as follows:

> (2) Executive authority shall be exercised in a manner compatible with the principle of service to the people of Kenya, and for their wellbeing and benefit.

There is no trace in the Kenyan Constitution of collective responsibility, nor of the principle of cabinet secrecy. On the contrary, the Constitution specifically provides for decisions of cabinet to be recorded and conveyed to the public. Section 154(2)(c) provides that the '[s]ecretary to the Cabinet shall ... convey the decisions of the Cabinet to the appropriate persons or authorities'.

3 5 India

The Indian Constitution is Westminster-premised and adheres to the principle of collective cabinet accountability. The list of fundamental rights in the Indian Constitution does not include a right of access to information.

The Indian Right to Information Act 22 of 2005 provides for a general right of access to information but subject to a number of exceptions. One of these exceptions deals with information related to the deliberations of cabinet. The relevant provision (s 8(1)(i)) provides as follows:

> (1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen –
>
> (i) cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers:
>
> Provided that the decisions of Council of Ministers, the reasons thereof, and the material on the basis of which the decisions were taken shall be made public after the decision has been taken, and the matter is complete, or over:
>
> Provided further that those matters which come under the exemptions specified in this section shall not be disclosed.

It should be underscored that cabinet secrecy is applicable only to deliberations and not to actual decisions. Moreover, once decisions are taken, the decisions, as well as the motivations (reasons) for such decisions, must be made public.

4 Discussion

It is submitted that the exposition above supports a conclusion that the withholding of information of cabinet decisions and deliberations constitutes a *prima facie* infringement of section 32(1)(a) of the South African Constitution. In terms of this section, everyone has the right of access to information held by the state. Consequently, should the state withhold such information, it bears the burden of proving that the refusal to furnish the information occurred in circumstances which constituted a legitimate limitation under section 36 of the Constitution. Section 36

provides for two forms of limitation: extra-constitutional limitation and intra-constitutional limitation under section 36(1) and 36(2) respectively.

Extra-constitutional limitation is a well-known form of limitation, having on numerous occasions been dealt with by South African courts. In this scenario, the limitation (by virtue of which the infringement is rendered valid) of the constitutional right originates from law outside the Constitution. Section 36(1) requires that the respondent shows:

> (a) that the limitation resulted from law of general application;
>
> and
>
> (b) if so, that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account the considerations further mentioned in that subsection.

To meet the second requirement, a proportionality analysis must be carried out. This requires a court to balance the considerations justifying the limitation against the considerations militating against limitation. If the former outweigh the latter, then the infringement would be constitutional but if the latter outweigh the former, it would be unconstitutional. This has been confirmed by South African courts on many occasions starting with *S v Makwanyane* (1995 (3) SA 391 (CC); see parr 96-104 & 110-144).

Intra-constitutional limitation is provided for in section 36(2). In the case of such limitation, the limitation originates from inside the Constitution, that is, it is provided for in the text of the Constitution itself. This form of limitation featured in *AZAPO v President of the RSA* (1996 (8) BCLR 1015 (CC)).

Arguments in support of the justification to withhold information could be based on either of these forms of limitation. The structure of these arguments will now be set out.

4 1 The Argument Based on Section 36(1)

If the state refuses to disclose cabinet information, it will first have to show that the decision to withhold the information is based on a *law of general application*. Law includes any rule of law regardless of the nature of the law in question, that is, regardless as to whether it is statutory, common or customary law. Therefore, it obviously does not include a decision or practice which is not authorised by law (*August v Electoral Commission* 1999 (4) BCLR 363 (CC)). In the present case, it may be contended that the law in question is the common-law convention of cabinet secrecy, inherited from the English Westminster constitutional order which is still in force in present-day South African constitutional law, and that the state, therefore, could legitimately refuse to provide access to cabinet information. The argument may run as follows: South Africa, under the present Constitution, has a cabinet system essentially similar to that of England and the other jurisdictions dealt with above. In

this system the principle applies that all members of cabinet take collective responsibility for the policy adopted by cabinet. No individual member may distance himself/herself from a decision on the grounds that he/she is not in agreement with the decision and has voiced his/her disagreement during cabinet deliberations. Were it not for this convention, cabinet would not have been able to maintain a united front to the national legislature (and the public). On these premises it would be required that public access to the content of the deliberations and decisions be barred and cabinet secrecy thus be maintained.

This argument is supported by section 92(2) of the Constitution which essentially absorbed the principle of collective cabinet accountability by providing that members of the Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions. Cabinet secrecy is clearly implied in this principle (this contention is supported by the *dictum* referred to by the Constitutional Court in *President of the RSA v SARFU* 1999 (10) BCLR 1,059 (CC) par 243 (see par 2 above)).

The merits of the argument supporting refusal of public access to cabinet information are now dealt with. First, it may readily be conceded that the convention of cabinet secrecy known to Westminster-based constitutional dispensations is also part of present-day South African constitutional law. However, the scope of the materials protected by the convention of cabinet secrecy is, or rather should be, restricted. It should not cover all proceedings of cabinet. More particularly, information that could clearly disclose individual views expressed by members of cabinet that could reveal differences between members of the cabinet (particularly if the President and/or the Deputy President are involved), should not be disclosed. In consequence, deliberations of cabinet as well as voting patterns, if any, as well as all other information that could reveal internal divisions in cabinet, should be covered by the convention of cabinet secrecy.

Such deliberations and related information that could reveal internal differences must clearly be distinguished from cabinet decisions, especially decisions on policy, that have an impact on the general public. Such decisions should not be subjected to cabinet secrecy and should, therefore, be available to the public in terms of section 32(1)(a), unless the respondent can offer a compelling justification, *other than cabinet secrecy*, for refusing disclosure of information. This submission is supported by the comparative foreign law dealt with above as well as South Africa's distinctive legal regime.

As far as the comparative position is concerned, it could be argued that the Kenyan position is the most comparable and therefore emphatically instructive in order to conclude upon the South African position. The Kenyan Constitution, like that of South Africa, is a recently passed African constitution. For two reasons it is essentially similar to that of South Africa. First, section 129(2) of the Kenyan Constitution provides for

a broad principle of executive conduct similar to the foundational values outlined in section 1 of the South African Constitution. Section 129(2) of the Kenyan Constitution provides as follows:

> (2) Executive authority shall be exercised in a manner compatible with the principle of service to the people of Kenya, and for their wellbeing and benefit.

Second, the Kenyan Constitution, like the South African Constitution, has a Bill of Rights with a full set of constitutional rights, including the right of access to information provided for in section 35(1) of the Kenyan Constitution which provides that every citizen has the right of access to information held by the state. Additionally, section 35(3) burdens the state with the duty to publish any important information affecting the nation. Section 154(2) of the Kenyan Constitution reinforces this right and the corresponding duty by enjoining the secretary to the cabinet to 'convey the decisions of the Cabinet to the appropriate persons or authorities'.

Indian law, on the right of access to cabinet information, is premised on a distinction between the deliberation stage (i.e. the stage during which the decision is still under consideration) and actual decisions. The latter must be made available to the public whilst the former may be kept confidential. This is made clear by the Indian Right to Information Act22 of 2005 which provides for a general right of access to information but which is subject to a number of exceptions provided for in section 8(1)(i) of the Act – including information that relates to the deliberations of cabinet, as quoted in paragraph 3 5 above. Therefore, once a decision is taken and the *matter is complete, or over* as it is stated in the section, it must be made public.

As mentioned in the discussion of the English position, English constitutional law does not recognise a blanket cabinet secrecy and now provides for a broad public access to cabinet information. This is so in spite of the fact that, unlike the position in South Africa, a broad constitutional right of access to information is not recognised in English law. The same holds true for the position in Australia and Canada. To the extent that there possibly might be a residual tendency in English law, and in the law of any of the jurisdictions discussed here (notably those of Australia and Canada), to withhold cabinet information, such tendency cannot, for the following four reasons, qualify as convincing comparative authority in support of withholding cabinet information from the public.

First, the English constitutional order (and that of any of the others discussed here) does not have the same explicitly defined normative value basis as that provided for in section 1 of the South African Constitution which includes the value of 'human dignity, the achievement of equality and the advancement of human rights and freedoms … to ensure accountability, responsiveness and openness'.

Second, English law (and that of the other states discussed here) does not acknowledge a general right of access to information held by the state in the way section 32(1)(a) of the South African Constitution does. In South Africa the right of access to information, therefore, is recognised in much bolder terms than in England, Australia and Canada. In consequence, the law of the latter three states provides insufficient support for the view that South African law should correspond with, or be in keeping with, that of those states in so far as the denial of access of information to state information is concerned.

Third, it should be underscored that the convention of cabinet secrecy is not an autonomous convention but rather one which could be described as an accessory convention. It does not exist for its own sake. Its *raison d'être* is collective cabinet accountability and coherent government. Hence, there should be room for cabinet secrecy only to the extent that it is indispensable for collective cabinet accountability and coherent government. Conversely, if collective cabinet accountability and coherent government are achievable without cabinet secrecy, there should be no room for secrecy. For that reason it could readily be accepted that deliberations that preceded actual cabinet decisions generally (though not necessarily always) should be kept secret. By the same token, matters still under consideration, that is, where decisions are still to be made, should generally also qualify for cabinet confidentiality. However, once a decision of cabinet is taken the reason for cabinet secrecy falls away. Decisions which have already been reached represent the united front of cabinet for which cabinet, as a collective, is accountable. The public announcement of a cabinet decision should therefore be regarded as the embodiment of the principle of collective cabinet accountability. By contrast, the refusal to make public such decisions, that is, to deny public access to such decisions, defeats the principle of collective cabinet accountability. Without public knowledge of such decisions, cabinet cannot be held accountable. The merits of the decision cannot be appreciated and it is impossible to establish whether cabinet has in fact acted in accordance with its own decisions.

Fourth, there is a certain category of cabinet decisions the very purpose of which is that they should be made public. Their very *raison d'être* is that the public should have access to them. Decisions relating to the rules or guidelines applied by the President, Deputy President and members of cabinet relating to matters such as travel benefits, travel arrangement and private holidays should fall within this category. These rules are to be adhered to as they are essentially an instrument in terms of which public accountability could be given effect to. Without public knowledge of the rules in relation to this question, public accountability would be rendered impossible which, at the same time, opens the door to the uncontrolled misuse of public funds. Collective accountability of cabinet and individual accountability of cabinet members as envisaged in section 92(2) of the South African Constitution do not detract from this conclusion. On the contrary, it requires such information to be made

public. If not, the very principle of public accountability falls by the wayside.

4 2 The Argument Based on Section 36(2)

Section 36(2) of the Constitution provides that '[e]xcept as provided in subsection (1) *or in any other provision of the Constitution,* no law may limit any right entrenched in the Bill of Rights' (own emphasis).

In essence, section 36(2) provides that a provision elsewhere in the Constitution (but outside the Bill of Rights) may justifiably limit any of the constitutional rights of Chapter 2. Such intra-constitutional limitation (intra-constitutional because it originates from within the text of the Constitution) is not required to meet the requirements for limitation set out in section 36(1). Such limitations are justified solely because they are part of the Constitution (*AZAPO v President of the RSA* 1996 (8) BCLR 1015 (CC)).

In the premises it may be argued that the principle of collective cabinet accountability, which is expressly enacted in section 92(2) of the Constitution, entails that the convention of cabinet secrecy is a logical concomitant of collective cabinet accountability. However, it is the opinion of this author that there is limited merit in this argument because, although it might be conceded that cabinet secrecy is implied by collective cabinet accountability, there is no basis for arguing that such secrecy is a blanket and unqualified one. Cabinet secrecy is in fact qualified and, in each case, must be justified by any party insisting on such secrecy with reference to the considerations applicable to each case. This should be clear from the foreign law which has been outlined in the discussion above, as well as from the relevant South African constitutional provisions, notably section 1 and section 32(1)(a) that clearly do not countenance blanket secrecy.

5 Conclusion

Section 12(a) of PAIA should not be viewed as a limitation of the right of access to information held by cabinet. The effect of the provision is rather that the legal regime created by PAIA is not applicable to cabinet information. The applicable law that governs the question of access to cabinet information is section 32(1)(a) which has to be read with section 92(2) of the Constitution and with reference to the development of the common law principles surrounding cabinet secrecy in comparable jurisdictions. Such analysis brings to light that cabinet secrecy has been restricted and that the scope of public access to information held by cabinet should be interpreted generously, especially when it is clear that some public interests are obviously at stake. In such circumstances the broadly defined right of access to information and the constitutional value of accountability, responsiveness and openness, as outlined, leave but very limited scope for justifiably refusing cabinet information. This

conclusion is strongly reinforced by the law of comparable jurisdictions as discussed above.

K MALAN
University of Pretoria

Onlangse regspraak/Recent case law

Ferris v Firstrand Bank Ltd 2014 3 SA 39 (CC)

Enforcement of a credit agreement after breach of a debt rearrangement order and the ineffectiveness of debt review in terms of the National Credit Act

1 Introduction

The decision of the Constitutional Court in *Ferris v Firstrand Bank Ltd* (2014 3 SA 39 (CC); (*Ferris*)) deals with the right of a credit provider to enforce a credit agreement in terms of the National Credit Act 24 of 2005 (NCA) pursuant to a debt rearrangement order which was breached by a consumer. The Constitutional Court held that the credit provider, in such an instance, was in terms of the provisions of the NCA, independently entitled to enforce the agreement without further notice. In *Ferris*, breach of the rearrangement order thus immediately exposed consumers to enforcement actions by their credit providers which would not only automatically terminate the rearrangement order, but also the debt relief afforded by such an order.

One of the purposes of the NCA is to address consumer over-indebtedness by providing mechanisms for resolving over-indebtedness (s 3(g)). In this regard, section 86 of the NCA provides that a consumer may apply to a debt counsellor for debt review, which may ultimately result in an application to a magistrate's court to grant an order for the rearrangement of the consumer's obligations in terms of agreements that qualify as credit agreements under the NCA (see ss 86(1), 86(8)(b) & 87; see also s 8 for the definition of a 'credit agreement'). In practice a rearrangement in terms of the NCA usually entails an extension of payment dates accompanied by a reduction of the amount of the instalments payable in terms of the agreement (see s 86(7)(c)(ii)). The debt relief provided by the NCA's debt review process thus entails the possibility of a court granting a debt rearrangement order and a moratorium being placed on enforcement (see s 88(3)). Section 88(3)(b)(ii) is relevant for the purposes of this discussion as it provides that a credit provider may not proceed to enforce a credit agreement, which is subject to the order, until the consumer defaults on any obligation in terms of the order. However, unlike the income restructuring debt relief mechanisms in most foreign jurisdictions, which provide debtors with the opportunity to obtain a discharge of debt obligations after completion of a payment plan, the process of debt review does not provide for any such discharge, as the NCA's objective of providing debt relief is subject to the principle 'of satisfaction by the

How to cite: Roestoff '*Ferris v Firstrand Bank Ltd* 2014 3 SA 39 (CC)' 2016 *De Jure* 134-155
http://dx.doi.org/10.17159/2225-7160/2016/v49n1a9

consumer of all responsible financial obligations' (s 3(g); see also s 3(h)). The NCA, furthermore, does not prescribe any maximum periods for repayment and a consumer may thus be bound to a repayment plan indefinitely. Moreover, as indicated, should the consumer at any stage of the repayment period not be able to comply with the terms of the rearrangement order, enforcement actions may immediately ensue and the debt relief provided by the rearrangement order will then immediately come to an end. This outcome is so since the NCA does not provide for the setting aside or variation of a rearrangement order.

In January 2011, the World Bank's Insolvency and Creditor/Debtor Regimes Task Force (Task Force) was convened in order to commence an investigation into the policies and characteristics of effective insolvency systems for natural persons. At the conclusion of the Task Force meeting it was, *inter alia*, stated that (see The World Bank – Insolvency and Creditor/Debtor Regimes Task Force *Report on the treatment of the insolvency of natural persons* (2013) par 6 available from http://bit.ly/Oft3hp; hereafter the World Bank Report or Report):

> [O]ne of the lessons from the recent financial crisis was the recognition of the problem of consumer insolvency as a systemic risk and the consequent need for the modernization of domestic laws and institutions to enable jurisdictions to deal effectively and efficiently with the risks of individual over-indebtedness.

In 2013, the Task Force's investigation led to the publication of the World Bank's Report on natural person insolvency. The main objective of the Report is 'to provide guidance on the characteristics of an effective insolvency system for natural persons and on the opportunities and challenges that would be encountered in the developing of such a regime' (see Report parr 10-13).

The absence of provisions that provide for a discharge and a maximum payment period, has often led to the NCA's debt review process being criticised for its inability to provide effective and efficient debt relief to over-indebted consumers. Several commentators have called for the reform of the process, and correctly so (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* 353 and the sources cited in n 17). The aim of this case discussion is, thus, not only to analyse the Constitutional Court's decision as regards the applicable provisions of the NCA, but also to consider the implication of the case and to comment on the NCA's apparent pro-creditor orientation and accordingly its inability to provide effective and efficient debt relief to over-indebted consumers. In light of a brief outline of some of the modern international trends as well as guidelines provided by the World Bank, a further purpose is to identify some of the apparent shortcomings of the debt review process and the lessons to be learned by South African lawmakers regarding reform of the debt review process.

2 Facts and Decision

Ferris concerned an application to overturn a High Court's refusal to rescind a default judgment granted in terms of the NCA (*Ferris supra* par 1). In October 2007 the applicants, Mr and Mrs Ferris (hereafter the consumers), borrowed money from the first respondent (hereafter the credit provider) in order to purchase their home. The loan was secured by a mortgage bond over the property. The consumers fell behind with their bond repayments and in February 2009 they applied for debt review in terms of section 86(1) of the NCA. In March 2009, the consumers' debt counsellor made a repayment offer to the credit provider on terms more favourable to the consumers than initially agreed. The consumers contended that this offer was ignored, but the credit provider maintained that it was refused because it was not allowed in terms of the NCA. Apparently the credit provider did not make any counter-offer (par 2).

In September 2009, the debt counsellor applied to the magistrate's court for an order declaring the consumers over-indebted and for an order rearranging their debt obligations. However, while this application was pending, the credit provider sent a notice in terms of section 86(10) to the consumers and the debt counsellor to terminate the debt review. The consumers maintained that this notice was not delivered properly. After initially disputing this claim, the credit provider eventually conceded, before the Constitutional Court, that it was indeed not delivered properly. On 30 April 2010, shortly after dispatch of the notice, the magistrate's court granted a rearrangement order on the terms requested by the consumers. The order also specified that the original credit agreement would 'be revived and be fully enforceable' if the rearrangement order were breached (par 3).

A week later, the consumers fell behind with their payments on the debt restructuring order and on 14 June 2010, after they had fallen even further into arrears with their repayments having paid only R1 000 out of almost R9 000 owed, the credit provider proceeded with enforcement and issued summons for payment of the full balance of the loan plus interest. The credit provider also requested an order declaring the consumers' home specially executable. The consumers defended the matter and contended that the debt review had not been terminated by the section 86(10) notice. In replication the credit provider contended that it was entitled to enforce the loan on the basis of the consumers' breach of the debt rearrangement order. On 20 August 2010, the credit provider applied for summary judgment which was successfully resisted. However, on 8 November 2011 default judgment was granted against the consumers due to their failure to make discovery on time (par 4).

Six months later, the consumers applied for the rescission of the judgment in terms of rule 42(1)(a) of the Uniform Rules of Court, the common law or rule 31. They blamed their attorneys for their failure to defend the matter and contended that the default judgment was

erroneously granted because the section 86(10) notice was not properly delivered and that the sale in execution would unjustifiably infringe their right of access to adequate housing (par 5).

