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"You don't write because you want to say something,
you write because you have something to say"
(F. Scott Fitzgerald)

With the wise words of Fitzgerald in mind, the editorial board of *De Jure* has pleasure in presenting the second 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 parental condition of unmarried fathers; aspects relating to burials and cremations; aspects relating to business rescue proceedings to mention but a few as well as interesting case discussions dealing with a wide variety of topics. 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

Revisiting the limping parental condition of unmarried fathers

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OPSOMMING

'n Herbesinning van die hinkende ouerlike status van ongetroude vaders

Die oogmerk van artikel 21 van die Kinderwet was om die gemenereg so te ontwikkel dat ten minste betrokke ongetroude vaders ook deur regswerking as die ouers van hulle biologiese kinders erken kan word by geboorte. Die wetgewer het egter hierdie proses bemoeilik deur die dubbelsinnige en onduidelike terme wat in die bepaling gebesig word. Die groeiende aantal sake waarin die howe genader word vir die opheldering van die inhoud van artikel 21 is bewys hiervan en kom as geen verrassing nie. Die artikel gee 'n kritiese oorsig oor hierdie uitsprake wat nog grotendeels ongerapporteer is. Die mening word gehuldig dat die reg in terme van artikel 21 nie net ongeregverdig teen ongetroude vaders diskrimineer op grond van geslag en getroude status nie, maar ook teen ongetroude moeders en veral die kinders van sulke vaders. Daar word geargumenteer dat vaders op dieselfde basis as moeders ouerlike status behoort te verkry bloot op grond van die biologiese band met die kind. Indien dispute tussen die ouers ontstaan oor die uitoefening van hulle verantwoordelikhede en regte kan mediasie, 'n ouerskapplan of selfs die hof genader word om te bepaal wat is in die beste beland van die kind. Tot tyd en wyl artikel 21 ongrondwetlik verklaar word, sal die hinkende ouerlike status van ongetroude vaders egter voortduur. Die gevolgtrekking wat bereik word is dat alhoewel die uitsprake van die howe kan help met die uitleg van artikel 21, dit nie kan kompenseer vir die onderliggende gebrek aan objektiewe kriteria vir die verkryging van ouerlike verantwoordelikhede en regte deur ongetroude vaders nie.

1 Introduction

Section 21 of the Children's Act[1] was intended to develop the common law to allow at least committed unmarried fathers to become the legal parents of their biological children by operation of law. Unmarried fathers who qualify within the terms set by the Children's Act can thus currently acquire full parental responsibilities and rights on the same basis as mothers at the birth of their child. The importance of establishing a child's legal parentage with the highest degree of certainty at the earliest possible moment cannot be overestimated. The legislator has unfortunately complicated the process in the case of unmarried biological fathers by the vague and ambiguous terminology employed in

1 38 of 2005, hereafter the Children's Act.

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section 21.[2] The interpretational difficulties and increased litigation which have resulted were predicted.[3] Very few of the judgments have been reported. The extent of the problem is thus not readily apparent. This comment attempts to set the record straight by showing how the courts have interpreted and applied section 21 to determine what has been referred to as the 'parental condition'[4] of unmarried fathers in recent times.

2 Preliminary Considerations

2 1 The Question of Urgency

It is one of the general principles of the Children's Act that a delay in any matter concerning a child must be avoided as far as possible.[5] There are numerous examples of court orders relating to children being granted on

2 Discussed in detail in Louw *Acquisition of Parental Responsibilities and Rights* (LLD thesis UP 2009) 115-133. See also Heaton 'Parental Rights and Responsibilities' in Davel & Skelton (eds) *Commentary on Children's Act* (2007) 3-11 to 3-15; and Skelton 'Parental Rights and Responsibilities' in Boezaart (ed) *Child Law in South Africa* (2009) 75-77.

3 See Louw (LLD thesis) *supra* n 2 at 124 & 133.

4 A phrase used by the court in *GM v KI* 2015 3 SA 62 (GJ) parr 10 & 19. The use of the phrase is not explained by the court, possibly considering it superfluous. Despite the court's apparent confusion between the content of parental responsibilities and rights as defined in s 18(2) (par 10) and the acquisition thereof as regulated by s 21 of the Children's Act in the case of unmarried fathers (par 19), the phrase 'parental condition' seems to have been used as a substitute for the more clumsy phrase 'acquisition of parental responsibilities and rights', introduced by the Children's Act (see heading of Part I of Ch 3 of Children's Act). While other more common substitutes such as 'legal parentage', 'parenthood; and 'parental status' are commonly used internationally, they are rarely employed in South African legal discourse (recently only in the context of surrogacy; see *Ex parte MS* 2014 (3) SA 415 (GP) parr 37 & 67 and *Ex parte WH* 2011 6 SA 514 (GNP) par 52). However, it is perhaps unwise to use the phrases interchangeably. Only a biological link can e.g. create rights of intestate succession. As such, even if non-parents acquire full parental responsibilities and rights they will still not acquire 'parental status' in the true sense of the word. 'Parental status' should thus, strictly speaking, only be reserved for biological parents who have acquired full parental responsibilities and rights and persons who are by statutory decree placed in the same position as such parents. With regard to the latter category of persons deemed to be parents, it is noteworthy that the definition of 'parent' in s 1(1) of the Children's Act only includes an adoptive parent. Since the commissioning parents in the case of a confirmed full surrogate motherhood agreement (s 297(1) read with s 298) and the consenting spouse of a woman who is artificially fertilised (s 40(1)) also fall in this category, the definition is not inclusive enough and should be amended. For purposes of this article 'parental condition', in relation to an unmarried father, will refer to the acquisition of full parental responsibilities and rights by the unmarried father or the parental status of such a father.

5 S 6(4)(b).

an urgent basis.[6] Some of the divisions of the high court, moreover, in express terms treat certain issues pertaining to children as urgent. The high court in the Western Cape, for example, has been instructed as a general rule to treat all applications brought pursuant to the provisions of the Hague Convention on the Civil Aspects of International Child Abduction 1980 as urgent matters.[7] The court in *M v V (born N)*[8] was even prepared to go so far as to state that all matters concerning children are, by their very nature, urgent.

While the court's decision to hear the matter in *Goliath v Hutchinson*[9] on an urgent basis cannot be faulted,[10] the issue of urgency was much more controversial in *Sullivan v Olivier*.[11] In *Sullivan*, a mother approached the court on an urgent basis to declare herself and the biological father of the child co-holders of parental responsibilities and rights and to make certain orders pertaining to the exercise of contact and care and the payment of maintenance. The parents were in a permanent life-partnership at the time of the child's birth so the 'parental condition' of the unmarried father was not disputed in this case. The court indicated that the decision to hear the application on an urgent basis was solely based on the averment by the mother[12] that she and the child had been subjected to harm at the instance of the respondent 'who ha[d] threatened to remove the minor child from the care of the

6 See *Desai v Desai* 1987 4 SA 178 (T); *Davy v Douglas* 1999 1 SA 1043 (N); *Centre for Child Law v Minister of Home Affairs* 2005 6 SA 50 (T); and *C v Department of Health and Social Development, Gauteng* 2012 2 SA 208 (CC).

7 See Note 36 of the Western Cape High Court, Cape Town Consolidated Practice Notes effective as from 2013-05-01.

8 [2011] JOL 27045 (WCC) par 7.

9 Unreported case 280/2011 [2011] ZAECGHC 12 (3 March 2011).

10 In this case, the biological father and the paternal grandmother of a child approached the court on an urgent basis to grant an order pending the outcome of an inquiry by the family advocate into the permanent arrangements for 'custody' and 'family responsibilities' in respect of the child (par 1). The child had been living with his paternal grandmother from the age of one year. This long-term close relationship had been disrupted by the child's biological mother who had removed the child to stay with his maternal grandmother without the consent of the child's father (parr 3-4). In considering the urgency and the merits of the application, the court reiterated that 'primary' consideration (par 8) must be given to the best interests of the child and the list of factors mentioned in s 7 of the Children's Act. Surprisingly, however, the court reverted to a consideration of the relevant factors mentioned in *McCall v McCall* 1994 3 SA 201 (C) 205A – the precursor to s 7. After investigating the circumstances of the child in some detail, Andrews AJ found, quite understandably, the matter to be urgent based on the following considerations: The tender age of the child, the uncertainty of his current circumstances and the potential detrimental effect of a disruption in the stability and security of his home and family circumstances (par 16). The court thus ordered the child to be returned to his paternal grandmother pending the outcome of the investigation by the family advocate (parr 16 & 17).

11 Unreported case EL 1107/2013 ECD2607/2013 [2013] ZAECELLC 7 (10 September 2013).

12 *Idem* par 6.

applicant'.[13] Answering to a claim on behalf of the respondent that the matter should be dismissed on the basis that the application was not urgent, the court, with reference to *Revenue Services v Hawker Air Services*,[14] held that even if the application brought by way of urgency turns out not to be urgent, 'there is no salutary practice that such an application has to be dismissed on the grounds of lack of urgency alone'.[15]

Rejecting the application was never considered an option in this case since the court was satisfied that the application had been properly filed as an urgent matter.[16] However, because the father contested the allegations of threat of harm to the mother and/or the child, the matter could not be dispensed with on an urgent basis since it would have to be referred for oral evidence.[17] The court held that the issue of the exercise of the parents' responsibilities and rights could ultimately best be addressed by the family advocate.[18] As such, the court deemed it sufficient merely to grant interim relief. Pre-empting the possible rejection of the application if the court found no urgency in the matter, it was argued on behalf of the applicant that preventing her from approaching the court for relief that related to maintenance would amount to unfair discrimination against unmarried parents. The court rejected the contention that the applicant's position should be equated with that of a married woman seeking interim relief by means of rule 43 proceedings,[19] quite correctly in the opinion of the current author, based on the fact that there was no matrimonial action pending.[20] Despite the various provisions in the Children's Act, the court emphasised the fact that it is in no way limited by any law in making any order relating to children,[21] including the maintenance of a child – 'even if it is a provisional order … pending finalisation of the maintenance court enquiry'.[22] Tshiki J was of the opinion that maintenance matters involving children should be dealt with 'as expeditiously as is practically possible'.[23] It was perhaps because proceedings in the maintenance court in general cannot be expedited that the court in this case was willing to issue an interim order relating to maintenance as well.[24]

The case seems to confirm suspicions that parents (probably on the advice of their legal counsel) increasingly prefer to approach the high court directly to resolve disputes relating to children. The advantages of choosing this course of action would seem to override the burden of

13 *Idem* par 5.
14 2006 4 SA 292 (SCA) parr 9-11.
15 *Idem* par 12.
16 *Idem* par 13.
17 *Ibid*.
18 *Ibid*.
19 *Idem* par 16.
20 *Idem* par 17.
21 *Idem* par 14.
22 *Idem* para 18.
23 *Ibid*.
24 *Idem* par 20.4.

additional costs it involves. Moreover, the willingness displayed by the courts to entertain the notion of urgency in matters relating to children could mean that the relief can be obtained speedily – even if, as suggested by the court in *Sullivan v Olivier*, it turns out that there was never any real urgency in the matter. Furthermore, the high court can, for example, entertain and grant applications for relief relating to parental responsibilities and rights and maintenance simultaneously while such relief would require initiating proceedings in different courts on a lower level. An additional bonus would be the more (if only perceived) competent bench hearing the application. The procedure in the high court is being used notwithstanding the fact that the lower courts have concurrent jurisdiction to grant relief in such matters. In this case there was no dispute regarding the parental status of the parents. The dispute centred around the possible risk of harm to the child which could have been addressed either by a protection order issued by the magistrate's court in terms of the Domestic Violence Act[25] or an order by the children's court in terms of section 45(1)(a) of the Children's Act. The disputes relating to the exercise of care and contact and the payment of support in express terms fall within the jurisdiction of the children's court[26] and, presumably, also the maintenance court.[27] While the high court's jurisdiction as the upper guardian of minors naturally is not and cannot be limited in any way,[28] the court in *FS v JJ*[29] cautioned against a practice of forum-shopping 'even in cases concerning disputes over parenting rights and responsibilities'. The case involved a series of applications and counter applications over a period of nearly five years of litigation in the Northern and Western Cape High Courts during and after finalisation of a children's court inquiry. The unmarried father pre-empted the children's court inquiry by approaching the high court for a declaratory order to confirm his parental status in terms of section 21 which had by that stage come into operation. The grandparents, on their part, used the opportunity presented by the postponement of the father's application to hijack the outcome by lodging a claim of their own in another division of the high court. Succeeding on appeal against all of the orders made up to that point, the court confirmed that the unmarried father was the holder of full responsibilities and rights and granted the grandparents contact with their grandchild on a regular basis.[30] Lewis JA provided the following general guidelines as far as the practice of 'forum-hopping or forum-shopping' was concerned:

> High courts should not in general be faced with litigation requiring them in effect to set aside an order made in another jurisdiction. And as a rule, since one is entitled to assume that any order has been made in the best interests

25 116 of 1998.
26 S 45(1)(b) & (d) of the Children's Act.
27 S 15 of the Maintenance Act 99 of 1998.
28 S 45(4) of the Children's Act.
29 2011 (3) SA 126 (SCA) par 38.
30 *Idem* par 55.

> of a child, should those interests change over time, the court that made the initial order should be approached for a variation.[31]

The court was nonetheless convinced that the difficulties in this regard would be resolved by the enactment of section 29 of the Children's Act.[32] Section 29 deals with 'court proceedings' relating to applications brought by interested persons to acquire or terminate parental responsibilities and rights.[33] In such cases, the jurisdiction of the court in question – be it the children's court, the divorce court or the high court – would be determined by the place where the child is ordinarily resident.[34] Section 21 does not provide the same guidance. Section 21(3)(b) merely makes provision for the outcome of the mediation, which must first be sought in case of a dispute,[35] to be reviewed by 'a court'. Where section 29 could not assist, Lewis JA indicated that 'reliance on formalism and a resort to inflexible rules is to be discouraged'.[36]

The judiciary as well as experts in the field have alluded to the jurisdictional uncertainties and anomalies created by the Children's Act.[37] With the notable exception of issues relating to guardianship,[38] the children's courts and the high courts have concurrent jurisdiction as far as disputes relating to care, contact, and support are concerned. Section 1(4) of the Children's Act confuses matters even further by prohibiting a children's court from dealing with matters arising out of the application of the Divorce Act,[39] the Maintenance Act[40] or the Domestic Violence Act.[41] Thus, while an unmarried father may approach the children's court, for example, for a variation of a contact order, a

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31 *Idem* par 38.
32 *Ibid*.
33 In terms of s 22(4)(b) (by means of a parental responsibilities and rights agreement), s 23 (care or contact), s 24 (guardianship), s 26(1)(b) (application to confirm paternity in cases where mother cannot or will not consent to amendment of birth registration) and s 28 (termination of parental responsibilities and rights).
34 S 29(1).
35 S 21(3)(a).
36 Reference is made to the now well-known dictum by Sachs J in *AD v DW (Centre for Child Law as* Amicus Curiae*; Department for Social Development as Interested Party)* 2008 3 SA 183 (CC) par 30 that a child's best interests 'should not be mechanically sacrificed on the altar of jurisdictional formalism'. The majority of the court in *AD* concluded that while the children's court was the correct forum to consider applications for intercountry adoption, the high court could still hear such matters in 'exceptional cases' (par 34).
37 *Ex parte Sibisi* 2011 1 SA 192 (KZP) par 14; Sloth-Nielsen 'The Jurisdiction of the Regional Courts Amendment Act, 2008: some implications for child law and divorce jurisdiction' 2011 *Journal for Juridical Science* 1; and Gallinetti 'The Children's Court' in *Commentary on the Children's Act* RS 5 (2012) 4-4 to 4-5 & 4-9 to 4-10. See also Louw (LLD thesis) *supra* n 2 at 282 & 297-299.
38 S 45(3) of the Children's Act.
39 70 of 1979.
40 99 of 1998.
41 116 of 1998. Sloth-Nielsen 2011 *Journal for Juridical Science* 7 refers to the position as 'schizophrenic'.

divorced father must presumably go back to the court that originally granted the divorce order.[42] Unmarried fathers, therefore, would seem to have more options when choosing a forum.[43] The problem created by the Children's Act granting concurrent jurisdiction to several courts is clearly different from the more serious problem of the actual 'forum shopping' which occurred in the *FS* case. The possibility of using one of several courts – or only the high court[44] – to obtain relief, merely impedes on the right of poor litigants to access justice on an equitable basis.[45] It is evident that the more wealthy applicants are able to avoid the problems that beset the fragmented, and possibly less competent, adjudication of matters in the lower courts by simply approaching the high court directly. Restricting access to the high court would be counter-productive and challenge the high court's role as the upper guardian of all children. Proposing the creation of a family court with comprehensive jurisdiction is of no use whatsoever given the lack of political will to effect such a dramatic change to the resolution of family law disputes in South Africa. Legislative reform would thus sadly seem to be the only viable, albeit less ideal, solution at this stage.[46]

2 2 Historical Context

In accordance with the dictates of statutory interpretation, both the high court in *I v C*[47] and the Supreme Court of Appeal (SCA)[48] considered it of some importance to place section 21 in historical context before tackling the issues in dispute. Reference is made[49] to the common law denying unmarried fathers inherent rights, the enactment of (the since repealed) Natural Fathers of Children Born out of Wedlock Act[50] and the *Fraser* case(s)[51] catapulting the rights of at least committed fathers into the constitutional domain.[52] According to the SCA, the legislator clearly

42 S 8(2) of the Divorce Act 70 of 1979.
43 See Skelton 'Parental Rights and Responsibilities' in Boezaart (*supra* n 2) 83.
44 According to Skelton (*idem* 81) 'the sole jurisdiction of the high court presents a barrier to access to justice for some of the poorest and most vulnerable children'.
45 S 34 read with s 9 of the Constitution of the Republic of South Africa, 1996 (hereafter the Constitution).
46 See *Ex parte Sibisi supra* n 37 at par 14; and Sloth-Nielsen 2011 *Journal for Juridical Science* 17.
47 Unreported case 11137/2013 [2014] ZAKZDHC 11 (4 April 2014) par 18.
48 *KLVC v SDI* [2015] 1 All SA 532 (SCA) par 18.
49 Parr 19 & 18 respectively.
50 86 of 1997.
51 *Fraser v Children's Court, Pretoria North* 1997 (2) SA 261 (CC).
52 Echoing the sentiments expressed in the *Fraser* case, the South African Law Commission (as it was then called) concluded that 'at the current stage of South African societal and economic development, the *mere* existence of a biological tie should not in itself be sufficient to justify the automatic vesting of all parental responsibilities and rights in the father, where the father has not availed himself of the opportunity of developing a relationship with his extra-marital child and is willing to shoulder the responsibilities of the parental role': SALC *Discussion Paper on the Review of the Child Care Act* par 8.5.2.1.

intended 'to accord an unmarried father similar rights and responsibilities (sic) in relation to his child to those of the father who was married to the child's mother' and 'to promote both the equality guarantee in s 9 and, more importantly, the right of a child to parental care as envisaged by s 28 of the Constitution'.[53]

3 Section 21

3 1 Origin of Disputes Relating to Section 21

Section 21 became relevant in *RRS v DAL*[54] and *I v C*[55] in rather surprising circumstances. In both these cases the court had to decide whether the child in question had been wrongfully removed from the Republic in terms of the Hague Convention on the Civil Aspects of International Child Abduction, 1980.[56] For this purpose, the court had to determine whether the unmarried father had been possessed of, and was actually exercising, 'rights of custody' as defined in Articles 3 and 5 of the Convention when the child was removed from South Africa. In a more expected application of section 21, the court in *Rudi v Sonja*[57] had to determine whether the unmarried father had *ex lege* acquired parental responsibilities and rights at the birth of the child following the mother's abrupt termination of the father's contact with his child.

Because of its importance to the ensuing discussion, section 21 is reproduced here for ease of reference:

> 21 Parental responsibilities and rights of unmarried fathers
> (1) The biological father of a child who does not have parental responsibilities and rights in respect of the child in terms of section 20, acquires full parental responsibilities and rights in respect of the child-
> (a) if at the time of the child's birth he is living with the mother in a permanent life-partnership; or
> (b) if he, regardless of whether he has lived or is living with the mother-
> (i) consents to be identified or successfully applies in terms of section 26 to be identified as the child's father or pays damages in terms of customary law;
> (ii) contributes or has attempted in good faith to contribute to the child's upbringing for a reasonable period; and
> (iii) contributes or has attempted in good faith to contribute towards expenses in connection with the maintenance of the child for a reasonable period.
> (2) This section does not affect the duty of a father to contribute towards the maintenance of the child.
> (3)(a)If there is a dispute between the biological father referred to in subsection (1) and the biological mother of a child with regard to the fulfillment by that father of the conditions set out in subsection (1)(a) or

53 *I v C supra* n 47 at par 19.
54 Unreported case 22994/2010 [2010] ZAWCHC 618 (10 December 2010).
55 *Supra* n 47.
56 Incorporated into domestic law in terms of s 274 of the Children's Act.
57 Unreported case 115/13 [2014] ZANWHC 3 (9 January 2014).

(b), the matter must be referred for mediation to a family advocate, social worker, social service professional or other suitably qualified person.

(b) Any party to the mediation may have the outcome of the mediation reviewed by a court.

(4) This section applies regardless of whether the child was born before or after the commencement of this Act.

[Date of commencement of s. 21: 1 July 2007.]

3 2 Interpretational Guidance

3 2 1 Section 21(1)(a): Living Together at the Time of the Child's Birth

In the cases mentioned in the previous paragraph where compliance with the requirements in terms of section 21 was disputed, none of the parents were living in a permanent life-partnership at the time of the birth of the child. This requirement has consequently received little or no attention by the judiciary. The court in both *JE v NM*[58] and *Sullivan v Olivier*[59] simply, on the version of the parties in question, accepted that the unmarried father had become a co-holder of parental responsibilities and rights based on the fact that he was living with the mother at the time of the child's birth. Because the issue was not in dispute, no inquiry into the exact nature of the relationship was launched in any of the cases. The absence of a clear definition of the concept of a 'permanent life-partnership' thus seems to be less of a problem in practice than initially anticipated.[60] On the other hand, it could be argued that the requirement has simply been diluted to a requirement of cohabitation, making a further investigation into the permanence or otherwise of the relationship unnecessary. Proposals recommending that the provision be amended along these lines would seem to support such a contention.[61] The proposal to dilute the requirement should be welcomed. Not only would it avoid the almost impossible task of having to define the concept but it would also remove an unnecessary hindrance placed in the path of unmarried fathers to acquire parental status at the child's birth.

3 2 2 Section 21(1)(b)

3 2 2 1 Three-in-one Requirement?

The court in *RRS v DAL* held, without deliberating the issue, that all three requirements stated in section 21(1)(b) must be complied with for an unmarried father to acquire parental responsibilities and rights.[62] The

58 Unreported case 38571/2013 [2014] ZAGPJHC 175 (20 June 2014) par 4.

59 *Sullivan v Olivier supra* n 11 at par 3.

60 See Louw (LLD thesis) *supra* n 2 at 116-117; Heaton 'Parental Rights and Responsibilities' in Davel & Skelton (*supra* n 2) 3-13; and Skelton 'Parental Rights and Responsibilities' in Boezaart (*supra* n 2) 75.

61 This amendment will allegedly form part of the proposed Third Children's Amendment Bill currently being finalised by the Department of Social Development.

62 *RRS v DAL supra* n 54 at p 13, lines 2-4.

court in *I v C*, on the other hand, canvassed the arguments for and against such a proposition in some detail. It was contended on behalf of the unmarried father that:

> the use of the word "and" in section 21 denotes no more than a signal by the legislature that a Court must have regard to all three categories and that a negative conclusion regarding one did not preclude the granting of relief on the strength of the others.[63]

This point of view was based, firstly, on the judgment in *Klerck v Klerck*[64] in which the court held that the factors that had to be considered in the case of a forfeiture of benefits at divorce,[65] that were also linked with the word 'and', should be read disjunctively.[66] Moreover, it was contended no special significance could be attached to the word 'and' in section 21 and that using 'or' instead of 'and' would not have solved the problem either.[67] If the requirements were joined with 'or' it would have implied that the factors should be regarded as alternatives which it was alleged clearly could not have been the intention of the legislature in this case.[68]

Opposing counsel countered by arguing that section 21 means what it says and that the use of the word 'and' meant that all three requirements had to be met.[69] The dictum in *RRS* was used to support this view. Referring to *Guardrisk Insurance Company Limited v Registrar of Medical Schemes*[70] it was argued that in the absence of compelling reasons to the contrary, words in legislation should carry their ordinary meaning. The judgment in *Klerck* was distinguished on the basis that section 9 of the Divorce Act conferred a discretion on the court, which clearly was absent in section 21.[71] Gabriel AJ was inclined to agree with this point of view.[72] He was not convinced that the value judgment that had to be made by the court, when interpreting the broad concepts used in section 21, amounted to the exercise of a judicial discretion, as argued by applicant's counsel.[73] The court *a quo* ultimately found it unnecessary to decide whether the subsection should be read conjunctively since even if the matters referred to in section 21(1)(b)(i)-(iii) were self-standing and distinct requirements, the unmarried father had met them all.[74] The high court, however, did not exclude the possibility that a case with different facts may well turn on 'these jurisprudential arguments'.[75] On appeal

63 *I v C supra* n 47 at par 22.
64 1991 1 SA 265 (W) 269D-E.
65 S 9(1) of the Divorce Act 70 of 1979.
66 *I v C supra* n 47 at par 23.
67 *Idem* par 24.
68 *Ibid.*
69 *Idem* par 26.
70 2008 4 SA 620 (SCA) parr 9 & 12.
71 *I v C supra* n 47 at par 27.
72 *Idem* par 28.
73 *Ibid.*
74 *I v C supra* n 47 at par 32.
75 *Ibid.*

against this judgment, the majority in *KLVC v SDI* concurred with this view:

> It is a type of matter which can only be disposed of on a consideration of all the relevant factual circumstances of the case. An unmarried father either acquires parental rights or responsibilities or he does not. Clearly, judicial discretion has no role in such an enquiry – it is therefore an entirely factual enquiry.[76]

The question of whether section 21(1)(b) can be read disjunctively poses a dilemma. While a disjunctive reading would have the benefit of opening up additional opportunities for an unmarried father to be recognised as the other legal parent, it is difficult to see how the use of the word 'and' connecting the requirements can readily be ignored.

3 2 2 2 Section 21(1)(b)(i): Identification as Father

The cumulative listing of the requirements in section 21(1)(b) did not deter the court in *GM v KI*[77] simply to accept without more that the unmarried father acquired full parental responsibilities and rights when he consented to being identified as the child's father. In this case the unmarried father's name appeared on the child's birth registration and the child was registered under his surname.[78] The court assumed that the father had acquired full parental responsibilities and rights despite the fact that he had never lived with the mother[79] and that he had shown a lack of commitment to the child and did not maintain him or take any interest in his wellbeing.[80] There seems to be a popular misconception that a father whose name appears on the child's birth certificate is automatically also the legal father of the child. The birth registration process is aimed (at least where a naturally conceived child is concerned) at identifying the biological mother and father of the child – nothing more. The fact that a certain man is identified as the child's biological father will definitely not necessarily mean that he is also the legal father of the child. He can only acquire parental status if he is the birth mother's spouse or satisfies the requirement of section 21. The position of an unmarried father in South Africa is thus distinguishable from the position of such fathers in the United Kingdom where birth registration will automatically confer parental responsibility on the father.[81] Although the issue has not conclusively been settled, as shown above, it seems that being identified as the father is only one of a triad of requirements listed

76 *KLVC v SDI* [2015] 1 All SA 532 (SCA) par 14.
77 *GM v KI supra* n 4 at par 3.
78 Although not expressly mentioned at the outset the child was also registered under the surname of the father. The eventual order to change the surname of the child makes this assumption inevitable (*idem* par 4).
79 *Idem* par 2.
80 According to the judgment (*idem* par 2) the respondent 'essentially abandoned the Applicant and the child and is currently untraceable'.
81 S 4(1)(a) of the U.K. Children Act 1989.

in section 21(1)(b) that have to be satisfied to acquire legal parentage in South Africa. The new Immigration Regulations[82] which became effective on 1 June 2015, also seem to proceed from the premise that parents whose names appear on a child's birth certificate are necessarily the child's guardians and must therefore consent to the minor being removed from the Republic. According to Regulation 6(12)(b), where only one parent is travelling with a child the parent must produce an unabridged birth certificate and:

> (i) consent in the form of an affidavit from the other parent registered as a parent on the birth certificate of the child authorising him or her to enter into or depart from the Republic with the child he or she is travelling with;
> (ii) a court order granting full parental responsibilities and rights or legal guardianship in respect of the child, if he or she is the parent or legal guardian of the child.

The regulations therefore require an unmarried mother who travels with her child to provide a sworn, written statement by the biological father of the child consenting to the travel, unless the mother can produce a court order showing that she has full parental responsibilities and rights in respect of the child. The consent of the father will be required in all cases where his name appears on the birth certificate, regardless of the fact that he is not the legal father of the child in terms of section 20 or 21 of the Children's Act. Furthermore, it should be noted that a court order granting full parental responsibilities and rights or legal guardianship will not necessarily give the parent accompanying the child the right to travel abroad without the consent of the other parent – only an order granting the accompanying parent *sole* responsibilities and rights or *sole* legal guardianship will have that result.[83]

The mother in *GM v KI* applied in terms of section 28 of the Children's Act to terminate the rights that the father had supposedly acquired at the child's birth.[84] The application was motivated by a desire to protect the child against a father with an allegedly 'criminal disposition' who, in the mother's (by the court's own admission wholly unsubstantiated) opinion, could go so far as 'selling the child if he were allowed to take care of him without my supervision'.[85] However, based on the mistaken assumption that the father had acquired full parental responsibilities and rights, the more real inconvenience to the mother was caused by her believing that

82 Published in *GG* 37679 GN R413 2014-05-26.
83 In terms of regulation 6(12)(d), any unaccompanied minor must produce to the immigration officer proof of consent from one or both his or her parents or legal guardian, as the case may be. However, where one parent provides proof of consent, that parent must also provide a copy of a court order issued to him or her in terms of which he or she has been granted full parental responsibilities and rights in respect of the child.
84 *GM v KI supra* n 4 at par 3.
85 *Idem* par 2.9.

she had to obtain the consent of the absent father every time she wanted to travel to family in Zambia.[86]

With reference to the definitional section 1(1) read with section 18 of the Children's Act, the court held – quite correctly in the view of the present author – that 'parental responsibilities and rights are, for the most part, two sides of the same coin'.[87] The other sections in the Act, including section 28,[88] refer to parental responsibilities and rights conjunctively.[89] In the court's opinion, therefore, it is 'clearly neither desirable nor (*sic)* practicable to attempt to define which of the incidence of the parental condition is "*right*" and which "*obligation*"'.[90] The court recognised that to terminate rights but leave the responsibilities intact 'would be difficult, if not impossible' to apply.[91]

The reason for emphasising the indivisibility of parental responsibilities and rights arose as a result of the applicant's initial wish to terminate the rights, but not the responsibilities, of the child's father. In particular it would seem, the mother did not wish to terminate the responsibility of the father to maintain the child. Since the father's rights could not be terminated without also terminating all the father's responsibilities, Fisher AJ considered it better to suspend, rather than terminate, the father's responsibilities and rights.[92] If all the responsibilities and rights were merely suspended, they could be revived at a later date. In the present circumstances, it was deemed appropriate to link the suspension of the father's parental responsibilities and rights to the child's maintenance requirements[93] – i.e. when the father reappeared and started making a contribution to the maintenance of the child.[94] The court acknowledged the uncertainty which could be created when having to establish 'for purposes of dealing with third parties' whether or not the suspension had ceased to operate.[95] However, the court considered this uncertainty 'sometimes unavoidable' in the context of determining the status of unmarried fathers 'being as it is dependent on factors not readily apparent'.[96] In the court's view, such uncertainties could be resolved either 'by way of affidavit or other means of satisfying third parties' or '[a]s a last resort the court can be approached for clarity'.[97]

86 *Idem* par 2.10.
87 *Idem* par 14.
88 *Idem* par 12.
89 *Idem* par 11.
90 *Idem* par 10.
91 *Idem* par 14.
92 *Idem* par 17.
93 *Ibid.*
94 *Idem* par 18.
95 *Idem* par 16.
96 *Ibid.*
97 *Ibid.* The motivation behind these statements is hard to gather. The continued reference to third parties in this context is baffling to say the least. While it may conceivably sometimes be necessary for an unmarried father to defend his position against third parties (as suggested in n 4) it

While the court acceded that the obligation to maintain a child is not normally affected by whether that parent is allowed to exercise other parental responsibilities and rights, 'the contribution by a father to his child's maintenance cannot be underestimated in relation to its importance to the parental condition'.[98] The statement is substantiated with reference to the importance given to the making of a contribution to the maintenance of the child that is in terms of section 21(1)(b)(iii) regarded 'as momentous enough to bring about the acquisition by the unmarried father of full parental responsibilities and rights where they previously did not exist'.[99] Fisher AJ was not prepared to accept the express assurance in section 21(2) that the provisions of section 21 do not affect the duty of a father to contribute to the maintenance of the child. While he sensed that the duty to maintain would survive a blanket termination of all parental responsibilities and rights, he contended that the position was not clear.[100] The proposed order for suspension was thus deemed in order because it operates 'to preserve the right to claim, at least, future maintenance'.[101]

The reported judgment is intended to provide the reasons for the orders made by the court in response to the 'unusual'[102] request by the applicant's attorneys. Not willing to decide on whether the applicant was entitled to such reasons, Fraser AJ nevertheless acceded to the request 'because the matter involved the fundamental rights of a child as well as important considerations relating to the interpretation of the Act'.[103] The judgment can and should thus be considered *obiter* in its entirety for much the same reasons as the judgment in *Van Erk v Holmer*[104] where there was no longer any *lis* between the parties. Mercifully, in the opinion of the present author, it has not created a precedent and, contrary to its main goal, should not serve as guidance for future courts confronted with the same (non) issue.

The unfortunate judgment cannot even be excused on the basis that it amounted to a hard case. It is simply bad in law. The father never lived with the mother and only satisfied one of the three requirements listed in section 21(1)(b). The factual circumstances in this case could provide further support for the view that section 21(1)(b) should not be read disjunctively. I think it is fair to say that the legislator could never have intended to confer parental status on an unmarried father who displayed such indifference and lack of commitment. Had the court properly

would definitely not be the norm. The father would more often than not have to defend his position against the mother, as duly recognised in s 21(3) in terms of which the dispute must first be referred to mediation before a court is approached.

98 *Idem* par 19.
99 *Ibid*.
100 *Idem* par 20.
101 *Ibid*.
102 *Idem* par 6.
103 *Ibid*.
104 1992 2 SA 636 (W); see also *B v S* 1995 3 SA 571 (A) 578B-G.

investigated the history of section 21 and given proper weight to the wording used in the section it would have realised that the father could in fact never have acquired any rights to interfere with in the first place and would simply have dismissed the application. Notwithstanding the fact that the unmarried father had never acquired any responsibilities and rights in respect of the child he has a common law duty to maintain the child based on their blood relationship and will remain so until the child becomes self-supporting.[105]

3 2 2 3 Section 21(1)(b)(ii): Contribution Towards Upbringing of Child

As far as contributing to the child's upbringing is concerned, the court in *RRS v DAL* referred to the definition of 'upbringing' in the Concise Oxford Dictionary as meaning '[t]he treatment and instruction received from one's parents through childhood'. The court concluded that the conduct of the unmarried father in question could not fall within this category as it amounted to no more than a few occasional visits over a relatively short period of time. The court did, however, concede that the child was perhaps still too young for any meaningful role in her upbringing.

In another attempt to give content to the term 'upbringing', the court in *Rudi v Sonja*,[106] in the first place, referred to the judgment in *Jooste v Botha*[107] wherein it was observed that the parent-child relationship consisted of two aspects – an economic aspect providing for the child's physical needs, and the intangible aspect providing for the child's psychological, emotional development needs. Kgoele J in *Rudi v Sonja*[108] agreed with the present author's contention that 'upbringing', in the context of section 21, should be interpreted as pertaining to the intangible aspects of raising a child, such as 'the training, education, rearing or nurture of the child'. Supported by the *dicta* of Mothle J in *M v Minister of Police of the Government of the Republic of South* Africa,[109] the court indicated that the list of non-financial duties that a parent could perform was endless and that the word 'upbringing' in section 21 should thus be interpreted widely.[110]

Returning to the interpretation of section 21(1)(b)(ii), the court in *I v C*[111] considered the requirements of good faith contributions to the child's upbringing for a reasonable period 'elastic concepts' that 'permit a range of considerations culminating in a value judgment as to what should be deemed reasonable'. Section 21(1)(b)(ii) and (iii) were distinguished on the basis that the former speaks to a child's upbringing and the latter speaks to expenses in connection with the maintenance of the child, which clearly relates to finances necessary for the maintenance of the child.[112] The court held that section 21(1)(b)(ii) and (iii) should be read in conjunction with section 18(2) describing the incidences of parental responsibilities and rights.[113] Section 18(2)(d) was said to find

105 Van der Vyver & Joubert *Persone-en Familiereg* (1991) 627.
106 *Rudi v Sonja supra* n 57 at [16].
107 2000 2 SA 199 (T) 201D-E.
108 *Rudi v Sonja supra* n 57 at [16].

expression in section 21(1)(b)(iii) as the responsibility and the right 'to contribute to the maintenance of the child' while section 18(2)(a) and (b) (relating to care and contact) find expression in section 21(1)(b)(ii) which deals with the child's upbringing.[114] According to Gabriel AJ, 'upbringing' had a far wider meaning than the dictionary meaning imputed to the term in *RRS v DAL*:

> I am of the view that the concept of "upbringing" denotes more. At its minimum contributing toward a child's upbringing encompasses personal effort towards interacting, caring for and being in contact with the child. But the concept could entail more such as a father procuring suitable care or educational aids or other material yet useful comforts for a child to ensure a comfortable and good upbringing.[115]

Testing the unmarried father's conduct in terms of this broader view of 'upbringing' the court ultimately concluded that the father had made a sufficient contribution for the following reasons: The father's involvement in the child's life began before his birth and continued up to the mother's departure.[116] The fact that the duration of this period was only four months should be seen in the context of the young age of the child, the acrimony between the parents and the fact that the mother frustrated the father's efforts at contact. [117]

On appeal, the SCA in *KLVC v* SDI also deemed it significant that the word 'contribute(s)' in sections 21(1)(b)(ii) and (iii) is not qualified in any way.[118] The court deduced that '[c]learly, the legislature deliberately

109 2013 5 SA 622 (GNP) [22]. Although not directly concerned with the responsibilities and rights of unmarried fathers, the judgment in *M v Minister of Police of the Government of the Republic of South Africa* held great promise for children wishing to enforce their right to parental care against third parties who unlawfully deprived them of such care. In this case the father of two legitimate children died as a result of injuries sustained while wrongly incarcerated by the SAP. The mothers claimed constitutional damages on behalf of their minor children for the unlawful deprivation of their father's care. The judgment effectively overturned the much criticised precedent in *Jooste v Botha supra* n 107 at 210G in which the court refused to award compensation to a child born out of wedlock for having been deprived of love and care by his famous father. However, the SCA has overturned the judgment. The SCA in *Minister of Police v Mboweni* 2014 (6) SA 256 (SCA) [25] acknowledged the far-reaching ramifications if the decision of the court *a quo* was to be sustained. The SCA rejected the misguided and contradictory arguments used in the high court in a logical and convincing judgment. While a detailed discussion of the case is beyond the scope of this comment the case will have a huge impact on how the right to parental care lends itself to enforcement in future.

110 *Idem* par 17, agreeing with a similar conclusion reached by the present author (see Louw (LLD thesis) *supra* n 2 at 123).

111 *I v C supra* n 47 at par 35.

112 *Idem* par 36.

113 *Idem* par 37.

114 *Idem* ar 38.

115 *Idem* par 39.

116 *Idem* par 46.

117 *Idem* parr 41-47.

118 *KLVC v SDI supra* n 48 at par 21.

omitted to prescribe that the contributions must, for example, be reasonable, significant or material'. The fact that the word 'contribute(s)' in the section is in the present continuous tense was also deemed of some significance in as much as it conveys, in the court's view, 'that whatever the unmarried father contributes must be of an on-going nature'. The court also concluded that as the section stipulates that the contributions or attempts must endure for a reasonable period, 'what constitutes a reasonable period in the circumstances must be determined with reference to *inter alia* the age of the child and the circumstances of the parties at the time the determination is made'.[119] The court found further evidence of the father's contribution in the fact that he had introduced the child to his extended family and took out an endowment policy to cater for the child's future upbringing.[120] The fact that the father allegedly abused drugs and alcohol, was violent, aggressive and on one occasion came to visit the child whilst in possession of a firearm was considered, correctly in the author's view, irrelevant to the requirement in section 21(1)(b)(ii).[121] Section 21 is not concerned with the best interests of the child but with the acquisition of parental responsibilities by the father. The fact that he is violent and aggressive can be grounds for the termination of his responsibilities and rights should they pose a danger to the welfare of the child, but should not impede the initial acquisition of rights. Apart from getting married to the birth mother, the parental status of married fathers is not made subject to further conditions.[122] The court thus deemed it necessary to warn against unfairly discriminating against unmarried fathers by denying them responsibilities and rights 'entirely unrelated to his ability and commitment as a father'.[123] The approach adopted in this instance would therefore confirm the view expressed by the court in *KLVC v SDI*[124] to the effect that it is an entirely factual enquiry.

3 2 2 4 Section 21(1)(b)(iii): Maintenance

As far as contributing to the maintenance of the child is concerned, the court in *RRS v DAL* determined objectively, despite the father's contentions to the contrary, that he had in actual fact never made any financial contributions to the child. The court in *I v C* drew attention to the largely indistinguishable difference in the wording between section 21(1)(b)(iii), which speaks of 'expenses in connection with the maintenance of a child', and section 21(2), which simply refers to the 'maintenance of the child'.[125] Baby-sitting, so as to prevent the costs of a baby-sitter or the costs of a nanny, was mentioned as an example of an impecunious contribution towards the expenses in connection with the

119 *Ibid.*
120 *Idem* par 27.
121 *Idem* par 24.
122 S 20 of the Children's Act.
123 *KLVC v SDI supra* n 48 at par 20; see also Louw 'Constitutionality of a biological father's recognition as a parent' 2010 *PER* 175-183.
124 *Idem* par 14.
125 *I v C supra* n 47 at par 48.

maintenance of the child.[126] Accompanying the mother on some of the prenatal visits to the doctor and offering to pay for the costs of the pregnancy were regarded as contributions to the maintenance of the child because it not only related to the well-being of the mother but also related to the health and well-being of the child.[127] Further evidence of financial contributions towards the maintenance of the child was found, *inter alia*, in the fact that the father had built a changing table,[128] had bought certain items from Baby City[129] and a pram and car seat worth just over R10 000[130] and contributes to a monthly endowment policy and an education policy set up for the child.[131] Evidence of attempts at making financial contributions was found in the offer to put the child on his medical aid[132] which the mother declined, and to pay a contribution towards the child's maintenance costs[133] which did not materialise because the mother failed to furnish the father with her banking details.

On appeal against the decision in *I v C*, the SCA in *KLVC v SDI* emphasised that the requirement of a contribution towards maintenance had to be considered against the backdrop of two important factors, namely that section 21(2) of the Children's Act makes it plain that this requirement does not affect the duty of a father to contribute towards the maintenance of the child and, secondly, that the extent and nature of the contribution is again unqualified in the legislation.[134] Thus the submission by the mother that the contribution by the father was insignificant and that it had to be viewed in the context of maintenance as envisaged in the Maintenance Act, in the court's view, was clearly misconceived.[135]

4 Conclusion

The judgments referred to in the discussion above confirm the widely acknowledged, and increasingly evident fact that section 21 of the Children's Act has far from clarified the position of unmarried fathers – specifically and most importantly as far as the possible disjunctive reading of section 21(1)(b) is concerned. In addition to the uncertainty it has created, the author has also – in a previous article – attacked the section on constitutional grounds as unfairly discriminating against not only the unmarried father but the mother and the child as well.[136] The fear that automatic rights conferred on fathers could disrupt the established relationship between mother and child and place the onus on

126 *Ibid*.
127 *Idem* par 49.
128 *Idem* par 50.
129 *Idem* par 51.
130 *Idem* par 52.
131 *Idem* par 54.
132 *Idem* par 57.
133 *Idem* par 58.
134 *KLVC v SDI supra* n 48 at par 29.
135 *Idem* par 29.
136 Louw 2010 *PER* 156.

the mother to enlist the help of the courts to protect her rights, is misplaced.[137] Once again, a distinction should be drawn between the acquisition of rights and the exercise of those rights. Neither the birth mother nor the married father has to qualify to acquire parental responsibilities and rights. The married father qualifies based on his willingness to formally commit to the birth mother. Section 21 in practice now, in addition, regards commitment in the form of cohabitation as sufficient. To accept a marriage certificate or cohabitation as sufficiently indicative of a commitment to the child makes a mockery of recognising only meritorious fathers.[138] The dividing line between such supposedly committed fathers and other biological fathers is simply too artificial to be justified. Not even the ultimate goal of achieving substantial equality for mothers who are most often the primary caregivers of the children can justify the inequitable impact of the section. As far as the exercise of parental responsibilities and right is concerned, the present author cannot see why unmarried mothers should be treated differently from married parents or parents who cohabitated at the birth of the child.[139] Surely in all such cases the only question should be what is in the best interests of the child? If the father disrupts the child's life, then there is an onus on all interested parties to protect the child's interests. If this person is the mother, why should it make a difference whether she is or was married or lived with the father? Why should married mothers bear the onus of approaching the courts in such cases but unmarried mothers not? Mothers and fathers should be recognised on an equal basis as the legal parents of the child at birth, based simply on their biological connection. If this option is deemed too radical, the legal position of unmarried fathers in the United Kingdom and Australia can be emulated. In both these countries the registration of the father on the birth certificate of the child simultaneously confers legal responsibilities and rights on that father.[140]

An indifferent father will not interfere with the mother's parenting or decisions – evident from the facts in *GM v KI*.[141] If the father is in fact interested in taking part in his child's life and he and the mother cannot agree on how to co-exercise their responsibilities and rights, there are a variety of options available to resolve such disputes. The parents can mediate their differences or draw up and register a parenting plan to serve as a guideline for both parents.[142] As a last resort, the court can be called upon to determine what is in the best interests of the child. Section 21 merely creates a diversion from what should be the main concern –

137 See Louw (LLD thesis) *supra* n 2 at 93.
138 See e.g. *Fraser v Children's Court, Pretoria North supra* n 51 at par 29.
139 Or a mother who shares responsibilites and rights with a section 21-qualified father.
140 See s 4(1)(a) of the U.K. Children Act 1989 and s 69R of the Australian Family Law Act 1975, read in conjunction with s 61B explaining the meaning of 'parental responsibility'.
141 Discussed in par 3 2 2 2 above.
142 Ss 33 & 34 and regs 9-11 of the General Regulations Regarding Children, 2010 published in *GG* 33076 GN R261 2010-04-01.

devising a way of allowing the child to develop and maintain a meaningful relationship with *both* parents. The automatic *acquisition* of parental responsibilities and rights at the birth of the child has nothing to do with what is in the best interests of the particular child[143] – it is merely a factual enquiry leaving the court with no discretion.[144] The *exercise* of parental responsibilities and rights, on the other hand, has everything to do with what is in the specific child's best interests and is entirely in the discretion of the court. If parents are given the same responsibilities and rights at birth, the only kind of dispute that could arise between them would relate to the *exercise* of those responsibilities and rights which is entirely dependent on the child's best interests. A father should at least be given the opportunity to show himself (un)worthy. Excluding him legally from the child's life in an arbitrary fashion on a mere technicality such as not actually having lived with the mother at the time of the child's birth, or not having sufficiently or for a long enough period contributed to the child's upbringing and maintenance, seems unconscionable. Conferring legal parental status on both biological parents at birth could, however, create problems for a mother who wishes to travel abroad with the child – especially if the father's name appears on the child's birth certificate. Since the father who is identified on the birth certificate would also have acquired guardianship at birth, his consent would have to be obtained. If the father refuses consent, a high court order for substitute consent would be required. While it may be considered unfair to impose such an additional burden on an unmarried mother, it will in fact only place her in the same legal position as a married mother[145] who must obtain the consent of her spouse (and often, more problematically, her ex-spouse) as co-guardian to take the child out of the country.[146]

Until such time as section 21 is found to be unconstitutional and declared invalid it unfortunately remains central to determining the parental status of unmarried fathers. While the courts were initially slow to acknowledge the changing legal position of unmarried fathers, the judiciary seems to have become overzealous in its attempt to accommodate such fathers.[147] The interpretational guidance provided by the courts will be of some use but it cannot, in the view of this author, compensate for the lack of objective criteria to determine the continued limping parental condition of unmarried fathers.

143 Confirmed in *LB v YD* 2009 (5) SA 463 (T) par 43.
144 *KLVC v SDI supra* n 48 at par 14.
145 Or a mother who shares parental responsibilities and rights with a section 21-qualified biological father.
146 See s 18(3)(c)(iii) of the Children's Act.
147 Compare the steadfast insistence by Kgomo JP that the unmarried father had acquired no rights in the orders leading up to the judgment in *FS v JJ* 2011 3 SA 126 (SCA) par 33, with the blanket acceptance by Fisher AJ in *GM v KI supra* n 4 at par 3 that the unmarried father had in fact acquired those rights.

The law of privilege and the Economic Freedom Fighters in South Africa's National Assembly: the aftermath of the 7th of May 2014 national elections[1]

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OPSOMMING

Die reg insake privilegie en die Ekonomiese Vryheidsvegters in die Nasionale Vergadering in Suid Afrika – die namaal van die 7de Mei nasionale verkiesings

Hierdie artikel ondersoek die omvang van die fundamentele beginsel van parlementêre privilegie – met spesifieke verwysing na die Suid-Afrikaanse Nasionale Vergadering (NV) se bevordering van die demokratisering van die parlement se outonomie. Die oogmerk is om 'n institusionele beleid vir die NV te bepaal aangaande die afdwinging van die parlement se magte in die bevestiging van die parlement se grondwetlike identiteit, nie deur eksterne inmenging nie, maar deur die afdwinging van interne kontroles – veral in die bestuur van die ope debatte in die evolusie van die beginsel van privilegie. Die fokus is nie bedoel om die operasionele kant van die NV te bespreek nie, maar die bevordering van die beginsel van privilegie in die Vergadering self sonder om dit te onderskei van die komitees, aangesien die beginsel van vryheid van spraak ook daaroorheen strek om parlementêre privilegie te bevestig. Die artikel argumenteer dat die miernes van politieke aktiwiteite in die NV die funksionaliteit van die parlement lamlê en dat dit die oneffektiwiteit van die parlement as spreekbuis vir die sisteem van verteenwoordigende demokrasie bevorder. Die bedoeling is nie om 'n volledige evolusie van die geskiedenis en die reg met betrekking to parlementêre privilegie te gee nie en erkenning word gegee dat die VN nie in 'n vakuum funksioneer nie, maar in die politieke konteks waarin dit bedryf word.

Die fokus is gemotiveer deur die geboorte van die nuwe politieke party: die Ekonomiese Vryheidsvegters (EVV) na die 7 Mei 2014 nasionale verkiesings, wat die ontwikkeling van die beginsel van parlementêre privilegie in die konteks van die nuwe grondwetlike bedeling in die kollig gestel het. Hierdie beginsel is die basis vir die regulering van die institusionele outonomie van die VN deur die verteenwoordigers van die algemene publiek, en is gegrond op die regs- en grondwetlike konstruksie van Suid-Afrika se grondwetlike bedeling. Die grondwetlike status van parlementêre privilegie het geblyk om 'n fassinerende onderwerp vir konstitusionele reg te wees – veral sedert die aankoms van die EVV in die

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parlement. Die fassinering word egter pertinent wanneer die indruk geskep word dat die NV beheer verloor oor die bestuur van die debatte oor aangeleenthede van nasionale belang. Hierdie stand van sake dryf 'n dringendheid om die manier hoe die VN sy interne kontroles reguleer bepaal.

1 Introduction

The year 2014, – South Africa's twentieth year of democracy – marked an important milestone in the development of the principle of parliamentary law of privilege. Such importance relates to the democratisation of the South African Parliament, which, after the 7 May 2014 national elections, included a notable, new political party: the Economic Freedom Fighters (EFF). The arrival of the EFF in the South African Parliament – an opportunity, endorsed by section 19 of the Constitution,[2] that allows anyone to form or join a political party – delivered a new constitutional landscape in terms of the application of the law of parliamentary privilege in South Africa. It has also resulted in a dramatic increase in political contestations in the National Assembly (NA/House) – which have led to legal wrangles in consolidating South Africa's democracy. This provides an opportunity for the examination of the 1996 Constitution as a 'source of inspiration in shaping the principle of privilege'.[3] The principle is the basis for the regulation of the institutional autonomy of the NA by the representatives of the general populace, and is grounded on the legal and constitutional structure of South Africa's constitutional dispensation.[4]

The constitutional status of parliamentary privilege has proven to be a fascinating topic for constitutional law – especially since the arrival of the EFF in Parliament. The fascination becomes pertinent, because there is the impression that the NA is losing control of the management of debates on issues of national interest. This state of affairs is driving the urgency of determining the manner in which the NA regulates its internal controls.

This article examines the scope of the fundamental principle of parliamentary privilege – with particular reference to South Africa's NA in the furthering of its autonomy in the democratisation of Parliament.

2 The Constitution of the Republic of South Africa 1996 (hereafter the Constitution). S 19 of the Constitution entitles anyone to form, join a political party, hold public office if elected, and represent the vision and mission of the people who voted them into office. This is linked to the inter-relationship of parliamentary members comprised of political party members, as they strive towards establishing a common ground in fulfilling their constitutional role for an effective and democratic representation of the general electorate.

3 Klug 'Constitutionalism, democracy and denial in post-apartheid South Africa' (2012) University of Wisconsin Law School, Legal Studies Research Paper Series No 1204 available from http://ssrn.com/abstract = 2141310 (accessed 2015-02-12).

4 *Idem* p 4.

The objective is to determine an institutional response of the NA in terms of asserting its powers in affirming its constitutional identity, not from external interference, but in the enforcement of its own internal controls – especially on the management of free debates in the evolution of the principle of privilege. The focus is not meant to discuss the operational side of the NA but the advancement of the principle of privilege in the House itself, without distinguishing it from its committees because freedom of speech extends to them in the affirmation of parliamentary privilege. The article argues that the hive of political activity in the NA leads to functional inactivity, which fosters the ineffectiveness of Parliament as a mouthpiece of the system of representative democracy. It does not intend to be a comprehensive evolution of the history and law in relation to the principle of parliamentary privilege and acknowledges that the NA does not operate in a vacuum, but in the broader political context as a whole.