The high court dismissed the application for rescission. The court held that there was no basis for rescission under rule 42(1)(a) as the section 86(10) notice had validly terminated the debt review. Moreover, even if the debt review was still in place, this would, according to the court, still not be a complete defence on the merits. The court thus concluded that there was no *bona fide* defence to the enforcement action which precluded rescission. An application for leave to appeal was refused. The consumers petitioned the Supreme Court of Appeal for leave to appeal which was also refused. Two months later they applied to the Constitutional Court for leave to appeal, well outside the time allowed under the rules (par 6).

With regards to the issue of jurisdiction, Moseneke ACJ, delivering the unanimous judgment of the Constitutional Court, quoted the following passage from *Sebola v Standard Bank of South Africa Ltd* (2012 5 SA 142 (CC) par 36) in which the Constitutional Court referred to the purposes of the NCA in terms of section 3(a) and (g) (par 7):

> The means by which the [Act's] purposes are to be achieved include promoting of the development of a credit market that is accessible to all South Africans, and in particular to those who have historically been unable to access credit and promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers. These goals, and the means by which they are to be pursued, are intimately connected to the Constitution's commitment to achieving equality. Our jurisdiction is thus plain.

Moseneke ACJ found that the matter in *Ferris*, as was the case in *Sebola*, raised a constitutional issue and that the court was thus seized with the task of interpreting the NCA, as it was in *Sebola*. Moseneke ACJ, therefore, held that it was unnecessary to decide whether it would have jurisdiction in terms of section 167(3)(b), which came into effect as part of the Constitution Seventeenth Amendment Act of 2012 (par 8).

The remaining issues to be dealt with by the Constitutional Court in *Ferris* were (a) whether the Court should condone the late filing of the application for leave to appeal, (b) whether the application had reasonable prospects of success, and (c) whether in light of the answer to (b) and other considerations, it was in the interests of justice to grant leave to appeal (par 9).

Referring to the decision in *Bertie van Zyl (Pty) Ltd v Minister for Safety and Security* (2010 2 SA 181 (CC) par 14) – namely, that the test for condonation is whether it is in the interests of justice to grant condonation and in light of the fact that the credit provider stated that a pronouncement by the Constitutional Court on the issues raised are important to the banking sector – the court granted condonation. According to the credit provider, a pronouncement by the Court would

bring certainty on the question when a credit provider may enforce a loan that is subject to a debt restructuring order that had been breached (*Ferris supra* parrs 10-12).

As regards the question whether the application had reasonable prospects of success and, thus, whether the requirements for rescission were met, the Court first dealt with the requirements of rule 42(1)(a). The Court pointed out that unlike under the common law or rule 31, an applicant is not required to show good cause (including a *bona fide* defence) in order to succeed in terms of rule 42(1)(a). Under this rule, a court may rescind a default judgment if it was 'erroneously sought or erroneously granted' (par 13). However, the court held that there was no error in the default judgment. The court explained as follows (par 14):

> [The consumers] breached the debt-restructuring order. Once the restructuring order had been breached, [the credit provider] was entitled to enforce the loan without further notice. This is clear from the wording of the relevant sections of the Act. Section 88(3)(b)(ii) does not require further notice – it merely precludes a credit provider from enforcing a debt under debt review unless, among other things, the debtor defaults on a debt restructuring order.

The Court also pointed out that section 129(1) of the NCA expressly provides that the requirement to send a notice in terms of section 129(1) does not apply to debts that are subject to a debt restructuring order (par 14). Moreover, the debt restructuring order in *Ferris* itself provided that 'the rights and obligations as amended by the [debt-restructuring order] will be revived and be fully enforceable should the applicant default in terms of this court Order' (par 15).

Referring to *Firstrand Bank Ltd v Fillis* (2010 6 SA 565 (ECP)), Moseneke ACJ held that the breach of the debt restructuring order thus entitled the credit provider to enforce the original credit agreement without further notice (parr 16-17). The Court was also of the view, even if further notice was required, that its absence would be a mere dilatory defence and thus a defence that suspends proceedings rather than precludes a cause of action. It is, therefore, not an irregularity that would indicate that a judgment was erroneously granted and thus justify a rescission in terms of rule 42(1)(a) (par 17).

The consumers raised a number of arguments as to why the credit provider was not entitled to proceed with enforcement even though they had breached the debt restructuring order. First, they contended that the defective delivery of the section 86(10) notice precluded enforcement of the credit agreement as the debt review was not properly terminated. However, according to the Court, this argument was not convincing. Referring to the provisions of section 88(3)(b)(ii), the Court explained as follows (par 18):

> While [the credit provider] is not entitled to rely on this section for enforcement of the loan because notice was not properly given, it was independently entitled to enforce the loan on the basis of the breach of the

> debt restructuring order and the provisions of the debt-restructuring order itself.

The consumers further contended, because the credit provider refused the debt counsellor's initial instalment offer without making a counter-offer, that it did not participate in the debt review process in good faith as required by section 86(5)(b) of the NCA. Moseneke ACJ was of the view even if this was the case, that this contention missed the point. He explained as follows (par 19):

> The good-faith requirement is aimed at the parties reaching agreement on debt- restructuring before a debt- restructuring order is needed. Once a debt-restructuring order is granted, reaching agreement is no longer necessary and the good-faith requirement for participating in the debt-review proceedings becomes irrelevant.

Moseneke ACJ emphasised the fact that the debt-restructuring order was granted on the very terms sought by the consumers. According to the Court, it was thus difficult to see how they were adversely affected by any lack of good faith (par 19).

The consumers also contended that they 'substantially' complied with the debt restructuring order and did not, therefore, breach the order to allow the credit provider to proceed with enforcement of the loan (par 20). Moseneke ACJ dismissed this argument as follows (par 21):

> While our law recognises that substantial compliance with statutory requirements may be sufficient in certain circumstances, [the consumers] have not given compelling reasons why a substantial- compliance standard would be useful or appropriate in determining compliance with a debt-restructuring order. On the contrary, there is no indication in the wording of the Act or debt- restructuring order that anything less than actual compliance is required. Further, it was raised for the first time at the hearing before this court, and this court has held that it should be wary of deciding issues raised for the first time on appeal.

The Court held, even if substantial compliance was appropriate *in casu*, that it was not persuaded that the consumers had indeed substantially complied at the stage when the summons was issued as they had, by then, paid only R1 000 of the almost R9 000 owing in terms of the order (par 21). The Court also dismissed the consumers' argument that the credit provider was not entitled to raise non-compliance with the debt restructuring order in replication (par 22).

Moseneke ACJ finally held that the requirements for rescission in terms of rule 42(1)(a) were not fulfilled as the default judgment was not erroneously granted (par 23). The Court also held that the requirements for rescission in terms of rule 31 or the common law were also not complied with (par 27). The consumers did not show good cause for rescission as they did not provide a reasonable explanation for their default. The consumers blamed the negligence of their attorneys for the default, but the Court pointed out that the consumers knew about the default judgment soon after it was granted, which was long before the

application for rescission was brought (parrs 24-25). The consumers also did not prove that they had a *bona fide* defence. They breached the debt restructuring order, which entitled the credit provider to enforce the loan and they raised no other defence as to the merits of the default judgment against them (par 26). The court finally held that the consumers had failed to show that the High Court acted in any way that would justify it to interfere with the exercise of its discretion (parr 28-29), that the consumers did not have reasonable prospects of success (par 30) and that it would, furthermore, not be in the interests of justice to grant leave to appeal (par 31). In this regard the court explained as follows (par 31):

> Given that [the consumers] do not have reasonable prospects of success, is it nevertheless in the interests of justice for us to grant leave to appeal? I do not think so. First, were we to grant the relief sought, it would merely delay the inevitable. They might get their house back for a time, but [the credit provider] would be entitled to enforce the loan again. We also do not know if they are able to comply with the debt-restructuring order or the terms of the revived loan.

The Court also criticised the consumers for not taking the Court into their confidence by, amongst others, claiming that they were not aware of the default judgment. Furthermore, the Court pointed out that the consumers had another remedy to their avail as they could sue their attorneys (par 31). Accordingly, the Court denied leave to appeal on the basis that it was not in the interests of justice to hear the matter, primarily because it lacked any prospect of success (par 32).

3 Analysis of Decision

3 1 The Constitutional Issue

In *Ferris* the Constitutional Court based its jurisdiction on the right to equality as enshrined in section 9 of the Constitution. The Court was of the view that the purposes of the NCA to provide equal access to all South Africans and to promote equity in the credit market by balancing the respective rights and responsibilities of consumers and credit providers (see ss 3(a) & (g)) were linked to the constitutional objective of achieving equality and that the matter thus fell within its jurisdiction (see ss 167(3)(b)(i) & (c) of the Constitution). According to the Court, (par 8) it was thus unnecessary to decide whether it had jurisdiction in terms of section 167(3)(b)(ii) and, therefore, whether the Court should grant leave to appeal 'on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court' (s 167(3)(b)(ii)).

3 2 Applicable Provisions of the NCA

3 2 1 Right to enforce

As indicated the Constitutional Court in *Ferris* held that the credit provider had the right to enforce the credit agreement purely on the basis

of the consumers' default in respect of the rearrangement order. There is no faulting the Court's judgment in this regard as section 88(3)(b)(ii), in effect, allows the credit provider to 'enforce by litigation or other judicial process any right or security under that credit agreement' without requiring any further notice as soon as, amongst other things, 'the consumer defaults on any obligation in terms of a re-arrangement … ordered by a court' (s 88(3)(b)(ii)). The NCA does not provide for the setting aside or variation of rearrangement orders and enforcement is thus allowed without any notice and without having to apply for a variation or a setting aside of the order of the magistrate (see *Jili v Firstrand Bank Ltd t/a Wesbank* 2015 3 SA 586 (SCA) par 12; and *Firstrand Bank Ltd v Kona* 20003/2014 [2015] ZASCA 11 (2015-03-13)). That the Court's interpretation in this regard is correct also appears from section 129(2) which provides that the requirement to draw any default under a credit agreement to the notice of a consumer, in terms of section 129(1) of the NCA, 'does not apply to a credit agreement that is subject to a debt restructuring order'. Moreover, as pointed out by the Court in *Ferris* (par 15), the wording of the debt restructuring order itself indicated that the original loan would be enforceable without further notice if the debt restructuring order was breached.

In *Jili*, the consumer argued that the credit provider had not been entitled simply to issue summons while the rearrangement order remained in force and, without the order being rescinded or varied, that any action to enforce the agreement was premature (par 21). In this regard the consumer argued that an important purpose of the NCA is to promote non-litigious methods of resolving consumer defaults and referred to the Constitutional Court's judgment in *Sebola* that 'weight must be given to constitutional considerations in assigning meaning to the statute's provisions' (*Jili supra* par 10). However, the Supreme Court of Appeal in *Jili* dismissed the consumer's appeal (see the judgment of Wallis JA (*Jili supra* par 16) and Leach JA (*Jili supra* par 31)). It also rejected the argument of the consumer, namely, that the Constitutional Court's interpretation in *Ferris* of the relevant sections was merely *obiter* and should not be followed (*Jili supra* parr 12 & 24). In this regard Leach JA stated (par 24):

> Although that order recorded that the rights and obligation amended by the order would be 'fully enforceable' in the event of the order being breached, this did no more than spell out the effect of section 88(3). The clear *ratio decidendi* of the case was that the breach of the debt rearrangement order entitled the bank to enforce the loan without further notice.

Willis JA observed as follows (par 12):

> In any event remarks of the Constitutional Court, even if merely obiter, carry great weight indeed. To refuse to follow Moseneke ACJ's observations and remarks on this point would create huge confusion among credit providers and consumers. Moreover, if every other credit provider affected by a debt restructuring order had to be given notice of an application for summary judgment, it would create a potentially never ending merry-go-round.

3 2 2 Termination of debt review

In *Ferris*, the consumers also contended that the defective delivery of the section 86(10) notice to terminate the debt review precluded enforcement. The Constitutional Court correctly dismissed the consumers' arguments in this regard.

Before amendment of the NCA by the National Credit Amendment Act 19 of 2014 (NCAA), section 86(10) allowed a credit provider to terminate a debt review by giving notice at least 60 business days after the consumer applied for debt relief – provided that the consumer was in default under the credit agreement. There were conflicting decisions and opinions as regards the right of credit providers to terminate a debt review while an application for a rearrangement order was pending (see Van Heerden & Coetzee '*Wesbank v Deon Winston Papier and the National Credit Regulator* (unreported Western Cape High Court case no 14256/10 (WCC) – Termination of debt review in terms of section 86(10) of the National Credit Act 34 of 2005' 2011 *De Jure* 463 for a discussion of cases prior to the decision of the Supreme Court of Appeal (SCA) in *Collett v Firstrand Bank Ltd* 2011 4 SA 508 (SCA)). In *Collett* the SCA held that a credit provider is indeed entitled to terminate a debt review in terms of section 86(10), after a debt counsellor had referred the matter to the magistrate's court for an order envisaged by section 86(7)(c) and while the hearing in terms of section 87 is still pending (*Collett supra* par 11). However, after amendment of the NCA, section 86(10)(b) now precludes a termination when an application for a rearrangement order is pending. This subsection provides that '[n]o credit provider may terminate an application for debt review lodged in terms of this Act, if such application for review has already been filed in a court or in the Tribunal'.

In *Ferris* the old section 86(10) applied and the credit provider, on the basis of the decision in *Collett*, was thus entitled to terminate even though the application for a debt rearranging order was still pending. However, the defectiveness of the notice still did not affect the credit provider's right to enforce as a section 86(10) notice is only required when a credit provider wishes to enforce before a rearrangement order has been granted. Once a rearrangement order has been granted, the credit provider is entitled to enforce as soon as the consumer has breached the order (see s 88(3)(b)(ii)). Application of the new section 86(10) to the facts in *Ferris* would also not change the position, as section 88(3)(b)(ii) still applies. Thus, although termination was disallowed as the application for a rearrangement order was already pending, a section 86(10) notice is not a requirement for enforcement when the consumer has breached the order.

3 2 3 Requirement of good faith

In *Ferris* the consumers argued, *inter alia*, that the credit provider's lack of good faith at the negotiating stage of the debt review proceedings precluded the credit provider from enforcing the loan. However, the

Court was of the view that the requirement of good faith in terms of section 86(5)(b) becomes irrelevant as soon as a debt rearrangement order has been granted and thus dismissed the consumers' argument in this regard (par 19). Section 86(5)(b) provides as follows:

> A consumer who applies to a debt counsellor, and each credit provider contemplated in subsection(4)(b), must –
>
> (b) participate in good faith in the review and in any negotiations designed to result in responsible debt-rearrangement.

From the wording of section 86(5)(b), it appears that the requirement of good faith relates only to the negotiation stage of the proceedings and, thus, to proceedings which occur before the granting of a debt rearrangement order. The requirement of good faith will become relevant where, for example, the credit provider ignored a repayment offer made by the consumer and thereafter terminated the debt review with a view to proceed with enforcement of the credit agreement. In such a case, the consumer would be entitled to apply to court for a resumption of the debt review process (see s 86(11) and *Collett supra* par 15). It is submitted that a lack of good faith is also an aspect which the court may take into consideration when exercising its discretion in terms of section 87(1) to grant a rearrangement order. However, once a debt rearrangement order has been granted, the requirement becomes irrelevant and it is submitted that the Constitutional Court's decision in this regard is correct.

3 2 4 Substantial compliance with order

As regards the consumers' contention that they had substantially complied with the order, the court pointed out that there was no indication in the wording of the NCA that anything less than actual compliance is acceptable (par 21). In this regard it should also be noted that the NCA, unlike the administration procedure that provides for the possibility that the order may be amended (s 74Q of the Magistrates' Courts Act 32 of 1944 (MCA)), does not provide for the variation of a rearrangement order as regards the time and amount of payments. Anything less than full compliance with the order will, thus, automatically terminate the order and allow the credit provider to proceed with enforcement.

4 Implication of the Case – Ineffectiveness of Debt Review

The observations made by Moseneke ACJ regarding his ruling to deny the consumers' application for leave to appeal on the basis that it was not in the interests of justice are indicative of the inability of the debt review process to deal effectively and efficiently with the problems of consumer over-indebtedness. Moseneke ACJ stated that if the court were to grant the relief sought, it would merely delay the inevitable. The consumers might get their house back for a time, but the credit provider would be

entitled to enforce the loan again. The Court also doubted whether the consumers would have been able to comply with the debt-restructuring order or the terms of the revived loan (par 31).

The Constitutional Court stressed the fact that the debt-restructuring order was granted on terms proposed by the consumers and the Court, therefore, did not have much sympathy with their case (par 19). However, the fact of the matter, as already indicated, is that the debt review process does not provide for any discharge or maximum payment periods and, thus, would in many instances only perpetuate the consumers' over-indebtedness (see Roestoff & Coetzee 'Consumer debt relief in South Africa; Lessons from America and England, and suggestions for the way forward' 2012 *SA Merc LJ* 69). Therefore, the process cannot provide a realistic option for most over-indebted consumers and most debt rearrangement plans, most likely, are destined for failure. There seem to be no statistics available as regards the percentage of rearrangement plans in terms of the debt review process that are ultimately successfully completed. Nonetheless, it is submitted that the large number of section 86(10) terminations and enforcement actions found in court decisions pertaining to the debt review process, indicate that debt review is not a workable option for most over-indebted consumers.

At this point it would be apt to refer to the observations of Leach AJ in *Jili*, where the SCA followed the decision of the Constitutional Court in *Ferris* (see the discussion in par 3 2 1 above). In dismissing the consumer's appeal against the High Court's refusal to grant summary judgment, Leach AJ reasoned as follows (parr 29-30):

> The appellant has already enjoyed the considerable benefit afforded by a debt-rearrangement order that substantially reduced her monthly instalments and at the same time increased the period available to her to effect repayment … To allow the appellant, who has spurned the advantages flowing from the [debt rearrangement] order by defaulting in her payments, yet further opportunity to attempt to get her affairs in order at the expense of the respondent who is entitled to the relief it seeks, would not be in the interests of justice. To refuse summary judgment would be to afford the appellant a further advantage not envisaged by the NCA – and a second bite at the cherry, so to speak – to the detriment of the clear rights of the respondent.

It is submitted that cases like *Ferris* and *Jili* do not, in actual fact, deal with consumers who, to use the words of Leach AJ, have 'spurned' the advantages flowing from debt restructuring by defaulting in their payments, but with consumers who have to attempt to get their affairs in order in terms of a measure regulated by an Act that does not truly pursue the objective of providing debt relief (*Jili* par 30). The implication of these cases is clearly that a measure providing for a mere rescheduling of debt and an extension of payment dates is insufficient to provide effective relief. It is submitted that this shortcoming of the debt review

process was the real reason why the consumers defaulted on their payments.

5 Some International Trends

Several countries over the past three decades have reformed their consumer insolvency systems regarding rearrangement plans in order to provide for maximum payment periods and for a discharge of debt obligations after completion of the plan. In the United States of America, law reform took place in 1979 with the promulgation of the Bankruptcy Reform Act of 1978 (generally known as the Bankruptcy Code) and the establishment of the so-called 'fresh start' policy. The American system is widely considered to be the frontrunner with regard to consumer debt relief. Apart from the relief provided by Chapter 7 of the Bankruptcy Code, which affords a consumer debtor a discharge of debt almost immediately after he or she has surrendered all non-exempt assets for liquidation and distribution, a consumer debtor may also opt for Chapter 13 as a form of relief. In terms of Chapter 13, the debtor receives a discharge of all unsecured pre-bankruptcy debt after completion of a payment plan which extends over a period of three to five years (w.r.t. ch 13, see generally Ferriel & Janger *Understanding Bankruptcy* (2007) 641).

During the 1980s and 1990s, several Northern European countries introduced legislation modelled on the American 'fresh start' example in an attempt to deal with the problem of rising consumer over-indebtedness (Roestoff & Renke 'Solving the problem of overspending by individuals: International guidelines' 2003 *Obiter* 3). From a South African perspective, the French process of law reform regarding consumer debt relief is especially instructive and this discussion will, thus, focus on the developments in France (for a detailed discussion of the developments in France see Kilborn '*La responsabilisation de l'economie*: What the United Sates can learn from the new French law on consumer overindebtedness' 2005 *Michigan Journal of International Law* (*Mich J Int'l L*) 619; see also Spooner 'Fresh start or stalemate? European insolvency law reform and the politics of household debt' 2013 *European Review of Private Law* (*ERPL*) 751). The French experience with over-lengthy payment plans, that place unrealistic payment obligations on debtors and allow them unrealistically low budgets (World Bank Report *supra* par 287), is especially significant for the purposes of this discussion. In addition, the French legislator's initial reluctance to provide the debtor with the opportunity to obtain a discharge and the further developments culminating in the introduction of a discharge provision providing a proper 'fresh start', may provide South African lawmakers with useful lessons regarding the reform of the debt review process.

In 1989, French consumer debt relief legislation provided for a measure in terms of which the debtor's obligations could be rescheduled into a repayment plan. Initially, creditors' consent was required before a

plan could come into effect, but amendments introduced in 1999 empowered courts to impose a plan on creditors if agreement could not be reached voluntarily (Spooner 2013 *ERPL* 752-753). Most payment plans were subject to a repayment period of eight to ten years, but since 2003 all plans are limited to a maximum payment period of ten years, unless more time is required to reschedule a home loan in order to avoid the loss of the debtor's home (Kilborn 2005 *Mich J Int'l L* 641). Unlike the South African debt review process, the French process was, and still is, not court orientated but is, rather, built around administrative bodies called 'commissions on individual over-indebtedness' (*commissions de surendettement des particuliers*). A debtor must apply to one of these commissions to obtain access to the procedure (Spooner 2013 *ERPL* 752). These commissions comprise of eight members, amongst others a representative of the French Central Bank (the *Banque de France)* – who acts as secretary and whose primary task is to develop and negotiate a payment plan between the debtor and his or her creditors (Kilborn 2005 *Mich J Int'l L* 639). The other members are representatives of local government and tax authorities, representatives of the credit industry and consumer associations and two consultative members, namely, a social worker and a lawyer. The social worker is required to provide advice to the commission as regards the best way to treat the debtor and his family's situation and how to develop a workable payment plan to avoid future financial problems. The lawyer has to assist in verifying the validity of creditors' claims and to ensure that court documents comply with legal standards (Kilborn 2005 *Mich J Int'l L* 637).

Initially payment plans in France could only provide for 'ordinary' measures such as debt rescheduling or interest rate reductions and a court-imposed plan could not provide for a discharge of any obligation. A discharge was allowed in only one exceptional case, namely, a discharge of the residual obligation after the forced sale of the debtor's home (Kilborn 2005 *Mich J Int'l L* 647). However, contrary to the present position in South Africa, where courts will not confirm payment plans that are not viable (*Seyffert v Firstrand Bank Ltd* 2012 6 SA 581 SCA par 13), a lack of resources was not a proper basis for dismissal of a plan in France. Initially, some courts dismissed cases of debtors who did not have adequate resources to form the basis of a feasible payment plan. However, in 1993 the French High Court rejected this approach and required courts to deal with these 'terminal' cases 'as best they could' (Kilborn 2005 *Mich J Int'l L* 649 n 228).

The 'ordinary' measures soon proved to be insufficient and it was clear that most consumers needed relief in the form of a discharge of at least a part of their debts. The 1998 amendments to the French legislation thus provided for 'extraordinary' measures which could be recommended by the commission in the form of a partial discharge of debt, or in cases where the debtor's insolvency was 'irremediable', a full discharge following a two year moratorium on enforcement and a subsequent assessment of the debtor's financial situation. The two year moratorium was designed to allow the debtor's financial situation to stabilise. If, upon

expiry of this two year period, the debtor's situation had improved and he or she was no longer insolvent, the commission was obliged to recommend a payment plan which included some or all of the 'ordinary' measures mentioned above. However, if the debtor was still insolvent, the commission had to recommend a discharge of the debtor's obligations. The percentage of the debtor's obligations that could be discharged was in the discretion of the commission, but the debtor was entitled to such discharge only once every eight years (Kilborn 2005 *Mich J Int'l L* 650).

The data from a survey done by the *Banque de France* in 2001 indicated that the commissions were still not able to implement effective relief for the most over-indebted consumers. Most consumers' insolvency was clearly not a temporary situation and the 'moratorium' was a mere formality, thus placing an unnecessary administrative burden on the commissions. Therefore, lawmakers introduced a 'fresh start' procedure in 2003, the *rétablissement personnel* (personal recovery) procedure, eliminating the payment plan requirement and providing an immediate discharge of the debtor's obligations in return for a liquidation of the debtor's assets. However, this form of relief is available only to debtors whose financial circumstances, according to the commission, are 'irremediably compromised' – thus, so overburdened with debt that no payment plan with ordinary or extraordinary measures would be able to ensure the repayment of at least a significant portion of their debts. Where the debtor does not possess any assets of significance, the commission can merely recommend personal recovery and the court may confirm it without a liquidation of assets (Kilborn 2005 *Mich J Int'l L* 655; Spooner 2013 *ERPL* 753).

With the introduction of the personal recovery procedure the French legislator acknowledged the right of debtors falling into the category of debtors with no income and no assets (NINAs) not to be excluded from a discharge procedure. In 2005, the Belgian legislator also introduced a NINA procedure in terms of which a total discharge may be granted to the debtor if it appears to the mediator that a payment plan is impossible due to the inadequate resources of the debtor (see Spooner 2013 *ERPL* 754 for a brief overview of the developments in Belgium). It is interesting to note that this NINA procedure was introduced following a decision of the Belgian Constitutional Court which held that it was contrary to the equality guarantee of the Constitution (see Art 10 of the Belgian Constitution of 1831) to exclude debtors who are unable to repay a substantial portion of their debt from debt relief (Spooner 2013 *ERPL* 755; World Bank Report *supra* par 300).

Since 2009, English law also provides relief to NINA debtors by allowing them to apply for a so-called Debt Relief Order (DRO). Once the debtor is allowed into the procedure, he or she is protected from enforcement for a period of twelve months, at which point the debtor also receives a discharge of debt obligations (as regards the NINA

procedure in England and Wales see Roestoff & Coetzee 2012 *SA Merc LJ* 73 *et seq*; Spooner 2013 *ERPL* 758).

Even the Irish legislator, which has traditionally been extremely conservative as far as consumer debt relief is concerned, has introduced reforms to accommodate over-indebted consumers (see Spooner 2013 *ERPL* 759 for a brief overview of recent developments in Ireland; see also Spooner 'Long overdue: What the belated reform of Irish personal insolvency law tells us about comparative bankruptcy' 2012 *American Bankruptcy Law Journal* (*Am Bankr LJ*) 243). In terms of the Debt Settlement Agreement (DSA) procedure, a debtor, through an insolvency practitioner, may negotiate a repayment arrangement with his or her unsecured creditors under court protection. If 65% in value of the creditors agree to the proposal and the court approves the proposal, the DSA will come into effect. Repayment plans cannot endure for longer than six years and the debtor receives a discharge of all remaining obligations at the end of the repayment period. Preferred and secured creditors are protected, while at least procedural, if not substantial, protection is provided to the debtor's home (Spooner 2013 *ERPL* 760).

The Personal Insolvency Arrangement (PIA) procedure is analogous to the DSA. Although the requirements for access and creditor approval are more burdensome, both secured and unsecured debt may be renegotiated. The debtor receives a discharge of all non-excluded unsecured debt at the end of a maximum repayment period of seven years, while secured debts may be discharged to the extent provided for in the arrangement. Irish law also provides for a NINA procedure similar to the English DRO procedure. This procedure, known as the Debt Relief Notice (DRN), is administrative in nature and provides for a discharge after three years (Spooner 2013 *ERPL* 760-761).

6 International Guidelines and Lessons for South Africa

From the above discussion, it should be clear that South Africa has fallen behind the rest of the world and reform of the system's income restructuring measures, to bring them in line with modern trends, is vital. In order to ensure the effectiveness of the system, payment plans must clearly provide for some discharge of debt obligations. This view is also reflected in the World Bank Report (see par 444) and in this regard Kilborn ('Reflections of the World Bank's Report on the treatment of the insolvency of natural persons in the newest consumer bankruptcy laws: Columbia, Italy, Ireland' 2015 *Pace International Law Review* (*Pace Int'l L Rev*) 312) notes that the 'most powerful overarching theme' of the Report is that countries who have not already done so should implement a formal legal mechanism by which over-indebted consumers may seek debt relief in the form of a forced discharge of some or all of their debt obligations. Kilborn (2015 *Pace Int'l L Rev* 312) furthermore points out that a discharge of debt 'has been a unifying and consistent theme of previous recommendations from international organisations spanning the past twenty years' (see e.g., Insol International *Consumer Debt Report:*

Report of Findings and Recommendations (2001) 15 & 22 (hereafter Insol Report)). Further to this, achieving equality between the debtor and his or her creditors has also been a central theme of international instruments (see, e.g., World Bank Report parr 115 & 393; Insol Report 15). In this regard the following is stated in the World Bank Report (par 393):

> [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.

However, the need for striking a balance between debtor and creditor interests also requires debtors to earn their fresh start by making at least some payments in terms of a payment plan in exchange for the relief in the form of a discharge of debt (Kilborn 2015 *Pace Int'l L Rev* 313; World Bank Report parr 262 & 356). In the United States, for example, initially a debtor automatically qualified for a Chapter 7 'straight' discharge of all remaining debt obligations after he or she has surrendered all non-exempt assets for liquidation and distribution to creditors. However, with the introduction of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCA), some debtors are now required to earn their new start by making payments in terms of a Chapter 13 payment plan. In this regard, BAPCA introduced a means test (s 707(b)(2)) that channels debtors to the Chapter 13 procedure where their income exceeds the median in the debtors' state of residence.

It should be noted that section 129(1)(b) of the South African Insolvency Act 24 of 1936 indeed provides debt relief in the form of a forced discharge of debt after sequestration and subsequent rehabilitation. It thus provides the debtor with a 'fresh start' and, accordingly, a 'straight discharge' without the requirement of a payment plan. However, in South Africa, the 'straight discharge' is subject to the advantage for creditors principle and the applicant in a sequestration application is required to prove that there are sufficient realisable assets in the estate to ensure that a not-negligible dividend is paid to creditors (see e.g., *Ex parte Kelly* 2008 4 SA 615 (T) 617). Furthermore, as indicated, debt review in terms of the NCA and administration in terms of section 74 of the MCA do not provide for any discharge of debt obligations (for a detailed discussion of administration and its comparison with debt review see Boraine, Van Heerden & Roestoff 'A comparison between formal debt administration and debt review – the pros and cons of these measures and suggestions for law reform' 2012 *De Jure* 80 & 254). Consequently, debtors who are unable to prove advantage will be denied the opportunity of obtaining any discharge – not even an 'earned discharge'. However, the new section 71 of the NCA (as amended by s 21 of the NCAA) has improved the position of the consumer as regards his or her right to rehabilitation. Before the

amendment of section 71 a debt counsellor could issue a clearance certificate only once the consumer had fully satisfied all the obligations under every credit agreement in terms of the debt rearrangement order. This meant that a consumer who, for example, had a home loan agreement with a repayment period of 30 years as one of his or her credit agreements under debt rearrangement, would be able to be relieved from the consequences of debt review only after a period of at least 30 years (see Roestoff *et al* 'The debt counselling process – Closing the loopholes in the National Credit Act 34 of 2005' 2009 *PER* 285). Under the new section 71, such a consumer may be issued with a clearance certificate if he or she has demonstrated that he or she has the financial ability to satisfy the future obligations in terms of the rearrangement order under the home loan agreement, that there are no arrears in respect of the rearrangement order, and that all other obligations under every credit agreement included in the rearrangement order have been settled in full (see s 71(1)(b)).

The World Bank Report identifies two important issues pertaining to payment plans, namely, plan duration and the amount that debtors are required to pay over the life of the plan (see parr 262-301). According to the Report, experience has proved that overly-extended repayment periods will not result in the successful completion of a payment plan (see Report parr 264-265 & 269). In the United States, for example, despite the relatively short maximum payment period of three years required in respect of Chapter 13 plans, only about one-third of debtors who opt for this form of relief successfully complete their plan and receive a discharge (Kilborn 2005 *Mich J Int'l L* 633). Payment plans in terms of the NCA's debt review provisions, that are not subject to a maximum period and do not provide for any discharge, are (as was the case in *Ferris*) thus clearly destined for failure. According to the Report, the issue of plan duration is especially relevant with regard to developing countries (and thus also South Africa) where rapidly changing economic conditions can make successful planning for even a short period extremely difficult (Report par 270).

As regards the question of how much payment may be expected or demanded from debtors, experience in every major insolvency regime has revealed that few debtors will have the resources to produce anything substantial for creditors beyond covering the debtor's basic needs and the administrative costs of the insolvency system, no matter how long or short the repayment period might be. Extending the repayment period is thus likely to actually depress creditor returns and to reduce the number of debtors who can be assisted by the system (Report par 264). A more generally attainable goal of requiring payment plans is, according to the Report, to inculcate payment responsibility and thus rather to pursue the moral or educational goal of payment plans (Report parr 265 & 315).

Most policymakers thus agree that this issue is more a question of defining a predetermined level of sacrifice for debtors than defining a predetermined benefit for creditors. An important factor in determining

the potential payment to creditors is, first of all, to determine the amount to be reserved for the reasonable support of the debtor and those dependent on him or her (Report par 274). Systems should also create incentives that will encourage maximum productivity by debtors. In this regard the observation that '[t]he most prominent, fundamental, and effective way of encouraging debtors to be as productive as possible is simply to offer the relief of a discharge of unpaid debts' is especially relevant from the South African legislator's perspective (see Report par 281). The Report also highlights the importance of addressing the problems of debtors who are unable to generate significant disposable income for the duration of the plan (the so-called 'NINA debtors'). At present, a significant number of debtors in all consumer insolvency systems fall into this category, and the preferred approach is to avoid this discrimination and provide equivalent relief to all debtors, regardless of their financial resources (Report par 298). It is submitted that South African lawmakers should pay urgent attention to this issue as the current regime may be open to constitutional challenge since the exclusion of NINA debtors from a discharge procedure infringes their fundamental right of equality (see Boraine *et al* 'The pro-creditor approach in South African consumer insolvency law and the possible impact of the Constitution' 2015 *Nottingham Business and Insolvency Law e journal* (*NIBLej*) 59.

A further important theme of the World Bank Report, is the prevalent policy preference for out-of-court settlement procedures rather than costly court-orientated procedures (Report parr 128-138). In this regard it should be noted that the NCA indeed provides for an out-of-court settlement procedure. However, it applies only in the event of a finding by the debt counsellor that the consumer is not over-indebted but is experiencing, or is likely to experience, difficulty in satisfying all of his or her obligations in time (see s 86(7)(b)). The NCA therefore does not require negotiations in the case of over-indebted consumers but, in terms of section 86(5)(b), it is actually expected from credit providers to participate in the debt review process and negotiations for debt rearrangement. However, in practice credit providers are often not eager to participate in the negotiation process. A research report by the Law Clinic of the University of Pretoria submitted to the National Credit Regulator (NCR) in 2009 indicated that credit providers not co-operating in the debt review process was an important cause of the ineffectiveness of the process (Haupt *et al The debt counselling process: Challenges to consumers and the credit industry in general* (2009) 308).

As regards the issue of creditor participation it is thus suggested that the South African legislature could learn from the reforms introduced in France (see the discussion in par 5 above). Apart from the French legislator's unique approach in introducing commissions comprising of members with the necessary expertise to assist in the developing and negotiating of workable repayment plans, the crux of the effectiveness of the new French system, it is suggested, clearly lies in the 'moral power' of the *Banque de France* (Huls 'Towards a European approach to

overindebtedness of consumers' 1993 *Journal of Consumer Policy* 218). According to Kilborn, the involvement of the *Banque de France* in the process is one of the most effective elements of the new French system. He explains that (2005 *Mich J Int'l L* 639):

> The participation and support of the central bank was seen as critical to ensuring smooth operation of the new law. The central bank's pivotal role lent crucial legitimacy to the radical new law in the eyes of lending establishments. The central bank was all too happy to lend its support, as it sought ways to exert greater oversight (and ultimately restraint) over the credit activities of French commercial lenders. The Banque the France was instrumental in overcoming the initial reticence of many creditors toward the new system. In the face of obstructionist attitudes from many institutional creditors during the first years of the new system, working groups constituted by the Banque de France successfully lobbied their constituent credit organizations in support of the new law. This lobbying effort produced a strong upsurge in creditor cooperation and a 150% increase in the success rate of out-of-court plan negotiations between 1990 and 1993.

In light of the generally apathetic attitude of credit providers, as well as their apparent distrust of the debt review process, it is submitted that South African lawmakers should consider a system similar to the French system in which the involvement of the NCR in the negotiation process may perhaps provide the necessary legitimacy and trust in the system (see also World Bank Report par 136 which notes the involvement of a government regulator as one of the factors that contribute to the higher success rate of voluntary settlements). Moreover, limiting the courts' involvement to a mere supporting role, for example, to approve recommendations of the administrative body that are not voluntarily accepted by credit providers, will also address the problem of overburdened courts that has been experienced with regard to applications for debt rearrangement in terms of the NCA (see *Standard Bank of South Africa Ltd v Kruger*; *Standard Bank of South Africa Ltd v Pretorius* 2010 4 SA 635 (GSJ) par 17).

According to the World Bank Report, the effectiveness of an insolvency system is also assessed by the system's ability to properly monitor debtor compliance and whether it allows modifications to payment plans for changed circumstances (parr 262 & 302). In practice, debt counsellors are required to monitor payments by the consumer for the full period of the debt review process (Roestoff *et al* 2009 *PER* 285). However, the NCA does not require such monitoring. Moreover, unlike the administration procedure that provides for the possibility that the order may be amended, suspended or rescinded on application by the debtor or any interested party (see s 74Q of the MCA), the NCA does not provide for the variation, suspension or setting aside of a debt rearrangement order. In *Ferris*, the consumer was thus denied the opportunity to deal with possible changed circumstances by applying for a suspension or variation of the rearrangement order, as the credit provider was entitled to proceed with enforcement in terms of section 88(3)(b)(ii). The absence of provisions dealing with monitoring and plan

modifications to cater for changed circumstances, such as a temporary disability to make repayments, it is submitted, is a shortcoming in the system and should be addressed by the South African legislator (see Boraine & Roestoff 2014 *THRHR* 545).