2 Parliamentary Privileges

2 1 Privilege: The Central Feature of Representative Democracy

Drawing from May, parliamentary privilege is:

> the sum of the peculiar rights enjoyed by each House collectively … and by members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals. Thus privilege, though part of the law of the land, is to a certain extent an exemption from the general law.[5]

From this, it is deduced that parliamentary privilege has long been recognised in many countries and emanates from the struggles that sought to develop it over a number of years in ensuring that Parliament was free from undue influence. Privilege, therefore, is the constitutional and legal basis for the protection of the institutional status and members of Parliament and its committees from any action, legal or otherwise, that could arise from an opinion expressed in the House. It entails the personal and institutional independence that is enjoyed by Parliament and its members in the performance of their duties without fear of intimidation or any barriers that may impede the fulfilment of their functions.[6]

This means that privilege is an affirmation of the enabling environment that encourages the exercise of duties and functions without interference from other branches, including the members of the

5 May 'Parliamentary practice' 1997 5 in National Assembly *Guide to Procedure* (2004) Parliament of the Republic of South Africa.

6 Macreadie 'An introduction to parliamentary privilege' 2010 9 available from http://www.academia.edu/3841322/An_Introduction_to_Parliamentary_Privilege (accessed 2016-04-12).

House themselves. This is the reinforcement of the maintenance of authority and independence that allows Parliament to undertake its core business of making legislation and reviewing the activities of the executive and to go further by holding the latter accountable if it is found to have failed to fulfil its duties. As expressed by Devenish, privilege should be considered as a 'necessity for the dignity and proper functioning of the institution in ensuring the fulfilment of the member's parliamentary duties and not for their personal benefit.[7] It is opined that privilege seeks to ensure the assertion of Parliament's integrity and independence while at the same time being free from undue influence. This is the centrality of the principle of privilege that is meant to ensure the prevention of tyranny and protection of liberty of Parliament in the endorsement of its specialist function of law-making as a branch of government. Mojab similarly contends that parliamentary privilege is framed in such a way that it:

> secures the proper dignity, efficiency and independence of the legislature and not to protect individuals from due process. This legal institution is not a personal immunity; it is an occupational immunity, which is provided to ensure that the duties of representatives may carry out perfectly. This immunity is not meant to place a Member of Parliament above the law, but to protect him from possible groundless proceedings or accusations that may be politically motivated; thus it is not a discriminatory institution.[8]

In the South African context, the evolution of the concept of parliamentary privilege should be understood against its archaic history which was characterised by strife, 'tumultuous and epic conflict' before the attainment of democracy in 1994.[9] The uniqueness of parliamentary privilege that has emerged through the protracted history of a political struggle for freedom, underpins the independence of Parliament. This is given credence by the adoption of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act,[10] which signifies the principle of the independence of Parliament as it provides that:

> The President and members have the same privileges and immunities in a joint sitting of the National Assembly and the National Council of Provinces as they have before the Assembly or the Council.[11]

This has its roots in section 58 of the Constitution, which regulates free speech in the NA and provides that:

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7 Devenish 'The "imperial presidency" and the powers and privileges of parliament' 2012 *SA Public Law* 170.

8 Mojab 'A review of parliamentary privilege with an approach to Iranian legal system' 2004 available from law.bepress.com/cgi/viewcontent.cgi?article=1863&context=expresso (accessed 2016-04-12).

9 Devenish 2012 *SA Public Law* 172.

10 4 of 2004 (hereafter the Privileges Act).

11 This is also the approach of the Kenyan Parliament on the importance of parliamentary privileges, when it adopted the Parliamentary Powers and Privileges Bill 2014 as entrenched in s 8 – to ensure the affirmation of the day-to-day activities of the House in the management of its internal affairs.

(1) Cabinet members, Deputy Ministers and members of the National Assembly:
(a) have freedom of speech in the Assembly and in its committees, subject to its rules and orders, and
(b) are not liable to civil or criminal proceedings, arrest, imprisonment or damages for:
(i) anything that they have said in, produced before or submitted to the Assembly or any of its committees ;or
(ii) anything revealed as a result of anything that they have said in, produced before or submitted to the Assembly or any of its committees.
(2) Other privileges and immunities of the National Assembly, Cabinet members and members of the Assembly may be prescribed by national legislation.[12]

Section 58 was contextualised by Mahomed CJ in *The Speaker of the National Assembly v Patricia De Lille*[13] when he held that:

> the right of free speech in the Assembly protected by section 58(1) is a fundamental right crucial to representative government in a democratic society. Its tenor and spirit must conform to all other provisions of the Constitution relevant to the conduct of proceedings in Parliament.[14]

The Court gave content and meaning to freedom of speech as a 'highly esteemed parliamentary privilege that is essential for members to enjoy absolute immunity from the threat of defamatory actions in order that they are able to express their minds on the affairs of the nation and the body politic without inhibition'.[15] The court had further given substance to freedom of speech in *Swartbooi v Brink*.[16] Although this case emanates from the local sphere of government, the principle it developed is directly linked to the advancement of parliamentary privilege. The court determined the 'scope of liability and the nature of the protected conduct of local government councillors in the advancement of the principle of privilege as entrenched in section 28(1)(b)[17] of Local Government: Municipal Structures Act 117 of 1998'.[18] Without going into an extensive analysis of the judgement, the court held that the 'conduct complained of must be directly linked to the business of the council whether it is through statements, documents produced and the submissions that are made to the council'.[19] The court then endorsed that section 28 is 'wide

12 See also ss 71 & 117 of the Constitution on the protection of the Provincial Assembly's privileges.
13 1998 (3) SA 430 (C).
14 *Idem* par 29.
15 Devenish 2012 *SA Public Law* 169.
16 2003 (5) BCLR 502 (CC).
17 The section provides that councillors are not liable to civil or criminal proceedings, arrest, imprisonment or damages for: (i) anything that they have said in, produced before or submitted to the council or any of its committees; or (ii) anything revealed as a result of anything that they have said in, produced before or submitted to the council or any of its committees.
18 *Swartbooi v Brink supra* n 15 at par 10.
19 *Ibid*.

enough to exempt members of a municipal council from liability for their participation in deliberations of the full council and its committees'.[20]

The court had further cautioned against the intrusion of the court a *quo* into the domain of the other two branches by 'seeking to punish the councillors instead of determining whether their conduct was inconsistent with the Constitution in line the doctrine of separation of powers'.[21] This reasoning is supported by the Constitutional Court when Kriegler J in *S v Mamabolo*[22] held that courts have to be cautious and exercise some 'form of restraint, [and] self-discipline which is defined by various factors that had developed over a number of centuries'.[23]

This is an affirmation of the legal and constitutional foundation supporting the legitimacy of parliamentary privilege in safeguarding the autonomy of the NA. It is an assertion of privilege as an essential principle for the respect of the legitimate sphere of the NA in the exercise of its constitutional mandate. This means that the concept of privilege is incorporated within the framework of the constitutionality in the function of the NA. Such a function is derived from the Constitution in ensuring that the NA exercises its role in a more meaningful way.[24] In essence, the constitutional prescription of privilege, supports the NA in affirming its constitutional purpose and autonomy in ensuring the effectiveness of the institution in regulating its internal controls.[25]

The constitutional purpose of the NA enables the exercise of its privilege in ensuring that parliamentary members are given 'an opportunity to go beyond merely opposing, to [engage] constructively in a national forum, another way of doing things [and] serves as an avenue

20 *Idem* parr 16-17.
21 *Idem* par 25.
22 2001 (5) BCLR 449 (CC).
23 *Idem* par 18.
24 See section 57 of the Constitution which provides that:
(1) The National Assembly may –
(a) determine and control its internal arrangements, proceedings and procedures; and
(b) make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.
(2) The rules and orders of the National Assembly must provide for–
(a) the establishment, composition, powers, functions, procedures and duration of its committees;
(b) the participation in the proceedings of the Assembly and its committees of minority parties represented in the Assembly, in a manner consistent with democracy;
(c) financial and administrative assistance to each party represented in the Assembly in proportion to its representation, to enable the party and its leader to perform their functions in the Assembly effectively; and
(d) the recognition of the leader of the largest opposition party in the Assembly as the Leader of the Opposition.
25 Fox-Decent 'Parliamentary privilege, rule of law and the Charter after the Vaid case' 2007 *Canadian Parliamentary Review* 35.

for articulating positions … on how a particular issue can be addressed or regulated better'.[26] This means that privilege:

- is central to the deliberative, multiparty democracy envisioned in the Constitution.
- implicates the values of democracy, transparency, accountability and openness.
- is perhaps the most important mechanism that may be employed by [the NA to scrutinise its own internal processes].[27]

Given that privilege is foundational to the functioning of the NA and that the latter is the central focus in the democratisation of the parliamentary system, this is the framework of South Africa's constitutional design. It seeks to ensure that all parliamentary members are given equal voices on deliberating issues of national interest. It reinforces the internal and robust debates in advancing the inter-relationship of privilege with representative democracy – in line with the values of accountability and transparency.[28] The importance of representative democracy creates space in the NA for all members to engage constructively, in consolidating hard-earned democracy in South Africa. It anchors the NA practices, which enhance vigorous interaction in dispelling the myths about the marginalisation of minority parties in terms of national debates. It seeks to eliminate any countervailing force to the power-driven logic of political society in the NA.[29] In sum, representative democracy encapsulates the principle of privilege by:

- promoting and advancing the interests of the Republic of South Africa;
- protecting and promoting the rights of South Africans;
- discharging the duties of parliamentary members with all their strength and talents, to the best of their knowledge and ability, and with truthfulness with regard to the dictates of their consciences.
- doing justice to all; and
- devoting themselves to the wellbeing of the Republic and its entire people.[30]

The above-mentioned factors provide a framework that is geared towards giving effect to the assertion of the constitutional identity of the NA. They further give due recognition to:

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26 Moegoeng CJ in *Oriani-Ambrosini v Sisulu MP, Speaker of the National Assembly* 2013 (1) BCLR 14 (CC) par 57.

27 *Mazibuko v Sisulu* 2013 (11) BCLR 1297 (CC) par 44.

28 Suttner 'Democratic transition and consolidation in South Africa: the advice of the "Experts"' 2004 *Current Sociology* 755-773; Tushnet 'New forms of judicial review and the persistence of rights – and democracy-based worries' 2003 *Wake Forest Law Review* 813-838.

29 Heller 'Democratic deepening in India and South Africa' 2010 *Journal of Asian and African Studies* 125; Crum & Fossum 'The multi-level parliamentary field: a framework for theorizing representative democracy in EU' 2009 *European Political Science Review* 249-271.

30 *Lekota v Speaker, National Assembly* (14641/12) [2012] ZAWCHC 385 par 36.

> the long history of "deep conflict between a minority which reserved for itself all control over the political instruments of the state and a majority who sought to resist that domination", the overwhelming majority of South Africans across the political divide realised that the country had to be urgently rescued from imminent disaster by a negotiated commitment to a fundamentally new constitutional order premised upon open and democratic government.[31]

The importance of the history on the law of privilege in parliament is driven by the acknowledgement that the process of democratising the NA cannot be undertaken in isolation – without considering the context it emanates from. Hence, Moegoeng CJ emphasised the damage to the functioning of parliament caused by the history of South Africa, when he held that:

> the inherent value of representative and participatory democracy and dissenting opinions was largely inspired by this nation's evil past and our unwavering commitment to make a decisive break from that dark history. South Africa's shameful history is one marked by authoritarianism, not only of the legal and physical kind, but *also of an intellectual, ideological and philosophical nature*. The apartheid regime sought to dominate all facets of human life. It was determined to suppress dissenting views, with the aim of imposing hegemonic control over thoughts and conduct, for the preservation of institutionalised injustice. It is this unjust system that South Africans, through their Constitution, so decisively seek to reverse by ensuring that this country fully belongs to all those who live in it … It is in this context that the [principle of privilege] must be understood [own emphasis].[32]

It is this history that failed to ensure that Parliament 'became a role model for good governance and the country's main representative institution'.[33] It is in this regard that a proper and meaningful understanding of the application of the law of privilege becomes crucial in the assessment of its enforcement by the NA. This is essential in maintaining the constitutional balance between the enabling of free debates and the scrutiny of its internal processes. This balance is an important principle sustaining South Africa's maturing democracy which has to be determined within the ambit and content of the principle of privilege in the new dispensation with reference to applicable legislation – which, in this instance, refers to the Privileges Act and the Constitution.[34]

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31 *Certification of the Constitution of the Republic of South Africa*, 1996 (10) BCLR 1253 (CC) (6 September 1996) par 10.

32 *Oriani-Ambrosini v Sisulu MP, Speaker of the National Assembly supra* n 26 at par 49.

33 Nijzink & Piombo 'The institutions of representative democracy' 2004 University of Cape Town, Centre for Social Science Research Working Paper No 85; Currie & De Waal *The new constitutional and administrative law* (2001) 50.

34 Gay 'The regulation of parliamentary standards: a comparative perspective' 2002 University College London, The Constitution Unit, School of Public Policy 64.

3 Construing the Constitutional Identity of the National Assembly in the Application of the Law of Privilege

3 1 Privilege: The 'Chronic Ailment' of Representative Democracy?[35]

The *De Lille* judgment had long settled the supremacy of the Constitution, when it reviewed the application of the parliamentary law of privilege. The bone of contention in this matter was the suspension of Ms De Lille – for 15 days – from Parliament. Ms De Lille was at the time, a member of the opposition party: the Pan Africanist Congress (PAC). She had alleged that certain members of the ruling party, the African National Congress (ANC), were 'apartheid spies'. The *ad hoc* Committee was constituted to investigate the remarks and recommended that Ms De Lille apologise and be suspended for 15 days from the NA. The recommendations were duly adopted by the NA. In turn, Ms De Lille was aggrieved by the decision – alleging that the Committee was biased against her, did not act in good faith and did not allow for a fair hearing before the adoption of the recommendations.[36]

The Court pointed out that the case impinged on the backbone of South Africa's Constitution – because the latter 'is the ultimate source of lawful authority in the country and not Parliament'.[37] It held that:

> no Parliament, however, bona fide or eminent its membership, no President, however formidable be his reputation or scholarship and no official, however efficient or well meaning, can make any law or perform any act which is not sanctioned by the Constitution… any citizen adversely affected by any decree, order or action of official or body, which is not properly authorised by the Constitution is entitled to the protection of the Courts. No Parliament, no official and no institution is immune from judicial scrutiny in such circumstances.[38]

The judgment constitutionalised the process of the application of the law of privilege and entrenched its enforcement. The process should consider the:

- circumstances of each case;

35 Obiyo 'The South African parliamentary committee system: the constitutional parameters and structure' 2006 53 available from http://wiredspace.wits.ac.za/bitstream/handle/10539/2197/ObiyoRE_Chapter%203.pdf; jsessionid = 10F1B88ED490DAA494178E7760B18DD4?sequence = 4 (accessed 2016-04-12); Swinton 'Challenging the validity of an Act of Parliament: the effect of enrolment and parliamentary privilege' 1976 *Osgoode Law Journal* 345-405.

36 *The Speaker of the National Assembly v Patricia De Lille supra* n 12 at parr 1-10.

37 *Idem* par 14.

38 *Ibid.*

- nature of the decision;
- identity and expertise of the decision-maker;
- range of factors relevant to the decision;
- reasons given for the decision;
- nature of the competing interests involved; and
- impact of the decision on the lives and well-being of those affected.[39]

The application of these principles in the exercise of the law of privilege is strengthened by section 57 of the Constitution, which empowers the NA to determine its own internal processes in line with Rule 44 of the Guide to Procedure. Section 57 is the cornerstone of the application of the law of privilege, because it limits any 'impotence of the [NA] in maintaining effective discipline and order during [Parliamentary debates]'.[40] Of equivalence is the corresponding responsibility of the NA to align such undertaking with due regard to representative and participatory democracy, accountability, transparency and public involvement.[41] This provision does not only regulate the way in which Parliament should function, but equally controls the manner in which the NA exercises its authority. It democratises the application of the law of privilege in advancing its procedural and substantive conceptions, in compliance with the Constitution. It closely guards 'any failure that may lead to running the risk of eroding the unique principles of democracy which are encapsulated in the representative form of democracy'.[42]

The importance of section 57 on the application of the law of privilege was given effect in the *Lekota* judgment, when the Court considered the rulings made by the Speaker for the withdrawal of a statement made by Mr Lekota during parliamentary debates. Mr Lekota alleged that the President violated his office by keeping quiet about the conduct of the ANC and its Alliance Partners in relation to a painting by the artist Brett Murray at the Goodman Gallery in Johannesburg. The painting resembled the President and had exposed genitalia.[43] The Court analysed the impact of the statement on the office of the President and Mr Lekota's refusal to withdraw it, and the reasonableness of the sanction imposed. It held that the statement 'did not only point to the serious dereliction of duty on the part of the President, but convey[ed] that the latter failed to uphold the oath of his office'.[44] The Court upheld the decision of the Speaker, and held that:

> [Mr Lekota's] remark clearly conveys to others that the President is not an honest person and does not have strong moral principles [and] did not only

39 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (7) BCLR 687 (CC) par 45.
40 *The Speaker of the National Assembly v Patricia De Lille supra* n 12 at par 16.
41 S 57(1)(b) of the Constitution.
42 Malherbe & Van Eck 'The state's failure to comply with its constitutional duties and its impact on democracy' 2009 *TSAR* 214.
43 *Lekota v Speaker, National Assembly supra* n 30 at parr 1-5.
44 *Idem* par 36.

> suggest that the President is guilty of improper conduct but also casts a serious reflection on his integrity as a member of the National Assembly.[45]

However, the affirmation of the standard required on the application of the law of privilege – as evidenced in *Lekota* and which has a negative impact on the importance of section 57 – was underscored by the manner in which the NA handled the enforcement of the discipline of the institution in line with the requisites of the Privileges Act.[46] This was against the members of the EFF who 'allegedly' disrupted the President's address to Parliament on 21 August 2014. The so-called disruption was caused by a question put to Mr Zuma – when was he going to 'pay back the money' as per the recommendations of the Public Protector's Report on the Nkandla spending?[47] The EFF was of the opinion that the President's response to the question was 'unintelligible' and 'meaningless', as it was required to obtain a proper or meaningful response from the President. [48] The response also caused its members to bang on the benches to voice objections – even to the manner in which the Speaker handled the issue. Members of the EFF were ordered out of the NA by the Speaker. The Powers and Privileges Committee was then constituted to investigate the allegations that were brought by the Speaker against the EFF, for transgressing the rules of the NA. The Committee investigated the matter and recommended that members of the EFF should be suspended for 30 days without pay based on the extent of the alleged contraventions which they have committed.[49] In essence, the Committee recommended:

- A withdrawal of benefits equal to 14 days salary (Category C: fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth and twenty first.);
- Suspension from membership of the National Assembly without pay for a period of 14 days (Category B: eighth, ninth, tenth, eleventh, twelfth and thirteenth applicants); and

45 *Idem* par 37.

46 See s 12(1), which provides that 'subject to this Act, a House has all the powers which are necessary for enquiring into and pronouncing upon any act or matter declared by or under section 13 to be contempt of Parliament by a member, and taking the disciplinary action provided therefore'.

47 The Public Protector 'Secure in Comfort: Report on an investigation of impropriety and unethical conduct relating to the installation and implementation of security measures by the Department of Public Works at and in respect of the private residence of President Jacob Zuma at Nkandla in KwaZulu-Natal' 2013 available from http://www.gov.za/sites/www.gov.za/files/Public%20Protector's%20Report%20on%20Nkandla_a.pdf (accessed 2015-04-16).

48 *Economic Freedom Fighters and Others v Speaker of the National Assembly and Others* [2014] ZAWCHC 206 (hereafter *EFF and Others*) pp 8 & 9.

49 See Powers and Privileges Committee of the National Assembly 'Report on the hearing into allegation of misconduct constituting contempt of Parliament by members of the National Assembly' 2014 par 20 available from https://pmg.org.za/committee-meeting/17844/ (accessed 2015-04-16).

- Suspension without pay as a member of the National Assembly for a period of 30 days (Category A: second, third, fourth, fifth, sixth and seventh applicants).[50]

In turn, the EFF lodged an application to the Western Cape High Court for an interdict against the implementation of the recommendations of the Committee. The Court was asked to 'prevent the Speaker from implementing the decision of the NA', which meant the 'imposition of the sanction of suspension without remuneration or a fine in respect of the 02nd to the 21st applicants'.[51]

In addressing this matter, the tone and language of the Court has put the conduct of the NA under intense scrutiny, on how the application of the law of privilege was used in dealing with dissenting voices.

First, the Court remarked on South Africa's history and its infancy status in developing the 'contours of democracy'.[52] The Court held that the move from 'political warfare' to 'legal warfare' has put enormous pressure on the judiciary to craft innovative theories that will guide it on whether to accede or refuse demands for what often appear to be heavy 'political lifting'.[53] Although this might seem heavy on the judiciary, the 'political brawl' helps to transform South African politics in a manner that gives effect to the underlying values of the new dispensation. It helps in the determination of the impact of the guise of the political activity – which reduces constitutional debates to the dearth of privilege relationships in the NA. It eliminates any manifestation of redundancy in ensuring adherence to the live and robust debates in a manner that consolidates the strides that the NA has sought to achieve. Of further importance, it enables the gauging of the transformative nature of the South African jurisprudence of the law of privilege. It also helps determine the quality of the capacity of the judiciary and its judges in not repeating and falling prey to the pre-democratic history of succumbing to the political will – instead of to the Constitution, as the supreme law of the Republic. The contention was endorsed by Ngcobo J in *Doctors for Life International v Speaker of the National Assembly*[54] judgment and affirmed the primary duty of the courts when this Court held that:

> if in the process of performing their constitutional duty, [they] intrude into the domain of other branches of government, that is an intrusion mandated by the Constitution. What courts should strive to achieve is the appropriate balance between their role as the ultimate guardians of the Constitution and the rule of law including any obligation that Parliament is required to fulfil in respect of the passage of laws, on the one hand, and the respect which they are required to accord to other branches of government as required by the principle of separation of powers, on the other hand.[55]

50 *EFF and Others supra* n 47 at p 7.
51 *Idem* p 1.
52 *Idem* p 3.
53 *Ibid*.
54 2006 (12) BCLR 1399 (CC).
55 *Idem* par 70.

Second, the Court considered the dominance of the ruling party in the Committee and analysed the way in which it conducted the hearings which had a direct impact on representative democracy as envisaged in section 19 of the Constitution alongside section 7 of the Privileges Act.[56] The intersection of the two provisions envisages the co-responsibility over the manner in which the members of the NA and the Speaker adhere to the democratic principles of the new dispensation. They seek to ensure an affirmation of the democratisation of the NA in eliminating the 'historic bridge between a past which was based on conflict … [and] … a future which is stated to be founded on the recognition of a … constitutionally protected culture of openness and democracy …, which is based on what, is 'justifiable in an open and democratic society based on freedom and equality'.[57]

Third, of further concern is the punishment of members of the EFF, which was imposed contrary to the basic rules of the law of privilege, as endorsed in the Privileges Act. Section 12(5) of the Privileges Act requires lesser measures for the application of instilling discipline, before the harsher sentence that was meted out to EFF members could be imposed. The discipline includes:

- a formal warning;
- a reprimand;
- an order to apologise to Parliament or the House or any person in a manner determined by the House;
- the withholding for a specified period of the members' rights to use or enjoyment of any specified facility provided to members of Parliament; and
- a fine not exceeding the equivalent of one month's salary and allowances.

These principles embody the 'fundamental rules of natural justice which entail the application of the law in an unbiased and impartial manner'.[58] As the Court pointed out in *Lesapo*, the NA as a constitutional institution:

> should be exemplary in its compliance with the fundamental constitutional principle that [advances measures that are just and equitable which are] crucial for a … sustainable democracy, [especially] in a country like ours

56 Section 7 provides that a person may not improperly interfere with or impede the exercise or performance by Parliament or a House or committee of its authority or functions: (a) Improperly interfere with the performance by a member of his or her functions as a member; (b) threaten or obstruct a member proceeding to or going from a meeting of Parliament or House or committee; (c) while Parliament or a House or committee is meeting, create or take part in any disturbance within the precincts.

57 *Shabalala v Attorney-General, Transvaal* 1996 (1) SA 725 (CC) parr 25 & 26; *Bennett v The Speaker of the Parliament of Zimbabwe* No SC 75/05, Civil Application No 16/05, Supreme Court of Zimbabwe.

58 *Lesapo v North West Agricultural Bank* 1999 (12) BCLR 1420 par 5.

> where [there is no room for justified punitive measures], which, as in this case, is inimical to a fundamental principle such as that against the exertion of [political authority].[59]

It is evident that the Committee was motivated by arbitrariness, which attests to the argument made by the EFF that the establishment of the Committee was nothing more than a 'sugar-coating' exercise of the political authority of the ruling party (the ANC). As the Court further contended, the punishment was designed as a ploy to limit the powers of 'the parliamentarians who are dispatched to Parliament to articulate the needs, views, political and economic attitudes of their constituency, the people who voted for them'.[60] The suspension did not consider the long-term effects of the short-term decision, as it sought to weaken the EFF's ability to represent its constituency.[61] The Court further pointed out that the EFF members were handicapped in their constitutional role because they were not just ordinary aggrieved employees, but:

> public representatives who represent 6.35% of the elected; that is of those who cast their vote in the 2014 elections. They are paid to represent these constituents. Failing to pay them does not only mean hardship for themselves personally in respect of their pension payments, mortgage bonds, vehicle finance and other costs that they must incur, but it weakens their financial ability for the period of the suspension to do the job for which they are paid. Similarly, a suspension which bars them from access to their offices can surely not be dependent on when the sanction was imposed. It prevents applicants to do what their political opponents are certainly able to do, that is to access their facilities, which they have of right as public representatives.[62]

The whole fracas is traced to the conduct of the Speaker when she could not retain her composure and deal with the 'alleged' disruption without the appearance of bias. By her own admission on the evidence presented before the Committee, when members of the EFF did not adhere to her instructions to leave the Chamber, 'she lost it'. This is evident in the language of the Speaker when trying to calm events in the NA, when she held that: 'Honourable Shivambu*, I will throw you out of the House. I will throw you out of the House if you don't listen …* Honourable Holomisa, please'.[63] The repeated call was nothing more than exertion of the authority of the politically empowered Speaker. This type of conduct was earlier characterised in the *De Lille* judgment, which equally applies in this matter as 'evidence of being driven by some kind of punishment for the statements [(the EFF)] made on the days preceding the sitting of the Assembly which was considered objectionable and unjustifiable'.[64]

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59 *Idem* par 17.
60 *EFF and Others supra* n 47 at p 19.
61 *Idem* p 34.
62 *Idem* p 45.
63 *Idem* p 17 [own emphasis].
64 *The Speaker of the National Assembly v Patricia De Lille supra* n 12 at par 17.

This was the 'lack of candour'[65] in a tortuous process of finding some justification for the removal of EFF members, while in turn the Speaker was more anxious to protect the vested interests of the ruling party – as she happened to be its National Chairperson.[66] The Speaker reduced her constitutional role to a partisan political power in the NA and negatively impacted on the development of the principles of accountability and transparency in relation to the development of the law of privilege.[67] This means that the importance of constitutional partisanship in the regulation of the internal controls in the NA, raises questions about the credibility of the office of the Speaker. The Speaker is required to manage any issue that emanates from the NA as objectively as possible – irrespective of affiliation to any of the political parties. The contention was given meaning in the *Lekota* judgment, when the Court held that the Speaker:

- is required to perform the functions of that office fairly and impartially in the interests of the National Assembly and Parliament;
- has to maintain order and apply and interpret its rules, conventions, practices and precedents; and
- should jealously guard and protect the member's rights of political expression entrenched in the Constitution.[68]

These principles reinforce the manner in which the Speaker should handle the application of the law of privilege and were further validated in *Malema v Chairman of the National Council of Provinces*.[69] This case emanated from the remarks that were uttered by the applicant (Malema) during parliamentary sittings that the ANC government 'massacred people in Marikana'.[70] The applicant was then requested to withdraw the statement by the Respondent (Chairperson of the NCOP) and he refused. He was then ordered to leave the House as the remark was considered to be 'unparliamentary'. He then lodged an application requiring the Court to have the Respondent's ruling's declared unlawful and invalid, reviewed as well as to set aside her decisions:

- that certain statements made by first applicant 'are unparliamentary and do not accord with the decorum of this House';
- to request and then order the first applicant to withdraw his statement that the ANC government had massacred the mine workers at Marikana in that the police who killed them represented the ANC government; and
- to ask the first applicant 'to leave the House'.[71]

65 *Matatiele Municipality and Others v President of the Republic of South Africa and Others* 2006 (5) BCLR 622 (CC) par 84.
66 *The Speaker of the National Assembly v Patricia De Lille supra* n 12 at par 20.
67 Nijzink & Piombo *supra* n 33 at 4.
68 *Guide to Procedure supra* n 4 as quoted in *Lekota v Speaker, National Assembly supra* n 30 at par 12.
69 (12189/2014) [2015] ZAWCHC 39.
70 *Idem* par 22.
71 *Idem* par 5.

The Court invalidated the rulings made by the Speaker and thoroughly examined the application of the law of privilege by determining the impact it has on this case as it drew lessons from the *Lekota* and *De Lille* judgments as discussed above. The Court affirmed the legitimacy of the Constitution as foundational to the establishment of the NA which is 'elected by the people as part of a system of democratic government to ensure accountability, responsiveness and openness and insofar as they afford a guarantee of freedom of speech in Parliament subject to that body's "rules and orders" and legislation enacted by Parliament in that regard'.[72] The Court further consolidated the application of the law of privilege in line with the principles of the right to freedom of speech as it analysed it through the concept of representative democracy which is characterised by accountability, transparency and public involvement'.[73] The Court then found the rulings of the Speaker to be irrational, establishing that she misconstrued the interpretation of the alleged 'unparliamentary' remark as a reference to the 'Members of Parliament who were members of Cabinet and reflected on their integrity by literally accusing them personally of murder'.[74]

The enforcement of the law of privilege has been a 'thorn' in the functioning of the NA, and with respect to the office of the Speaker, it is clear that the manner in which the Speaker handled the 'alleged' disruptive behaviour was 'disingenuous' because it did not fall within the tenor of the 'legal culture of accountability and transparency [where the law of privilege could have been applied in a manner] that gives effect to the purpose which it seeks to advance by its enactment'.[75] As mentioned above, the law of privilege is closely linked and founded on the values of accountability, and the Speaker created an impression of bias which clouded the importance of transparency in the NA processes.[76]

As matters stand, it appears that the NA has not learnt the lesson from the *De Lille* judgment – on how it enforces its rules and procedures within the broader framework of the principle of privilege. The whole process of enforcing the rules of parliamentary privilege has been reduced to a *chronic ailment*[77] of South Africa's history that undermines the reasonableness of the application of the law of privilege. The NA has reduced itself to being the reactionary machinery in the maintenance of order and discipline in the House.

In summary, the aftermath of the 2014 elections has exposed the manipulation of the law of privilege in the NA at the hands of the majority party (ANC). The aftermath tested the impact of the Constitution in regulating the manner in which the NA constitutionalises its processes in

72 *Idem* par 44.
73 *Idem* par 52.
74 *Idem* par 55.
75 *Shabalala v Attorney-General, Transvaal supra* n 56 at par 26.
76 Ngcobo CJ in *Br?mmer v Minister for Social Development* 2009 (6) SA 323 (CC) par 62.
77 Swinton 1976 *Osgoode Law Journal* 345-405.

advancing the law of privilege. It also legitimises the mushrooming of various political parties as a force to be reckoned with on how the NA conducts its business. It is an eye-opener to the general public in terms of how Parliament functions, and its response to the challenges it is faced with in managing dissenting voices. It seeks to bridge the gap between 'us and them' – ensuring an inclusive approach in the regulation of state authority.

4 Conclusion

The draconian handling of the EFF's alleged disruptive behaviour – in maintaining the discipline of the NA – has developed a perception of an institution that is ruled by instilling fear in its dissenting voices. South Africa's constitutional framework has enabled the courts to be at the forefront of the creation of a space for constitutional debates in ensuring that contestations are resolved in a manner that will give confidence to the general public and generate debate around the manner in which the NA, as the mouthpiece of the democratic processes, advances the constitutional law of privilege. Therefore, there is a clear need for sensitivity on how the NA projects itself to the general public, and it should not reduce itself to being a 'political umbrella' for any of the political parties.

Burial or cremation – who decides?

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OPSOMMING

Begrawe of veras - wie besluit?

Elke mens gaan eendag te sterwe kom. Met dood verval alle regte wat die lewende mens gehad het. Die besluit om die oorledene te begrawe of te veras word aan die agtergeblewenis oorgelaat. Begrafnisondernemers het egter geen leiding oor wie van die agtergeblewenes se wil moet geld nie. Dit lyk voor die handliggend dat dit die naaste familie moet wees, maar in veranderde omstandighede is die familie nie meer soos van ouds nie. Die hele kosep van 'n familie het verander weens saamblyverhoudings of dieselfde geslag-huwelike. Wat doen 'n begrafnisondernemer indien die naasbestaandes nie kan ooreenkom wat met die lyk moet gebeur nie. Die Wet (National Health Act 61 van 2003) en die Regulasies in terme van die Wet bied geen leiding nie. 'n Voorstel is om as lewende persoon 'n dokument op te stel waarin aangedui word wie verantwoordelik vir die liggaam na dood moet wees.

1 Introduction

> The physicality of a human corpse is undeniable. It is a carcass, with a predisposition to decay, to become noisome, obnoxious to the senses, and harrowing to the emotions. Disposal of such perishable remains is imperative.[1]

Every human being will eventually die. With death all rights to autonomy and self-determination ends. Not even the wish a living person expressed in a will concerning the disposal of his body has any legal effect. The decision whether a burial or a cremation should take place after death is left to those who stay behind.[2] Family members might feel a moral obligation to fulfil the deceased's wishes as pronounced in a will, but this can only happen if the contents of a will are known to the family members as a will is usually only read after the burial or cremation takes place. A difficulty for funeral undertakers is that as they have no legal guidance of whose wishes should be honoured or who should give permission for a cremation to take place.

1 Richardson 'Death, Dissection and the Destitute' in Cantor *After We Die: The life and times of the human cadaver* (2010) 91.

2 Whether a person died from natural causes or otherwise is not the focus of this article, the emphasis is rather on who should give permission for the cremation or burial to take place after a death certificate has been obtained as well as who has the right to the ashes after a cremation.

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Cremation is the process of burning a dead body at very high temperatures until there are only brittle, calcified bones left, which are then pulverized into 'ashes'.[3] These cremains can then be kept in an urn, buried, scattered or even incorporated into objects as part of the last wishes of the deceased.[4] In modern crematories, the body is stored in a temperature-controlled room until approval is given for cremation. Apart from someone giving consent for a body to be cremated, a death certificate is essential to make sure no medical investigation is needed because unlike after a burial, the body cannot be exhumed once it is cremated. It might seem obvious that it should be the nearest family consenting to a cremation but in a changing society the word 'family' is beginning to get a new meaning as it is no longer based on blood relation alone.

If there is a dispute amongst the family members whether a cremation or a burial should take place, the funeral director has no legal guidelines as to who has the final say. There could be people who are not family members with whom the deceased, long before his death, had discussed issues relating to his final disposition. An example might serve to explain the dilemma in real terms. Person X, the divorced father of a minor child, dies. Before his, death he was living with a woman from a different religion for the past three years. His mother and father are still alive. He left a will in which he expressed his wish to be cremated. Both his partner and his father are against a cremation, but his mother insists that his wish to be cremated be honoured. The executor of the deceased's will, who is not a family member but a long-time friend, also wants a cremation in order to honour his friend's wish. Whose view should the funeral home follow? Should a dispute like this be legally directed?

Although this article is applicable to both burials and cremations, the emphasis, to a certain extent, is more on cremation as the cremation of human corpses might become legally prescribed within the foreseeable future because land is a diminishing resource. Cemeteries are nearing saturated and land for new ones is unlikely to be provided.[5] The issues surrounding the cremation of a corpse are also more intricate since once a body has been burnt, there is no turning back – unlike a burial where

3 'Cremo' is Latin for burn. Cremains is another word for human ashes as it refers to the human remains after a cremation has taken place.

4 For the history of cremation see Goetting & DelGuerra 'Cremation: History, Process and Regulations' 2003 *The Forum for Family and Consumer Issues* available from: http://ncsu.edu/ffci/publications/2003/v8-n1-2003-january/fa-1-cremation.php (accessed 2014-10-28); Murphy 'Please do not bury me down in that cold ground: The need for uniform laws on the disposition of human remains' 2007 *The Elder Law Journal* 384-389.

5 Mhlanga 'Land shortage will see cremations soar' 22 Aug 2011 available from: http://www.property24.com/articles/land-shortage-will-see-cremations-soar/13962 (accessed 2014-10-28); Health Systems Trust 'South Africa: cremation the only option as cemeteries fill' (accessed 2014-10-28); Dambudzo 'The state of cemeteries in South African cities' 2012 *South African Local Government Association* (*SALGA*); Masango 'Cremation a problem to African people' 2005 *HTS Theological Studies* 1286-1287.

the body can be exhumed. With this in mind, the question of who should dispose of human cremains is also analysed.[6]

The article starts by discussing a testamentary wish concerning what should happen with one's body after death but as will be indicated, a dead body is no one's property; it is thus not possible to legally determine what should happen with your body after death. By concluding that a wish in a will is only a directive to the next of kin, the next part of the article discusses the changing definition of a family and the effect it might have on giving consent for a cremation and the disposing of the cremains afterwards. The legal uncertainty in South Africa regarding authorised cremations will then be highlighted after which some recommendations are made to assist local funeral homes in cases where they are faced with differing family views.

2 The Dead's Wishes in a Will

The common law writers were unanimous in stating that any person has the freedom of testation.[7] South Africa acknowledges the right to freedom of testation as long as the will of the testator is not *contra bones mores*. This requirement – of not being against societal values – could be interpreted as meaning that the law of succession is interested in issues of morality and should therefore be in favour of 'the moral thing to do' after a person has passed away.

English common law does not recognise property rights in a dead body and a deceased cannot dispose of his body by will. In the United States of America, the courts in most states recognise that there is no property in a dead body in a commercial sense but the courts do respect a deceased's wishes of burial preferences as part of freedom of testation.[8] In other words, according to common law dead bodies are not property to be owned but rather property to be taken care of.[9] The right to bury or cremate human remains is a 'quasi' right in the property of the

6 Richardson 'Death, Dissection and the Destitute' in Cantor (*supra* n 1) 112-118.

7 De Groot 2 18 4; Van Leeuwen RHR 3 4 2; Voet (Gane-translation) 28 1 2; Van der Keessel Praelectiones ad Gr 2 16 2; Van der Linde Koopmans Handboek 1 9 4; Van der Westhuizen & Slabbert 'Wysigings van die bepalings van 'n liefdadigheidstrust' 2007 *TSAR* 211-212.

8 Hernandez 'The property of Death' 1999 *University of Pittsburgh Law Review* 982; Young 'The right of posthumous bodily integrity and implications of whose right it is' 2013 *Marquette Elder's Advisor Law Review* 247-248 where it is stated that at 'common law, individuals cannot make legally binding decisions about the means of disposal of their bodies. This is because the law of succession is said only to contemplate transfers of property and one's body is not property at common law'. Arizona has overridden this as Arizona law provides that a 'legally competent adult may prepare a written statement directing the cremation or other lawful disposition of the legally competent adult's remains'.

9 Slabbert 'This is my kidney, I can do what I want with it – Property rights and ownership of human organs' 2009 *Obiter* 501-504.

dead body.[10] In his *Institutes of the Laws of England*, Sir Edward Coke wrote that the 'burial of the Cadaver is *nullius in bonis* (in the goods of no one) and belongs to Ecclesiastical cognisance'.[11] In his *Commentaries on the Laws of England*, published in 1765, Sir William Blackstone wrote that:

> though the heir has a property in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes; nor can he bring any civil action against such as indecently at least, if not impiously, violate and disturb their remains, when the dead are buried. [But] if anyone in taking up a dead body steals the shroud or other apparel, it will be felony; for the property thereof remains in the executor, or whoever was at the charge of the funeral.[12]

There are at least three reasons for the rule that a corpse (or cremains) is incapable of being owned. First, there is no ownership of a human body when alive, why should death then trigger ownership of it?[13] Second, as implied by Coke and Blackstone above, the body was the temple of the Holy Ghost and it would be sacrilegious to do anything other than to bury it.[14] Third, it is in the interest of the public health not to allow persons to make cross-claims to the ownership of a corpse.[15] An example of a case in this regard is the United Kingdom case of *Williams v Williams*.[16] In a codicil to his will, the deceased directed that his executor should give his body to Miss Williams; he requested her to cremate his body under a pile of wood (cremation was not lawful in Britain until 1902) and to place his ashes into a Wedgewood vase. She could claim her expenses from the executor. Despite his wish, the body had been buried by the executor. Miss Williams instructed that the body be dug up and it was cremated in Milan. She claimed the expenses from the executor but her claim was dismissed as the judge held there was no property in the corpse and therefore a person could not dispose of his body by will.[17]

In accordance with the views above, it seems clear that no one can own a corpse or human cremains. The practice in common law countries

10 Haddleton 'What to do with the body: The trouble with postmortem disposition' 2002 *Probate & Property Magazine* (November/December) 56; Murphy 2007 *The Elder Law Journal* 398.

11 3 Co. Institutes 203 (1644).

12 15th ed, 1809, Book II, 428-429.

13 Slabbert 2009 *Obiter* 499-517.

14 *In Re Estate of Johnson* 7 NYS 2d 81 (Sur. Ct. 1938); the United States (US) case of *Spiegel v Evergreen Cemetery Co.*, 186 A. 585, 586 (N.J. 1936) where it was stated that '[t]he ecclesiastical court had jurisdiction of the dead; and, in consonance with the doctrines of that jurisdiction, the common law early rejected the concept of property in the corpse and the ashes, and treated them as subjects largely of church superintendency'.

15 *Doodeward v Spence* in the High Court of Australia (1908) 6 CLR 406.

16 [1882] 20 Ch D 659.

17 See the US case of *Enos v Snyder* 63 P. 170,171 (Cal. 1900) where the court stated in the absence of statutory provisions, there is no property in a dead body, that it is not part of the estate of the deceased person, and that a man cannot by will dispose of that which after his death will be his corpse.

is usually that if the wishes of the deceased are known, and he is survived by a spouse, the spouse may make funeral and disposition arrangements according to the deceased's wishes. If the deceased and his spouse were estranged at the time of the death or if the wishes of the deceased are not known, then the funeral and disposition arrangements pass to the major children, the parents of the deceased, or a close relative.[18] The problem here is that if the father and mother are both still alive and do not agree as per the example earlier, who has the final say? The same can be asked when the major children disagree on cremation or burial.

The same problem is highlighted by Rodriguez-Dod in her discussion of statutory laws regulating funerary and crematory services.[19] She states that the general purpose of these laws is to guide the funeral home operators by clearly delineating the priority of those persons who are legally authorised to make funeral arrangements for a deceased person. But, the statutes fail to address what happens if two people in the same category, such as siblings, disagree over the manner of disposition of the body or the distribution of the ashes. Section 497.383(2) of the Florida Statute provides only that it should be resolved in court. The same is required by the states of Minnesota and Pennsylvania.[20] Courts are instructed to make a decision based on the following factors:

> The reasonableness, practicality and resources available for payment for the proposed arrangements and final disposition; the degree of the personal relationship between the deceased and each of the persons in the same degree of relationship to the deceased; the expresse3d wishes and directions of the deceased and the extent to which the deceased has provided resources for the purpose of carrying out those wishes or directions; and the degree to which the arrangements and final disposition will allow for participation by all who wish to pay respect to the deceased.[21]

It is virtually impossible to ensure that the deceased's wishes for his funeral and burial arrangements are carried out as there appears to be no sanction if they are not. If the deceased's family wish to countermand his instructions, who is to enforce his wishes? If a will or declaration is executed, the deceased-to-be will have done about all he can to see that his wishes are carried out. Sometimes that information is discovered only after the deceased has been buried somewhere else or a cremation has already taken place.[22] An example from the United States of America can once again illustrate this dilemma. In *Betty Brannam v Edward Robeson Funeral Home* No 43141/96 (N.Y. Sup. Ct. Nov 14, 1996) (unpublished order),[23] the deceased requested – in an executed will – that his remains

18 Haddleton *supra* n 10 at 56.
19 Rodriguez-Dod 'Ashes to ashes: Comparative law regarding survivors' disputes concerning cremation and cremated remains' 2008 *Transnational Law & Contemporary Problems* 316.
20 *Idem* 318.
21 D.C. Code 3-413.01; Minn. Stat. 149A.80; Rodriguez-Dod 2008 *Transnational Law & Contemporary Problems* 318-319.
22 Haddleton *supra* n 10 at 59.
23 Hernandez 1999 *University of Pittsburgh Law Review* 972.

be cremated and that his ashes be in the sole control of his executor who was his long-term female companion and the mother of three of his children. The executor contacted his estranged wife to advise her of the deceased's wishes and invited her to participate in the funeral arrangements. The estranged wife had the body removed from the mortuary to a funeral home for burial rather than cremation. Even though the executor provided the funeral home with a copy of the deceased's will, the funeral home refused to abide by it. Ms Brannam had to get a court order compelling the funeral home to abide by the deceased's wishes. The disregard for the doctrine of testamentary freedom is specifically heightened when a testator favours persons other than the biological family members.[24] This leads to conflict because of a lack of legislation guiding a funeral home as to who has the right to make funeral arrangements.

3 Mortal Remains Legislation

The question could be asked who has the ultimate authority over funeral arrangements to fulfil certain wishes expressed while living or even whether cremains should not get legal status 'because ashes of the deceased are now often treated as souvenirs, ending up sometimes in bitter disputes between family members and sometimes in the garbage'.[25] Rodriguez-Dod refers to the American case of *Kulp v Kulp*[26] in which a child's ashes had to be divided between the deceased child's parents to be disposed of as each saw proper. The dispute over the couple's son arose in the process of their divorce. Unfortunately, disputes such as these are not uncommon and funeral homes are increasingly finding themselves in the middle of family feuds.[27]

Traditionally the care of the body of a deceased was the primary responsibility of the family, the justice system sees it as the family

24 In this regard see the US case of *Rosenblum v New Mt. Sinai Cemetary Assoc.* 481 S.W.2d 593, 595 (Mo. Ct. App. 1972) in which it was stated that how far the desires of the deceased should prevail against those of a surviving spouse, depends upon the particular circumstances of each case; *McEntee v Bonacum* 92 N.W. 633,634 (Neb. 1902) in which the court doubted whether a dying request by a deceased as to the disposition of his remains is obligatory upon his next of kin; *Burnett v Surratt* 67 S.W.2d 1041,1042 (Tex. Civ. App. 1934) where the court said that a surviving spouse's preferences are paramount to those of a deceased except where the spouse has forfeited the right of control of the burial due to estrangement, divorce, or separation at which point the deceased's wishes are entitled to a respectful consideration by the court.

25 As quoted in Rodriguez-Dod 2008 *Transnational Law & Contemporary Problems* 311.

26 *Kulp v Kulp* 920 A2d 867, 873 (Pa. Super. Ct 2007).

27 Rodriguez Dod 2008 *Transnational Law & Contemporary Problems* 312 where it is stated that on 'March 12, 2007, the Superior Court of Pennsylvania decided that a trial judge had abused his discretion in deciding that a child's ashes should be divided between the deceased child's parents to be disposed of as each saw proper'.

members having a quasi-property right in the body to take care thereof until burial or cremation.[28] When funeral homes developed, they, over time, followed this trend. Yet, today only one in four families conforms to the idea of the traditional nuclear family of mother, father, and children.[29] The rising incidence of divorce, the decreasing stigma of sexual relationships out of marriage and alternative lifestyles with same sex partners have challenged the traditional concept of a family. Even the advancements in reproductive sciences have removed the determinacy of equating family with genetic connections.[30]

> [T]he concept of the family is culturally determined and subject to ethic and cultural variations…. Legally, a family group may be based on consanguinity or affinity by marriage alone; but there may be *de facto* relationships also, without blood relationship or marriage, and these may or may not be legally recognized… [S]mall group classifications, regardless of whether they originate in psychology, sociology, or anthropology, do not necessarily coincide with legal classifications…[L]egal classifications [of family] tend to be more narrow and rigid than group classifications…. [They are] cerebral… abstract and relatively removed from specific factual situations.[31]

In *Stewart v Schwartz Brother-Jeffer Memorial Chapel*,[32] the deceased's mother and brother took possession of his remains for an elaborate Orthodox Jewish funeral and burial. This was opposed by the deceased's life-partner of five years who stated it was the wish of the deceased to be cremated although he failed to record it in his will. The court considered the close, spousal-like relationship that existed between the two and accepted the life-partner's standing as a representative of the deceased's wishes. Even though the court accepted the life-partner's position as representative, they did not consider him 'family'. Should a corpse get legal status by way of mortal remains legislation, it could be a mechanism to acknowledge the expanding definition of 'family' and thus diminish familial conflict or the disregard for life-long partnerships. Such a legally recognised directive would allow the deceased, while still living, to define whom he sees as 'family' and whom he wants to take decisions concerning his remains. Such legislation does not have to determine who owns the remains as property, but it should rather appreciate the complexity of death in a society where autonomy is valued and few people live their lives alone. The legislation could create a construct that respects individual rights while acknowledging the importance of the

28 Hernandez 1999 *University of Pittsburgh Law Review* 993.

29 Foster 'Individualized justice in disputes over dead bodies' 2008 *Vanderbilt Law Review* 1357-1361 where it is stated that 'legal ties do not necessarily create familial ties'.

30 Hernandez 1999 *University of Pittsburgh Law Review* 1004-1005; Smolensky 'Rights of the dead' 2006 *Ariz. Legal Studies* Discussion Paper 06-27 784, where the case of *Hecht v Super Ct (Kane)* 20 Cal Rptr. 2d 275, 282-283 (Cal. Ct. App. 1993) is discussed. The deceased's intent to reproduce posthumously was respected.

31 As quoted in Hernandez 1999 *University of Pittsburgh Law Review* 1007.

32 606 N.Y.S.2d 965,966 (Sup. Ct. 1993) issuing a judicial opinion to serve as a guidepost for other courts even though the litigants settled the case.

individual's social network as death is a context in which autonomy is enforced by one's relation to others. In the end, death implicates the needs of not only the deceased, but also of those who loved him as well.[33] Currently, it seems that there is bias in favouring the preferences of biological family members concerning the mortal remains of members of their family.[34] The tension between individualism and family status is one which mortal remains legislation could begin to alleviate.[35]

Mortal remains legislation could also permit a deceased to delegate the control over his mortal remains to a proxy, as the law of wills – as pointed out above – is insufficient to ensure that the wishes of a deceased will be carried out. Even if the family was prepared to comply with a deceased's wish, the content of a will is usually only validated after the body has been buried or cremated. Funeral homes are often unsure as to whether they should respect the burial instructions in a will if such a will has not yet been accepted by the Master of the High Court as being valid. Although South Africa has legislation concerning cremation facilities, there are no guidelines on who may request cremation or a burial when the deceased's wishes are unknown or who may ultimately control the deceased's cremains.[36]

4 Cremains in South Africa

There is no specific legislation controlling the disposal of human cremains nor are there guidelines on who should consent to a cremation in South Africa. As indicated above, due to the lack of specific legislation, funeral homes follow the practice as per the common law on who may consent. It is based on biological linkages and will usually be the spouse, a major child, the parents or a major sibling. In the absence of specific legislation, it could be of value to consider the National Health Act[37] concerning permission for an organ donation. Section 62(2) determines that 'in the absence of a donation under sub-section (1)(a) [where the donor him or herself have indicated they are organ donors]… the spouse, *partner*, major child, parent, guardian, major brother or major sister of that person, *in the specific order mentioned*, may, after that person's death, donate the body…'[38] The significance of this section is that it allows for a partner to consent before the biological order of children and brothers or sisters are followed. The same order in which consent must be given is followed in section 66(1)(b) concerning the granting of

33 Hernandez 1999 *University of Pittsburgh Law Review* 1026. For a list of US state laws concerning the disposition of a body, see Murphy 2007 *The Elder Law Journal* Appendix A 416-465.
34 Hernandez 1999 *University of Pittsburgh Law Review* 975.
35 *Ibid*.
36 The Regulations Relating to the Management of Human Remains, GN R363 in *GG* 36473 2013-05-22; Regulations to the National Health Act 61 of 2003.
37 61 of 2003.
38 Own emphasis.

permission for a post-mortem. No mention is specifically made in section 68 that the Minister can make regulations concerning the burial or cremation of the remains of a person except section 68(1)(b) which determines regulations can be made concerning 'the preservation, use and disposal of bodies, including unclaimed bodies', but this should be read with section 90(4)(c).

The regulations in terms of the National Health Act regarding the general control of human bodies, tissue, blood, blood products and gametes[39] determines in section 26 that '[a]ny person who acquired the body of a deceased person… by virtue of any provision of the Act and these regulations, shall… on receipt of that body… acquire exclusive rights in respect thereof'. An interpretation of this provision could mean that the funeral undertaker has exclusive rights in the dead body but cannot decide how to dispose thereof.

Other regulations in terms of the Act relating to the management of human remains[40] provides, in section 2(1), that these regulations shall apply to '[f]uneral undertakers' premises and crematoriums' but it discusses only finer detail concerning funeral undertaker's premises, the transportation, importation and exportation of human remains, the burial in excavated land, and the requirements to be an authorised crematorium. Crematoriums must keep a register of all cremations as section 19(1)(g) determines that there should be a record of 'the manner in which the ashes of the person were disposed of'. This requirement seems strange as the funeral undertaker can only record to whom the cremains were given as he or she has no control over what happens with the cremains once handed over. What is more disturbing, is that no mention is made as to who should consent to a cremation nor to whom the cremains of a person should be given to for disposal. Because of this lack of clarity or direction given to funeral undertakers, they fall back on the biological family and the order traditionally followed according to common law. In the recent case of *AB and the Surrogacy Advisory Group v Minister of Social Development*[41] concerning the genetic link requirement for surrogacy according to the Children's Act,[42] Basson J discussed the constitutional concept of 'family' by stating that:

> The question that pertinently arises is whether genetic lineage (which constitutes a critical component currently in terms of the Act should be relevant in defining the concept of a family.[43]

The Constitutional Court has on occasion been willing to question the traditional view of what constitutes a family in the context of two lesbian parents. In *J v DG, Department of Home Affairs* 2003 (5) SA 621 (CC) …

39 No. R.180 in *GG* 35099 2012-03-02.
40 GN R363 *supra* n 36.
41 *AB and Another v Minister of Social Development as Amicus Curiae: Center for Child Law* (40658/13) [2015] ZAGPPHC.
42 38 of 2005.
43 *AB and Another v Minister of Social Development supra* n 41 par 43.

the court held that …plainly the Legislature sought thereby to deal with advances in fertility and reproductive technology but it seems to have confined itself to the traditional view of the family[44].