A further important issue regarding payment plans is the question as to how secured debt should be dealt with. In light of the facts in *Ferris*, where the credit agreement involved was a home loan and thus a mortgage agreement in terms of the NCA (see s 8(4)(d)), this is an important issue for the purposes of the current discussion. It should be noted that the NCA's debt review process allows a court to impose a rescheduling of debt upon credit providers and that such rescheduling may also be ordered with regard to secured debt which would, amongst others, include obligations with regard to home mortgages. This is quite revolutionary when compared to foreign systems where secured creditors are, in principle, protected in insolvency procedures (see Boraine, Van Heerden & Roestoff 2012 *De Jure* 264). The World Bank Report points out that the strong position of secured creditors is defendable as confidence in the credit markets should be protected. Moreover, the constitutional right to property justifies the rights of secured creditors as security interests are normally defined as property rights (Report par 321). In a Chapter 13 reorganisation bankruptcy, in terms of the American Bankruptcy Code, for example, modification of plans in respect of the time and amount of payments is not allowed where the claim is secured only by 'real property that is the debtor's principal residence' (s 1322 (b)(2) of the Bankruptcy Code). Should the debtor therefore opt to retain the property and should he or she wish to deal with the debt in terms of a Chapter 13 plan, such a plan must provide for payment of the regular mortgage instalments as originally agreed. The court is not empowered to reduce the instalments and extend the period of the agreement. However, any amount that is in arrears may be repaid over the duration of the plan (see Boraine, Van Heerden & Roestoff 2012 *De Jure* 265).

By not providing any preference as to the repayment of mortgage debt, the South African legislator has most likely contributed to credit providers' distrust in the system. It is submitted that South African lawmakers should consider the American example as regards the treatment of housing loans (Boraine, Van Heerden & Roestoff 2012 *De Jure* 271). In addition, the consumer could also be allowed to budget for the instalments in respect of home loans as part of his or her minimum living expenses, provided they are reasonable and thus qualify as necessary living expenses (see World Bank Report par 291; see also s 74(C)(2)(d) of the MCA which provides for the possibility that the court may exclude a certain amount from the instalments to be made to the administrator to enable the debtor to make periodical payments under mortgage bond obligations if the court is of the opinion that the instalments are reasonable and that it is desirable to safeguard the mortgaged property). Regulation 24(7) of the National Credit Regulations currently provides that minimum living expenses be based upon a

budget provided by the consumer and adjusted by the debt counsellor with reference to guidelines issued by the NCR. However, thus far the NCR has not issued any such guidelines. Although some discretionary element, regarding the issue of what is considered to be 'reasonable needs and expenses', is desirable, it is submitted that basic budgetary guidelines should be issued in order to overcome the problem of variable decision making by debt counsellors and our courts (see World Bank Report par 285; see also its criticism against the practice of assigning debtor budgets to the discretion of system administrators and courts).

It is suggested that secured creditors' rights should, in principle, be protected in the debt review process, but measures providing for rescheduling of repayment periods and/or the reduction of interest rates or the principal amount owed by the debtor on the loan should be possible on the basis of a negotiated agreement between consumers and credit providers. However, the inclusion of a provision for a discharge of unsecured debt obligations is of the utmost importance. In *Ferris*, such an inclusion would have improved the consumers' chances of bringing their arrears under the home loan agreement up to date and to complete the remainder of the payment plan successfully and, eventually, to overcome their over-indebtedness.

7 Concluding Remarks

It is submitted that the Constitutional Court has correctly applied the relevant provisions of the NCA to the facts in *Ferris* and that the credit provider was thus entitled to enforce the credit agreement without further notice once the consumers had breached the debt rearrangement order. However, the implication of *Ferris* is that the minor measures currently provided for by the NCA – namely, a mere rescheduling of debt and an extension of payment dates – are insufficient to provide effective and efficient relief to all South African (including NINA) debtors. International developments and guidelines discussed above indicate that overly-extended payment plan periods and plans which provide for a limited discharge of debt obligations will eventually lead to the failure of such plans. Therefore, payment plans that provide for no maximum period and no discharge, such as those in terms of the debt review process, are obviously even more destined for failure.

As indicated, one of the central themes of the World Bank Report is that consumer insolvency systems should strive to obtain a balance among debtor and creditor interests. In this regard it is indeed one of the NCA's objectives to promote equity in the credit market. However, from the discussion of *Ferris* it should be clear that this objective and the South African Constitution's commitment to achieving equality are, in actual fact, not attained by the NCA's debt review process. The outcome of *Ferris* clearly demonstrates that the NCA does not truly pursue the objective of providing debt relief to debtors as it is mainly oriented towards debt collection and thus the principle of maximising returns to creditors.

South African consumer over-indebtedness is still at an unacceptably high level. The latest statistics provided by the NCR (see the *Credit Bureau Monitor* (March 2016)) indicate that the percentage of consumers with impaired records (i.e. consumers who, amongst others, are in arrears with three or more instalments) currently stands at 40 %. Law reform of the NCA's debt-review process, thus, is vital and proper measures that would deal effectively and efficiently with the problem of consumer over-indebtedness should be introduced.

M ROESTOFF
University of Pretoria

P K Harikasun v New National Assurance Company Ltd (190/2008) [2013] ZAKZDHC 67 (12 December 2013)

Of red herrings, sardines and insurance fraud: Something's fishy

1 Introduction

Fraudulent insurance claims may be divided into three broad categories. The first is unfounded or fabricated claims and these are claims for losses that never occurred (Reinecke *et al South African Insurance Law* (2013) 375-376). Here, the insured fraudulently attempts to obtain a benefit he would not have been entitled to, were it not for his fraud. The second is fraudulently exaggerated claims, which refers to those claims where the insured inflates the value of what was lost. The third category refers to claims that are fully valid but which are accompanied by fraudulent means or devices – this means that the claim is valid but because the insured is of the opinion that the fraud is necessary to render the claim valid, he perpetrates fraud. At common law, the principle is that an insured cannot claim more than he is actually entitled to. Insurance companies often deal with insurance fraud by including fraudulent claims clauses into their contracts. Standard fraud clauses entitle the insurer to repudiate such claims and, in some instances, the insurer may also be entitled to cancel the contract. These clauses confirm the parties' rights and where an insurer has, for instance, compensated a policyholder and it later transpires that the claim was fraudulent, the insurer has the right to recover benefits that were mistakenly paid to the policyholder.

Of particular interest is the inclusion of forfeiture clauses in insurance contracts. As they stand, these clauses typically stipulate that a policyholder who was fraudulent regarding a portion of his claim,

How to cite: Millard '*P K Harikasun v New National Assurance Company Ltd* (190/2008) [2013] ZAKZDHC 67 (12 December 2013)' 2016 *De Jure* 155-167
http://dx.doi.org/10.17159/2225-7160/2016/v49n1a10

regardless of how small that portion was, stands to forfeit his *entire* claim against the insurer. As is evident from the case in question, it seems particularly harsh to enforce such a claim where the so-called fraudulent part of the claim is particularly small in relation to the total claim value. Although the South African common law position leads to equitable results, there is nothing that prohibits insurance companies from changing the *naturalia* of their contracts by including forfeiture clauses. These forfeiture clauses mirror the position in English law and seem to be widely accepted in insurance practice. However, as can be seen in the case under discussion, forfeiture clauses may lead to unfair results where only a small portion of a claim was fraudulent, yet the policyholder forfeits the entire claim.

The ultimate question, therefore, is whether it is fair to have these clauses in insurance contracts. The question of fairness versus *pacta sunt servanda* is a raging debate within the law of contract in general and much has been written on this topic. However, for the sake of brevity, this discussion will only highlight the main issues in so far as it is relevant to forfeiture clauses.

Additionally, this discussion will also compare the current common law position in South Africa to that in England to illustrate that the inclusion of forfeiture clauses actually places South Africa on par with England. The comparison with England was chosen here because many aspects of English insurance law became part of South African law over the years. Although English law is no longer a source of our law, and also no longer a binding source, Reinecke *et al* correctly state that it retains a persuasive authority (Reinecke *et al South African Insurance Law* (2013) 15).

2 Facts

In casu the plaintiff, Mr PK Harikasun, brought an action for indemnification under an insurance policy issued by the defendant, New National Assurance Company Limited, for loss suffered during an armed robbery (par 1). The uncontested facts of the matter were that the plaintiff completed and submitted a Personal Insurance Plan Proposal Form dated 20 March 2007 to GDI Schofield Insurance Brokers. The defendant accepted the risk and issued a domestic insurance policy to the plaintiff with effect from 1 April 2007. The insurer covered 41 items of jewellery under the 'All Risks Specified Section'. The 'Household Contents Section' contained certain limitations, including a limitation on cover in respect of cellular phones at the insured's private residence to R1 500, unless specified. Furthermore, the limitation stated that 'theft must be accompanied by forcible and violent entry and accidental damage is excluded' (par 24).

On 4 July 2007 there was a robbery at the plaintiff's home, which prompted him to lodge a claim form dated 6 July 2007. Attached to this form was a schedule dated 10 July, which included 43 specified items of

jewellery valued at R305 775, and a cell phone valued at R4 500. It, therefore, was the plaintiff's contention that the incident at his house was a defined event in terms of the policy and that the defendant was liable to compensate him. The plaintiff alleged that the defendant was in breach of its obligations in that, notwithstanding compliance by the plaintiff with all his obligations under the policy, the defendant had failed and/or refused to pay the claim amount of R321 275, which is the extent of the plaintiff's loss (par 3).

The insurance company admitted to having issued the policy. Their refusal to compensate the plaintiff was based on their contention that the items of jewellery that were allegedly stolen on 4 July 2007 had in fact been stolen prior to the inception date of the policy. In addition, the defendant averred that, as it extended insurance cover in respect of the three items relying on the plaintiff's misrepresentation, the policy was induced by fraud. The defendant, therefore, was entitled to cancel the policy and had tendered repayment of the premiums paid. The defendant also placed in dispute the robbery and the theft of the items listed in the plaintiff's schedule of stolen goods. Even if the plaintiff did prove the loss, the defendant contended that it was not obliged to indemnify him and it was entitled to avoid the agreement of insurance because the plaintiff lodged two fraudulent claims. This was in breach of clause 9 of the contract. The first of these claims was for the loss of a Sony Ericsson cell phone, which the plaintiff falsely represented was in use and had a replacement value of at R4 500. The second was for an 18 carat Loasia chain valued at R6 250, which had been stolen from him on 27 April 2006.

3 Decision

The plaintiff requested a separation of the merits and quantum in terms of Rule 33(4) of the Uniform Rules, and the trial proceeded only on the merits (par 7). There were three issues for determination. The first was whether the plaintiff had proved that a robbery had taken place at his residence on 4 July 2007 and established that he had suffered the loss, which included the cell phone and the Loasia chain. The second issue was whether the defendant was entitled to avoid the contract of insurance because it was induced by the plaintiff's misrepresentation to issue the policy and to extend insurance cover over three items which were not in his possession. The third issue was whether the defendant could repudiate the plaintiff's claim for compensation and cancel the insurance contract because the plaintiff had breached the contract by his fraudulent claims for the damaged cell phone with no value and the Loasia chain which was not in his possession on 4 July 2007 (par 8).

The court remarked – and this is trite – that the onus is on the plaintiff to bring his claim within the four corners of the contract and to prove the extent thereof (see *Schoeman v Constantia Insurance Co Ltd* 2003 6 SA 313 (SCA) at 323A). That simply means that the plaintiff must prove that a robbery took place at his house on 4 July 2007 and that he is entitled

to be indemnified by the defendant for loss suffered as a result of the robbery, as it constitutes a defined event in terms of the insurance policy. It is also true that an insurer who alleges fraud has to prove it on a balance of probabilities. The court remarked that this 'burden is an onerous one and our courts have observed that the point of departure has to be that fraud – the insured's intention to deceive and defraud the insurer – is not to be imputed lightly' (par 10). Furthermore, insurance fraud cannot be presumed and an important element of fraud in respect of fraudulent claims is the intention of the insured to deceive the insurer 'by misrepresentation or deception and to cause the insurer prejudice' (see *Springgold Investments (Pty) Ltd v Guardian National Insurance Co Ltd* 2009 3 SA 235 (D) at 243F–G).

The plaintiff and his wife declined to take a polygraph test (par 24.5). However, the plaintiff did supply receipts and valuations for some of the jewellery on the schedule and two affidavits in respect of the cell phone. Upon investigation, MTN, the service provider on whose system the lost cell phone was registered, confirmed that they had inspected the cell phone on 18 February 2006. MTN established liquid damage to the phone and the repair cost was R3 780, whereas the replacement cost amounted to R4 028.32. The insured opted not to have the phone repaired (par 24.7).

As far as the legal principles are concerned, other than those pertaining to the onus of proof, the court remarked that with regard to the pre-contractual fraud, the insurer has the right to avoid a contract of insurance whether the proposer has misrepresented a material fact or he has failed to disclose one (par 12). The court relied on *Mutual & Federal Insurance Co Ltd v Oudtshoorn Municipality* (1985 1 SA 419 (A) at 432E–H) in this respect.

As their main reason for repudiating the case, the defendant relied on the exemption contained in clause 9 of the General Conditions of the agreement of insurance to avoid the agreement of insurance (par 16). The court remarked that while there is no general principle that exemption clauses should be construed differently from other provisions in a contract, the courts are wary of contractual exclusions since they deprive parties of rights that they would otherwise have had at common law, and in this respect the court referred to *Van der Westhuizen v Arnold* (2002 6 SA 453 (SCA) 4 All SA 331 at parr 37–40). Additionally, in applying the *dictum* in *Fedgen Insurance Ltd v Leyds* (1995 3 SA 33 (A) at 38B–E), the court observed that it is a well-recognised principle of interpretation of insurance policies that the courts should lean toward upholding the policy rather than producing a forfeiture (par 16).

To return to the evidence and onus of proof: there was no direct evidence and the court had to rely on circumstantial evidence, which means that the inference drawn must be consistent with all the proven facts and the proved facts should be such 'that they exclude every reasonable inference from them save the one sought to be drawn' (*R v*

Blom 1939 AD 188 202–203). However, in a civil case it is also important to bear in mind that the court must balance probabilities and select the most plausible conclusion (par 16). In this respect, the court referred to *Ocean Accident and Guarantee Corp Ltd v Koch* (1963 4 SA 147 (A) at 159C–D) and to *Santam Bpk v Biddulph* (2004 5 SA 586 (SCA) at 589G).

The court heard the evidence of the plaintiff, his daughter Tasha, and a cousin, Caveer Ramjathan. In summarising the evidence, the court remarked that the stolen cell phone was scheduled as having a value of R4 500. It is in fact the cell phone that upset the apple cart. Apparently, the plaintiff could not remember what his response was when asked to take a polygraph test. He and his wife were called to a meeting with the insurers at which he was asked why he had not declared that the cell phone was not functional or faulty. The plaintiff testified as follows:

> I explained to them exactly what I knew at that point in time. That the cell phone was damaged, it went in for repairs, it came out unrepaired and I never used that cellphone from the time it went to MTN for repairs and was returned (par 45.)

He had not said that the phone was in use. The court dealt with Mr Harikasun's evidence about the cell phone and three other items, namely a Loasia chain, a quarter Kruger Rand with a diamond, and a hand chain. He admitted that the chain, the Kruger Rand and the hand chain were stolen during a previous 'smash and grab' robbery on 27 April 2006, and he had been compensated therefore by the insurer at the time, Mutual & Federal. Despite this he still insured these with the defendant.

The court described the plaintiff as neither an impressive nor a credible witness. The court described the many inconsistencies in the plaintiff's testimony (par 49). Funnily, the plaintiff's credibility was seriously undermined by his evidence about how the cell phone was damaged and this portion of the judgment makes for interesting reading. During his examination-in–chief, the plaintiff testified that the phone was damaged when he went into the water at Addington beach during a sardine run, with his phone in his back pocket. Apparently he 'got out happily with the sardines' and phoned his uncle with the good news about his catch (par 52). Under cross-examination the plaintiff could not tell how he phoned his uncle with a broken cell phone and he changed his version several times. Unfortunately his version became even more inconsistent when he was reminded that the sardine run occurred during the winter months and not in February as he alleged (par 54). The plaintiff then alleged that it was not sardines, but mackerel. At this time Moodley J remarked:

> Having lived in KwaZulu-Natal all my life, although I am not a fisherman, I have never heard of a mackerel run, although unlike the plaintiff, I am familiar with the saying "To throw a sprat to catch a mackerel". Unsurprisingly the mackerel run turned out to be "a red herring". According to the South African Sustainable Seafood Initiative – the species of mackerel or the King mackerel (also called Couta or Cuda) which is found near the KwaZulu-Natal coastline, are linefish. This species is targeted by commercial and subsistence

> fishers but also caught by recreational line and spear fishers. The plaintiff's explanation about how liquid damage was caused to the phone while he was gathering armfuls of mackerel is consequently a ludicrous lie (par 54).

As far as the actual robbery was concerned, the court accepted that the event insured against did take place and the plaintiff was successful in proving this.

Turning to the inducement of the contract of insurance by a material misrepresentation, the court observed that the defendant had to prove the pre-contractual fraud and that the misrepresentation materially affected the assessment of the risk under the policy at the time of issue (par 66). However on the evidence, Moodley J remarked that the court found 'no merit or pertinence' in the plaintiff's allegation that the defendant suffered no prejudice because he paid the premiums on the items and did not include them in the claim he lodged with the defendant (par 71). In addition, the argument that the nondisclosure did not materially affect the risk assumed by the defendant in respect of the plaintiff was also without merits because the defendant extended cover for items which did not exist at the time of the issue of the policy and for which the plaintiff bore no risk. Overall, the court proceeded to remark that it was not convinced that the contract of insurance was induced by fraud on the part of the plaintiff (par 72). The court remarked that the plaintiff was assisted by a broker in the completion of the proposal and it was probably convenient to move the list of items covered by the previous insurer to the defendant, instead of re-listing all these items. This was apparently done on a previous occation when the broker completed a form for insurance with SA Eagle. And even though the proposal to the defendant did carry the plaintiff's signature, the court was not satisfied that the plaintiff:

> deliberately and with intent, made a material misrepresentation or non-disclosure in failing to note that certain items ought not have been transferred from the previous schedule to the policy with the defendant, as he was not solely responsible for listing the items included "All Risks" section in the policy (par 72).

Here, the court relied on *Fransba Vervoer (Edms) Bpk v Incorporated General Insurances Ltd* (1976 4 SA 970 (W) at 790 E-F).

Therefore, despite the duty of disclosure on the plaintiff and the objective test to be applied in determining the materiality of the misrepresentation, the facts *in casu* indicate that there are:

> special circumstances that indicate that a reasonable man would not have disclosed certain facts. The court is therefore not persuaded that the defendant is entitled to rely on the provisions of section 53 of the Short Term Insurance Act 53 of 1998 to avoid the policy on the grounds that it was induced by fraud on the part of the plaintiff (par 72).

Because it was not possible for the defendant to avoid the entire claim because of a misrepresentation (or pre-contractual fraud), the court had

to decide whether or not to allow the claims for the cell phone and the Loasia chain. The court again referred to the evidence and rules that the plaintiff's version was 'inherently improbable'. The court agreed with the defendant that the fraud consisted in the plaintiff's misrepresentation that the cell phone did work and was worth R4 500. The plaintiff deliberately tried to claim for a benefit that was not due to him. In addition, it was 'fraudulent in the sense of having been made knowingly and with the intention of obtaining a benefit under the policy' (par 90).

In avoiding liability the defendant relied on clause 9 of the General Conditions of the insurance agreement, which provides that:

> If any claim under this policy be in any respect fraudulent or if any fraudulent means or devises be used by the Insured or anyone acting on his behalf to obtain any benefit under this Policy or if any accident, loss, destruction, damage or liability be occasioned by the wilful act or with the connivance of the Insured all benefit under this Policy shall be forfeited (par 91).

The court found that the plaintiff's fraudulent claim in respect of the cell phone, constituted a breach of the conditions of the policy with the result that the defendant was entitled to avoid the claim (par 92). As far as the Loasia chain was concerned, the court found that there are 'many unsatisfactory aspects in the plaintiff's evidence in relation thereto'. However, the court found that it was not necessary to deal with this claim any further because the claim in respect of the cell phone was fraudulent and the entire claim was therefore dismissed (par 93).