> In *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC) at [11] the CC questioned the traditional view of a family and held as follows: 'Family means different things to different people, and the failure to adopt the traditional form of marriage may stem from a multiplicity of reasons – all of them equally valid and all of them equally worthy of concern, respect, consideration and protection under law'.[45]

> I am in agreement with the sentiments expressed by the Constitutional Court: A family cannot be defined with reference to the question whether a genetic link between the parent and the child exists. More importantly, our society does not regard a family consisting of an adopted child or adopted children as less valuable or less equal than a family where children are the natural or genetically linked children of the parents. A family can therefore, in my view, take due cognisance of the advances made in fertility and reproductive technology and with that comes the obligation to redefine the traditional view of the family.[46]

Taking cognisance of the above, it seems clear that the Constitutional Court recognises that a family – as it is traditionally known – should no longer be the determining factor when decisions must be taken. In the context of this article, it should thus be self-explanatory that a funeral undertaker should not solely follow the common law lineage when asking permission for a cremation to take place. In this regard, it is recommended that the funeral home should recognise the wishes of surviving unmarried (opposite or same sex) partners, blended family members, extended family members and nonrelatives of the deceased. Even more favourable would be if the deceased-to-be, whilst still alive, could execute a signed, maybe a notarial executed document, naming an agent to take care of his remains in order to avoid that the body is given to the family. Haddleton gives such an example:

44 *Idem* par 44.
45 *Idem* par 45.
46 *Idem* par 46.

Example:[47]

Declaration of disposition of last remains and appointment of agent

I,…….. (name of declarant), being of sound mind and lawful age, hereby revoke all prior declarations of my wishes regarding the disposition of my last remains. I declare and direct that after my death these procedures should be followed:

I nominate ……. as my agent to oversee that my will is done. I nominate …….. as my alternate designee.

I direct that my body shall be cremated.

My cremated remains must be……

I request the following ceremonial arrangements to be made……

I have entered into a preneed contract with …….. (funeral home)

Etc.

I may revoke or amend this declaration in writing at any time. I agree that any third party who receives a copy of this declaration may act according to it. Revocation of this declaration is not effective as to a third party until the third party learns of my revocation. My estate shall indemnify any third party or the agent appointed for costs incurred as a result of claims that arise against the third party or expenditures made by the agent because of good-faith reliance on this declaration.

I execute this declaration as my free and voluntary will on this …….. day of …… 2015.

Address: .....

Signature: .....

The declarant personally appeared before me and proved his/her identity as:……

He/she acknowledge the foregoing to be his/her free will.

……(notary public)

Witness 1……

Witness 2……

47 Haddleton *supra* n 10 at 60.

Such a declaration should be legally binding and thus different from a living will which has no legally binding effect. It should not be part of the will of the deceased and should therefore not be regulated by the law of succession concerning property rights. It should rather be seen as a separate legally valid document or direction about what should happen with a body or cremains after death – it should be able to stand on its own in a court of law. An example of such a declaration could be inserted into the regulations of the National Health Act and could be used by funeral homes or people selling funeral cover.

5 Conclusion

Society's moral standing could be uplifted if promises made to the dead are kept because keeping such promises will indicate respect for the dignity of the dead. If it is seen by the living that promises to the dead are fulfilled, the living will be comforted that their wishes will also be respected after death.[48] By changing legislation to allow for an advance directive to people who care about what happens to their bodies after death, is to give them confidence that their wishes will be respected and will ultimately be fulfilled.[49] Thus, the claim that living individuals have an interest in what happens to their corpses rests not on interests that survive death, but rather on the benefit to them knowing, while they are alive, that their wishes will be respected.[50] If it becomes common practice to follow and respect the directives given by a living person about what should happen with him after death, a lot of family conflicts will be resolved and posthumous bodily integrity will be respected.[51]

The dead should be treated with dignity because they were alive once and while alive they possessed autonomy to make decisions concerning their bodily integrity after death. Granting the dead posthumous 'rights' will aid in controlling the behaviour of living persons and harmonising society.[52] Funeral homes should not be left in the middle of family conflicts. Death is an emotional matter but with a few additions to the regulations of the National Health Act, a huge difference could be made to both the living and the dead.

48 Young 2013 *Marquette Elder's Advisor Law Review* 201.
49 *Idem* 200.
50 *Idem* 214.
51 *Idem* 267.
52 Smolensky *supra* n 30 at 769.

Politokratiese kommunitarisme en publieke geregtigheid

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SUMMARY

Politocratic communitarianism and public justice

Politocratic communitarianism is based on Nisbet's, Sandel's and MacIntyre's interpretation of Aristotle's sociology and theory of justice. It fosters Aristotle's views on the growth manifested in the organismic state under which the whole of society is subsumed. The *physis* (growth) of the state is expressive of the whole of reality. In this sense, the city-state is by nature clearly prior to non-state entities and individual persons, since the state is of necessity prior to its parts. The Aristotelian organismic teleology is related to the doctrine of the great chain of being, which sees every element of society as an infinitesimal gradation of ascent to transcendental reality, and which informs the politocratic communitarian philosophy of community. Society as a whole, its structure and processes, is deemed to be representative of the organismic state; society and all its institutions, participates in the entire realm of organismic reality, an idea fundamental to politocratic communitarianism and National-Socialistic state and legal philosophy. The ideal forms of community and public justice are expressive of the biopolitical aims of the power-state: the plurality of non-state entities are subsumed under the universalistic state, the pluriformity of legal spheres in society are encapsulated within the organismic political society and the principles of liberty and equality in civil private law are negated to the point where material injustices are legitimised by state aims. The Aristotelian concept of the biopolitical state is, arguably, the highest barrier for politocratic communitarians and National-Socialists to overcome in their aspirations to meet the benchmarks of the law-state and to satisfy the requirements for ensuring public justice. This essay investigates the implications of politocratic communitarianism, its shared Aristotelian heritage with National-Socialism, and the law-state implications emanating from this tradition's organismic and biopolitical state and legal philosophy.

1 Inleiding

Die afgelope dekades het politokratiese kommunitarisme skerp kritiek teen liberale regstaatlikheid geopper[2] en die Aristoteliese publieke

1 My dank aan Danie Strauss vir insiggewende kommentaar oor die wysgerige grondidees van eietydse kommunitêre geregtigheidsparadigmas.

2 Sandel *Liberalism and the Limits of Justice* (1983) 174 & 183; Knight 'Aristotelianism versus Communitarianism' 2005 *Analyse und Kritik* 259.

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geregtigheidsideaal as regssosiologiese alternatief op die voorgrond gestel.[3] Met verrekening van Nisbet,[4] Sandel[5] en MacIntyre[6] se kommunitêre regssosiologie, formuleer politokratiese kommunitariërs staats en regsparadigmas wat tot 'n groot hoogte op die lees van Aristoteles se geregtigheidstandpunte geskoei is. Politokratiese kommunitarisme het ook vir die Suid-Afrikaanse politologie en staatsregtelike denke relevant geword. In die Suid-Afrikaanse literatuur is Malan[7] en Goosen[8] verteenwoordigend van dié herlewing van regssosiologie regsparadigmas wat Aristoteles se geregtigheidsteorie as vertrekpunt neem. Malan se veroordeling van die 'territoriale staat' en die idee van individuele outonomie moet teen die agtergrond van dié regsteoretiese vertrekpunte beoordeel word: die reg is nie 'n objektiewe neutrale normkompleks nie; regsreëls is grondliggend onbepaald en beskik nie oor 'n vaste normatiewe inhoud nie; bygevolg beskik regsreëls vanweë die onbepaaldheid daarvan nie oor die vermoë om regsekerheid te bewerkstellig nie; die reg is bloot dit wat die hof en administrateurs wat die reg toepas 'van beslissing tot beslissing sê dit is';[9] die reg is nie 'n eiestandige werklikheidsgegewe nie maar is bloot 'n 'manifestasie van die politiek',[10] die politieke konteks waarin reg en geregtigheid funksioneer is 'n natuur-gegewene wat aan voortdurende organiese ontwikkeling onderhewig is. Dié implikasies vloei voort uit Malan se aanvaarding van die Aristoteliese *polis*-staat as normatief vir gemeenskap en dié se geregtigheidsteorie as normatiewe konteks vir die nastrewing van publieke geregtigheid.[11]

Goosen neem die Aristoteliese idee van die *polis*-gemeenskap as vertrekpunt vir die ordening van die regs en politologiese werklikheid. In sy kritiek teen die modernisme, liberalisme, kapitaal en individuele regte,[12] bespeur Goosen die spanning tussen staat en individu en dié

3 Sien b.v. Malan *Politokrasie. 'n Peiling van die dwanglogika van die territoriale staat en gedagtes vir 'n antwoord daarop* (2011); Goosen *Oor Gemeenskap en Plek. Anderkant die onbehae* (2015).

4 Nisbet *Community and Power* (1962); Nisbet *Tradition and Revolt* (1968); Nisbet *History of the Idea of Progress* (1980).

5 Sandel *Justice. What's the Right Thing to do?* (2009).

6 MacIntyre *After Virtue* (1984); MacIntyre *Marxism and Christianity* (1995); MacIntyre *Ethics and Politics II* (2007).

7 Sien Malan ''n Kritiese evaluering van menseregte as eietydse globale politiek-juridiese verskynsel' 2003 *Tydskrif vir Geesteswetenskappe* (*TGW*) 94-111; Malan 'Die brose wisselwerking tussen die (reg op) eierigting en die (falende staat)' 2007 *TGW* 119-134.

8 Goosen 'Demonisering en Demokrasie' 2007 *TGW* 142-154; Goosen 'Oor die Republikeinse Gedagte. 'n Oefening in Herinnering' 2010 *Historia* 182-203; Goosen 'Die Teoretiese Lewe. Perspektiewe vanuit die Tradisie' 2011 *TGW* 490-506; Goosen 'Oor die Geestelike' 2012 *TGW* 707-718; Goosen 'Politieke Denke en Praktyke; boekbespreking van Koos Malan, Politokrasie (PULP))' 2012 *TGW* 761-764; Goosen 'Monsters en Mense: Oor die geestelike en haar moderne afwesigheid' 2013 *TGW* 515-529; Goosen *Oor Gemeekskap en Plek* (2015).

9 Malan *supra* n 3 op 169.

10 *Ibid*.

11 *Idem* 280 ev.

12 Sien b.v. Goosen *supra* n 3 op 132, 227 & 317.

tussen gesag en instemming as uitvloeisels van die antitetiese spanning tussen die voorskriftelike staat en die beroep op individuele regte: hoe meer die staat sy gesag – onder meer by wyse van territoriale standaardisering – opeis, des te meer doen die individu 'n beroep op sy/haar regte. Laasgenoemde verkeer onder die indruk dat die beroep op regte 'n alternatief tot staatlike gesag verteenwoordig. In der waarheid verteenwoordig dit, volgens Goosen, slegs die teenkant van dieselfde modernistiese denkraamwerk: staatlike gesag en die liberale beroep op regte bevoordeel mekaar, hou mekaar in stand – die een roep die ander op.[13] Teenoor die 'territoriale staat' kies Goosen vir die Griekse *polis*-staat as vorm van 'n volwaardige gemeenskapslewe: die *polis* is ontologies die gemeenskap van gemeenskappe; deugde is deur die Griekse *polis* 'gekultiveer en oorgedra' en die 'Tradisie' manifesteer vanselfsprekend in die 'stad of *polis*'.[14]

Beide Malan en Goosen se politokratiese kommunitarismes is gemodelleer op die Aristoteliese politologiese en regsfilosofiese kommunitarismes van Nisbet, Sandel en MacIntyre[15] vir sover dié outeurs die biopolitieke onderbou van die Griekse stadstaat as grondslag vir die verwesenliking van die ideale gemeenskap en publieke geregtigheid beskou.[16] In navolging van die kommunitêre regssosiologie vertoon sowel Malan as Goosen se politokratiese kommunitarisme verskeie fasette van die Aristoteliese geregtigheidsdenke – in die plek van die liberale geregtigheidsdenke word Aristoteles se geregtigheidsdeug as normatief vir eietydse geregtigheidsuitdagings gestel: in plaas van die klem op die individu word die fokus na die transpersonale aard van die regs en politieke lewe verplaas;[17] 'n beroep word op die historiese opvatting van gemeenskap gedoen ingevolge waarvan gemeenskap as grondslag van die regs en politieke bestaan van die mens beskou word;[18] dit verwerp die liberaal-individuele opvatting van menseregte en gemeenskap word as voorwaarde vir die individuele bestaan van die mens en dié se regte beskou,[19] en gemeenskap pretendeer om betekenis

13 Hy doen 'n beroep op Knight ('n ondersteuner van MacIntyre): 'Liberal politics presupposes the authority of the state, and the first task of liberal political philosophy is, logically, that of justifying the state's claim to authority as *the* political actor' (Goosen *supra* n 3 op 317).

14 *Idem* 289. Soos Gadamer (*Wahrheit und Methode* (1975) 265) tereg aantoon is die betiteling van 'n enkele filosofiese stroming as die 'Tradisie' hoogs betwyfelbaar.

15 Sien Malan *supra* n 3 op 156; en Goosen *Die Nihilisme: notas oor ons tyd* (2007) 83, 203, 327, 435 & 437; Goosen *supra* n 3 op 42, 67-68, 112, 132, 203, 227, 309, 315, 317 & 420.

16 Nisbet *The Quest for Community* (1953) 175; Sandel *supra* n 2 op 173; Sandel *supra* n 5 op 9-12, 186-188 & 244-269; MacIntyre *Whose Justice? Which Rationality?* (2008) 31-32.

17 Transpersonale regs en staatsteorieë hou direk verband met die regsfilosofiese weerstand teen die individualisties-nominalistiese opvatting van menslike vryheid en individuele outonomie van die Verligtingsdenke.

18 Sien b.v. Goosen *supra* n 15 op 37 en Goosen *supra* n 3 op 34 & 37.

19 Goosen *supra* n 3 op 33.

aan die individu se lewe en die mens se rol in die sosiale lewe te gee.[20] Die gemeenskap waarbinne die strewe na gemeenskap vervul moet word, is 'n samelewingsorde sonder die staat as territoriale entiteit. Die *polis*-staat wat 'anderkant' die territoriale staat verrys is 'n politieke entiteit wat hiërargies-struktureel uit talle klein plaaslike gemeenskappe saamgestel is.[21] Die idee van die *polis*-staat as ideale mikro-gemeenskap vorm bygevolg die sluitsteen van politokraties-kommunitêre regs en staatsteorieë.[22]

Belangrike regsfilosofiese en politologiese vraagstukke word deur die politokratiese regssosiologie en geregtigheidsdenke na vore gebring. Vir doeleindes van hierdie opstel word die aandag slegs bepaal by die vraag tot welke mate die politokraties-Aristoteliese geregtigheidsdenke as normatiewe raamwerk vir sosiale geregtigheidsvraagstukke kan dien en aan die drempel van regstaatlikheid beantwoord. Voorts word kortliks aandag aan enkele implikasies van politokratiese geregtigheidstandpute gegee. Dié implikasies hou direk verband met Aristoteles se organismiese staatsteleologie, sy biopolitiese siening van menslike waardigheid en die kollektivistiese inslag van sy publieke geregtigheidsbenadering. Dit betrek aspekte van die staatlike versorging van die publieke belang (*salus publica*), die kompetensiebeperkings van die materiële staatlike regsterreine en die pluriformiteit van staatlike en nie-staatlike regskompetensies, sowel as die normatiewe eise van menslike waardigheid en die verrekening daarvan as rigtinggewende regsbeginsel. Vir doeleindes van hierdie bespreking word staatlike geregtigheid oorweeg as synde publieke verbandsgeregtigheid gerig op die regstaatlike versorging van die *salus publica,* met verrekening van die prinsipiële eise van materiële staatlike regsterreine en die eerbiediging van die pluriformiteit van nie-staatlike regskompetensies ter beskerming van menslike waardigheid as regulatiewe regsbeginsel.

2 Die Aristoteliese Geregtigheidsbegrip en die Publieke Belang

2 1 Regssosiologiese Vertrekpunte en die Staat as Publieke Regsverband

Politokratiese kommunitariërs volg 'n benadering van historistiese identifisering van die Aristoteliese gemeenskap, wat uitdrukking aan die ideaal van deugdelikheid gegee het. Historistiese staatsteorieë neig tot

20 Sien Goosen *supra* n 15 op 42 & 64. Die gemeenskapsomsluitende effek van die historiese gemeenskapsidee word soos volg verwoord: 'Vroeër het gemeenskappe my nie net besit nie. Hulle het my ook in staat gestel om hoegenaamd enige keuse – ook oor wat ek kan besit – uit te oefen'.

21 Malan *supra* n 3 op 126, 228, 276-278 & 280.

22 *Idem* 276: 'Die begrip politokrasie is ontleen aan die Klassieke Griekse begrip *polis* – die stadstaat'. Dit neem kennis van die denke van die Klassieke Griekse politiek en heg 'besondere waarde aan die aspekte van veral Aristoteles se denke'.

verselfstandiging van staatsvorme ten koste van die tipies bowe-historiese staatlike struktuurelemente en beperk die regssosiologiese horison van menslike ervaring tot 'n bepaalde manifestasie van samelewingstipes. Dit kom daarop neer dat die maatskaplike feite as synde volkome veranderlik, vloeiend en veranderlik beskou word, sonder om daarin 'n vaste a-historiese struktuur te bespeur wat self nie aan verandering onderhewig is nie. Onderskeid behoort dus gemaak te word tussen die konstante strukture, wat aan menslike samelewingsverhoudinge te grondslag lê aan die een kant, én die veranderlike, wisselende vorme, wat hierdie verhoudinge in die historiese ontwikkelingsproses aanneem aan die ander kant.[23] Die staat neem in sy historiese ontwikkeling allerlei vorme (of gestaltes) aan wat, hoewel verskillend, nie van die struktuurtipiese aard van die staat as sodanig losgemaak kan word nie. Staatsvorme bly in hul historiese verskeidenheid steeds *vorme* van die staat. Die struktuurtipiese aard van die staat is die relatief konstante draer van die historiese ontwikkelingsproses waarin 'n staat allerlei veranderderlike vorme kan aanneem. Die historistiese verheffing van staatsvorme tot ideale struktuurtipes is vorme van funksionalisme, omdat dit slegs die historiese funksie van die samelewing ondersoek en die res buite beskouing laat; dit verteenwoordig wat J. Zwart noem 'een reductionistische versimpeling' van die komplekse struktuuraspekte waaraan die staat deel het.[24] Historistiese staatsteorieë verhef dus vloeiende en veranderlike staatsvorme tot supra-tydelike strukture van menslike samelewingsverhoudinge. Historiese ontwikkeling van staatsvorme veronderstel struktuurtipiese elemente wat ten spyte van veranderlike vorme steeds die konstante draers van staatlike ontwikkelingsprosesse is. A. Fives reageer soos volg op die relativistiese onderbou van politokratiese teorieë in dié verband: '... MacIntyre is left with the familiar problem of relativism or perspectivism: that is, if reason discovers first principles only within traditions, then there can be no way to determine what is to count as a good reason to choose one tradition over the other'.[25] Politokratiese kommunitarisme behoef dus 'n normatiewe regssosiologiese samelewingsvisie wat dié relativistiese implikasie kan ondervang.

Tereg toon Schuyt aan dat die regssosiologie géén hulpwetenskap van die regswetenskap is nie, maar tot die terrein van die algemene sosiologie behoort en op eiesoortige wyse reg en maatskaplike verskynsels ondersoek.[26] Die analise van die onderskeie regsterreine van die menslike samelewing behoort te geskied aan die hand van 'n wysgerig-sosiologiese ondersoek na die aard van die verskeidenheid

23 Zwart 'Over waardevrije sociologie, normatieve sociologie en hulpbehoevende rechtsfilosofie' 1987 *Philosophia Reformata* (*Phil Ref*) 71.
24 *Idem* 70.
25 Fives 'Aristotle's ethics and contemporary political philosophy: virtue and the human good' 2006 *Twenty First Century Society* 212.
26 Schuyt 'Discussie' 1975 *Rechtsphilosophie en Rechtstheorie. Orgaan van de Vereniging voor Wijsbegeerte van het Recht* 29.

menslike samelewingsverbande. Vir sover menslike samelewingstrukture 'n pluriforme eiesoortigheid weerspieël, samelewingstrukture op eiesoortige struktuurbeginsels berus en op eiesoortige wyse in die menslike samelewing funksioneer, word 'n wetenskaplike analise van die kwalifiserend-eiesoortige aspekte van samelewingsverbande behoef ten einde tot die unieke aard en funksie van elke samelewingstruktuur deur te dring.[27] In verskillende wetenskaplike tradisies word die gevare van postulering van 'n valse dilemma tussen atomistiese (individualistiese) en holistiese (universalistiese) geregtigheidsbenaderings ingesien. Om dié dilemma van atomisme (individualisme) en holisme (universalisme) te oorkom word erken dat die identifisering van die eie aard van onderskeie samelewingsvorme die sluitsteen van 'n a-relativistiese regstaatparadigma behoort te wees. Dié insig is aanwesig by verskillende prominente outeurs in die veld van die publieke geregtigheidsteorie. John Rawls skryf byvoorbeeld dat 'it seems natural to suppose that the distinctive character and autonomy of the various elements of society requires that, within some sphere, they act from their own principles designed to fit their peculiar nature'.[28] Jürgen Habermas verwys na 'citizens within their own private spheres of life'.[29] Hy maak melding van 'differentiated forms of life'.[30] In sy uitgebreide werk oor kommunikatiewe handelinge praat hy eksplisiet van die 'own laws' van 'specific social spheres' wat in die menslike ervaringshorison na vore kom: '... den sogenannten Eingesetzlichkeiten einzelen sozialer Sphären'.[31] Dieselfde insig onderlê Dooyeweerd se analise van die interne struktuurtipes (of struktuurprinsipes) wat regssosiologies relevant is en 'n komplekse verskeidenheid van maatskaps en gemeenskapsfunksies na vore bring.[32] Die regshistoriese ondersoek na staatsvorme bring aan die lig dat ten spyte van wisselende staatsvorme, die onderliggende struktuurprinsipes van staatlikheid egter onveranderd bly. Die onontbeerlike staatlike struktuurtipe is dié van 'n publieke regsverband wat aan die eise van handhawing van 'n ewewig en harmonie van regsbelange in die samelewing ter waarborg van publieke geregtigheid moet voldoen. Die historiese vormgewing van dié struktuurtipiese elemente van die staat vertoon 'n wye verskeidenheid staatsvorme waarvan sommiges nie in staat was om aan dit wat van Eikema Hommes die 'normatiewe benedengrens' van regstaatlikheid

27 Sien Dooyeweerd *De Wijsbegeerte der Wetsidee III* (1935/1936) 550 oor die individualiteitstrukture synde die tipiese strukture van konkrete dinge, gebeurtenisse, handelinge en samelewingsverhoudinge wat binne alle aspekte van ons ervaringswêreld op tipiese wyse fungeer en hierdie aspekfunksies tot 'n tipiese struktuureenheid verbind.

28 Rawls *Political Liberalism* (1996) 262.

29 Habermas *The Postcolonial Constellation. Political essays* (2001) 8 & 81.

30 *Idem* 82.

31 Habermas *Theorie des kommunikativen Handelns II* (1995) 437.

32 Dat Dooyeweerd se insigte in dié verband méér aandag verdien, is beklemtoon deur Stellinga *Grondtrekken van het Nederlands Staatsrecht* (1953) 1 & n 3; Couwenburg *De Omstreden Staat* (1974) 37; en Hommes *De grenzen van de rechtsmacht van de staat* (1975) 17 & n 3.

noem, te kon beantwoord nie.[33] Staatsvorme kan op minder of meer geslaagde wyse die struktuurtipe van die staat as regstaat tot uitdrukking bring: 'Zo kan in bijvoorbeeld onze tijd de ene concrete staat een hogere realiseringsvorm van de rechtsstaatsidee zijn dan de andere, terwijl nochtans beide concrete staten binnen de grenzen van het normatieve statelijke structuur-principe vallen en dus het predicaat staat verdienen'. Voorts veronderstel dit dat 'een staat op meer of minder talrijke punten van zijn wetgeving en administratie zodanig met de zin-inhoud van de rechtsstaatidee in strijd kom, dat hij ... beneden de *normatieve benedegrens* zinkt, die in het structuurtype van de staat besloten ligt'.[34] Die gevolg is dat 'n staatsvorm dermate 'n verwronge weergawe van die normatiewe aard van die staat weerspieël dat dit tot 'n terreurorganisasie degenereer en nie die predikaat 'staat' verdien nie, of hoogstens as magstaat tipeer kan word.[35]

Voorts stuit die staat nie alleen op die grense van die interne publiekreg van die staat nie, maar ook op die juridiese organisasievorme van owerheidsgesag, wat aan die struktuurprinsipes van die staat gebonde bly. Derhalwe is die demokrasie byvoorbeeld 'n tipies-staatlike, politieke regeringsvorm, wat tot die terrein van die staat se kernfunksies behoort. Die toepassing van dié politieke beginsels op nie-staatlike samelewingskringe, behels dus 'n onkritiese nivellering van die onderlinge struktuurverskille van samelewingsverbande.[36]

Met verwysing na die Aristoteliese *polis*-staat en die neerslag daarvan in politokraties-kommunitêre staatsteorieë, word oorweeg tot welke mate dié staats- en regsteorieë aan die drempel-vereistes van regstaatlikheid beantwoord. Die aspekte wat besonderlik aandag verdien is die vraag na die struktuur-eiesoortige elemente van die staat as regsverband: die eis van publieke verbandsgeregtigheid, die regstaatlike versorging van die *res publica*, die prinsipiële aard van materiële regsterreine, die eerbiediging van die pluriformiteit van nie-staatlike regskompetensies en die beskerming van menslike waardigheid as regulatiewe regsbeginsel.

2 2 Aristoteles se Staatsteleologie en die Publieke Belang

Die idee van die *res* (of *salus*) *publica* behoort aan die struktuurtipiese aard van die staat georiënteer te word ten einde te verhoed dat dit as instrument van staatsabsolutisme gebruik word of ter beliggaming van willekeurige opvattings van uitwendige staatsdoelwitte degenereer. Die *salus publica*-prinsipe is 'n staatlike integreringsbeginsel wat alle staatsaktiwiteite bind aan die leidende idee van publieke geregtigheid in

33 Hommes *De Wijsgerige Grondslagen van de Rechtssociologie* (1986) 109.
34 *Ibid.*
35 *Idem* 110.
36 Sien Dooyeweerd *De Crisis in de Humanistische Staatsleer in het Licht eener Calvinistische Kosmologie en Kennisleer* (1931) 150-155; Mekkes *Proeve eener critische beschouwing van de ontwikkeling der humanistische rechtsstaatstheorien* (1940) 617-618.

die verhouding tussen owerheid en onderdaan. Peter Badura verwoord die noue verband tussen publieke belang en die eise van publieke geregtigheid soos volg: 'Das Gemeinwohl ist, nicht anders wie die Gerechtigkeit, eine Maxime der staatlich zu vermittelnden Rechtsidee'.[37] Dié prinsipe dien ter ewewigtige harmonisering van alle belange vir sover dit met die eise van die staatsgeheel vervleg is en met eerbiediging van die pluriforme eiestandigheid van nie-staatlike samelewingsterreine rekening hou.[38] Die publieke belang vereis dat die beskerming van staatlike publiekreg en burgerlike privaatreg, asook die eerbiediging van nie-staatlike privaatregtelike verhoudinge wesenlike fasette van die staat se beantwoording aan die normatiewe ladings van die *salus publica* onder leiding van die publieke geregtigheidsidee vorm. Dit is veral die kwesbaarheid van die burgerlike privaatreg wat by die degenerasie van regstaatlikheid en die versinking van staatsvorme onder die drempel vir regstaatlikheid aandag verdien. Die wesenlike belang van die burgerlike reg vir die regstaat word deur Dooyeweerd soos volg vertolk: Degenerasie van dié reg beteken onherroeplik 'n versinking van die moderne samelewing in 'barbaarsheid en despotisme'; die burgerlike reg is 'het juridisch asyl der individuele menselijke persoonlijkheid en de burcht der individuele vrijheid. En het blijft ook onlosmakelijk verbonden met de grondslagen van het rechtsstaat en met diens publiek-rechtelijke verbandssfeer'.[39] Dooyeweerd dui byvoorbeeld spesifiek aan wat die implikasies van Leon Duguit se aanvalle op die burgerlike reg is, soos dit in die strewe na sosialisering van die reg, gestalte gekry het.[40] Tot welke mate beantwoord die Aristoteliese vorm van die *polis*-staat aan die vereistes van regstaatlikheid met besondere verwysing na die burgerlike reg?

Die Aristoteliese geregtigheidsteorie kry beslag binne die konteks van 'n teleologies-bepaalde samelewingsbeskouing: alle menslike assosiasievorme staan in 'n doelmatigheidsverhouding teenoor mekaar, waardeur die laere gemeenskapsvorme as afhanklike komponente op die *polis*-staat as hoogste samelewingsgeheel betrek word.[41] Die hiërargiese opbou van die samelewing waarbinne geregtigheid as deug vergestalt word, word trapsgewys vanaf die *familia* tot die *polis*-staat as hoogste sosiale samelewingsvorm opgebou: die mees basiese samelewingsentiteit is die *familia* waartoe die man as huishoof met vrou, kinders en slawe behoort – 'n entiteit wat benewens die tipiese struktuur van die gesin ook die eerste bousteen van die ekonomiese lewe vorm.[42] Families word in eenhede bekend as dorpsgemeenskappe of sibbes, waarvan in

37 Badura 'Die Tarifautonomie im Spannungsfeld' 1979 *Archiv für öffentliches Recht* 259.
38 Sien Dooyeweerd *A New Critique of Theoretical Thought III* (1969) 446; Dooyeweerd *Verkenningen in de Wijsbegeerte, de Sociologie en de Rechtsgeschiedenis* (1962) 128.
39 Zwart 'De Staatsleer van Herman Dooyeweerd' 1980 *Phil Ref* 132.
40 *Ibid.*
41 Mekkes *supra* n 36 op 59; Pretorius *Die Begrip Openbare Belang en Burgervryheidsbeperking* (LLD proefskrif UFS 1986) 9.
42 Nagle *The Household as the Foundation of Aristotle's Polis* (2006).

vroeë tye die koning die patriarg daarvan was, saamgesnoer. Uit hierdie gemeenskappe is die *polis*-staat opgebou – 'n totaalverband wat die *familia* en dorpsgemeenskappe as dele van die geheel omvat. Sowel die *familia* as die sibbe is diensbaar aan die *polis*:

> every state is as we see a sort of partnership, and every partnership is formed with a view to some good... It is therefore evident that, while all partnerships aim at some good, the partnership that is the most supreme of all and includes all the others does so most of all, and aims at the most supreme of all goods; and this is the partnership entitled the state, the political association.[43]

Op die voetspoor van Plato beskou Aristoteles die staat as die volmaakte gemeenskap, die hoogste uitdrukking van menslike assosiasie en die individuele aard van die mens.[44] Die staat is 'n uitdrukking van die redelik-sedelike wesensvorm van die mens en alle wetgewing moet gerig wees op die opvoeding van die burgery tot 'n deugdelike lewe in 'n omvattende sin van die woord.[45] Volgens MacIntyre se universalistiese inkapseling van die individuele belange in die *polis*-belang:

> the *polis,* at least the best kind of *polis*, is directed toward achieving all the goods of its citizens, and for human beings the highest good to be achieved, that which in an individual life is for the sake of which all other activity is undertaken, is *theoria*, a certain kind of contemplative understanding. The virtuous activities which enable someone to serve the *polis* well culminate and are perfected in an intellectual achievement which is internal to the activity of thinking.[46]

Bygevolg ontbreek die materiële regsbeginsels wat – soos byvoorbeeld in die Nasionaal-Sosialisme en ander vorme van staatsabsolutisme – die gelykskakeling van mag, orde en reg ter verwesenliking van willekeurige staatsdoelwitte moes verhoed. Kan staatsdoelwitte die rol van materiële staatlike struktuurbeginsels oorneem? Sosiale doelwitte kan nie die materiële regsaard van staatlike regsfunksies bepaal nie, omdat sosiale doelwitte buite die staatsstruktuur lê. Die staatsdoelwit-benadering van Aristoteles het wel belangrike implikasies vir sy siening van die publieke belang.

In die Aristoteliese regs en staatsteorie figureer die staat nie as egte *res publica* nie. Die staat as publiekregtelik entiteit impliseer dat daar benewens die staat se publieke belange ook private regssfere van 'n nie-staatlike aard bestaan. Reeds in sy *Du contrat social* (1762) bespeur Jean-Jacques Rousseau (1712-1778) die noodsaak daarvan dat elke staatlike regering 'n 'republikeinse' inslag behoort te hê.[47] Dit veronderstel dat die staat 'n 'publieke saak' is. Die publiekregtelike struktuur van die staat impliseer dus dat elke individuele staat, afgesien van die spesifieke vorm

43 Aristoteles *The Politics* (1921) I 1 1 1-8 (1252a-b).
44 Aristoteles *Ethica Nicomachea* (1925) I ii (1094a-b).
45 Aristoteles *supra* n 43 op I i (1252a). Kyk ook Barker *The Political Thought of Plato and Aristotle* (1955) 102, 111, 133, 207, 324 & 521.
46 MacIntyre *supra* n 16 op 107.
47 Rousseau *Du contrat social* (1762) 259.

wat dit mag aanneem, 'n republikeinse instelling behoort te wees wat op die handhawing van die publieke belang gefokus is.[48] As publiekregtelike entiteit is die staat normatief geroepe om as publieke regsverband onder leiding van 'n publieke geregtigheidsidee te funksioneer. Die geregtigheidsidee wat rigting en koers aan staatlike optrede moet gee is egter by politokratiese kommunitariërs onderhewig aan relativistiese en wisselende kriteria – dit wat MacIntyre noem die eis 'to abide by your own conventions' in die verdeling van die voorregte waarop elke persoon geregtig is.[49] Voorts bepaal die staat dit waarop elkeen geregtig is. Bykomend is geregtigheid slegs van toepassing op vrye en gelyke burgers, terwyl die toekenning van burgerskap uitsluitlik 'n staatlike aangeleentheid is.

2 3 Sedelike Deug en Onderwerping aan Staatlike Wetgewing

Volgens Aristoteles is sedelike volmaaktheid slegs binne die *polis*-staat moontlik en die hoogste vergestalting van sedelike deug is gehoorsaamheid aan die wette van die *polis*. Geregtigheid in dié vorm (*politokon dikaion*) is 'n omvattende deug: dit omvat alle moraliteit, die staat behartig die omvattende sedelike opvoeding van die burgery en dit eis die gehoorsaming van alle geskrewe en ongeskrewe wette en etiese eise van die staat. Bygevolg beskik algemene geregtigheid nie oor 'n juridies gekwalifiseerde betekenis nie en die reg is slegs 'n middel vir die sedelike opvoeding van die mens. Voorts behels die publieke belang by Aristoteles dat die totale sedelike versorging en ontplooiing van die mens in die hande van die staat gelaat word.[50] Hoewel Aristoteles ruimte laat vir die staat om slegs op homself te neem wat die burgery nie in staat is om ter vervolmaking van sigself te verrig nie, bied dit geen normatiewe begrensingsmaatstaf van die staat se kompetensieterrein nie. Hierdie kriterium – wat in die staats en regsfilosofie van Thomas Aquinas (c 1225-1274) geyk geraak het – plaas nie strukturele bevoegdheidsperke aan die staat se sedelike opvoeding van die burgery nie.[51] Dié sogenaamde beginsel van 'subsidiariteit' word byvoorbeeld deur Sandel voorgehou as vryheidswaarborg vir die regsbelange van individue in die samelewing. Die feit dat die verhouding tussen die individu en die samelewing deur allerlei gedesentraliseerde vorme van 'politieke assosiaisie' bemiddel word, bevestig reeds die universalistiese oorkoepeling van alle samelewingsbelange deur staatlike politieke strukture. By afwesigheid van materiële struktuurbeginsels wat die materiële kompetensiegrense van staatlike en nie-staatlike optrede bepaal, is Sandel se 'self-government republic' ewe seer die slagoffer van

48 Strauss 'Prinsipiële Besinning oor die Regstaat' in Landman (red) *Christelike Geloof en Politiek* (1998) 96-97.
49 MacIntyre *supra* n 16 op 121.
50 Aristoteles *supra* n 43 op I i (1252a-b). Individue is die materie waaruit die staat opgebou is.
51 Strauss 'The Transition from Greco-Roman and Medieval to Modern Political Theories' 2007 *Politikon* 58.

Aristoteliese staatsoorwoekering.[52] Dieselfde beswaar geld teen Robert Nisbet se beklemtoning van gesinstrukture, kerklike organisasies en plaaslike woonbuurte sonder om die regssosiologie prinsipes ter bepaling van die onderskeidelike kompetensieterreine van elk te bepaal.[53] Derhalwe is subsidiariteit op sigself onvoldoende om aan die eise van die *salus publica* binne die raamwerk van 'n gedifferensieerde regs en staatssosiologiese orde uitdrukking te gee: 'The principle of subsidiarity operates with the idea of relative autonomy of the various subordinate parts of society, understood as parts of the encompassing nature of the state'.[54]

Omdat Aristoteles nie prinsipiële perke aan die staat se juridiese taakbehartiging plaas nie, vervloei staatlike en nie-staatlike kompetensieperke tot hoër en laer doeleindes wat transpersonaal alle individuele en sosiale belange opeis wat aan die staat se etiese doelwitte ondergeskik gestel word. Die omvattende staatsbelang (in die latere regs en staatsfilosofie geformuleer as *salus rei publica suprema lex*) oorwoeker ander individuele en partikuliere belange:

> For even if the good of the community coincides with that of the individual, it is clearly a greater and more perfect thing to achieve and preserve that of a community; for while it is desirable to secure what is good in the case of an individual, to do so in the case of a people or a state is something finer and more sublime.[55]

Met die oog op die verdere bespreking van Aristoteles se geregtigheidsleer en die gebrek aan staatlike kompetensiebeperkings, is die volgende aspekte van deurslaggewende belang: die *polis*-staat se behartiging van die algemene belang stoel op 'n staatsopvatting wat nie oor materiële regsgrense beskik nie; die publieke belang wat deur die *polis*-staat behartig word, sluit in die redelik-sedelike deugdelikheids-doelwitte soos deur die staatsowerheid bepaal; die menslike neiging na gemeenskap vind in die *polis*-staat sy doel en beperking; samelewings-vorme naas of buite die *polis*-staat beskik hoogstens oor gedelegeerde kompetensies wat van staatsweë vergun en herneem kan word; alle nie-staatlike lewensvorme verteenwoordig onselfgenoegsame deel-aspekte van die oorkoepelende staatsgemeenskap.[56] Nisbet se standpunt dat die moderne staat 'n noodsaaklike euwel is en plaaslike gemeenskappe as bolwerke van ware vryheid dien, word tereg deur Harold afgewys:

> This is false for all the reasons we have seen: Unless we know the character of the small social groups we cannot know whether they are worth preserving. The state could very well be a positive social good if it intervenes against the injustices perpetuated by smaller societies, and true freedom might, on occasion, take the unfortunate form of striving for security rather than local

52 Sandel *Democracy's Discontent* (1998) 27.
53 Nisebet *supra* n 16 op 175.
54 Strauss 'Sphere sovereignty, solidarity and subsidiarity' 2013 *Tydskrif vir Christelike Wetenskap* 93.
55 Aristoteles *supra* n 44 op I ii (1094b).
56 Pretorius *supra* n 41 op 13.

> liberty. Nisbet, however, sees freedom one-dimensionally as the absence of state power and the proliferation of local authorities – a surprisingly negative definition from someone who supposedly upholds a positive view of freedom, but the one Nisbet is left with, since he does not get into nitty-gritty discussions of the substantive goods concrete communities pursue.[57]

2 4 Die Staat as Omvattende Deugdelikheidsorde

Die Aristoteliese soeke na 'n omvattende gemeenskapsbegrip waarbinne geregtigheid die sedelike deugde van die totaal-gemeenskap moet weerspieël, speel 'n deurslaggewende rol in die politokraties-kommunitêre politieke en regsdenke. Sandel onderskei byvoorbeeld tussen die 'sentimentele' en 'konstitutiewe' opvattings van gemeenskap. Die sentimentele konsepsie van gemeenskap beperk die waarde van gemeenskap tot die sentimente van voorafgaande ('antecedently') geïndividualiseerde subjekte, terwyl die konstitutiewe konsepsie die individu se selfbegrip en identiteit van die gemeenskapsbegrip maak.[58] Tot die mate dat die mens se konstitutiewe selfbegrip 'n groter subjek as slegs die individu alleen betrek, maak dit byvoorbeeld die Aristoteliese *polis*-staat konstitutief vir die identiteit van die individu.[59] Wat geregtigheid in die konstitutiewe gemeenskap betref, word 'n gemeenskap van 'n bepaalde soort en op 'n bepaalde wyse georden, veronderstel, 'such that community describes its basic structure and not merely the disposition of persons within the structure'. Die geregtigheidsbegrip is van 'n transpersonale aard vir sover dit veronderstel 'not simply an attribute of certain of the participants' plans of life'.[60] Die transpersonale aard van geregtigheid gaan aan die (regs) belange van individue vooraf: 'justice as fairness describes a "basic structure" or framework that is likewise distinguishable from and prior to the sentiments and dispositions of individuals within it'.[61] Volgens MacIntyre beskik slegs burgers wat die deugdelike lewe in die *polis* ondersteun oor die vereiste rasionele insig in geregtigheid:

> the rational justification of the life of virtue within the community of the *polis* is available only to those who already participates more or less fully in that life. The *Nicomachean Ethics* and the *Politics* should therefore be read as directed to a particular type of audience, that composed of the mature citizines of the *polis*. They alone will have that kind of experience which will enable them to understand the standards and values implicit in the life of any tolerably well-ordered *polis,* as Aristotle presents it.[62]

57 Harold 'Robert Nisbet's Visible and Invisible Communities' 2010 *The Catholic Social Science Review* 184.
58 Sandel *supra* n 2 op 161.
59 *Idem* 172.
60 *Idem* 173.
61 *Idem* 174.
62 MacIntyre *supra* n 16 op 110.

Wat word met 'goed geordende *polis*' bedoel? Dit wat teleologies deur die staatsowerheid nagestreef word en wat die staat in die algemene belang ag.[63] Bygevolg word die redelik-sedelike deugdelikheids-oogmerke van staatdoelwitte die oortroewende oorwegings, dit bepaal die regsaard van die *polis*-staat; die *polis*-staat word van sy status as regsstaat onttroon en staatsdoelwitte neem die plek van grondliggende regsprinsipes in. Geregtigheid word aan die historiese vorm van die *polis*-staat ondergeskik gestel en a-juridiese staatsdoelwitte word deur middel van die reg as redelik-sedelike eise afgedwing.

Die Aristoteliese *polis*-staat staan midde in die antitetiese politieke en juridiese spanningsvelde: die trekkragte van rasionalisme en voluntarisme – die polis is 'n natuurlik-rasionele orde wat sy bestemming in die wilsbeslissings van die staatlike regsvormende organe vind; die staatsorde staan in die spanningsveld van regstaat en magstaat – die sintese wat uit hierdie antitese voortkom is die voluntaristiese deugdelikheidstaat wat die reg transendeer. Die staat vorm dus 'n vermeende grootste geheel in die samelewing wat alle ander lewensvorme as integrale dele omvat en alle samelewingsoptrede as staatsoptrede beskou.[64] Wat is die implikasies van die Aristoteliese skroomvalligheid om konstante struktuurbeginsels te onderskei met die oog op die normatiewe oriëntasie aan sleutel-belangrike fasette van geregtigheid van 'n bowe-tydelike aard in die menslike ervaringshorison? Die antwoord op die vraag hou verband met die Aristoteliese onderskeid tussen distrubutiewe en kommutatiewe geregtigheid, publieke geregtigheid, die Aristoteliese geregtigheidsargument en die regs-kompetensies onderliggend tot die Aristoteliese *polis*-orde.

3 Aristoteles se Besondere Geregtigheidsteorie

3 1 Distributiewe en Kommutatiewe Geregtigheid en die Materiële Kompetensiebeperkings van Staatlike Mag

Aristoteles se onderskeid tussen distributiewe (publiekregtelike) geregtigheid en kommutatiewe (privaatregtelike) geregtigheid bied nie die versekering van die afbakening (en beskerming) van 'n regsterrein van individuele regte en die beskerming van die integriteit daarvan nie. Daar is met ander woorde nie voldoende kompetensiebeperkings op die materiële staatlike regsterreine wat die integriteit van private regte kan waarborg nie. Die Aristoteliese kommutatiewe geregtigheidsbegrip bevat 'n aritmetiese gelykheidskriterium ingevolge waarvan inter-individuele regsverhoudinge in die vorm van kontraktuele en deliksverhoudinge op grondslag van gelykheid beoordeel moet word. Dit impliseer egter geensins dat Aristoteles die terreine van die burgerlike en nie-burgerlike privaatreg as eiestandige regsterreine onderskei nie. Daarenteen behels distributiewe geregtigheid die verdeling van eer, ampte en uiteenlopende

63 *Idem* 109.
64 Aristoteles *supra* n 43 op I ii (1253a).

gemeenskapsgoedere op grond van die persoonlike hoedanighede en status van persone in die *polis.* Enersyds is die onderskeid tussen die publiek en privaatregtelike regsverhoudinge in die *polis* nie aan materiële regsgrense gebind nie. Andersyds geniet die onderskeid tussen burgerlike en nie-burgerlike regbelange in die *polis* nie erkenning nie. Sowel publiekregtelike as privaatregtelike belange is aan die eksterne staatsdoelwitte ter sedelike opvoeding van die burgery ondergeskik. Die mate van erkenning wat publiekregtelike en privaatregtelike belange geniet is uitgelewer aan die politieke mag waaroor die staatsowerheid beskik om beslag aan die sedelike opvoeding van die onderdane te gee. Sosiale doelwitte kan egter nie die materiële aard van publieke geregtigheidstoebedelings bepaal nie omdat die maatskaplike doel van publiekregtelike norme buite die grense van die reg lê. Wat die status en beskerming van die burgerlike en nie-burgerlike private regssfere in Aristoteles se geregtigheidsteorie betref, is die onderdane uitgelewer aan wisselende staatsdoelwitte en 'n manipuleerbare staatsetos. 'n Tipiese voorbeeld van die ongenuanseerde verrekening van die volle spektrum van regsbelange binne die staatsterritorium vind ons by Aristoteles se klem op burgerskap van die *polis*. Vir Aristoteles druk die status van staatsburgerskap die essensie van menslike waardigheid uit. Persone wat nie oor burgerskap van die *polis* beskik nie, beklee die status van diere of soortgelyke regsobjekte. Voorts is burgerskap 'n manipuleerbare statushebbendheid wat in die hande van die *polis*-owerheid berus. Slawe, vroue, boere en hande-arbeiders beskik byvoorbeeld nie oor burgerskap nie en geniet derhalwe nie die regstatus en beskerming wat aan *polis*-burgers toekom nie. MacIntyre gooi dit oor die boeg van die vermoë ter identifisering en ordening van die deugdelike lewe in die polis: 'The immature are excluded from this audience, because not sufficiently experienced or disciplined in respect of their passions'.[65] Publieke geregtigheid kan nie tot ontplooiing kom sonder versorging van die *salus publica* met verrekening van die regstaatlike eise van die erkenning en handhawing van die pluriformiteit van staatlike en nie-staatlike regskompetensies en die versekering van menslike waardigheid as regulatiewe regsbeginsel nie.

3 2 Publieke Geregtigheid as Uitdelende Geregtigheid

Is Aristoteles se geometriese gelykheidsmaatstaf voldoende om publieke geregtigheid in die staat te bewerkstellig? Die antwoord op dié vraag vereis 'n bespreking van die kriteria waarvolgens gelyke en ongelyke behandeling in die staat bepaal word en die waardes aan die hand waarvan die verdeling van ampte, eerbewyse en publieke goedere moet geskied. Aristoteles se bespreking van hierdie aspekte is vervat in sy *Politica* boek III saamgelees met die relevante opmerkings in boek V van sy *Ethica Nicomacheia:* Uitdelende geregtigheid (Bgu) impliseer vir Aristoteles sowel 'n deug ('political good') as 'n vorm van gelykheid.[66]

65 MacIntyre *supra* n 16 op 110.
66 Raath *Die Juridies Wysgerige Grondslae van Vryheid en Gelykheid. Die Grieks-Romeisne Aanloop* (MA verhandeling UFS 1983) 210.

Gelykheid dui op die wyse van verdeling van ampte, eerbewyse en goedere deur die staatlike owerheid aan die onderdane binne die *polis.*[67] Meer spesifiek behels die wyse van verdeling dat daardie onderdane wat gelykwaardig geag word gelyke ampte, eerbewyse en materiële voordele behoort te ontvang, terwyl diegene wat ongelyk is, ongelyke dele behoort te kry. Dié maatstaf is doelmatig bepaal vir sover sommige onderdane aanspraak maak op gelyke behandeling, terwyl 'n ander groep die basis vir regverdige verdeling in die ongelyke behandeling van ongelykes vind.[68] Volgens Aristoteles is hierdie meningsverskil toe te skryf aan die menslike sug na eie gewin (*pleonexia*) en die feit dat elke individu regter in sy eie saak wil wees. Die subjektiewe menings van die onderskeie groepe kan egter geen basis vir Bgu wees nie: die vrye burgers redeneer immers dat hul gelyk is vir sover hulle 'n gelyke vryheid deelagtig is; daarteenoor is die welgestelde burgers van oordeel dat rykdom bepalend is vir die vraag of persone gelyk is al dan nie. In sy *Politica* formuleer Aristoteles die gelykheidsprobleem onderliggend tot Bgu soos volg: 'But there still remains a question: equality or inequality of what?'.[69] Derhalwe moet Aristoteles alle relevante faktore identifiseer wat vir die beantwoording van die gelykheidsvraag in die *polis* relevant is.[70] Aristoteles gebruik die metafoor van die fluitspeler om aan te dui welke kriteria relevant (en irrelevant) met die oog op verdeling van 'n musiekinstrument sal wees. Omdat goeie afstamming geen bydrae tot uitmuntende fluitspel lewer nie, behoort die beste fluit aan die beste fluitspeler gegee te word.[71] Selfs adellike afkoms kan nie kompenseer vir minderwaardige fluitspel nie;[72] net so min as wat atletiekprestasies deur politieke eerbewyse beloon kan word. Die voorbeelde van sowel fluitspel as atletiekprestasies resorteer egter buite die domein van publiekregtelike verdelings. Hoe sou die kriteria vir verdeling op die méér komplekse terrein van publieke geregtigheid daar uitsien? Die kriteria wat Aristoteles in dié verband identifiseer sien soos volg daaruit:

(a) Geregtigheid behels die gelyke behandeling van gelykes en ongelyke behandeling van ongelykes.

(b) Die waardeskaal waarvolgens verdeling behoort te geskied, behoort te onderskei tussen twee kategorieë van waardes:

(i) Waardes wat noodsaaklik is vir die *bestaan* van die *polis:* afkoms (O), rykdom (M) en vryheid (Y), sodat O, M en Y by publiekregtelik verdelings in aanmerking geneem moet word in plaas van atletiese vermoëns en fluitsspel.

(ii) Waardes (of eienskappe) wat noodsaaklik is vir die *voortbestaan van die polis:* één daarvan is politieke deugdelikheid (PD).[73]

67 Van der Vyver 'Die Regsleer van Aristoteles' 1962 *Koers* 224.
68 Raath *supra* n 66 op 214 n 297.
69 *Idem* 215; Aristoteles *supra* n 43 op III ix-xi (1281a-1282b).
70 Aristoteles *supra* n 43 op III vii (1279b).
71 Raath *supra* n 66 op 215-216.
72 Aristoteles *supra* n 43 op III xi-xii (1282b-1283a).
73 Aristoteles *supra* n 44 op V iii (1131a-b).

Teenoor fluitspel is M 'n essensiële (konstitutiewe) politieke waarde, terwyl PD op sy beurt 'n bydrae tot goeie regering van die *polis* lewer. Hoewel fluitspel nie met M uitruilbaar is nie, is sowel M as PD relevante politieke waardes in die *polis* en dus wel uitruilbaar. Die kriteria vir meriete (*axia*) met die oog op publiekregtelike toebedelings sluit dus sowel die waardes van (b)(i) as (b)(ii) in – sowel noodsaaklike politieke waardes as voldoende politieke waardes is vir juridiese verdelings relevant. Dit behels voorts dat uiteenlopende politieke voortreflikhede vergelykbaar (uitruilbaar) is. Die vraag word nou verplaas na die vraag oor hoe 'n bepaalde hoeveelheid van M of Y met 'n sekere kwantum van PD vergelyk kan word. Aristoteles se standpunt behels dat indien Bgu 'n 'gelykheid van verhoudinge' ten grondslag het, en indien so 'n geometriese gelykheid nie verwesenlik kan word tensy die verskillende waardes (wat bydrae tot gemeenskaplike welvaart) vergelykbaar is nie, dan sou die standpunt van die onvergelykbaarheid van die verskillend kategorieë waardes lei tot die ontkenning van die gelykheidsubstraat onderliggend tot Bgu. Deur die twee groepe waardes van die onderskeie belangegroepe in die staat met mekaar te vergelyk, tref Aristoteles 'n kompromie tussen die botsende belangegroepe in die staat. Derhalwe kan die faktore wat volgens die onderskeie groepe in die staat vorme van voortreflikheid verteenwoordig, by publiekregtelike toebedelings deur Aristoteles verreken word en die diverse belange (heterogeniteit) in die *polis* vir regsdoeleindes verreken word om politieke harmonie te bewerkstellig. Hoewel die rykes benewens hul rykdom ook vry en deugdelik mag wees en die polities-deugdelikes ook oor M en Y mag beskik, is die geometriese gelykheid van Bgu veronderstel om politieke harmonie in die staat te bewerkstellig. Die oogmerk van Aristoteles se Bgu-maatstaf is die behoud van orde in die *polis* – om die onderskeie aansprake op O, M, Y en PD tot politieke harmonie te bring.[74] Ter behoud van die *polis* word sowel O, M, Y en PD vereis hoewel dié 'voortreflikhede' tot verskillende kategorieë behoort. Ál hierdie voortreflikhede word egter in 'n bepaalde verhouding vereis. Voorts vereis die pragmatiek van die politieke lewe dat op die tyd en plekgebonde voortreflikhede wat vir *polis*-burgers relevant (en belangrik) is gelet moet word wanneer staatlike ampte, eerbewyse en publieke goedere verdeel word.