4 Comment

4 1 South African Common Law Position

Although the court observed that the plaintiff was by no means a star witness and even though the way in which the truth regarding the cell phone was discovered by the court was rather comical, the application of the forfeiture clause *in casu* does seem unnecessarily harsh. It is a striking example of where a whole claim is forfeited because of fraud that actually only affects a relatively small portion of the claim. Translated into monetary terms, this meant that the plaintiff's total claim of R321 275 was repudiated because of the fraudulent claim of R4 500. This begs the question whether forfeiture clauses should in fact be allowed and whether it is fair overall to have these in insurance contracts.

When one investigates the theoretical background, it is evident that forfeiture provisions have the effect of depriving a policyholder of that which he would have been entitled to at common law (Reinecke *et al supra* 382–383). The effect of a fraudulent claim on the insurer's liability at common law depends on the category of fraud that applies.

As was pointed out in paragraph 1, the first category of fraudulent claims refer to unfounded or fabricated claims, the second is fraudulently exaggerated claims, and the third category refers to claims that are fully

valid but are accompanied by fraudulent means or devices. Reinecke *et al* (*supra* 377) explain that the rule in Roman-Dutch law is that an insured can gain no benefit from his fraudulent claim, which simply means that the insured cannot claim more than he is entitled to. This means that in the instance of fraudulently fabricated claims (the first category), the insurer is not liable for anything and the insured forfeits his entire claim. This makes sense simply because the insurer cannot claim for something he did not lose or for damage he did not incur. In the case of a fraudulently exaggerated claim (the second category), the insurer is liable for the insured's actual loss but is not liable for the exaggerated part of it. Again, the insurer cannot claim for something he did not lose but he can claim for his actual loss (Reinecke *et al supra* 378). Applied to the facts in *Harikasun,* the claim for the phone would be repudiated but the remainder of the claim would stand. In the instance of a valid claim accompanied by fraudulent means (the third category), Reinecke *et al* (*supra* 378) explain that the insurer's liability is not affected as the insured's fraud is 'merely incidental and causally irrelevant to his loss or the insurer's liability'. The fact remains that, regardless of the kind of fraud, the insurer's civil remedy is a claim for damages against the insured for any damages his fraud may have caused (Reinecke *et al supra* 378). In addition, the insurer may institute criminal proceedings against the insured for his fraud, regardless of the amount for which the insured instituted a claim (Reinecke *et al supra* 378). In all three these instances, fairness prevails as the actual loss is compensated, nothing more and nothing less. Furthermore, where the insurer has the option of instituting criminal proceedings against the policyholder for fraud, it must be evident that the policyholder's actions do constitute fraud in the criminal sense and nothing else because failing this, there can be no prosecution and absolutely no conviction. Here, it is important to note that Snyman (*Criminal Law* (2008) 520) defines fraud as 'the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another'. Insurance fraud then relates to the unlawful and intentional making of a misrepresentation by the insured which then results in an actual or potential loss for the insurer.

It follows that where a policyholder made a misrepresentation regarding a claim but this was not done intentionally, it cannot be fraud. Applied to insurance contracts, this means that only the intentional mirepresentations of a policyholder invokes the sanctions described by Reinecke *et al* (*supra* 378) and that any actions that amount to something less than fraud may not form the basis of an action for damages against the policyholder. This to is fair, since the proper application of the definition of fraud will prevent insurers from acting in an arbitrary fashion and from repudiating claims that should in fact be paid, simply because the insurer is of the opinion that some act of the policyholder might be tainted with dishonesty.

It, therefore, is not the common law position that constitutes the *naturalia* of insurance contracts that is cause for concern. Neither is it disputed that if there is no express forfeiture clause in a policy, such term

may not be implied *ex lege* or incorporated tacitly (*Schoeman v Constantia Insurance Co Ltd* 2003 2 All SA 642 (SCA)). Rather, the concern is around forfeiture clauses such as the one in Mr Harikasun's case that lead to seemingly unfair results. This now turns the discussion to the raging debate on fairness.

4 2 Fairness in Insurance Contracts

Legal certainty is a foundational principle that underlies the South African legal system (Hopkins 'Developers, municipalities, wrong decisions, liability and the Constitution' 2004 *SAPR/PL* 433). This entails, *inter alia*, that the law must be certain in order to enable legal subjects to regulate their conduct (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). The principle of *pacta sunt servanda* (agreements must be kept) conveys the idea of certainty and implies that a party to a contract should be able to rely on the other party to keep their contractual promise. However, as was seen in *Barkhuizen v Napier* (2007 5 SA 323 (CC)), there are clauses in insurance contracts that have negative consequences for policyholders and it is often when disgruntled policyholders are faced with such clauses that the debate turns to the fairness of these clauses.

It is well-known that fairness, as a so-called abstract value, has been transported into contract law by the Roman law defence of bad faith or the *exceptio doli*, and that this defence was abolished in *Bank of Lisbon and South Africa Ltd v De Ornelas* (1988 3 SA 580 (A)). Joubert JA pronounced the *exceptio doli* a 'superfluous defunct anachronism', effectively abolishing the principle (*Bank of Lisbon and South Africa supra* 605I). In the wake of this judgment, many called for legislative intervention and others debated the possibility of using public policy as an alternative concept to introduce fairness and good faith into contract law (Hawthorne 'The end of bona fides' 2003 *SA Merc LJ* 272). Much debate on the role of good faith followed and cases such as *Afrox Health Care Ltd v Strydom* (2002 6 SA 21 (SCA)) re-iterated that good faith, reasonableness and fairness do not provide an independent, free-floating basis for interfering with contractual relationships (*Afrox Health Care Ltd supra* par 32). It is also a fact that academic opinion remains divided on the use of the South African Constitution of 1996 as a vehicle to import good faith, equity and fairness into South African contract law (Davis 'Private law after 1994; Progressive development or schizoid confusion?' 2008 *SAJHR* 329; Barnard 'A different way of saying: On stories, text, a critical legal argument for contractual justice and the ethical element of contract in South Africa' 2005 *SAJHR* 278).

In the context of insurance, it is a well-known fact that in *Barkhuizen v Napier* (2007 5 SA 323 (CC)) the Constitutional Court had to rule on the validity of time bar clauses. In this case, the majority of the court held that public policy requires parties to comply with contractual obligations undertaken freely and voluntarily (Kuschke '*Barkhuizen v Napier*' 2008 *De*

Jure 466), thus reinforcing the rule of *pacta sunt servanda*. Accordingly, the clause in question did not deny the applicant the right to institute legal action but only limited the time within which he had to do so. Following this judgment however, the legislature intervened and formulated new rule 7.4 of the Policyholder Protection Rules (PPR's) in terms of the Long-Term Insurance Act 52 of 1998 and the Short-term Insurance Act 53 of 1998. As from 1 January 2010, any time limitation provision may not include the 90-day period within which the insured may make representations to the insurer, and it must provide for a period of not less than six months after the expiry of the 90-day period for the institution of legal action. The new rule states that even in cases where the time bar period has expired, the policyholder may request the court to condone non-compliance if the court is satisfied that 'good cause' exists for the failure to institute legal proceedings, and 'that the clause is unfair to the policyholder'. This, no doubt, is fair.

The question remains whether legislation should be passed to exclude forfeiture clauses and, as promised, a quick overview of the position in England follows.

4 3 English Law

In English law, any fraud in connection with an insurance claim, causes forfeiture of the insured's entire claim (Birds *Birds' Modern Insurance Law* (2010) 291-292). This means that whether the claim is a fraudulently fabricated one, a fraudulently exaggerated claim or a valid claim accompanied by fraudulent means, the insured forfeits his entire claim (Birds *supra* 290-291). Evidently the position in English law is exactly the same as it is in South Africa where a forfeiture clause is included in an insurance contract. If the insurer did pay and the fraud was discovered later, it may recover payment from the insured (Birds *supra* 291). However, earlier non-fraudulent claims are not affected by subsequent fraud and it is not possible for an insurer to avoid the contract retrospectively (Birds *supra* 289). It is not possible for an insured to validate the claim by retracting the fraud (*Direct Line Insurance Plc v Fox* EWHC 386 (QB) 2009 1 All E.r. (Comm) 1017). In *Galloway v Royal Guardian Royal Exchange (UK) Ltd* (2000 Lloyd's Rep. I.R. par 209) the Court of Appeal ruled that even though the policy in question did not contain a forfeiture clause, the policy would be treated as if there was such a clause.

It is quite evident that in England, the courts are of the opinion that the purpose of the law must be to discourage fraudulent claims. This principle was in fact confirmed in *Axa General Insurers Ltd v Gottlieb* (EWCA Civ 112 2005 Lloyd's Rep. I.R. 369; see also Birds *supra* 290). This means that even in the absence of a forfeiture clause, policy considerations dictate that the fraudster should be deprived of his entire claim.

This position is, no doubt, much stricter than the position in South African common law, because the principle that is applied is *fraus omnia corrumpit,* which means that 'fraud infects the whole transaction' (Reinecke *et al supra* 377 n 209). The strong reliance on this adage has been confirmed in case law in England. In fact, in *Schoeman v Constantia* (2003 6 SA 313 (SCA)) the court states that this rule in English law is *unashamedly penal* and although the court did not have to rule on the fairness of these clauses in general, it does conclude that South African civil law is anti-penal (see *Pearl Assurance Co v Union Government* 1934 AD 560 (PC)). Therefore, although South African insurance law has much in common with English law, this very fundamental difference between South African insurance law and English insurance law on penal clauses, makes a good case against the inclusion of forfeiture clauses in insurance contracts.

Still, the fact remains that South African insurers are not prohibited from relying on forfeiture clauses. The next issue for investigation is the way in which fairness manifests itself in insurance contracts and whether rules pertaining to other onerous clauses may be used as an argument against forfeiture clauses.

4 4 Role of Insurance Intermediaries and the Financial Advisory and Intermediaries Act 37 of 2002

It is suggested that fairness has seeped into the South African law of insurance via the Financial Advisory and Intermediaries Act 37 of 2002 (the FAIS Act). This statute is primarily concerned with the regulation of the activities of financial advisors and intermediaries, and those who sell insurance inevitably have to abide by this statute. There are numerous provisions that are aimed at protecting consumers but perhaps the most relevant stipulation can be found in the General Code of Conduct (GCC) in terms of the FAIS Act. Section 7(c)(vii) of the GCC provides that financial service providers should provide a client, at the earliest possible opportunity, with full and appropriate information of, *inter alia*, 'concise details of any special terms or conditions, exclusions of liability, waiting periods, loading, penalties, excesses or circumstances in which benefits will not be provided'.

Failure to do so, according to the FAIS Ombud, constitutes a breach of contract and that renders the provider or insurance broker liable to the client. This principle has been repeated in a number of Ombud cases, notably *Wiltash Musiek CC v Teneo Financial Services CC and Christiaan Stephanus Lessing* (case no FAIS 07648/12-13 FS 3) and *Fliptrans CC v S & P Insurance Advisors (Pty) Ltd t/a McCrystal and Partners and E Solmes* (case no FAIS 07987/11-12/GP3). The latter dealt with a broker who failed to inform the insured that his motor cycle needed to be fitted with a tracking device and when the claim was repudiated for failure to fit such device, the Ombud ruled that the broker failed to alert the policyholder of this particular clause.

As far as the debate on fairness is concerned, one must consider that the FAIS Ombud's mandate, in terms of section 20 of the FAIS Act, is to adjudicate complaints with due consideration of the 'contractual relationship or other legal relationship' between the parties and 'by reference to what is equitable'. This means that the Ombud has a statutory mandate to consider fairness when making a decision. Ombud decisions such as in *Wiltash* and *Fliptrans* (*supra*) illustrate the Ombud's approach to onerous clauses, namely that an intermediary or advisor has a duty to ensure that a policyholder is aware of these clauses.

It is submitted that the same holds true of forfeiture clauses. Although it was never Mr Harikasun's case that he was not aware of the forfeiture clause, such clauses will no doubt not be enforced by the FAIS Ombud if a complainant can prove that he was not aware of the clause.

Overall, it can be argued that the FAIS Act introduces fairness in insurance law by means of the regulation of the activities of intermediaries and advisors. Unfortunately, the courts are not bound to reach an 'equitable result' whereas the FAIS Ombud is. This means that it is possible for the same case to be adjudicated differently by the Ombud and by a civil court. At the very least, although the FAIS Act does not forbid forfeiture clauses, there is an obligation on intermediaries and advisors to ensure that a prospective policyholder's attention is drawn to these and every other onerous clause in an insurance policy.

5 Conclusion

South African common law allows for the forfeiture of that portion of the claim that is fraudulent. *In casu*, if there were no forfeiture clause, Mr Harikasun would only have forfeited the claim for the cell phone but the remainder of the claim would have been paid. That seems fair.

However, in order to be fair to insurers, fraudulent claims clauses have seemingly become necessary because of the high incidence of insurance fraud. Although the intentional misrepresentation of facts can be said to go to the heart of the contract and although there is a lot of truth in the maxim *fraus omnia corrumpit,* it is submitted that forfeiture clauses often strike at more than just the forfeiture of *fraudulent* claims. This was not the case in *Harikasun*, but it is possible for insurers to include, in forfeiture clauses, actions that are not fraud *per se*. That means that even honest mistakes can by interpretation be covered by a forfeiture clause and that may lead to unfair results.

Although the validity of forfeiture clauses have not been successfully challenged in a South African court, a clear call for legislative reform was uttered in *Napier NO v Van Schalkwyk* (2004 (3) SA 425 (W) at 444). The question, then, is what shape those reforms should take?. As was remarked before, unlike the position in England where forfeiture clauses are valid and enforceable, South African civil law does not have a penal nature and we should be cautious to allow forfeiture clauses, and thereby follow English law.

Ultimately, it would be ideal for forfeiture clauses to simply reflect the common law position, namely that a claimant would only forfeit that portion of the claim that was fraudulent. Even though it is doubtful that the legislature will ever outlaw forfeiture clauses, it is suggested that the inclusion of the other recommendations in the PPR's will temper the effect of these clauses and ensure a more equitable result. Therefore, it is submitted that the PPR's in terms of both the Long-term Insurance Act 52 of 1998 and the Short-term Insurance Act 53 of 1998, should be amended to include rules on forfeiture clauses. These rules should, first, stipulate that where a policy contains a forfeiture clause, it should clearly define what is meant by fraud – this definition should be the common law definition of fraud and should not include any other actions by the policyholder. Second, the forfeiture clause should be very clear on the consequences of the fraud for the insured. These consequences should be the forfeiture of that portion on the claim which is fraudulent as opposed to the entire claim. As with any other clauses in a policy, this clause should be written in plain language. Third, it is suggested that where a policy does contain a forfeiture clause, the policyholder should, as soon as a claim is submitted, be reminded of the existence and consequences of the particular clause. This places a duty on an insurer to warn a policyholder, at claim stage, that there will be consequences for submitting a fraudulent claim.

Overall, the suggested amendments will deal effectively with those fishy claims and opportunistic policyholders without depriving them of compensation for the legitimate portions of their claims.

D MILLARD
University of Johannesburg

Minister of Mineral Resources v Mawetse (SA) Mining Corporation (Pty) Ltd 2016 (1) SA 306 (SCA)

*Prospecting rights under the MPRDA: Public Law Instruments?**

Will the wind ever remember
the names it has blown in the past?
Jimi Hendrix

1 Introduction

Upon enactment of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) the State became the custodian of the mineral resources of South Africa 'for the benefit of all South Africans' (s 3(1)), and the Minister of Mineral Resources became empowered to grant new types of rights to minerals, such as prospecting and mining rights to any applicant (s 3(2)(a)).

Applications for prospecting rights or mining rights have to be lodged at the office of the regional manager (ss 16(1) & 22(1) respectively). An applicant for such rights has to comply with the general requirements of the MPRDA (ss 17(1) & 23(1)(a)-(g) respectively; see further Badenhorst & Mostert *Mineral and Petroleum Law of South Africa* (2004) 15-7 to 15-8 & 16-6 to 16-7). The MPRDA has also, as its object, the transformation of the mining industry to attempt to counter the inequalities and exclusion of black people from the mining industry in the past (see s 2(d); *Minister of Mineral Resources v Mawetse (SA) Mining Corporation (Pty) Ltd* (2016 (1) SA 306 (SCA) par 16). In addition to the general requirements, the minister 'may', in terms of section 17(4) of the MPRDA, request the applicant for a prospecting right to give effect to the object of section 2(d) of the MPRDA. Compliance with transformation objectives, stated in sections 2(d) and (f), is expressly required for the grant of a mining right (s 23(1)(h)). Section 17(4) has, therefore, been perceived as discretionary, whilst section 23(1)(h) has been seen as obligatory (Dale, Bekker & Bashall *et al South African Mineral Law* (2005) 238). Section 2(d), a black economic empowerment (BEE) provision, has, as its object, the expansion of opportunities for historically disadvantaged persons to enter the mineral industry and to benefit from mineral exploitation by virtue of empowerment deals, whilst section 2(f) is aimed at the promotion of employment and advancement of the social welfare of all South Africans. Unlike mining, prospecting is not an attractive investment destination for empowerment purposes because of its high

* I wish to acknowledge the comments and suggestions of Professor JC Sonnekus to an earlier draft. I, however, remain responsible for the correctness of the end product.

How to cite: Badenhorst '*Minister of Mineral Resources v Mawetse (SA) Mining Corporation (Pty) Ltd* 2016 (1) SA 306 (SCA)' 2016 *De Jure* 168-181
http://dx.doi.org/10.17159/2225-7160/2016/v49n1a11

costs, risks and relatively poor success rate (Dale, Bekker & Bashall *et al supra* at 240). So far, black economic empowerment deals undertaken by the mining sector have generated R101 billion in total value attributable to historically disadvantaged beneficiaries (Theobald, Tambo, Makuwerere & Anthony 'The Value of BEE deals' 2015 *Intellidex Research Report* available from https://www.google.com.au/?gws_rd=ssl#q=Theobald%2C+Tambo+%26+Makuwerere+%E2%80%98The+Value+of+BEE+deals%E2%80%99+2015+Intellidex+Research+Report+ (accessed 2016-07-12). BEE compliance in respect of shareholding, however, remains the biggest concern for foreign companies wanting to invest in the South African mining industry (see Nkabinde 'BEE turns off US firms' (2015-07-07) *Citizen* available from http://citizen.co.za/418054/bee-turns-off-us-firms/ (accessed 2016-07-12).

On acceptance of an application and receipt of any additional information requested, the regional manager forwards the application to the minister for consideration (s 16(5)). The power to grant a prospecting right has been delegated to the Deputy Director General of Mineral Development (DDG; s 103(1)(2); item 5 of the Delegation of Powers by the Minister of Minerals and Energy of 2004-05-12). In practice, the DDG approves and signs the recommendation of the regional manager to grant a prospecting right and grants a power of attorney to the regional manager to sign the prospecting right upon notarial execution of the agreement.