Die maatstawwe waaraan publieke geregtigheid moet voldoen, het nie betrekking op die juridiese struktuurprinsipes van staatwees as sodanig nie. Die onderskeie kategorieë van maatstawwe word uit die terrein van politieke konflik na die terrein van die reg verplant. Daarom verwys Sandel deurgaans na Aristoteles se geregtigheidsmodel as 'political conceptions of justice'[75] en volgens MacIntyre 'failure (of justice) in one is failure in the other' samelewingsvorme.[76] Die vorm wat geregtigheid in die staat anneem, is formalisties en kontingent; dit is afhanklik van die

74 Sien Raath *supra* n 66 op 218.
75 Sandel *supra* n 52 op 20 & 22.
76 MacIntyre 'Politics, Philosophy and the Common Good' in Knight (red) *The MacIntyre Reader* (1998) 31.

aard van politieke oorwegings wat op 'n gegewe moment in 'n bepaalde staatsvorm relevant mag wees. Voorts beteken dit dat 'minderheidsgroepe' wat oor een of méér van die genoemde kategorieë 'voortreflikhede' beskik, aan die oorwoekerende 'voortreflikheid' van meerderheidsgroepe uitgelewer is. Dit kan byvoorbeeld gebeur dat 'n minderheidsgroep vir politieke doeleindes oor so min 'voortreflikheid' beskik dat by verdeling van beperkte hoeveelhede publieke goedere, hul geen aanspraak op voordele (of bykans geen voordele) sou hê nie. Wiskundige berekenings om politieke konflik te besweer bied nog geen kriteria wat die staatstruktuur aan bowe-tydelike prinsipes met universele gelding bind nie.[77] Voorts kan die geometriese uitruilbaarheid van kriteria van pragmatiese aard ernstige gevolge vir die menswaardigheid van bepaalde groepe in die staatslewe hê. Die mees ingrypende implikasies van wetgewing met die oog op bevordering van 'n deugdelikheidsideologie, die oorwoekering van herkoms teenoor persoonlike vryheid, die pragmatiese integrasie van hierdie 'voortreflikhede' op grond van relevante politieke oorwegings en die afdwinging daarvan deur die reg blyk uit die Nazi-wetgewing wat hier onder kortliks aan die orde gestel word – tasbare implikasies vir regsordes wat die weg van die Aristoteliese *polis*-staat bewandel. Daarbenewens moet in aanmerking geneem word dat slegs *polis*-burgers toegang tot Bgu geniet en dat vreemdelinge, slawe en ander kategorieë van nie-burgers nie toegang tot Bgu had nie. Die groteske regs en politieke implikasies daarvan word verhoog na mate die Aristoteliese Bgu-maatstawwe as vorme van 'beloning' vir die 'voortreflikhede' van die staatlike burgery beskou word. Michael Sandel verklaar byvoorbeeld onomwonde dat geregtigheid nie vir alle persone binne die staatsdomein geld nie, maar as beloning 'verdien' moet word.[78] Dit impliseer dat nie-burgers en kategorieë van minderheidsgroepe volgens die mening van die staat oor onvoldoende 'voortreflikheid' mag beskik om beloon te word. Die hoofrede waarom politokratiese kommunitariërs 'n geslote oog op die implikasies van Aristoteles se Bgu-maatstawwe nahou, spruit waarskynlik uit die buite-konteks metaforiese toepassing van die meriete van die fluitspeler op die terrein van publieke geregtigheid, sonder verrekening van die volle lading van Aristoteles se Bgu-argument in sy politieke en etiese hoofwerke.

77 De Graaff *Lot en Daad, Geluk en Rede in het Griekse Denken* (1957) 74-75: 'Zaken kunnen wiskundig worden gedefinieerd, maar niet personen. Met alle waardering, die het modern rechtsleven voor de subtiele determinaties op juridisch gebied van Aristoteles moge hebben, moet worden vastgesteld, dat hij het wezen der rechtvaardigheid voorbijziet... De rechtvaardigheid moet haar fundamenten in een andere, hogere orde leggen, zal zij de beperkingen, die Aristoteles haar oplegde, te boven komen'.

78 Sandel *supra* n 5 179 & 186-188.

3 3 Geregtigheid en die Pluriformiteit van Regskompetensies in die Aristoteliese *Polis*-orde

3 3 1 Gelykheid, Vryheid en die Burgerlike Privaatreg

In die Aristoteliese regsteorie word regstatus en die regsposisie van onderdane in 'n individuele en sosiale hoedanigheid volgens 'n biopolities-sedelike maatstaf bepaal. Die biopolitiese onderbou van sy religious-etiese denke het in twintigste eeuse absolutistiese benaderings tot menslike waardigheid na vore gekom en sy meegaande publieke geregtigheidsbegrip is aangegryp om growwe publieke onreg te legitimeer en menslike waardigheid in terme van biopolitiese doelwitte te relativeer. Dié implikasies het veral in die twintigste eeuse Nasionaal-Soisialistiese staatsdenke tot ontluiking gekom:

> This Aristotelian idea of the state was the philosophical expression of the ancient Greek popular conviction. ... It was very much like the idea of the totalitarian state as recently taken up by Facism and National-Socialism, although here the idea is no longer based on a so-called "metaphysical" order of reason, but is oriented irrationally to the community feeling of the people.[79]

Waarom tref Dooyerweerd 'n noue verband tussen die Aristoteliese *polis*-staat en Nasionaal-Sosialistiese magstaatpraktyke en wat is die implikasies daarvan vir menslike waardigheid?

In die Aristoteliese *polis* beskik slawe, vroue, boere en hande-arbeiders vir politieke en geregtigheidsdoeleindes oor mindere waarde en belang. Tesame met die gebrek aan erkenning van regte wat teenoor die *polis*-staat afdwingbaar is, die eksklusiewe beskouing van burgerskap en die gebrek aan staatlike kompetensiebeperkings, is van sowel menseregte as die klassieke grondregte in die Aristoteliese regsteorie geen sprake nie.[80] Voorts maak Aristoteles nie voorsiening vir die beskerming van die individu as staatsdoel nie. Die universele sedelike belange van die staatsorde fnuik die effektiewe beskerming van die individu teen staatsoptrede.[81] Die Aristoteliese *polis*-staat gaan eerstens mank aan 'n ontslote en verfynde juridiese integreringsnorm met die oog op die versorging van 'n openbare regsorde wat beantwoord aan die eise van publieke verbandsgeregtigheid. Dit impliseer dat die staat oor die normatiewe taak ter handhawing van ewewig en harmonie in die veelheid van regsbelange in ooreenstemming met die staat as publieke regsentiteit behoort te beskik. Die staat se versorging van die *salus publica* (publieke welsyn) ontleen sy tipiese aard aan die staat se regstaatlike inslag. Kommunitêre regsteorieë ontleen egter hul staats en regsgrondslae aan die Aristoteliese biopolitieke *polis*-orde. Bygevolg ontbreek die staatlike verbandsregtelike kwalifikasie in hul regsfilosofiese teorieë. 'n Belangrike implikasie van dié gebrek aan

79 Dooyeweerd *The Christian Idea of the State* (1978) 8-9.
80 Sien Van der Vyver *supra* n 67 op 224-260.
81 Pretorius *supra* n 41 op 12.

juridiese onderskeiding is die afwesigheid van burgerlik-privaatregtelike belange wat – soos hierbo aangetoon – neweskikkende regsverhoudinge tussen individue orden, afgesien van die a-juridiese vorme waarvolgens nie-staatlike samelewingstrukture funksioneer. Die burgerlike privaatreg as keersy van sowel die nie-burgerlike privaatreg as die publieke verbandsreg van die staat vereis die beskerming van die juridiese persoonlikheidswaarde van regsubjekte ongeag taalverskille, rasverskille, geloofsverskille, ekonomiese verskille en so meer. Dooyeweerd beskryf die grondliggende aard van burgerlike privaatreg in die volgende terme: 'Civil private law, in its nature, constitutes the juridical asylum of the human personality, the stronghold of individual freedom and as such it is destined to provide a beneficial counter balance against the excessive pressure of communal demands within legal life'.[82] Die burgerlike privaatreg behoort dus regsvoorsiening te maak vir elkeen wat op die staat se territorium aanwesig is ongeag die sosiaal-gedifferensieerde veelheid van verbintenisse wat individue mag hê, en die regulering van individuele optrede wat op grondslag van vryheid en gelykheid naas en teenoor mekaar te staan kom.[83]

3 3 2 Die Organismiese Staat en Menslike Waardigheid

Die staat as 'natuurlike' verband en 'organiese' gemeenskap figureer prominent in politokratiese kommunitarisme.[84] Die ongedifferensieerde organiese *polis*-orde laat nie ruimte vir 'n ontslote uitsig op burgerlike vryheid en gelykheid volgens die eise van publieke geregtigheid nie, menslike waardigheid geniet nie die juridiese beskerming wat die staat as publieke regshandhawer veronderstel is om aan alle ingesetenes te bied nie en laat ruimte vir staatlike ingrepe vir biologiese en godsdienstige redes in die interne kompetensiesfere van nie-staatlike samelewingsinstellings: volgens Aristoteles se redelik-sedelike religieuse maatstawwe bepaal die staat die posisie van mense in die samelewing;[85] mans is verhewe bo vroue;[86] vroue beskik oor in bepaalde opsigte dieselfde status as slawe;[87] die staat beskik oor die kompetensie van gedwonge aborsie waar staatsgoedgekeurde geboortes oorskry word en misvormde kinders moet gedood word;[88] fundamentele grondregte geniet geen erkenning in die *polis*-staat nie[89] 'barbare' en slawe beskik nie oor betekenisvolle vryheid nie;[90] landbouers beskik oor dieselfde status as slawe;[91] onderwys is gerig op die verwesenliking van politieke

82 Strauss *supra* n 48 op 107.
83 *Idem* 110.
84 Sien b.v. *Nisbet Social Change and History* (1969) 8-9; Goosen *supra* n 3 op 11 & 67.
85 Barker *supra* n 45 op 428.
86 Aristoteles *Historia Animalium* (*Hist Anim*) (1910) 9.608b7; Aristoteles *De Partibus Animalium* (1911) 2.648a14.
87 Aristoteles *Hist Anim* 9.1.608a22-24.
88 Aristoteles *supra* n 3 op VII 16 xvi (1334b-1336a).
89 Rushdoony *The Institutes of Biblical Law III* (1999) 155.
90 Douma *Natuurrecht – een Betrouwbare Gids?* (1978) 14.
91 Barker *supra* n 45 op 410.

oogmerke en alle onderwys word deur die staat beheer;[92] die staat bepaal die status en posisie van mense in die staatshuishouding;[93] die huwelikslewe is onderhewig aan regulering van owerheidsweë ten einde bioties aanvaarbare nakomelinge te verwek,[94] vir welke doeleindes toesighouers aangestel moet word om as 'inspekteurs van kinders' op te tree;[95] sommige mense is van nature bestem om aan andere onderworpe te wees[96] en die staatsgodsdiens moet ter wille van die voortbestaan van die staat gehandhaaf word.

Is die politokraties-kommunitêre strewe na gemeenskap voldoende waarborg vir 'n regverdige staatsorde? Nee. Omdat die modale integriteit van die reg en die regssosiologiese onderbou van politokratiese kommunitarisme aan materiële struktuurprinsipes mank gaan en diensbaarheid van die reg aan buite-juridiese oorwegings wesenlike gevare is. Die materiële regstaatlike gebreke van politokratiese kommunitarisme is analoog aan dié van die Nasionaal-Sosialistiese regime in die twintigste eeu. Verwringing van die reg en instrumentalistiese aanwending van ongenormeerde mag in die gedaante van reg, volgens die Aristoteliese geregtigheidsdenke, is geen hersenskimme nie. Die groteske implikasies van eksterne staatsdoelwitte wat op grond van hoër sedelike motiewe in die staatsorde beslag kry, het navolging in totalitêre staatsordes – waarskynlik vir Aristoteles onvoorsiens – gehad. Regsstandaarde is onderhewig gestel aan eksterne staatsoogmerke. In Hans Frank se *Nationalsozialistisches Handbuch für Recht und Gesetzgebung* (1935) is dit juis die vertolking wat aan Aristoteles se beskouing van die mens as 'politieke dier' (*zoon politokon*) geheg word:

> Man vergasz, dasz schon Aristoteles den menschen als ein "Zoon politicon" bezeignet hattem das heiszt als ein Wesen, das nicht in seiner Vereinzelung allein denkbar ist, sondern das erst dann entfaltbar und erklärbar ist, wenn man es, in den Rahmen des Gemeinschaft hineingestellt, betrachtet und erklärt.[97]

Tydens die Nasionaal-Sosialistiese regime in Duitsland is wetgewing – deels met beroep op Aristoteles se regsfilosofie – aanvaar en deur regsteoretici uit dié kringe regverdig. Met 'n beroep op Aristoteles se minderwaardige beeld van vroue, verklaar Alfred Rosenberg – 'n vooraanstaande denker ter ondersteuning van dié indertydse regime – oor die minderwaardige karakter van vroue: 'Das Weibchen ist Weib kraft einer gewissen Fähigkeitslosigkeit'. Hy vervolg:

> Die fähigkeitslosigkeit ist die Folge des auf das Pflanzenhafte und auf das Subjektive gerichteten Wesens. Es fehlt der Frau aller Rassen und Zeiten die

92 *Idem* 423.
93 Kyk b.v. Aristoteles *supra* n 43 op I ii-I vi (1252b-1255a).
94 Barker *supra* n 45 op 426.
95 *Idem* 431.
96 Douma *supra* n 90 op 36.
97 Frank *Nationalsozialistisches Handbuch für Recht und Gesetzgebung* (1935) 18.

> Gewalt einer sowohl intuitiven als geistigen Zuzammenschau: überall da, wo ein mythische weltgestaltung, ein groszes Epos oder Drama, eine dem Kosmos nachforschende wissenschaftliche Hypothese in der Weltgeschichte auftauscht, steht ein Mann als Schöpfer dahinter ... und ein männlicher Geist ist es überall, der gegen das Chaos eine Weltordnung gebiert.[98]

In die regspraktyk het die *Gesetz zur erhütung erbkranken Nachwuchses* (van 14 Julie 1933) het vir sterilisasie van misdadigers voorsiening gemaak ten einde 'ungesunden und unheilbar kranken kindern' te verhoed; die *Gesetz gegen Missbräuche bei der Eheschliessung und Annahme an Kinder Staat* (van 23 November 1933) het bepaal dat huwelike nietig verklaar kon word indien dit nie met die oog op die belang van die gemeenskap gesluit is nie, maar vir persoonlike voordeel; die *Gesetz zur Verminderung der Arbeitslosigkeit* (van 1 Junie 1933) het finansiële ondersteuning van bioties 'gesonde' egpare gemagtig, en die *Gesetz über den Ausbau der Standesämpter zu Zippenämptern* het bepaal dat die bloedsuiwerheid van elke sibbe met die oog op versekering van die 'wichtigsten erbgesundheitlichen Feststellung' ... bepaal moes word.[99]

3 3 3 Bemiddelende Groepe en die Valse Dilemma

Is dit moontlik om die 'territoriale staat' as publieke regshandhawer uit te skakel? Tereg verklaar Harold dat 'n regssosiologiese ondersoek na die strukturele voorwaardes vir handhawing van 'n publieke regsorde nie die staat as regsentiteit wat publieke geregtigheid moet verseker, kan ontbeer nie:

> take away the state and you are left with mediating institutions which no longer mediate anything to anyone. They then become the new state, the new final authority which on principle must be destroyed for freedom to arise. In the end there would be no logical stopping point at which the condemnation of authority would cease.[100]

Die opvatting van sommige kommunitariërs dat bemiddelende groepe wat onderling in kompetisie tot mekaar staan, die beste waarborg teen magsmisbruik is, is slegs moontlik indien 'n meganisme (die staat) bestaan om konflik te verhoed. Die valse dilemma waarop Nisbet en andere se regssosiologiese standpunte berus, lê opgesluit in die keuse wat hul tussen plaaslike gemeenskappe en die staat as regshandhawer afdwing: 'In its general form, this is a false conclusion, because it can never be a question of giving precedence to one of the terms of the relation or of choosing between alternatives'.[101]

98 Rosenberg *Der Mythus des 20. Jahrhunderts* (1936) 483.
99 Frank *supra* n 97 op 16.
100 Harold *supra* n 57 op 209.
101 *Idem* 185.

4 Konklusie

Beantwoord die Aristoteliese geregtigheidsmodel aan die drempelgrens van regstaatlike geregtigheid? Immanent-krities beoordeel, skuil 'n wesenlike teenstrydigheid in politokratiese kommunitarisme. Enersyds word betoog vir die uitskakeling van die staat, in die plek waarvan 'n verskeidenheid van 'tuistelike gemeenskappe' moet tree; andersyds word van subsidiariteit as staatlike delegasienorm melding gemaak en die beginsel van 'korreksie' deur die staat as politieke owerheid vir onreg wat deur (en binne) tuistelike gemeenskappe gepleeg word. In die lig van Harold se opmerkings is die vraag of die weerstand van kommunitariërs teen die staat as sodanig nie misplaas is nie. Behoort die kritiek nie teen die *totalitêre onregstaat* as sodanig te wees nie? Voorts sinspeel Harold daarop dat 'n normatief sterk geregtigheidsbenadering 'n belangrike troef teen sentralisering van staatlike mag is. Die vraag is nou tot welke mate 'n materiële geregtigheidsparadigma by politokratiese kommunitariërs aanwesig is en binne die praktiese regslewe gestalte ter die versorging van die publieke belang kan kry.

Politokratiese kommunitarisme bly in gebreke om die juridies-relevante fasette van Aristoteliese biopolitiese deugdelikheid as politieke integreringsnorm aan te dui. Voorts is deug geen *begin*-sel aan die hand waarvan die regsorde integraal saamgesnoer behoort word nie. Deug is hoogstens 'n *end*-sel oftewel 'n aksiale oordeel wat gefel word na aanleiding van die vraag of 'n bepaalde handeling in ooreenstemming met die sinsinhoud van die sedelike is. Die Christen sal die vraag byvoorbeeld met verwysing na die sentrale liefdesgebod beantwoord, die Nasionaal-Sosialis met verwysing na die biopolitiese sug na Ariese meerderwaardigheid en die Aristoteliaan deur 'n biopolities-organiese gemeenskapsnorm aan te lê. Regstaatlik behoort die staat egter op die terrein van die sedelike met uiterste terughoudendheid op te tree omdat 'n egte regstaat sigself nie met die vermeende onsedelike gedrag van die onderdane *as sodanig* behoort te bemoei nie. Sedelike opvoeding en bekamping van onsedelikheid lê nie primêr op die terrein van die staat se juridiese kompetensies nie omdat dit nie primêr tot die struktuureise van die staat behoort nie en dit die persoonlike verantwoordelikheid van staatsonderdane geweld aandoen. Die staat as *regstaat* mag nie as sedemeester op die sedelike lewe van sy onderdane toesig hou nie. Die staat behoort aan die eise van regstaatlike belangebehartiging ter versekering van publieke geregtigheid in die publieke belang op te tree. As *regshandhawer* is die regstaat slegs *marginaal* met die sedelike lewe van sy onderdane gemoeid, naamlik slegs wanneer en vir sover die publieke regsorde in gedrang kom.

Bo en behalwe hierdie strukturele eis aan die regstaat, vereis regstaatlike geregtigheid dat die pluriforme *konstitutiewe regsbeginsels* onderliggend aan die regstaat gehandhaaf word wat vir die onderlinge regsgebiede onmisbaar is. Dít sluit in die burgerregtelike beginsels van

vryheid en gelykheid, die staatlike verteenwoordigingsbeginsel ensomeer. Die hiërargiese samelewingsorde wat die kompetensiegebied van politokratiese kommunitarisme uitmaak, maak nie vir die verrekening van hierdie beginsels voorsiening nie. Die ontkenning van vryheid en gelykheid as materiële burgerlik-privaatregtelike ordeningsbeginsels reduseer die terrein van die burgerlike privaatreg tot dié van die domein van owerheidsbemoeiing en outoritarisme.

Die versorging van die publieke belang geskied voorts sonder verrekening van die pluriforme verskeidenheid van eiesoortige samelewingsterreine wat struktureel elk oor nie-burgerlike privaatregtelike kompetensies beskik. Elke nie-staatlike samelewingsverband ontvang 'subsidiêr' gedelegeerde kompetensies wat voorts deur 'korreksie' volgens staatspolitieke doelwitte ingeklee kan word.[102]

Publieke verbandsgeregtigheid vereis dat die staat om *regstaat* te wees, aan al die materieël-strukturele eise van die staat as regsentiteit ter versorging van die publieke belang moet beantwoord. Die verwatering van regstaatlikheid in die politokraties-kommunitêre benadering bring meteen die idee van publieke verbandsgeregtigheid in gedrang, dit sny die menswaardige behandeling van onderdane by die wortel af en bevorder politieke bevoordeling as primêre staatsdoelwit. Bygevolg bly politokratiese kommunitarisme in gebreke om menswaardigheid as regulatiewe norm beslag te gee. Waarskynlik is die belangrikste les wat uit politokraties-kommunitêre diskoerse geleer kan word, dat bloot formele beroepe op 'deugdelikheid' en 'gemeenskap' by verre nie voldoende is om aan die eise van publieke verbandsgeregtigheid te voldoen nie. Vir sover politokratiese kommunitarisme van die grondliggende vereistes van publieke verbandsgeregtigheid afwyk beantwoord dit nie aan die normatiewe drempel wat vir die bestaan van 'n regstaat vereis word nie.

102 Spesifiek Malan *supra* n 3 op 285 se idee van 'korreksie'.

Is post-commencement finance proving to be the thorn in the side of business rescue proceedings under the 2008 Companies Act?

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OPSOMMING

Is na-aanvangsfinansiering die doring in die vlees van ondernemingsreddingsverrigtinge ingevolge die 2008 Maatskappywet?

Ondernemingsredding word toenemend as 'n gewilde en belangrike punt op die wetgewende agenda van lande wêreldwyd beskou. In Suid- Afrika het die Maatskappywet 71 van 2008 (die Wet) wat op 1 Mei 2011 in werking getree het, geregtelike bestuur vervang met 'n ondernemings-reddingmodel wat onder andere die rehabilitasie van 'n maatskappy in finansiële nood as doelstelling het. Een van die sleutelfaktore van 'n suksesvolle ondernemingsreddingproses is die verkryging van na -aanvangsfinansiering. Die onderhawige artikel bevat 'n bespreking van die spesifieke tekortkominge van die ondernemingsreddingmodel wat 'n nadelige effek het op die vekryging van na -aanvangsfinansiering in die praktyk. Aandag word ook geskenk aan ondernemingsreddingsverrigtinge, na -aanvangsfinansiering in die algemeen en die rangorde van die eise van skuldeisers wat sogenaamde na -aanvangsfinansiering verleen. Daar word ook gekyk na die benadering wat deur die Verenigde State van Amerika in hoofstuk 11 van die Amerikaanse 'Bankruptcy Code', asook ander internasionale instrumente, gevolg word. Die outeurs doen dan ten slotte aan die hand dat ondernemingsredding as model slegs kan slaag indien daar 'n paradigma skuif plaasvind wat wat tot 'n meer skuldenaar-vriendelike milieu tot gevolg sal hê en sodoende sal verseker dat na -aanvangsfinansiering meer vrylik beskikbaar sal wees.

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1 Introduction

> The Chinese use two brush strokes to write the word 'crisis'. One brush stroke stands for danger; the other for opportunity. In a crisis, be aware of the danger – but recognize the opportunity.
>
> (*J. F. Kennedy, Speech in Indianapolis, Indiana, 12 April 1959*)[1]

Corporate rescue has become an increasingly popular topic on the legislative agenda of many countries, and has long been a focus of global interest. The Companies Act 71 of 2008,[2] which contains Chapter 6 entitled 'Business rescue and compromise with creditors', introduced a new corporate rescue regime into the South African commercial law landscape.[3] This new approach was welcomed as it was generally accepted that the process of judicial management was a failure in practice.[4] The purpose of this particular chapter in the Act is to provide the opportunity to companies that are financially distressed to reorganise and restructure themselves in order to have the best possible chance of returning to a position of solvency while having regard to the rights and interests of all stakeholders.[5]

Where the option of rescuing a business is available, many jurisdictions have now recognised that any going concern strategy requires a means of financing the business until such time as the rescue plan can be successfully devised and implemented.[6] It logically follows that one of the most important factors to business rescue proceedings in bringing about a successful rehabilitation is thus that of post-commencement finance. It has also been stated that post-commencement finance 'is potentially one of the most important, and most problematic, aspects of a successful business rescue model'.[7] A recent study done in the United States (US) also acknowledged that '[a]s a general matter, the Commissioners recognized the need for a robust,

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1 Olivares-Caminal *Phoenix Operations in the Pre-packaged Administration: A Rescue for the Company or a Trap for the Creditors?* (LLM Dissertation QMUL 2013).

2 Hereinafter the '2008 Companies Act' or 'the Act'.

3 The Act came into effect in May 2011.

4 Burdette 'Some initial thoughts on the development of a modern and effective business rescue model for South Africa (Part 1)' 2004 *SA Merc LJ* 241 (hereinafter Burdette Part 1); *Le Roux Hotel Management (Pty) Ltd v E Rand (Pty) Ltd* 2001 2 SA 727 (C).

5 Rushworth 'A critical analysis of the business rescue regime in the Companies Act 71 of 2008' 2010 *Acta Juridica* 375; s 7(k) of the 2008 Companies Act.

6 Sarra 'Financing Insolvency Restructurings in the Wake of the Financial Crisis: Stalking Horses, Rogue White Knights and Circling Vultures' 2011 *Penn State International Law Review* 582. Pretorius & Du Preez 'Constraints on decision making regarding post-commencement finance in business rescue' 2013 *South African Journal of Entrepreneurship and Small Business Management* 170.

7 Burdette 'The development of a modern and effective business rescue model for South Africa: Pre consultation working document' (2004) 51; see also Prins *Priority issues in business rescue* (LLM dissertation UCT 2015) 3-5.

competitive post-petition financing market and the value it provides to distressed companies'.[8]

There have also been a number of cases where the courts have emphasised the importance of the availability of post-commencement financing in order to meet the requirement that the court must be satisfied that there is a reasonable prospect of rescuing the business as contained in section 131(4) of the Companies Act.[9] South Africa seems to lag behind in the 'corporate rescue' realm in terms of having a debtor-friendly rescue culture; this may well be because of the relatively new status of the legislation or specific challenges associated with an emerging market economy.[10]

It should be noted that the post-commencement financing of financially distressed companies is a challenging and complex subject and this paper will not attempt to deal with all the legal aspects and principles related to this process in detail but, instead, will aim to identify some of the shortcomings as well as stimulate some discussion of the next step scholars need to take in understanding the role of post-commencement finance in the business rescue environment. Business rescue proceedings, post-commencement finance and the ranking of claims in general will also be discussed. A brief comparison will be drawn against the US rescue administration procedure, which is contained in Chapter 11 of the Code,[11] as well as the guidance provisions that have been issued by the United Nations Commission on International Trade Law (UNCITRAL) and the World Bank in order to determine what

8 Goffman, McDermott, Panagakis & Turetsky 'Overview of ABI Commission Report and Recommendation on the Reform of Chapter 11 of the Bankruptcy Code' (2014) Skadden 75 available from https://www.skadden.com/sites/default/files/publications/Overview_of_ABI_Commission_Report_and_Recommendation_on_the_Reform_of_Chapter_11_of_the_Bankruptcy_Code.pdf (accessed 2016-06-30).

9 Loubser 'Post –commencement financing and the ranking of claims – A South African perspective' in Perry (ed) *European Insolvency Law: Current Issues and Prospects for Reform* (2014) 31; see *inter alia AG Petzetakis International Holdings Ltd v Petzetakis Africa (Pty) Ltd (Marley Pipe Systems (Pty) Ltd Intervening)* 2012 5 SA 515 (GSJ) par 29; *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 (Pty) Ltd* (15155/2011) [2011] ZAWCHC 442 (25 November 2011); 2012 2 SA 423 (WCC); *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2013 4 SA 539 (SCA) par 33; *Newcity Group (Pty) Ltd v Pellow, China Construction Bank Corporation Johannesburg Branch v Crystal Lagoon Investments 53 (Pty) Ltd* (12/45437, 16566/12) [2013] ZAGPJHC 54 (28 March 2013).

10 In *Swart v Beagles Run Investments 25 (Pty) Ltd (Four Creditors Intervening)* 2011 5 SA 422 (GNP) 28, Makgoba J stated that 'where an application for business rescue … entails the weighing-up of the interests of the creditors and the company the interests of the creditors should carry the day'.

11 The Bankruptcy Code of 1978 came about as a result of the *Report of the Commission on the Bankruptcy Laws of the United States* HR Doc no 137 93d Congress session 1973. The Bankruptcy Reform Act of 1978 was most recently amended by the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) of 2005.

prerequisites are necessary in a system to ensure that successful turnaround financing is secured for distressed companies. Lastly, some suggestions are made to improve the current position in South Africa as well as for future research activity.

2 Business Rescue in South Africa: A Brief Discussion

The globalisation of trade and business activities is having an impact on many areas of our law and the global economic crisis has had an effect on companies worldwide.[12] Wood describes liquidation as the 'guillotining of a company' and considers it to be a drastic measure.[13] Once a liquidation order is granted, there are certain consequences that ensue such as the demise of the corporate entity, loss of employment for many, as well as 'an unsatisfactory pro rata share in the residue for unsecured creditors, and the abandonment of claims when such are not proved'.[14] Due to such results, it is appropriate to have legislation that provides other options in situations of business turmoil.

The business rescue procedure attempts to provide temporary measures that aid in the rehabilitation of a company. For the duration of such a rescue, the company's management will be placed under the supervision of a business rescue practitioner and will have a moratorium placed on all claims against the company on behalf of the creditors.[15] In the case of *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Company (Pty) Ltd*,[16] Kgomo J commented that:

> business rescue is also a system that is aimed or geared at temporarily protecting a company against the claims of creditors so that its business can thereafter be disposed of (if concern could not be saved) for maximum value as a going concern in order to give creditors and shareholders a better return than they would have received had the company been liquidated.[17]

12 Du Preez *The status of post-commencement finance for business rescue in South Africa* (MBA dissertation 2012 Gordon Institute of Business Science, UP) 1.

13 Wood *Principles of International Insolvency Law* (2007) 31.

14 Bradstreet 'The new business rescue: will creditors sink or swim?' 2011 *SALJ* 352.

15 Bradstreet 'The leak in the lifeboat: Inadequate regulation of business rescue practitioners may adversely affect lenders' willingness and the growth of the economy' 2010 *SA Merc LJ* 195; s 133 of 2008 Companies Act.

16 *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Company (Pty) Ltd* (13/12406) [2013] ZAGPJHC 109 (10 May 2013).

17 *Idem* par 4; see also s 133 of 2008 Companies Act.

There are two ways in which such proceedings can be entered into, namely, by a voluntary resolution by the board of directors, or by an application to court by an 'affected' person.[18] The actual bodywork of the rescue process will be assembled in the form of a 'rescue plan' drafted by the business rescue practitioner in terms of the Act.[19] This plan deals with all of the company's affairs, assets, liabilities and other relevant areas relating to the business, and attempts to strategise a way in which these elements can be restructured in order to maximise the chances of the distressed company returning to solvency.[20] There have been various high-profile cases in which large South African companies have entered into business rescue proceedings. These instances have brought the proceedings and their results to the attention of the public through the media hype surrounding them.[21]

In any corporate rescue regime it is clear that financial support is required from the surrounding commercial domain in order to enable the rescue to take place. As noted by Du Preez, during times of economic downturn such financing is more difficult to come by as investors are wary of the risks involved in placing money in what is essentially, a failing entity.[22] Ironically, when financing is needed most in order to secure a turnaround for the business in question, it is often unavailable, or the creditors themselves are financially troubled. Thus, one of the most important factors of a corporate rescue effort involves obtaining additional finance to meet temporary trade obligations, such as working capital requirements, and covering the rescue/restructuring costs in order for a company to recover swiftly from its temporary liquidity challenges. In addition, the availability of new finance is also vital for the approval of a business rescue plan.[23]

18 Davis *et al Companies and other Business Structures in South Africa* (2011) 165-167; ss 129 & 131 of the 2008 Companies Act.

19 Part D of Chapter 6 deals with the development and approval of a business rescue plan.

20 S 128(1)(b) of the Act.

21 See the example of Sanyati where the ineffective post-commencement financing scheme led to the tragic demise of the business. Sanyati was building roads for the South African government and subsequently the government accrued a debt of R79 million to the company. The company went into business rescue but was in desperate need of financing to complete its existing contracts. After the President intervened, some payments were made to the company but most other suppliers, by then, had cancelled their contracts due to non-payment. The company consequently terminated the business rescue proceedings and went into liquidation. See Loubser 'Post–commencement financing and the ranking of claims – A South African perspective' in Perry (ed) *supra* n 9 at 31.

22 Du Preez 6.

23 Pretorius & Du Preez 2013 *South African Journal of Entrepreneurship and Small Business Management* 170; Kunst *et al Meskin, Insolvency Law and its Operation in Winding-up* (loose-leaf edition) (2014 updated version, LexisNexis) par 18.8.2.3.

3 Post-commencement Finance – A Current South African Perspective

It can be extremely difficult for a company to secure funding when it is the subject of business rescue proceedings; this is due to the fact that lenders have the valid concern that they may not see a return on their investment.[24] Where the classic common pool problem presents itself, creditors will generally prefer the relative certainty afforded by insolvency proceedings which usually facilitate normative objectives that include the orderly and equitable distribution of a debtor's assets where they are insufficient to meet the claims of all his creditors.[25] Van der Linde also mentions the following:

> Policy considerations in favour of a priority for post-commencement financing have to be balanced against established principles including the *pari passu* rule, the vested rights principle, the ideal of upholding commercial bargains and, in regard to secured claims, the *prior in tempore* maxim.[26]

In order to sustain the business as a going concern, there are certain business activities that will require funding, such as 'goods and services from suppliers, labour costs, insurance, rent, maintenance of contracts and other operating expenses, along with the cost of maintaining the value of assets' and thus it is imperative to obtain a source of finance as soon as possible.[27] It must be emphasised that post-commencement financing extends from short-term goals to that of the long-term strategy that will be implemented in trying to obtain a successful turnaround.[28]

In order to deal with the difficulty of obtaining such financing, Chapter 6 provides, under section 135, mechanisms through which such financing becomes more attractive to the financier.[29] In short, this is done by conferring priority or allowing the company to use its assets as security for such loans.[30]

The nature and extent of post-commencement financing is detailed in section 135 of the Companies Act as follows:

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24 Davis *supra* n 18 at 170.

25 Sarra 2011 *Penn State International Law Review* 582. See Kirshner 'Design flaws in the Bankruptcy Regime: Lessons from the U.K. for preventing a resurgent creditors' race in the U.S.' 2014 *University of Pennsylvania Journal of Business Law* 530.

26 Van der Linde 'Priority issues in post-commencement financing – a view from South Africa' in Wessels & Omar (eds) *The Intersection of Insolvency and Company Laws* (2008) – Papers from the INSOL Europe Academic Forum Annual conference Barcelona, Spain, 1–2 October 2008 41.

27 Pretorius & Rosslyn-Smith 'Expectations of a business rescue plan: international directives for Chapter 6 implementation' 2014 *Southern African Business Review* 132.

28 UNCITRAL *UNCITRAL Legislative Guide on Insolvency Law* (2005) 113 available from http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf (accessed 2014-10-08).

29 Sharrock *et al Hockly's Insolvency Law* (2012) 289.

30 Davis *supra* n 18 at 170.

(1) To the extent that any remuneration, reimbursement for expenses or other amount of money relating to employment becomes due and payable by a company to an employee during the company's business rescue proceedings, but is not paid to the employee –
(a) the money is regarded to be post-commencement financing; and
(b) will be paid in the order of preference set out in subsection (3)(a).
(2) During its business rescue proceedings, the company may obtain financing other than as contemplated is subsection (1), and any such financing –
(a) may be secured to the lender by utilizing any asset of the company to the extent that it is not otherwise encumbered; and
(b) will be paid in the order of preference set out in subsection (3)(b).
(3) After payment of the practitioner's remuneration and expenses referred to in section 143, and other claims arising out of the costs of the business rescue proceedings, all claims contemplated -
(a) in subsection (1) will be treated equally, but will have preference over–
(i) all claims contemplated in subsection (2), irrespective of whether or not they are secured; and
(ii) all unsecured claims against the company; or
(b) in subsection (2) will have preference in the order in which they were incurred over all unsecured claims against the company.
(4) If business rescue proceedings are superseded by a liquidation order, the preference conferred in terms of this section will remain in force, except to the extent of any claims arising out of the costs of liquidation.

The ranking of creditors' claims are also important for purposes of comprehending why investors are sometimes reluctant to invest in companies that are subject to rescue proceedings. In summary these claims rank as follows:

(1) The business rescue practitioner's remuneration and costs arising from business rescue proceedings;[31]
(2) All post-commencement finance claims related to employment once business rescue has commenced but which have not yet been paid;[32]
(3) Claims for post-commencement loans obtained during business rescue, firstly secured claims in the order in which they were incurred;[33]
(4) All other unsecured claims against the company.[34]

If the business rescue proceedings are superseded by a liquidation order, the preferences mentioned above continue to apply, but the claims would rank below the costs of liquidation.[35]

There has been considerable debate surrounding these rankings, in particular regarding the position of lenders who attained their security prior to the business rescue proceedings.[36] In the *Merchant West* case, Kgomo J stated that the claim belonging to pre-business rescue secured

31 S 135(3)) (as per s 143); *Murgatroyd v Van den Heever* [2014] JOL 32250 (GJ).
32 S 135(1); s 135(3)(a). The employees' claims rank equally to and have preference over the claims of creditors.
33 Ss 135(3)(a) & 135(2).
34 S 135(3)(b).
35 S 135(4).
36 Du Preez 14.

creditors will now rank below those creditors who have supplied funding to the distressed entity during business rescue proceedings (i.e. post-commencement financiers).[37] As correctly pointed out by Prins, the ranking set out by Kgomo J specifically refers to an earlier publication by Stein and uses a verbatim copy of the ranking as suggested by the present authors.[38] Subsequently, in *Redpath Mining South Africa v Marsden,*[39] Kgomo J confirmed his previous *dicta* by once again stating that the ranking is as listed in the judgment handed down in the *Merchant West* case.[40]

Despite these judgments declaring the ranking of creditor claims, the particular cases' focal points were not related to the ranking of claims and thus it is submitted that both comments by the same judge should be considered to be *obiter*.

In section 134(3), the legislature deals with the position of secured creditors and states that:

> If, during a company's business rescue proceedings, the company wishes to dispose of any property over which another person has any security or title interest, the company must:
>
> (a) obtain the prior consent of that other person, unless the proceeds of the disposal would be sufficient to fully discharge the indebtedness protected by that person's security or title interest; and
> (b) promptly;
> (i) pay to that other person the sale proceeds attributable to that property up to the amount of the company's indebtedness to that other person; or
> (ii) provide security for the amount of those proceeds, to the reasonable satisfaction of that other person.[41]

The Act then proceeds in section 135(2)(a) to state that financing during business rescue may be secured only by assets not otherwise encumbered.[42] Van der Linde also states that:

> Section 134(3) expressly regulates the rights of secured creditors during business rescue proceedings and makes it clear that if the property is sold, the secured claim must be 'promptly' paid from the proceeds or otherwise (alternative) security for its payment must be provided to the satisfaction of the secured creditor. This principle applies for the entire duration of business rescue proceedings. It is obvious that section 135(3), which sets out the ranking of claims, makes no mention of secured pre-commencement claims.

37 *Merchant West* case *supra* n 16 at par 21.
38 See Stein & Everingham *The New Companies Act Unlocked: A Practical Guide* (2011) 421, an earlier publication which provided one of the first interpretations of the ranking of creditors' claims under business rescue. See also Prins 8.
39 (18486/2013) [2013] ZAGPJHC 148 (14 June 2013).
40 *Idem* par 60.
41 Ss 134 (3)(a)-(b); see *Kritzinger and Another v Standard Bank of South Africa* (3034/2013) [2013] ZAFSHC 215 (19 September 2013) par 30.
42 S 135(2)(a).

> In my view this is precisely because these claims are paid separately from the proceeds of the security that no mention is made of them in section 135.[43]

It is therefore clear that the position of pre-commencement secured creditors has clearly been excluded from the section 135 ranking scenario and it is submitted that it was not the intention of the legislature to revise the position or alter the preference of the secured lender during business rescue proceedings. Van der Linde also mentions that the Act clearly states that the post-commencement claims of employees are expressly said to enjoy priority over post-commencement claims, whether secured or not. The express reference to 'whether secured or not' is a clear indication that the legislature wanted to introduce an exception to the general principle of separation between secured and unsecured claims.[44] Henochsberg also expressly disagrees with the interpretation by Kgomo J in the *Merchant West* case, and mentions that this ranking does not seem to be in accordance with the wording of section 135, since there is no reference in that particular section to claims by pre-commencement secured lenders.[45]

As a result of these recent inferences from case law accompanied by vigorous academic debate, the subject of creditor ranking in terms of business rescue proceedings has the potential of becoming an uncertain and undefined area in our law and creating an additional obstacle to the business rescue practitioner's already difficult task of securing post-commencement finance.

4 Comparative Overview

4 1 The US 'Debtor in Possession' System

Due to the lack of literature relating to post-commencement financing in developing countries such as South Africa, it seems necessary to delve into one of the most recognised corporate rescue systems in the world, namely that of the US. A secondary reason for choosing to explore this jurisdiction lies in the fact that when the South African legislature decided that it was necessary to move away from judicial management and develop a corporate rescue procedure, that would be inherently more successful than its predecessor, it was stated that in creating this new and improved reorganisation process 'the provisions of the US Chapter 11 would be considered'.[46] This was not the first time that it had been suggested that the Bankruptcy Code – as operated in the US – should be

43 Van der Linde 'Company and Insolvency Law Update' 2014 *Annual Banking law Update* 15. On file with author.
44 *Ibid*.
45 Delport *et al Henochsberg on the Companies Act 71 of 2008* (2011) (Loose-leaf Edition) 478(10)-(12).
46 See Department of Trade and Industry 'South African company law for the 21st century: guidelines for corporate reform' 2004 *Notice 1183 of 2004 GG 26493* 45.

considered.[47] Commentators had often noted that judicial management was dysfunctional and needed to be reworked by paying close attention to the US system.[48] It has been pointed out that it was a common trend in European countries, during reform of their particular insolvency laws, to give special time and consideration to Chapter 11 and its procedures.[49]

To understand the US Chapter 11 provisions properly, it is essential to look at the origins and rationale behind the Chapter 11 proceedings.[50] As Martin explains:

> The current U.S. bankruptcy system grew directly out of the United States' unique capitalist system, which rewards entrepreneurialism as well as extensive consumer spending. It makes sense that a society in which dollars rule would have a forgiving personal bankruptcy system in order to keep consumer spending high, and an equally forgiving business reorganization system to encourage risk taking and economic growth. Both systems are part of a larger scheme to keep economic players alive and active in the game of capitalism. U.S. bankruptcy systems are among the country's few social programs and they address many of society's ills. Thus, they are broad and form an integral part of the social system from which they sprung.[51]

The main difference between US-style reorganisation and that of most other jurisdictions is that in the US, current management of the failing company normally stays in place with no administrator directly supervising the proceedings.[52] The historical development of this unique principle originates from the first reorganisations in the railroad industry. At the time that the Munroe Railroad and Banking Company defaulted on its obligations to its lenders, there was no legal framework in place to address this particular business failure, other than the lender's right to foreclose and the court's equitable right to appoint a receiver to take over the debtor's assets.[53] Due to a piecemeal sale of the debtor's assets,

47 Bankruptcy Reform Act of 1978.
48 Rajak & Henning 'Business rescue for South Africa' 1999 *SALJ* 262.
49 Omar 'Four models for rescue: convergence or divergence in European insolvency law? (Part 2)' 2007 *International Company and Commercial Law Review* 179; Loubser 'Tilting windmills? The quest for an effective corporate rescue procedure in South African law' 2013 *SA Merc LJ* 439.
50 Martin 'The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation' 2005 *Boston College International and Comparative Law Review* 32.
51 *Ibid*.
52 *Ibid*. See also Metzger & Bufford 'Exporting United States Bankruptcy Law: The Hungarian Experience' 1993 *California Bankruptcy Journal* 153; and Tabb 'The History of the Bankruptcy Laws in the United States' 1995 *American Bankruptcy Institute Law Review* 18-23.
53 Martin 2005 *Boston College International and Comparative Law Review* 32; Skeel *Debt's Dominion* (2001) 57. See also Stuart 'Coming Through in a Crisis: How Chapter 11 and the Debt Restructuring Industry are Helping to Revive the U.S. Economy' 2012 *Journal of Applied Corporate Finance* 23-35; Goren 'Chip Away at the Stone: The Validity of Pre-Bankruptcy Clauses Contracting around Section 363 of the Bankruptcy Code' 2006/07 *New York Law School Law Review* 1078-1104.

potentially resulting in an economic and social catastrophe, the court merged these two legal concepts and ordered that the lender sell the assets as a going-concern sale, rather than piecemeal. This innovation led to a new way of looking at reorganisation and value and subsequently acted as the precursor to the current Chapter 11 system.[54] Years later, the Act of 1978 introduced Chapter 11 reorganisation; the result of years of development in the US.[55]

The main aim of Chapter 11 is to avoid the complete collapse of an ailing business by providing financial restructuring that is binding on all parties.[56] During a rescue attempt, a firm enjoys temporary relief from its creditors' claims (similar to the moratorium created in South Africa), so that while still in business, the existing management can examine its current business model and attempt to reorganise it in a way that will bring about a successful resurrection of the said business.[57] The statutory goal of a Chapter 11 proceeding is the preparation and confirmation of a reorganisation plan.[58]

After the filing of a chapter 11 petition the management of the company will normally remain in control of the debtor's affairs and continue with normal business activities such as making decisions regarding both the debtor's business and its reorganisational options..[59]

Notably section 1107 of the Code authorises the debtor in possession to, among other things, exercise all 'the rights … and powers, and [requires it to] perform all the functions and duties … of a trustee serving in a case under this chapter', with only minor exceptions that do not detract from the central role of the debtor in possession.[60] Although there is no new addition to the management of the failing entity, these proceedings are subject to judicial oversight and there are exceptional

54 Martin 2005 *Boston College International and Comparative Law Review* 32; Spannaus 'A Short History of "Chapter 11": Model for a Bankrupt Economy Executive' 2002 *Intelligence Review* 19.

55 Loubser 2013 *SA Merc LJ* 441. As is known, in the US the laws are divided into state law (applying only to that specific state) and federal law, which is a nationwide ruling. See also Ferriell & Janger *Understanding Bankruptcy* (2013) 5.

56 Ferriell & Janger 4.

57 Goren 2006/07 *New York Law School Law Review* 1090.

58 11 US Code s 1121. The debtor, other than a small business debtor, has a 120-day period during which it has an exclusive right to file a plan. This period may be extended or reduced by the court. But in no event may the exclusivity period, including all extensions, be longer than eighteen months.

59 'Management displacement' in favour of an impartial supervisor or trustee only takes place in extraordinary cases where matters such as fraud, dishonesty or gross mismanagement are involved. See also American Bankruptcy Institute (ABI) 'Commission to Study the Reform of Chapter 11 2012–2014 Final Report and Recommendations' (hereinafter ABI 'Final Report and Recommendations') available from http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1096&context=books (accessed 2016-06-30).

60 11 USC s 1107; Du Preez 25; ABI 'Final Report and Recommendations' 22.

circumstances in which an administrator will replace the management team, for instance in the case of fraud or gross mismanagement.[61]

It must be noted that the US has a debtor-friendly system which essentially entails that the legislation provides companies with protection from creditors in times of uncertainty. In turn, this allows for the best possible chance at a return to solvency.[62] In a recent study done by the American Bankruptcy Institute (ABI) on the possible reform of Chapter 11, the following recommendation was included:

> Thus, on balance, the Commission concluded that the potential value of a mandatory trustee-like actor was significantly outweighed by the potential disruption, costs, and inefficiencies associated with the displacement of the debtor's management. Accordingly, the Commission recommended retention of the debtor in possession model.[63]

4 2 DIP Financing

Special provisions to deal with corporate restructuring and so called 'debtor-in-possession (DIP)' financing or post-petition financing is a common feature introduced by the 1978 Code. Section 364 of the Code generally governs a debtor in possession's request to obtain post-petition financing and is structured in part to incentivise lenders to extend credit to a company in bankruptcy by providing special creditor rights to post-petition loans.[64] DIP financing is one of the most vital instruments to enable 'the DIP to provide current or new lenders the first priority claim on the finances (i.e. right of repayment priority) through the acquisition of financing and loans on favorable terms for the company'.[65] As a practical matter, DIP loans often offer attractive interest rates at relatively low risk, and the DIP creditor often has substantial control over the bankruptcy process.[66]

A pre-petition secured creditor that intends to provide post-petition financing may obtain a lien against collateral (real or personal property) acquired by the debtor in possession after the commencement of the

61 Gaur 'Post-petition financing in corporate insolvency proceedings' 2012 *Taxmann's SEBI & Corporate Laws Journal* 19.

62 See generally Couwenberg & De Jong 'It takes two to tango: An empirical tale of distressed firms and assisting banks' 2006 *International Review of Law and Economics* 429.

63 ABI 'Commission to Study the Reform of Chapter 11 2012–2014 Final Report and Recommendations' (hereinafter ABI 'Chapter 11 Commission Report') 22 available from http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1096&context=books (accessed 2016-06-30).

64 US Bankruptcy Code, 11 USC s 364; see also ABI 'Chapter 11 Commission Report' 74.

65 Du Preez 26.

66 Mindlin 'Comparative analysis of Chapter 6 of the South African Companies Act, no. 71 of 2008 (Business Rescue Proceedings)' presentation to the Company Law Symposium, Johannesburg South Africa, 1 March 1 2013. See also Zdunkewicz 'Recent Trends and Developments in DIP Financing' 2014 SRR Guest Article available from http://www.srr.com/assets/pdf/recent-trends-and-developments-dip-financing.pdf (accessed 2016-06-30).

case and is referred to as 'cross-collateralization'.[67] If a pre-petition creditor doesn't demonstrate a significant commitment to provide post-petition credit as opposed to merely strengthening its pre-petition claim, a Bankruptcy Court will generally not approve such credit.[68]

Section 364 of the Code sets out four different financing options, each of which involves a progressively greater measure of protection for such lenders:[69]

(1) Section 364(a) hands the debtor an automatic right (unless the court orders otherwise) to incur unsecured debt as a first-priority administration expense (top-ranking claim) or as secured debt, and to acquire unsecured obligations in the ordinary course of business.[70]. The DIP can thus seek to obtain credit as an 'administrative expense'.
(2) A post-petition creditor may also provide an unsecured loan outside of the ordinary course of business after notice and a hearing.[71]
(3) If such financing is not obtainable, the following option would be that the DIP loan can be given 'super-priority' over other administrative expenses, secured against any unencumbered property, or secured by a junior lien on property that is already encumbered.[72]
(4) As a final credit enhancement option a bankruptcy court can grant the DIP lender a senior or equal lien on encumbered property of the estate (so-called 'priming lien') so long as there is 'adequate protection'.[73]

In section 364(d), it is stated that a 'super-priority' status will only be placed on pre-petitioned assets if these lenders can prove that there is no other financing available on any other terms as well as showing that the originally secured party is still adequately protected in the circumstances.[74] It should be noted that a priming lien has the effect altering the priorities of pre-existing secured creditors and as such the burden of proof for authorising such a lien is a heavy one.[75] A pre-petition lender would thus often choose to fund the debtor's post-petition operations with a DIP loan so as to avoid this 'priming fight' with another third-party post-petition lender that would seek to obtain a priming lien on the pre-petition lender's collateral.[76]

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67 See *Burchinal v Cent. Wash. Bank (In re Adams Apple, Inc.),* 829 F.2d 1484, 1490-91 (9th Cir. 1987).
68 ABI 'Chapter 11 Commission Report' 23.
69 Rankin *et al* 'Defensive debtor-in-possession financing' presentation at *36th Annual Judge Alexander L. Paskay Seminar on Bankruptcy Law and Practice* available from http://lamfin.arizona.edu/fixi/creditmod/DIPFinancing.pdf.
70 11 U.S.C. s 364(a). Carmichael & Graham *Accountants' Handbook, Special Industries and Special Topics* (2012) 20. Under the US Code, the debtor-in possession can obtain unsecured credit outside the ordinary course of business after notice and a hearing. See also 11 U.S.C. s 503(b)(1).
71 11 U.S.C. s364(b) read with 11 U.S.C. s 503(b)(1).
72 11 U.S.C. s 364(b) and (c).
73 11 U.S.C. s 364(d). See also 11 U.S.C. s 361.
74 Gaur 2012 *Taxmann's SEBI & Corporate Laws Journal* 23. See *In re Mosello* 195 B.R. 277, 289 Bankr. S.D.N.Y. 1996.
75 Rankin *et al* 4.
76 Zdunkewicz 2014 SRR Guest Article 1-2.

Under the Code, the ranking of allowed claims is the same whether the insolvency proceeding is a Chapter 7 liquidation or a Chapter 11 reorganisation, except that under certain circumstances involving creditor consent, a Chapter 11 plan of reorganisation can modify the strict priority rules. The hierarchy of claims under Chapter 11 are as follows:[77]

(1) Allowed claims secured by liens valid under state law and unavoidable under bankruptcy law.[78]
(2) Next are allowed expenses and claims that have priority under the Code and in corporate insolvency cases, expenses relating to the administration of the case rank at the top of the priority claims category and are divided into three different ranks.[79]
(a) First are super-priority claims relating to DIP financing in Chapter 11 cases.[80]
(b) Second are super-priority claims under the Code to compensate a secured creditor for the failure to provide adequate protection while the automatic stay is in effect and the trustee or debtor-in-possession uses the collateral.[81]
(c) Third are all other administrative expenses subject to the order of priority listed in Code.[82]
(3) The allowed claims of general unsecured creditors are next in the pecking order, followed by subordinated claims. Any surplus goes to equity holders.

An interesting amendment under the US Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) has been made in section 503(b)(9). This section was included as part of BAPCPA to provide added protection to certain trade creditors 'by allowing suppliers of goods to assert an administrative expense claim for the value of goods sold and delivered to, and received by, a customer in the ordinary course of business within 20 days of the customer's bankruptcy filing (the "503(b)(9) Claim")'.[83]

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77 See generally Gilson 'Investing in distressed situations: A market survey' ch 1 in Gilson (ed) *Creating Value through Corporate Restructuring: Case Studies in Bankruptcies* (2010) 64; Du Preez 27; Platt *Principles of Corporate Renewal* (2004) 33. See also Flaschen *et al Practical Law Restructuring and Insolvency Multi-jurisdictional Guide 2014/15: Q&A Template United States* (2014) available from https://www.insol.org/_files/Fellowship%20Class%20of%202014%20-%202015/Literature/Practical%20Law%20Restructuring%20&%20Insolvency%20USA%20Q&A.pdf.
78 Bankruptcy Code s 506.
79 S 507(a).
80 Pursuant to Bankruptcy Code s 364(c)(1).
81 S 507(b)
82 S 503(b). Wages for services rendered after the commencement of the bankruptcy case are first on the S 503(b) list.
83 See Nathan *et al* 'The 20-Day Goods Priority Claim Under Bankruptcy Code Section 503(b)(9): The Complexities of a Seemingly Simple Statute' 2009 *Lowenstein Sandler* 3 available from https://www.lowenstein.com/files/Publication/4b72f2a3-3867-45de-9457-6e5680072d0e/Presentation/PublicationAttachment/1deb8129-d8f2-469e-babc-7affacc0730f/The%2020-Day%20Good%20Priority%20Claim.pdf (accessed 2016-06-30); Gage 'Should

These '20-day' claims are distinctive because they cannot be paid pro rata in the same way as general unsecured claims, nor can they be paid over time through a reorganisation plan, like secured claims.[84] Instead all these trading claims must be paid in full in cash on the effective date of the plan.[85] In essence, this section converts creditors who under the previous dispensation would have qualified only as ordinary unsecured creditors into a class that must be fully compensated before a reorganisation plan may be implemented. Consequently, so-called 20-day claimants can now exercise considerable influence over Chapter 11 proceedings and their sheer numbers may ultimately have a huge impact on the success of a reorganisation plan by curbing the DIP financing market.[86]

Another common occurrence in the US is that of 'pre-packaged plans' or 'prepacks' where the plan and disclosure statement are prepared in advance and sufficient favourable votes are obtained prior to the commencement of the Chapter 11 case, leading to a prompt plan confirmation.[87] A pre-packaged plan of reorganisation thus represents a hybrid restructuring tool, whereby a private restructuring arrangement is agreed upon and the company subsequently implements the plan through a judicial process.[88] For some debtors, the filing of a bankruptcy petition is the end result of a reorganisation process rather than the beginning of such a process. The goal of the pre-packaged Chapter 11 process is to maximise the effects of a bankruptcy in a minimum amount of time, and in essence this means that the trade debt is still relatively low at the time of submission, which in turn suggests there is a higher chance of a successful turnaround.[89]

A pre-packaged plan is also an effective tool for dealing with so called hold-out creditors.[90] If a pre-packaged plan is approved by the required percentages of creditors and stockholders, and certain other requirements are satisfied, the plan may be 'crammed down' on all parties, including parties that did not vote on or voted against the plan.[91] This effectively deals with the hold-out situation as it basically removes any economic advantage to non-participation. Another advantage to such a prepack arrangement would be minimal reputational damage

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Congress Repeal Bankruptcy Code Section 503(B)(9)?' 2011 *ABI Law Review* 217.

84 Routh 'Twenty-Day Claims: The Anticipated and Unanticipated Consequences of Code §503(b)(9)' 2006 *American Bankruptcy Institute Law Review* 24 (describing twenty-day claims as a 'hybrid' of prepetition claim and administrative expense claim).

85 S 1129(a)(9)(A).

86 Nathan 2009 *Lowenstein Sandler* 3-6.

87 Bartell *A Guide to the Judicial Management of Bankruptcy Mega-Cases* (2007) 27.

88 Harner & Griffin 'Facilitating Successful Failures' 2013 *Florida Law Review* 17.

89 Du Preez 27.

90 Brigham & Daves *Intermediate Financial Management* (2012) 955.

91 11 USC s 1129(b).

suffered due to the shortened time frame as well as the preserving of the value of the company that would otherwise 'vanish' with the entry into the normal bankruptcy procedure.

The US DIP system is a classic example of a debtor-friendly structure that is modelled around the genuine desire to rescue those distressed businesses.[92] This type of system is clearly not to the detriment of creditors and illustrates well that there is a balance that needs to be struck between both interests. Essentially the rationale behind this system is that all creditors will be better off if the debtor is successfully rescued from liquidation.[93]

4 3 A Concise Comparison of the Post-commencement Financing Spheres in the US and South Africa

It is fairly obvious that both the DIP system as found in Chapter 11 in the US and the business rescue proceedings of Chapter 6 in South Africa aim to be debtor friendly, while still balancing the interests of creditors.[94] The approach taken in the US is extremely sophisticated, stemming from an evolution of the laws relating to corporate rescue. The process is predictable and directed by specialist courts, and supervised by judges that specialise in the solvency and rescue arena.[95] The approach in South Africa is still fairly uncertain in that the legislation is relatively new and courts are still working out the kinks in the approach.[96]

South Africa is struggling to establish a rescue culture due to a variety of reasons as oppose to the US where the rescue culture is fairly evident resulting from a transparent process which is highly supported by the parties involved. There is also little or no damage to a company's reputation in the US when it files for bankruptcy under Chapter 11 because the public appreciates that the system works in favour of salvaging distressed entities.[97]

Although both jurisdictions make provision for post-commencement financing, there are substantial differences that should be noted. A significant factor in US turnaround finance regime is the ranking of DIP lenders as a super-priority administrative claims, whereas in South African these financiers are ranked below the practitioner's remuneration, costs of the actual proceedings as well as below employee claims. Also noteworthy is the phenomenon where a priming lien under section 364(b) has the effect of altering the priorities of pre-existing lienholders.

92 Loubser 2013 *SA Merc LJ* 441.
93 Pretorius & Rosslyn-Smith 2014 *Southern African Business Review* 113-116.
94 Pretorius & Du Preez 2013 *South African Journal of Entrepreneurship and Small Business Management* 172.
95 Loubser 2013 *SA Merc LJ* 439.
96 Pretorius & Du Preez 2013 *South African Journal of Entrepreneurship and Small Business Management* 173.
97 *Ibid.*

5 International Guidelines on Insolvency Law

5 1 The World Bank

The World Bank's international publication titled 'Principles for Effective Creditor Rights and Insolvency Systems'[98] contains various recommendations regarding the principles for successful post-commencement financing. One such principle relates to the issue of stabilising distressed businesses along with the sustainment of business operations. In this principle it is stated that, subject to certain safeguards, a business should have access to commercially viable forms of funding and that these 'loans' should be on terms of agreement that afford repayment priority under exceptional circumstances in order to allow the debtor to meet its day-to-day needs.[99]

In developing countries (such as South Africa) the type of financing that is usually available is in the form of debt in which security is often required, taking the shape of unencumbered assets that are either immovable or movable in nature. It is of importance to note that the World Bank collaborated with UNCITRAL to develop a set of principles that would afford various jurisdictions guidance in evaluating and developing new laws which would stand up to the international standard of insolvency laws.[100] It is in the light of this collaboration that this paper will focus on the UNCITRAL provisions as they are all-encompassing.

5 2 UNCITRAL's Legislative Guide on Insolvency Law

The 'Legislative Guide on Insolvency Law'[101] sets out very clearly the provisions that are regarded as essential by UNCITRAL when drafting insolvency laws in any jurisdiction.[102] A considerable section of this guide focuses on the matter of post-commencement finance, for obvious reasons. The guide describes the post-commencement financing needs of a debtor as well as noting the possible sources of such finance in the form of available cash, the sale of liquid assets, funding through the means of trade credit, and loans.[103] Emphasis is placed on the need for new funding and thus a tentative distinction is drawn between the financing of transactions outside the normal course of business and those that can be considered necessary for survival.[104]

98 World Bank 'Principles for effective creditor rights and insolvency systems' revised 2015 available from http://www.worldbank.org/en/topic/financialsector/brief/the-world-bank-principles-for-effective-insolvency-and-creditor-rights (accessed 2016-06-30).
99 Principle C9.2, World Bank 17.
100 Burdette Part 1 2004 *SA Merc LJ* 263.
101 UNCITRAL *supra* n 28 at 115.
102 Burdette Part 1 2004 *SA Merc LJ* 253.
103 Van der Linde *supra* n 43 at 43.
104 UNCITRAL *supra* n 28 at 115.

The legislative guide contains recommendations regarding post-commencement finance provisos that should be included in present-day insolvency and creditor systems. Firstly, note is made of the purpose of having post-commencement finance provisions in business rescue legislation; these entail that for the continued operation and survival of the company, a degree of financing is required as well as provision for the correct protection of the entities that supply this type of funding. Finally it must be ensured that protection is granted to those whose rights will be affected by the issuing of such financing.[105]

UNCITRAL recommends specific content be included into the relevant legislation surrounding post-commencement finance. This specifically deals with the attracting and authorising of turnaround funding. Under recommendation 63 it is formulated as follows:[106]

> The insolvency law should facilitate and provide incentives for post-commencement finance to be obtained by the insolvency representative where the insolvency representative determines it to be necessary for the continued operation or survival of the business of the debtor or the preservation or enhancement of the value of the estate. The insolvency law may require the court to authorize or creditors to consent to the provision of post-commencement finance.

Du Preez mentions the fact that UNCITRAL created this recommendation based on three different aspects of post-commencement financing which includes the need for turnaround funding, the sources of such funding and the authorisation of said financing.[107]

In terms of the need for funding, it is clearly critical for a struggling company to have access to funding that will enable it to pay the day-to-day costs of business.[108] The funding could come from various sources (as previously mentioned: liquid assets, incoming cash flow from operations or funding from a third party) and this need for funding should be identified early in the process in order to make sure the continuation of the business is realised after that business has filed for such proceedings.[109] In terms of the sources, there are two types, namely pre-insolvency lenders who provide trade credit or in some instances provide new funds in order to increase the probability of the company surviving and in turn salvaging their initial claims, and lenders with no previous relationship to the distressed company who are motivated by the chance to receive a higher rate of return on an investment.[110] The final pillar in the trio regarding recommendation 63 relates to the authorisation for post-commencement finance; UNCITRAL notes that in various jurisdictions the insolvent entity is allowed to decide

105 *Idem* 118, recommendations 63-68.
106 *Ibid*.
107 Du Preez 22-23.
108 UNCITRAL *supra* n 28 at 113 par 94.
109 *Idem* 114 par 95.
110 *Idem* 115 par 99.

whether new financing is required and then subsequently is authorised to obtain unsecured credit without court approval, whereas in some dominions court approval is required in such circumstances.[111] For this reason UNCITRAL decided that court intervention is only really required where the priority or security derived from the post-commencement financing will affect the interests of pre-existing secured creditors who are inherently against the rescue proposal.[112]

The 64th recommendation relating to the priority for post commencement finance states the following:[113]

> The insolvency law should establish the priority that may be accorded to post-commencement finance, ensuring at least the payment of the post-commencement finance provider ahead of ordinary unsecured creditors, including those unsecured creditors with administrative priority.

This recommendation is based on two considerations. The first one is in respect of expenses relating to the operation of standard business tasks. These are usually dealt with as administration expenses, and such administrative creditors will not rank ahead of secured creditors but will rank ahead of those creditors whose claims are unsecured as well as ahead of statutory priorities such as taxes. In terms of a trade creditor advancing funds to the entity, this is seen as lending funds to the insolvent estate as opposed to a distressed entity, and it is due to this that the funding becomes an expense to the insolvent estate and subsequently attracts a higher ranking.[114] The second reason this recommendation came about was due to the fees of the insolvency representative or professional employed in the matter; in some jurisdictions these costs are assigned super-priority which ranks ahead of administrative creditors.[115]

The next three recommendations relate directly to the security that will or can be lodged in favour of the turnaround funding that is forwarded by the various sources. These recommendations are formulated as follows:[116]

> 65. The insolvency law should enable a security interest to be granted for repayment of post-commencement finance, including a security interest on an unencumbered asset, including an after-acquired asset, or a junior or lower-priority security interest on an already encumbered asset of the estate.
> 66. The law should specify that a security interest over the assets of the estate to secure post-commencement finance does not have priority ahead of any existing security interest over the same assets unless the insolvency representative obtains the agreement of the existing secured creditor(s) or follows the procedure in recommendation 67.

111 *Idem* 117 par 105.
112 *Idem* 117 par 106.
113 *Idem* 118.
114 *Idem* 116 par 101.
115 *Idem* 116 par 102.
116 *Idem* 119.

67. The insolvency law should specify that, where the existing secured creditor does not agree, the court may authorize the creation of a security interest having priority over pre-existing security interests provided specified conditions are satisfied, including:
(a) The existing secured creditor was given the opportunity to be heard by the court;
(b) The debtor can prove that it cannot obtain the finance in any other way; and
(c) The interests of the existing secured creditor will be protected.

Once again it is important to mention the reasons why these recommendations were put forth. These suggestions were based on the following considerations. Firstly it relates to what the security will be (i.e. security can be lodged against unencumbered assets, even though in situations of financial distress these types of assets are hard to come by, or security can be lodged as 'junior security' on encumbered assets in which there is an excess value over the asset relating to an existing obligation).[117] These recommendations came about because in the case of existing lenders, their pre-commencement priority relating to encumbered assets is retained unless otherwise agreed. Additionally, in certain jurisdictions, laws exist which entail that when there is new financing, that source can be ranked above existing secured creditors; but there is often reluctance from the courts on this issue and it is usually only accepted as a final resort.[118]

The final recommendation relating to post-commencement financing issued by UNCITRAL deals with the effect of conversion on post-commencement finance. Under the 68th recommendation this is stated as follows:[119]

> The insolvency law should specify that where reorganization proceedings are converted to liquidation, any priority accorded to post-commencement finance in the reorganization should continue to be recognized in the liquidation.

This was based on the fact that once a company enters liquidation proceedings, the most desirable approach is to make sure those creditors who have acquired a priority for new financing that are preliquidation, will maintain such a priority in any subsequent liquidation. The reason for this is that if this principle does not apply then there is no incentive for investment by potential financiers.[120]

The guidelines set down by UNCITRAL take into account the acute needs of a corporate rescue system in which there is room for successful post-commencement financing of struggling businesses. These guidelines had to be taken into account when developing a new set of corporate rescue laws in South Africa, and as a result our local rules

117 *Idem* 116 par 103.
118 *Idem* 116 par 104.
119 *Idem* 119.
120 *Idem* 118 par 107.

largely comply with what was recommended in these guidelines.[121] It must be noted that in complying, another formidable barrier against the interests of foreign investors has been lowered, and the socioeconomic impact of these laws has had and will continue to have a beneficial effect on all affected persons.[122]

6 Conclusion and Recommendations

A point that is evident from the comparison made between the South African system and the US 'debtor in possession' system has to do with the ranking of creditors. In our local legislation, post-commencement financing does not take the form of a 'super-priority' status when looking at debt repayment by the borrowing entity,[123] as can be seen from the list of rankings mentioned earlier. It is submitted that it may be necessary to revisit the ranking of post-commencement finance claims in an attempt to create a balance between the rights of employees and high-priority claims.[124] It is surmised that this will only come about if the necessary political will is generated in order to create an environment in which high-level negotiations between various stakeholders such as labour unions and policy makers could take place.

Along with this point, the debate about whether or not secured creditors (pre-business rescue) rank higher than all secured post-commencement finance claims under section 135(3)(a)(i) should also be considered. In order for light to be shed on this uncertain area, law and policymakers will have to address the ranking of claims in order for investors and financial institutions to be able to take informed decisions.

A significant issue that seems to have emerged as well is the tendency shown by companies in times of struggle to abuse the new legislation:

> Anecdotal evidence (confirmed by the facts in the many failed applications to court for business rescue orders) strongly suggests that there is widespread abuse of the voluntary business rescue proceedings in terms of section 129 of the Companies Act 2008 by company directors, with the assistance of unethical business rescue practitioners.[125]

121 Burdette 'Some initial thoughts on the development of a modern and effective business rescue model for South Africa (Part 2)' 2004 *SA Merc LJ* 446.

122 *Idem* 447.

123 Du Preez 155.

124 Bradstreet 2011 *SALJ* 359. According to Bradstreet, the reason that these employee claims are ranked highly is due to the fact that if these claims were ranked lower, businesses could suffer a fatal blow in the form of multiple resignations by employees who have lost faith in the company. Bradstreet states that by offering this high-priority claim, employees will have the desired motivation to stay and continue their employment as opposed to cutting their losses and looking for alternative employment.

125 Loubser 2013 *SA Merc LJ* 456.

Such 'abuse' can either be attributed to the legal and financial advisors giving the company incorrect advice, or to the devious need to make unwarranted use of the creditor moratorium that is imposed.[126] Either way, this plays a major role in corroding the trust of potential investors.[127]

As can be seen from what has been discussed so far, one of the main reasons that there seems to be a lack of post-commencement finance in South Africa has to do with the fact that the legislation is underdeveloped. Judicial management did not match up to current predispositions regarding insolvency law due to an undue preference for the interests of the creditors.[128] According to various authors this main characteristic of the system, namely that it was deemed to be 'creditor friendly' also attributed to the failure of that system.[129] South Africa's new Chapter 6 provisions are considered to be 'debtor friendly' as they balance the rights of both the debtor and the creditors.[130] The problem is that due to having had a creditor-friendly regime in this country for so long, a sudden 180-degree change to a debtor-friendly system is not necessarily going to show positive effects immediately.

There are a currently strong demand for a more robust private equity industry in South Africa that not only invests in businesses requiring commercial and financial restructuring but also invests in distressed businesses too. However, it needs to be understood that creating an investment culture that is pro-business rescue among the corporate landscape in South Africa is not going to happen overnight. One of the claims which arise from the legal origins literature is sometimes referred to as the 'quality of law' statement which according to La Porta:[131]

> claims that legal rules shape economic outcomes according to how far they support market-based economic activity as suggested in new institutional economics. It is argued that legal protection of the interests of the shareholders and creditors will increase the flow of investments and enhance the availability of external finance to firms.

In conclusion, one of the conceptual challenges when assessing any legislative process is determining what the measures of success should look like. It is submitted that without accurate and reliable statistics based on international best practice, we have very little foundation for decision-making or improvement.

126 Du Preez 154.
127 Pretorius & Du Preez 2013 *South African Journal of Entrepreneurship and Small Business Management* 185.
128 Bradstreet 2011 *SALJ* 354.
129 Loubser 'Judicial management as a business rescue procedure in South African corporate law' 2004 *SA Merc LJ* 162.
130 Bradstreet 2011 *SALJ* 357.
131 La Porta *et al* 'The Economic Consequences of Legal Origins' 2008 *Journal Economic Literature* 285–332. See also North *Institutions, Institutional Change, and Economic Performance* (1990) for a broad discussion on this topic.

The newly introduced corporate rescue regime has yet to provide us with results that leave us with a sense of accomplishment. The shift away from judicial management was much needed as became clear from the international legislative directives on insolvency law. The contents of Chapter 6 have now potentially placed companies that are in financial distress in a potentially better position with regard to the options available to them. However, in order for the potential turnaround of a struggling entity to become a reality, a degree of financial support is needed in order to satisfy the day-to-day costs of business as well as the long-terms costs of the proceedings.[132] What is evident is that local legislation loosely adheres to the international guidelines relating to the corporate rescue realm but due to the novel approach of Chapter 6, success in this area has not met expectations. The proposition of providing post-commencement finance should be made attractive to investors with the right risk profile. However, it is concluded that any reform effort should only come about as part of a holistic approach to deal with shortcomings in the Act.

132 Van der Linde *supra* n 43 at 41.

Alternatives for the treatment of transfer pricing adjustments in South Africa

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OPSOMMING

Alternatiewe vir die hantering van oordragprysaansuiwerings in Suid-Afrika

Die Inkomstebelastingwet maak tans voorsiening vir 'n geagte dividend as sekondêre aanpassing wanneer 'n maatskappy 'n oordragsprysaansuiwering ingevolge artikel 31 maak. Gegewe die feit dat hierdie bepaling drie keer in die afgelope vier jaar gewysig is, ondersoek hierdie artikel die bepaling om vas te stel of dit konseptueel suiwer is of bloot 'n praktiese maatreël wat in die toekoms verdere wysigings sal noodsaak. Die konseptuele ontleding is gebaseer op die karaktereienskappe van die alternatiewe transaksies waarop sekondêre aanpassings gebaseer word, die vereistes van verbondenheid van persone asook nie-belasting motiewe wat oordragsprysing beïnvloed. Uit die ontleding blyk dit dat die hantering van sekondêre aanpassings normaalweg wel konseptueel suiwer is, behalwe in die geval waar 'n Suid-Afrikaanse beherende maatskappy 'n oordragsprysaanpassing maak wat voortspruit uit 'n transaksie met 'n beheerde maatskappy. Daar word aangevoer dat die moontlikheid van 'n dubbele dividendbelastingimplikasie 'n uitsondering op die sekondêre aanpassing reël vir maatskappye kan regverdig.

1 Introduction

The manipulation of pricing in international trade that leads to capital flight and tax base erosion has long been a concern of governments.[1] Transfer pricing concerns arise when a local company undercharges for its supply of goods and services to connected offshore parties, or is overcharged for goods and services it acquires from such parties. In both

1 OECD *Transfer pricing guidelines for multinational enterprises and tax administrators* (2010) 17; De Boyrie *et al.* 'Estimating the magnitude of capital flight due to abnormal pricing in international trade' 2005 *Accounting Forum* 249.

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instances, the result is a reduction of its taxable profits.[2] Transfer pricing adjustments address the potential mismatch between the profit allocation for tax purposes and the distribution of risks, assets and functions between related parties.[3] In the South African context, the transfer pricing provisions in section 31 of the Income Tax Act[4] aim to prevent this reduction in taxable income. Taxpayers are required to adjust their taxable income to reflect arm's length amounts if they enter into transactions with connected persons outside South Africa on terms or conditions that are not at arm's length and derive a tax benefit from such terms and conditions. Section 31(2) requires a primary adjustment to correct the direct impact of non-arm's length pricing on the taxable income of a South African taxpayer by increasing such taxable income.[5] The shifting of value through artificial pricing may however also provide taxpayers with an opportunity to avoid other tax implications – for example, withholding taxes on distributions, in the host country.[6] In order to adjust the overall tax effect of the value allocation to what it would have been had it not been for the non-arm's length pricing arrangement, the domestic tax law of a country may require a further adjustment, which is commonly referred to as a secondary adjustment.[7]

Prior to the amendments of section 31 in 2012, a secondary adjustment existed in the form of a deemed dividend that was subject to Secondary Tax on Companies. Section 31 was amended to deem a primary adjustment to give rise to a notional loan, which was in turn deemed to be an affected transaction that required a further adjustment to taxable income due to the lack of interest charged on this notional loan.[8] With effect from 1 January 2015, section 31(3) was again amended due to the concerns regarding the administrative burden on taxpayers and the tax authorities as well as complications in respect of exchange controls caused by the notional loan.[9] This section now deems a resident company to have paid a dividend if a transfer pricing adjustment arises between itself and a connected non-resident or another resident's permanent establishment outside of South Africa.

2 SARS *Practice Note 7: Section 31 of the Income Tax Act, 1962 (the Act): Determination of the taxable income of certain persons from international transactions: Transfer pricing* (1999) 5; OECD *supra* n 1 at 19; Kotze 'Internal transfer pricing, be careful, very careful' 2011 *TaxTalk* 16-17.

3 OECD *Multi-country analysis of existing transfer pricing simplification measures* (2012) 14.

4 58 of 1962, hereinafter the Act (any reference to a section in this article refers to a section in the Act unless specifically indicated otherwise).

5 OECD *supra* n 3 at 14.

6 European Commission *Final report on Secondary Adjustments Directorate – General Taxation and Customs Union* (2013) 3.

7 OECD *supra* n 1 at 28.

8 Section 57 of the Taxation Laws Amendment Act 24 of 2011; National Treasury *Explanatory memorandum on the Taxation Laws Amendment Bill 2014* (2014) 61.

9 Section 50 of the Taxation Laws Amendment Act 43 of 2014.

Given the number of changes to the secondary adjustment and in particular the change back to a deemed dividend – a position which warranted an amendment to a deemed loan in 2012 – the question arises whether the 2015 amendment is conceptually sound or merely a temporary practical expedient that may ultimately require further amendments. The aim of this article is to consider whether the nature of the secondary adjustment to be made by a resident company is conceptually sound. The basis for the conceptual analysis is provided in part 2 of the article. The conceptual analysis that was performed is reported in part 3 and the article concludes with findings and recommendations in part 4.

2 Basis for the Conceptual Analysis of Section 31(3)(i)

The conceptual analysis of section 31(3)(i) was based on the main requirements that impact on the application of the section. In addition, the alternatives suggested for the potential treatment of the adjustment were taken into consideration. The characteristics of each of the underlying transactions on which the hypothetical adjustment can be based are considered in paragraph 2 1 below. The relationships that result in persons being connected to a company and therefore potentially subject to transfer pricing adjustments are explored in paragraph 2 2. Lastly, the reasons and motives affecting pricing between related parties as evidenced in the literature are discussed in paragraph 2 3.

2 1 Nature of the Underlying Transactions

The Organisation for Economic Co-operation and Development (OECD) identified a dividend, loan (debt) and equity contribution as the most common constructive transactions as a basis for secondary adjustments.[10] The critical and distinguishing characteristics of each of these three transactions are identified in this part of the article based on definitions in the Act and other relevant legislation as well as case law, all of which may provide a legal perspective on the nature of the underlying transaction. The analysis is expanded to also include International Financial Reporting Standards (IFRS), which often classifies a transaction or event on its substance as opposed to its legal form.[11]

2 1 1 Dividend

A dividend is defined in section 1 as:

> any amount transferred or applied by a company that is a resident for the benefit or on behalf of any person in respect of any share in that company, whether that amount is transferred or applied –

10 OECD *supra* n 1 at 28.

11 International Accounting Standards Board (IAS) *Conceptual Framework for Financial Reporting* (2010) 26.

(a) by way of a distribution made by; or
(b) as consideration for the acquisition of any share in, that company.

This definition excludes certain transfers that meet these requirements if made from capital (in the context of the Act, this is referred to and defined in section 1 as contributed tax capital).

The definition of a dividend does not limit the counterparty to whom the benefit is transferred to a shareholder as it refers to *any* person. A shareholder does not have to receive the benefit personally but may also benefit from amounts flowing to another entity under its control.[12] The Companies Act's[13] definition of a distribution similarly refers to a transfer of money or property to or for the benefit of the shareholder of such company or any other company in a group scenario.

The term 'amount' includes anything that has a monetary value.[14] It is submitted that this view may be of particular relevance to a transfer pricing adjustment as it was expressed in the context of a transaction where a benefit (use of funds without paying interest) was derived without being realised in cash. This scenario has some similarities to a transfer pricing adjustment where goods or services exceeding the cash consideration are transferred to the counterparty. The term amount, in the context of a dividend, may also include the transfer of property or another benefit (for example, the right of use of the property) for consideration less than its market value, as this represents value transferred by a company to or on behalf of a shareholder.[15]

A characteristic of a dividend, which is implied in the above discussion, is that the transfer of the amount contemplated should not involve any consideration in exchange for the transfer from the counterparty.[16] This excess value over consideration paid (if any) constitutes a distribution from earnings and profits,[17] which is in line with the IFRS definition of a dividend being a distribution of profits.[18] In the context of a transfer pricing manipulation, the implicit profit extraction is evident from the fact that a transaction at arm's length would have left the company with greater distributable profits.

Therefore, it is submitted that a dividend represents an extraction of something of value from the company,[19] whether cash or otherwise, in

12 *Shedd v Commissioner of Inland Revenue (CIR)* 2000 TC Memo 292 p 15.
13 71 of 2008, hereinafter the Companies Act.
14 *Brummeria Renaissance (Pty) Ltd v CSARS* 2007 (69) SATC 205 p 213.
15 Cliffe Dekker Hofmeyr *Large corporates and their tax advisers in the cross-hairs? Sale of asset for less than* market value: a dividend? (2012) 4 available from http://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/news/publications/2012/tax/downloads/Tax_Alert_-11_May_2012.pdf (accessed 2013-06-02).
16 *Shedd v CIR supra* n 12 at 15.
17 Helminen *The dividend concept in international tax law* (1999) 1.
18 International Accounting Standard (IAS) 18 *Revenue* at par 5.
19 Jenks 'Constructive dividends resulting from section 482 adjustments' 1970 *Tax Lawyer* 84.

a manner that a shareholder of the company, directly or indirectly, benefits through another related entity without the distributing entity receiving equivalent consideration in exchange for the value so transferred.

2 1 2 Equity Contribution

Unlike the term 'dividend', the Act does not directly refer to the term of an equity contribution. It however alludes to this concept in the definition of 'contributed tax capital' in section 1, which essentially refers to an amount of consideration received for the issuing of shares in the company. Similarly, the Companies Act does not explicitly refer to an equity contribution or capital, but makes provision for consideration to be paid for the subscription of shares in sections 39 and 40. In economic terms, the concept of equity contribution generally refers to funds invested in a company.[20] Such funds invested would be exposed to the risk of the business, as opposed to loans that are only exposed to credit risk.[21] Unlike debt, capital would not ordinarily be returned to the investor in the normal course of the business.[22] An investor, in contrast to a lender, profits through the growth of the business in the form of dividends or share value growth and will not necessarily withdraw funds in advance.[23]

In addition, the withdrawal of such an equity contribution is generally at the discretion of the company, in contrast to a loan that has fixed and enforceable repayment terms. For financial reporting purposes, a financial instrument is classified as an equity instrument – the financial reporting equivalent of an equity contribution – if the instrument includes no contractual obligation to deliver cash or other financial assets to another entity.[24] Equity is distinguished from a financial liability by the fact that the entity cannot avoid making repayments to settle a contractual obligation relating to a liability, while any payment made in respect of an equity instrument can be avoided and, therefore, are at the discretion of the company.[25]

Therefore, it is submitted that the defining characteristics of an equity contribution is that it constitutes the transfer of property or funds by an investor (owner) to a company, where such company is under no obligation to repay such investment to the investor but may do so at its own discretion. In addition, the investor shares in the growth of the business of the company but is also exposed to the risk of the business.

20 *Sage Holdings Ltd v The Unisec Group Ltd* 1982 (1) SA 337 (W) p 303.
21 *Schlemmer v Viljoen* 1958 (2) SA 280 (T) p 288.
22 Ibid.
23 Keyes *Federal taxation of financial instruments and transactions* (2013) 1.
24 IAS 32 *Financial Instruments: Classification and Presentation* at par 11.
25 IFRS *A guide through International Financial Reporting Standards* (2012) 956.

2 1 3 Debt

Neither the Act nor the Companies Act defines the terms 'loan' or 'debt'. The ordinary meaning of a loan is 'a thing that is borrowed, especially a sum of money that is expected to be paid back with interest'.[26] A loan would generally contain stipulations regarding interest and capital repayments.[27] A further important trait of a loan is that it has an unconditional, fixed or definite obligation to repay a sum on a set date, along with a fixed percentage of interest, normally regardless of the debtor's profitability or lack thereof.[28] This characteristic is supported by the financial reporting definition of a liability which requires a contractual obligation to deliver cash, or another financial asset, to another entity or to exchange financial assets or financial liabilities with another entity under conditions that are potentially unfavourable to the entity that has the liability.[29] Unlike an equity instrument, the classification of an instrument as a financial liability requires that the entity has an unavoidable unconditional obligation to make repayments. In order to ensure that these obligations are met, the counterparty (lender) would generally prefer not to have a subordinated claim[30] and may require security or collateral to ensure enforcement of the obligation.[31] This feature of compulsory repayment is clearly distinguishable from the discretionary nature of payments made in respect of equity instruments that are likely to only be made if the borrower is in a position to make such repayments.

It is therefore submitted that the distinguishing characteristics of debt (loans), as opposed to a dividend or equity contribution, is the unavoidable requirement to repay the benefit or funds transferred, irrespective of the financial position of the entity.

2 2 Relationships Covered by Section 31(3)(i)

Section 31(3)(i) applies to a resident company transacting with a non-resident (including a controlled foreign company, as defined in section 9D) or a foreign permanent establishment of another resident that is connected to the first mentioned resident company. In this part of the conceptual analysis the connected person relationship, which is a prerequisite for a primary adjustment that may ultimately trigger a secondary adjustment, is considered. Literature on the composition of multinational groups as well as the definition of a connected person in the Act is the basis for the analysis.

26 *The Oxford University Press Dictionary* (2013).
27 *Schlemmer v Viljoen supra* n 21 at 288.
28 *Curry v United States* 1968 396 F2d 630, 634 (5th Cir) par 634.
29 IAS 32 *Financial Instruments: Classification and Presentation* at par 11.
30 *Nestle Holdings Inc. v CIR* 90 TC 682 (1995) p 17.
31 *Roth Steel Tube Co. v CIR* 800 F2d at 630 (6th Cir. 1986) p 4.

2 2 1 Composition of Multinational Groups of Companies

A multinational group consists of a parent corporation in the home country and operates through affiliates, whether in the form of branches or separately incorporated subsidiaries, in host countries.[32] These affiliates operate in an interlocking network of activities and would work more or less in tandem depending on the control exercised by the parent company.[33] Subsidiaries generally enjoy some degree of freedom from the control of the parent, but are ultimately required to contribute to the objectives of the group as a whole.[34] As a result the behaviour of each entity is subject to the multinational group's unified control, compatible with a certain degree of decentralised decision making that could be deliberately allowed by the parent company to achieve certain commercial outcomes.[35] Ownership requirements in various locations, for example, Broad-based Black Economic Empowerment in South Africa, may cause minority interests to exist in a multinational group. A layered structure where the ultimate control and concentration of value is separated from the operational activities may often exist to limit, or hollow out, the value being attributed to the minorities.[36]

Literature on the composition of multinational groups clearly distinguish between entities with a controlling role and those with an operational role. The structure of a multinational group typically involves a central ownership structure from which control is exercised over foreign affiliates.[37] Research shows that multinational group structures tend to use pyramidal structures with the ultimate owner or group of owners controlling a structure of operational companies.[38] This control may be concentrated in a group of persons including the state, entrepreneurs or families.[39] Functions performed at the controlling level of a multinational group structure include capital decision making,

32 Kopits *Taxation and multinational firm behaviour: a critical survey* (1976) 626.
33 Eden *Taxing Multinationals: Transfer pricing and corporate income taxation in North America* (1998) 6.
34 Sakurai 'Comparing cross-cultural regulatory styles and processes in dealing with transfer pricing' 2002 *International Journal of the Sociology of Law* 176.
35 Kopits *supra* n 32 at 627.
36 Naiping *et al.* 'A Regression Analysis on Ultimate Shareholders and Corporate Financial Performance, and Capital Structure' 2013 *International Journal of Nonlinear Science* 235.
37 Kopits *supra* n 32 at 627.
38 La Porta *et al.* 'Corporate Ownership around the World' 1999 *The Journal of Finance* 477; Claessens *et al.* 'Disentangling the Incentive and Entrenchment Effects of Large Shareholdings' 2000 *Journal of Financial Economics* 82.
39 Faccioa & Lang 'The ultimate ownership of Western European corporations' 2002 *Journal of Financial Economics* 393; Xia 'Founder Control, Ownership Structure and Firm Value: Evidence from Entrepreneurial Listed Firms in China' 2008 *Journal of Accounting Research* 32; Zhu *et al.* 'A Regression Analysis on Ultimate Shareholders and Corporate Financial Performance, and Capital Structure' 2013 *International Journal of Nonlinear Science* 228.

strategic activities and headquarter functions.[40] For purposes of this article, an entity that fulfils this role is referred to as a controlling entity.

Below the controlling structure, a multinational group would consist of subsidiaries or branches, either newly established or acquired through cross-border acquisition activities.[41] The roles of these entities vary depending on the resources and markets available in the different locations where such entities are situated.[42] Functions typically carried out at different locations by lower level group entities are likely to be operational and could range from securing of materials or inputs, sale and distributions of goods or services, group service functions and research and development activities.[43] Integration or expansion of activities through entities in multiple locations may be vertical, with functions feeding into each other in the value chain, or horizontal, where the location, protectionist barriers, transport costs or other peculiarities of local demand may demand duplication of functions.[44] For purposes of this article, an entity fulfilling this role is referred to as an operational or controlled entity.

2 2 2 Definition of Connected Person in Relation to a Company

The definition of connected persons, as contained in section 1(1) and explained in Interpretation Note 67, should be considered in light of this composition and operation of multinational groups. In relation to a company, the definition distinguishes between connected persons that are companies and other persons.

Any company is considered to be connected in relation to another company if it forms part of a group of companies where a controlling company holds more than 50 per cent of the shares of a company and such controlling company, together with its controlled companies, hold more than 50 per cent of the shares of the company in question.[45] This definition recognises a structure with a controlling 'parent' or company which corresponds to the centrally controlling structure identified from the literature.[46] The literature in paragraph 2 2 1 suggested that, in practice, the structure would consist of controlled operational entities in various geographical areas. The South African entity subject to section 31 could either be an investor (controlling company) or a controlled company. The relationship and the role of the South African entity that is subject to the transfer pricing adjustment can be distinguished for

40 Crescenzi *et al*. 'Innovation Drivers, Value Chains and the Geography of Multinational Firms in European Regions' 2012 *London School of Economics and Political Science Europe in Question Discussion Paper Series (LEQS)* 5; Naiping *et al. supra* n 36 at 235.
41 Barrios *et al*. *International Taxation and Multinational Firm Location Decisions: European Communities* (2009) 2.
42 Guillen *Understanding and Managing the Multinational Firm* (2006) 1.
43 OECD *supra* n 3 at 14.
44 SARS *Practice Note 7 supra* n 2 at 5.
45 Par (d)(i) of the definition 'connected person' in section 1(1) of the Act.
46 Kopits *supra* n 32 at 626.

purposes of the connected person definition as being a controlling group company (i.e. a company that holds the shares in the other) or a controlled group company (i.e. a company whose shares are held by the other), as described in the definition of 'group of companies' in section 1(1).

The definition also covers the scenario where another company holds at least 20 per cent of the equity shares or voting rights of the company subject to the transfer pricing adjustment.[47] As paragraph (e) of the definition effectively requires application in both directions of the relationship, this requirement may apply to a resident company having to make the transfer pricing adjustment in respect of a transaction with an investor or in an investee relationship where the interest held by the resident company is less than 50 per cent. The presence of minority shareholders generally causes transactions to be closer to arm's length terms, depending on the role and influence of the minority shareholder.[48] It is submitted that non-arm's length terms and conditions in a relationship with an interest of less than 50 per cent shareholding is unlikely given the loss in value to external parties that may be suffered should value be shifted to such an entity. Relationships involving interests of between 20 and 50 per cent were therefore not considered in this analysis.

The last component of the definition that applies between two companies is where a company is managed or controlled by a connected person in relation to the resident company, being subject to the transfer pricing adjustment, or by a connected person in relation to such a connected person.[49] In this context, 'managed' refers to being responsible to run the business and control – as referring to *de facto* control – being evident because of the presence and influence on the company's affairs.[50] This interpretation is unlikely to refer to a relationship where either of the entities invested in the other entity or controls the other entity. As such, it is submitted that the relationship refers to two entities under common control or management.

In relation to persons other than a company, a person that holds at least 20 per cent of the equity shares or voting rights in such company is considered to be a connected person.[51] As the requirement relates to shareholding in a company, with the resident company being the only company in this equation, this component of the definition is likely to refer to the other person being part of the ownership structure of the group, as opposed to an operational unit. It is therefore submitted that in this context the company, being subject to the secondary transfer pricing

47 Par (d)(v) of the definition of 'connected person' in section 1(1) of the Act.
48 OECD *supra* n 1 at 115.
49 Par (d)(vA) of the definition of 'connected person' in section 1(1) of the Act.
50 Par 3.5.5 of SARS *Interpretation Note (IN) No. 67 to the Act: Connected Persons* (2012) 22.
51 Par (d)(iv) of the definition of 'connected person' in section 1(1) of the Act.

adjustment, will arguably fulfil the role of investee as opposed to the investor.

2 3 Economic Reasons and Motives for Transfer Pricing in Multinational Groups of Companies

Literature in the field of business and financial management suggests that multinationals have both internal (managerial) and external (financial) motivations when setting a transfer price.[52] Minimisation of tax liabilities, achieving goal congruence and the motivation of management effort are some of the most important objectives of transfer pricing within a group.[53] Not all transactions that require a transfer pricing adjustment would necessarily be motivated by obtaining a tax benefit. Section 31(2) merely requires that a tax benefit be derived, but does not go as far as requiring a determination of the motive for the non-arm's length terms and conditions. This section of the article explores motives and reasons, other than a tax saving, that may affect transfer pricing. Where non-tax motives exist in setting the transfer price, the tax treatment should provide an outcome that is not clearly contrary to such motives.

2 3 1 Internal Motives

2 3 1 1 Performance management and evaluation

Ultimately the overall objective of a multinational group is to maximise the profit of the group as a whole, as opposed to the performance of each component of the group.[54] This requires performance to be managed from the bottom of the structure upwards by evaluating the performance of the divisional managers and the divisions individually.[55] The process units in the structure may be evaluated as individual profit centres and assessed on its profits.[56] Pricing negotiations by independently assessed business units should, in principle, result in the pricing approximating an arm's length pricing arrangement due to the bargaining and individual interests at stake as this simulates an open market environment.

Evidence of hard bargaining alone may however not necessarily be sufficient to conclude that the transaction is at arm's length.[57] Given an

52 Eden & Reuter *Transfer price manipulation* (2012) 210; Bernard *et al.* 'Transfer pricing by U.S.-based multinational firms' 2006 *National Bureau of Economic Research* 2.

53 Horngren *et al. Cost Accounting – a managerial analysis* (2015) 883.

54 Hirshleifer 'On the economics of transfer pricing' 1956 *The Journal of Business* 172; Hirshleifer 'Economics of the divisionalised firm' 1957 *The Journal of Business* 100.

55 Cools *et al.* 'Management control in the transfer pricing tax compliant multinational enterprise' 2008 *Accounting, Organizations and Society* 3.

56 Eden *International taxation, transfer pricing and the multinational enterprise* (2001) 593.

57 Kopits *supra* n 32 at 626.

objective of overall group profit maximisation,[58] minimisation of the overall tax burden impacts positively on the group's overall profitability and may cause performance management to be done on such a basis that it encourages the lowering of the overall tax liability.[59] Decisions made by group management, including performance objectives and related pricing arrangements, may be developed to influence the allocation of profit, capital components and cash flow across the centres that can achieve this outcome.[60]

Therefore, it is submitted that performance management and evaluation as a primary motivation should not result in transfer pricing manipulation. Where this is however used as one of the tools to lower the overall tax burden, with actual performance management being of secondary importance, this may be a motivation to manipulate transfer pricing. It is therefore submitted that performance management is unlikely to motivate non-arm's length pricing for reasons other than obtaining a tax saving. As such, this motive is not considered further as part of the conceptual analysis.

2 3 1 2 Operational Objectives

Market entry

Subsidiaries, amongst others, could be established by a multinational group in order to gain entry into a new market.[61] An entry strategy of the group could be to charge lower transfer prices to, or put differently, to subsidise the subsidiary.[62] The OECD aptly describes a market entry strategy as the reduction in current profits in anticipation of increased future profits.[63] Market entry gained through a wholly-owned subsidiary is likely to lead to a normal profit allocation and return on investment in the long-run.[64]

Efficiency considerations

In addition to assisting a subsidiary to enter a new market at a competitive price, pricing may also be used to allow a market leader to

58 *Idem* 597; Cristea & Nguyen *Transfer Pricing by multinational firms: new evidence from foreign firm ownerships* (2013) 27 available from http://pages.uoregon.edu/cristea/Research_files/transfprice.pdf (accessed 2014-05-13).

59 OECD *supra* n 1 at 31.

60 Steens *How managerial transfer pricing can help create economic value* (2011) 75.

61 Birkinshaw & Hood 'Multinational subsidiary evolution: Capability and charter change in foreign-owned subsidiary companies' 1998 *Academy of Management Review* 773.

62 Schjelderup & Sørgard 'Transfer pricing as a strategic device for decentralised multinationals; 1997 *International Tax and Public Finance* 278; Porter *Competitive advantage: creating and sustaining superior performance* (1985) 12.

63 OECD *supra* n 1 at 50.

64 Twarowska & K?kol *International business strategy – reasons and forms of expansion into foreign market* (2013) 1007.

institute price reductions in response to slack demand or declining markets in a geographic area.[65] This, however, may also be a strategy to obtain further growth in a market in which the entity or group already functions. Companies could be enabled to institute price reductions if other companies in the group charge a lower transfer price to the company.[66] This decision may be taken at a central level where the group's operating strategy is determined and merely implemented or enforced on the level of operating companies.[67] Such a pricing strategy indirectly provides financial assistance to the company and as a result, benefits the group as a whole.[68]

2 3 2 External Motives

2 3 2 1 Difference in Corporate Income Tax Rates and the Avoidance of Duties

Opportunities exist for multinational groups to exploit differences in policies and tax rates between countries in order to minimise their overall tax burden, thereby maximising the ultimate shareholder profits.[69] This exploitation may involve the artificial shifting of profits[70] or, by the misclassification of products, to circumvent export duties.[71] Such a shift in profits is often accompanied by the repatriation of such profits into the group or to the shareholder in a different form, for example, dividends that may be subject to tax at a lower rate or be exempt from tax.[72] It is submitted that this type of profit shifting is precisely the activity that transfer pricing provisions in tax legislation aim to prevent.[73] As such, this motivation for the pricing arrangement does not constitute a valid business reason, other than obtaining a tax benefit, to be factored into the conceptual analysis. Arguably, this is the case even when the reason for the manipulation relates to circumvention of duties, despite the fact that such duties do not meet the definition of tax as per the Act that only relates to income tax, as the underlying reason cannot be linked to another valid non-tax business objective.

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65 Cravens 'Examining the role of transfer pricing as a strategy for multinational firms' 1997 *International Business Review* 134.

66 Schjelderup & Sørgard 1997 *International Tax and Public Finance* 278.

67 Kind *et al.* 'Corporate tax systems, multinational enterprises, and economic integration' 2005 *Journal of International Economics* 510.

68 Ibid.

69 Lin & Chang 'Motives of transfer pricing strategies – systemic analysis' 2010 *Industrial Management & Data Systems* 2; Cristea & Nguyen *supra* n 58 at 26.

70 Li & Balachandran 'Effects of differential tax rates on transfer pricing' 1996 *Journal of Accounting, Auditing and Finance* 191.

71 Goetzl 'Why don't trade numbers add up?' (2005) *International Tropical Timber Organisation (ITTO) Tropical Forest Update* 9.

72 Kocieniewski 'G.E.'s strategies let it avoid taxes altogether' *The New York Times* (2011-03-24) available from http://www.nytimes.com/2011/03/25/business/economy/25tax.html?pagewanted=all&_r=0 (accessed 2014-04-24).

73 OECD *supra* n 1 at 32.

2 3 2 2 Country and Currency Related Motives

Many countries, in particular on the African continent, have some form of exchange control regulation aimed at maintaining the stability of its own currency and managing its balance of payments.[74] Restrictions imposed by such measures however limit the accessibility of funds in a multinational group. Circumvention of foreign exchange control restrictions in order to prevent losses due to the devaluation of the currency of a country may play an important role in the setting of transfer prices by multinational groups.[75] Pricing of related party transactions can be used as a method of moving profits (value) in a form other than cash, for example, attempting to overcharge for management services rendered rather than drawing funds as dividends, despite such restrictions.[76] The OECD views foreign exchange restrictions as a governmental pressure and confirms that this may cause transfer prices to be manipulated due to cash flow requirements of multinational groups.[77] A closely related risk is country risk. Country risk occurs in the following two forms: Risk of sovereignty (the risk of possible expropriation and profit restriction) and transfer or convertibility risk (when the central bank cannot mobilise enough foreign reserves in order to convert financial funds in the local currency to a foreign currency).[78] The presence of such risks may lure multinational groups into attempting to transfer wealth out of a country to avoid the erosion of its future value in times of political uncertainty.[79] It is submitted that this motive is not primarily driven by the tax benefit to be obtained from the pricing, even though the tax benefit may play a secondary role. As such, this motive is considered in the conceptual analysis.

3 Conceptual Analysis of the Treatment in Section 31(3)(i)

Section 31(3)(i) deems any transfer pricing adjustment by a resident company arising from a transaction with a connected non-resident or a connected resident's foreign permanent establishment to be a deemed dividend. In this part of the article it is considered whether it is

74 Douglas *Are exchange controls a benefit or detriment to African business?* (2014) 1; World Bank Group *Restrictions on Foreign Investors/Currency Exchange Controls* available from http://ppp.worldbank.org/public-private-partnership/legislation-regulation/framework-assessment/legal-environment/foreign-investor-currency-exchange-restrictions#CurrencyExchange (accessed 2015-06-05).

75 Chan & Chow 'An empirical study of tax audits in China on international transfer pricing' 1997 *Journal of Accounting and Economics* 101.

76 OECD *supra* n 1 at 214.

77 *Idem* 55.

78 Petrovi? & Stankovi? 'Country risk and effects of foreign direct investment' 2009 *Economics and Organization* 12.

79 Lensink *et al.* 'Capital flight and political risk' 2000 *Journal of International Money and Finance* 74; Mohamed & Finnoff *Capital flight from South Africa, 1980 to 2000* (2004) 3; OECD *supra* n 1 at 215.

conceptually sound to treat all secondary adjustments by companies as dividends. This analysis is structured to consider the position from the perspective of the two roles that the resident company may fulfil in a multinational group (as identified in paragraph 2 2), namely an operating or controlled company in paragraph 3 1 and controlling company in paragraph 3 2. This is done to establish the direction of the likely flows of value, which is a critical factor in the conceptual analysis. For each of these roles, the appropriateness of the dividend treatment is considered by having regard to the non-tax motives for pricing, as identified in paragraph 2 3, and the characteristics of the alternatives for underlying transactions, as considered in paragraph 2 1.

3 1 Resident Company Performs the Role of an Operating Entity Within the Group

Operations within a multinational group are likely to take place in operating subsidiaries located across various geographical regions. In the context of the definition of a connected person in the Act, such subsidiaries are likely to be connected to the parent, or the central holding structure, as controlled companies contemplated in paragraph (d)(i) of this definition. Such an entity is connected in relation to both the central holding entity as well as other operating or controlled entities held within the same structure. Paragraph (d)(v) of the definition also refers to structures where entities, other than companies (for example a trust), invests and holds shares in a company. Similarly, paragraph (d)(vA) of the definition results in entities that form part of the same structure by reason of ultimately being controlled or managed by the same persons to be connected. For purposes of this analysis, it is assumed that where the South African resident entity subject to transfer pricing is connected in relation to the counterparty to a transaction, firstly, as investee or, alternatively, by reason of being commonly controlled, that such entity fulfils the role of an operating entity in the multinational structure. In such a case the benefit (underpriced goods or services or overpayment for supplies made to it) will be transferred horizontally to another related operating entity under common control or alternatively upwards into the holding structure for the owners of the structure to be able to extract such a benefit.

Based on the review of the literature on the characteristics of a dividend, as considered in paragraph 2 1 1, a dividend would be something of value, whether cash or otherwise, that is transferred to a person in such a manner that the shareholder of the company benefits, directly or indirectly through another related entity, without the distributing entity receiving equivalent value in exchange for such transfer. It is submitted that where the resident operating company transfers value, either horizontally or upwards into the holding structure, such benefit is extracted from the entity for the benefit of its owner.

This transfer may be direct, in the case of an upward distribution, or indirect, in the case of a horizontal shift of value to an entity in which the

ultimate owner has an interest and from which the value can be extracted by the ultimate owner. If a transfer pricing adjustment is required, this implies that the resident company does not receive something of equivalent value in exchange for what is given up. In light of the fact that value could ultimately be extracted to the top of the structure where the operations are owned, as indicated in paragraph 2 2 1, there is no indication, nor any reason, why such value would be repaid to the resident operating company in future. This lack of an agreement or implied repayment terms eliminates the benefit from being treated as a constructive loan. As the resident transferor has no apparent stake in the business and risks of the transferee, it is submitted that a value shifted through transfer pricing by a resident company in this context lacks this essential characteristic of an equity contribution. Based on the characteristics of the three alternatives it is submitted in the context of a resident company being an operating or controlled entity in a multinational structure that the treatment of the value transferred as a dividend appears to be conceptually sound.

As part of an integrated product or service value chain of a multinational enterprise it is submitted that the resident company subject to section 31 may be involved in non-arm's length pricing arrangements aimed at achieving overall efficiency of the group. This may, in certain instances as, indicated in paragraph 2 3 1, require the South African entity to subsidise another operational entity in which case a tax benefit may arise in the hands of the South African entity. In this context, it is submitted that the beneficiary of the value transferred is likely to be the operating entity with which the resident company transacts (i.e. horizontal transfer). This does not alter the direction and nature of the value flow considered above.

Regarding the external motives for such pricing arrangements, the goods or services supplied or acquired by the resident company may be part of a scheme to withdraw value indirectly from a location with high currency and country risk (see par 2 3 2). However, it is submitted that such a withdrawal strategy, involving the flow of goods or services, would still take place horizontally in the case of an operating entity forming part of the value chain. Given that the controlling structure of a multinational group would generally be located in a democratic country or one with relatively low country risk,[80] an upward extraction of value may be used to remove funds that originated from activities in a high-risk regime. A downward redistribution of funds may not necessarily achieve the desired outcome, as this would mean that the funds or value would eventually have to pass through the high-risk regime again to be extracted. As the transfer pricing regime in section 31 is aimed at the artificial shifting of funds that reduce profits in South Africa, the motive of pricing manipulation to circumvent currency or country risk will arguably only result in South African transfer pricing adjustments if the South African environment or currency is viewed as posing such a risk

80 Barrios *et al*. supra n 41 at 8 & 26.

which value has to be shifted away from. It is therefore submitted that this motive supports the direction of the value flow as indicated above.

Based on the position of such an operating resident company in a multinational structure and the fact that value is likely to be shifted horizontally or upwards, based on the non-tax motives that may be relevant in determining pricing arrangements, it is submitted that the treatment of the secondary adjustment as a constructive dividend, which is subject to dividends tax, is conceptually sound in the case of a South African resident operating company, as value is shifted away from South Africa to a location from which the ultimately shareholders or owners will benefit from it.