As to the legal nature of prospecting rights or mining rights, it is stated that such rights granted in terms of the MPRDA are 'limited real right[s]' (s 5(1)). A grantee of such a right is obliged to lodge the right for registration in the Mineral and Petroleum Titles Registration Office (MPTRO; ss 19(2)(a) & 25(2)(a) of the MPRDA respectively; s 5(1)(d) of the Mining Titles Registration Act 16 of 1967 (MTRA)). For purposes of registration, the 'contract' has to be notarially executed (s 15(2) of the MTRA). A prospecting right or mining right that has been registered in the MPTRO constitutes a 'limited real right binding on third parties' (s 2(4) of the MTRA). The contradiction of the creation of a real right at the occurrence of different legal acts – namely, upon grant by the minister or delegate and registration in the MPTRO – and the doctrinal difficulties caused by the poor draftsmanship of the legislature, has been raised and discussed before (see Badenhorst 'Nature of New Order Rights to Minerals: a Rubikian exercise since passing the Mayday Rubicon with a Cubic Zirconium' 2005 *Obiter* 505). The contradiction caused by section 5(1) of the MPRDA was rectified by the Mineral and Petroleum Resources Development Amendment Act 49 of 2008 (MPRDAA) which commenced on 7 June 2013 (GN R14 *GG* 36512 of 2013-05-31). Section 5(1) of the MPRDA now makes it clear that in the case of a prospecting right or mining right, a real right is acquired upon grant and registration thereof. Generally, a real right is created upon registration in the Deeds Office (s 16 of the Deeds Registries Act 47 of 1937) or the MPTRO (s 2(4) of the MTRA). Upon execution, a prospecting right or mining right comes into effect (ss 17(5) & 23(5) respectively, read with the definition of 'effective

date'). Nothing is stated in the MPRDA about the moment of creation or legal nature of such rights before registration in the MPTRO. Such granted rights were construed in the private law contexts as being personal rights or contractual rights (Badenhorst 2005 *Obiter supra* at 505).

In a decision by the full bench in *Meepo v Kotze* (2008 1 SA 104 (NC)), it was decided that the granting of a prospecting right to an applicant is contractual in nature (*Meepo v Kotze supra* at par 46.3) and it takes place when its terms and conditions have been determined and consensually agreed upon or consented to by an applicant upon notarial execution of the deed (par 46.3). The Court rejected the argument that a prospecting right is granted when the DDG approved and signed the recommendation of the regional manager to grant a prospecting right to an applicant (parr 46.1 & 46.3; see further Badenhorst & Mostert 'Dueling Prospecting rights: A Non-Custodial Second? *Meepo v Kotze*' 2008 *TSAR* 819; see also *Doe Run Exploration SA (Pty) Ltd v Minister of Minerals and Energy* unreported, NCD case no 499/07 2008-02-08 parr 19-21).

In *Global Pact Trading 207 (Pty) Ltd v the Minister of Minerals and Energy; the Regional Manager: Mineral Regulation, Free State Region; the Deputy Director-General: Mineral Regulation* (unreported, OPD case no 3118/06 20017-06-14 par 2), it was decided that the decision of the minister or delegate to grant or refuse an application for a prospecting right, constitutes an administrative action, as defined in the Promotion of Administrative Justice Act 3 of 2000, which administrative act has to be procedurally fair (see Badenhorst & Carnelly 'Review of a Refusal to Grant a Prospecting right – *Global Pact Trading 207 (Pty) Ltd v Minister of Minerals and Energy*' 2008 *Obiter* 113).

Therefore, the views differ as to whether a prospecting right that has been granted by the DDG is contractual in nature or merely an administrative act. The nature of a prospecting right and the bureaucratic procedure for its application – grant, execution and coming into effect – came under the scrutiny of the Supreme Court of Appeal in *Minister of Mineral Resources v Mawetse (SA) Mining Corporation (Pty) Ltd* ((20069/14) [2015] ZASCA 82 (2015-05-28)). The abovementioned amendments of the MPRDA by the MPRDAA did not apply to the case as the amendments were promulgated subsequent to the events at issue in this case (par 8).

The facts, issues and decision of the Court will be discussed, followed by a commentary about the correctness of the decision. The public law road embarked upon by the Supreme Court of Appeal will also be examined. A conclusion will be reached about the impact of the decision of the Supreme Court of Appeal as the decision was aimed at 'all other rights under the MPRDA' (par 24).

2 Facts

An application for a prospecting right by Dilokong Chrome Mine (Pty) Ltd's (Dilokong) was accepted by the Regional Manager and granted by the DDG on condition that Dilokong complied with the BEE imperative of a 26 percent shareholding in terms of section 2(d) of the MPRDA (par 3). Due to Dilokong's inability to comply with the BEE condition, a notarial deed for the prospecting right was not executed and registration of the prospecting right did not take place (see par 5). Meanwhile, Mawetse (SA) Mining Corporation (Pty) Ltd (Mawetse) also applied for a prospecting right which application was not accepted by the Regional Manager because Dilokong already held a prospecting right for the same mineral and land (par 6). In an internal appeal against the grant of a prospecting right to Dilokong, the minister upheld Dilokong's prospecting right and dismissed Mawetse's appeal (par 6).

Mawetse applied for a review of the minister's decision in the Gauteng Division of the High Court. Dilokong filed a counter-application to compel the Department of Mineral Resources to execute the prospecting right (par 6). Masipa J decided that Dilokong did not hold a valid prospecting right which could lawfully be exercised and it no longer constituted a bar to the consideration of Mawetse's application for a prospecting right (parr 1 & 2). Dilokong (fifth appellant) appealed against the decision to the Supreme Court of Appeal (par 1). The minister and officials of the Department (the other appellants) did not participate in the appeal although they made common cause with Dilokong and filed a comprehensive answering affidavit to that end in the court below (par 1).

3 Issues

At issue on appeal was whether a prospecting right had lawfully been granted to Dilokong and, if so, whether Dilokong could lawfully exercise that right. Allied to this issue, was a further question on whether that right had lapsed due to its expiry or abandonment (par 1).

4 Decision

The Court decided that a prospecting right was lawfully granted to Dilokong on condition that it comply with the section 2(d) BEE requirement of a 26 percent shareholding. Due to its failure to meet this condition, it was held that Dilokong was not entitled to exercise the prospecting right. The Court decided that Dilokong's prospecting right had expired due to effluxion of time (par 28). In arriving at its decision, different features of a prospecting right received the attention of the Supreme Court of Appeal, some of which will now be discussed.

4 1 Acquisition of a Prospecting Right

It was confirmed by the Court that the decision to grant a prospecting right is made by the DDG and not the regional manager (par 24). As will

be shown below, unlike in the *Meepo* decision (*Meepo v Kotze supra*), it was decided that a prospecting right is granted on the date that the DDG approves the recommendation of the regional manager to grant a prospecting right (par 19). Acquisition of a prospecting right thus takes place upon the date of approval.

In dispute was whether Dilokong could lawfully have been required to be BEE-compliant (par 11). It was argued that an applicant for a prospecting right could not be compelled to be BEE-compliant and the mining charter does not apply to applications for prospecting rights. The Court held that section 17(4) of the MPRDA (see par 1 above) unequivocally empowers the minister to make the grant of a prospecting right conditional upon compliance with the section 2(d) BEE requirement (par 15). The request was perceived by the Court as a necessary preliminary step to ensure compliance with the section 2(d) BEE imperative (par 15). Compliance with the request, therefore, was not merely optional (par 17). It should be added that the minister or delegate first has to consider the type of mineral or extent of the proposed prospecting project before such a request is made (s 17(4)) – which discretionary power is vague and open-ended (see Dale 'Comparative International and African Mineral Law as Applied in the Formation of the New South African Mineral Development Legislation' in Bastida, Wälde & Warden-Fernández (eds) *International and Comparative Mineral Law and Policy* (2005) 834).

The Court found that the DDG had lawfully requested Dilokong to comply with the section 2(d) BEE requirements, which request was acknowledged by Dilokong but not complied with (par 17). It can be added that a prospecting right is linked to a mining right insofar as the holder of a prospecting right has an exclusive right to apply for and be granted a mining right in respect of the mineral and prospecting area (s 19(1)(b)). Because of the linkage or continuity of tenure of rights, compliance with BEE requirements at the prospecting stage makes sense (as to linkage, see Badenhorst 'Security of Mineral Tenure in South Africa: Carrot or stick?' 2014 *Journal of Energy and Natural Resources Law* 5, 14 & 20).

4 2 Nature of a Prospecting Right

The Court rejected the decision in *Meepo* (*Meepo v Kotze supra*) that: (a) the granting of a prospecting right is contractual in nature; (b) consensus has to be reached; or (c) an applicant has to consent to the terms and conditions of the right (*Mawetse* (SCA) *supra* at parr 22, 23 & 26). According to Majiedt JA, the right is granted by the minister or delegate without the concurrence of the affected party and 'occurs outside the ambit of and regardless of the existence of a contract between the minister and a successful applicant' (par 24). Thus, the granting of a prospecting right does not require consensus between a grantor and grantee of a prospecting right (par 26). In conclusion, Majiedt JA stated that 'the decision in *Meepo* that the right is granted only at the stage of the

registration of the right is wrong' (par 28). This statement by Majiedt JA seems incorrect as it was decided in *Meepo* that a prospecting right is granted upon execution of the notarial deed and not on registration (*Meepo v Kotze supra* at par 46.1).

The Court also distinguished *Ondombo Beleggings (Edms) Bpk v Minister of Mineral and Energy Affairs* ((1991) 4 SA 718 (A); for a discussion of the decision, see Badenhorst & Van Heerden 'A comparison between the nature of prospecting leases in terms of the Precious Stones Act 73 of 1964 and prospecting permits in terms of the Minerals Act 50 of 1991 – *Ondombo Beleggings (Edms) Bpk v Minister of Mineral and Energy Affairs*' 1993 *TSAR* 159), where it was decided that a prospecting lease in terms of section 4(1)(b) of the Precious Stones Act 73 of 1964 was a contract, from the case in point on the basis that section 17 of the MPRDA differs totally from section 4 of the Precious Stones Act 73 of 1964 (see *Mawetse supra* at par 27). The similarities between the dispensation of state holding of rights under the Precious Stones Act, and the current dispensation were overlooked by the Court. It is submitted that the following reasoning by Eksteen JA in the *Ondombo Beleggings* decision is still reflective of contract law:

> The fact that the [Precious Stones] Act expressly requires certain matters to be dealt with in the lease, and in some instances gives the Minister an overriding say in determining certain terms, does not, in my view, detract from the contractual nature of the lease. After all, much the same circumstances pertain to numerous commercial agreements, more particularly when an individual contracts with a large corporation and is presented with a printed form of agreement. The mere fact that the individual may not readily be able to procure the alteration of any of the terms, does not detract from the fact that his acceptance of those terms would lead to a binding contract being concluded (*Ondombo Beleggings supra* at 724 F-H).

Majiedt JA reasoned in *Mawetse* that an administrative act is not changed into a contract merely because the prospecting right is 'subject to the terms and conditions' stipulated in section 17(6) of the MPRDA (*Mawetse supra* at par 27). The contractual terminology used by the legislature is, thus, treated as the consequence of an administrative decision rather than a contract.

The Court decided that the granting of a prospecting right is an authoritative unilateral administrative act by the minister or her delegate, by virtue of their statutory powers under the MPRDA (parr 24, 26 & 27). It was perceived as an administrative decision 'whereby rights are granted with or without conditions and in terms whereof rights accrue to and obligations are imposed upon the successful applicant' (par 26). This was held also to apply to all other rights under the MPRDA (see par 24). The administrative decision is thus perceived as the source of the (statutory) prospecting right, its entitlements and duties of the holder of a prospecting right.

Majiedt JA describes the nature of a unilateral administrative act with reference to the following dictum of Schreiner JA in *Mustapha v Receiver of Revenue, Lichtenburg* (1958 3 SA 343 (A) 347E-F):

> In exercising the power to grant or renew, or to refuse to grant or renew, the permit, the Minister acts as a state official and not as a private owner, who need listen to no representations and is entitled to act as arbitrarily as he pleases … (*Mustapha supra* at par 24).

The above dictum of Schreiner JA should, in fairness, be placed in its proper context or quoted in full. The *Mustapha* decision dealt with the termination of a permit to occupy a trading site, which permit was granted in terms of section 18(4) of the Native Trust and Land Act 18 of 1936 during the apartheid era, to Indian traders on land owned by the South African Native Trust and was earmarked for blacks as beneficiaries. The termination of the permit was challenged due to the alleged cancellation solely because the holders were Indians (*Mustapha supra* at par 352G-H). Ogilvie Thompson AJA decided that if the minister (in his capacity as trustee of the Trust) granted a permit to occupy a trading site, a contract is concluded when the grantee expressly or impliedly accepts the permit (par 356D-H). According to Ogilvie Thompson AJA, the rights of the parties are defined by contract and not statute (par 356H). Thus, termination of a permit amounted to the exercise of a contractual right and not a statutory power (par 357A). According to the Court, the only way by which the cancellation of the permit could be challenged as bad law, was if an implied term that the contract would not be cancelled simply because the permit holders were Indians, could be established (see par 59A-B). In the (obvious) absence of such a term, it was decided that the trustee was entitled to terminate the permit without providing reasons for its cancellation (parr 358D-E & 359F-G). Schreiner JA agreed with the contractual construction, but, in dissent, decided that despite the contractual nature of the permit, the powers of the minister still had to be exercised within the framework of the statute and regulations (par 347D). Thus, the power to fix the terms of the permit and to act in accordance with such terms, were regarded as statutory powers (par 347E). After a review of the legislation, Schreiner JA correctly found that the minister was not empowered to terminate the permit on the ground that the holders were Indians (par 350H). In order to contextualise Schreiner JA's *prima facie* unrestricted statement, it should be noted that his sentence in the above dictum ended with a proviso, namely, 'so long as he breaks no contract', which proviso was left out by the Court in the *Mawetse* decision. Schreiner JA also distinguished the actions of the state from an owner of land, who (at that time) could exclude and eject persons from his land, by stating '[b]ut the minister has no such free hand. He receives his powers directly or indirectly from the Statute alone, and can only act within its limitations, express or implied' (par 347F-G). In other words, a proviso of statutory limitation must be added to the stated dictum of Schreiner JA to provide a complete picture of his dissenting decision.

The Court in *Mawetse* subsequently mentioned that statutory licenses are regarded as 'public law instruments' in English law (*Mawetse supra* at par 25). The Court referred to *Norweb plc v Dixon* (1995 3 All ER 952 (QB)) (at par 25) where it was decided that the obligation of a public supplier of electricity to supply electricity to a consumer on terms which are dictated by legislation is inconsistent with a contract. By stating the position in English law only, or in passing, it seems as if the Court hinted that a granted prospecting right is in the nature of a statutory license or public law instrument.

As to the nature of a registered prospecting right, which was not necessary for the Court to decide, Majiedt JA accepted *obiter* 'that the right becomes a limited real right only upon registration' (*Mawetse supra* at par 19). The Court seemed to have accepted that notarial execution of a prospecting right was required because it is a limited real right in terms of the then section 5(1) of the MPRDA (par 5). This was despite the Court's awareness of the contradiction between section 5(1) of the MPRDA and section 2(4) of the MTRA and the Court's view that it was not a cause for concern in the present case (par 19). As indicated before, the legislature was concerned enough to rectify section 5(1) of the MPRDA. The Court correctly indicated that the purposes of registration is also to serve as a notice to the general public, 'akin to registration of immovable property in the Deeds Office' (par 19). The principle of publicity of a real right is correctly used by the Court to explain and justify the real nature of a registered prospecting right. It can be added that the legislature has opted for a right that is registrable in a public office, is real in nature, and has stated *ex abundanti cautela* that a registered real right is enforceable against third parties, in order to provide security of tenure to mining companies and allay fears of insecure rights by investors in such companies (s 2(g); see, Badenhorst 2014 *Journal of Energy and Natural Resources Law supra* at 13-14 & 17-18). Security of mineral tenure is important for any developing country as it is one of the most important criteria for mining companies when deciding on investment preferences (Dale 'Security of Tenure as a Key Issue Facing the International Mining Company: A South African Perspective' 1996 *Journal of Energy and Resources Law* 298; Bastida 'A Review of the Concept of Security of Mineral Tenure: Issues and Challenges' 2001 *Journal of Energy and Resources Law* 31 & 32). The way in which Schreiner JA was quoted in the *Mawetse* decision will surely not enhance faith in security of mineral tenure in South Africa.

4 3 Content of the Prospecting Right

The Court found that the prospecting right was granted on condition that Dilokong comply with the request to be BEE-compliant (*Mawetse supra* at par 17). A prospecting right is subject to the MPRDA, applicable law and the terms and conditions stipulated in the right (s 17(6)). The Court regarded compliance with section 2(d) of the MPRDA as a condition of grant that was unequivocally imposed when the DDG approved the recommendation about granting a prospecting right (par 17). The Court

decided that, upon non-compliance with the condition, Dilokong was not entitled to exercise the prospecting right and the Department of Minerals was entitled to refuse notarial execution of the prospecting right (par 17).

4 4 Duration of a Prospecting Right

To determine the starting point of the period of a prospecting right, the Court distinguished between three distinct legal processes, namely: (a) the granting of the prospecting right; (b) the execution of the prospecting right; and (c) the coming into effect of the right (par 19).

According to the Court, the above legal processes take place at the following moments:

(a) A prospecting right is granted on the date that the DDG approves the recommendation of the regional manager (to grant a prospecting right; par 19). From the date of the grant of a prospecting right, an applicant becomes the holder of a valid prospecting right as defined in the MPRDA (par 19).

(b) Upon execution of a notarial deed, a prospecting right (in the nature of a contract) is not granted (see parr 19 & 22-24).

(c) A prospecting right comes into effect in terms of section 17(5) of the MPRDA on approval of the lodged environmental plan (par 19; it should be remembered that this subsection has subsequently been amended by the MPRDAA). The Court held that the decision to grant a prospecting right remains valid until set aside by a Court (par 20). According to the Court, Dilokong should have obtained a mandamus compelling the department to execute the right, if the prospecting right was lawfully granted (par 20).

It was, however, decided that the period for which the right endures has to be computed from the time that the applicant is informed of the grant (parr 19, 21 & 28). For purposes of such calculation, it was held to be irrelevant that the prospecting right still had to be executed and had not yet become effective (par 21). The Court reasoned that the aim of communication of the decision was to enable the grantee to challenge objectionable conditions and alert other competitors (par 19).

Lapsing of a prospecting right, amongst other reasons, takes place upon effluxion of the time period for which the right has been granted (s 56(a) of the MPRDA) or abandonment of the prospecting right (s 56(f) of the MPRDA; par 18).

The Court found that:

(a) Dilokong's prospecting right was granted on 21 June 2007 when the DDG approved the regional manager's recommendation to grant a prospecting right (par 19).

(b) The period for which the prospecting right endured had to be computed from 18 July 2007 when Dilokong was informed of the grant (parr 19 & 21). According to the Court, upon this date 'Dilokong became the holder of a valid prospecting right, subject to compliance with the request to prove

BEE compliance' (par 21). This statement of the Court is in conflict with the Court's decision that vesting of the prospecting right takes place (earlier) upon the grant. A right, whether private or public in nature, cannot vest at different moments in time and this statement of the Court about vesting upon notification seems incorrect. The same mistake was made by the Supreme Court of Appeal in *Minister of Mineral Resources of the RSA v Sishen Iron Ore* (2013 (4) SA 461 (SCA) parr 54 & 56; see also Badenhorst & Olivier 'Conversion of Jointly-held old order mining rights' 2014 *THRHR* 145 & 152).

(c) Dilokong's (four year) prospecting right had expired due to the effluxion of time on 17 July 2011 (par 21).

It was not necessary for the Court to find that Dilokong had abandoned its right due to its failure to take steps to enforce its rights (par 21).

5 Comment

The Court's identification of an administrative decision taking place when the DDG accepts the recommendation of the regional manager, is correct. The Court's description of the administrative act, with reference to the dictum of Schreiner JA in the *Mustapha* decision without provisos of statutory limitation, is unfortunate for the current constitutional dispensation and the custodial administration by the State of the mineral resources of the people of South Africa (s 3 of the MPRDA). Schreiner JA's decision in *Mustapha* does not support such an unbridled state of affairs.