3 2 Resident Company Performs the Role of Investor in the Group

The definition of a 'connected person in the Act, in particular paragraph (d)(i) read with the definition of group company, includes the scenario where a connected person's relationship is triggered by the fact that the resident company acts as an investor in other companies (this position differs from that considered in paragraph 3 1 where the resident company was connected to the counterparty that it deals with by reason of being an investee or commonly controlled). In this instance, the resident company, in its role as investor, may perform the function of being the central point of control in the structure, or at least an intermediary point of control. This role of South African companies is supported by the South African National Treasury's drive to make South Africa attractive as a gateway for holding companies to invest and expand into Africa.[81] It is submitted that paragraphs (d)(vA) and (d)(v) are both only triggered by a relationship where the company is the investee or is controlled by another person. Based on the literature review in paragraph 2 2 1, control of a multinational group structure is likely to be concentrated in a few entities in a pyramidal structure while there may be a larger number of operating entities.

A key characteristic of a dividend, as indicated in paragraph 2 1 1, is that something of value, whether cash or otherwise, is transferred to a person in such a manner that the shareholder of the company benefits, directly or indirectly, through another related entity. In relation to the investor resident company itself, it becomes questionable whether this element will always be met. It is submitted that the direction of the flow of value subject to the transfer pricing adjustment is critical. If the adjustment takes place horizontally to an operating entity which is directly controlled by another controlling entity or upwards, to the shareholder of the controlling or investor entity, the transaction will meet this requirement and the treatment as a dividend would be conceptually

81 National Treasury *Explanatory memorandum on the Taxation Laws Amendment Bill 2013* (2013) 1; PWC *International transfer pricing 2013/2014* (2013) 192.

sound. If however the value is transferred downwards in the group structure, no real benefit would have been extracted from the sub-part of the group owned by the resident investor company's shareholder, either directly or indirectly. The value stays in or below the resident company in the structure, and would arguably still have to be extracted for the benefit of the resident company's shareholder in future. This future extraction would be subject to a dividend withholding tax. If the downward transaction also attracts dividends tax, the same value may potentially be subject to dividends tax twice. This unintended effect stems from the fact that a deemed dividend is not a conceptually sound outcome on a downward transaction with a controlled company.

Therefore, it is submitted that the treatment of value transferred by a resident investor company, which attracts a transfer pricing adjustment, is conceptually sound only if the value is transferred horizontally or upwards, but not when shifted to an entity in which the resident company holds an interest. In light of the fact that the secondary adjustment is only a hypothetical transaction, the critical element of debt, as determined in paragraph 2 1 3, to have an obligation to repay the benefit is unlikely to exist. Such a transfer of value to an investee, however, is likely to display the defining characteristics of an equity contribution, as set out in paragraph 2 1 2, in that the value is shifted or contributed to an entity in which the investor has an interest in the growth but also the risk of the business. As controlling entity in the structure, the resident company should have a controlling or management influence over the benefit transferred and its repatriation or utilisation. Lastly, whether the value flows back to the resident investor or not, depends on the performance of the investee and is likely to be discretionary. It is submitted that in this instance, the transfer of value has the characteristics of an equity contribution, rather than those of a dividend.

The consideration of reasons and motives for horizontal or upward transfers by such a controlling entity should be similar to those discussed in paragraph 3 1 and are not repeated here. In the context of a controlling company transferring value downwards in the structure, it is submitted that the internal motive of a pricing arrangement to enable market entry or otherwise provide assistance to the investee, as identified in paragraph 2 3 1, may feature strongly. Treatment of such a transfer as an equity contribution will be consistent with the characteristics identified as the value shifted to the investee is likely to be at risk, if such investee requires assistance, but may increase the value of the resident company's interest should the assistance be successful. It is submitted that this motive for transfer pricing does not alter the direction of the flow of value as discussed above. A potential double dividends tax implication, as indicated above, that may arise if the South African controlling entity contributes towards controlled entities in the form of startup assistance through pricing may impact adverse on the use of South Africa as an investment gateway into the rest of Africa.

The external, non-tax, motive for pricing arrangements identified in paragraph 2 3 2, namely extraction of value from high country or currency risk environments, should in principle not apply in a downward direction from the controlling company to the controlled company as this would imply that the central controlling company is situated in the high-risk environment, which is highly unlikely to be the case based on the views of commentators that such entities are normally located in stable democratic countries.[82] This motive, therefore, has not been considered further in the context of downward transactions by controlling companies.

4 Conclusion on the Conceptual Analysis

Based on the analysis performed in this article, it is submitted that the treatment of a transaction that requires a secondary adjustment as a deemed dividend would generally be conceptually sound taking into account the critical characteristics of a dividend, compared to those of an equity contribution or loan, the relationships between entities in a multinational structure that may cause such entities to be connected persons in relation to each other, as well as the motives and reasons that may exist for non-arm's length pricing, other than to obtain a tax benefit.

This treatment is however not conceptually sound in the case where value is transferred downwards by an investor company to an investee company. Such a transfer would take place between entities that are connected in relation to each other by reason of the transferor of the value being a controlling company, as contemplated in paragraph (d)(i) of the definition of connected person in the Act read with the definition of group company, to a controlled company, as contemplated in those same definitions. If this adjustment is treated as a deemed dividend, this may result in the same value potentially being subject to dividends tax twice. The analysis performed in this article suggests that it would be more appropriate from a conceptual perspective to treat a transfer of value in these circumstances as a deemed equity contribution rather than a deemed dividend.

The contribution of value or funds to an investee has no direct or immediate tax implications under South African tax law other than establishing a cost for such investment. Unlike a deemed dividend that imposes a further tax burden on the taxpayer, this cost of the investment will have the effect of reducing taxable gains (whether of a revenue or capital nature) in future. It is questionable whether such an adjustment in favour of a taxpayer, despite being conceptually sound, can be required by a transfer pricing provision, which is essentially an anti-avoidance measure. However, an exemption from the provisions of section 31(3)(i) may be warranted in light of the potential double dividend tax this creates in a structure. It is therefore recommended that

82 Guillen *supra* n 42 at 8 & 26.

further research be performed to establish whether the current framework of secondary transfer pricing adjustments in section 31(3)(i) would be able to accommodate an exception from the deemed dividend treatment without such an exception creating opportunities for abuse or avoidance of the secondary adjustment in circumstances where the deemed dividend treatment would have been appropriate.

Children's rights of access to health care services and to basic health care services: a critical analysis of case law, legislation and policy

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OPSOMMING

Kinders se reg op toegang tot gesondheidsdienste en basiese gesondheidsorgdienste: 'n kritiese analise van hofbeslissing, wetgewing en beleid

Die Grondwet waarborg kinders se reg op gesondheidsorg in artikel 27(1) en artikel 28(1)(c). Artikel 27(1) bepaal dat elkeen die reg op toegang tot gesondheidsorgdienste het, met inbegrip van reproduktiewe gesondheid sorg. Artikel 28 bepaal dat elke kind die reg op basiese gesondheidsorgdienste het. Die artikel ondersoek die betekenis en verband tussen die twee regte om sodoende te bepaal wat dit vir die staat beteken. Dit gee dan aanleiding tot 'n evaluering van wetgewende en ander maatreëls wat die regering aangeneem het om die twee regte te realiseer.

1 Introduction

In mid-2014, South Africa's total population was estimated at 53.7 million people, 18.5 million of who were children (under eighteen years).[1] Therefore, children constitute 34% of the total population. Such a large population of children presents an opportunity for government to hasten economic development and to minimise poverty. However, in 2014 63% of children still live in poverty.[2] The correlation between poverty and health is well known. Poor children face a host of health problems. They also do not have access to the most basic health care services.

South Africa showed commitment to protecting and promoting children's rights to health care when it ratified the United Nations Convention on the Rights of the Child, 1989 (hereafter the CRC) in 1995

1 Children Count 'Children in South Africa' available from www.childrencount.org.za/indicator.php?id = 1&indicator = 1 (assessed 2016-12-01).

2 Children Count 'Children who live in poverty' available from www.childrencount.ci.org.za /indicator.php?id = 2&indicator = 14 (assessed 2016-12-01).

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and subsequently adopted the Constitution of the Republic of South Africa, 1996 (hereafter the Constitution).[3] Children's right to health care is expressed in two sections of the Constitution. Section 27(1) accords the right to have access to health care services for all South Africans. Section 28(1)(c) entitles every child to the right to basic health care services.

Despite the obvious importance for children of the right to access to health care services and the significance the Constitution attaches to their right to basic health care services, the Constitutional Court has largely avoided basing their decisions on section 28(1)(c) of the Constitution.[4] There have also been a limited number of cases in which the right of access to health care services has been invoked.[5] As a result, there is a relative scarcity of judicial authority in South Africa on the interpretation of children's right to health care. However, in *Government of the Republic of South Africa and Others v Grootboom and Others*[6] (hereafter *Grootboom*), the Constitutional Court dealt, for the first time, with the interpretation of the right of access to adequate housing as entrenched in section 26 of the Constitution. Although this case did not directly deal with the right of access to health care services and children's right to basic health care services, the judgment has certain clear implications for the rights of the latter. This was made explicit by the Constitutional Court in its subsequent decision of *Minister of Health and Others v Treatment Action Campaign and Others* (hereafter *TAC*) where much of its reasoning on housing rights was reiterated in respect of health care rights.[7]

The aim of this paper is to analyse the significance and the relationship between these two rights and to examine what this means for the state. This leads to an evaluation of the legislative and policy measures the South African government has put in place to realise these two rights.

3 S 24 of the Convention recognises the right of a child to the 'highest attainable standard of health'. It further obliges states parties to strive to ensure that no child is deprived of his or her right of access to health care services which is but a single strand of the broader health rights that are recognised.

4 The court focussed on the right to access health care services afforded to all in s 27; see also Buchner-Eveleigh & Nienaber 'Gesondheidsorg vir Kinders: Voldoen Suid-Afrikaanse wetgewing aan die land se verpligtinge ingevolge die Konvensie oor die Regte van die Kind en die Grondwet?' 2012 *PER* 123; Skelton 'Children' in Currie & De Waal (eds) *The Bill of Rights Handbook* (2013) 611.

5 *Soobramoney v Minister of Health, KwaZulu Natal* 1998 1 SA 765 (CC), *B v Minister of Correctional Services* 1997 (6) BCLR 789, *Treatment Action Campaign v Minister of Health* 2000 BCLR (4) 356 (T).

6 2001 (1) SA 46 (CC).

7 2002 (5) SA 721 (CC); Pillay 'Tracking South Africa's progress on health rights: Are we any closer to achieving the goal' 2003 *Law, Democracy and Development* 57.

2 The Right to Health Care Under the Constitution of the Republic of South Africa, 1996

Children's right to health care is expressed in two sections of the South African Constitution. Section 27(1) accords the right to have access to health care services, including reproductive health care services, for all South Africans. Section 27(2) obliges the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of, amongst others, health care rights. Section 28(1)(c), which is that portion of the Bill of Rights dealing specifically with children's rights, states that children have the right to basic health care services.

It is also important to note that section 7(2) of the Constitution places an obligation on the state to respect, protect, promote and fulfil all the rights, including health care rights, in the Bill of Rights.

Questions of central concern are: What is the significance of children's right to basic health care services in section 28(1)(c), given that the Constitution already recognises the right of everyone to have access to health care services in section 27? What is the relationship between these two rights and what specific obligation does the state have in relation to children's rights to basic health care services?

2 1 Implications of the Words 'Right to Access' in Section 27(1)(c) in Comparison to the Words 'Right to' in Section 28(1)(c)

In *Grootboom*, the Constitutional Court suggested that to have access to housing under section 26 of the Constitution was different from the right to adequate housing under article 11(1) of the International Covenant on Economic, Social and Cultural Rights, 1966.[8] Similarly, it could therefore be argued that the right to basic health care services has different implications from those of the right to *access* to health care services because the former does not include the word 'access'.[9]

However as Chirwa notes, the manner in which the court defined the right of access to housing in that case did not clearly demonstrate that the right to housing and the right to access to housing meant different things.[10] In particular, the court emphasised in *Grootboom* that 'access

8 Chirwa 'Child poverty and children's rights of access to food and to basic nutrition in South Africa' 2009 *ESR Review: Economic and Social Rights in South Africa* 3.
9 *Idem* 4.
10 *Ibid.*

to' signified that it was not only the state that had the responsibility to provide housing but also private actors.[11] It also stressed the obligation of the state to facilitate the realisation of the right of access to housing (an element of the duty to fulfil).[12] According to Chirwa, the obligation of the state in terms of section 7(2) of the Constitution – to respect, protect, promote and fulfil the rights in the Bill of Rights – has rendered the words 'access to' in the socio-economic rights provision superfluous, as each of these rights, irrespective of whether they use 'access to', engenders these obligations, including the duty to facilitate the realisation of these rights (an element of the duty to fulfil).[13]

2 2 The Question of Child Prioritisation

It was initially thought that the inclusion of socio-economic rights for children in section 28(1)(c) – and because children's socio-economic rights in this section are not qualified by progressive realisation and available resources such as the socio-economic rights of everyone in sections 26 and 27 – children were entitled to priority over everyone else in the allocation of basic services and goods.[14] The Constitutional Court in *Grootboom* cited legitimate concerns against this kind of reasoning especially if it meant that children had an unqualified right to certain socio economic rights.

The Constitutional Court, rejecting the application of the right under section 28(1)(c) unqualifiedly, pointed out that such reasoning had absurd consequences in that it meant that parents with children were to be accommodated with their children, while those who did not have children, no matter how old, disabled or otherwise deserving they may be, would remain without any form of respite.[15] The court also warned about the danger of children being used as stepping stones to housing by their parents instead of being valued for who they are.[16]

The court was of the opinion that section 28 must be read in context and stated that 'the obligation created by section 28(1)(c) can properly be ascertained only in the context of the rights and, in particular, the

11 Par 35; see also Chirwa *ESR Review: Economic and Social Rights in South Africa* 4.
12 Parr 35 & 36.
13 Chirwa 2009 *ESR Review: Economic and Social Rights in South Africa* 4.
14 Proudlock 'Children's socio-economic rights: Do they have a right to special protection' 2002 *ESR Review: Economic and Social Rights in South Africa* 6; Proudlock 'Children's socio-economic rights' in Boezaart (ed) *Child law in South Africa* (2009) 292; see also *Grootboom v Oostenberg Municipality* 2000 3 BCLR 277 (C) para 290G-H & 291 B-D. See further Liebenberg 'The interpretation of socio-economic rights' in Woolman *et al* (eds) *Constitutional law of South Africa* (2006) 33-51; Stewart 'Interpreting and limiting the basic socio-economic rights of children in cases where they overlap with the socio-economic rights of others' 2008 *SAJHR* 473; Pieterse 'Children's access to health care services within and outside of the parental-child relationship' 2010 *THRHR* 232.
15 Par 71.
16 *Ibid.*

obligations created by section 25(5), 26 and 27'.[17] This could imply that the basic socio-economic rights of children are subject to the internal limitations set out in section 27(2) that apply to everyone in cases where the rights of both the parents and their children are at stake.[18] It further implies that the rights can only be viewed in the light of the obligations placed on the state.

The court further held that section 28(1)(c) and section 28(1)(d) must be read together.[19] Essentially, section 28(1)(b) outlined who had the responsibility for the care of children while section 28(1)(c) outlined the essential elements of that care.[20] Thus if the child is in the care of the parents, then the parents have the primary duty to provide for the needs of the child. The state's duties are limited to creating a legal, administrative and infrastructural environment that would enable children to enforce their rights against their parents.[21] However, if the child, for example, is removed from their parents and is in state care, then the state bears the obligation under section 28(1)(c).[22]

The decision that the state is not primarily responsible for children under parental care can be interpreted to mean that children's socio-economic rights are subordinate to everyone's rights.[23]

In *TAC* an action was instituted as a result of the government's refusal to expand its pilot programme on the provision of Nevirapine, a drug administered to prevent the transmission of HIV from pregnant women to their unborn children. The Constitutional Court attempted to clarify its earlier decision in *Grootboom* by declaring that the state's duty to guarantee and provide children's socio-economic rights under section 28(1)(c) is triggered not only when children are physically separated from their parents, but also in situations where, although the children reside with their parents, the parents are indigent and unable to effectively provide for their children.[24] In others words, children whose parents lack the financial resources and who are dependent on the state for the

17 Par 73.
18 See also Stewart 2008 *SAJHR* 476.
19 Par 76; s 28(1)(b) provides that every child has the right to family care or parental care or to alternative care when removed from the family environment. S 28(1)(c) provides that every child has the right to basic nutrition, shelter, basic health care and social services.
20 Par 76.
21 Parr 71 & 75-78. See also Pieterse 2010 *THRHR* 234.
22 Par 77. See Proudlock 2002 *ESR Review: Economic and Social Rights in South Africa* 7 where she criticises this interpretation as it provides limited protection to the majority of children whose parents can't afford to fulfil their needs.
23 Nicholson 'The right to health care, the best interests of the child, and AIDS in South Africa and Malawi' 2002 *CILSA* 365; Proudlock 2002 *ESR Review: Economic and Social Rights in South Africa* 7; Chirwa 2009 *ESR Review: Economic and Social Rights in South Africa* 5.
24 Par 79. See also Liebenberg 'Taking stock: The jurisprudence on children's socio-economic rights and its implications for government policy' 2004 *ESR Review: Economic and Social rights in South Africa* 4.

provision of health care services have a claim against the state for the provisioning of health care services.[25]

Despite the above clarification, the court did not base its decision on section 28(1)(c) when it concluded that children are direct bearers of individual rights to health care services if they have indigent parents. Instead in this case, as well as the *Grootboom* case, the Constitutional Court declared that a violation of sections 27(1) and 27(2) of the Constitution had occurred in that the state did not adopt reasonable measures. Reasonableness requires the design, adoption and implementation of measures to realise socio-economic rights that are comprehensive, in the sense that they do not exclude a significant segment of the population, especially not those whose needs are the most urgent and whose ability to enjoy all rights is most in peril.[26] The court emphasises the need to pay attention to vulnerable and marginalised groups in general measures for implementing socio-economic rights in its definition of the test of reasonableness.[27] This part of the test provides space for children's rights to be invoked, as demonstrated in the *TAC* case, where the court found that the negative impact on children's rights to basic health care services of the state's limited programme, was a ground contributing to the unreasonableness of the policy.[28]

Two Transvaal High Court judgments have subsequently elaborated the entitlements implied by the state's responsibility for children who lack parental care. In *Centre for Child Law v Minister of Home Affairs*, the court indicated that it understood *Grootboom* to mean that 'the state is under a direct duty to ensure basic socio-economic provision for children who lack parental care'.[29] The court accordingly ordered that unaccompanied foreign children had to be removed from a repatriation camp, taken to a place of safety and be provided with the necessary legal assistance. In *Centre of Child Law v MEC for Education,* the same court emphasised the 'unqualified and immediate' nature of section 28(1)(c) rights and held that the state was duty-bound to fulfil them for children that are in the care of the state.[30] It ordered that children housed at a school of industry had to be immediately provided with sleeping bags, as well as with interim psychological and therapeutic support pending an investigation and recommendations pertaining to the implementation of permanent support structures at the school.[31]

25 Par 79. See also Proudlock 'Children's socio-economic rights' in Boezaart (ed) (*supra* n 14) 300.
26 Currie & De Waal (eds) *The Bill of Rights Handbook* (2013) 576.
27 Par 68.
28 Skelton 'Children' in Currie & De Waal (eds) (*supra* n 4) 611; Proudlock 'Children's socio-economic rights' in Boezaart (ed) (*supra* n 14) 299. See further Friedman *et al* 'Children's rights' in Woolman *et al* (eds) *Constitutional law of South Africa* (2002) 47-13.
29 2005 (6) SA 50 (T).
30 2008 1 SA 223 (T) 227I-J & 228G.
31 230F-231F.

The current jurisprudence can be read to suggest that only children without parents and children living in extreme poverty may have a direct and immediate claim to socio-economic rights.[32] It is, however, doubtful whether the Court will in future interpret section 28(1)(c) as bestowing an unqualified, direct and immediate right on children where parental care is present. Liebenberg correctly states that 'current jurisprudence has not resolved whether children have direct entitlements to socio-economic services under section 28(1)(c)'.[33]

In those instances where parental care is present, or where the socio-economic rights of everyone is at stake, it appears as if Courts attempt to avoid interpreting section 28(1)(c). It is clear from the *Grootboom* and *TAC* judgments that courts prefer to adjudicate the matters where adults and children are concerned in term of everyone's socio-economic rights as provided for in sections 26 and 27. Recognising children's socio-economic rights in a separate section in the Constitution, if not intended to emphasise the priority of these children, at least underscores the need to pay particular attention to children in general measures, policies and programmes on social provisioning and the need for child-specific measures.[34]

A possible reason for the court's reluctance to interpret section 28(1)(c), is that the remedies to realise socio-economic rights require time and resources.[35] The difficulties inherent in the enforcement of section 28(1)(c), however, should not imply that children's socio-economic rights cannot be viewed as unqualified rights.

2 3 The Issue of Defining the Substantive Content of Health Care Service Rights

The Constitutional Court's treatment of the content of the right to health care in the *TAC* case is minimal.[36] Instead of giving content to the right, the court, just as in the *Grootboom* case, confined itself to assessing whether the state has taken reasonable legislative and other measures to implement the right. The reason for this is essentially a rejection of a minimum core content of health care services that fits all situations (and which would be applicable to children).[37] In its most recent judgment on the right of everyone to have access to sufficient water in *Mazibuko and Others v City of Johannesburg and Others*,[38] O'Reagon J also rejected the minimum core concept by stating:

32 See also Liebenberg 'The interpretation of socio-economic rights' in Woolman *et al* (eds) (*supra* n 14) 33-51; Stewart 2008 *SAJHR* 478.
33 Liebenberg 'The interpretation of socio-economic rights' in Woolman *et al* (eds) (*supra* n 14) 33-51.
34 Chirwa 2009 *ESR Review: Economic and Social Rights in South Africa* 5.
35 See also Stewart 2008 *SAJHR* 479.
36 Currie & De Waal (eds) 591.
37 See also Proudlock 'Children's socio-economic rights' in Boezaart (ed) (*supra* n 14) 303.
38 2010 4 SA 1 (CC).

> Moreover, what the right requires will vary over time and context. Fixing a qualified content might, in a rigid and counter productive manner, prevent an analysis of context. The concept of reasonableness places context at the centre of the enquiry and permits an assessment of context to determine whether a government programme is indeed reasonable.[39]

O'Reagon J held further that:

> ... ordinarily it is institutionally inappropriate for the court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. This is a matter, in the first place, for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights.[40]

Liebenberg has criticised the court's reasoning by stating that:

> A court cannot evaluate whether the state's conduct or omissions are reasonable in relation to the fulfilment of socio-economic rights unless it develops a prior understanding of the normative goal to be achieved.[41]

Stewart is also of the opinion that a major shortcoming in the Constitutional Court's adjudication of socio-economic rights is the reluctance of the Court to give substantive content to socio-economic rights.[42] He argues that section 28(1)(c) should be the minimum core content of everyone's entitlements and suggests that in determining the meaning or defining section 28(1)(c), the Court should be guided by the values and the transformative aims of the Constitution and by international law.[43] The International Covenant on Economic, Social and Cultural Rights (hereafter the ICESCR)[44] and the CRC are relevant for section 28(1)(c). The monitoring committee of the ICESCR was responsible for the idea of the recognition of the minimum core of rights and has produced extensive commentary on the content of health.[45] The supervising body of the CRC has also extensively commented on the

39 Par 60.

40 Par 61. See Liebenberg 'Water rights reduced to a trickle' *Mail and Guardian* Online (2009-10-15) available from http://mg.co.za/article/2009-10-21-water-rights-reduced-to-a-trickle (accessed 2016-12-01) where she criticises the court's reasoning as follows: 'A court cannot evaluate whether the state's conduct or omission are reasonable in relation to the fulfilment of socio-economic rights unless it develops a prior understanding of the normative goal to be achieved'.

41 Liebenberg *Mail and Guardian Online* (2009-10-21) *supra* n 40; see also Proudlock Children's socio-economic rights' in Boezaart (ed) (*supra* n 14) 304.

42 2008 *SAJHR* 493.

43 Stewart 2008 *SAJHR* 482-485.

44 The ICESCR has been signed by South Africa but not ratified.

45 UN Committee on Economic, Social and Cultural Rights General Comment 3 'The nature of state parties obligations', General Comment 14 'The right to the highest attainable standard of health'.

health rights contained in the CRC.[46] None of these commentaries are strictly binding under international law, but since they aim to implement and advance human rights, they constitute valuable material that the court may use in defining the scope and content of children's basic socio-economic rights.[47]

What follows is an investigation into policy and legislative measures the South African government has put in place to realise children's right to health care.

3 Legislative Analysis

Currently there are three primary and many related pieces of legislation regulating children's health care rights.[48] The three main pieces are the National Health Act,[49] Mental Health Care Act[50] and Children's Act.[51] The Choice on Termination of Pregnancy Act[52] and the Sterilisation Act[53] provide for appropriate and accessible reproductive health care services. Reference will also be made to the Consumer Protection Act.[54]

3 1 The National Health Act

The National Health Act came into operation in 2005 and provides a framework for the realisation of health care rights in South Africa.[55] This Act seeks to regulate national health and provide uniformity in respect of health services across the nation. It establishes a national health system made up of both the public and private health sector and highlights the rights and duties of health care providers and users.[56] It also strives to protect, respect, promote and fulfil the rights of people to progressive realisation of the constitutional right to access to health care services, children's right to basic health care services, and the rights of vulnerable groups such as women, children, elderly persons and persons with disabilities.[57]

46 General Comment 3: HIV/AIDS and the rights of the child (2003), General Comment 4: Adolescent health and development in the context of the CRC (2003).
47 Rosa & Dutschke 'Child rights at the core: The use of International law in South African cases on children's socio-economic rights' 2006 *SAJKHR* 228, 229 & 249.
48 See Buchner-Eveleigh & Nienaber 2012 *PER* 113.
49 61 of 2003.
50 17 of 2002.
51 38 of 2005.
52 92 of 1996.
53 44 of1998.
54 68 of 2008.
55 Preamble of the National Health Act.
56 S 2.
57 S 2(c).

The Act refers to the constitutional right to health care for children and recognises them as a vulnerable group.[58] The Act therefore recognises that children have specific health care needs. However, the Act does not define the concepts 'health care services' or 'basic health care services'.[59] As these terms are not generally used in international instruments or national constitutions, its content and definition is fairly unclear.[60] It is therefore difficult for health care providers to know what to do to ensure that children's constitutionally protected health care rights are fulfilled.

The Act does provide the categories of people eligible for free health services and gives legal force to the government policy on providing free health care services to children under the age of six.[61] Section 4(3)(a) indicates that the state and clinics and community health centres funded by the state must provide free health services to children below the age of six who are not members or beneficiaries of medical aid schemes. Health services are rather unhelpfully defined in the Act as follows:

> health care services, including reproductive health care and emergency medical treatment as contemplated in section 27 of the Constitution, basic nutrition and basic health care services contemplated in section 28(1)(c) of the Constitution, medical treatment contemplated in section 35(2)(e) of the Constitution and municipal health services.[62]

Additionally, the state must provide 'free primary health care services' to all persons, except members of medical aid schemes and their dependents[63] and women, it seems regardless of membership to a medical scheme, with free termination of pregnancy services.[64] The reference to 'health services' in section 4(3)(c) rather than 'primary health care services', implies that all services, not just primary health care services,[65] must be provided free of charge to children under the

58 S 2(c)(iii) & (v).
59 See also Buchner-Eveleigh & Nienaber 2012 *PER* 113.
60 Buchner-Eveleigh & Nienaber 2012 *PER* 113; Pillay 'The National Health Bill: A step in the right direction?' 2002 *ESR Review: Economic and Social Rights in South Africa* 11. However, the equivalent right to s 27 of the Constitution in the ICESCR (art 12, the right to the highest attainable standard of physical or mental health) has been the subject of a recent Comment (General Comment 14 'The right to the highest attainable standard of health') by the Committee on Economic, Social and Cultural Rights. The right which is not confined to 'health care', is of a wider scope than that in s 27 of the Constitution, but a good deal of the Comment can be of assistance in interpreting the South African right.
61 See par 41 *infra*.
62 S 1.
63 S 4(3)(b).
64 S 4(3)(c).
65 Primary health care services are the basic first level of entry into the health system. It generally includes maternal and child care, prevention and control of locally endemic diseases, immunisation against the main infectious diseases and appropriate treatment of common diseases and injuries.

age of six.[66]

However, the Act makes provision for free health care to children and other persons eligible for free health care dependant on the discretion of the Minister of Health. It states that the decision must be taken in consultation with the Minister of Finance and must take into account a number of factors, including the range of free health services currently available, the categories of persons already receiving free health services, the impact of any such conditions (in the case of a child) on access to health services, and the needs of vulnerable groups such as women, children, elderly persons and persons with disabilities.[67] It is arguable that the inclusion of this section about the Minster's discretion means that the right of children to free health care is not adequately safeguarded.[68]

Interestingly, the Act enables the Minister to determine the types of free health services that should be provided but this power has not yet been used.[69] Further, even though there are categories of people who are able to access free health services, the scope of these services are not evident. In other words, there is little to no detail on the actual tangible free health care services which the public, including children, may lawfully access.[70] Trying to determine what health care services children may be entitled to is a difficult exercise. There is no law on this issue and one must resort to policy documents, which mainly deal with primary health care.

As far as the rights of health care users are concerned, the Act does not contain a separate section dealing with the rights of children as health care users. However, the Act provides a link with the Child Care Act[71] in its definition of 'health care user'.[72] As the Child Care Act has been repealed by the Children's Act,[73] the relevant section is now in terms of

66 Buchner-Eveleigh & Nienaber 2012 *PER* 115; Meerkotter, Gerntholtz & Govender 'Rights of vulnerable groups to health care' in Hassim, Heywood & Berger (eds) *Health and Democracy* (2007) 307.
67 S 4(2).
68 Meerkotter, Gerntholtz & Govender 'Rights of vulnerable groups to health care' in Hassim, Heywood & Berger (eds) (*supra* n 66) 307.
69 S 3 read with the definition of 'primary health services' and 'essential health services' in s 1.
70 Williams, Versfeld & Singh 'Public Health services: Pre- and post-NHI' 2013 *Healthcare Review 32*.
71 74 of 1983.
72 S 1. A health care user is defined as the 'person receiving treatment in a health establishment, including receiving blood or blood products, or using a health service; and if the person receiving treatment or using a health service is a) below the age contemplated in s 39(4) of the Child Care Act, 1983, user includes the person's parent or guardian or another authorised by law to act on the first mentioned person's behalf'.
73 35 of 2005.

the Interpretation Act[74] section 129 of the Children's Act.[75] Section 129 lowers the age at which a child may consent to medical treatment and operation independently to twelve years (from the previous ages of fourteen and eighteen respectively) and also takes into account the level of maturity of the child.[76]

A health care user has the right to consent to a health service provided that the user is twelve years of age, mature enough and capable of understanding the benefits, risks and other social implications.[77] The user has the right to participate in any decisions affecting his or her personal health and treatment.[78] If the consent is given by a person other than the user, such a person must, if possible, consult the user before giving the required consent.[79] The individual also has a right to appropriate, adequate and comprehensive information about the health services delivered,[80] as well as the right to emergency medical treatment.[81] Every user is also entitled to have full knowledge and receive information in connection with matters relating to his health.[82]

3 2 The Mental Health Care Act

The Mental Health Care Act provides a legal framework for mental health. This Act seeks to ensure that appropriate care, treatment and rehabilitation services are made available to people with mental health care problems.[83] It also seeks to regulate access to and provide mental health care, treatment and rehabilitation services to voluntary, assisted and involuntary mental health care users.[84] It highlights the rights and duties of mental health care users.[85]

The Act makes very little specific reference to the care, treatment and rehabilitation of children. It therefore does not give priority to their mental health care needs.[86]

The Act also does not provide the scope and detail of the mental health care, treatment or rehabilitation services to be provided.

74 33 of 1957. S 12(1) provides that where a law repeals and re-enacts with or without modifications, any provision of a former law, references in any other law to the provision so repealed shall be construed as references to the provision so re-enacted.
75 Buchner-Eveleigh & Nienaber 2012 *PER* 115.
76 See par 3 3 *infra*.
77 S 7, read with s 129 of the Children's Act 38 of 2005.
78 S 8.
79 S 8(2)(a).
80 S 12.
81 S 5.
82 S 6.
83 S 3(a).
84 S 3(b).
85 S 3(c).
86 See also Buchner-Eveleigh & Nienaber 2012 *PER* 117.

Although the Act does not deal with the rights of children in a separate section, it does refer to a child younger than eighteen years in its definition of 'mental health care user'.[87] The user has the right to consent to care, treatment and rehabilitation services or admission to health establishments, except in urgent cases or where a court or a review board has authorised it.[88] The Act distinguishes between different categories of persons who require mental health care on the basis of whether they submit themselves voluntarily or not to mental health care or admission. A person, including a child younger than eighteen years, who is capable of making an informed decision, can submit him or herself voluntarily to treatment and admission. The person is then entitled to appropriate care, treatment and rehabilitation services or to be referred to an appropriate health establishment.[89]

A person who is incapable of making an informed decision on the necessity of care, treatment or rehabilitation services due to his or her mental illness and who does not refuse the health intervention, may receive assisted care, treatment or rehabilitation services without his or her consent if the head of the health establishment has approved a written application.[90] The application for assisted care, treatment or rehabilitation of a child must be made by the parent or guardian of the user.[91] At the time of making the application, there must be a reasonable belief that the user is suffering from a mental illness or a severe or profound mental disability and that care, treatment and rehabilitation services are required for his or her health or safety, or for the health and safety of other people.[92]

A person who is incapable of making an informed decision on the necessity of care, treatment or rehabilitation services and who refuses the health intervention must be provided with care, treatment and rehabilitation services without his or her consent if the head of the establishment approved a written application by someone else.[93] An application for the involuntary care, treatment and rehabilitation of a child must be made by the child's parent or guardian.[94] At the time of making the application, there must be a reasonable belief that the user has a mental illness of such a nature that the user is likely to inflict serious

87 S 1. A mental health care user is defined as a 'person receiving care, treatment and rehabilitation services or using a health service at a health establishment aimed at enhancing the mental health status of a user, State patient and mentally ill prisoner and where the person concerned is below the age of eighteen years or is incapable of taking decisions, and in certain circumstances may include i) prospective user; ii) the person's next of kin; iii) a person authorised by any law or court order to act on that persons behalf'.
88 S 9(1).
89 S 25.
90 S 26.
91 S 27(1)(a).
92 S 26(b)(i).
93 S 32.
94 S 33(1).

harm to him or herself or others or that care, treatment and rehabilitation is necessary for the protection of his or her financial interests or reputation.[95]

3 3 The Children's Act

The Children's Act was adopted in 2005 to give effect to children's rights already guaranteed in the Constitution, and sets out principles relating to their care.[96]

This Act provides that all actions or decisions pertaining to children must respect, protect and fulfil the children's rights set out in the Bill of Rights.[97] Section 4 provides further that all organs of government at the national, provincial and local levels must take reasonable measures to the maximum extent of available resources to achieve the realisation of its provision. Section 4 is in agreement with the decisions of the Constitutional Court in *Grootboom* and *TAC* in that children's section 28(1)(c) rights are not unqualified but subject to the availability of resources. In terms of section 4, a uniform approach aimed at co-ordinating and integrating the services delivered to children must be developed.[98]

The Act also provides that the best interests of the child are paramount and must always be considered when taking decisions pertaining to children.[99] In addition, the Act recognises the right of children to be involved in the decision-making process on issues related to them.[100]

The Act only gives children limited protection in respect of health care services. The main text of the Children's Act does not specifically refer to the child's right to basic health care services.[101] The Act also does not define the standard of health care of children or the concept 'basic health care services'.[102] However, the Act guarantees the right to information on health care and deals extensively with consent to medical treatment, surgery and HIV testing. These consent provisions empower children, who have reached a certain age and level of maturity, to access a particular health service independently. In terms of sections 129(2) and 129(3), a child may consent to his or her own medical treatment or operation if the child is over the age of twelve and of sufficient maturity

95 S 32(b).
96 Further commitment to the protection of the rights of the child was added through the Children's Amendment Act; see also the preamble of the Children's Act.
97 S 6(2).
98 Ss 4(1), 4(2) & 5.
99 Ss 7 & 9. This is in line with provisions on the best interest of children already contained in the Constitution of the Republic of South Africa, 1996.
100 S 10.
101 The preamble of the Children's Act refers to s 28 of the Constitution, which includes basic health care services. See also Van der Westhuizen 'Critical care decisions on neonates and young children in England and Wales – Lessons for South Africa' 2013 *Obiter* 461.
102 Buchner-Eveleigh & Nienaber 2012 *PER* 120.

to understand the benefits and risks of the proposed treatment or operation. In the case of a medical operation, the child must also be duly assisted by his or her parent or guardian. Section 130 – which deals with HIV-testing – provides that no child shall be tested for HIV except when it is in the best interest of the child and consent has been given by the child if he or she is twelve years of age or older, or under the age of twelve years and is of sufficient maturity to understand the benefits, risks and social implications of such a test.

Section 134 deals with access to contraceptives. It provides that children twelve years or older may buy condoms and have access to free condoms.[103] Children of twelve years or older may access other forms of contraceptives without the permission of their parents or care-givers provided that they have received proper medical information and they have had a medical examination to ensure that there is no medical reason why the child should not receive a specific contraceptive.[104] This provision is inconsistent with the other provisions relating to the age of consent in the Act, because it does not require an assessment of the maturity of the child before the child receives contraception. The Act also protects the right of the child to confidentiality when getting access to contraceptives and advice to contraception.[105]

3 4 The Choice on Termination of Pregnancy Act

The Choice on Termination of Pregnancy Act promotes reproductive rights and extends freedom of choice by affording every woman (including adolescent girls) the right to choose whether to have an early, safe and legal termination of pregnancy. It sets out the circumstances under which a pregnancy may be terminated and the place where such termination may take place. It also addresses the issue of consent, counselling and information concerning the termination of pregnancy.

This Act provides that a girl of any age can consent to a termination of pregnancy.[106] She must be advised to seek parental assistance, but cannot be refused access to a termination if she does not wish to do so.[107] The High Court in *Christian Lawyers Association v Minister of Health* declared this provision of the Act to be in line with the Constitution.[108] The court found that the approach of the legislature to allow children access to abortion services without parental consent is constitutionally permissible because it is flexible to recognise and accommodate the individual position of the child based on her intellectual, psychological and emotional make up and actual maturity.[109]

103 S 134(1).
104 S 134(2).
105 S 134(3).
106 See ss 5(2) & 1(xi).
107 S 5(3).
108 2005 (1) SA 509 (T).
109 Sloth-Nielsen 'Protection of children' in Davel & Skelton (eds) *Commentary on the Children's Act* (2007) 7-31.

3 5 The Sterilisation Act

The Sterilisation Act provides for the right to sterilisation and determines the circumstances under which it may be performed. This Act explicitly states that a person under eighteen years may only be sterilised if failure to perform the sterilisation would jeopardise his or her life or seriously impair his or her health.[110] In this case, permission is required from the person who is legally entitled to act on behalf of the child who is to be sterilised.[111] An independent medical practitioner must also certify, in writing, that the sterilisation is in the best interests of the particular child. Furthermore, the desirability of the sterilisation must be assessed by a panel.[112]

3 6 The Consumer Protection Act

In terms of the Consumer Protection Act (CPA), there is an obligation on a service provider – such as health-care professional – to provide quality and timely service.[113] Section 54 of the CPA should be read together with section 3, which sets out the purpose of the Act, namely to protect vulnerable groups.[114] These two sections refer to medical services available to children. The Act provides for the enforcement of consumers' rights by means of various remedies.[115]

4 Specific Health Care Policies and Programmes

4 1 Free Health Care to Pregnant Women and Children Under the Age of Six

One of the first interventions targeting child health was made in 1994, when President Mandela introduced a policy that provided free health care to pregnant women and children under the age of six.[116] This policy is an appropriate and important measure aimed at making health services increasingly accessible to a particularly vulnerable sector of health users.[117] This initiative was coupled with an extensive clinic-building programme to ensure greater physical availability of health care

110 S 2(3)(a).
111 S 2(3)(c)(i) & (ii).
112 S 3(2) read together with s 2(3)(b).
113 S 54(1)(a) & (b) reads as follows: 'When a supplier undertakes to perform any services for or on behalf of a consumer, the consumer has a right to (a) the timely performance and completion of those services, and timely notice of any unavoidable delay in the performance of the service; (b) the performance of a service in a manner and quality that persons are generally entitled to expect'.
114 See Jacobs, Stroop & Van Niekerk 'Fundamental consumer rights under the Consumer Protection Act 68 of 2008: A critical overview' 2010 *PER* 304.
115 *Idem* 307. It falls outside the scope of this article to discuss these remedies in detail.
116 GN 657 of 1994-07-01.
117 Pillay 2003 *Law, Democracy and Development* 73.

services to people in South Africa, especially for those who live in poverty.

Since 1994, the Government has developed a wide ranging set of policies and programmes that target children and address their specific health care needs.

4 2 The Primary Health Care Approach

Government has adopted the primary health care approach since 1994. Child health is a key component in the primary health care package of services. According to the Department of Health's Primary health care package for South Africa – norms and standards – primary health care clinics must provide promotive, preventative (monitoring and promoting growth, immunisations, home care counselling, de-worming and promoting breast feeding), curative (assessing, classifying and treating) and rehabilitative services in accordance with the integrated management of childhood illnesses protocols at all times that the clinic is open.[118] The integrated management of childhood illnesses strategy is a key national strategy for reducing morbidity and mortality from common childhood illnesses that affect children under the age of five years.[119] It provides detailed action-orientated guidance on assessing, classifying, treating and counselling children and their caregivers on common childhood illnesses.

Primary health care clinics must also provide immunisation services at all times that the clinic is open. The Expanded Programme of Immunisation aims to decrease childhood morbidity and mortality from vaccine-preventable diseases. Immunisation against these diseases remains the most cost effective health intervention presently known.

Although the package also deals with adolescent health, it is less comprehensive than the service offered to younger children.[120]

4 3 Adolescent and Youth Health Policy

In 2002 the Department of Health launched a policy on youth and adolescent health. The Department of Health reviewed and updated the policy.[121] This policy seeks to improve the health status of young people through the prevention of illness, the promotion of healthy lifestyles, and the improvement of health care delivery systems by focussing on the

118 Department of Health *Primary health care package for South Africa – norms and standards* (2000) available from www.hsph.harvard.edu/population/vaccination/southafrica2.doc (accessed 13-01-2017).

119 See also Meerkotter, Gerntholtz & Govender 'Rights of vulnerable groups to health care' in Hassim, Heywood & Berger (eds) (*supra* n 66) 313.

120 As defined by the World Health Organization, adolescents are aged between ten and nineteen years.

121 The adolescent and Youth Health Policy Draft 2012 is available from http://www.youthmetro.org/uploads/4/7/6/5/47654969/adolescent_youth_health_policy_draft.pdf.

accessibility, efficiency, quality, and sustainability of youth and adolescent-friendly health services. The policy, amongst others, addresses sexual and reproductive health and rights, HIV and AIDS, tuberculosis, chronic disease, disability, drug and substance abuse, mental health, violence and unintentional injuries. A key strategy for addressing their health is to increase access to and quality of youth-friendly health services. The Youth-Friendly Health Services initiative aims to ensure that all health services are accessible to youth and adolescents by supporting a more relaxed atmosphere of delivering health care. The National Department of Health Strategic Plan 2010-2013 has set a target of 70% for primary health care facilities implementing youth friendly services by 2014/2015, to increase accessibility, availability and utilisation of health services by young people. However, studies have shown that the provision and impact of the youth friendly service initiative are limited and below the Departments target (that 70% of primary health care facilities should implement these services by 2014/2015).[122] The Department has called for the acceleration of the implementation of youth friendly health services in all primary health care facilities.

5 Conclusion

Although the Constitutional Court has held that the socio-economic rights of children who are under parental care do not create unqualified obligations on the state to provide certain socio-economic goods on demand, this does not mean that children's socio-economic rights have no meaningful implications for the state. At the very minimum, by recognising their right to basic health care services, the drafters of the Constitution intended to emphasise the need for child-specific measures on basic health services and the fact that general measures on the right to health care services should make adequate provision for children.[123]

The evaluation of legislation and policy shows that there is no single, comprehensive piece of legislation dealing with the child's right to health care.[124] There are three main and many related pieces of legislation dealing with children's right to health care. The National Health Act is the only Act that refers to the child's right to basic health care services. However, the Act does not define basic health care services. The concept

122 See Geary, Gomez-Olivé, Kahn, Tollman & Norris 'Barriers to and facilitators of the provision of a youth-friendly health service programme in rural South Africa' available from https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4067688/ (assessed 2016-12-01); Geary, Webb, Clarke & Norris 'Evaluating youth-friendly health services: young people's perspectives from a simulated client study in urban South Africa' available from https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4306747/ (assessed 2016-12-01).

123 See also Chirwa 2009 *ESR Review: Economic and Social Rights in South Africa* 7.

124 See also Buchner-Eveleigh & Nienaber 2012 *PER* 136.

is also not defined in any government policy which has been developed to address children's specific health care needs.

The National Health Act recognises the overall vulnerability of children but then only makes provision for free health services to children under the age of six. In other words it provides free health services for only a particular category within the group of children.[125] As stated above, the reference to 'health services' rather than 'primary health care services' to which older children are entitled, implies that all services, not just primary health care services, must be provided free of charge to children under six.[126] As the National Health Act is silent on the actual tangible free health care services that must be provided to children, one must resort to policy documents which neither refers to the Act nor claim to determine the scope of primary health care services comprehensively.

As far as consent to health care services is concerned, it is clear that the National Health Act does refer to the Children's Act. The Children's Act deals with consent to medical treatment, operation and HIV testing. However the Children's Act does not refer to the National Health Act. Consent to termination of pregnancy is regulated by the Choice on Termination of Pregnancy Act. The Mental Health Care Act regulates consent to treatment by mentally ill children. The Mental Health Care Act provides that a person, including a child younger than eighteen years, who is capable of making an informed decision, can submit him or herself to voluntary treatment. There is no reference to the age threshold of twelve as is the case in the Children's Act. The Mental Health Act also does not refer to consent to an operation. It seems as if mentally ill children's consent to treatment is regulated by the Mental Health Care Act while their consent to an operation is regulated by the Children's Act.

It is clear that although a wealth of legislation and policies exist, none comprehensively provide for children's health care rights. The legislation that does exist contains obvious gaps. Most importantly, the concept 'basic health care services' has not been defined. A definition of basic health care services is important as it would firstly enable children and their caregivers to know what services they are entitled to under the Constitution. Second, it would provide service providers, managers and policy-makers with clear goals to work towards. Third, it would allow a more coherent development of laws, policies, programmes, services and budgets by aligning all of these to the defined requirements. Lastly, it will be possible to monitor progress made towards the implementation of children's right to health care through the development of appropriate indicators.

125 See also Pillay 2003 *Law, Democracy & Development* 75.
126 See par 3 1 *supra*.

Aantekeninge/Notes

Social security 'benefits' and the collateral source rule – an analysis of the three *Coughlan* decisions

1 Introduction

The law of damages abounds with cases dealing with the collateral source rule. This rule is applicable to instances where the victim of a damage-causing event, despite suing the wrongdoer or his or her insurer for damages, receives a benefit from a third party (Mukheibir '*Road Accident Fund v Timis* – child support grants is not *res inter alios acta*' 2011 *SALJ* 246; see in general Potgieter, Steynberg & Floyd *Visser & Potgieter's Law of Damages* (2012) 229-273). However, despite the various case law and commentary in literature on the subject, this concept remains unburdened by clarity. This is particularly true as far as the interpretation and intersection between the application of the rule and social security benefits.

The first noteworthy decision in considering this interplay is *Makhuvela v Road Accident Fund* (2010 1 SA 29 (GSJ)). The court had to consider the deductibility or otherwise of a foster care grant from an amount claimed for loss of support. Similarly, the court in *Road Accident Fund v Timis* ([2010] ZASCA 30; (26 March 2010) dealt with the deductibility of a child support grant from an amount claimed for loss of support.

Most recently, and important for this discussion, the question of the deductibility of foster care grants from an amount claimed for loss of support again received judicial attention in *Coughlan v Road Accident Fund*. It will be shown that the outcomes of the three decisions, the High Court (977/08 WCC; 6 June 2013 (hereafter *Coughlan* High Court decision)), the Supreme Court of Appeal (2014 6 SA 376 (SCA) (hereafter *Coughlan* SCA decision)) and the Constitutional Court (2015 4 SA 1 (CC) (hereafter *Coughlan* CC decision)) are in principle fundamentally different. The only corresponding feature of the three cases is the clear illustration of the trite fact that the collateral source rule evolves on a casuistic basis.

This discussion is limited to social security grants received as a 'benefit' consequent to a damage-causing event and its relevance to the collateral source rule. Social security refers to the protection that the state provides for its citizens through public measures against economic and social distress (Steynberg & Millard 'Distinguishing between private law

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and social-security law in deducting social grants from claim for loss of support' 2011 *PER* 2011 (14) 4 260 at 267).

An interrogation of the three decisions will turn on the following key issues: the application of the collateral source rule; the benefit received and its source; the death-of-a-breadwinner requirement in claims for loss of support; and the viability of social grants as a general *res inter alios acta*.

2 The Facts

Mr Coughlan, in his capacity as *curator ad litem* for three minor children, lodged a claim against the Road Accident Fund in the Western Cape High Court in Cape Town (*Coughlan v Road Accident Fund* 977/08 (WCC)) for damages for loss of support as a result of the death of the children's mother in a motor vehicle accident. Consequent upon the accident and subsequent death of the deceased, the children's grandparents successfully approached the Children's Court to be appointed as foster parents to their grandchildren. Resulting from such appointment, the grandparents received a foster care grant in terms of section 8 of the Social Assistance Act (13 of 2004). The merits were conceded, and the respondent agreed to compensate the applicant in his representative capacity for 100% of the proven damage suffered as a result of the deceased's death. At the time of the hearing in the court of first instance, the amount received by the grandparents as a foster care grant was R146 790 whilst the amount agreed to be paid for loss of support was R 112 942. The issue before the court was whether the amount received as foster care grant should be deducted from the amount agreed for loss of support to the children or whether the foster care payments are to be considered *res inter alios acta* and therefore not deductible.

This discussion considers, in some detail, the decisions of the High Court, the Supreme Court of Appeal and the Constitutional Court in this regard.

2 1 High Court

Mr Coughlan relied on *Makhuvela* in contending that the foster care grant was paid out to the foster parents to enable them to comply with their obligations to the children. On this premise, it was submitted that the children had no claim to the money which therefore ought to be treated as *res inter alios acta* in regard to their claim for loss of support (par 12). However, the defendant leaned on the decision of the Supreme Court of Appeal in *Timis* and the interpretation of section 1(1) and (2) of the Assessment of Damages Act (9 of 1969) in arguing that the foster care grant is a benefit in terms of law and must therefore be deducted from an amount payable for loss of support (parr 13-19).

In agreeing with the judgment of Malan J in *Makhuvela*, the High Court, per Henney J, accepted that the death of the children's mother did not cause the grandparents to take care of the children but rather that her

death only formalised the process of foster care (par 30). In essence, the High Court concluded that the foster care grant paid to the foster parents was *res inter alios acta* and could therefore not be deducted from the damages awarded.

The RAF appealed against that finding to the Supreme Court of Appeal.

2 2 Supreme Court of Appeal

The RAF contended that the High Court incorrectly relied on *Makhuvela* and urged the Supreme Court of Appeal to follow its own judgment in *Timis* (par 8). In this court, Lewis JA speaking for a unanimous court, held that, in principle, there was no difference between grants paid out in terms of section 6 (child support grant) and section 8 (foster care grant) of the Social Assistance Act. Thus, the court found that the foster care grant paid out to the grandparents served the same purpose as a claim for loss of support (par 21), providing the children with the financial support lost as a result of the death of their mother. In essence, the foster care grant was found to be a compensating advantage and therefore deductible. However, to further heighten the casuistry of the rule, the court went on to state that its finding 'does not mean that there is any general principle precluding an award of damages for loss of support where dependants have had the benefit of social support grants' (par 22).

As shall be demonstrated below, the difficulty in grappling with the question of deductibility of benefits is a real one. Therefore, legal certainty and development of this area of the law of damages could better be achieved by authoritative pronouncements of a general nature. The above quote is a clear example of an undesirable commitment to casuistry that continues to plague the collateral source rule.

The curator appealed against the Supreme Court of Appeal's finding to the Constitutional Court.

2 3 Constitutional Court

In a unanimous judgment delivered by Tshiqi AJ, the Constitutional Court upheld the appeal (2015 4 SA 1 (CC)). In deciding the question of law before it, the court addressed four compelling issues namely, the state's constitutional obligation to children in terms of sections 27 and 28 of the Constitution (of the Republic of South Africa, 1996 (hereafter the Constitution)); the nature and purpose of the foster child grant *vis-a-vis* awards for loss of support; the effect of *Makhuvela*; and, whether there is any causal link between a foster child grant and compensation for loss of support.

The court considered the state's obligations to the children in terms of the Constitution and section 156(1)(e) of the Children's Act (38 of 2008) and found that there is no justifiable reason to treat children in foster care differently to children in youth-care centres as far as compensation for loss of support is concerned. Notwithstanding this, the court noted the

incompatibility of a foster child grant with a claim for loss of support, stating that:

> an award for damages for loss of support is no substitute for foster parenting and there is no basis to deprive a child compensation for loss of support because they are in foster care (par 44).

The court further agreed with the decision in *Makhuvela* and conceded that a foster child grant is payable to the foster parent to discharge his or her responsibility to the child, while the award for loss of support is payable to the child to make good the loss of the monetary contribution suffered as a result of the death of a breadwinner (parr 45-46). In essence, according to the court, there is no basis to deduct the one from the other. In the final analysis, the court concluded that the nature and purpose of a social grant is different from compensation for loss of support and not predicated on the death of the parent (par 51).

3 The Collateral Source Rule

It is trite that a damage-causing event does not always result in only negative losses but may, in some instances, have positive benefits for the plaintiff. The inclusion or otherwise of the positive benefits of the damage-causing event has not always lent itself to a simple answer. This unresolved position owes much of its under- development to two conflicting general principles of the law of damages. On the one hand, the law does not allow for double compensation as a result of a single cause of action. On the other hand, it is stated that the wrongdoer or his or her insurer should not escape liability on account of some fortuitous event such as the generosity of a third party (*Zysset and Others v Santam Ltd* 1996 1 SA 273 (CPD) 279B-C; Potgieter, Steynberg & Floyd 233).

Mukheibir notes that there is no generally acceptable single test to determine whether or not a benefit ought to be deducted (Mukheibir 'Comparing the casuistry of compensating advantages and collateral sources' 2002 *Obiter* 330). This problem was further described as a question of demarcation in *Standard General Insurance Co Ltd v Dugmore* (1997 1 SA 33 (A) 41D-E), in other words, the question of whether or not to deduct, depends on the claim and the court's interpretation of the collateral source rule. Ultimately, the demarcation of benefits is determined by policy considerations of fairness (*Dugmore supra* at 42B). However, this is no easy task and this was patently acknowledged in a separate opinion of Marais JA in *Dugmore* when he captured the difficulty of this balance by stating that the:

> dilemmas arise when one attempts to respect well-established principles (*each of which has its own particular justification and reason for existence*), but finds that in respecting one, one is spurning another, and that one's best efforts to reconcile them come to nought (*Dugmore supra* at 47D-E).

Notwithstanding the appreciation of this difficulty and the absence of satisfactory answers to the question of deductibility of benefits, it has long been established that there are exceptions to the rule against double

compensation. For example, benefits received by the plaintiff under ordinary contracts of insurance for which the plaintiff has paid premiums; and money and other benefits received by the plaintiff as *solatium* or from the generosity of third parties motivated by sympathy are collateral benefits in any action for damages. It is apparent from the listed and generally accepted exclusions that the established exceptions of *res inter alios acta* do not address the absence of general principles to the question of deductibility or otherwise but rather considers a predetermined conclusion to exclude them from quantification (Monyamane *The nature, assessment and quantification of medical expenses as a head of delictual damage(s)* (LLM dissertation UNISA 2014) 60).

However, despite the inherent dangers of casuistry and the conflict of general principles of the law of damages as highlighted, Potgieter, Steynberg & Floyd (*supra* at 233) submit that the application of the collateral source rule is flexible and must be considered in view of the interests of the plaintiff, the defendant, the source of the benefit, the community and other interested third parties. This echoes the view held in *Zysset* that the inquiry to determine the deductibility of benefits must necessarily include considerations of public policy, reasonableness and justice (*Zysset supra* at 279A).

4 The Benefit Received and its Source

Not much thought has been devoted to the essence and meaning of the benefit received except in instances where it satisfies the fairness requirement necessary to categorise a benefit as *res inter alios acta*. A number of cases dealing with various benefits have come before courts. Among them are *Indrani and Another v African Guarantee and Indemnity* (1968 4 SA 606 (D)); *Dippenaar v Shield Insurance Co Ltd* (1979 2 SA 904 (A)); and *Mutual and Federal Insurance Co Ltd v Swanepoel* (1988 2 SA 1 (A)). These cases considered the deductibility of pension funds based on a variety of sources. In *Santam Versekeringsmaatskappy Bpk v Byleveldt* (1973 2 SA 146 (A)), the court grappled with the deductibility of wages that the employer continued to pay to an employee, despite incapacity. *Erasmus and Ferreira* & *Ackermann and Others v Francis* (2010 2 SA 228 (SCA)) dealt with whether pension benefits paid to a claimant was deductible in calculating damages paid to her as a result of a law firm's negligence.

The absence of clear guidelines as to the relevance of the essence of a benefit for purposes of the collateral source rule manifested itself in the decision of the Constitutional Court in *Coughlan*. The rationale, as adopted by the court, has the implied conclusion that a foster care grant is not *per se* a benefit. This is evidenced by the view of the court that foster care grants are unrelated to damages for loss of support and that the grants arise out of a constitutional obligation to care for children in need (par 51). Of course, this largely stems from the fact that the Constitutional Court found that the payment of a foster care grant is not

generally predicated on the death of the breadwinner (par 51). Granted that there may be some merit to the argument that there is no *nexus* between foster care grants and loss of support, the court overstated the difference between the two in order to justify a statutory (constitutional) rights-based conclusion. It is not a hypothesis to state that the children of the deceased were only placed under their grandparents' foster care after the death of their mother. It is conceded that the court was correct in holding that foster parenting turns on the needs of the children to be cared for (par 37). However, the naked facts before the court pointed to the reality that this need was only satisfied after the death of the children's mother. Therefore, the question of deductibility as entertained by even the Constitutional Court itself must have led the court to the correct conclusion and acknowledgement that a foster care grant was indeed a benefit received only after the deceased's death.

This conclusion would, in n way, have suggested that the foster care grant is inevitably a compensating advantage. It is prudent, at this stage, to note that the correct application of the collateral source rule is limited to instances where the plaintiff receives a benefit directly and not where a third party receives the benefit for the benefit of the plaintiff. For this reason, the present author is inclined to agree with the High Court's judgment in its application of the conventional norms of the collateral source rule (*Coughlan* High Court decision *supra*).

As far as the source of the benefit is concerned, it is doubtful whether the source of the positive benefit is an altogether irrelevant factor (Potgieter, Steynberg & Floyd 271). After all, this forms the essence of the established exception to the rule against double compensation. In determining whether public policy, reasonableness and justice warrant the inclusion of the benefit in damages, it is fitting that regard must be had to the *actual benefit* as well as its *source*. Although the source of the positive benefit may not satisfactorily address the question of deductibility on its own, it is submitted that it will address the question of purpose fairly well. Thus, in *Coughlan*, it may be that public policy, reasonableness and justice required the state to fulfil its obligations to the children in terms of sections 27 and 28 of the Constitution. For this reason, it is submitted that the identity of the source from which a positive benefit arises in no way hinders the process of determination but, if correctly considered in context, would make the process much easier. The Constitutional Court favoured an approach that emphasises constitutional rights and obligations over and above a consideration of the conventional delictual essence of the collateral source rule.

The Constitutional Court, in developing the common law, as it has done on a number of occasions, must promote the spirit, purport and objects of the Bill of Rights (s 39(2) of the Constitution). Be that as it may, the development of any law must also be practical. It stands to reason that, after the Constitutional Court's decision, the collateral source rule in general remained in exactly the same position in law as it had been before the matter reached the court. The one exception, however, is that

the Constitutional Court's decision resolved the superfluous difference between *Timis* and *Makhuvela*. In effect, there is certainty regarding the deductibility or otherwise of social grants from amounts payable as damages. Thus, what is clear at this point is that both foster care and child support grants are to be accepted as general exclusions when determining the deductibility of benefits from claims for loss of support. In fact, in view of the elaborated exposition of the nature of foster care grants in the case, it is not even clear whether the court considered these grants to be benefits at all.

5 The Death of a Breadwinner Requirement in Claims for Loss of Support

Despite the fact that the *Coughlan* matter turns on the question of whether or not the foster child grant is deductible from a damages award, sight should not be lost of the main claim of the applicant. Essentially, the applicant was claiming for loss of support on behalf of the minor children as a result of the death of their mother. According to Corbett J in *Evins v Shield Insurance Co Ltd* (1980 2 SA 814 (A) 839A), the general purport of a claim for loss of support is that the claimant is injured by the death of a breadwinner. Therefore, it follows, and this is in part supported by Steynberg & Millard (2011 *PER* 273-274), that to satisfy an award of damages in this respect a link must first be established between the death of the breadwinner and loss of support as well as the death of the breadwinner and the subsequent receipt of the social grant in cases similar to the current one.

In the High Court, Henney J (*Coughlan* High Court decision *supra* at par 28), on the evidence, accepted that the children were in need of care before the death of their mother and that her death only served to formalise their subsequent placement in the foster care of their grandparents. This acknowledgement in no way swayed the court to conclude that the foster child grant was deductible. The Supreme Court of Appeal, however, was not inclined to accept the findings of the High Court. It found no evidence to support the conclusion that death only formalised the process of foster care and the subsequent receipt of foster child grants (*Coughlan* SCA decision *supra* at par 18). Although it is common cause that the two courts came to conflicting decisions on both fact and principle, it has to be emphasised that they both considered the legal issue by applying the conventional – though admittedly unsatisfactory – understanding of the collateral source rule. Both courts considered the cause of action, being the death of the breadwinner, and the deductibility or otherwise of the benefit which was the subject of litigation. This is the conventional way of addressing the collateral source rule.

It may well be that the need to appoint a foster parent is not predicated on the death of a breadwinner, as the Constitutional Court found (*Coughlan* CC decision *supra* at par 51). However, it is submitted that the court's line of reasoning was somewhat divorced from the facts of the

case. The incompatible nature of the foster care grant and loss of support on its own was sufficient ground not to deduct the one from the other. Furthermore, the collateral source rule operates from the premise where the benefit is received by the plaintiff, and not by a third party for the benefit of the plaintiff. Therefore, an application of the Social Assistance Act and its regulations alone would have led to the conclusion that a foster care grant is predicated on the children's needs – however payable to the foster parent for the benefit of the children. This is certainly beyond the reach of the collateral source rule.

On the whole, the present author agrees with the Constitutional Court that the state, in providing the foster parents with a foster care grant, was discharging its constitutional obligations to the children. The present author further agrees that the multi-dimensional nature of fostering makes it inappropriate to deduct a foster care grant from a claim for loss of support.

6 Social grants – A Third Collateral Benefit

The Constitutional Court held that:

> The purpose of the RAF is to give the greatest possible protection to claimants. A deduction of either foster child or child support grants would undermine that purpose. A reading of the RAF Act suggests that those grants should not be deductible. The RAF Act expressly provides that double compensation for persons who are entitled to claim under the Compensation for Occupational Injuries and Diseases Act [130 of 1993] should be deducted from compensation by the RAF but there is no equivalent reference to social grants (par 59).

Although the Constitutional Court did not expressly pronounce to this effect, the inference is that the court has extended the established list of *res inter alios acta* to include social grants. Thus, as of the date of judgment, general collaterals are (a) benefits received under ordinary contracts of insurance for which premiums are paid; (b) benefits received as *solatium* or from the generosity of third parties; and (c) social grants paid in terms of the Social Assistance Act.

7 Conclusion

It is submitted that the conclusion of the Constitutional Court is persuasive, namely that these grants are paid in view of the state's constitutional obligations and that (generally) a damage-causing event is not a necessary prerequisite for their provision. The Social Assistance Act is determinative of these requirements and is silent on their deductibility or otherwise in damages awards. The receipt of social grants is designed to safeguard the social security of citizenry and ought not to be considered an advantage in quantifying compensation. However, this is just about the only positive result coming out of the three *Coughlan* cases. It must be noted that although the High Court correctly ruled that the grant was a *res inter alios acta*, it held itself persuaded by the judgment

in *Makhuvela*. The premise of that conclusion was based on the superficial distinction between foster care and child support grants. The distinction is without substance and the court ought not to have slavishly bound itself to it. The Supreme Court Appeal, though correctly finding that the distinction, in principle, is only relevant for categorisation of the respective grants, missed an opportunity to correct its decision in *Timis*. Despite the obviously incorrect decision in the latter case, what was most disconcerting about that judgment appears from the following passage:

> It is important to stress that this finding does not mean that there is any general principle precluding an award of damages for loss of support where dependants have had the benefit of social support (par 22).

Over and above the legacy of casuistry, the cases represent a missed opportunity to set sound principles regarding the application of the collateral source rule. The determination of the rule still turns on a process of demarcation.

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Onlangse regspraak/Recent case law

Cecil Sher and Another v Vermaak (AR 197/13) [2014] ZAKZPHC 8 (25 February 2014)

Ensuring consistency in the law of defamation

1 Introduction

A person's *fama* or good name is the respect and status he enjoys in society (see Neethling, Potgieter & Visser *Law of Personality* (2005) 129). A person's right to his good name or *fama* is recognised and protected as an independent personality right (see Neethling & Potgieter *Law of Delict* (2015) 351). Personality law deals with the legal norms (rules and principles) aimed at protecting an individual's (or a juristic person's) personality, including the rules and principles which deal with the recognition, definition and protection of the various personality rights (see, in general, Neethling *et al supra*). It is trite law that defamation is the wrongful, intentional publication of words or behaviour concerning another person which has the effect of injuring his or her status, good name or reputation (see Neethling & Potgieter 352). Although some individuals are more easily insulted or offended than others, it is not the subjective feeling of being injured that entitles a person to a claim based on defamation. This makes it more difficult in a sense because it is the objective evaluation of the wrongfulness of the infringement that needs to be considered by a court. Although the law of defamation is clear and has developed over a long period of time (Neethling *et al* 12-16), case law sometimes creates the perception that legal principles are not applied consistently. The question of whether the reputation of the person concerned has been infringed is a factual one, based on whether the reasonable person sees it as such (Neethling & Potgieter 354).

The issue of factual infringement of the reputation of a person is particularly evident from the recent decision in *Cecil Sher and Another v Vermaak* ((AR 197/13) [2014] ZAKZPHC 8 (25 February 2014)). The purpose of this case discussion is to evaluate the way in which the court applied the existing principles pertaining to defamation and to indicate how the court, on appeal, reversed the rather strange findings of the court *a quo*. The discussion of the facts below shows that the dispute between Sher and Vermaak is typical of a situation where relations between parties have soured and they deemed it necessary to verbalise their dislike and, in the process, involve individuals who have no interest in what is essentially a petty squabble. However, court cases do not

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concern themselves with social phenomena or group dynamics. Rather, it is the role of the courts to establish whether the behaviour of individuals such as Sher and Spencer, in fact, infringed a legally recognised right such as the right to a good name and, similarly, whether defences or grounds of justification were present or not. Whether or not the court did that *in casu* becomes evident from the discussion that follows.

2 The Judgments

2 1 Facts of the Case

Mr William Vermaak (the plaintiff in the court *a quo*) instituted an action against Mr Cecil Sher and Ms Lorraine Spencer (the defendants in the court *a quo*) in which he claimed payment of the sum of R150 000 on the basis that the defendants had defamed him (*Sher and Another v Vermaak* par 1 of appeal judgement).

The incident in question stemmed from Vermaak's expulsion from the Stella Athletic Club. Vermaak, Sher and Spencer were all members of the club at that time (par 2). Trouble started when Sher wrote a letter to Vermaak which letter was subsequently distributed by Spencer. This letter, which was distributed to all the members of the club, contained a number of statements, *inter alia,* that there were various complaints about Vermaak, his behavior was unbecoming of a gentleman and he allegedly brought the club into disrepute (par 3). Following this correspondence, Vermaak attended a disciplinary hearing. In accordance with the findings, he was asked to resign and he was also informed that should he refuse to resign, he would be expelled (par 3 of appeal judgement). Predictably, Vermaak was in fact expelled and he formed a new club, the KZN Striders (par 3 of appeal judgement).

Not one to let sleeping dogs lie, Vermaak opted to institute a claim against his former fellow club members based on defamation. He contended that the letter in question was *per se* defamatory and that it had a 'distinctive defamatory sting' (par 4 of appeal judgement). In support of this, the particulars of claim set out a number of averments (par 4 of appeal judgement). First, Vermaak claimed that Sher and Spencer stated that, 'to [their] knowledge, William Vermaak is the first person to have been expelled by Stella Athletic Club' (par 4(a) of appeal judgement). These words, according to Vermaak, were specifically intended to isolate him and reiterate the point that Vermaak was the 'only person in the history of the club to have been adjudged so unworthy as to warrant expulsion' (par 4(a) of appeal judgement).

Second, Vermaak pleaded that the words in question, namely, that the plaintiff 'acted in an overbearing, presumptuous and aggressively haughty manner', were defamatory (par 4(b) of appeal judgement). The plaintiff deducts this from the words used in the letter, namely, that Vermaak was arrogant in telling the club that their constitution was 'old,

invalid and superceded by the National Constitution' (par 4(b) of appeal judgement).

In the third instance, Vermaak pleaded that Sher and Spencer used words that suggested that the plaintiff had such an 'odious' reputation that no other club in Durban or its surrounds would admit him as a member (par 4(c) of appeal judgement). In addition, Vermaak averred that the allegation that he had 'poached and canvassed' some members was intended to paint the picture that the plaintiff recruited new members for his club in an unfair and unsportsmanlike way (par 4(d) of appeal judgement).

Furthermore, Vermaak averred that the allegations by Sher and Spencer that he exploited the Stella Sports Club 'to nourish his own ego and advance his own objectives' (par 4(e) of appeal judgement) were defamatory, because it creates the impression that Vermaak was unworthy of membership and that he will continue to 'engage in future socially unacceptable behaviour to the detriment of runners, motorists and pedestrians' (par 4(f)(ii) of appeal judgement).

Not surprisingly, Sher and Spencer denied that the statements made by them were wrongful and made with the intent to injure the respondent's reputation, as their statements could in fact be justified. More specifically they pleaded that their statements were in essence true and what was more, is that the publication thereof was in the interest of the members of the athletic section of the club. Overall, having regard to Vermaak's behaviour at the disciplinary hearing, the surrounding circumstances support their defence based on fair comment and truthfulness (par 5 of appeal judgement).

2 2 Judgment of the Court *a Quo*

Mokgohloa J found in Vermaak's favour and ordered Sher and Spencer, jointly and severally, to pay Vermaak a sum of R50 000 together with the costs of the action (par 15 of *a quo* judgment).

In what can only be described as a disappointing and unscientific approach, Mokgohloa J seemingly deals with the defence of truth and public interest as a ground of justification by ruling, in her view, that the letter written by Sher and Spencer contained defamatory matter because it injured the plaintiff's reputation or lowered the plaintiff's status in the eyes of the members of the Stella Club (par 7 of appeal judgement). Instead of applying the law in a systematic way, the judge jumped into the boxing ring and commented that Sher and Spencer failed to show that Vermaak acted in an arrogant manner. In addition, the judge commented as follows: '[The] appellants (Sher and Spencer) did not deny that the respondent had enjoyed success with the training of his elite squad and that his manner of training benefited the group' (par 6 of appeal judgement & 15 of *a quo* judgment). Therefore, it would be understandable that when he started his own club, most runners would decide to join him. The judge further stated that it therefore cannot be

said that he poached members to join his 'club' (par 7 of appeal judgement).

Unfortunately, the judge failed to set out the law in a satisfactory manner and to deal properly with the averments in the particulars of claim. The conduct of the judge can almost be likened to an irritated teacher who enters a sandpit with two fighting children and upon hearing the last bit of the argument, punishes one of the children at random without enquiring about the context or about the circumstances surrounding the fight. The remainder of the averments were not dealt with by the judge of the court *a quo* (par 8 of appeal judgement).

2 3 Preliminary Remarks

Instead of entering the fray as a party to a tug of war, a judge must consider the proven facts, apply the law and reach a decision. We need to remind ourselves that Vermaak had to prove that the poison-pen letter from Sher, and Spencer's distribution thereof, constituted defamation because it constituted the wrongful and intentional publication of words that had the effect of injuring his status, good name or reputation (see Neethling & Potgieter 352). Publication is the disclosure of the defamatory statement or behaviour to a third person (see Neethling & Potgieter 353; and *Lubbe v Robinsky* 1923 CPD 110 111). In this particular case, publication was clearly not an issue. Apart from publication, the court needed to consider the wrongful, intentional publication of words or behaviour concerning another person which has the effect of injuring that person's status, good name or reputation (see Neethling & Potgieter 352). Vermaak had to prove that the words were wrongful by showing that in the eyes of the 'reasonable person with normal intelligence and development, the reputation of the person concerned has been injured (thus also an objective approach)' (Neethling & Potgieter 354). It is also very important to remember that the defamation complained of must have the effect of reducing the injured person's status in the community. Therefore, it is possible that the injured person may feel aggrieved by such statements. This is not a requirement for defamation, but rather a possible consequence which may follow. The statements made about him must have had the effect of lowering his status in the eyes of the community (Neethling & Potgieter 354). This test is clearly objective. As has been said, the judge did not consider all the elements of defamation and seemingly just picked a side (par 8).

Wrongfulness in the context of defamation is a complicated matter. The test for wrongfulness in these cases is based on the reasonable person test. This test states that whether, in the opinion of the reasonable person with normal intelligence and development, the reputation of the plaintiff has been injured. It cannot be avoided in the way Mokgohloa J did in this particular case. Rather, a judge should apply the test for wrongfulness based on the reasonable person test. Although there is no doubt that the application of the reasonable person test is complicated,

there are a number of factors which must be taken into account. First, the judge should have considered that the reasonable person is a fictional, normal, well-balanced and right-thinking person who is neither hypercritical nor oversensitive. The judge should look at whether such a person would find a statement to injure a person's reputation or not (see Neethling & Potgieter 355-356). Second, this reasonable person is someone who subscribes to the norms and values of the Constitution. This person is very much aware of the principles of the Constitution and would use these principles as underlying values to judge situations (Neethling & Potgieter 355). Third, he is a member of society in general and not only of a certain group. Therefore, the statement concerned would offend or harm all persons in society and not just those of one specific group (Neethling & Potgieter 355). Fourth, the reaction of the reasonable person is dependent on the circumstances of the particular case. The manner in which it is conveyed of each publicised statement should be looked at separately as this would affect the reaction of the reasonable person (Neethling & Potgieter 356). Fifth, verbal abuse is in most cases not defamatory because it does not normally have the effect of injuring a person's good name. Therefore, even a statement that amounts to verbal abuse, may not necessarily amount to defamation (Neethling & Potgieter 356). The sixth point is that words can *prima facie*, or according to their primary meaning, be defamatory but words can also be defamatory according to their secondary meaning. In such a case, the plaintiff would have to prove that the secondary meaning (or innuendo) is defamatory (Neethling & Potgieter 356). The last point to be taken into consideration is that if words have an ambiguous meaning, the one defamatory and the other not, then the meaning most favourable to the defendant must be followed. It is submitted that *in casu,* the judge in the court *a quo* did not analyse the specific element of wrongfulness in sufficient detail. The learned judge did not ask the question of whether a reasonable person with normal intelligence and development, would have found the person's reputation to have been injured (par 6).

If the judge in the court *a quo* had dealt with wrongfulness as an element of defamation in detail, she may have come to the same conclusion as the appeal court where it was said by Ploos van Amstel J that he 'was not convinced that a reasonable reader would find this statement to be defamatory, if objectively scrutinised' (par 26).

Also, even if the judge in the court *a quo* had found that *prima facie* wrongfulness was proven (Neethling & Potgieter 357), it must be remembered that Sher and Spencer had in fact relied on the defences of truth and public interest for the use of their 'defamatory' statements. They raised the defences that their statements were true and that the publication thereof was in the best interests of the club and the other members of the club. These factors are grounds of justification and should have been dealt with by the judge in the court *a quo* (see Neethling & Potgieter 357).

The plaintiff who proves that the publication is defamatory and that it refers to him, provides only *prima facie* proof of wrongfulness (see Neethling & Potgieter 357). A presumption of wrongfulness then arises, which places the onus on the defendant to rebut it (Neethling & Potgieter 357). If a defendant can prove that a statement made by him or her is justified according to a relevant defence, then the defendant can escape liability based on a ground of justification for example, privilege, truth and public interest, and fair comment (see Neethling & Potgieter 357). The most relevant grounds of justification *in casu* are truth and public interest as well as privilege (relative). None of the defences were dealt with by the judge in the court *a quo,* specifically the defence of privilege (which is relevant *in casu*) was clearly not dealt with in the court. Privilege exists where someone has a right, duty or interest to make specific defamatory assertions and the people to whom the assertions are published have a right or duty to learn of such assertions (Neethling & Potgieter 358). This will then allow a person to injure another's good name and, in so doing, his conduct will not be regarded as wrongful. However, if the plaintiff proves that the defendant exceeded the bounds of this privileged occasion, then this protection will fall away (Neethling & Potgieter 358). Neethling and Potgieter distinguish between absolute and relative privilege (see Neethling & Potgieter 358). The defendants' communication is generally privileged. Absolute privilege means that a person making the statement has an absolute right to make that statement at that time, even if it is defamatory. In other words, the person making the defamatory statements is immune from liability for defamation. For example, it exempts persons from liability for potentially defamatory statements made during judicial or parliamentary proceedings. Relative privilege means that a defendant making the allegedly defamatory statement may have had some right to make the statement. If relative privilege applies to a statement it means that the plaintiff must prove that the defendant exceeded the bounds of privileged occasion (Neethling & Potgieter 358).

Having regard to the relationship between the parties, it could be argued that in the court *a quo*, the defendants (Sher and Spencer) could have relied on the defence of relative privilege. A relationship existed between the parties at that time. Sher and Spencer, as members of the Stella Club, wrote the letter on behalf of its club members with regard to the alleged misconduct of Vermaak. The defence is available if the defamatory words were published in the discharge of a duty or exercise of a right to a person who had a duty or right to receive the statement (*Mkhonza v Minister of Police* (16629/12) [2015] ZAGPPHC 266 (8 May 2015)). Due to the relationship that existed between the parties *in casu* and if it is proven that both parties had a corresponding duty or interest (that a privileged occasion existed), the defendant must further prove that he acted within the scope and limits of the privilege. The defendants would have had to prove that the defamatory assertions were related to the discharge of their duties or the furtherance of the interests of the Club. However, the plaintiff may still show that the defendants exceeded

the boundaries of privilege because they acted with malice. In *Kennel Union of South Africa and Others v Park* (1981 1 SA 714 (C)), it was held that the defendants cannot shelter behind the privilege unless it is shown that the report was a truthful, accurate and honest report, published *bona fide* without malice.

The *prima facie* wrongfulness of the defendant's conduct will also be cancelled if he proves that the defamatory remarks were *true* and in the *public interest* (see Neethling & Potgeiter 360). Sher and Spencer raised this defence by stating that the statements made by them were true and in the interest of the members of their club (i.e. public interest) (par 5). Therefore, if the defendants in a defamation matter can prove that the statements made were true and in the public interest, then they can escape liability (see Neethling & Potgieter 357).

Every element of a delict must be proven in order to succeed with a delictual action. The elements of a delict are the following: an act, wrongfulness, fault (either intent or negligence), causation and damages (Neethling *et al* 4). With that being said, in order to prove defamation, every requirement of defamation must also be proven in order to succeed with a claim for defamation (Neethling & Potgieter 352).

The second element to prove defamation is intent or *animus iniuriandi,* which means that '[a]n accountable person acts intentionally if his will is directed at a result which he causes while conscious of the wrongfulness of his conduct' (Neethling *et al* 132). If there is no direction of the will or conscious wrongfulness, then there cannot be intent (Neethling *et al* 132). The intentions of Sher and Spencer were directed towards reprimanding Vermaak for his unscrupulous behaviour rather than defaming him (par 3). Vermaak's disciplinary hearing came about through various complaints received from other members of the club and the public alike (par 3).

2 4 Judgment of the Appeal Court

The matter was then appealed to the Kwazulu-Natal High Court Division in Pietermaritzburg. The judgment of the appeal court was based solely on whether the statements made by Sher and Spencer were in fact defamatory or not (par 1). With this being said, the judge in the appeal court was restrained to deal only with the facts that the judge in the court *a quo* dealt with. The facts were directly linked to whether or not the statements made by Sher and Spencer actually amounted to defamation according to the legal definition.

The two statements which were of main concern, and which were found to be defamatory by the court *a quo*, were thus also the main issues at hand in the court of appeal (par 7). Firstly, the statement regarding the poaching of members reads as follows: 'Consequently he has poached and canvassed a number of our members to join him. They obviously enjoyed his training and joined him. They are entitled to choose a club of their choice' (par 4(d)).

The court dealt with this issue by stating that '[Vermaak] failed to prove that in this case the statement was defamatory' (par 27). The second statement of concern was with regards to the 'arrogance' issue and reads as follows: 'William never accepted the disciplinary hearing nor did he accept those hearing it. He was arrogant to the point in telling us that our Constitution is old, invalid and superceded by the National Constitution' (par 4(b)).

The appeal court judgment stated that, when one is dealing with 'defamatory statements', the statement complained of should be seen as defamatory to the reasonable reader and if it is objectively scrutinised, then one would find it to be defamatory (par 26). *In casu*, it would appear that the statement complained of was not that the respondent is an 'arrogant person', but rather that the respondent had acted and behaved in an 'arrogant fashion' at the disciplinary enquiry (par 26). Ploos van Amstel J was not convinced that a reasonable reader would find this statement to be defamatory, if objectively scrutinised (par 26). He could not find that the statement complained of would 'injure the good esteem in which the respondent was held by the reasonable reader' (par 27).

The judge looked at the wrongfulness element (parr 26 & 27) and came to the conclusion that the objective test for wrongfulness had not been proven (par 27). The fact that the first element of defamation, namely wrongfulness, could not be proven is sufficient basis to conclude that the statements concerned could not amount to defamation.

The appeal court specifically considered these two statements and held that the court *a quo* had erred in holding that these two statements were defamatory, and the appeal was thus successful (parr 28 & 29).

3 Relevant Case Law

3 1 *Kennel Union of Southern Africa and Others v Park* 1981 1 SA 714 (C)

Mr Park, the respondent in the Constitutional Court and plaintiff in the court below (the Magistrate's Court, Cape Town) is married to Susanna Magdalena Park who is a breeder of dogs in Salisbury, Rhodesia. 'Both the Parks are members of the Kennel Union of Southern Africa. This is a voluntary association comprising a large number of affiliated clubs and members who are natural persons controlled by a Federal Council consisting of 12 members from 12 centres' (*Kennel Union of Southern Africa and Others v Park supra* at 716D). The Federal Council has certain disciplinary powers over members (art 33 of the Kennel Union Constitution read with the disciplinary rules, schedule 1, made under arts 3 (5), (18) & (19)). Pursuant to powers similar to these in force after 1 September 1975 (when the present constitution came into force), the Kennel Union had, in 1973, suspended Mrs Park for four years from taking part in any of the affairs of the Union (716H). This meant, *inter alia*, that she was debarred from exhibiting dogs at shows – a serious

penalty for a breeder. Her suspension was to run from 18 October 1973 to 11 October 1977. During this time, Mr Park did a transfer of registration for a few of the dogs owned by Mrs Park so that these dogs could take part in certain exhibitions (716H).

One of the dogs taking part in an exhibition was still registered in his wife's name and therefore, the Union took disciplinary action against Mr Park and suspended him (717H). They further decided that any awards received from the show by Mr Park should be cancelled. A while after, it was then decided by the Union that this suspension be withdrawn. However, the suspension of Mr Park was already published in the Kennel Union Gazette (720D).

The action by Mr Park arose out of this publication by the first defendant in the Kennel Union Gazette, of which the second defendant was the editor and third defendant the printer, of a report that the plaintiff had been suspended until further notice in terms of certain rules of the first defendant (719A). These rules authorised suspension for conduct which was 'improper, disgraceful or discreditable... or prejudicial or injurious to the interests of canine affairs' (719D). The alleged conduct for which the first defendant had suspended the plaintiff was that he had entered a dog in a dog show and had signed the entry form as owner of the dog when, according to the first defendant's records, the dog was owned by his wife, who had some time previously been suspended by the first defendant. In fact, the plaintiff was the owner of the dog in question, he having purchased it from his wife, and the entry form which he had signed was regular in terms of first defendant's rules as the plaintiff had applied to the first defendant for the transfer of registration of ownership of the dog to his own name. It further appeared that the suspension followed a complaint by the secretary of the first defendant, but that no copy of the written complaint had been sent to the plaintiff as required by the first defendant's rules and, in breach of the first defendant's constitution, he had had no opportunity to answer the complaint or otherwise defend himself. The decision to suspend him was accordingly improperly reached and invalid. It was alleged that this publication was *animo iniuriandi* (720(G)), in consequence whereof the plaintiff suffered R750 as damages to his good name and reputation (720(G)).

In the alternative, Mr Park pleaded the following:

> Alternatively, and only in the event of this Honourable Court's finding that the pleaded words of Defendants were not defamatory in their plain and ordinary meaning, plaintiff, pleads that the said words constitute an innuendo of dishonesty on Plaintiff's part, the words being intended to convey and in fact conveying to readers of the said Kennel Union Gazette that Plaintiff is a dishonest person and that he would and did dishonestly enter a dog in a show without being entitled to do so. The innuendo that Plaintiff was not the registered owner of the dog, Exhibit 318, as at 13th/14th March 1976 and had therefore dishonestly signed as owner of all three dogs is clear, was factually incorrect, and was published and printed with the intention of injuring

> Plaintiff in his good name and reputation. As a result thereof Plaintiff suffered damages to his good name and reputation in the sum of R750,00 (720H).

As to the innuendo pleaded by the plaintiff, the defendants denied that the words were intended to convey or did convey to readers of the Gazette that the plaintiff was dishonest and had dishonestly entered a dog for a show without being entitled to do so (721H).

The parties then went on to deny the:

> alleged innuendo that the plaintiff had been guilty of improper, disgraceful or discreditable conduct or conduct prejudicial or injurious to the interests of canine affairs or persons concerned or connected therewith; and denied that anyone understood the report in that way; and in the result denied that the plaintiff had suffered any damages at all (722D).

Nine months later, the defendants amended their plea by pleading privilege. They averred that the occasion of the publication was privileged because (722F):

> (i) The plaintiff was at all material times a member of the Kennel Union and as such was bound by the constitution; or alternatively was at all material times bound by the constitution.
> (ii) The defendants respectively publish, edit and print the Gazette which is the official organ of the Federal Council of the Kennel Union of Southern Africa.
> (iii) The Gazette is published only to members of the Union who are persons having an interest in the affairs of the Union and in affairs relating to dogs generally,
> (iv) In terms of Rule 14 in Schedule 1 to the Constitution the Council is empowered to publish in the Gazette full details of any complaint, the decision of the Disciplinary Committee and the decision of the Council thereon.
> (v) The defendants accordingly had a duty to publish the words concerning plaintiff which they did publish and the members of the Union had an interest in receiving such publication,
> (vi) The words about plaintiff accurately reflected the decision of the Federal Council.
> (viii) In publishing those words defendants acted without malice or impropriety and in the bona fide belief that the words were true (722F - 723B).

On these pleadings, the case went to trial and it was held by the court that based on the facts of the case it had not been ascertained that the alleged improper exhibition of the dog by Mr Park had not been adjudicated upon: when the report was published, the defendants had stated something which they had not known to be true, regardless of its truth or falsity, the inference of an improper motive arose and the defence of privilege was defeated (731A). The appeal was accordingly dismissed (733A).

The relevance of precedent in the law is that it partly constitutes the law as well as maintains consistency within our courts. The facts of the two cases are strikingly similar in that both cases dealt with independent

organisations where members have allegedly been defamed. The *Kennel Union* case would have served as direct precedent for the judge in the *Vermaak* case in the court *a quo*. Cases can be properly adjudicated upon if the judges properly relied on precedent when deciding on similar issues.

4 Analysis and Conclusion

Section 34 of the Constitution of the Republic of South Africa, 1996 provides as follows: 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'. Allied to this, section 165(1) of the Constitution gives the courts the power to exercise judicial authority. Evidently these are extreme powers which must be exercised with caution, restraint and responsibility underpinned by accountability (Bosielo *Judgment Writing for Aspirant Judges* African Judicial Training Institute (2013) 3). In their judgments, judicial officers are obliged to furnish adequate reasons to explain how and why they arrived at certain decisions (Bosielo 3). Generally, every judgment amounts to storytelling with an introduction, body and conclusion (Bosielo 18). Every judgment must have (a) an introduction; (b) the facts; (c) the issues; (d) the law which governs the issues; (e) how to apply the law to the facts; (f) the remedy; and (g) the order (Bosielo 18).

It is submitted that the courts are not thoroughly focusing on or addressing all the relevant issues raised by a particular case. It is vital that the courts remain consistent in applying the basic legal principles in each case. In order to ensure consistency in our law, with specific reference to defamation, the courts must display a thorough analysis, understanding and application of the law to the facts. In so doing, the correct legal issues have to be identified. This is an essential stage of the process because if these issues are not properly identified or recognised, it will become impossible to apply the law to the facts which, inevitably, will result in various inconsistencies.

The legal principles relating to defamation are fairly consistent and have occasioned a great deal of assurance over time. As legal students are taught to unravel the facts of each case, identify the legal principles and to lastly apply these principles to the facts, this should also remain fairly consistent within our courts. Legal scholars soon realise that not all cases are clear cut and each scenario is different, which would require slightly different deliberations. Be that as it may, the law still remains constant and a correct application of the legal principles should result in fairly similar outcomes.

It is submitted that the elements of delict were not proven in the *Sher v Vermaak* matter. Upon using the ordinary meaning of the words as well as the objective and reasonable person test, it follows that the statements are not defamatory. The publication of the letter to members of the club

may have caused the plaintiff a bit of embarrassment or even real prejudice but it does not amount to defamation. It must be remembered that the consistency of court decisions is crucial for justice to be served. The legal principles are there to lead the courts in the correct direction and these legal principles should always be followed by the courts.

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MtGox Co., Ltd (Re), 2014 ONSC 5811

Insights from some Canadian cases into the application of the UNCITRAL Model Law on Cross-Border Insolvency (1997) regarding the debtor's centre of main interests

1 Introduction

If an international model law has been adopted in two countries in reasonably similar terms, it is instructive for lawyers from the one country, who lack cases decided in terms of their local version of the model law, to consider cases decided in the other country as a source of examples and guidelines with respect to the application of that model law. *MtGox Co., Ltd (Re)* ('*MtGox*') was decided in terms of the Canadian adaptation of the *UNCITRAL Model Law on Cross-Border Insolvency Law* (1997) (the Model Law), which is in full force in Canada. By contrast, the South African adaptation of the Model Law in the Cross-Border Insolvency Act 24 of 2000 (the CBIA) is still not in full force in this country, because the Minister has not yet designated the states to which the statute applies (ss 2(2)-2(5)). So there are no South African precedents that can be commented on as regards the interpretation and application of this statute in practice. However, as the relevant South African cross-border insolvency provisions form part of the latest Insolvency Bill about which there is some interest (see Keynote Address by the Deputy Minister of Justice and Constitutional Development, the Hon John Jeffery MP, at the INSOL Africa Round Table (2015) available from http://www.gov.za/speeches/insol-africa-round-table-12-oct-2015-0000 (accessed 2016-10-31)), it is submitted that a consideration of the relevant cross-border insolvency provisions and then some comparisons with the equivalent Canadian provisions may prove instructive for South African lawyers, for when they do come to face interpretational issues in terms of the local provisions in practice. More particularly, in the search for a viable approach to determining the debtor's centre of main interests (COMI), as no such approach is set out in detail in the Model Law or in its

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Canadian or South African adaptations, it is submitted that a consideration of the two approaches adopted in Canadian case law may offer a fruitful ground for comparison in South African law.

Accordingly, this case note briefly summarises the relevant provisions of the South African CBIA. This sketch enables South African readers to consider the brief statement of the *MtGox* facts and then the Canadian application of the corresponding provisions to those facts, with respect to the recognition of foreign proceedings, the classification of those proceedings as foreign main proceedings, and the resultant automatic stay of local proceedings. After dealing with these three aspects, the discussion proceeds to deal with the two Canadian tests for determining the debtor's COMI – the three-pronged test in one line of cases, and the multifaceted approach applied in another line of earlier cases. The conclusion to this case note discusses the possible application of these two Canadian tests by South African lawyers and courts if the local statute should come into full force once the Minister promulgates the required list of countries.

For the sake of argument, it is assumed that such a list would include the countries mentioned in the Canadian cases – Canada, the United States of America, Japan, and Germany.

2 Selected Provisions of the South African Cross-Border Insolvency Act

A foreign representative seeking to deal with property in South Africa or receive assistance here is required to apply to the South African court for the recognition of the foreign proceedings (s 15(1)). The relevant South African definitions follow those of the Model Law. Thus, the foreign proceedings are collective judicial or administrative proceedings in a foreign state, including interim proceedings, under insolvency law in which proceedings the debtor's assets or affairs are subject to a foreign court's control or supervision, for reorganisation or liquidation (s 1(g)). The foreign representative (including an interim appointee) is authorised in foreign proceedings to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as the representative of the foreign proceedings (s 1(h)).

The foreign representative, as well as the South African court that is approached for recognition and assistance, must, as soon as possible (s 17(3)), draw an essential distinction between two types of foreign proceedings (s 17(2)). Foreign main proceedings are those proceedings taking place in the state where the debtor has the centre of her, his, or its main interests (s 17(2)(a)), and foreign non-main proceedings are those proceedings that are taking place in a state where the debtor has an establishment (s 17(2)(b)). An establishment is any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services (s 1(c)).

Of the three presumptions regarding recognition (s 16), the third is the important one for present purposes. In the case of a company, unless there is proof to the contrary, the debtor's registered office is presumed to be the debtor's COMI (s 16(3); this presumption and its displacement are discussed in par 5 *infra*).

The recognition of foreign proceedings as foreign main proceedings has certain important effects (s 20). The first is the stay that follows upon such recognition. This immediate stay applies to the commencement or continuation of individual legal actions or legal proceedings as to the debtor's assets, rights, obligations, or liabilities (s 20(1)(a)). The stay also applies to execution against the debtor's assets (s 20(1)(b)).

The relevant South African provisions having been sketched, the discussion moves on to the facts of *MtGox*.

3 The Facts of *MtGox*

MtGox was registered and had its headquarters in Japan (*MtGox* par 3), and from April 2012 to February 2014 ran its online exchange for buying and selling bitcoins – a digital currency – on its website (http://www.mtgox.com). When thousands of bitcoins were lost or stolen, the company stopped withdrawals from its customers' bitcoin accounts and soon suspended trading (*MtGox* par 4).

The court in Tokyo found that MtGox could not be rehabilitated, and it wound up MtGox and appointed Kobayashi as the trustee (*MtGox* parr 6-7). The company had about 120 000 customers who held bitcoin or fiat currency balances and who lived in about 175 countries (*MtGox* par 8). A class action against MtGox was instituted in the Superior Court of Justice in Ontario (*MtGox* par 9; see *Joyce v MtGox Inc*., 2016 ONSC 581) by Canadian residents claiming that they were 'owed currency and the value of bitcoins by Mt. Gox that they [had] been unable to withdraw' (Becker 'Canadian Class-Action Lawsuit Filed against Mt. Gox, Mizuho Bank' *Reuters* (2014-03-14) available from http://www.reuters.com/article/bitcoin-mtgox-mizuho-idUSL2N0MC01G20140315 (accessed 2016-10-31); recent news is that on 17 June 2016, the court in Ontario dismissed the class action, leaving individuals to carry on with their own claims (EconoTimes 'Mt Gox Class Action Lawsuit Dismissed In Canada' *EconoTimes: Digital Currency Revolution* (2016-05-19) available from http://www.econotimes.com/Mt-Gox-Class-Action-Lawsuit-Dismissed-In-Canada-210153 (accessed 2016-10-31))).

In October 2014, the Japanese trustee applied for initial recognition to the Superior Court of Justice in Ontario (*MtGox* par 1). The relevant local provisions on cross-border insolvencies were in the *Bankruptcy and Insolvency Act*, R.S.C 1992, c. 27, s. 2 (BIA), with its Part XIII on cross-border insolvencies comprising sections 267 to 284. The Japanese trustee sought a declaration and recognition concerning the Japanese bankruptcy proceedings, which he claimed were a foreign main proceeding (BIA s 270). He also sought a declaration that he was a foreign

representative (BIA s 268(1)) with the right to bring this application (BIA s 269), and he sought to stay and enjoin claims, rights, liens or proceedings against or concerning MtGox and its property. The Japanese trustee gave his reasons for bringing this application as follows: he wished to maximise creditors' recoveries and seek a fair distribution of value among creditors, and so he considered it necessary to interdict the Canadian litigation against MtGox (*MtGox* par 25). This injunction was to operate with the protections under the Japanese bankruptcy proceeding.

4 The Judgment of Newbould J

4 1 The Applicable Law

Newbould J held that between the two extremes of territorialism and universalism (*MtGox* par 10), the growing impetus in multinational bankruptcies was towards modified universalism (*MtGox* par 11). The main proceedings involving the debtor should be recognised in court in a single jurisdiction, and proceedings in other jurisdictions should be recognised as non-main proceedings (*MtGox* par 11). Modified universalism underlay the Model Law, which had been mostly adopted by Canada in 2009 through amendments to the BIA and the *Companies' Creditors Arrangement Act* RSC 1985, c C-36 (CCAA) (as to the CCAA, cf also *Caterpillar Financial Services Corporation v Boale, Wood & Company Ltd.*, 2014 BCCA 419 (CanLII) par 27). Even before 2009, Canadian courts had applied comity in cross-border insolvency cases (*MtGox* par 11; *Babcock & Wilcox Canada Ltd., (Re)*, 2000 CanLII 22482 (ON SC); 18 CBR (4th) 157; and *Lear Canada (Re)*, 2009 CanLII 37931 (ON SC); (2009) 55 CBR (5th) 57 (Ont SCJ)).

4 2 Recognition of Foreign Proceeding

A foreign representative may apply for the court in Canada to recognise the foreign proceeding (*MtGox* par 13; BIA s 269(1)). The court must recognise the foreign proceeding if it is a foreign proceeding and the applicant is its foreign representative (BIA s 270(1)).

According to Newbould J, a 'foreign proceeding' is a judicial or administrative proceeding, including an interim one, in a jurisdiction outside Canada, and dealing with creditors' collective interests generally 'under any law relating to bankruptcy or insolvency'; and the debtor's property and affairs are controlled or supervised by a foreign court for reorganisation or liquidation (*MtGox* par 14; BIA s 268(1)).

As seen in paragraph 2 above, the broad South African definition of 'foreign proceedings' follows the definition in the Model Law. The beginning of the Canadian definition has a different order, and the words 'bankruptcy or insolvency' allow for variations in the name of the relevant area of law.

Newbould J applied the Canadian definition to the Japanese bankruptcy proceeding (*MtGox* par 15). It was a judicial proceeding and

related to the collective interests of creditors generally under the *Bankruptcy Act* in Japan. In terms of this Act concerning bankruptcy and insolvency, the Tokyo District Court, Twentieth Civil Division, supervised the assets of MtGox, and the Japanese proceeding thus met the definition in section 268(1) of the BIA. The Japanese proceeding would similarly meet the South African definition of foreign proceedings mentioned in paragraph 2 above.

The next question was whether the Japanese trustee was a foreign representative (BIA s 268(1); *MtGox* par 16). This was a person or body, including a provisional appointee, who was authorised in a foreign proceeding, as regards the debtor, to administer the debtor's property or affairs for reorganisation or liquidation, or else to act as a representative as regards the foreign proceeding. Again, the South African definition is similar, as seen in paragraph 2 above.

Newbould J applied the Canadian definition to the Japanese trustee (*MtGox* par 17). This person, under the Japanese bankruptcy statute and the Tokyo Court's order in the Japanese bankruptcy proceeding, was authorised to administer the property and affairs of MtGox for liquidation and act as a foreign representative. The trustee met the Canadian definition, and so the court in Canada could recognise the Japanese proceeding as a foreign proceeding (*MtGox* par 18). Similarly, the Japanese trustee would meet the definition in the CBIA, and therefore, as can be seen from the discussion in paragraph 2 above, the South African court would recognise the Japanese proceeding.

4 3 Foreign Main Proceeding

A distinction was drawn between a foreign main proceeding and a foreign non-main proceeding (*MtGox* par 19). In *MtGox*, the Japanese trustee sought recognition of the Japanese proceeding as a foreign main proceeding. According to Newbould J, a foreign main proceeding was a foreign proceeding in a jurisdiction where the debtor's COMI was located (BIA s 268(1); *MtGox* par 20). Unless there was contrary proof, the debtor company's registered office was deemed to be that centre (BIA s 268(2)). Similarly, as noted in paragraph 2 above, the South African definition of 'foreign main proceeding' must be read with the deeming provisions that – in the case of a company, unless there is contrary proof – the company's registered office is deemed to be the debtor's COMI.

Newbould J listed three factors that must be taken into account in determining the COMI (*Lightsquared LP (Re)*, 2012 ONSC 2994 (CanLII); (2012) 92 CBR (5th) 321 (Ont SCJ); *MtGox* par 21). Could creditors promptly ascertain the location of that centre? Were the debtor's main assets and operations found there? And was the debtor managed there?

The Japanese trustee provided facts showing that MtGox's COMI was Japan (*MtGox* par 22). The trustee listed eight aspects, which may be summarised as follows. MtGox had always been organised in Japan, where its registered office and headquarters had always been located

and its books and records kept and most of its bank accounts, including the main one for operating the business, were maintained. In Japan, its parent company, Tibanne, provided MtGox with operational and administrative services such as its main workforce. MtGox's only director at all relevant times had lived in Japan. MtGox's website clearly showed customers and others that the company was a Japanese corporation located in Japan. The company had investigated the facts that brought about the Japanese civil rehabilitation, under the Tokyo Court's supervision. The company had no offices, subsidiaries, or assets in Canada (par 22).

Newbould J concluded that the company had its COMI at its registered office in Japan (*MtGox* par 23). He held that the Japanese bankruptcy proceeding was a foreign main proceeding (par 23).

It is submitted that, similarly, on the grounds set out in paragraph 2 above, the South African court would find that the COMI of MtGox would be located in Japan. It is assumed for the sake of argument that there would be no offices, subsidiaries, or assets of the company in South Africa.

4 4 The Stay of Proceedings

Recognising the Japanese proceeding as a foreign main proceeding (BIA s 271(1); *MtGox* par 24) resulted in a general ban on instituting or continuing legal actions, execution or other proceedings related to MtGox's property, debts, liabilities or obligations (BIA s 271(1)(a)). Debtors carrying on business must not dispose of their property in Canada except in the ordinary course of business (BIA s 271(1)(b)). Individual debtors must not sell or dispose of their property in Canada (BIA s 271(1)(c)).

Japan adopted the Model Law in 2000 (*MtGox* par 27). Newbould J confirmed the transparent regime that the Model Law introduced – foreign creditors were entitled to begin or take part in insolvency proceedings in a different state (Sarra 'Oversight and financing of cross-border business enterprise group insolvency proceedings' 2009 *Texas International LJ* 547). This aim was advanced by the automatic stay (BIA s 271(1)(a)). The Japanese trustee had a right to this stay because the Japanese proceeding was a foreign main proceeding. The Tokyo Court had set a final date for filing claims by 29 May 2015.

Newbould J mentioned the North American class actions against MtGox (*MtGox* par 28). Two of them had opened in the United States, and the Japanese trustee had obtained recognition of the Japanese proceedings as a foreign main proceeding under Chapter 15 of the *United States Bankruptcy Code* (hereafter Bankruptcy Code; see US Code Title 11 – Bankruptcy Chapter 15 Ancillary and other cross-border cases (ss 1501-1532) available from https://www.law.cornell.edu/uscode/text/11/chapter-15; that chapter adopted the Model Law for the United States, and was added by the *Bankruptcy Abuse Prevention and Consumer*

Protection Act of 2005). The United States litigation had been automatically stayed. Newbould J concluded that, similarly, the Japanese trustee had a right to the automatic stay of the Ontario class action.

On the basis of the relevant South African provisions in paragraph 2 above, it is submitted that the Japanese trustee would likewise be entitled to the automatic stay under section 20(1)(a)-(b) of the CBIA.

Having dealt with the three aspects – recognition, the classification of the proceedings as foreign main proceedings, and the stay of local proceedings – the discussion proceeds to the two Canadian tests for determining the debtor's COMI. These two tests are dealt with in paragraphs 5 1 and 5 2 below. After that, the conclusion in paragraph 6 of this case note considers the possible application of the two tests in South African law should the South African CBIA come into full force once the Minister designates the relevant states.

5 Two Canadian Tests regarding the Determination of the Debtor's Centre of Main Interests

This paragraph discusses the more recent three-pronged test and then the earlier, multifaceted test.

5 1 The Three-pronged Test in *Lightsquared*

The facts of *MtGox* enabled Newbould J to reach a straightforward decision in finding that the COMI of MtGox was Japan (*MtGox* par 23). The court dealt with the eight listed factors as a whole (*MtGox* par 22, items (1)-(8)) and did not provide separate answers to the three questions posed by the *Lightsquared* test as stated in *MtGox* (par 21). It would have been interesting to see the court answer these questions separately. This exercise may be carried out for the sake of argument. Firstly, as regards whether creditors could ascertain the COMI, what was significant was that the website of the company clearly showed customers and third parties that the company was a Japanese company incorporated in Japan. This website was accessible throughout the world before it was closed down. Secondly, as regards the location of the main assets and operations of the company, it was clear that most of MtGox's bank accounts, including its main business operating account, were in Japan, along with its books and records. That country was where its main workforce operated. Finally, regarding the place where MtGox was managed, the registered office coincided with the headquarters in Japan, and the sole director of MtGox lived there. Both the parent company and the company were Japanese companies. It was also interesting that the Japanese trustee added the information about the rehabilitation inquiry conducted in Japan.

The evidence provided by the Japanese trustee showed the predominance of connections to Japan, starkly contrasted by the trustee with the absence of links to Canada, where there were no offices,

subsidiaries, or assets (*MtGox* par 22, item (1)). There were creditors, as the Canadian class action showed (*MtGox* par 9, read together with *Joyce v MtGox Inc. supra*), but no attempt was made, so it seems, to indicate where the main creditors of the company were located. It appears that no creditor intervened to oppose the Japanese trustee's application for recognition as a foreign trustee and thus to provide evidence that Canada should be found to be the COMI.

It was important for the Japanese trustee to provide evidence, a step necessary for applying the presumption regarding the registered office of the company to the facts. It is interesting that in the absence of sufficient uncontested evidence as to the debtor's COMI, a court in Canada may be prepared to make a preliminary finding with the co-operation of the parties. Thus in *Burckhardt Reimer (Re)*, 2012 BCSC 2091 (CanLII) par 18 there was a dispute whether the petitioner had led enough evidence to establish the COMI for the respondents to contest. Prompted by Griffin J, the parties co-operated in preparing a draft order (*Burckhardt Reimer* par 20). Comity was shown towards the German insolvency proceeding (*Burckhardt Reimer* par 21), which was provisionally recognised as a foreign non-main proceeding (BIA s 270), without prejudice to a subsequent application to establish that it was a foreign main proceeding (*Burckhardt Reimer* par 23).

The simplicity of the *MtGox* facts may be contrasted with the more complicated variations that can be found in some of the other Canadian cases on cross-border insolvency. An example of more complicated facts is the *Lightsquared* case itself – relied on by Newbould J for his statement of the three factors for the court to consider in determining the COMI (*MtGox* par 21).

In *Lightsquared LP (Re)*, 2012 ONSC 2994 (CanLII); (2012) 92 CBR (5th) 321 (Ont SCJ), the applicant, Lightsquared LP, and some of its affiliates began voluntary reorganisation proceedings under Chapter 11 of the United States Bankruptcy Code in New York. The companies stated that they would be applying for Lightsquared LP to act as the foreign representative (*Lightsquared* parr 1-2). The initial recognition order sought from the Ontario Court in Canada was for a declaration of that company's status as a foreign representative, that the Chapter 11 proceeding was a foreign main proceeding under the CCAA, and that proceedings against the Chapter 11 debtors should be stayed (*Lightsquared* par 5). Of these twenty entities, sixteen had head offices or headquarters in the United States (*Lightsquared* par 8). Three of the debtors were Canadian – SkyTerra Holdings (Canada) Inc. (SkyTerra Holdings) and SkyTerra (Canada) Inc. (SkyTerra Canada), both incorporated in Ontario, and Lightsquared Corp. (LC), incorporated in Nova Scotia (*Lightsquared* par 9).