Although the dissenting opinion of Schreiner JA in *Mustapha* was just and correct and the majority of the Court (ironically), in a sense, 'used' the principles of contract to arrive at its decision, it should be noted that the decision in *Mustapha*, regarding the nature of a permit, is contrary to the decision in *Mawetse* regarding the nature of a prospecting right. Although Majiedt JA did not rely on the *Mustapha* case for his decision that a prospecting right is an administrative act, it is a pity that the Court did not deal with the *Mustapha* decision given the similarities between a permit to occupy land for trading, and a right to enter and prospect on the land (in terms of s 5(3) of the MPRDA). Just like the *Meepo* decision, the conclusion of a contract was recognised by the Appellate Division in *Mustapha*.

As suggested by the Court, the granting of (all) rights under the MPRDA by an official would be a unilateral administrative act. However, differences do exist between these rights. Prospecting rights are granted by the DDG upon acceptance of the recommendation by the regional manager, whilst mining rights are granted by the minister. These rights are registrable in the MPTRO (s 5(1)(d) of the MTRA). Reconnaissance permits and mining permits are issued by the regional manager or Chief Director; items 3 & 11 of the ministerial delegation) and are only recordable in the MPTRO (s 5(1)(v) of the MTRA). Different officials and different processes are, therefore, involved in the granting and issuing of rights and permits and the registration or recording thereof. Registered rights are real in nature, whilst recorded rights are not real in nature (see

Badenhorst & Mostert (2004) *supra* at 13-28 to 13-29). Thus, generalisations about the grant and the nature of rights or permits granted or issued in terms of the MPRDA cannot be made, unless the Court did not refer to permits as well. Further references to prospecting rights also apply to mining rights (but not to permits or permissions).

Whether a statutory prospecting right can be regarded as a statutory licence or public law instrument, as in English law, is another matter. A licence in English real property law is merely a permission to be on land, and can take different forms. First, a bare licence is a gratuitous permission to enter land which can be revoked at any time because of the lack of valuable consideration (see Harpum, Bridge & Dixon (eds) *Megarry and Wade the Law of Real Property* (2012) 1439). Second, a contractual licence is granted under the terms of a contract and subject to the rules of contract (Harpum, Bridge & Dixon (eds) *supra* at 1439). Third, a licence may be linked to a property interest (for instance, a permission to enter land is attached as an adjunct to a *profit à prendre* or an easement, which are proprietary rights; see Harpum, Bridge & Dixon (eds) *supra* at 1440). The first and third type of licence do not make sense in South African law due to the absence of valuable consideration as a requirement for the formation of a contract (*Conradie v Rossouw* 1919 AD 279) and the establishment of a limited real right upon creation of servitude which is not linked to a separate permission to enter land. A contractual licence was absent in the *Mawetse* decision. The nature and features of a statutory licence or public law instrument in English law and/or its equivalents in South African law, are not investigated or discussed either. Incorporation of English law by mere reference to examples in such a system, without investigating its suitability to South African law, creates legal uncertainty.

Prospecting rights or mining rights need not necessarily be treated as public law instruments. For instance, the nature of statutory prospecting or mining rights within Australian mineral legislation (with similar structures to the MPRDA) is still being examined within the paradigm of personal rights and proprietary rights (see, for instance, the examination of the legal nature of prospecting or mining licences by Hunt (*Mining Law in Western Australia* (2009) 96 & 154-155) with reference to, and by comparison with, a bare licence, a leasehold interest or a *profit à prendre* at common law (see also Badenhorst 'Towards a Theory on publically-owned minerals in Victoria' 2014 *Australian Property Law Journal* 157).

It seems that because of the transformative nature of the MPRDA, the courts try to move away from tried and tested common law concepts. For instance, in *Minister of Mineral Resources v Sishen Iron Ore Company (Pty) Ltd* (2014 2 SA 603 (CC) par 68) the Constitutional Court accepted, without investigation, that the common law supports the erroneous view that upon conversion by one of the holders of jointly held 'old order rights', the converter acquires the entire shareholding. An investigation of the common law principles of co-ownership or joint holding of real rights (see Badenhorst & Olivier 'Conversion of "old order mining rights": Sleeping at

the MPRDA's wheel of (mis)fortune? – *Sishen Iron Ore Company (Pty) Ltd v Minister of Mineral Resources* (unreported decision) case no 28980/10 (NGD)' 2013 *THRHR* 269, 275-277 & 281) would have indicated that the common law was actually in line with and supported the Constitutional Court's correct decision that, upon conversion and registration, the converter only acquires a new mining right in accordance with its former shareholding (parr 67, 71 & 77).

Section 15(2) of the MTRA requires the execution of a notarial 'contract' which seems to suggest that the legislature somehow had a contract in mind. It is conceded that the MTRA originally dealt with the registration of agreements in terms of the Mining Rights Act 20 of 1967 and the Precious Stones Act (*supra*), whilst the new MPRDA system was forced onto the provisions of the MTRA without proper analysis or thought. Even if notarial execution of a contract is just required for registration purposes, it cannot be without legal consequences. Such a 'contract' has, as its content, contractual rights which the Court seemed to ignore at all costs.

Upon registration of the notarial 'contract' a limited real right is created. In terms of basic property law principles, three juristic acts are involved upon the creation or transfer of a real right, namely: (a) the conclusion of a contract or obligation-creating agreement; (b) the existence of a real agreement to transfer and receive the real right; and (c) the registration of the right in the Deeds Office (Van der Merwe 'Things' in Joubert (ed) *The Law of South Africa* (2014) par 20). If by analogy, these basic principles are applied to registration of a prospecting right in the MPTRO, it becomes apparent that an obligation-creating agreement and a real agreement are absent from the Supreme Court of Appeal's construction. On the one hand, the Supreme Court of Appeal recognises the legislature's creation of a (common law style) limited real right and the policy of notice of registered rights and security of tenure, whilst, on the other hand, it denies the creation of a preceding obligation-creating agreement and real agreement by consensus. Thus, a grantee acquires a public law licence prior to registration and a private law style real right upon registration which is not doctrinally sound, even though it is based on the interpretation of provisions of two sister statutes. The unilateral administrative right precedes the possible conclusion of a contract (with the same or even different terms) at a later stage. The Court acknowledged that the grantee may still challenge and object to some of the conditions after granting a prospecting right (*Mawetse supra* at par 19), which seems odd as the prospecting right has already been granted in a unilateral manner. In practice, negotiations as to the terms and conditions to be embodied in the prospecting right or mining right do take place (Dale in Bastida, Wälde & Warden-Fernández (eds) *supra* at 828). It is submitted that upon notarial execution of the deed, a contract is created between the parties. A unilateral administrative decision is followed by the conclusion of a 'prospecting contract' and the acquisition of a real right upon registration. The failure to recognise the different juristic acts that are taking place can be attributed to the fact that the MPRDA does not

distinguish between the prospecting right as an agreement, and the prospecting right as a contractual right or real right. If the basic principles of contract law and property law had been taken into account by the Supreme Court of Appeal, the presence or absence of different juristic acts could at least have been considered. If a limited real right can be regarded as a trusted friend for purposes of security of tenure and an object of real security, why should the preceding contract be ignored?

The Court does not convincingly explain why the duration of a prospecting right does not have to be computed from the time that a prospecting right is (administratively) granted. Computation from notification of the grant does not fit the mould of a unilateral decision taken by an official free from notions such as consensus. Or, is the custodian's common courtesy merely the starting point for calculations, and how is it to be determined if the custodian, at times, is not so courteous?

The creation of rights by virtue of administrative acts can be conditional. If the granting of a prospecting right is subject to a suspensive condition, the vesting of the prospecting right must have been suspended until the BEE requirements were met. If the grant is subject to a resolutive condition, the grant of the prospecting right would have been terminated upon non-compliance with the BEE requirements at the date which was proposed for notarial execution. If so, the examination of the duration of the prospecting right and its termination by effluxion of time was unnecessary as the prospecting right no longer existed. The Court accepted the view of the court-a-quo that Dilokong's failure to meet the BEE condition had the effect of barring Dilokong from implementing its right to prospect (*Mawetse supra* at par 17) which says nothing about the vesting or termination of the right.

Upon approval of the regional manager's recommendation, the DDG performed a unilateral administrative act. In the absence of notarial execution of the agreement, the Court could have confirmed that a contract was not concluded. It is arguable that notarial execution is not required for the validity of the contract (as was the case with mineral leases in terms of section 3(1) of the General Law Amendment Act 50 of 1956) but only for the purposes of registration. Notarial execution of a contract cannot be without legal consequences.

6 Conclusion

The law in accordance with the *Mawetse* decision now states that upon approval by the DDG of the recommendation of the regional manager (to grant a prospecting right), a prospecting right is granted in terms of the provisions of the MPRDA whilst, upon registration in the MPTRO, a prospecting right (which is real in nature) is created. In short, the accrual of a magical public law creature is followed by the creation of a common law style real right. The recognition of a unilateral administrative act on the part of the DDG, when the recommendations of the regional manager

are accepted, should be distinguished from what takes place legally after such a decision until registration of the prospecting right in the MPTRO. During this interim period, the conclusion of a contract, with personal rights as its content, is still legally possible. Objections by the grantee, after the grant has been recognised by the Supreme Court of Appeal, and negotiations after the grant still take place in practice, until such time that a notarial contract is finalised. As decided in the *Meepo* decision, and rejected as incorrect by the Supreme Court of Appeal, conclusion of the contract takes place upon its notarial execution. The notarial execution of a contract cannot be stripped of possible legal consequences or simply be ignored, otherwise, notarial execution is simply a formalistic requirement for the purposes of registration, which the Supreme Court of Appeal should have clearly stated. A unilateral administrative decision can be followed by the conclusion of a contract and, eventually, be followed by the creation of a limited real right upon registration. Private law doctrine need not always be discarded by the winds of change.

PJ BADENHORST
Deakin University
Nelson Mandela Metropolitan University

Absa Bank Limited v Keet 2015 JDR 0996 (SCA)

Should vindicatory claims be subject to prescription? A long-standing uncertainty resolved at last

1 Introduction

The question of whether claims for vindication of property should be subject to prescription is one which judges have offered a variety of views in recent years. Some of these have even been directly contradictory. For example, in *Barnett and Others v Minister of Land Affairs and Others* (2007 6 SA 313 (SCA) (*Barnett*)) Brand JA, speaking for the full bench of the Supreme Court of Appeal (SCA), held that:

> I am also prepared to accept that the vindicatory relief which the government seeks to enforce constitutes a 'debt' as contemplated by the Prescription Act. Though the Act does not define the term 'debt', it has been held that, for purposes of the Act, the term has a wide and general meaning and that it includes an obligation to do something or refrain from doing something. Thus understood, I can see no reason why it would not include a claim for the enforcement of an owner's rights to property (*Barnett supra* par 19).

However, more recently in *Absa Bank Limited v Keet* (2015 JDR 0996 (SCA) (*Absa*)) Zondi JA, writing on behalf of the full bench of the SCA, held '[i]n my view, there is merit in the argument that a vindicatory claim,

How to cite: Parker & Zaal '*Absa Bank Limited v Keet* 2015 JDR 0996 (SCA)' 2016 *De Jure* 181-190
http://dx.doi.org/10.17159/2225-7160/2016/v49n1a12

because it is a claim based on ownership of a thing, cannot be described as a debt as envisaged by the Prescription Act' (*Absa* par 20). He added that '[i]n the circumstances, the view that the vindicatory action is a "debt" as contemplated by the Prescription Act which prescribes after three years is, in my opinion, contrary to the scheme of the Act' (*Absa* par 25).

What then, led to such a complete turnaround? How did the SCA go from declaring the *rei vindicatio* to be a debt, in terms of the Prescription Act 68 of 1969 (the Act), which prescribes after three years, and then – seven years later – to stating the exact opposite and holding that the *rei vindicatio* is in fact not a debt in terms of the Act and that it does not prescribe after three years? This contribution seeks to explore the answer to this question. The authors also trace what might be called a 'zig-zag course' which different judges have taken in recent years on whether vindication claims should be subject to prescription. The contribution pays particular attention to the *Absa* judgment as the most recent and important authority on this point. The analysis concludes by suggesting two reasons why the judgment of the SCA in *Absa,* that vindication claims are not subject to prescription, should be adhered to in the future as the final and correct resolution of a long-standing judicial controversy.

2 A Controversial Point of Law: Overview of the Earlier Decisions

To properly appreciate the significance of the SCA judgment in *Absa,* it is necessary to have some understanding of earlier judicial views on whether the *rei vindicatio* is a debt that can prescribe. In the first part of the discussion, therefore, the modern South African decisions in which this point of law arose, are considered. In considering these decisions, it is appropriate to begin with *Evins v Shield Insurance Co Ltd* (1979 3 SA 1136 (W) (*Evins*)) because it had a seminal influence on the jurisprudence which followed. In *Evins* there was no claim based on the *rei vindicatio*, but the Court had to consider the meaning of the word 'debt' in the Act. In doing so, the Court, per King J, held that debt 'must be given a wide and general meaning denoting not only a debt sounding in money which is due, but also, for example, a debt for the vindication of property' (*Evins* 1141 par F-G). This conclusion, in particular as it relates to vindication, was not commented on in a subsequent appeal judgment reported as *Evins v Shield Insurance Co Ltd* 1980 2 SA 814 (A). It was also *obiter* because it was not relevant to the outcome of the case. However, the statement of the court *a quo* is significant for initiating more than three decades of confusion on whether the *rei vindicatio* is a debt which prescribes.

The first matter in which King J's wide definition of a debt exerted influence was *Barnett*. In this case, the government sued to vindicate land it alleged had been built on illegally. An issue that arose was whether or not its claim had prescribed because the buildings on the land had been erected at least six years prior to the issuing of the first summons.

Although the special plea of prescription was unsuccessful on the basis that this was a continuing wrong which could not have prescribed, regardless of the time period, the Court, per Brand JA, held that

> I am also prepared to accept that the vindicatory relief which the government seeks to enforce constitutes a "debt" as contemplated by the Prescription Act. ... Thus understood, I can see no reason why it would not include a claim for the enforcement of an owner's rights to property (*Barnett supra* par 19).

Brand JA approvingly referred to King J in *Evins* as having decided the same point correctly (*Barnett* par 19). *Barnett* thus confirmed the wide definition of a debt in *Evins*. However, once again nothing turned on the point because even if the *rei vindicatio* was a debt in terms of the Act that could prescribe after three years, prescription failed on the ground that there was a continuing wrong. Thus, the Court had not actually needed to apply its mind to the question of a correct understanding of a debt because it was going to make no difference to the outcome.

The question of whether vindicatory claims can prescribe surfaced again in *Grobler v Oosthuizen* (2009 5 SA 500 (SCA) (*Grobler*)). Here a claim based on cession was misinterpreted in the court *a quo* as resting essentially on the *rei vindicatio*. The claim was then challenged on the basis that it had prescribed. At an appeal hearing, the SCA decided that this claim was not based on the *rei vindicatio* (*Grobler* par 18). However, the Court disagreed with the court *a quo*, which had stated that the prescription period for the *rei vindicatio* was 30 years. In a confusing statement, even after concluding that the *rei vindicatio* had no role to play in this case, the Court still went on to state that the extinctive prescription period can only be three years (*Grobler* par 18).

In contrast to its unimportance in *Evins*, *Barnett* and *Grobler*, the question of whether vindicatory claims can prescribe at last became essential to reaching a decision in *Leketi v Tladi NO* (2010 3 All SA 519 (SCA) (*Leketi*)). This matter involved an attempt to vindicate immovable property from an estate into which it had been fraudulently transferred. Relying on the above-mentioned *obiter dictum* in *Barnett* – that a 'debt' includes an owner's right to property and so prescribes in accordance with the Act – Mthiyane JA dismissed the claim. A disappointing aspect of the judgment is that despite the fact that only an *obiter dictum* was relied on, there was no discussion at all. The Court unquestioningly accepted that a claim for the return of property by an owner is a debt that prescribes. This was crucial to the outcome of the case because it meant that the owner's attempt to counter the effects of fraud failed.

The next matter in which the issue of a vindicatory right prescribing arose was *Staegemann v Langenhoven and Others* (2011 5 SA 648 (WCC) (*Staegemann*)). This case involved a claim for the return of a motor-vehicle from an innocent third party to whom it had been fraudulently sold. The claim was brought after more than three years and so the Court had to consider, as an essential question, whether the *rei vindicatio* had prescribed. Blignaut J's judgment is noteworthy as the first one in which

this question was considered in some detail. He reasoned that the Act has two main parts: that concerning acquisitive prescription in chapters 1 and 2, and that concerning extinctive prescription in chapter 3. He opined that this division reflects the fundamental distinction in our law between actions *in rem* and actions *in personam* (*Staegemann* parr 20-21). The former apply to real rights in property, such as ownership and servitudes, which rights are subject to acquisitive prescription as referred to in the first two chapters of the Act. The latter deal with obligations and are the subject of chapter 3. It is only these rights which are extinguished after three years (*Staegemann* parr 14-21). This led him to conclude that '[t]he *rei vindicatio* is clearly a claim to ownership in a thing. It cannot on any reasonable interpretation be described as a claim for payment of a debt' (*Staegemann* par 21).

Blignaut J briefly considered *Road Accident Fund and Another v Mdeyide* (2011 2 SA 26 (CC) (*Mdeyide*)), where the Court considered the prescription of a claim against the Road Accident Fund, and not the *rei vindicatio* at all. Blignaut J noted that the Constitutional Court in *Mdeyide* (*Staegemann* par 24) relied briefly on the description of a debt from *Barnett*, which statement itself was *obiter* (*Staegemann* par 26), as was the statement relied on in *Barnett* from *Evins* (*Staegemann* par 27). Blignaut J was thus satisfied that he was not bound by any of these judgments in as far as they apply to the prescription of the *rei vindicatio* (*Staegemann* parr 23-28). He then concluded that actions based on the *rei vindicatio* are not subject to prescription (*Staegemann* par 28) and ordered that the motor vehicle be returned to the applicant (*Staegemann* par 39).

The correctness of Blignaut J's reasoning was briefly considered by the SCA in *Bester NO and Others v Schmidt Bou Ontwikkelings CC* (2013 1 SA 125 (SCA) (*Bester*)). This involved an application, *inter alia*, for rectification of title deeds where the whole, instead of only a portion, of a subdivided property had been registered in the name of a company, Innova – represented by its liquidators. The evidence was clear that the parties had intended to transfer only part of the property. The Court, per Brand JA, therefore confirmed that because their agreement had not been correctly implemented, despite the registration of ownership, Innova never became the owner of the property. The appellants, Innova's liquidators, argued that the respondent (the closed corporation which was the true owner of the property) was not able to apply for rectification of the transfer because its claim to do so had prescribed. The Court rejected this argument on two grounds. First, it concluded that rectification of a deed of transfer is, for relevant purposes, the same as the rectification of a contract. It noted that the SCA had previously held, in *Boundary Financing Ltd v Protea Property Holdings (Pty) Ltd* (2009 3 SA 447 (SCA)) that the rectification of a contract does not equate to a debt in terms of the Act. This is because such rectification does not alter the legal rights and obligations of the parties. In the same way, rectification of a deed of transfer also does not alter existing rights. Therefore in *Bester*, Innova had never become the owner of the property. Furthermore, there was no claim for vindication, merely rectification and because there was

no debt, the claim did not prescribe in terms of the Act (*Bester* parr 10-12). Second, the Court held that even if the word 'debt' is to be given a wider meaning, the situation in a case involving rectification still does not amount to a debt (*Bester* parr 13-14).

Since the Court in *Bester* concluded that the respondent's claim was based on rectification rather than vindication, it did not need to decide whether the latter amounts to a debt prescribing after three years. Despite this however, Brand JA went on to refer to his own earlier favouring of prescription of vindicatory claims in *Barnett*, and that *Staegemann* had questioned the correctness of this. He then conceded that:

> I must admit that I find the reasoning in *Staegemann* attractive and, at least on the face of it, quite convincing. I therefore have no doubt that the case will come where this court will have to reconsider the correctness of the decisions in *Barnett*, *Grobler* and *Leketi* that the *rei vindicatio* is extinguished by prescription after three years. But this is not that case, simply because the liquidators' prescription defence has already been held to founder on other grounds (*Bester supra* par 15).

By 2013, therefore, the question of whether vindicatory claims can prescribe – despite numerous judicial pronouncements – had not been firmly settled. The case in which the point was finally to be decided definitively, some two years later, was *Absa*. The reasoning in the judgment *a quo* and in the appeal to the SCA in the *Absa* case will now be considered.

3 The Facts and Judgment of the Court a Quo in *Absa v Keet*

The facts in *Absa* were not unusual. Eastvaal Motors Ltd had sold a vehicle to Keet in terms of an instalment sale. Eastvaal Motors' right, title and interest in and to the agreement was then ceded to Absa Bank. Keet took delivery of the vehicle. In terms of the agreement, ownership would not pass to Keet until the outstanding money owed in terms of the sale was paid in full. The final instalment was due to be paid in November 2007. The agreement allowed Absa Bank to take possession of the vehicle if Keet failed to comply with any terms of the sale. Absa Bank was also entitled to demand payment of any outstanding instalments. More than four years after the agreement ought to have come to an end, Absa Bank instituted an action in the High Court for repossession of the vehicle, alleging that Keet had defaulted on his payments (*Absa Bank Ltd v Keet* 2013 JDR 1701 (GNP); in the part that follows immediately below, all paragraph references are to this 2013 judgment). In response, Keet raised a special plea of prescription. He contended that more than three years had passed since the agreement would have come to an end and Absa Bank, therefore, was not entitled to cancel it or to claim the recovery of the vehicle (parr 2-5). In reply Absa Bank, relying on *Staegemann* (*supra*), argued that as title is only acquired through

acquisitive prescription after 30 years, the right of an owner to vindicate his property can only prescribe after 30 years (par 5).

The sole question to be decided arose from the special plea. Thus, whether vindicatory claims prescribe after three years was the essential issue and only issue. In its analysis, the Court focused on the application of section 10 of the Act to the *rei vindicatio*. In so doing, Fabricius J found himself confronted by the differing judicial opinions noted above. After considering them, he decided to follow *Evins, Barnett, Grobler* and *Leketi*. This was expressly in preference to following the two more recent judgments in *Staegemann* and *Bester*. As should be remembered, in the latter two cases the courts had favoured the view that vindicatory claims should not prescribe. In rejecting them, Fabricius J decided that *Staegemann* was incorrect in concluding that *Barnett* was *obiter* on the point. He also relied on the fact that in *Barnett*, four other judges had concurred with Brand JA's original view (parr 6-8). Although he quoted the later view of Brand JA in *Bester*, that 'I must admit that I find the reasoning in *Staegeman* (*sic*) attractive and, at least on the face of it, quite convincing', Fabricius J nevertheless found that *Staegemann* was not in line with other authorities and rejected its *obiter* reasoning on *vindicatio* (par 10). The special plea in *Absa* was therefore successful in the court *a quo*. Fabricius J concluded that delivery of the vehicle created a debt, which had prescribed after three years.

4 The Appeal Decision

Absa Bank appealed to the SCA. However, the parties reached a settlement prior to the hearing and the SCA had to decide whether or not it should still consider the matter. It concluded that it should do so because although courts are generally reluctant to hear moot points, the case raised a matter of public importance and there was uncertainty in the law resulting from the mixed views offered by courts in previous decisions (*Absa supra* parr 7-8). The Court, after noting the facts, reviewed the *dicta* concerning vindication and prescription in *Evins, Barnett, Grobler, Leketi, Bester* and *Staegemann* (*Absa* parr 12-19). In particular, the Court approved of the comments in *Staegemann*. It agreed with the conclusion in the latter that the solution to the previous uncertainty concerning prescription is to be found in the distinction between real rights and personal rights.

Zondi JA decided that the obligation imposed on a debtor does not create a real right, but a personal right. In contrast, 'a vindicatory claim, because it is a claim based on ownership of a thing, cannot be described as a debt as envisaged by the Prescription Act' (*Absa* par 20). In support of this, he noted that the distinction between real and personal rights had been consistently confirmed by our courts. As an example of this he cited paragraph 31 in *National Stadium South Africa (Pty) Ltd v Firstrand Bank Ltd* (2011 2 SA 157 (SCA); *Absa* par 21). He agreed with *Staegemann* that the Act also reflects this distinction. Acquisitive prescription of real rights is the subject of chapters 1 and 2 of the Act, and extinctive prescription

of obligations is dealt with separately in chapter 3. He quoted from a memorandum submitted by Professor JC de Wet (who drafted the Act) to parliament. This emphasised that extinctive and acquisitive prescription are two separate legal concepts. In relation to debts, Zondi JA noted, with approval, a remark by De Wet in the memorandum that '[i]n the case of extinctive prescription one is more specifically concerned with the relationship between creditor and debtor and prescription serves in the first instance to protect the debtor against claims that perhaps never came into existence or had already been extinguished' (*Absa* par 24).

The Court opined that viewing the *rei vindicatio* as a debt which prescribes after three years is 'contrary to the scheme of the Act' (*Absa* par 25). This would in fact 'undermine' the distinction in the Act between extinctive and acquisitive prescription – the former dealing with the debtor-creditor relationship and the latter dealing with real rights (*Absa* par 25). With extinctive prescription, the creditor loses his right to bring an action against the debtor – the personal right, but he does not lose his right in a thing. The Court added that to regard the vindicatory action as a debt, would mean that debtors effectively acquire ownership of property after three years instead of 30. Owners/creditors would not be permitted to enforce ownership rights after a mere three years, even though in terms of acquisitive prescription, they should have at least 30 years to do so. He concluded that this is 'absurd' and 'not a sensible interpretation' (*Absa* par 25).

Zondi JA did concede that the SCA had, in three previous judgments, expressed a view contrary to the approach favoured by him. However, he noted that those decisions were not dependent on the views expressed in them concerning the *rei vindicatio*. He added that, even if the views expressed are regarded as being part of the *ratio*, they were wrong in law and that it was appropriate for the SCA to now depart from its earlier decisions. He submitted that to do so is not problematic because *Barnett*, as the main contrary previous decision, is recent and so would not yet have impacted significantly on commercial practice. Brand JA, as author of that contrary conclusion, had himself subsequently indicated in *Bester* that his view needed reconsideration (*Bester supra* par 15). And finally, the Court concluded that perpetuating the incorrect view would promote absurdity (*Absa* par 26). Zondi JA thus upheld the appeal and dismissed the special plea. He found that the court *a quo* was incorrect in finding that a claim for delivery is a debt that prescribes after three years in terms of the Act (*Absa* par 27).

5 Comments and Concluding Remarks

As has been shown, there has been considerable judicial variance on whether vindicatory claims should prescribe after three years. Judicial approaches to this question have gone through many twists and turns before what appears to be a final resolution at last by the SCA in *Absa*. What was merely a peripheral and barely considered comment in passing in *Evins* was accepted by the SCA in *Barnett*. It was then re-

iterated by the SCA in *Grobler*, applied by the SCA in *Leketi* and not applied in *Staegemann*. It was subsequently questioned in *Bester* (Brand JA doubting his own previous opinion in *Barnett*), applied once again by the court *a quo* in *Absa* and then finally rejected by the SCA in the *Absa* appeal judgment.

The foundational cause of judicial confusion was the absence of any definition of what constitutes a debt for purposes of the Prescription Act. The beginning of the problem, resulting from this legislative *lacuna*, can be seen in the unfortunate holding in *Evins* that the word 'debt' in the Act 'must be given a wide and general meaning denoting not only a debt sounding in money which is due, but also, for example, a debt for the vindication of property' (*Evins supra* 1141 F-G). Although this statement started all the uncertainty which followed, it is not clear why the Court in *Evins* thought that a claim for vindication of property would amount to a debt. This had no significance in this case and was not explained. Clearly, this view was incorrect because it conflated an action *in rem* with an action *in personam.*

Ironically, many of the *dicta* which sowed further confusion in the wake of *Evins* were equally unnecessary. The decision as to whether or not the *rei vindicatio* prescribes after three years was only relevant in *Leketi* and *Staegemann*. And in *Leketi* it was simply assumed, without discussion, that any obligation by an estate to return fraudulently acquired property to its rightful owner was a debt. There was no exploration of how this supposed debt had arisen and, in particular, no interrogation of the implications of fraud. There was no consideration of the fact that the claim by the rightful owner was based on ownership. The claim was thus a *ius in rem* and not a claim based on any obligation-creating event. It was certainly not a *ius in personam,* and thus arguably not a debt. Most of the discussion in the case was around when the time periods necessary for the prescription of a debt should start and end. Thus, *Leketi* provided little meaningful assistance as a precedent for subjecting vindication to prescription because the Court did not apply its mind to the legal status of a claim based on a real right.

Although the precedent set by the SCA in *Leketi* was a weak one, the ultimate rejection of it by the SCA in *Absa* was far from predictable. If Brand JA in *Bester* had not decided to add an *obiter dictum* approving the approach of the High Court in *Staegemann* and questioning his own previous approach, it is possible that the view might have become entrenched into law that the *rei vindicatio* is a debt for purposes of the Act. Fortunately, however, Brand JA's reconsideration opened the door to a possible future new approach by the SCA. In view of this, if the trial in *Absa* had been heard before another judge rather than Fabricius J, it is conceivable that the issue would not have come back to the SCA. But, in yet another unpredictable turn of events, the *Absa* court *a quo* chose to discount the more recent signals from the SCA which were against the idea that vindicatory claims should prescribe within three years. Instead, it favoured the earlier decisions where the issue was either irrelevant or

had not yet been carefully interrogated. The approach of the court *a quo* in *Absa* was surprising because it canvassed the issue in some detail. It had access to the *Staegemann* judgment, which explained very clearly the scheme of the Act and the distinction between claims based on real and personal rights. The statement in *Bester*, which approved of *Staegemann*, was also available to it. Yet it still persisted in disregarding the implications of the distinction.

The overruling of the decision of the *Absa* court *a quo* by the SCA is to be welcomed. Since the appeal court holding that vindicatory claims do not prescribe after three years was essential for purposes of its conclusion and thus is clearly not *obiter*, it may safely be accepted that the uncertainty concerning this point of law has at last been resolved. It is the submission of the authors that the SCA judgment is clearly correct for two main reasons. First, it accords with the nuanced approach in our law to real and personal rights. It recognises the primary distinction between these, and their corresponding actions. Real rights arise out of a relationship with a thing and personal rights out of an obligation-creating event, such as a contract or delict. It is trite to say that real rights are enforceable against the world at large and personal rights only as against the other person. The creation of a personal right with its correlative obligation results in a creditor-debtor relationship, but no such relationship flows from the creation of a real right. Because of the fundamental difference in nature between real and personal rights, they require different remedies for their enforcement. In relation to personal rights, for example, delictual remedies are available to enforce rights arising out of delicts, and contractual remedies are available to enforce rights that arise out of contractual relationships. The protection of a real right is quite different – the main remedy is, of course, the *rei vindicatio* which is available to an owner for the return of the possession of his or her property, but there are other remedies such as the *actio negatoria* available to protect limited real rights. The *Absa* appeal decision, in recognising that vindicatory claims need to be treated differently from debts relating to personal rights, supports the durable and *sui generis* nature of the *rei vindicatio*.

A related consideration is that the decision also fits with the basic design of the Prescription Act. As has been noted this is divided into the two main parts. It will be remembered that chapter 3 of the Act deals with extinction of debts and thus indicates the circumstances under which a creditor may no longer enforce a personal right due to effluxion of time. This chapter makes specific reference to a 'debt' (in ss 10-16). It also makes reference to a debtor (in ss 10-16) and creditor (in ss 12, 13 & 15). Therefore, it ought to be interpreted as envisaging a debtor-creditor relationship which would need to arise from some obligation-creating event such as a delict or contract. Chapter 1 of the Act, however, deals with real rights and specifically with the acquisition of ownership. Again, in recognising that vindication of ownership claims should be dealt with very differently from personal right claims, the *Absa* appeal decision accords with the structure of the Act. Furthermore, in

delineating that a debt for purposes of the Act does not include vindicatory claims, it helps address the problems resulting from the failure to define a debt in the Act.

Second, and most importantly, the *Absa* appeal judgment is to be commended for removing the absurdity resulting from the previous decisions holding that the *rei vindicatio* prescribes. As was pointed out by Zondi JA (*Absa supra* par 25), a conclusion that the remedy available to an owner to have his or her property returned prescribes after three years has a peculiar consequence. If someone else has been in adverse possession of the property for more than three years, the owner no longer has a remedy and can do nothing to vindicate the property. The possessor or successors in title will only acquire ownership after 30 years. Quite clearly, this long delay in anyone having full rights to property makes no sense at all. The intended scheme in the Act could never have been that owners are prevented from asserting ownership rights and recovering property after three years, while adverse users can continue in mere possession until such time as 30 years has expired. Once this is appreciated, it becomes obvious that it is inappropriate to regard a claim for the recovery of property as a debt which prescribes after three years. Why, it might be asked, was this not recognised in most of the reported cases in which the issue was referred to? It would seem that in these matters the courts focused more on formulating a position than on exploring its consequences.

Finally, the *Absa* appeal decision appropriately recognises that the division between real and personal rights informs the distinction drawn between acquisitive and extinctive prescription in the Act. It also avoids the absurdity resulting from conflating personal and real right claims in such a way that an owner's right to vindicate property becomes prescribed after a mere three years. After what might be termed a somewhat turbulent recent history of the point in the courts, the holding of the SCA in *Absa*, that vindicatory claims do not prescribe after three years, has brought about a significant and hopefully permanent improvement in the law – in this regard it should perhaps be noted that the *Absa* decision has been met with approval in both the SCA and the Constitutional Court (see *Fedgroup Participation Bond Managers (Pty) Ltd v Trustee, Capital Property Trust* 2015 (5) SA 290 (SCA) n 23; and *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) parr 189-190).

J PARKER
University of KwaZulu-Natal

FN ZAAL
University of KwaZulu-Natal

Redaksionele Beleid

1. *De Jure* se hoofoogmerke is die bevordering van die regswetenskap en 'n kritiese analitiese benadering tot die reg. Ten einde hierdie doelwitte te verwesenlik, word oorspronklike bydraes van 'n hoë akademiese standard daarin gepubliseer.

2. *De Jure* is 'n nasionale en algemene regstydskrif, waartoe akademici, lede van die regsbank en lede van die verskillende regsprofessies bydra. Geen voorkeur word aan outeurs van enige instelling verleen nie. Die besluit om 'n voorlegging te publiseer, hang daarvan af of dit aan die hoë kwaliteitsvereistes van *De Jure* en of daar plek vir die publikasie beskikbaar is.

3. Voorleggings in beide Afrikaans en Engels word gepubliseer en dit kan uit artikels, aantekeninge en resente regspraak en boekresensies bestaan. 'n Vertaalde title en 'n kort opsomming van ongeveer 300 woorde in Engels moet 'n artikel vergesel indien die artikel in Afrikaans geskryf is. In geval van 'n artikel in Engels, word dieselfde vereiste gestel met betrekking tot 'n Afrikaanse title en opsomming.

4. Ten einde vir publikasie oorweeg te word, moet 'n voorlegging die resultaat van oorspronklike navorsing deur die outeur(s) wees, aan die toepaslike regsbeginsels met betrekking tot die publikasie voldoen (soos outeursreg ensovoorts), iets wat voldoende nuut is tot die bestaande literatuur voeg en aan taalkundige, tegniese en styl-vereistes van publikasies in *De Jure* voldoen. Outeurs is persoonlik daarvoor verantwoordelik om toe te sien dat hul voorleggings aan al hierdie vereistes voldoen.

5. Voorleggings word slegs vir oorweging aanvaar op die basis dat alhoewel die redaksie die finale besluit oor publikasie maak, voorleggings aan gepaste portuur-evaluering en evaluering deur deskundiges onderwerp word, asook aan evaluering deur lede van die advieskomitee indien nodig. Die redaksie behou die reg voor om alle voorleggings wat ivr publikasie aanvaar is, ooreenkomstig die redksionele beleid te redigeer, asook om dit te verkort indien nodig.

6. Manuskripte mag slegs in elektroniese format (gebruik MS Word) via 'n e-pos aan die redkteur of deur aflewering van 'n elektroniese skyf by die kantoor van die redakteur, voorgelê word. Bykomend, moet outeurs

(a) relevante kontakbesonderhede, in besonder e-posadres(se) en telefoonnommers verskaf;
(b) waarborg dat hulle geregtig is om die volle voorlegging te publiseer en dat dit, of deel daarvan nie elders gepubliseer is nie;
(c) openbaar of die voorlegging, of deel daarvan, ook aan 'n ander tydskrif vir publikasie voorgelê is; en
(d) onderneem om redelike kennis aan die redakteur te gee indien die voorlegging weens enige rede onttrek word.

7. Tensy reelings vooraf met die redakteur getref is, mag 'n artikel (insluitend voetnotas en opsomming) nie 8000 woorde oorskry nie. Ander bydraes mag nie 5500 woorde oorskry nie.

8. Tegniese riglyne vir outeurs is op die webblad van die Fakulteit Regsgeleerdheid van die Universiteit van Pretoria bekikbaar: http://www.dejure.up.ac.za/index.php/submissions.

Editorial policy

1. *De Jure* has the promotion of legal science and a critical and analytical approach to law as its main objectives and, towards this aim, publishes original contributions of a high academic standard.

2. *De Jure* is a national and general legal journal to which academics, members of the judiciary and members of the different legal professions may contribute. No preference is given to authors from any particular institution. The decision whether to publish any submission depends on whether it meets the high quality standards of *De Jure* and whether space is available for publication.

3. Contributions in both English and Afrikaans are published and may consist of articles, notes, discussions of recent cases and book reviews. A translated title and a brief summary of approximately 300 words in Afrikaans must accompany an article written in English. In the case of Afrikaans articles a similar requirement applies regarding an English title and summary.

4. In order to be considered for publication a contribution must be the result of original research by the author(s), meet with all applicable legal principles in respect of publication (such as copyright, etcetera), contribute something sufficiently new to the existing legal literature and conform to the linguistic, technical and stylistic requirements for publications in *De Jure*. Authors are personally responsible to ensure that their submissions meet all these requirements.

5. Submissions are accepted for consideration only on the basis that while the editorial committee makes the final decision on publication, submissions will be subjected to appropriate peer and expert review, as well as review by members of the advisory committee when necessary. The editorial committee further reserves the right to edit all submissions accepted for publication in terms of the editorial policy, as well as to shorten submissions if necessary.

6. Manuscripts may only be submitted in electronic format (utilising MS Word) through an e-mail to the editor or on an electronic disc delivered to the editor's office. In addition, authors

(a) must supply their relevant contact particulars, especially e-mail address(es) and telephone numbers;
(b) guarantee that they are legally entitled to have the full submission published and that it, or a part of it, has not been published elsewhere before;
(c) disclose whether it, or a part of it, has been submitted to any other journal for publication; and
(d) undertake to give reasonable notice to the editor if the submission is withdrawn for any reason.

7. Unless prior arrangements have been made with the editor, an article (including footnotes and the summary) may not exceed 8000 words and other contributions may not exceed 5500 words.

8. Technical guidelines to authors are available on the website of the Faculty of Law of the University of Pretoria: http://www.dejure.up.ac.za/index.php/submissions.