The Canadian debtors had the following functions (*Lightsquared* par 11). First, SkyTerra Canada held regulated assets as Canadian corporations were required to hold, and these assets were of mainly

three types – a satellite, Canadian industry licences, and contracts with Lightsquared LP's affiliates and third parties. SkyTerra Canada had no third-party customers or employees, and was funded entirely by Lightsquared LP. Second, SkyTerra Holdings, lacking employees or operational functions, was only to hold SkyTerra Canada shares. Third, LC was to provide customer services in Canada with respect to products and services that the Chapter 11 debtors had created for the United States market. LC held Canadian licences and authorisations and ground-related assets. The forty-three employees at LC's Ottawa offices did not belong to a union. Lightsquared LP funded LC's operations.

The integrated group management resulted in corporate and important decisions being taken in the consolidated offices in the United States (*Lightsquared* par 12). The Chapter 11 debtors' senior executives, including those of the Canadian debtors, lived in the United States. Management of the Chapter 11 debtors, including the Canadian ones, was mostly shared. For the Chapter 11 debtors, including the Canadian ones, the majority of the 'employee administration, human resource functions, marketing and communication decisions…and related functions' took place in the United States (*Lightsquared* par 12). Cash was managed under the supervision of employees mainly in the United States. Various other functions were shared among the Chapter 11 debtors, including the Canadian ones, and were managed mostly in the United States, such as 'pricing decisions, business development decisions, accounts payable, accounts receivable and treasury functions' (*Lightsquared* par 12).

Nearly all the funding of the Canadian debtors came from Lightsquared LP and other United States debtors (*Lightsquared* par 13). Lightsquared LP's credit facilities were guaranteed by the Canadian debtors by a priority interest over their assets (*Lightsquared* par 14). Accordingly, the Chapter 11 debtors' creditors were mostly common to them.

Morawetz J confirmed that, without contrary proof, the registered office of a debtor was deemed to be its COMI (*Lightsquared* par 23). The Canadian debtors had registered offices in Canada, but Lightsquared LP argued that Canada was not the COMI of the Canadian debtors (*Lightsquared* par 24).

Morawetz J held that if the court needed to travel beyond the presumption in section 45(2) of the CCAA regarding the registered office, 'the following principal factors, considered as a whole, [would] tend to indicate' whether the COMI was located where the proceedings were filed (*Lightsquared* par 25). Morawetz J then stated the list later given by Newbould J in *MtGox* (see par 4 3 *supra*). Morawetz J explained that these three factors would usually indicate one jurisdiction as the COMI (*Lightsquared* par 26). Where the factors differed, the facts would need to be examined. One factor might have to be given greater or lesser weight, depending on the facts. But the overall purpose was to ascertain

> that the location of the proceeding, in fact, corresponds to where the debtor's true seat or principal place of business actually is, consistent with the expectations of those who deal with the enterprise prior to commencement of the proceedings (*Lightsquared* par 26).

If the court found that the evidence contradicted the presumption, it should take the three factors into consideration when deciding where the COMI was located (*Lightsquared* par 27). This approach accorded with the 'preliminary commentary in the Report of UNCITRAL Working Group V (Insolvency Law) of its 41st Session (New York, 30 April - 4 May, 2012) (Working Paper AICN.9/742, paragraph 52' (*Lightsquared* par 28). Morawetz J considered this three-pronged framework appropriate for examining the COMI. He intended it to be a refinement of his opinion in *Massachusetts Elephant & Castle Group Inc. (Re)*, 2011 ONSC 4201; (2011) 81 CBR (5th) 102, where he had considered the following factors to be important:

- the location of the debtor's headquarters or head office functions or nerve centre;
- the location of the debtor's management; and
- the location which significant creditors recognize as being the centre of the company's operations (*Massachusetts* par 30).

As Part IV of the CCAA on cross-border insolvencies did not deal with corporate groups, the COMI had to be determined for each entity (*Lightsquared* par 29). Morawetz J applied his revised three-pronged test to the facts, and found that the Canadian debtors' centres of main interests were in the United States (*Lightsquared* par 31).

The three-pronged test in *Lightsquared* and *MtGox* has also since been applied in *Caesars Entertainment Operating Company, Inc. (Re)*, 2015 ONSC 712 (CanLII) par 33. In that case, Morawetz J found that the Chapter 11 debtors' COMI was the United States, where most of the other 172 Chapter 11 debtors were incorporated and headquartered and where they conducted various activities (*Caesars Entertainment Operating Company* par 35).

LeBlanc J also mentioned the *Lightsquared* three-pronged test in the Supreme Court of Nova Scotia (*Wolfridge Farm Ltd. (Re)*, 2015 NSSC 168 (CanLII) parr 32-33). The judge held that the presumption regarding the registered office in the United States had been rebutted, and that the COMI of Wolfridge Farm Ltd was Nova Scotia (*Wolfridge Farm* par 55). LeBlanc J also referred to *Probe Resources Ltd. (Re)*, 2011 BCSC 552 (CanLII); [2011] B.C.J. No. 802 (QL) parr 21-22, in which Fitzpatrick J in the Supreme Court of British Columbia had discussed work by Sarra (*Rescue! The Companies' Creditors Arrangement Act* (2007) 295-296) and McElcheran (*Commercial Insolvency in Canada* (2011) 376) to the effect that the relevant centre was where the debtor regularly administered its interests and where the creditors could ascertain this too (*Wolfridge Farm* par 30). On the basis of decisions from the European Union and the

United States, it was submitted by these authors that rebutting the presumption might be based on objective factors that would lead third parties reasonably to conclude that the registered office was not the COMI. The factors might include the locations of the headquarters, the management, the main assets and operations, and most of the creditors.

The *Lightsquared* three-pronged test has also recently been applied by Newbould J in *Zochem Inc. (Re)*, 2016 ONSC 958 (CanLII) parr 22-23.

The application of the three-pronged test having been dealt with, the discussion now proceeds to the multifaceted approach that was applied in an earlier line of Canadian cases.

5 2 The Earlier, Multifaceted Test in *Angiotech*

The three-pronged *Lightsquared* test is the more recent one for determining the COMI in Canadian law. Morawetz J's *Massachusetts* judgment is the door between this test and an earlier, multifaceted test in Canadian law. In *Massachusetts*, Morawetz J said that counsel had referred to *Angiotech Pharmaceuticals Ltd. ((Re)*, 2011 BCSC 115 (CanLII) par 7; *Massachusetts* par 26). In the Supreme Court of British Columbia in *Angiotech*, Walker J set out ten aspects to consider in determining the COMI in Canadian law:

(1) the location where corporate decisions are made;
(2) the location of employee administrations, including human resource functions;
(3) the location of the company's marketing and communication functions;
(4) whether the enterprise is managed on a consolidated basis;
(5) the extent of integration of an enterprise's international operations;
(6) the centre of an enterprise's corporate, banking, strategic and management functions;
(7) the existence of shared management within entities and in an organisation;
(8) the location where cash management and accounting functions are overseen;
(9) the location where pricing decisions and new business development initiatives are created; and
(10) the seat of an enterprise's treasury management functions, including management of accounts receivable and accounts payable.

In *Massachusetts*, Morawetz J held that as the relevant Part IV of the CCAA had taken effect in September 2009, Canadian courts were not well versed in determining the COMI (*Massachusetts* par 19). He set out the list of ten factors and commented that these were intended to guide the interpretation of the only requirement, the COMI (*Massachusetts* parr 26 & 27). Some of these or other factors might be ruled more important than others (*Massachusetts* par 28). No single factor was decisive, and all of them might be considered in the particular circumstances of the case.

Morawetz J explained, for instance, that the place of organising or authorising finance, or the location of the debtor's main bank, would be

important only if the bank exercised some control over the debtor (*Massachusetts* par 29). The location of the employees might be important if they were future creditors, but less so because protecting the employees was more a matter of protecting interested parties' rights and thus was irrelevant in determining the debtor's COMI. Further, the law of the jurisdiction governing most disputes might not be significant if the jurisdiction was not connected to the place of management or the carrying on of business. However, three aspects were usually important:

(1) the location of the debtor's headquarters or head office functions or nerve centre;
(2) the location of the debtor's management; and
(3) the location which significant creditors recognize as being the centre of the company's operations (*Massachusetts* par 30).

Other factors might be relevant, said the judge, but perhaps they 'should be considered to be of secondary importance and only to the extent that they relate to or support the above three factors' (*Massachusetts* par 31).

Morawetz J explained why it was preferable to apply this *Massachusetts* three-pronged test. In the *Massachusetts* case, the Chapter 11 debtors had begun Chapter 11 proceedings in the United States. All except three debtors were incorporated there (*Massachusetts* parr 5-6). Two of the Canadian debtors were registered in Ontario and the third in Nova Scotia. The issue was whether there was enough evidence to displace the rebuttable presumption regarding these Canadian debtors' registered offices in Canada (*Massachusetts* par 22). The head offices of all the debtors, including the Canadian ones, were in Boston (*Massachusetts* par 23). The debtors operated 'as an integrated North American business' in a group, and were run by all the members of the debtors' management in Boston. The Boston offices handled most of the 'human resources, accounting/finance, and other administrative functions' (*Massachusetts* par 23). Most of the information technology was furnished in the United States, and one of the Canadian debtors was a parent to a restaurant group operating only in the United States (*Massachusetts* par 23).

The applicant argued in favour of recognising the Chapter 11 proceedings as a foreign main proceeding (*Massachusetts* par 24). One person stated that almost half the operating premises and employees were in Canada, and that a Canadian equipment financing company had lent considerable sums to the applicant (*Massachusetts* par 25). But the lender company did not oppose the present application. In the circumstances, Morawetz J held that the debtors' headquarters or office functions (its 'nerve centre'), as well as the management, were in Boston (*Massachusetts* par 32). The important lending creditor in Canada did not oppose the relief that the applicant sought. Morawetz J thus concluded that each Chapter 11 debtor, including the Canadian ones, had its COMI in the United States.

A summary of the longer *Angiotech* list of factors, and the shorter *Massachusetts* test, is seen in *Digital Domain Media Group, Inc. (Re)*, 2012 BCSC 1565 (CanLII) parr 21 & 22. Fitzpatrick J in the Supreme Court of British Columbia held that Morawetz J in the *Massachusetts* test had 'identified what he considered to be the most significant factors'. Fitzpatrick J then also set out the revised, *Lightsquared* test (*Digital Domain Media* par 23).

Finally, it is noted that if Canadian companies intend to apply for the Canadian proceedings to be recognised under Chapter 15 of the United States Bankruptcy Code, the Canadian courts have held that the determination of the debtor's COMI is to be left to the United States court (see, for example, *Cinram International Inc. (Re)*, 2012 ONSC 3767 (CanLII) par 42; *Re iMarketing Solutions Group*, 2013 ONSC 2223 (CanLII) par 30; *Cline Mining Corporation (Re)*, 2014 ONSC 6998 (CanLII) par 52). Conversely, Chapter 11 proceedings under the United States Bankruptcy Code have been recognised as foreign proceedings under the CCAA (see *Massachusetts* par 13, mentioning the *Babcock* and *Lear* cases; and *Magna Entertainment Corp. (Re)*, 2009 CanLII 9757 (ON SC); 51 CBR (5th) 82 (Ont SC)).

6 Conclusion

The discussion now turns to the South African position regarding the determination of the debtor's COMI. The preceding survey, in paragraph 5, of several Canadian cases provides examples and guidelines that South African courts may find useful in determining the debtor's COMI when the CBIA comes into full force. The central determination is where this centre is located, on an objective view by third parties such as creditors. It is noted that, as in *Burckhardt Reiner* (see par 5 1 *supra*), an interim finding may be made that the foreign proceedings are foreign non-main proceedings, with the proviso that a later application may be made to establish that the foreign proceedings are foreign main proceedings.

The earlier, multifaceted test of ten factors (*Angiotech* par 7; see par 5 2 *supra*) provides a detailed framework for the analysis. It seems unlikely that the court would need to consider any further factors in reaching its determination. Morawetz J cautioned that, in the determination of the only requirement, the COMI, some of these ten factors might be considered to be more important than others, none being decisive, and all to be considered (*Massachusetts* par 28). In this regard the judge's warning about the location of where the debtor's finances are organised or authorised, or where its main bank is to be found (*Massachusetts* par 29), should be remembered because this factor would be important only if the debtor's bank had some measure of control over the debtor. The complicating factor would be the determination of the extent of that bank's control. Perhaps this factor would be important if the company were heavily indebted to a bank or banks, and most of the company's assets were encumbered in favour of those banks. The view of the major creditors, or a major creditor, may also be important – it is significant

that the equipment financing company was mentioned in *Massachusetts* and that this lender had not opposed the application for recognition (*Massachusetts* par 25). It is also noteworthy that the choice of law governing most of the parties' disputes may be held not to be important if there is no link to the place where the debtor is managed or carries on business (*Massachusetts* par 29). This consideration would meet the expectations of local creditors in the sense that they would expect local law to apply to the resolution of disputes, rather than a foreign legal system with which they would not be familiar.

Morawetz J's views in *Massachusetts* (par 29) on the importance of the location of the employees are interesting. It is submitted that employees may be future creditors in the sense that their contracts of employment would normally continue to run in the event of business rescue proceedings in South African law (several of the Canadian decisions involve reorganisation –business rescue – under Chapter 11 of the United States Bankruptcy Code). But it is also significant that the interests of the employees were kept separate by Morawetz J from the determination of the debtor's COMI. In other words, the protection of one group of creditors should not impinge on the determination of the COMI. However, the facts may vary – it is conceivable that a solvent company may face a looming future debt and seek to weather the storms of this debt by resorting to business rescue; and that a sizable portion of the overall liabilities of this company may be liabilities with respect to the employees. An oversized workforce may be one of the problems that cannot be ignored.

The advantage of the multifaceted test is its variety of factors that may be considered, each to be given greater or lesser weight according to the circumstances of the case. Yet it may also be felt that in its variety lies a complication of application, and – although the facts of cases may vary – that it may take some time for a body of cases to develop in which the application of the multifaceted test may be observed and the importance given to some factors rather than others may be calibrated. In this respect, the advantage of the three-pronged test in *Lightsquared* is that it is simpler to apply. The *Lightsquared* test, as applied in the *MtGox* case (par 21), asks three simple questions: whether creditors can promptly ascertain the location of the debtor's COMI, whether the debtor's main assets and operations are to be found there, and whether the debtor is managed there. The three-pronged *Lightsquared* test, the refined version of the *Massachusetts* test, may, on its own, be sufficient to guide the court in determining the COMI in one country, as in *MtGox*. Even if the facts may be more complicated than those in *MtGox* and the debtor's COMI may have to be determined for each debtor which forms part of a company group, the cases of *Lightsquared* and *Caesars* demonstrate that the test is still helpful in guiding the court to determine the debtor's COMI where the rebuttable presumption of the company debtor's registered office being the COMI is displaced.

Finally, if a South African company were to apply for the South African insolvency proceedings to be recognised under the business rescue provisions of a foreign country, the South African courts would be well advised, like their Canadian counterparts in cases such as *Cinram* (see par 5 2 *supra*), to decide that determining the debtor's COMI should be left to the appropriate foreign court. Conversely, it is submitted that, as in Canada (see the *Massachusetts* case; par 5 2 *supra*), Chapter 11 proceedings under the United States Bankruptcy Code should be recognised as foreign proceedings under the CBIA once the United States appears on the Minister's list of relevant countries.

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Jerrier v Outsurance Insurance Company Limited [2015] 3 All SA 701 (KZP)

The duty to disclose: An ongoing problem?: Revisited

1 Introduction

As shown by the author in an earlier case note, (Church '*Jerrier v Outsurance Insurance Company Ltd* The duty to disclose: An ongoing problem?' 2013 *De Jure* 859), the case of *Jerrier v Outsurance Insurance Company Ltd* (2013 JDR 0562 (KZP) (*Jerrier a quo*)) highlights the fact that the duty to disclose is still problematic. A concern highlighted in the note, was the fact, as a result of this decision, that short term insurers believed the judgment to mean that consumers are obliged to report to their insurers every minor incident, such as driving through a pothole or a scratch on their car, even where they elect not to lodge a claim for the resultant damage – failing which, their insurance claims might be rejected. This interpretation, in the opinion of the author was incorrect (an opinion now vindicated by the court of appeal).

However, since this interpretation by insurers caused a public outcry, the National Treasury stepped in. A meeting was held between Treasury, the Financial Services Board (FSB) and the South African Insurance Association (SAIA). The outcome was that SAIA declared that in future, member companies (insurers) would not reject motor car claims on the grounds that the insured did not report minor incidents. Although this was a step in the right direction, it is deemed not to be sufficient (see generally Church 2013 *De Jure* 859-868).

Fortunately, the decision was taken on appeal (*Jerrier v Outsurance Insurance Company Limited* [2015] 3 All SA 701 (KZP) (*Jerrier Appeal*)) and

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the court, reversing the decision of the court *a quo*, found that the failure to disclose did not constitute 'material' non-disclosure. Thus, the fear that insurance companies could rely on this case to reject a claim where minor incidents were not disclosed (at the very least in the case of similar policies), has now been put to rest.

Be that as it may, the court of appeal, in the words of Chetty J, recognised:

> how difficult it can be for a prospective client seeking insurance to determine either at the commencement of a contract or at any time thereafter, what a reasonable person would have considered to be material for the purpose of ascertaining the risk to be assumed by the insurer (par 36).

From this, it seems clear that the duty to disclose remains a concern that needs to be addressed.

2 Facts and Judgment

The appellant, Sherwin Jerrier (hereafter Jerrier) appealed against the judgment granted in *Jerrier v Outsurance Insurance Company Ltd* (*Jerrier a quo supra*). The court *a quo* had dismissed Jerrier's claim against the respondent, Outsurance Insurance Company Ltd (hereafter Outsurance).

Jerrier (the plaintiff in the court *a quo*) had instituted action against Outsurance as a result of the company repudiating his claim for the repair of his Audi R8 damaged in a vehicle collision on 8 January 2010. The claim was founded on an insurance contract concluded between the parties. However, Outsurance denied liability, elected to reject the claim made against it, and to avoid the insurance agreement (*Jerrier a quo supra* at par 2). Outsurance based their defence on the fact that Jerrier had failed to comply with the provisions in the policy on two grounds.

The first related to disclosure of certain information (the so called 'non-disclosure defence'). With regard to short term insurance, where there has been a failure to disclose material information or where there has been a misrepresentation, the insurer can avoid the insurance contract or deny liability and reject the insured's claim (s 53 of the Short-term Insurance Act 53 of 1998 (STIA)). The duty to disclose is a pre-contractual duty, which may become an additional or continuous duty when it is incorporated into the contract (Reinecke *et al General Principles of Insurance Law* (2002) par 196; Van Niekerk 'The Insured's Duties of Disclosure: Delictual and Contractual; Before the Conclusion and during the Currency of the Insurance Contract: *Bruwer v Nova Risk Partners Ltd*' 2011 *SA Merc LJ* 135; Church 2013 *De Jure* 859).

The second related to the exclusion of cover where the insured was driving under the influence of alcohol or drugs (*Jerrier a quo supra* at parr 6 & 7). Although the court *a quo* did not deal with this defence in any great detail, it found that the evidence tendered by the defence in this regard was not admissible. Furthermore, even if it were admissible, the court reasoned that it would not be of sufficient weight to displace the

version that Jerrier was not under the influence of alcohol (*Jerrier a quo supra* at par 37). Consequently, it was not necessary for the court to determine whether cover would be excluded on the ground of driving under the influence. Nonetheless, Outsurance was held not to be liable on the court's interpretation of the insured's duty to disclose in the light of the circumstances of the case. In other words, even though Jerrier had had no intention of lodging a claim under the policy, his failure to report *two* previous incidents within the time frames stipulated in the policy, amounted to a 'material non-disclosure or breach of the terms of the policy' and this, it was held, had absolved Outsurance from liability.

On appeal, the findings of fact by the court *a quo* with regard to the driving under the influence, were not in issue. Consequently, the appeal centred on the finding of the court *a quo* with regard to non-disclosure.

The first incident, driving into a pothole (the pothole incident), occurred on 2 April 2008, prior to the conclusion of the contract. The second related to a more serious incident, a collision with a vehicle in Amamzintoti on 11 April 2009 (the Amamzintoti collision).

In the view of the court *a quo*, both were incidents which might have resulted in – in the sense that they could possibly have resulted in – a future claim irrespective of whether or not they did result in such claim (*Jerrier a quo supra* at par 29). Moreover, the court concluded that both these incidents:

> would cause a reasonable man to conclude that knowledge of their occurrence would indicate a change to the plaintiff's circumstances, at the very least from a claims history perspective, but also as a moral risk, that may (not necessarily would) influence whether the defendant would give the plaintiff cover, the conditions of cover or the premium they would charge (*Jerrier a quo supra* at par 30).

The provisions in the policy considered by both courts provided that:

> First;
> In order to have cover you need to:
> - pay your premiums;
> - provide us with true and complete information when you apply for cover, submit a claim or make changes to your facility. This also applies when anyone else acts on your behalf;
> - inform us immediately of any changes to your circumstances that may influence whether we give you cover, the conditions of cover or the premium we charge;
> - E.g. If you sell your car and buy another one, you need to inform us about the change before you can take delivery of this car so that you can be certain that your car is OUTsured by the time you drive off the showroom floor.
>
> This includes any changes to any information:
> - on your schedule;
> - about the financial position of any person covered under this facility, specifically relating to defaults, civil judgments, sequestrations,

administration orders and liquidation of companies in which you have an interest;
- about convictions for offences related to dishonesty by you or any person covered under this facility (*Jerrier a quo supra* at par 5).

Second, the provisions determined the responsibilities of the insured in relation to the submission of claims. The insured had to report his claim or any incident that might have led to a claim to the insurer as soon as possible but not later than 30 days after any incident. This included incidents for which he did not want to claim but which might have resulted in a claim in the future (*Jerrier a quo supra* at par 6).

Furthermore the policy stipulated that the insured was required to provide the insurer with 'all information and documentation within the time frames' it set out and to warrant that statements made and answers given during the application for insurance and at each renewal of the contract were true and correct (*Jerrier a quo supra* at par 6).

Against this background, the court of appeal considered the finding of the court *a quo* regarding the non-disclosure defence and upheld the appeal. Contrary to the court a quo, the court of appeal followed the contextual approach taken in *Mahadeo* (*Mahadeo v Dial Direct Insurance Ltd* 2008 4 SA 80 (W)). As will be discussed below, the need to establish whether non-disclosure was material in the context in which the insured found himself was emphasised.

With regard to the provisions in the contract determining time frames, the court of appeal found that the court *a quo* had erred in its reasoning. It had incorrectly been persuaded by the argument made by counsel for the insurer, that even where Jerrier had already himself paid the driver of the other vehicle (the third party) for his loss suffered, Outsurance would be obliged to defend or settle a claim by the third party if the third party, at a later stage, contended that he had suffered damages in excess of that amount. Counsel for Outsurance argued that such a scenario would be an example of 'an incident which may result in a claim in the future'. However, the court of appeal disagreed with this reasoning. Accordingly, it found that the words 'but which may result in a claim in the future' could relate only to the election by the insured of whether or not he wished to claim beyond the 30-day period. The court noted that the '30-day notice period is a guillotine provision, after which the insurer is exempted from indemnifying the appellant or any other party which has sustained damages in an accident'. While any other party might still have a claim against the insured, the insurer would not be under an obligation to indemnify the insured against such a claim, should the insured have elected not to report the claim within the relevant time period. As no contractual nexus exists between the third party and the insurer, the words 'but which may result in a claim in the future' could only relate to the election to claim by the insured. As long as the insured had understood that where he had elected not to report the incident to the insurer, he would have had no claim against the insurer at the time

of the incident or later – no obligation rested upon him to report the matter to the insurer.

3 Comment

As already stated, the duty to disclose material information is a duty that arises prior to the conclusion of the insurance contract and at each renewal. While this duty rests on both the insured and the insurer as was determined in *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* (1985 1SA 419 (A)), the focus in the *Jerrier* case was on the insured's duty of disclosure (for an insightful evaluation of the insurer's precontractual duties see Millard & Kuschke 'Transparency, trust and security: An evaluation of the insurer's precontractual duties' 2014 *PER/PELJ* 2412). The duty to disclose only becomes a continuous one if this is provided for in the contract itself. In order to establish whether or not this was so, the court had to analyse and interpret the terms of the contract as set out in the policy. The court found that it simply did not provide for this on-going duty to report after commencement of the policy (*Jerrier Appeal supra* at par 34). Furthermore, even if it did, the obligation to report 'incidents' was not set out with any particularity and, in the words of Chetty J, was 'bound to lead to uncertainty as to what should and should not be reported, especially where the insured had no intention of lodging a claim'. To that end, declared the judge, the appeal would be upheld (*Jerrier Appeal supra* at par 34). Clearly this dictum suggests that the court followed a contextual approach with regard to the interpretation of the policy and the position of the insured in this regard. The approach of the court is to be lauded.

A contextual approach would be particularly important in determining whether there was a duty on the insured to disclose and following upon this, whether non-disclosure was material. While recognising that the test for materiality is an objective test, the approach should be contextual. As Van Niekerk points out, in the application of the test, 'the reasonable person has to be placed in a particular context' (Van Niekerk 'More on Insurance Misrepresentation, Materiality, Inducement and No-Claim Bonuses: *Mahadeo v Dial Direct Insurance Ltd*' 2008 SA *Merc LJ* 427). This means that the test is not what the reasonable person on the street would consider to be relevant to the assessment of the risk and premium, but what a reasonable person, in the circumstances of the particular insured, would have considered to be relevant. Various factors would have to be considered holistically in determining this. For example, not only the wording of the policy itself would be important but how it would be understood by the reasonable person in the position of the insured, against the background of the nature of the policy, how it was presented and how it would have been perceived. So too, for example, the position might be different if the agreement was concluded telephonically or where there was a broker involved. As the court of appeal noted, such a contextual approach, favoured in *Mahadeo v Dial Direct Insurance Ltd* (*supra*), was not followed by the court *a quo* in the *Jerrier a quo* case (*Jerrier Appeal supra* at par 34).

Various circumstances in the case under discussion were to determine whether or not the appellant had a continuous duty to disclose. In the first place, the court found that the insurer, as part of its business branding profile, prided itself on assuring prospective clients that the relevant policy documents would 'say it simply' in 'plain language' and convey details in the 'clearest possible way' and also on saving the consumer money by excluding brokers in order to reduce the premium (*Jerrier Appeal supra* at par 4). As was pointed out by the author in a comment on the earlier *Jerrier* decision, where the insured makes use of the services of a broker, the broker is obliged to warn the insured to disclose all material information and to explain what this means (Church 2013 *De Jure* 859; see also Reinecke *et al* par 474). While excluding a broker might save the insurer money, where there is no broker there is an even greater need for an insurer, as one who would understand how risk and premiums are assessed, to make sure that this is understood by a prospective insured and the policy documents should consequently be clear and comprehensible. Unfortunately, in this case – as the court pointed out – the wording of the policy was not as simple and in plain language as the insurer might have believed.

Furthermore, the premiums were to be based on an individual's profile and the policy went further to explain in plain language that 'as an insured, you are rewarded for not claiming' (*Jerrier Appeal supra* at par 18). Moreover, the manner in which the insurer's policy was designed, the court found, 'positively discourages its clients from submitting claims' (*Jerrier Appeal supra* at par 19). These facts, and the resultant uncertainty, actually reinforced the insured's perceived need to elect not to claim in the hope of preserving his 'Outbonus' and not to disclose 'incidents' where he had not claimed but self-funded damage suffered. Further to the wording of the contract and an added incentive not to submit claims, was the fact that the policy was not 'similar to other "conventional" policies, which are subject to an annual renewal' (*Jerrier Appeal supra* at par 20). Where a contract is subject to an annual renewal, the precontractual duty of disclosure revives and the risk will be reassessed against the insured's previous claims history and, consequently, the insurer may elect not to provide cover or to increase the premium.

A further point made by the court in regard to the contractual provisions, was that Jerrier was required to inform Outsurance immediately of any 'changes to his circumstances'. However, in the context of the wording of the policy which focussed on the financial position of the insured (for example sequestration or even a civil judgment against the insured) as affecting the risk focused on, as the court stated, envisages the insured's personal circumstances rather than a change in the condition of the vehicle (*Jerrier Appeal supra* at par 21). In the light of such focus, a reasonable person in the situation of the insured could have been expected to believe that it was his or her financial position that was material to the risk. Moreover, I would agree with Millard ('*Jerrier v Outsurance Insurance Company Limited*' 2015 *Juta's*

Insurance Law Bulletin 18) that the listing of specific events would invoke the *eiusdem generis* rule. In terms of this rule, where a word or expression with a broad, general meaning is used in conjunction with words that denote species of the same genus, the meaning of the general word or phrase is limited to refer only to matters of the same genus (Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) 179). Here, 'change in circumstances' was qualified by mentioning matters that relate to the information about the insured's financial situation and not to changed circumstances pertaining to the risk or risk object. If Outsurance intended that 'change in circumstances' included the situation where the insured had himself absorbed the loss and not instituted a claim, it should have specifically stated so in the policy.

Furthermore, the court noted that the policy should not only be couched in plain language but should be clear and specific (*Jerrier Appeal supra* at par 22). Not only did the contract itself determine that the policy was 'a plain language document' but in respect of the terms and conditions governing the policy, the insurer undertook to '"[S]ay it simply. There is no fine print in our documents. Our documents are easy to read and user-friendly so there are no hidden surprises"' (*Jerrier Appeal supra* at par 4). Despite this undertaking in the policy, the court found that the word 'incident' was vague. The duty, as contained in the policy, to disclose certain 'incidents' after the conclusion of the contract, placed an uncertain and vague burden on the insured (*Jerrier Appeal supra* at par 22).

The need for plain language is clear with regard to all contracts. This is so since the legal notion of consensus involves the meeting of minds of the relevant parties to the contract. Despite the fact that the Consumer Protection Act (68 of 2008) does not apply to the insurance industry (Financial Services Laws General Amendment Act s 66; see also Millard & Kuschke 2014 *PER/PELJ* 2412), the need for plain language is in fact recognised in the policy holder protection rules (see Policyholder Protection Rules published in terms of both the STIA and the Long-term Insurance Act 52 of 1998). However, while the need is clear and recognised in the *Jerrier* case, albeit in this case an obligation arising from the policy itself, it would seem that failure to use plain language would lead to costly litigation. It may be argued that standard form contracts would alleviate the problem. With tried and tested clauses in 'plain language' where the meaning of a clause became concretised over time, this would lead to legal certainty. However, this would not necessarily mean that a particular insured would comprehend the meaning and legal obligation involved.

Further to the point made above with regard to plain language, the judgment in the Court of Justice of the European Union (CJEU) in *Jean-Claude Van Hove v CNP Assurances SA* (Case C-96/14, 23 April 2015) is apposite. The judgment, *inter alia*, turned on the application of Article 4(2) of the Unfair Terms in Consumer Contracts Directive of the European Union (93/13/EEC of 5 April 1993, hereafter the Directive). The

Directive provides that consumers are not bound by unfair clauses that are set out in a contract concluded with a seller or supplier. However, terms concerned with the main subject-matter of the contract fall outside the scope of the Directive, provided that those terms are drafted in plain, intelligible language. In determining the language issue, the CJEU explained that in order to comply with the requirement, the wording 'cannot be reduced merely to their being formally and grammatically intelligible' to the consumer, but that the requirement of transparency must be interpreted broadly (*Jean-Claude Van Hove supra* at par 40). This would mean that besides being grammatically intelligible to the consumer, the contract must also transparently set out 'the specific functioning of the insurance arrangements, taking into account the contractual framework of which they form part, so that that consumer is in a position to evaluate, on the basis of precise, intelligible criteria, the economic consequences for him which derive from it' (*Jean-Claude Van Hove supra* at par 50). The sentiments expressed by the CJEU are especially relevant with regards to the drafting of contracts, particularly insurance contracts, where legal notions are not easily comprehended by the average policyholder.

Moreover, like many other commercial contracts which, as Gouws points out (Gouws 'A Consumer's Right to Disclosure and Information: Comments on the Plain Language Provisions of the Consumer Protection Act' 2010 *SA Merc LJ* 81), are often mass-produced and their terms non-negotiable, so too is the case with insurance contracts. As such, the insured is not really in a position to bargain with the insurer. It is therefore gratifying that the court applied the *contra proferentem* rule. In terms of this rule of interpretation, where the meaning of the policy wording is ambiguous, the wording of the policy must be interpreted against the drafter of the contract, here the insurer, and in favour of the other contracting party, the insured.

4 Conclusion

While one may agree with the outcome of the case, and although it is gratifying that the court used a contextual approach to determine the materiality of the information to be disclosed, it is clear that it may be difficult for a court, and even more so an insured, to determine what would be considered to be material in the circumstances.

Possibly, the call by Van Niekerk for the farewell of the duty to disclose, or at least its reform (Van Niekerk 'Goodbye to the Duty of Disclosure in Insurance Law: Reasons to Rethink, Restrict, Reform or Repeal the Duty (Part 1)' 2005 SA Merc LJ 150; Van Niekerk 'Goodbye to the Duty of Disclosure in Insurance Law: Reasons to Rethink, Restrict, Reform or Repeal the Duty (Part 2)' 2005 SA Merc LJ 323), still rings true, especially in the current era of consumer protection. However, crucial to the contract of insurance is the need for both the insurer and the insured to comprehend the risk-based approach.

What has been said in an earlier publication bears repeating (see Church 2013 *De Jure* 859). While it may be so that certain knowledge could exclusively be within the insured's domain, and that the insurer may need to rely on the disclosure of such information, it would be the insurer who is generally in a better position to know how a specific risk is assessed and the premium determined. The risks that the insured offers for insurance are very often assessed and the premium determined according to categories – all risks that fall into a certain profile are then rated in the same way. Especially with regard to certain types of policies, such as motor vehicle policies, the insurer would know what the categories are and what the risk and rating factors would be. Specifically with regards to the type of policy *in casu,* and one where a 'no claim bonus' is applicable, the insurer would be in the best position to explain the risk-based approach and to ask the relevant questions in order to alert the insured to what information was required. In the *Jerrier* case for example, the actuary's testimony as to what would result in an adjustment in premium and acceptance of the risk, could briefly be summarised in one paragraph.

Particularly where there is a continuous contractual duty to disclose in the case of a short-term insurance policy, it would be the insurer who would comprehend the principles underpinning a 'no-claim bonus'. It would be the insurer who would understand why such continuous duty to disclose would be relevant in the specific circumstances. It should therefore be incumbent upon the insurer to communicate this clearly to the insured. This would be fair and in the interest of both the insured and the insurer.

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Is an agreement to refer a matter to an inquiry by an arbitrator in terms of section 188A of the LRA a straightjacket?

1 Introduction

At first sight, *SATAWU v MSC Depots (Pty) Ltd* 2013 34 *ILJ* 706 (LC) (*MSC Depots*) and the more recent case of *Mchuba v Passenger Rail Agency of SA* [2016] ZALCJHB 73 (*Mchuba*) appear to add nothing to the evolving labour dispute resolution jurisprudence. However, a closer reading of *MSC Depots* and *Mchuba* reveal that the two cases bring to light novel questions concerning section 188A of the Labour Relations Act (66 of 1995; hereafter the LRA) – pre-dismissal arbitration. Simply put, can an employer unilaterally withdraw from pre-dismissal arbitration and convene an internal disciplinary hearing after which errant employees are

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dismissed? Does the fact that the relevant dispute settlement agency lack jurisdiction to conduct a section 188A process – due to lack of accreditation – provide the employer with discretion to conduct an internal disciplinary hearing? Also surfacing is the question whether the Labour Court can grant an urgent application for a declaratory relief setting aside dismissal effected after an internal disciplinary hearing – in circumstances where the parties had agreed to submit misconduct allegations to arbitration in terms of section 188A? The pertinent aspects of the two judgments merit scrutiny.

2 Section 188A Pre-dismissal Arbitration

The answer to the question whether a pre-dismissal arbitration agreement is a straightjacket depends on the interpretation of section 188A of the LRA. The relevant parts of section 188A read as follows:

> (1) An employer may, with the consent of the employee request a *council*, an accredited agency or the Commission to conduct an arbitration into allegations about the conduct or capacity of that employee.
>
> ...
>
> (3) The *council*, accredited agency or the Commission must appoint an arbitrator on receipt of –
>
> (a) payment by the employer of the prescribed fee; and
>
> (b) the employee's written consent to the inquiry.
>
> (4) (a) An employee may only consent to a pre-dismissal arbitration after the employee has been advised of the allegation referred to in subsection (1) and in respect of a specific arbitration.

Three points emerge from this section namely, (a) it introduces a tripartite agreement between the employee, the employer and the Commission for Conciliation, Mediation and Arbitration (CCMA) or any other accredited dispute settlement agency; (b) the arbitrator tasked with the section 188A process, exercises the employer's disciplinary jurisdiction, including the right to dismiss; and (c) the written consent of the employee to the pre-dismissal arbitration must be obtained. The peg on which the pre-dismissal procedures contemplated in terms of section 188A hang, is the written consent of the employee. There are compelling reasons for this. An employee who consents to the section 188A process, surrenders the right to have the same allegations of misconduct against him/her determined in terms of the employer's internal disciplinary process. The benefit to the employee is that when allegations of dismissals are pursued in terms of the internal processes, the employer may not challenge the presiding officer's determination in favour of the employee, whereas it may review the decision of the arbitrator who conducted the pre-dismissal arbitration.

The effect of a section 188A pre-dismissal arbitration on the employer's unfettered managerial prerogative can hardly be overstated. It should be apparent that the section 188A procedure divests the employer of its disciplinary jurisdiction over the transgressing employee and vests it in the arbitrator. The right to exercise discipline and – in

appropriate circumstances – to dismiss, is a defining feature of the managerial prerogative (for extensive engagement see Strydom *The Employer Prerogative from A Labour Law Perspective* (LLD thesis UNISA 1997).

3 *SATAWU v MSC Depots (Pty) Ltd*

3 1 The Facts

The facts of the matter may be summarised as follows. The second and third applicants, who were employees and shop stewards, had levelled allegations regarding health and safety standards at the respondent's premises with the Department of Labour. The outcome of the investigation conducted by the Department of Labour established that the allegations were without substance. The respondent employer then suspended and instituted misconduct charges against the two employees. The first respondent and the first applicant (the union) agreed that the second respondent (the CCMA) be requested, in terms of section 188A of the LRA, to appoint an arbitrator (the third respondent) to conduct a pre-dismissal arbitration. The arbitrator handed down an award in terms of which he found the employees not guilty of the charges proffered against them and ordered that they be reinstated.

Aggrieved by the award, the employer took the matter on review and prevailed. Gush J reviewed and set aside the award and ordered the CCMA to convene a fresh hearing before a different commissioner. Rather than wait for the CCMA to have a 'second bite at the cherry' by referring the matter for hearing afresh before another arbitrator in terms of the order granted on 22 May 2012, the employer decided to hold a disciplinary inquiry. The applicants were duly notified to attend the internal disciplinary enquiry. The essence of the charges related to the same misconduct allegations that were submitted to the pre-dismissal arbitration hearing before the arbitrator.

Alarmed by the resumption of internal disciplinary proceedings, the union addressed a letter to the employer asserting that the parties were bound by the terms of the court order – to conduct a pre-dismissal arbitration in line with section 188A of the LRA. The employer was unpersuaded and proceeded with the internal disciplinary hearing presided over by a member of its management. The employees refused to be subjected to a disciplinary hearing and in their absence they were found guilty of the alleged misconduct. Subsequently, the employees were informed that they were dismissed with immediate effect.

The crisp issue for determination before Van Niekerk J, was whether the respondent was bound by the parties' agreement to invoke section 188A and the court order granted by Gush J, to have the allegations of misconduct against the second and third applicants remitted to the CCMA for a fresh hearing before another commissioner.

3 2 The Court's Decision

The principal argument raised by the applicants was that the first respondent was not entitled to unilaterally revoke the pre-dismissal agreement or withdraw from the section 188A process. It was also submitted that even if the respondent had been entitled to terminate the agreement, there was no case made out on the papers of any lawful termination, either summarily or on reasonable notice. The applicant, for its part, contended that since the arbitrator's award was set aside, it was no longer bound by its initial agreement to have the allegations of misconduct against the employees dealt with by way of an arbitration hearing.

In answering the overarching question, whether an employer can unilaterally revoke a pre-dismissal arbitration agreement, Van Niekerk J observed:

> It seems to me from the wording of s188A that once an employee consents to refer the determination of misconduct or incapacity to an arbitration hearing in terms of 188A, and once the CCMA accedes to the request, the employer effectively agrees to bypass the application of its disciplinary procedures and to accelerate the disciplinary process to the stage of the arbitration hearing ordinarily applicable in a post-dismissal phase. That being so, and since the consent of the affected employee and the CCMA is necessary to achieve the result, it is not open to the employer to abandon the process on a unilateral basis (par15).

The court found it unnecessary to settle the ancillary issue as to whether any agreement concluded under section 188A was amenable to termination at common law. By the same token, it declined to decide whether that pre-dismissal agreement constituted a collective agreement capable of termination on reasonable notice as envisaged by section 23(4) of the LRA. The respondent's submission that its consent may be withdrawn unilaterally at any stage in the process, was untenable as 'it flies in the face of the system of compulsory arbitration that is established by Part C of chapter VII of the Act, the material parts of which are specifically made applicable to an arbitration hearing in terms of section 188A' (par 16).

A further contention by the first respondent to the effect that there was an 'initial dispute' referred to arbitration hearing and that the process was completed by the setting aside of the arbitration award was found to be patently flawed. The arbitration hearing envisaged by the order granted by Gush J, was not a discrete process but flowed from the same process initiated by the parties' agreement to have the allegations of misconduct against the applicants tested by way of an arbitration hearing. The allegations of misconduct remained the same – the only intervening factor was the setting aside of the award, and an order directing the CCMA to convene a fresh hearing before another commissioner. Having regard to the factual context and the mandatory provisions of section 188A, the first respondent had no leeway to

abandon the agreement and to subject the allegations of misconduct to a pre-dismissal arbitration hearing. The learned judge explained his conclusion in the following words:

> In the absence of any right by the first respondent to unilaterally withdraw from an agreement to refer the allegations of misconduct against the second and third applicants to an arbitration hearing, the applicants are entitled to the relief they seek. Their rights are affirmed by the terms of the order of this court granted on 22 May 2012. In these circumstances, the dismissals of the second and third applicants stand to be set aside, and the first respondent ordered to comply with its obligations in terms of the agreement concluded in terms of s 188A (par 18).

A related issue that the court had to deliberate upon, was the ineptitude with which the pre-dismissal arbitration was conducted which resulted in a successful review and an order that the matter be remitted to the CCMA for re-hearing. The prejudice suffered by the parties, especially the respondent which had to continue paying the employees, can hardly be overstated. A pertinent question that arises in this context is: does the risk of placing the function of workplace discipline in the hands of an unknown third party, justify the employer abandoning the process midway? The straightforward answer is in the negative – having regard 'to significant cost savings to be had by avoiding the duplication occasioned by elaborate in-house disciplinary enquiries and an inevitable arbitration hearing at which the same allegations are tested in a *de novo* hearing' (par 19). In the present case, it is respectfully submitted that the benefit of simple and expeditious dispute resolution had been subverted by the arbitrator as was the confidence of the parties in the integrity of the system. To mitigate the prejudice suffered by the parties, the court directed that the arbitration hearing be conducted before a senior commissioner on an expedited basis (par 20).

Consequently, the dismissal of the second and third applicants was set aside as it was in breach of the pre-arbitration agreement concluded by the parties, and in contravention of the order granted by Gush J on 22 May 2012. The first respondent was directed to refer the matter to a pre-dismissal arbitration as contemplated in section 188A.

4 *Mchuba v Passenger Rail Agency of SA*

4 1 The Facts

The background to *Mchuba* was the following. The applicant was suspended from duty pending investigation into allegations of misconduct against him. He was issued with a notice to attend a pre-dismissal arbitration hearing. In the notice, the respondent employer informed the applicant, *inter alia*, that it had elected to refer the matter to a pre-dismissal arbitration hearing in terms of clause 5.3 of its disciplinary code which formed part of the employee's contract of employment. Clause 5.3 provided that for purposes of disciplining employees for allegations of misconduct, the employer may hold either

a disciplinary enquiry or section 188A arbitration. Tokiso Dispute Settlement Services (Tokiso) was appointed to conduct the section 188A process.

At the onset of the pre-dismissal arbitration, the applicant's representative raised an objection to the process being conducted under the auspices of Tokiso since it was not an accredited agency and therefore lacked the necessary jurisdiction. In response to the objection, the arbitrator ruled and directed the parties, *inter alia*, to verify with the CCMA if Tokiso was accredited. If the CCMA confirmed that accreditation in writing, the parties were to resume the pre-dismissal arbitration in compliance with the structures of section 188A. In the event that the CCMA informed the parties in writing that Tokiso was not accredited, the employer must approach the CCMA or any accredited agency to conduct the section 188A process.

Shortly after, it transpired that at the time of the abortive pre-dismissal hearing, Tokiso was a non-accredited agency. However, the respondent nevertheless informed the applicant that it was going ahead with an internal disciplinary inquiry against him through written representations. The applicant was invited to make his full written representations in answer to misconduct allegations which were similar to those that featured in his pre-dismissal arbitration notice. He was called upon to provide written reasons, before the expiration of a deadline, detailing why disciplinary steps should not be taken against him in light of the serious allegations. The applicant declined to take part in the internal disciplinary proceedings but insisted that the pre-dismissal arbitration be pursued under the auspices of the CCMA or any other accredited agency. Subsequently, the applicant was informed that his employment contract was being terminated with immediate effect.

The applicant then approached the Labour Court seeking an order declaring that the termination of his contract of employment constituted a breach of a contractual obligation to address the allegations of misconduct by way of a pre-dismissal arbitration. The applicant also sought an order setting aside the termination of his employment and retrospective reinstatement. In addition, he sought an order that, in the event the respondent elected to pursue an inquiry into the alleged misconduct by the applicant, it be directed to do so by way of pre-dismissal arbitration.

4 2 The Court's Decision

The thrust of the respondent's case, apart from denying it had a contractual obligation to pursue the section 188A pre-dismissal arbitration, was directed at the courts lack of jurisdiction, and the posture displayed by the applicant during the initial pre-dismissal arbitration. Regarding the issue of lack of jurisdiction, the court found that the respondent's submission was based on a misreading of the case of *Gcaba*

v Minister of Safety & Security (2010 (1) SA 238 (CC)). Lallie J put the matter thus:

> In *Gcaba*, it was held that the court's jurisdiction is determined by the applicant's pleadings. The applicant's pleaded case is based on the breach of his contract of employment. Section 77(3) of the Basic Conditions of Employment Act 75 of 1997, grants the Labour Court jurisdiction over any matter concerning a contract of employment. It is common cause that the right the applicant seeks to assert which is the determination of allegations of misconduct against him by means a pre-dismissal arbitration is based on his contract of employment. The respondent conceded that it initially chose the option of dealing with the allegations of misconduct against the applicant by means of a pre-dismissal arbitration. The court therefore has the necessary jurisdiction to adjudicate the matter at hand (par 6).

While the respondent conceded having initially opted to conduct pre-dismissal arbitration, it expressed misgivings about the applicant's lack of co-operation with the process. It was contended that the employer could not be faulted for reconsidering the decision to pursue the pre-dismissal arbitration given that the applicant's requests for unnecessary, irrelevant and unavailable documents. The logical inference is that 'had the applicant co-operated with the process and adopted an attitude acceptable to the respondent, the latter would not have reconsidered its decision to pursue the pre-dismissal arbitration' (par 12). Furthermore, it was submitted that the respondent was entitled to conduct the disciplinary enquiry by way of written representations.

On the question of *MSC Depots*, the respondent strenuously contended that the applicant's reliance on the judgement was misplaced as there was no agreement between the parties and Tokiso to hold a pre-dismissal arbitration. A further argument advanced to demonstrate that there was no obligation on the respondent to be party to the section 188A process, concerned the absence of the requisite tripartite agreement between the employee, the employer and Tokiso as outlined in *MSC Depots*. This contention found no favour with the court as it noted that while the decision in *MSC Depots* was based on different facts, its interpretation of section 188A rested on sound footing. On the contrary, the court took the view that the respondent raised the defence of the applicant's lack of written consent as an opportunistic attempt to justify its cavalier conduct. Put in another language, the respondent cannot be allowed to blow hot and cold and thereby 'have the best of both worlds'. In particular:

> The respondent's disciplinary code provides that the respondent may appoint Tokiso or any other labour dispute settlement services. When Tokiso's jurisdiction was challenged, there was a duty on the respondent to appoint an alternative body to conduct section 188A arbitration. In addition, the respondent disclosed the real reason for abandoning the pre-dismissal arbitration. It had nothing to do with the absence of the applicant's written consent to the pre-dismissal arbitration... The reality is that it was punishing the applicant for requesting documents he needed to prepare his defence because it was of the view that they were irrelevant and unnecessary. By referring the matter to pre-dismissal arbitration, the respondent lost the right

> to take decisions on the relevance of documents the applicant requested as it had handed it over to Tokiso. When the tripartite agreement was reached, the respondent had no residual power to take any step against the applicant including dismissing him in terms of its disciplinary code. The respondent had no right to abandon the pre-dismissal arbitration agreement unilaterally. By withdrawing from the pre-dismissal arbitration agreement having elected to deal with the allegations of misconduct against the applicant by means of a pre-dismissal arbitration, the respondent acted in breach of the applicant's contract of employment (par 16).

In the circumstances, the court held that the termination of the applicant's contract of employment by the respondent constituted a breach of the respondent's contractual obligation to deal with the misconduct allegation by way of a pre-dismissal arbitration in terms of section 188A. It followed that the applicant was entitled to the relief sought. To recapitulate the terms of the order: (a) the termination of the contract of employment was set aside; (b) the employer was ordered to reinstate the employee with retrospective effect; and (c) if the respondent elected to pursue an enquiry into the alleged misconduct by the applicant, it was directed to conduct a pre-dismissal arbitration as contemplated in section 188A of the LRA.

5 Analysis

The critical aspects of the judgments of the Labour Court in *MSC Depots* and *Mchuba* addressed the vexed question whether the employer can unilaterally resile from a section 188A process. If the employee has given a written consent to pre-dismissal arbitration, then a tripartite agreement between the employee, the employer and the CCMA, or any other disputes resolution settlement agency, arises and irrevocably binds the parties to a section 188A process. A pre-dismissal arbitration agreement in terms of section 188A has the same tenor as the now famous non-variation clause in the law of contracts in that it entrenches itself so that no party can escape from its shackles (see *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren* 1964 (4) 760 (A) 766B-767B & 766B-H; *Nyandeni Local Municipality v Hlazo* 2010 (4) SA 261 (ECM) parr 42-50).

Irrespective of whether the employer has what could be considered as genuine misgivings about the conduct of the pre-dismissal arbitration, or the reality that the dispute settlement agency seized with the matter is non-accredited – thereby rendering the process a nullity by reason of lack of jurisdiction or merely because the employee made frivolous requests for documents during the course of the pre-dismissal hearing – the employer cannot decide to withdraw from the process by electing to deal with the misconduct allegations via an internal disciplinary inquiry. According to *MSC Depots* and *Mchuba*, there are no modes of escaping the shackles of a section 188A process. It must be borne in mind that once the CCMA or any other dispute settlement agency is seized with a section 188A process, there is no question of the employer backtracking by reverting to its internal procedures. The appointment of the arbitrator

means that the employer has no residual power to take any steps against the alleged misconduct of the employee.

The strict enforcement of the section 188A pre-dismissal arbitration agreement by the courts, is based on sound legal and judicial policy. It is also consonant with the purpose-built dispute resolution system in the LRA – which takes precedence over non-purpose-built processes and forums. The section 188A procedure accelerates the disciplinary process to the stage of the arbitration hearing ordinarily applicable in a post-dismissal phase. To permit employers to unilaterally revoke pre-dismissal arbitration agreements would effectively undermine the statutory dispute resolution system and frustrate the objective of expeditious resolution of labour disputes (*CUSA v Tao Ying Metals Industries* 2008 29 *ILJ* 2451 (CC) par 65; see also Steenkamp & Bosch 'Labour dispute resolution under the 1995 LRA: Problems, pitfalls and potential' 2012 *Acta Juridica* 120).

MSC Depots also stands out as one of those rare exceptions in which the court showed that it will not shrink from granting urgent declaratory relief setting aside dismissals effected following internal disciplinary proceedings conducted in breach of a pre-dismissal arbitration agreement under section 188A. Quite apart from affirming a statutory dispute resolution mechanism, the court's appreciation of the inherently asymmetrical employment relationship is more manifest in this regard (for an extended analysis, see Vettori *Alternative Means to Regulation Employment Relationship in the Changing World of Work* (LLD thesis UP 2005)). It is worth reminding ourselves that the point at which the employment relationship breaks down, is the time when the employee is most vulnerable and hence, most in need of protection. The vulnerability of employees is underscored by the fact that dismissal has been aptly called 'the labour relations equivalent of capital punishment' (Landman 'Unfair dismissal: The new rules for capital punishment in the workplace (part one)' 1995 *Contemporary Labour Law* 41; and Landman 'Unfair dismissal: The new rules for capital punishment in the workplace (part two)' 1996 *Contemporary Labour Law* 51).

6 Conclusion

The message in *Mchuba* is loud and clear. Resiling from a section 188A process cannot be countenanced. The approach of the Labour Court corresponds fairly well with the concern that employers, unilaterally withdrawing from the pre-dismissal arbitration process, are effectively bypassing the statutory dispute resolution institutions and undermining their role in a carefully crafted scheme that gives primacy to the value of self-regulation (*NUMSA v Bader Bop (Pty) Ltd* 2003 24 *ILJ* 305 (CC) parr 26 & 65; *Kim-Lin Fashions CC v Brunton* 2001 22 *ILJ* 109 (LAC) parr 17-18; *SA Breweries v CCMA* 2002 23 *ILJ* 1467 (LC) par 2). Additionally, it is surely not unfair to the employers who have full control over the decision to refer matters to an 'inquiry by arbitrator' in terms of section 188A in the first place.

The rationale of our dispute resolution system is fairly obvious: neither employers nor employees can afford delays. The pivotal role of labour dispute resolution institutions in sustaining an appropriate balance between the rights and interests of employers and employees, while at the same time preserving relatively healthy industrial relations with minimal resort to self-help cannot be gainsaid.

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(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.